WORLD TRADE ORGANIZATION

WT/DS268/R
16 July 2004

(04-2956)

Original: English

UNITED STATES - SUNSET REVIEWS OF ANTI-DUMPING MEASURES ON OIL COUNTRY TUBULAR GOODS FROM ARGENTINA (DS268)

Report of the Panel

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ORAL STATEMENTS, FIRST AND SECOND MEETINGS

[1] Argentina confirmed, by its letter dated 12 December 2003, that all references made to Exhibit ARG-56 in Argentina's first written submission, must now be understood as being made to Exhibit ARG-56 *bis*.

ANNEX E

QUESTIONS AND ANSWERS

[2] Pursuant to the explanations provided by the United States at the beginning of the second substantive meeting of the Panel with parties, the United States provided a revised version of its written answers to the questions of the Panel in connection with the first substantive meeting of the Panel with parties. In this revised version, the full text of paragraph 14 of the original document dated 8 January 2004, as well as similar sentences found in paragraph 17 (the penultimate sentence), paragraph 41 (the second sentence), and paragraph 44 (the latter part of the third sentence) were deleted.

[3] Pursuant to the explanations provided by the United States at the beginning of the second substantive meeting of the Panel with parties, the United States provided a revised version of its written answers to the questions of Argentina in connection with the first substantive meeting of the Panel with parties. In this revised version, edits were made to paragraph 14 of the original document dated 8 January.

ANNEX F

REQUEST FOR THE ESTABLISHMENT
OF A PANEL

I. INTRODUCTION

1.1 On 7 October 2002, the Government of the Republic of Argentina requested consultations with the Government of the United States of America pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("the *DSU*"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("the GATT 1994"), and Article 17.3 of the Agreement on Implementation of Article VI of GATT 1994 ("the Anti-Dumping Agreement") concerning, *inter alia*, the determinations of the United States Department of Commerce ("the USDOC") and the United States International Trade Commission ("the USITC") in the sunset reviews of anti-dumping duty measure on oil country tubular goods ("OCTG") from Argentina.[4] The United States and Argentina consulted on 14 November and 17 December 2002, but failed to settle the dispute.

1.2 On 3 April 2003, Argentina requested the Dispute Settlement Body ("the DSB") to establish a panel pursuant to Article XXIII of the GATT 1994, Article 6 of the *DSU* and Article 17 of the Anti-Dumping Agreement.[5]

1.3 At its meeting on 19 May 2003, the DSB established a panel in accordance with Article 6 of the *DSU* to examine the matter referred to the DSB by Argentina in document WT/DS268/2. At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Argentina in document WT/DS268/2, the matter referred to the DSB by Argentina in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.4 On 22 August 2003, Argentina requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the *DSU*. On 4 September 2003, the Director-General accordingly composed the Panel as follows:

Chairman: Mr. Paul O'Connor

Members: Mr. Bruce Cullen
Dr. Faizullah Khilji

1.5 The European Communities, Japan, Korea, Mexico and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu reserved their third-party rights.

1.6 The Panel met with the parties on 9-10 December 2003 and on 3 February 2004. It met with the third parties on 10 December 2003.

II. FACTUAL ASPECTS

2.1 This dispute concerns certain aspects of US sunset reviews laws, regulations, and procedures as well as their application in the sunset review of the anti-dumping duty on OCTG from Argentina. The original anti-dumping investigation on OCTG from Argentina that gave rise to the sunset review at issue in these dispute settlement proceedings was initiated in 1994, i.e. before the establishment of the World Trade Organization ("the WTO") and was completed in 1995, i.e. following the entry into force of the Marrakesh Agreement Establishing the WTO. Therefore, the investigation was carried out under pre-WTO US laws and regulations.

[4] WT/DS268/1.
[5] WT/DS268/2.

2.2 The only exporter from Argentina that was party to the original investigation was Siderca. The dumping margin calculated for Siderca was 1.36 per cent, which also established the basis for the anti-dumping duty imposed. The USDOC calculated a residual duty at the same rate, i.e. 1.36 per cent for other Argentine exporters.

2.3 Following the imposition of the duty, Siderca stopped exporting OCTG into the US market.

2.4 During the five-year lifespan of the anti-dumping duty, four administrative reviews were initiated by the USDOC at the request of the domestic producers of OCTG in the United States. In these administrative reviews, Siderca stated that it had not made any shipment for consumption in the United States and, following its analysis, the USDOC agreed with Siderca and rescinded the administrative review.

2.5 On 3 July 2000, the USDOC initiated, on its own initiative, a sunset review of the anti-dumping duty on OCTG from Argentina. The US producers, petitioners in the sunset review, participated in the sunset review and filed substantive responses to the USDOC. Siderca also participated and filed a substantive response on 2 August 2000. On 22 August 2000, the USDOC decided to conduct an expedited sunset review under US law because Siderca was the lone respondent and accounted for significantly less than the threshold provided for in the Regulations of 50 per cent of total imports of OCTG from Argentina to the United States in the 1995-1999 period.

2.6 In its final determination, the USDOC determined that dumping was likely to continue or recur at 1.36 per cent should the duty on OCTG from Argentina be revoked and reported that to the USITC as the likely margin of dumping.

2.7 The USDOC's final likelihood of continuation or recurrence of dumping determination, in which it found that dumping was likely to continue or recur, was published on 7 November 2000. In June 2001, the USITC published its final injury determination in which it also found a likelihood of continuation or recurrence of material injury. On 25 July 2001, the USDOC published the notice of continuation of the anti-dumping duty on OCTG from Argentina.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. ARGENTINA

3.1 Argentina requests the Panel:

1. To find that 19 U.S.C. § 1675(c)(4) of the Tariff Act of 1930 and 19 C.F.R. § 351.218(d)(2)(iii) of the USDOC's Sunset Regulations (the "waiver provisions") violate:

   _ Article 11.3 of the Anti-Dumping Agreement because the waiver provisions mandate that the USDOC find likelihood of continuation or recurrence of dumping without the conduct of a "review," without any analysis and, hence, without the required "determination" of Article 11.3;

   _ Article 6.1 of the Anti-Dumping Agreement because the waiver provisions preclude respondent interested parties from being able to present evidence in sunset reviews;

   _ Article 6.2 of the Anti-Dumping Agreement because the waiver provisions deny respondent interested parties the ability to defend their interest in sunset reviews;

2. To find that the provisions of 19 U.S.C. § 1675a(a)(1) and (5) of the Tariff Act of 1930 are inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 11.1 and 11.3 of the Anti-Dumping Agreement because these statutory requirements provide for an open-ended

analysis for possible future injury by requiring that the USITC determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" and that the USITC "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time";

3. To find that the irrefutable presumption embodied in Sections 751(c) and 752(c) of the Tariff Act of 1930, the provisions of Statement of Administrative Action ("the SAA") relating to sunset reviews, and Section II.A.3 of the Sunset Policy Bulletin ("the SPB") and demonstrated in the USDOC's consistent practice in sunset reviews violates Article 11.3 because the principal obligation of Article 11.3 of the Anti-Dumping Agreement requires that anti-dumping measures be terminated after five years of imposition, unless the authorities satisfy the requirements for maintenance of the measure;

4. To find that The USDOC's determination to conduct an expedited sunset review and its conduct of an expedited review, on the basis that Siderca's OCTG exports to the United States were less than 50 per cent of the total OCTG exports from Argentina to the United States, and the application of waivers provisions were inconsistent:

_ with the requirements of Articles 11.3, 11.4, 6.1, 6.2, 6.8, 6.9 and Annex II of the Anti-Dumping Agreement because notwithstanding Siderca's full cooperation and submission of a complete substantive response consistent with the USDOC's regulatory requirements, the USDOC deemed Siderca's response to be inadequate solely on the basis of import data and, hence, denied Siderca the opportunity to defend its interest;

_ with Article 11.3 of the Anti-Dumping Agreement because the USDOC rendered a determination of likelihood of continuation or recurrence of dumping without any analysis;

_ with Article 6.1 of the Anti-Dumping Agreement because the USDOC failed to give Siderca the opportunity to present evidence;

_ with Article 6.2 because the USDOC denied Siderca the right to defend its interests;

_ with Article 6.8 and Annex II of the Anti-Dumping Agreement because the USDOC did not comply with these provisions in its use of facts available;

5. To find that the USDOC's determination to conduct an expedited sunset review and the USDOC's sunset determination, which incorporated the USDOC's *Issues and Decision Memorandum* by reference, violated Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because the USDOC failed to provide public notice and explanations in sufficient detail of its findings on all issues of fact and law;

6. To find that The USDOC's sunset determination was inconsistent with Article 11.3 of the Anti-Dumping Agreement because:

_ the USDOC failed to apply the disciplines of Article 2;

_ the USDOC failed to conduct a prospective analysis;

_ the USDOC failed to make a determination of "likely" (or "probable") dumping;

_ the USDOC failed to base its determination on positive evidence;

- the USDOC's reliance on the cessation of Siderca's exports into the United States in the wake of the anti-dumping measure as the sole basis for its likelihood determination was inconsistent with Article 11.3 of the Anti-Dumping Agreement;

- the USDOC's reliance on the original margin of dumping of 1.36 per cent, calculated using the WTO-inconsistent practice of zeroing negative margins for purposes of its likelihood decision, as well as its reporting of that margin to the USITC was inconsistent with Article 11.3 and Article 2 of the Anti-Dumping Agreement;

7. Separate and apart from whether US anti-dumping laws and regulations regarding sunset reviews are deemed to establish an unlawful presumption, or are otherwise found to be consistent on their face *per se* with the US WTO obligations, and irrespective of whether the SAA and SPB are "measures" that can be subject to challenge, to find that the USDOC failed to administer in an impartial and reasonable manner the US sunset review laws, regulations, decisions and rulings in violation of Article X:3(a) of the GATT 1994;

8. To find that, in its determination of the likelihood of continuation or recurrence of injury in the instant sunset review, the USITC applied a lower standard than that which is required by Article 11.3 of the Anti-Dumping Agreement;

9. To find that the USITC's sunset determination violated:

- Articles 3.1, 3.2, 3.4, 3.5, and 11.3 of the Anti-Dumping Agreement because the USITC did not conduct an objective examination of the record or base its determination on positive evidence regarding its conclusions concerning the likely volume of imports, the likely price effects, and the likely impact of imports on the domestic industry;

- Article 3.4 of the Anti-Dumping Agreement because in assessing the likelihood of continuation or recurrence of injury to the domestic industry, the USITC failed to evaluate all the relevant economic factors and indices having a bearing on the state of the industry, including those enumerated in the mentioned article;

- Article 3.5 of the Anti-Dumping Agreement because the USITC failed to respect the causation provisions of this article;

10. To find that the USITC's application of 19 U.S.C. § 1675a(a)(1) and (5) of the Tariff Act of 1930 in the sunset review of OCTG from Argentina was inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 11.1 and 11.3 of the Anti-Dumping Agreement because by applying the "within a reasonably foreseeable time" standard and by using a time frame that is not "imminent" but which rather relates to "a longer period of time", the USITC speculated and conducted an open-ended analysis for possible future injury;

11. To find that the USITC's use of cumulation in its likelihood of continuation or recurrence of injury determinations in the OCTG sunset review was inconsistent with Article 11.3 of the Anti-Dumping Agreement, which precludes the use of a cumulative injury analysis in sunset reviews; or, if cumulation is permitted in sunset reviews, to find in the alternative that the USITC's decision to cumulate in the OCTG sunset review violated Article 3.3 of the Anti-Dumping Agreement because the USITC failed to comply with the conditions set out in the mentioned article for the use of cumulation; in addition, to find that the USITC's use of cumulation also conflicted with the "likely" standard of Article 11.3;

12. To find that because the United States violated its obligations under the Anti-Dumping Agreement, it also violated the provisions of Article VI of the GATT 1994, Articles 1 and 18 of the Anti-Dumping Agreement, and Article XVI:4 of the WTO Agreement;

13. To suggest that the United States implement the Panel's recommendations by terminating the anti-dumping duty on OCTG from Argentina and by repealing its WTO-inconsistent laws, regulations, and procedures or by amending such laws, regulations, and procedures to eliminate the WTO-inconsistencies.

B. UNITED STATES

3.2 The United States requests the Panel to reject Argentina's claims in their entirety. The United States requests the Panel to find that the claims set forth in paragraph 3.1 beyond those found in Argentina's panel request are not within the Panel's terms of reference.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their written submissions and oral statements to the Panel and their answers to questions. The parties' submissions, oral statements and their answers to questions are attached to this Report as Annexes (see List of Annexes, pages viii and ix).

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties, the European Communities, Japan, Korea, Mexico and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu are set out in their written submissions and oral statements to the Panel and their answers to questions. The third parties' submissions, oral statements and their answers to questions are attached to this Report as Annexes (see List of Annexes, pages viii and ix).

VI. INTERIM REVIEW

6.1 On 7 May 2004, we submitted the interim report to the parties. Both parties submitted written requests for the review of precise aspects of the interim report. Parties also submitted written comments on the other party's comments. Neither party requested an interim review meeting.

6.2 We have outlined our treatment of the parties' requests below. Where necessary, we have also made certain technical revisions to our report.

A. REQUEST OF ARGENTINA

6.3 **Argentina** submits that the Panel should make a legal finding that the violations committed by the United States of its WTO obligations constitute nullification or impairment of Argentina's rights under WTO agreements within the meaning of Article 3.8 of the *DSU*.

6.4 The **United States** opines that since Argentina has not proved that it suffered actual harm due to the violations found by the Panel, the latter should refrain from finding that these violations lead to a nullification or impairment of Argentina's rights under WTO agreements.

6.5 **We** note that Article 3.8 of the *DSU* sets out the presumption that in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. The cited article does not require that the complaining party prove actual harm for the Panel to find that an infringement of a WTO obligation also constitutes nullification or impairment of the complaining party's WTO rights. We therefore made a modification to paragraph 8.2 of our report to accommodate Argentina's comment.

6.6 Second, **Argentina** argues that the Panel should make findings regarding Argentina's claim concerning the use by the USDOC of the original dumping margin, which, in Argentina's view, had been calculated on the basis of the so-called methodology of zeroing.

6.7 The **United States** submits that the Panel should exercise judicial economy and not make any findings regarding this aspect of Argentina's claim.

6.8 **We** note that in paragraph 7.219 below we found that the USDOC erred in basing its factual finding that dumping had continued over the life of the measure on the existence of the margin of dumping from the original investigation. We therefore concluded that the factual basis of the USDOC's determination that dumping had continued over the life of the measure was improper. In paragraph 7.223, we stated that, having found that the USDOC erred in relying on this original dumping margin, we did not analyse the issue of whether that margin had been calculated through zeroing. We therefore decline to make additional findings in this regard.

6.9 Third, **Argentina** submits that the Panel should make findings regarding the USDOC's reliance on the post-order decline in the volume of imports of OCTG from Argentina.

6.10 The **United States** argues that the Panel should exercise judicial economy and not make any findings regarding this aspect of Argentina's claim.

6.11 **We** note that in paragraphs 7.201-7.206 below, we made the relevant factual findings regarding Argentina's claim challenging the USDOC's determinations in the OCTG sunset review. In particular, in paragraph 7.202, we observed as a matter of fact that the USDOC had based its likelihood determination on the facts that dumping had continued over the life of the measure and that import volumes of the subject product had declined. It is, therefore, clear that we have made relevant factual findings in this regard. As far as legal findings are concerned, we note that we have decided Argentina's claim regarding the USDOC's likelihood determinations in the OCTG sunset review. We have found that the USDOC's reliance on the existence of the original dumping margin was inconsistent with Article 11.3 of the Anti-Dumping Agreement. We therefore did not need to address whether the USDOC's reliance on declined import volumes was yet another action inconsistent with that article. Argentina argues that we should make a finding in this regard in case our decision is appealed and the Appellate Body finds that the USDOC's reliance on the original dumping margin was in fact consistent with Article 11.3. We do not consider, however, that it would be appropriate to make an additional legal finding based on the hypothetical situation Argentina posits. We therefore decline to make additional findings in this regard.

6.12 Fourth, **Argentina** submits that it put forward sufficient argumentation to support its claim under Article 6.9 of the Anti-Dumping Agreement and therefore the Panel should make findings in this regard.

6.13 The **United States** agrees with the Panel's view that Argentina did not develop sufficient argumentation to make a claim under Article 6.9 and submits that the Panel should not make any finding in this regard.

6.14 **We** consider that Argentina did not develop arguments sufficient to make a claim under Article 6.9. We added paragraphs 7.243-7.244 to our report in order to further clarify the reasons why we decline to make any finding under Article 6.9 of the Agreement.[6]

[6] We note that the United States requested to be given a new comment period in case the Panel decided to make a finding under Article 6.9. Given that our additional discussion in paragraphs 7.243-7.244 of our report is intended to clarify why we declined to make a finding regarding Argentina's argumentation under

6.15 Fifth, **Argentina** disagrees with the Panel's characterization of Argentina's claim regarding the USITC's failure to apply the "likely" standard of Article 11.3 of the Anti-Dumping Agreement in the OCTG sunset review. In particular, Argentina disagrees with the Panel's statement in paragraph 7.280 that "... the crux of Argentina's claim is..." and the statement in paragraph 7.285 that "...the essence of Argentina's claim is not..."

6.16 The **United States** did not specifically respond to this comment.

6.17 **We** note that Argentina's main argument in this regard, i.e. the USITC failed to apply the "likely" standard of Article 11.3 in the OCTG review, is correctly identified and then discussed by the Panel in paragraphs 7.284-7.285 below. The statement in paragraph 7.280 is intended to draw attention to the similarity between the texts of Articles 3.1 and 3.2 of the Anti-Dumping Agreement on the one hand and the Panel's standard of review in the present proceedings on the other. As such, this statement does not determine the Panel's main line of approach with respect to this claim. The statement in paragraph 7.285 is intended to link Argentina's claim regarding the USITC's failure to apply the "likely" standard to the three arguments raised by Argentina regarding the USITC's determinations in the OCTG sunset review, i.e. volume, price effect and consequent impact of likely dumped imports. Similarly, this statement does not undermine, nor change, the nature of Argentina's claim.

6.18 We therefore decline to make any modification to our findings in this regard.

6.19 Sixth, **Argentina** disagrees with the Panel's characterization of Argentina's claim regarding cumulation. In this context, Argentina argues that the Panel has failed to discuss Argentina's arguments that Articles 11.3 and 3.3 of the Agreement prohibit cumulation in sunset reviews and that the USITC's use of cumulation in the OCTG sunset review led to a failure to apply the "likely" standard of Article 11.3.

6.20 The **United States** generally disagrees with Argentina and submits that the report adequately discusses Argentina's argument that Articles 11.3 and 3.3 prohibit cumulation in sunset reviews.

6.21 **We** note that in paragraphs 7.325 and 7.326 below we have addressed Argentina's argument that Article 3.3 limits the use of cumulation to investigations. This, in our view, is equivalent to the proposition that Article 3.3 prohibits the use of cumulation in sunset reviews. We have nevertheless added paragraph 7.334 to discuss Argentina's argument regarding the use of the word "duty" in the singular, as opposed to the plural, in Articles 11.1 and 11.3 of the Agreement in connection with the present claim.[7]

6.22 Regarding Argentina's claim that the USITC failed to apply the "likely" standard of Article 11.3 by using cumulation in the OCTG sunset review, we note that we have discussed this particular issue in paragraph 7.337 below. We therefore decline to make any modification to our findings in this regard.

6.23 We have made a modification to paragraph 7.239 at the request of Argentina.

Article 6.9, rather than constituting a finding, we do not find it necessary to give the United States another opportunity to make comments in this regard.

[7] We note that the United States requested to be given a new comment period in case the Panel decided to engage in an additional discussion of Argentina's arguments under this claim. Given that our discussion of Argentina's argument regarding the word "duty" does not change our conclusion with respect to this claim and that the United States has already expressed its views on this particular issue (see, for instance, First Written Submission of the United States, para. 366), we do not find it necessary to give the United States another opportunity to make comments in this regard.

B. REQUEST OF THE UNITED STATES

6.24 The **United States** requests the Panel to make certain modifications to paragraphs 7.85 and 7.91 to prevent a potential misunderstanding regarding the legal basis of the provisions of US law governing affirmative and deemed waivers. More particularly, the United States argues that under US law the provisions that apply to deemed waivers are found exclusively in the Regulations, not the Statute. The modifications that the United states is suggesting are aimed at clarifying this issue.

6.25 **Argentina** disagrees with the United States with respect to both paragraphs and opines that although the provision that creates the deemed waiver category is found in the Regulations, the Statute is also relevant with respect to the provisions applicable to deemed waivers in that it is the Statute, and not the Regulations, that sets out the legal consequence of deemed waivers.

6.26 **We** note that, as stated in the two paragraphs cited by the United States, under US law it is the USDOC's Regulations, and not the Statute, which creates the deemed waivers category. Section 751(c)(4)(A) of the Tariff Act provides that interested parties may elect to waive participation in the USDOC part of a sunset review and limit their participation to the USITC part. Section 351.218(d)(2)(iii) of the USDOC's Regulations, however, describes the situations in which waivers may arise. One of the situations described in this section is the deemed waivers category. The legal consequence of waivers, regardless of the situation in which they arise, is set out in Section 751(c)(4)(B) of the Tariff Act, i.e. an affirmative finding of likelihood. We cannot, therefore, accept the US comment, which suggests that the Statute has no effect with respect to deemed waivers.

6.27 Second, the **United States** requests that the Panel make certain modifications to paragraphs 7.156 and 7.158 of the report to reflect the fact that the SPB has no authority to request the USDOC to do anything and similarly no authority to give the USDOC the discretion to do anything.

6.28 **Argentina** opines that the modifications requested by the United States are aimed at re-litigating certain substantive issues that have been decided by the Panel and therefore the Panel should reject them.

6.29 **We** note that the basis on which the United States builds its comments at issue are closely related to the substance of the claims raised by the parties and discussed by the Panel in the present proceedings. We have already made a decision regarding the US' view that the SBP as such cannot give rise to a WTO violation because it is not binding under US law. We therefore decline to revisit our substantive finding in that regard. We have nevertheless made certain modifications to the descriptive portions of paragraphs 7.156 and 7.158 to accommodate the concern raised by the United States regarding the binding effect of the SPB on the USDOC.

6.30 Third, the **United States** requests the Panel to add to the recitation of facts in paragraph 7.203 of the report the fact that no Argentine exporter other than Siderca responded to the notice of initiation.

6.31 **Argentina** requests that the preceding four sentences of this paragraph be maintained should the Panel decide to make any modification to this paragraph.

6.32 **We** note that the two paragraphs that follow paragraph 7.203 make clear that no Argentine exporter other than Siderca filed a substantive response to the notice of initiation in the OCTG sunset review. We therefore decline to make any modification to paragraph 7.203 in this regard.

6.33 Fourth, the **United States** submits that either the Panel should point to relevant evidence that demonstrates that Siderca requested a hearing in the OCTG sunset review and was declined or paragraphs 7.232 through 7.236 should be deleted.

6.34 **Argentina** disagrees with the United States and submits that the Panel should reject the US comment because the application of waiver provisions and the conduct of an expedited sunset review in the OCTG sunset review precluded Siderca from having the opportunity to request a hearing.

6.35 **We** note our factual finding in paragraph 7.235 that in the OCTG sunset review, which took the form of an expedited sunset review under US law, Siderca did not have an opportunity to request a hearing because US law precluded such an opportunity. This is, in our view, enough ground to make a decision as to the WTO-consistency of the procedural rights provided to interested parties in the OCTG sunset review. In other words, we disagree with the view that in order to be able to challenge the US investigating authorities' failure to provide an opportunity for a hearing in the OCTG sunset review, Siderca had to make such a request and have it denied even though it was evident that such a request would not be granted as a matter of US law. We therefore decline to make any modification to our report in this regard.

6.36 We have deleted four paragraphs from the part of our report dealing with the United States' request for preliminary rulings at the request of the United States. We have also made the modifications requested by the United States to paragraphs 7.11, 7.74 and 7.106.

6.37 Finally, we have made some typographical and style-related improvements to the interim report.

VII. FINDINGS

A. GENERAL ISSUES

1. Standard of Review

7.1 In light of the claims and arguments made by the parties in the course of these Panel proceedings, we recall, at the outset of our examination, the standard of review we must apply to the matter before us.

7.2 Article 11 of the *DSU* [8], in isolation, sets forth the appropriate standard of review for panels for all covered agreements except the Anti-Dumping Agreement. Article 11 imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", an obligation which embraces all aspects of a panel's examination of the "matter", both factual and legal.

7.3 Article 17.6 of the Anti-Dumping Agreement sets forth the special standard of review applicable to anti-dumping disputes. It provides:

> "(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;"
>
> "(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one

[8] Article 11 of the *DSU*, entitled "Function of Panels", states: "The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements…"

> permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

7.4 Thus, together, Article 11 of the *DSU* and Article 17.6 of the Anti-Dumping Agreement set out the standard of review we must apply with respect to both the factual and legal aspects of our examination of the claims and arguments raised by the parties.[9]

7.5 In light of this standard of review, in examining the claims under the Anti-Dumping Agreement in the matter referred to us, we must evaluate whether the United States measures at issue are consistent with relevant provisions of the Anti-Dumping Agreement. We may and must find them consistent if we find that the United States investigating authorities have properly established the facts and evaluated them in an unbiased and objective manner, *and* that the determinations rest upon a "permissible" interpretation of the relevant provisions. Our task is not to perform a *de novo* review of the information and evidence on the record of the underlying sunset review, nor to substitute our judgment for that of the US authorities, even though we might have arrived at a different determination were we examining the record ourselves.

2. Burden of Proof

7.6 We recall that the general principles applicable to burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim.[10] In these Panel proceedings, Argentina, which has challenged the consistency of the United States' measures, thus bears the burden of demonstrating that the measures are not consistent with the relevant provisions of the Agreement. Argentina also bears the burden of establishing that its claims are properly before us. We also note that it is generally for each party asserting a fact to provide proof thereof.[11] In this respect, therefore, it is also for the United States to provide evidence for the facts which it asserts. We also recall that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case.

B. UNITED STATES' REQUEST FOR PRELIMINARY RULINGS

7.7 In its first written submission, the United States made a request for preliminary rulings by the Panel.[12] From an analytical point of view, the bases of the United States' request for preliminary rulings can be divided into two groups. First, the **United States** asserts that Argentina's panel request is vague in two respects. The United States submits that, inconsistently with Article 6.2 of the *DSU*, the claims raised by Argentina on page 4 of its panel request do not present the problem clearly. Along the same line, the United States argues that references to Articles 6 and 3 of the Anti-Dumping Agreement in sections B.1, B.2 and B.3 of Argentina's panel request do not present the problem clearly, because these articles are being referred to generally in their entirety, without any specification of the relevant sub-paragraphs.

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[9] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*US – Hot-Rolled Steel*"), WT/DS184/AB/R, adopted 23 August 2001, paras. 54-62.

[10] Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("*US – Wool Shirts and Blouses*"), WT/DS33/AB/R and Corr. 1, adopted 23 May 1997, DSR 1997:I, 323, p. 337.

[11] *Ibid*.

[12] The US request for preliminary rulings is premised solely on the allegation that Argentina has failed to provide a brief summary of the legal basis of some of its claims sufficient to present the problem clearly, inconsistently with Article 6.2 of the *DSU*. The United States has not alleged a failure to identify the specific measure at issue. See, Response of the United States to Question 21 from the Panel Following the Second Meeting.

7.8 Second, the United States contends that certain claims presented in Argentina's first submission are not within our terms of reference because they were not raised in Argentina's panel request. These are:

- Argentina's claim challenging the US practice as such and as applied in the instant sunset review regarding the alleged irrefutable presumption in sunset reviews,
- Argentina's claim regarding the alleged irrefutable presumption under US law as such,
- Argentina's claim under Article X:3(a) of the GATT 1994,
- Argentina's claim regarding the USITC's sunset determinations in the instant sunset review,
- Argentina's consequential claims under Articles 1 and 18 of the Anti-Dumping Agreement, Article VI of the GATT 1994 and Article XVI:4 of the WTO Agreement.

7.9 In response to the United States' request for preliminary rulings on the basis of Article 6.2 of the *DSU*, **Argentina** generally submits that the United States can not prevail because it has failed to demonstrate to the Panel that it has suffered prejudice as a result of the alleged deficiencies in Argentina's panel request. In addition to this general observation, Argentina also puts forward counter-arguments to the US allegations with regard to each aspect of the latter's request for preliminary rulings.

1. Alleged Vagueness of Argentina's Request for Establishment

7.10 The **United States** requests that we dismiss certain claims raised by Argentina in its panel request on the grounds that, inconsistently with the requirements of Article 6.2 of the *DSU*, these claims were identified vaguely. In this context, the United States takes issue with the claims raised on page four and those raised in sections B.1 through B.3 of Argentina's panel request.

(a) Claims raised on page 4 of Argentina's panel request [13]

7.11 The **United States** argues that Argentina failed to provide a brief summary of the legal basis of the claims raised on page four of its panel request. According to the United States, inconsistently with Article 6.2 of the *DSU*, the claims raised by Argentina on page 4 of its panel request fail to present the problem clearly and are therefore outside our terms of reference. The United States submits that Argentina's reference to various articles from WTO agreements that contain multiple obligations fell short of the requirements of Article 6.2 of the *DSU*. The United States also asserts that the absence of a brief summary of the legal basis of the claims raised on page four renders this portion of the panel request inconsistent with Article 6.2 of the *DSU*.

7.12 **Argentina** argues that the Panel has to read Argentina's panel request as a whole in deciding whether it meets the requirements of Article 6.2 of the *DSU*. Argentina submits that the minimum requirement to clarify the legal basis of a claim in WTO dispute settlement proceedings is the citation of the treaty articles alleged to have been violated. According to Argentina, claims on page four of its panel request met this standard. Argentina contends that, although Article 6.2 does not require the inclusion of a narrative description of the legal basis of a claim, Argentina did provide such a description in relation to its page four claims. Argentina states that page four of its panel request is

[13] We note that page four of Argentina's panel request is not limited to the part that the United States is challenging on the grounds of vagueness. The United States is taking issue with the portion of page four of Argentina's panel request that is found between the paragraph numbered four and the concluding paragraph that starts with "Accordingly, Argentina respectfully requests that..." Given that both parties refer to this portion of Argentina's panel request as "page four", we have also used the same characterization for ease of reference.

not intended to set out additional claims that are not found elsewhere in the request. According to Argentina, therefore, even if page four is severed from the rest of its panel request, the effect would be minimal.[14]

7.13 **We** note that, under Article 7 of the *DSU*, it is Argentina's panel request that determines our terms of reference in these proceedings. Article 6.2 of the *DSU*, which sets out the requirements applicable to the requests for the establishment of a panel, provides:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

7.14 According to Article 6.2, therefore, a panel request must identify *the specific measures at issue* and must provide a *brief summary of the legal basis of the complaint*. Together, these two elements comprise the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the *DSU*. It is important that the panel request be sufficiently clear for two reasons: First, it defines the scope of the dispute. Second, it serves the *due process* objective of notifying the parties and third parties of the nature of a complainant's case. We must therefore scrutinize carefully Argentina's panel request "to ensure its compliance with both the letter and the spirit of Article 6.2 of the *DSU*." In doing that, we shall consider Argentina's panel request as a whole and take into account the circumstances of the present proceedings.[15]

7.15 With these considerations in mind, we now turn to the text of Argentina's panel request to decide whether it conforms to the requirements of that article. The portion of page four of Argentina's panel request contested by the United States reads:

> Argentina also considers that certain aspects of the following US laws, regulations, policies, and procedures related to the determinations of the Department and the Commission are inconsistent with US WTO obligations, to the extent that any of these measures mandate action by the Department or Commission that is inconsistent with US WTO obligations or preclude the Department or Commission from complying with US WTO obligations:
>
> - Sections 751(c) and 752 of the Tariff Act of 1930, as amended, codified at Title 19 of the United States Code §§ 1675(c) and 1675a; and the US Statement of Administrative Action (regarding the Agreement on Implementation of GATT Article VI) accompanying the Uruguay Round Agreements Act (the SAA), H.R. Doc. No. 103-316, vol. 1;
>
> - The Department's *Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Anti-Dumping and Countervailing Duty Orders*; Policy Bulletin, 63 Federal Register 18871 (16 April 1998) (Sunset Policy Bulletin);

[14] Argentina's Comments on the US Closing Statement at the Second Substantive Meeting of the Panel, and US Answers to Questions from the Panel and Argentina in Connection with the Second Substantive Meeting, para. 49.

[15] We find support for our approach in the Appellate Body decision in *US – Carbon Steel*. See, Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*US – Carbon Steel*"), WT/DS213/AB/R and Corr.1, adopted 19 December 2002, paras. 125-127.

- The Department's sunset review regulations, codified at Title 19 of the United States Code of Federal Regulations § 351.218; and the Commission's sunset review regulations, codified at Title 19 of the United States Code of Federal Regulations §§ 207.60-69 (Subpart F).

Argentina considers that the Department's Determination to Expedite, the Department's Sunset Determination, the Commission's Sunset Determination, the Department's Determination to Continue the Order and the above mentioned US laws, regulations, policies and procedures are inconsistent with the following provisions of the Anti-Dumping Agreement, the GATT 1994, and the WTO Agreement:

- Articles 1, 2, 3, 6, 11, 12, 18 and Annex II of the Anti-Dumping Agreement;

- Articles VI and X of the General Agreement on Tariffs and Trade (GATT) 1994; and

- Article XVI:4 of the WTO Agreement.[16]

7.16 We note that on page four, Argentina invokes various articles of the Anti-Dumping Agreement and other WTO agreements in their entirety, many of which contain multiple obligations, such as Articles 2, 3 and 6 of the Anti-Dumping Agreement. However, as we stated above, we shall not read page four of Argentina's panel request in isolation. Argentina's panel request consists of four pages altogether. We have to scrutinize the text of the panel request as a whole in inquiring whether it conforms to the requirements of Article 6.2.

7.17 The crux of the US allegation regarding page four of Argentina's panel request is that page four is vague in the sense of being overly broad. The United States argues that since page four is not sufficiently clear, it is not possible to discern the nature of the claims raised in this part of the panel request.

7.18 In our view, the task before us is not to decide, in the abstract, whether Argentina's panel request conforms to the requirements of Article 6.2 of the *DSU*. Rather, the issue is whether Argentina has, during the course of these proceedings, asked us to address claims which are not identified with sufficient clarity in its panel request to satisfy the terms of Article 6.2 and thus could not be foreseen by the defendant and the third parties. To that end, we invited the United States to identify, in concrete terms, which claims in Argentina's submissions to the Panel were based exclusively on page four of the panel request and therefore should, in the United States' view, be found to be outside our terms of reference. In response to our question, the United States identified a number of claims raised by Argentina in its first and second submissions that it considered to fall in this category. In response to the US allegation, Argentina generally argued that the United States was attempting to recast Argentina's claims, and asked the Panel to reject the US allegations in this regard in their entirety.

7.19 The claims that are alleged by the United States to be outside our terms of reference because of the alleged vagueness on page four of Argentina's panel request[17] and our analysis with regard to each one of them are as follows:

(i) Section VII.A of Argentina's first written submission and section III.A of its second written submission

7.20 The **United States** asserts that although section A of Argentina's panel request refers only to Section 351.218(e) of the USDOC's Regulations, in section VII.A of its first written submission and

[16] WT/DS268/2, p.4.
[17] See, Response of the United States to Question 22 from the Panel Following the Second Meeting.

section III.A of its second written submission, Argentina extends the scope of this claim to Section 351.218(d)(2)(iii) of the Regulations. **Argentina** submits that the Panel should reject the US allegation.

7.21 **We** note that section A.1 of Argentina's panel request reads, in relevant part:

> ...In particular, 19 U.S.C. § 1675(c)(4) and 19 C.F.R. § 351.218(e) operate in certain instances to preclude the Department from conducting a sunset review and making a determination as to whether termination of an anti-dumping duty measure would be likely to lead to continuation or recurrence of dumping, in violation of Articles 11.1, 11.3...of the Anti-Dumping Agreement. When a respondent interested party is deemed by the Department to have "waived" participation in the Department sunset review, US law mandates that the Department find that termination of the order would be likely to lead to continuation or recurrence of dumping, without requiring the Department to conduct a substantive review and to make a determination based on the substantive review. (emphasis added)

7.22 We note that, as the United States also concedes[18], the narrative part of section A.1 clearly refers to US law's provisions relating to deemed waivers and asserts that the USDOC is precluded from making the requisite determination in these cases. We therefore consider that the text of Argentina's panel request makes it sufficiently clear that Argentina could pursue a claim challenging Section 351.218(d)(iii) of the Regulations, which contains the provision that creates the deemed waivers category under US law.

7.23 Furthermore, we note that the United States also acknowledges that this alleged extension of Argentina's claim did not cause any prejudice to the United States.[19]

7.24 We therefore decline the US request for a preliminary ruling in this regard.

(ii) Section VII.B.2 of Argentina's first written submission

7.25 The **United States** argues that section VII.B.2 of Argentina's first written submission contains claims regarding 19 U.S.C. 1675(c) and 1675a(c), the SAA, and the SPB. However, section A of the panel request refers to 19 U.S.C. 1675(c)(4) only and does not refer to the other provisions of 19 U.S.C. 1675(c), 19 U.S.C. 1675a(c), the SAA, or the SPB. According to the United States, therefore, these portions of Argentina's claims are outside the Panel's terms of reference and have to be disregarded by the Panel. **Argentina** submits that the Panel should reject the US allegation.

7.26 **We** note that Section A.4 of Argentina's panel request provides:

> The Department's Sunset Determination is inconsistent with Article 11.3 of the Anti-Dumping Agreement, and Article X:3(a) of the GATT 1994 because it was based on a virtually irrefutable presumption under US law as such that termination of the anti-dumping duty measure would be likely to lead to continuation or recurrence of dumping. This unlawful presumption is evidenced by the consistent practice of the Department in sunset reviews (which practice is based on US law and the Department's Sunset Policy Bulletin). (emphasis added)

[18] Footnote 26 to the Response of the United States to Question 22 from the Panel Following the Second Meeting.

[19] First Written Submission of the United States, footnote 103; footnote 26 to the Response of the United States to Question 22 from the Panel Following the Second Meeting.

7.27 We note that section A.4 of Argentina's panel request takes issue with US law's provisions relating to the likelihood of continuation or recurrence of dumping determinations. In addition to this general reference, the mentioned section also cites the SPB and the USDOC's practice in this regard. In our view, this section is sufficiently clear to inform the United States that Argentina may pursue a claim to challenge the provisions of US law regarding the alleged irrefutable presumption under US law concerning the likelihood of continuation or recurrence of dumping determinations in sunset reviews. We consider that the references to 19 U.S.C. 1675(c), 19 U.S.C. 1675a(c) and the SAA on page four of the panel request, viewed in conjunction with section A.4, further clarify that Argentina can invoke these provisions of US law in its first written submission to the Panel.

(iii) Section VII.E.1 of Argentina's first written submission

7.28 The **United States** argues that section VII.E.1 of Argentina's first written submission raises a claim regarding the United States' administration of its laws, regulations, decisions, and rulings with respect to sunset reviews in violation of Article X:3(a) of the GATT 1994. However, section A.4 of the panel request only challenges the OCTG sunset determination in this regard, rather than all US laws, regulations, decisions, and rulings with respect to all sunset reviews. **Argentina** submits that the Panel should reject the US allegation.

7.29 **We** need not, and do not, address this aspect of the US request for a preliminary ruling here given that this claim was submitted by Argentina as an alternative to its claim regarding the alleged irrefutable presumption under US law regarding the likelihood of continuation or recurrence of dumping determinations and that we did not address it[20].

(iv) Section VIII.C.2 of Argentina's first written submission and section III.D.2 of its second written submission

7.30 The **United States** argues that section VIII.C.2 of Argentina's first written submission and section III.D.2 of its second written submission contains a claim regarding the USITC's application of 19 U.S.C. 1675a(a)(1) and (5) in the instant sunset review even though section B.3 of the panel request is limited to US law "as such" and makes no reference to the instant sunset review. **Argentina** submits that the Panel should reject the US allegation.

7.31 **We** note that section B of Argentina's panel request reads, in relevant part:

> **B. The Commission's Sunset Determination was inconsistent with the Anti-Dumping Agreement and the GATT 1994:**
>
> ...
>
> 3. The US statutory requirements that the Commission determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" (19 U.S.C. § 1675a(a)(1)) and that the Commission "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time" (19 U.S.C. § 1675a(a)(5)) are inconsistent with Articles 11.1, 11.3 and 3 of the Anti-Dumping Agreement. (emphasis added)

7.32 On its face, section B.3 of Argentina's panel request seems to be limited to the US statutory provisions and does not refer to the USITC's application of these statutory provisions in the sunset review at issue. However, the heading of section B refers to the USITC's determinations in this sunset review. Therefore, we consider that the text of section B, including the heading, is sufficiently clear

[20] See, *infra* para. 7.169.

to inform the United States that Argentina may challenge the application of the cited statutory provisions in the sunset review at issue.

(v) Section IX of Argentina's first written submission and section V of its second written submission

7.33 The **United States** argues that Article VI of the GATT 1994, Articles 1 and 18 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement that are being raised in section IX of Argentina's first written submission and section V of its second written submission only appear on page four of Argentina's panel request. According to the United States, therefore, these claims are outside our terms of reference. **Argentina** submits that the Panel should reject the US allegation.

7.34 **We** note that we exercised judicial economy with respect to these consequential claims raised by Argentina and did not rule on them[21]. We therefore need not, and do not, rule on this aspect of the US request for a preliminary ruling either.

(vi) Section X of Argentina's first written submission

7.35 The **United States** takes issue with the phrase "US sunset review, statutory, regulatory, and administrative provisions as such violate the Anti-Dumping Agreement and the WTO Agreement" in the conclusion part of Argentina's first written submission and argues that the only basis for this general assertion is page four of Argentina's panel request. **Argentina** submits that the Panel should reject the US allegation.

7.36 **We** note that the phrase cited by the United States is heading A under the "Conclusion" section of Argentina's first written submission. As evidenced by its name, rather than introducing new claims, the conclusion is intended to, and does in fact, repeat the claims already raised by Argentina throughout its first submission. Given that we have not made substantive rulings regarding the "Conclusion" section of Argentina's first written submission, we need not, and do not, address this aspect of the US request for a preliminary ruling.

(vii) Section III.B of Argentina's second written submission

7.37 Regarding the alleged irrefutable presumption, the **United States** argues that the claim raised in section III.B of Argentina's second written submission regarding certain provisions of the US Statute, the SAA and the SPB are outside our terms of reference because section A.4 of Argentina's panel request only contains a claim aimed against the application of an alleged irrefutable presumption in the instant sunset review. **Argentina** submits that the Panel should reject the US allegation.

7.38 **We** note once again that section A.4 of Argentina's panel requests provides:

> The Department's Sunset Determination is inconsistent with Article 11.3 of the Anti-Dumping Agreement, and Article X:3(a) of the GATT 1994 because it was based on a virtually irrefutable presumption under US law as such that termination of the anti-dumping duty measure would be likely to lead to continuation or recurrence of dumping. This unlawful presumption is evidenced by the consistent practice of the Department in sunset reviews (which practice is based on US law and the Department's Sunset Policy Bulletin). (emphasis added)

7.39 Given the two clear references in this section to US law regarding the alleged irrefutable presumption, we consider that Argentina's panel request made it sufficiently clear to the United States

[21] See, *infra* para. 7.342.

that Argentina could be raising a claim aimed against US law as such concerning this alleged irrefutable presumption.

(viii) Conclusion

7.40 In conclusion, we decline the US request for preliminary rulings relating to the alleged vagueness of the claims set forth on page four of Argentina's panel request.

(b) References to Articles 6 or 3 of the Anti-Dumping Agreement in sections B.1, B.2 and B.3 of the panel request

7.41 The **United States** argues that Argentina's references to Article 6 of the Anti-Dumping Agreement in sections B.1 and B.2, and to Article 3 in section B.3, of its panel request in their entirety fail to present the problem clearly. According to the United States, since Articles 3 and 6 of the Anti-Dumping Agreement both contain multiple obligations, the mere listing of these articles in their entirety makes it impossible to discern the nature of Argentina's problem, inconsistently with Article 6.2 of the *DSU*. The United States also claims to have suffered prejudice due to these deficiencies in sections B.1, B.2 and B.3 of Argentina's panel request because it did not know what case to answer. Therefore, the United States requires us to find that the claims of inconsistency with Article 6 in sections B.1 and B.2 and the claim of inconsistency with Article 3 in section B.3 of Argentina's panel request are not within our terms of reference.

7.42 Regarding the references to Article 6, **Argentina** submits that these references present the problem clearly because Article 6 is relevant to sunset reviews in its entirety. With regard to the reference to Article 3, Argentina similarly argues that given that Article 3 is generally applicable to sunset reviews and that it is particularly relevant to the issue of the time-frame on the basis of which sunset determinations have to be made, this reference also presents the problem clearly. Argentina argues that Article 6.2 requires that claims – not arguments – be set out in the panel request and that its panel request sets out its claims under Articles 3 and 6 with sufficient clarity. Finally, Argentina asserts that we should decline the US request because the United States has not been prejudiced in its right to defend itself due to the alleged inconsistency with Article 6.2 of sections B.1, B.2 and B.3 of its panel request.

7.43 **We** note that the contested sections B.1 through B.3 of Argentina's panel request read:

> **The Commission's Sunset Determination was inconsistent with the Anti-Dumping Agreement and the GATT 1994:**
>
> 1. The Commission's application of the standard for determining whether the termination of anti-dumping duty measure would be "likely to lead to continuation or recurrence of ... injury" was inconsistent with Articles 11, 3 and 6 of the Anti-Dumping Agreement. The Commission failed to apply the plain and ordinary meaning of the term "likely" and instead applied a lower standard in assessing whether injury would continue or recur in the event of termination, in violation of Articles 11.1, 11.3, 11.4, 3.1, 3.2, 3.3, 3.4, 3.5, and 6 of the Anti-Dumping Agreement.
>
> 2. The Commission failed to conduct an "objective examination" of the record and failed to base its determination on "positive evidence" regarding whether termination of the anti-dumping duty measure "would be likely to lead to continuation or recurrence" of injury. In particular, the Commission's conclusions with respect to the volume of imports, price effects on domestic like products, and impact of imports of the domestic industry demonstrate the Commission's failure to conduct an objective examination in violation of Articles 11, 3, and 6. The

> Commission's findings on these issues do not constitute "positive evidence" of likely injury in the event of termination, in violation of Articles 11.1, 11.3, 11.4, 3.1, 3.2, 3.3, 3.4, 3.5, and 6 of the Anti-Dumping Agreement.
>
> 3. The US statutory requirements that the Commission determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" (19 U.S.C. § 1675a(a)(1)) and that the Commission "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time" (19 U.S.C. § 1675a(a)(5)) are inconsistent with Articles 11.1, 11.3 and 3 of the Anti-Dumping Agreement.

7.44 We note that sections B.1 and B.2 contain a number of references to specific paragraphs of Articles 11 and 3 of the Anti-Dumping Agreement and a general reference to Article 6. Section B.1 contains Argentina's claim regarding the standard applied by the USITC in the instant sunset review, whereas section B.2 deals with the USITC's alleged failure to carry out an objective examination. We note, however, that with respect to both claims, Argentina has not invoked Article 6 in its submissions to the Panel during these proceedings. Consequently, in our report, we have not made any findings with regard to Article 6 under these two claims. We therefore need not, and do not, rule on the US request for a preliminary ruling concerning the general references to Article 6 of the Anti-Dumping Agreement in sections B.1 and B.2 of Argentina's panel request.

7.45 Turning to section B.3, we note that this section contains a general reference to Article 3, as well as specific references to two individual paragraphs of Article 11 of the Anti-Dumping Agreement. We also note that in its submissions to the Panel, although Argentina cited various subparagraphs of Article 3 in support of its claim challenging US law's provisions regarding the time-frame on the basis of which the USITC carries out its likelihood determinations, it only developed arguments under paragraphs 7 and 8 thereof. Therefore, the issue is whether section B.3 of Argentina's panel request was sufficiently clear to inform the United States that Argentina could invoke Articles 3.7 and 3.8 as part of this claim.

7.46 As we have already stated, Article 3 contains, in its various paragraphs, detailed rules dealing with injury determinations in anti-dumping investigations. These provisions govern different aspects of injury determinations. Paragraphs 7 and 8, in their turn, deal with threat of material injury determinations in anti-dumping investigations. Article 3 sets out certain factors to be considered in threat of material injury determinations whereas Article 3.8 requires that special care be exercised in the application of anti-dumping measures on the basis of a threat of material injury. Among other things, Article 3.7 also contains provisions regarding the timing aspect of threat of material injury determinations. In this context, we note that the chapeau of Article 3.7 reads in the relevant part:

> A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent[10]....
>
> _____
>
> [10] One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices. (emphasis added)

7.47 We note that there are important textual indications that Article 3.7 entails certain elements that deal with the time-frame on the basis of which threat of material injury determinations are to be made. In our view, a comparison of the text of Article 3.7 with section B.3 of Argentina's panel request reveals certain textual similarities. For instance, the use of certain words or phrases such as

"imminent", "within a reasonably foreseeable time" and "over a longer period of time" in section B.3 of Argentina's panel request demonstrates that the panel request was sufficiently clear to allow the United States to expect that Argentina could be relying on Articles 3.7 and 3.8 in its submissions to the Panel in this regard. We therefore conclude that although Article 3 of the Agreement contains multiple obligations that apply to different aspects of injury determinations, in the circumstances of the present proceedings, section B.3 of Argentina's panel request was sufficiently clear to inform the United States about the nature of the claim that could be pursued by Argentina.

(i) Conclusion

7.48 In conclusion, we decline the US request for preliminary rulings regarding the citation of Articles 6 and 3 of the Anti-Dumping Agreement in their entirety in sections B.1 through B.3 of Argentina's panel request.

2. Certain Claims That Have Allegedly Not Been Raised in Argentina's Panel Request

7.49 The **United States** asserts that certain claims that appear in Argentina's first written submission are not within our terms of reference because these claims have not been raised in Argentina's panel request.

7.50 **Argentina** argues that none of the matters referred to by the United States in this context are new because they are all found in Argentina's panel request. Further, Argentina submits that in order for an allegation of inconsistency with Article 6.2 to prevail, the defending party has to prove actual prejudice resulting from the alleged deficiency, which, according to Argentina, the United States has not done so far.

7.51 Claims which, in the United States' view, are outside our terms of reference and our analysis with respect to each of them are as follows:

(a) Argentina's claim challenging the US practice as such and as applied in the instant sunset review regarding the alleged irrefutable presumption in sunset reviews

7.52 The **United States** submits that Argentina's claim challenging the US practice as such and as applied in the instant sunset review regarding the alleged irrefutable presumption in sunset reviews is not included in its panel request and therefore the Panel should find these claims to be outside its terms of reference.

7.53 **Argentina** argues that section A.4 of its panel request contains both an "as such" and an "as applied" claim regarding the US practice concerning the alleged irrefutable presumption in sunset reviews.

7.54 **We** note that section A.4 of Argentina's panel request reads:

> 4. The Department's Sunset Determination is inconsistent with Article 11.3 of the Anti-Dumping Agreement, and Article X:3(a) of the GATT 1994 because it was based on a virtually irrefutable presumption under US law as such that termination of the anti-dumping duty measure would be likely to lead to continuation or recurrence of dumping. This unlawful presumption is evidenced by the consistent practice of the Department in sunset reviews (which practice is based on US law and the Department's Sunset Policy Bulletin). (emphasis added)

7.55 We also note that we did not rule on Argentina's claim regarding the USDOC's practice as such in this regard.[22] We therefore need not, and do not, rule on this aspect of the US request for a preliminary ruling.

7.56 In our view, however, it is nevertheless clear that section A.4 takes issue with an alleged irrefutable presumption in the context of sunset reviews. Further, the first sentence links this alleged presumption to the USDOC's determination in the instant sunset review whereas the second sentence links it to the USDOC's practice.

(b) Argentina's claim regarding the alleged irrefutable presumption under US law as such

7.57 The **United States** asserts that Argentina's claim that 19 USC. §§ 1675(c) and 1675(a)(c), the SAA, and the SPB, taken together, establish an irrefutable presumption that is inconsistent with Article 11.3 of the Anti-Dumping Agreement is not within our terms of reference because this claim is not set out in Argentina's panel request. The United States argues that section A.4, which is the only place where Argentina is raising its claim regarding this alleged presumption, is limited to the USDOC's determinations in this sunset review and thus does not challenge the US law.

7.58 **Argentina** submits that section A.4 of its panel request clearly states that Argentina's claim regarding the irrefutable presumption is premised on Argentina's allegation that the US law contains such a presumption. Therefore, this claim is within the Panel's terms of reference.

7.59 **We** note once again that section A.4 of Argentina's panel request reads:

> 4. The Department's Sunset Determination is inconsistent with Article 11.3 of the Anti-Dumping Agreement, and Article X:3(a) of the GATT 1994 because it was based on a virtually irrefutable presumption under US law as such that termination of the anti-dumping duty measure would be likely to lead to continuation or recurrence of dumping. This unlawful presumption is evidenced by the consistent practice of the Department in sunset reviews (which practice is based on US law and the Department's Sunset Policy Bulletin). (emphasis added)

7.60 We note that section A.4 of the panel request contains the phrases "irrefutable presumption under US law as such" and "practice is based on US law and the Department's Sunset Policy Bulletin". Thus, we consider that the text of this section is sufficiently clear to put the United States on notice that Argentina may pursue a claim against US law as such regarding the alleged irrefutable presumption.

(c) Argentina's claim under Article X:3(a) of the GATT 1994

7.61 The **United States** argues that section VII.E of Argentina's first written submission introduces a claim of inconsistency with Article X:3(a) of the GATT 1994 regarding the US practice as such and as applied in the instant sunset review. However, in the view of the United States, section A.4 of Argentina's panel request challenges only the USDOC's sunset determination in the instant sunset review, not the US practice as such.

7.62 **Argentina** argues that section A.4 of its panel request clearly contains a claim under Article X:3(a) of the GATT 1994 regarding the US practice as such and as applied in the instant sunset review.

[22] See, *infra*, para. 7.168.

7.63 **We** note that this aspect of the US request for a preliminary ruling is the same as the one the United States raised in the context of its challenge regarding page four of Argentina's panel request. Therefore, on the basis of our above analysis (*supra*, para. 7.29) we decline the US request here.

(d) Argentina's claim regarding the USITC's sunset determinations in the instant sunset review

7.64 The **United States** contends that section VIII.C.2 of Argentina's first written submission contains a claim regarding the USITC's application of 19 U.S.C. 1675a(a)(1) and (5) in the instant sunset review. According to the United States, however, the relevant portion of Argentina's panel request, section B.3, is limited to the US statutory provisions "as such" and makes no reference to the instant sunset review.

7.65 **Argentina** asserts that the heading of section B of its panel request clearly states that Argentina is also challenging the application of the US statutory provisions by the USITC in the instant sunset review.

7.66 **We** note that this aspect of the US request for a preliminary ruling is the same as the one the United States raised in the context of its challenge regarding page four of Argentina's panel request. Therefore, on the basis of our above analysis (*supra*, paras. 7.31-7.32) we decline the US request here.

(e) Argentina's consequential claims under Articles 1 and 18 of the Anti-Dumping Agreement, Article VI of the GATT 1994 and Article XVI:4 of the WTO Agreement

7.67 The **United States** submits that Article VI of the GATT 1994, Articles 1 and 18 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement that are being raised in section IX of Argentina's first written submission only appear on page four of Argentina's panel request. Given the US assertion that page four is not within our terms of reference, the United States argues that we should find these claims to be outside our terms of reference.

7.68 **Argentina** argues that given that these provisions are cited as consequential claims, their mere citation on page four of Argentina's panel request is sufficient to present the problem clearly in conformity with Article 6.2 of the *DSU*.

7.69 **We** note that this aspect of the US request for a preliminary ruling is the same as the one the United States raised in the context of its challenge regarding page four of Argentina's panel request. Therefore, on the basis of our above analysis (*supra*, para. 7.34) we decline to rule on the US request.

(f) Conclusion

7.70 In conclusion, we decline the US request for preliminary rulings regarding certain matters that are allegedly not raised in Argentina's panel request.

3. The Issue of Prejudice

7.71 Finally, we note that as our analysis with respect to the totality of the United States' request for preliminary rulings was based on a textual analysis of Argentina's panel request, we did not need to inquire into the issue of whether the United States had been prejudiced in its right to defend itself in the present proceedings due to the alleged inconsistencies in the panel request. We nevertheless note that the United States has not shown to the Panel that it had been prejudiced in its right to defend itself in these proceedings due to these alleged inconsistencies in Argentina's panel request. In several instances, the United States argued that it did not know what case it had to answer because of the lack

of precision with respect to certain parts of Argentina's panel request.[23] However, we consider that without supporting arguments, this simple allegation can not be taken to establish prejudice.[24]

C. CLAIMS REGARDING US LAW[25] AS SUCH

1. Waiver Provisions under US Law

(a) Arguments of parties

(i) Argentina

7.72 Argentina argues that Section 751(c)(4) of the Tariff Act and Section 351.218(d)(2)(iii) of the Regulations ("hereinafter "waiver provisions"), which relate to the circumstances in which an exporter waives its right to participate in a sunset review, are inconsistent with Article 11.3 of the Agreement. Argentina submits that these waiver provisions, under certain circumstances, direct the USDOC to find likelihood of continuation or recurrence of dumping without carrying out a substantive review as required under Article 11.3. Argentina contends that Article 11.3 requires the investigating authority to take an active role in sunset reviews. In order to make the required determination under Article 11.3, the investigating authority has to gather and evaluate relevant facts. It can not passively assume that dumping is likely to continue or recur.

7.73 According to Argentina, the US waiver provisions also violate Articles 6.1, 6.2 and consequently 11.4 of the Agreement because they deny exporters involved in a sunset review the opportunity to submit evidence to the investigating authority and to defend themselves in sunset reviews.

(ii) United States

7.74 According to the United States, apart from the cross-references in Articles 11.4 and 12.3, Article 11.3 is the only provision in the Agreement that sets out the rules that govern sunset reviews. Aside from the obligations set out in these provisions, the Agreement leaves the conduct of sunset reviews to the discretion of the investigating authorities. Article 11.3 does not require the investigating authorities to conduct a full sunset review, as defined under US law, in all cases. Investigating authorities would have wasted their and some private parties' resources had they been required to conduct a full sunset review in all cases. The United States argues that the waiver provisions simply determine the factual basis upon which the USDOC will make sunset determinations and in no way prevent the USDOC from making the requisite likelihood determination under Article 11.3. The waiver provisions effectuate the expeditious completion of sunset reviews *vis-à-vis* interested parties that fail to submit substantive responses to the notice of initiation of a sunset review, as allowed under Article 6.14 of the Agreement.

7.75 The United States also contends that the waiver provisions do not contradict Articles 6.1 and 6.2 of the Agreement. The United States argues that US law provides interested parties in sunset reviews with ample opportunity to submit evidence and to defend their interests as required in these provisions. According to the United States, since the evidentiary standards for expedited sunset

[23] See, for instance, First Written Submission of the United States, para. 110; Second Oral Submission of the United States, para. 41.

[24] We find support for this approach in the Appellate Body decision in *Korea-Dairy* and the panel decision in *HFCS*. See, Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea – Dairy*"), WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3, para. 131; Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* ("*Mexico – Corn Syrup* "), WT/DS132/R and Corr.1, adopted 24 February 2000, DSR 2000:III, 1345, para. 7.17.

[25] Throughout this report, we use the term "US law" to refer to the relevant statutory provisions, the Regulations and other legal instruments in the US legal system, such as the SAA and the SPB.

reviews provided for under US law are consistent with Article 6, the fact that the United States provides interested parties in full sunset reviews with extended opportunities to submit evidence can not render US law WTO-inconsistent.

(b) Arguments of third parties

(i) European Communities

7.76 The European Communities criticises the SAA's mere concentration on the issue of the extraordinary administrative burden on the agency resources and on achieving administrative efficiency. Though acknowledging the importance of such objective, the European Communities submits that, as a matter of WTO law, resource allocation issues could never justify the disregard of Article 11.3 in sunset reviews.

(ii) Japan

7.77 Japan agrees with Argentina that the waiver provisions of US law are inconsistent with Articles 6, 11.3 and 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement.

(iii) Korea

7.78 Korea submits that all interested parties have to be given the opportunity to present evidence and to defend their interests. In Korea's view, expedited sunset reviews – whether on the basis of waiver or inadequacy – conflict with Articles 6.1 and 6.2. Korea also argues that the USDOC's practice does not comply with the provisions of Article 6.8 and Annex II of the Agreement governing the use of facts available.

(iv) Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

7.79 According to the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, although the conduct of an expedited sunset review in and of itself is not WTO-inconsistent, the provisions that direct the USDOC to make a likelihood determination in cases where interested parties waive their right to participate are inconsistent with Article 11.3 of the Agreement.

(c) Evaluation by the Panel

(i) Alleged Violations of Article 11.3 of the Agreement

Measures at issue

7.80 Argentina challenges the waiver provisions of US law as such.[26] Specifically, Argentina's claim relates to Section 751(c)(4) of the Tariff Act and Section 351.218(d)(2)(iii) of the Regulations. Argentina does not challenge Section 351.218(d)(2)(i) of the Regulations. We did, however, refer to Section 351.218(d)(2)(i) of the Regulations as context for analysis below.

7.81 Section 751(c)(4) of the Tariff Act of 1930 provides, in relevant part:

> (4) Waiver of participation by certain interested parties
>
> (A) In general

[26] Argentina is not challenging the provisions of US law regarding expedited sunset reviews as such. See, Response of Argentina to Question 1 from the Panel Following the Second Meeting.

> An interested party described in section 1677(9)(A) or (B) of this title may elect not to participate in a review conducted by the administering authority under this subsection and to participate only in the review conducted by the Commission under this subsection.
>
> (B) Effect of waiver
>
> In a review in which an interested party waives its participation pursuant to this paragraph, the administering authority shall conclude that revocation of the order or termination of the investigation would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) with respect to that interested party.[27] (emphasis added)

7.82 Next, we turn to Section 351.218(d)(2) of the USDOC's Sunset Regulations, which provides in relevant part:

> (2) Waiver of response by a respondent interested party to a notice of initiation–
>
> (i) Filing a Statement of Waiver. A respondent interested party may waive participation in a sunset review before the Department under Section 751(c)(4) of the Act by filing a Statement of Waiver with the Department, not later than 30 days after the date of publication in the Federal Register of the notice of initiation. If a respondent interested party waives participation in a sunset review before the Department, the Secretary will not accept or consider any unsolicited submissions from that party during the course of the review. Waiving participation in a sunset review before the Department will not affect a party's opportunity to participate in the sunset review conducted by the International Trade Commission. (emphasis added)
>
> ...
>
> (iii) No response from an interested party. The Secretary will consider the failure by a respondent interested party to file a complete substantive response to a notice of initiation under paragraph (d)(3) of this section as a waiver of participation in a sunset review before the Department.[28] (emphasis added)

7.83 We note that Section 751(c)(4)(A) of the Tariff Act provides that an interested party may elect to waive its participation in sunset review proceedings conducted by the USDOC and participate only in sunset review proceedings conducted by the USITC. Section 351.218(d)(2)(i) of the Regulations provides that an interested party may waive participation by filing a statement of waiver with the USDOC. We will refer to this as an "explicit" or "affirmative" waiver. Further, according to Section 351.218(d)(2)(iii) of the Regulations, the USDOC will consider the failure of an interested party to submit a complete substantive response to the notice of initiation of a sunset review to constitute a waiver of participation in the USDOC's sunset review proceedings. We will refer to this as an "implicit" or "deemed" waiver.

7.84 On the basis of the above-cited provisions of US law, we understand the operation of the waiver provisions to be as follows: Following the publication of the notice of initiation of a sunset review, foreign exporters (referred to as "respondent interested parties" under US law) which desire to participate in the sunset review proceedings before the USDOC must submit a complete substantive response to the USDOC. For the substantive response to be complete, it has to contain all of the items listed in Section 351.218(d)(3) of the Regulations. According to Section 751(c)(4)(A) of the Tariff

[27] Codified in 19 U.S.C. § 1675(c)(4) (Exhibit ARG-1 at 1152).
[28] Codified in 19 C.F.R. § 351.218(d)(2) (Exhibit ARG-3).

Act, an interested party in a sunset review may elect to waive its right to participate in the USDOC part of a sunset review. Section 351.218(d)(2)(i) of the Regulations provides that interested exporters who wish to waive participation may do so by submitting a statement of waiver to the USDOC. Under Section 351.218(d)(2)(iii) of the Regulations, an exporter's failure to submit a complete substantive response to the notice of initiation is deemed to constitute a waiver of its right to participate in the USDOC proceedings. In either case, the application of Section 1675(c)(4) of the Tariff Act leads to the same result: The USDOC "shall" find likelihood of continuation or recurrence of dumping with respect to an exporter which waives its right to participate.

7.85 We consider it important to note that the distinction between affirmative and deemed waivers stems from Section 351.218(d)(2)(iii) of the Regulations, not the Tariff Act. The Tariff Act simply provides that interested parties may choose not to participate in the USDOC part of a sunset review, and that the effect of a waiver is an affirmative finding of likelihood by the USDOC. Section 351.218(d)(2)(iii) of the Regulations, however, creates the deemed waiver category by stipulating that submission of an incomplete, or no, response to the notice of initiation also constitutes a waiver. Therefore, our findings regarding affirmative waivers will have implications on the Tariff Act whereas those relating to deemed waivers will only affect Section 351.218(d)(2)(iii) of the Regulations.

Nature of the obligations in Article 11.3

7.86 Argentina contends that the above-cited waiver provisions of US law are inconsistent with the investigating authorities' obligation to determine likelihood of continuation or recurrence of dumping under Article 11.3 of the Agreement.

7.87 Article 11.3 of the Anti-Dumping Agreement reads:

> Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.[22] The duty may remain in force pending the outcome of such a review.
>
> _____
>
> [22] When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

7.88 Article 11.3 provides that an anti-dumping duty must be terminated after five years "unless the authorities determine, in a review..." that expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The ordinary meaning of "determine" is, *inter alia*, "settle or decide (a dispute, controversy, etc., or a sentence, conclusion, issue, etc.) as a judge or arbiter"[29]. This ordinary meaning seems to fit the usage of "determine" in Article 11.3, which requires that the investigating authority determine that dumping and injury is likely to continue or recur in a case where the duty is revoked. The Article 11.3 obligation to "determine" the likelihood of continuation or recurrence of dumping requires the investigating authority to make a reasoned finding on the basis

[29] The New Shorter Oxford English Dictionary, Oxford University Press, p. 651.

of positive evidence that dumping is likely to continue or recur should the measure be revoked. The obligation to make such a determination precludes an investigating authority from simply assuming that likelihood exists. The authority must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination.[30]

7.89 Accordingly, we consider that Article 11.3 requires that an investigating authority's determination that dumping is likely to continue or recur must be supported by reasoned and adequate conclusions based on the facts before it in a sunset review. We will therefore consider whether the waiver provisions of US law prevent the USDOC from making such a determination in situations where an interested party has waived its right to participate in a sunset review .[31]

Examination of the consistency of the waiver provisions

7.90 In the context of its claim under Article 11.3 of the Agreement, Argentina is challenging the provisions of US law relating to both affirmative and deemed waivers.[32] We will, therefore, analyse both of these two types of waivers in light of the investigating authorities' obligation to determine likelihood of continuation or recurrence of dumping under Article 11.3.

Deemed waivers

7.91 We recall that under 351.218(d)(2)(iii) of the USDOC's Regulations, there will be a deemed waiver in cases where an exporter submits an incomplete – or no – substantive response to the notice of initiation of a sunset review. Pursuant to Section 751(c)(4)(B) of the Tariff Act, which makes no distinction between affirmative and deemed waivers, the consequence of a waiver is a finding of likelihood of continuation or recurrence of dumping by the USDOC with respect to that exporter.

7.92 The first factual situation that leads to a deemed waiver is the submission by an exporter of an incomplete substantive response to the notice of initiation of a sunset review. In this case, the exporter intends to participate in the sunset review and submits information to the USDOC. However, the submission is not complete, i.e. it does not contain all the information that US law requires to be submitted in a substantive response to the notice of initiation of a sunset review. US law mandates a finding of likelihood in this case.

7.93 In our view, where the foreign exporter submits information to the USDOC, the obligation to make a reasoned determination of likelihood under Article 11.3 of the Agreement requires the USDOC to take that information into consideration in its sunset determination.[33] Taken together, however, Section 751(c)(4)(B) of the Tariff Act and Section 351.218(d)(2)(iii) direct the USDOC to find that likelihood exists with respect to a given exporter simply because the exporter's substantive response to the notice of initiation does not contain some of the information prescribed under US law.

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[30] We find support for this approach in the Appellate Body decision in *US – Corrosion-Resistant Steel Sunset Review*. See, Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("*US – Corrosion-Resistant Steel Sunset Review*"), WT/DS244/AB/R, 15 December 2003, paras. 111-115.

[31] We note that it is clear, and United States has not argued to the contrary, that waiver provisions bind the USDOC. Therefore, in the context of Argentina's present claim, we do not need to address the applicability of the mandatory/discretionary distinction. The only issue in this context is whether or not the content of the waiver provisions is WTO-inconsistent.

[32] Response of Argentina to Question 1 from the Panel Following the Second Meeting.

[33] Except, of course, to the extent it was entitled to disregard such information pursuant to Article 6.8 and Annex II of the Agreement. The United States has not, however, argued that US law regarding waiver provisions can be justified under those provisions. This does not of course prejudge the credibility and relevance of, and weight to be given to, the information submitted by an exporter, which will vary from case to case. The waiver provisions of US law, however, preclude the USDOC from considering these matters.

Thus, the USDOC is precluded from taking into consideration, in its determination with respect to a given exporter, the facts submitted by that exporter (or any other facts before it that might be relevant to its determination), and it is further precluded from receiving, much less considering, any other facts relevant to this question. To the contrary, it is required to make an affirmative determination on the basis of one fact alone: the failure of the exporter to submit a complete substantive response to the notice of initiation of a sunset review.[34] In our view, this can not be a determination supported by reasoned and adequate conclusions based on the facts before an investigating authority.

7.94 The second situation that may lead to a deemed waiver is failure to respond at all to the notice of initiation of a sunset review. In this case, the exporter concerned neither explicitly waives its right to participate nor submits any information to the USDOC. Under Section 351.218(d)(2)(iii) of the Regulations, this situation is also deemed to constitute a waiver of participation.[35] Pursuant to Section 751(c)(4)(B) of the Tariff Act, the USDOC is required to find likelihood with respect to the exporter that remains silent following the publication of the notice of initiation.

7.95 We recall our view that Article 11.3 requires that an investigating authority's determination that dumping is likely to continue or recur be supported by reasoned and adequate conclusions based on the facts before the authority in a sunset review. In the factual situation we are now analyzing, the failure of the exporter to put any information before the USDOC may mean that the USDOC has little or no information before it that is relevant to whether dumping by that exporter is likely to continue or recur (although some relevant evidence, such as the results of administrative reviews, may nevertheless be available). Such non-cooperation clearly is not without consequences for the exporter. Under these circumstances, the USDOC may, consistent with the terms of Article 6.8 and Annex II of the Agreement, resort to the use of the facts available, including information from secondary sources. As Annex II clearly indicates, "this situation could lead to a result which is less favourable to the party than if the party did cooperate". It is clear to us that in this context, the USDOC may have no choice but to make its determination on the basis of a more limited and less robust record than would exist had the exporter co-operated. This does not, however, mean that the USDOC may be automatically authorized, and indeed required, to make an affirmative finding that the continuation or recurrence of dumping by the exporter is likely, without any further inquiry and irrespective of any relevant evidence before it.[36] In our view, an affirmative determination based exclusively upon the fact that the exporter did not respond to a notice of initiation, and which disregards entirely even the possibility that other relevant information might be in the record, is not supported by reasoned and adequate conclusions based on the facts before an investigating authority, inconsistently with Article 11.3.[37]

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[34] We note that Section 351.218(d)(2)(iii) of the USDOC's Regulations does not take account of the amount of the missing information in a substantive response to the notice of initiation when declaring that response to be "incomplete". In other words, this section provides on its face that no matter how minimal the quantity or the quality of the missing information is, if the response to the notice of initiation is incomplete the result will be an automatic finding of likelihood of continuation or recurrence of dumping by the USDOC.

[35] The United States confirmed that under US law failure to respond at all to the notice of initiation of a sunset review is equal to the submission of an incomplete substantive response. Response of the United States to Question 8 from the Panel Following the First Meeting.

[36] As previously noted (*supra*, note 33), the United States does not argue that its waiver provisions may be justified under Article 6.8 and Annex II of the Agreement.

[37] We note that this approach to non-cooperation in a sunset review is no different from the approach that an investigating authority takes in an original investigation. If an exporter fails to respond to a questionnaire or otherwise to participate in an investigation, the investigating authority may resort to the facts available. While it is likely, and perhaps highly probable, that the investigating authority's determination based on facts available will be unfavourable to the exporter, this would not exclude the investigating authority from the obligation to make a determination based on such information as was available to it pursuant to the rules set forth in Article 6.8 and Annex II of the Agreement.

Affirmative waivers

7.96 Under Section 751(c)(4)(A) of the Tariff Act and Section 351.218(d)(2)(i) of the Regulations, an exporter may file a statement of waiver declaring that it will not participate in the USDOC portion of a sunset review. In this situation, Section 751(c)(4)(B) directs the USDOC to make an affirmative finding of likelihood with regard to the exporter that explicitly waives its right to participate in the USDOC part of the sunset review.

7.97 Argentina asserts that Section 751(c)(4)(B) of the Tariff Act requires a finding of likelihood for an exporter that explicitly waives its right to participate in a sunset review and is inconsistent with the obligation to determine set out in Article 11.3 of the Agreement. According to Argentina, the investigating authority has the obligation to carry out an examination on the basis of positive evidence to make a reasoned determination even in a case of an affirmative waiver. It can not simply assume that dumping is likely to continue or recur without any analysis.[38]

7.98 We note that in a sunset review where an exporter explicitly states that it intends not to participate in the review, it is likely to be much easier for the investigating authority to discharge its obligation to determine likelihood with respect to that particular exporter, compared with an exporter that fully cooperates with the investigating authority. This is because in most cases the bulk of the information concerning the issue of whether an exporter is likely to continue or recur to dump in the event of revocation of the order will be submitted by the exporter concerned.

7.99 We nevertheless consider that even in a case of affirmative waiver, the investigating authority's obligation to make a determination supported by reasoned and adequate conclusions based on the facts before it continues to apply. The investigating authority can not simply assume, without further inquiry, that dumping is likely to continue or recur because the exporter chose not to participate in the review. In this respect, we incorporate our above analysis (*supra*, paras. 7.94-7.95) regarding deemed waivers in cases where the exporter remains silent following the initiation of the sunset review. In our view, therefore, the provisions of US law relating to affirmative waivers are also inconsistent with the obligation to determine likelihood of continuation or recurrence of dumping under Article 11.3 of the Agreement.

Company-specific vs. order-wide sunset determinations

7.100 The United States submits that, under US law, the final likelihood determination in a sunset review is made on an order-wide basis for a country. Although US law mandates an affirmative finding of likelihood with respect to exporters that have waived their right to participate in a sunset review, it does not do so with respect to the order-wide determination.[39] Therefore, depending on whether there are exporters that have waived their right to participate, a US sunset review may include two steps: If no exporter has waived its right to participate, there will only be one sunset determination, which will be made on an order-wide basis. If, however, some exporters have waived their right to participate, then the USDOC will make an affirmative likelihood determination with respect to these exporters. The USDOC will then make a final order-wide sunset determination for the country.[40] Depending on the share of the exporters that have submitted a complete substantive

[38] Response of Argentina to Question 1 from the Panel Following the Second Meeting.

[39] Response of the United States to Questions 4(c) and 5(d) from the Panel Following the First Meeting; Second Written Submission of the United States, para. 21.

[40] Under US law, in cases where the respondent interested parties submitting a complete substantive response to the notice of initiation account for less than 50 per cent of the total exports of the subject product into the United States over the five-year period preceding the initiation of the sunset review, their complete substantive responses will be considered to be inadequate under Section 351.218(e)(1)(ii)(A) of the Regulations. According to Section 751(c)(3)(B) of the Tariff Act and Section 351.218(e)(1)(ii)(C)(2) of the Regulations, in case of an inadequate substantive response, the USDOC will conduct an expedited sunset review and will, "without further investigation", make its sunset determinations on the basis of facts available.

response to the notice of initiation, that final determination will be made either through a full or an expedited sunset review. The United States, therefore, submits that the waiver provisions do not violate Article 11.3 of the Agreement because they do not determine, in and of themselves, the final outcome of a sunset review; they only determine the outcome of the first step.[41]

7.101 Even focusing on the final order-wide determination, we find the US argument unconvincing. As explained above, Article 11.3 requires that an investigating authority's determination that continuation or recurrence of dumping is likely must be supported by reasoned and adequate conclusions based on the facts before it. The United States concedes that company-specific likelihood determinations are "considered" when making an order-wide likelihood determination, and argues only that they do not determine, in and of themselves, the order-wide result.[42] To the extent that the order-wide determination of likelihood is based in whole or in part upon a company-specific determination that was improperly established, we do not see how the order-wide determination can be supported by reasoned and adequate conclusions based on the facts before the investigating authority.

7.102 We note in this regard that a company-specific determination of likelihood may have a significant, if not conclusive, impact on an order-wide determination. Where, for example, the exporter that has waived participation is the only exporter, the company-specific result is likely to be conclusive. In fact, we asked the United States whether the USDOC had ever made an affirmative likelihood determination with respect to some exporters that had waived their right to participate, and then found no likelihood on an order-wide basis. The United States responded in the negative.[43] Nor has the United States cited a provision of US law that clearly states that the order-wide sunset determinations are independent from the company-specific determinations made pursuant to the waiver provisions.

Conclusion

7.103 In conclusion, we find that both affirmative and deemed waivers provisions of US law, i.e. Section 751(c)(4)(B) of the Tariff Act and Section 351.218(d)(2)(iii) of the USDOC's Regulations, are inconsistent with the investigating authorities' obligation to determine likelihood of continuation or recurrence of dumping under Article 11.3 of the Anti-Dumping Agreement.

(ii) Alleged Violations of Articles 6.1 and 6.2 of the Agreement

7.104 **Argentina** argues that deemed waivers provisions of US law, i.e. Section 351.218(d)(2)(iii) of the Regulations, violate Articles 6.1 and 6.2 of the Agreement because by precluding the USDOC

[41] See, for example, Second Written Submission of the United States, para. 21; Response of the United States to Question 2 from the Panel Following the First Meeting.

In this context, we note that, as the United States asserts, both the SAA and the SPB clearly provide that the USDOC will make its sunset determinations on an order-wide basis. The SAA (Exhibit US-11 at 879); the SPB (Exhibit ARG-35 at 18872). We also note the Appellate Body's ruling in *US – Corrosion-Resistant Steel Sunset Review* that sunset determinations can be made on an order-wide basis. Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 155.

[42] In this respect, the United States stated:

> The United States has not argued that a waiver "does not affect" the final order-wide likelihood determination. While the individual affirmative likelihood determinations may affect the order-wide likelihood determination, they do not determine, in and of themselves, the ultimate outcome of the order-wide analysis. Commerce considers all the information on the administrative record, including prior agency determinations and the information submitted by the interested parties or collected by Commerce, as well as any individual affirmative likelihood determinations, when making the order-wide likelihood determination.

Response of the United States to Question 4(b) from the Panel Following the Second Meeting.

[43] Response of the United States to Question 4(a) from the Panel Following the Second Meeting.

from making the required likelihood determination under Article 11.3, these provisions deprive interested parties of their right to submit evidence and to defend their interests, inconsistently with Articles 6.1 and 6.2, respectively.

7.105 The **United States** asserts that no provision of US law prevents interested parties from submitting evidence to the investigating authority and from defending their interests in sunset reviews in conformity with Articles 6.1 and 6.2 of the Agreement.

7.106 **We** note that in the context of the present claim regarding US law, Argentina does not challenge affirmative waivers provisions and limits its claim to the deemed waivers provisions. We shall, therefore, base our analysis exclusively on the deemed waivers provisions.

Applicability of Articles 6.1 and 6.2 to Sunset Reviews

7.107 We note that Argentina's claim here is based on the assumption that Articles 6.1 and 6.2 of the Agreement apply to sunset reviews. According to Argentina, these provisions apply to sunset reviews by virtue of the cross-reference in Article 11.4. The United States contends that this cross-reference incorporates into sunset reviews only those provisions of Article 6 that deal with evidence and procedure, but does not specifically dispute that Articles 6.1 and 6.2 fall within this category.[44]

7.108 The first issue before us is, therefore, whether the provisions of Articles 6.1 and 6.2 apply to sunset reviews.

7.109 Article 11.4 of the Anti-Dumping Agreement reads:

> The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review. (emphasis added)

7.110 We note that the cross-reference in Article 11.4 of the Agreement makes the provisions of Article 6 regarding evidence and procedure applicable to sunset reviews. We also note, however, that the cross-reference in Article 11.4 to Article 6 is qualified by the language "regarding evidence and procedure". Considering that the drafters often did not qualify the cross-references in other parts of the Agreement, we have to address the significance of this language with regard to the applicability in sunset reviews of paragraphs 1 and 2 of Article 6 cited by Argentina.

7.111 In our view, two possible approaches can be taken regarding the meaning and effect of this qualifying language in Article 11.4: First, it can be argued that on its face this language suggests that there may be provisions in Article 6 that deal with matters other than "evidence and procedure". Otherwise, the drafters would not have inserted this qualifying language in Article 11.4. Therefore, when faced with the question of whether certain individual paragraphs/provisions of Article 6 apply to sunset reviews, the treaty interpreter has to analyse the provision at issue with the qualifying language in Article 11.4 in mind to decide whether or not that provision deals with "evidence and procedure". The second approach could be that this language in Article 11.4 does not qualify the cross-reference to Article 6; it simply reiterates the fact that Article 6 contains rules that deal with "evidence and procedure". This is evidenced in the title of Article 6, which reads "Evidence".

7.112 In our view, Articles 6.1 and 6.2 deal with "evidence and procedure". Article 6.1 of the Agreement sets out rules regarding interested parties' right to be given notice of the information required by the investigating authority and an ample opportunity to submit evidence to the investigating authority. Article 6.2 provides that interested parties shall be given a full opportunity to

[44] Response of the United States to Question 10(a) from the Panel Following the First Meeting.

defend their interests. Therefore, no matter which one of the above-cited two approaches is followed regarding the meaning of the qualifying language in Article 11.4, we consider that Articles 6.1 and 6.2 apply to sunset reviews.

Nature of obligations under Articles 6.1 and 6.2 of the Agreement

7.113 Having concluded that the provisions of Articles 6.1 and 6.2 of the Agreement apply to sunset reviews, we now turn to the provisions of these two articles.

7.114 Article 6.1 provides, in relevant part that:

> All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

7.115 We note that Article 6.1 stipulates generally that an investigating authority in a sunset review must give notice of the information that it requires from interested parties and allow interested parties ample opportunity to present in writing all evidence that the interested parties themselves deem relevant to the defence of their position in that sunset review. In its subparagraphs, Article 6.1 sets forth more specific procedural rights relating, *inter alia*, to questionnaires.

7.116 Article 6.2 provides:

> Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.

7.117 Article 6.2 generally deals with the right of interested parties to defend their interests in an investigation and, by operation of Article 11.4, in a sunset review. More specifically, it provides that the investigating authority must provide, on request, interested parties an opportunity to meet other interested parties in the proceeding to hear their views and to make their own views known to them. In other words, Article 6.2 grants interested parties a right to participate in a hearing or otherwise to confront those parties with adverse interests. Further, it gives interested parties the right, on justification, to present other information orally.

Examination of the consistency of the deemed waivers provisions

7.118 Turning to the provisions of US law challenged by Argentina, i.e. those dealing with deemed waivers, we recall that the provision of US law that creates the deemed waiver category is Section 351.218(d)(2)(iii) of the USDOC's Regulations. This section considers exporters submitting incomplete responses to the notice of initiation of a sunset review and those that submit no response at all to have waived their right to participate in a sunset review. The consequence of having been deemed to waive the right to participate in a sunset review is the same as in the case of an affirmative waiver: an affirmative finding of likelihood of continuation or recurrence of dumping by the USDOC, as mandated by Section 751(c)(4)(B) of the Tariff Act. In this respect, the Statute does not distinguish between affirmative and deemed waivers.

7.119 In order to evaluate whether the provisions of US law regarding deemed waivers fall foul of Articles 6.1 and 6.2, we must first examine the precise implications of a deemed waiver on an exporter's ability to participate in a sunset review. We shall then analyse separately two factual situations that lead to a deemed waiver, i.e. failure to submit a complete response to the notice of initiation and failure to respond at all.

7.120 We recall that Section 751(c)(4)(B) of the Tariff Act requires the USDOC to make an affirmative finding of likelihood with respect to the exporter that has elected to waive its right to participate. Section 351.218(d)(2)(iii) of the USDOC's Regulations provides that an exporter that has not filed a complete substantive response to the notice of initiation of a sunset review is deemed to have waived its right to participate. As a result, that exporter will also be subject to an affirmative finding of likelihood by the USDOC.

7.121 We note that in a deemed waiver situation, US law does not allow the USDOC to take into account evidence submitted by an exporter in its incomplete submission when making its likelihood determination in respect of that exporter.[45] Further, it is clear that an exporter who has submitted an incomplete response is precluded from presenting any further evidence to the USDOC (and in any event, the USDOC would be precluded from taking it into account when making its likelihood determination with respect to that exporter). It is also clear that the exporter would not be permitted to participate in hearings or other procedures to confront other interested parties.[46] In fact, these conclusions flow naturally from the fact that the exporter is deemed to have waived participation in the review, and are not disputed by the United States.

7.122 The first situation that may lead to a deemed waiver is the submission by an exporter of an incomplete response to the notice of initiation. We recall that under US law, an exporter that is deemed to have waived its right to participate by submitting an incomplete response can not submit further evidence to the USDOC. Further, we also recall that the USDOC is required to reach an affirmative likelihood determination with respect to this exporter without considering evidence submitted in the exporter's incomplete response. It follows that the exporter is deprived of its right to submit evidence to the USDOC. This obviously runs foul of Article 6.1 of the Agreement, which requires that interested parties be given an ample opportunity to submit information to the investigating authority. We see no provision in the Agreement that allows such denial of the procedural rights provided for in Article 6.1 on the grounds that the exporter made an incomplete submission to the notice of initiation.

7.123 We also find US law to be inconsistent with Article 6.2 of the Agreement in that it denies an exporter that is deemed to have waived its right to participate in a sunset review by submitting an incomplete response to the notice of initiation of a sunset review the right to participate in a hearing or otherwise to confront those parties with adverse interests. We find no justification in the Agreement that would allow such a departure from the provisions of Article 6.2 on the grounds that that exporter has submitted an incomplete response to the notice of initiation.

7.124 The United States argues that the information contained in an incomplete submission of an exporter which is deemed to have waived its right to participate is nevertheless taken into

[45] Section 751(c)(4)(B) of the Tariff Act, codified in 19 U.S.C. § 1675(c)(4)(B) (Exhibit ARG-1 at 1152).

[46] In this respect, we note the following statement of the United States:

> If an exporter in fact submitted an incomplete substantive response – a hypothetical situation – that exporter would be deemed to have waived its right to participate in the sunset review, pursuant to Section 351.218(d)(2)(iii). Therefore, the exporter would not have the right to submit additional evidence or request a hearing.

Response of the United States to Question 2(e) from the Panel to the United States Following the First Meeting. We note that the United States made a similar statement in its second written submission. See, Second Written Submission of the Unites States, para. 25.

consideration by the USDOC in its order-wide analysis for the country as a whole.[47] According to the United States, therefore, deemed waivers provisions of US law are not inconsistent with the provisions of Article 6.1 of the Agreement.

7.125 In our view, to the extent that the order-wide determination of likelihood is based in whole or in part upon a company-specific determination that was established inconsistently with Articles 6.1 and 6.2 of the Agreement, we do not see how the order-wide determination can be interpreted as being consistent with these two provisions. We consider that the violations of Articles 6.1 and 6.2 at the company-specific level would necessarily taint the USDOC's order-wide determination. Assuming *arguendo* that the USDOC does evaluate this information in its order-wide analysis consistently with the requirements of Articles 6.1 and 6.2, that can not cure the inconsistency stemming from the USDOC's failure to consider that information in the company-specific determination relating to the exporter submitting the information.

7.126 Further, the United States has not clarified to us in what ways and for what purpose information submitted by an exporter that is not being used in the company-specific determination conducted for that particular exporter can be used in the order-wide sunset determination for the country subject to the sunset review. For instance, in a sunset review where all exporters either failed to respond at all or submitted incomplete responses, the USDOC would have to make an affirmative likelihood determination with respect to all exporters by virtue of Section 751(c)(4)(B) of the Tariff Act, without taking into account the information contained in these exporters' incomplete submissions. Yet, according to the US argument, the USDOC would conduct another order-wide analysis for the country as a whole in which it would consider the information contained in the incomplete submissions of these exporters. We do not understand how usefully this information could be considered for the country as a whole, given that it would not be used with respect to the individual exporter submitting it. As we stated above (*supra*, para. 7.102), there has never been a sunset review in which the USDOC found no likelihood in the order-wide analysis where it had already found likelihood for some exporters under the waiver provisions. This supports our view that the US explanation regarding the consideration of the evidence submitted in the incomplete responses of some exporters does not reflect the US practice and is far from convincing.

7.127 The second situation that can lead to a deemed waiver is an exporter's failure to respond, within the specified time period, to a notice of initiation. Under US law, exporters that do not submit a timely substantive response to the notice of initiation of a sunset review are precluded from submitting any further evidence to the USDOC and from requesting, or participating in, hearings. In our view, the fact that an exporter failed to submit a substantive response to the notice of initiation at the outset of a sunset review can not justify depriving that exporter of its procedural rights under Articles 6.1 and 6.2 of the Agreement for the rest of the sunset review. We recognize that in many such cases the USDOC will be entitled to resort to facts available under Article 6.8 and Annex II of the Agreement, which, in turn, may lead to an unfavourable determination with respect to such an exporter. In that regard, the USDOC may decline, on a case-by-case basis, to take into consideration evidence submitted by that exporter if the submission is not made within a reasonable time.[48] Article 6.8 and Annex II do not, however, allow the USDOC to disregard all evidence submitted by an exporter in the period following the deadline for the submission of a substantive response to the notice of initiation on the ground that the exporter failed to make such a submission in the first place. The USDOC can only disregard information submitted by an exporter on the grounds, and by following the procedure, provided for in Article 6.8 and Annex II. It follows that the deemed waivers provisions of US law violate Articles 6.1 and 6.2 of the Agreement in this second factual situation too.

[47] Response of the United States to Questions 2(e) and 7(b) from the Panel Following the First Meeting; Second Written Submission of the United States, para. 24.

[48] We find support for this proposition in the Appellate Body Report in *US – Hot-Rolled Steel*. See, Appellate Body Report, *US – Hot-Rolled Steel*, *supra*, note 9, paras. 80-82.

Conclusion

7.128 In conclusion, we find Section 351.218(d)(2)(iii) of the USDOC's Regulations relating to deemed waivers to be inconsistent with Articles 6.1 and 6.2 of the Agreement.[49]

2. Alleged Irrefutable Presumption of Likelihood Under US Law/Practice

(a) Arguments of parties

(i) Argentina

7.129 Argentina asserts that US law as such is inconsistent with Article 11.3 because it contains an irrefutable presumption of likelihood of continuation or recurrence of dumping in sunset reviews where certain factual scenarios are met. According to Argentina, US law in this respect consists of Sections 751(c) and 752(c) of the Tariff Act of 1930, the provisions of the SAA relating to sunset reviews, and Section II.A.3 of the SPB. Argentina considers that the statutory provisions cannot be analysed in isolation from the SAA and the SPB. Argentina points out that the SAA and the SPB provide the USDOC with a simple checklist as the basis for the latter's decision as to whether there is a likelihood of continuation or recurrence of dumping. The SPB contains three basic factual scenarios that would support a finding of likelihood of continuation or recurrence of dumping in a sunset review. Therefore, rather than carrying out a prospective analysis as required under Article 11.3 of the Agreement, the USDOC simply checks whether one of these three scenarios is present, and if so, concludes that there is a likelihood of continuation or recurrence of dumping should the measure be lifted. Argentina argues that USDOC has a consistent practice which demonstrates that the USDOC attributes a decisive relevance to the factual scenarios set out in the SPB.

7.130 Independently from its challenge to US law, Argentina also argues that the USDOC's consistent practice as such is inconsistent with Article 11.3 of the Agreement because it embodies the WTO-inconsistent irrefutable presumption regarding the likelihood of continuation or recurrence of dumping determinations in sunset reviews. For instance, according to Argentina, in all sunset reviews in which a domestic interested party participated the USDOC found likelihood of continuation or recurrence of dumping. According to Argentina, "practice that prescribe[s] a standard can be subject to WTO challenge."[50] Therefore, this practice is also susceptible to a WTO challenge.

7.131 If the Panel rejects Argentina's claim regarding the alleged irrefutable presumption under US law/practice, Argentina requires the Panel to find that the United States failed to administer its sunset review laws and regulations in a manner consistent with Article X:3(a) of the GATT 1994.

(ii) United States

7.132 The United States asserts that neither the SPB nor the SAA contains an irrefutable presumption regarding the likelihood of continuation or recurrence of dumping determinations in sunset reviews.[51] Even if they did, the United States contends that these two instruments do not

[49] We note that Argentina also argues that violations of Articles 6.1 and 6.2 lead to consequential violations of Articles 11.3 and 11.4 of the Agreement. Given that these are purely consequential claims, we exercise judicial economy and do not rule on them.

[50] First Written Submission of Argentina, para. 139.

[51] Regarding Argentina's challenge against the Tariff Act in the context of this claim, the United States pointed out that:

> [Argentina] does not allege that any US statutory provision establishes the presumption, nor could it, because there is no such provision. Instead, it turns to three items: the SAA, the Sunset Policy Bulletin, and supposed Commerce "practice."
> First Written Submission of the United States, para. 174.

constitute "measures" for purposes of WTO dispute settlement proceedings, nor are they binding legal instruments under US law. They therefore can not be challenged in the WTO. Similarly, the United States submits that the USDOC's practice concerning sunset reviews cannot be challenged under WTO law because practice as such is not a measure.

(b) Arguments of third parties

(i) Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

7.133 Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu submits that the SAA and the SPB are not binding legal instruments under US law. Therefore, there does not seem to be an irrefutable presumption of likelihood of continuation or recurrence of dumping under US law. Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu contends that no conclusive inference can be drawn from the USDOC's practice in sunset reviews.

(c) Evaluation by the Panel

(i) Status of the Sunset Policy Bulletin

7.134 Argentina submits that US law is inconsistent with Article 11.3 of the Agreement in that it contains an irrefutable presumption regarding the likelihood of continuation or recurrence of dumping determinations in sunset reviews. In this respect, Argentina considers that US law consists of Sections 751(c) and 752(c) of the Tariff Act of 1930, the provisions of the SAA relating to sunset reviews, and Section II.A.3 of the SPB. In Argentina's view, to discern the meaning and operation of US law regarding this alleged presumption, the relevant provisions of these three legal instruments should be read and analysed in conjunction with one another.

7.135 As an initial matter, the United States submits that the SPB does not constitute a measure that can be challenged in WTO dispute settlement proceedings because it is not a measure that has a functional life of its own under US law. The United States further argues that even if the Panel considers the SPB as a measure, it does not mandate WTO-inconsistent action because it is not a mandatory measure. We understand the United States to argue that the SPB can not possibly violate a WTO obligation because it is either not a measure at all, or because in any event it is not a mandatory measure.

7.136 Turning first to the US argument that the SPB is not a measure of the type that may be subject to dispute settlement challenge, we note that the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* has made it clear that the concept of a "measure" that can be subject to a WTO challenge is very broad. According to the Appellate Body, "any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings"[52] (footnote omitted). The Appellate Body further stated that any legal instrument under a WTO Member's law could also be challenged as a measure before a WTO panel irrespective of the way in which it operates in individual cases.[53] Given that the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* was addressing precisely the issue of the SPB, there can be no doubt that the Appellate Body considers the SPB to be a measure that can be subject to WTO dispute settlement, and we will proceed accordingly.

7.137 We next turn to the US contention that the SPB in any event cannot be found to be inconsistent with the WTO Agreement because it is not a *mandatory* measure. In advancing this argument, the United States is relying upon a series of GATT and WTO dispute settlement panels that have found that only those provisions of a Member's law that mandate GATT/WTO-inconsistent

[52] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 81.
[53] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 82.

action or preclude GATT/WTO-consistent action can be found to be GATT/WTO-inconsistent.[54] Under this approach, if the challenged provision provides the executive branch with discretion, rather than requiring it to follow a certain course of action, then that provision can not be found to be inconsistent as such.[55] Similarly, if the challenged provision does not have legal force, it could not be found to require WTO-inconsistent action. Of course, the *application* of that provision could nevertheless be found to be inconsistent if the discretion inherent in the provision is exercised in a WTO-inconsistent manner.

7.138 We note that the Appellate Body has so far not pronounced its views about the status of the mandatory/discretionary test that has been applied by WTO panels. To the contrary, the Appellate Body has to date made clear, even in cases where the mandatory/discretionary test was at issue, that it was not ruling on the validity of the test.[56] It has, however, reviewed the "application" of that test by WTO panels. In its decision in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body disagreed with the panel's finding that "the Sunset Policy Bulletin is not a mandatory legal instrument obligating a certain course of conduct and thus can not, in and of itself, give rise to a WTO violation".[57] In this context, although the Appellate Body did not consider that the appeal in that dispute required it to "undertake a comprehensive examination" of the mandatory/discretionary

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[54] The reason mandatory legislation mandating GATT-inconsistent behaviour must be challengeable was first explained by the GATT panel in *US – Superfund*. See, Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances* ("*US – Superfund*"), adopted 17 June 1987, BISD 34S/136, para. 5.2.2. The mandatory/discretionary distinction continued to be applied by other GATT and WTO panels.

Regarding the application of this distinction by other GATT panels, see, Panel Report, *European Economic Community – Regulation on Imports of Parts and Components* ("*EEC – Parts and Components*"), adopted 16 May 1990, BISD 37S/132, pp. 198-199; Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* ("*Thailand – Cigarettes*"), adopted 7 November 1990, BISD 37S/200, pp. 227-228; Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages* ("*US – Malt Beverages*"), adopted 19 June 1992, BISD 39S/206, pp. 281-282 and 289-290; Panel Report, *United States – Denial of Most-Favoured Nation Treatment as to Non-Rubber Footwear from Brazil*, adopted 19 June 1992, BISD 39S/128, p. 152.

Regarding the application of this test by WTO panels, see, for instance, Panel Report, *United States – Measures Treating Exports Restraints as Subsidies ("US – Export Restraints"), WT/DS194/R and Corr. 2*, adopted 23 August 2001, para. 8.131; Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by Japan* ("*US – 1916 Act (Japan)*"), WT/DS162/R and Add.1, adopted 26 September 2000, as upheld by the Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4831, para. 6.192; Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act* ("*US – Section 129(c)(1) URAA*"), WT/DS221/R, adopted 30 August 2002, para. 3.28.

[55] *See*, for example, Panel Report, *US – Export Restraints*, *supra*, note 54, para. 8.131.

[56] In this regard, footnote 94 of the Appellate Body report in *US – Corrosion-Resistant Steel Sunset Review* provides:

> In our Report in *US – 1916 Act* , we examined the challenged legislation and found that the alleged "discretionary" elements of that legislation were not of a type that, *even under the mandatory/discretionary distinction*, would have led to the measure being classified as "discretionary" and therefore consistent with the Anti-Dumping Agreement. In other words, we *assumed* that the distinction could be applied because it did not, in any event, affect the outcome of our analysis. We specifically indicated that it was not necessary, in that appeal, for us to answer "the question of the continuing relevance of the distinction between mandatory and discretionary legislation for claims brought under the Anti-Dumping Agreement". (Appellate Body Report, *US – 1916 Act*, para. 99). We also expressly declined to answer this question in footnote 334 to paragraph 159 of our Report in *US – Countervailing Measures on Certain EC Products*. Furthermore, the appeal in *US – Section 211 Appropriations Act* presented a unique set of circumstances. In that case, in defending the measure challenged by the European Communities, the United States unsuccessfully argued that discretionary regulations, issued under a separate law, cured the discriminatory aspects of the measure at issue.
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> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 93.

[57] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 100.

distinction, it observed that the import of the distinction could vary from case to case, and cautioned against the application of the distinction in a "mechanistic fashion".[58]

7.139 Having reversed the finding of the panel in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body, in Section VI.E of its report, considered whether it could itself complete the analysis and rule on the claim in question, which was essentially the same claim now being pursued by Argentina.[59] It explained that a panel's analysis regarding a claim aimed at a WTO Member's law as such must start with the text of the challenged measure. If the text alone fails to clarify the issue, then the panel can look to other evidence. In this context, the Appellate Body recalled its earlier finding in *US-Carbon Steel* that in such cases evidence about the consistent application of the challenged measure can be taken into account by panels.[60] The Appellate Body discussed in some detail the issues it would have to resolve and the factual findings by the panel that would be required in order for it to rule on the claim in question. The Appellate Body concluded that the panel had not examined the nature and meaning of the relevant section of the SPB, nor had it considered evidence submitted by the complainant seeking to establish the consistent application of that section. The Appellate Body concluded that it was unable to rule on that claim because of the absence of relevant factual findings by the panel.[61]

7.140 We note that the Appellate Body's findings and its underlying reasoning appear to represent a significant shift from the mandatory/discretionary distinction previously applied by a number of GATT/WTO panels. The Appellate Body did not, however, clearly state whether this decision meant that the mandatory/discretionary test has from now on to be applied in a different manner. We are therefore left with a certain degree of uncertainty regarding the content and the applicability of this test in WTO dispute settlement proceedings. It is, however, clear to us from Section VI.E of the Appellate Body's Report that we must analyse the substance of Argentina's claim on the basis of the provisions of the SPB cited by Argentina. It is only as part of our substantive analysis of the SPB that we may decide whether it mandates WTO-inconsistent behaviour or precludes WTO-consistent behaviour. We shall refrain from applying the mandatory/discretionary test in the abstract to determine whether the SPB can give rise to a WTO violation or not. In the words of the Appellate Body, this would amount to applying the mentioned test in a "mechanistic fashion" and would not be acceptable.[62]

(ii) Standard regarding presumptions

7.141 Regarding the WTO-consistency of a legal instrument that contains presumptions concerning likelihood determinations in sunset reviews, the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* pointed out that:

> [A] firm evidentiary foundation is required in each case for a proper determination under Article 11.3 of the likelihood of continuation or recurrence of dumping. Such a determination cannot be based solely on the mechanistic application of presumptions.[63] (emphasis added)
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> ...

[58] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 93.

[59] The complainant argued that Section II.A.3 of the SPB was inconsistent with Article 11.3 "because it requires USDOC to make an affirmative likelihood determination in every case in which one of three scenarios exists". Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 164. Unlike the complainant in that case, however, Argentina does not challenge the consistency of the "good cause" requirements of US law with respect to the submission of other evidence to the USDOC in these proceedings.

[60] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 168.

[61] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 190.

[62] *Supra*, note 58.

[63] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 178.

> As we have found in other situations, the use of presumptions may be inconsistent with an obligation to make a particular determination in each case using positive evidence. Provisions that create "irrebuttable" presumptions, or "predetermine" a particular result, run the risk of being found inconsistent with this type of obligation.[64] (footnote omitted, emphasis added)

7.142 The Appellate Body then went on and opined that legal provisions that give a determinative, rather than probative, value to certain factors would be inconsistent with Article 11.3 of the Agreement.[65] In this regard, the Appellate Body stated:

> We therefore consider that the consistency of Sections II.A.3 and 4 of the Sunset Policy Bulletin with Article 11.3 of the *Anti-Dumping Agreement* hinges upon whether those provisions instruct USDOC to treat dumping margins and/or import volumes as determinative or conclusive, on the one hand, or merely indicative or probative, on the other hand, of the likelihood of future dumping.[66] (emphasis added)

7.143 The Appellate Body has made it clear that Article 11.3 requires that a likelihood determination in a sunset review be based on a sufficient factual basis, taking into consideration the circumstances of the case at issue. It can not be based on presumptions that contain pre-determined conclusions for certain factual scenarios. In other words, a scheme that attributes a determinative/conclusive value to certain factors in sunset determinations is likely to violate Article 11.3.

7.144 With these considerations in mind, we will analyse the provisions of US law cited by Argentina to decide whether they, either individually or in conjunction with one another, give rise to the presumption alleged by Argentina. We shall commence our analysis with the legal provisions cited by Argentina. If the text of the legal provisions cited by Argentina does not allow us to reach a conclusion, then we shall also evaluate evidence that Argentina submitted regarding the alleged consistent application by the USDOC of these provisions of US law.

(iii) Examination of the Measures Cited by Argentina

7.145 Argentina generally argues that the alleged irrefutable presumption under US law consists of the provisions of the Tariff Act, the SAA and the SPB. As far as the Tariff Act is concerned, Argentina cited Sections 751(c) and 752(c) in its first written submission whereas it only cited 752(c) in its second submission. We note that although Argentina argues that the Panel should analyse these three legal instruments in conjunction with one another in deciding whether this irrefutable presumption exists under US law, it mainly focuses on the provisions of the SAA and the SPB in developing its arguments.[67] We nevertheless commence our analysis with the relevant provisions of the Tariff Act and then analyse the SAA and the SPB. In doing so, we shall evaluate the relevant provisions of these three measures individually and in conjunction with one another in deciding whether the alleged presumption exists.

The Statute and the Statement of Administrative Action

7.146 The provisions of the Tariff Act that are relevant to the present claim are found in Section 752(c), which provides in relevant parts:

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[64] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 191.
[65] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 178.
[66] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 178.
[67] In fact, in the "Conclusion" section of its first written submission, Argentina submits that the Panel should find the SAA and Section II.A.3 of the SPB are inconsistent with Article 11.3 of the Agreement with respect to the alleged irrefutable presumption. Argentina has not requested that a particular provision of the Tariff Act be found to be WTO-inconsistent in this regard.

(c) Determination of likelihood of continuation or recurrence of dumping

(1) In general

In a review conducted under section 1675(c) of this title, the administering authority shall determine whether revocation of an antidumping duty order or termination of a suspended investigation under section 1673c of this title would be likely to lead to continuation or recurrence of sales of the subject merchandise at less than fair value. The administering authority shall consider—

(A) the weighted average dumping margins determined in the investigation and subsequent reviews, and

(B) the volume of imports of the subject merchandise for the period before and the period after the issuance of the antidumping duty order or acceptance of the suspension agreement.

(2) Consideration of other factors

If good cause is shown, the administering authority shall also consider such other price, cost, market, or economic factors as it deems relevant.[68] (emphasis added)

7.147 We note that the Statute provides that in determining whether dumping is likely to continue or recur in the case of revocation of the order, the USDOC has to consider two factors: "historical dumping margins" and "import volumes". The Statute also states that, where good cause is shown, the USDOC may – and in fact "shall" – consider other factors. Although these provisions seem to limit the factual basis of the USDOC's likelihood determinations, in the sense that they require a showing of good cause in order for other information to be considered, in our view they fall short of attaching a conclusive value to these two factors.[69] The Statute does not stipulate that the USDOC is required to limit the factual scope of its analysis to these two factors in all cases. To the contrary, it specifically states that if good cause is shown factors other than dumping margins and import volumes shall also be considered by the USDOC.

7.148 We note that the premise of Argentina's claim is that US law contains certain scenarios, the satisfaction of which would lead to an affirmative likelihood determination by the USDOC *per se*. The three scenarios that Argentina cites are found in Section II.A.3 of the SPB, as we discuss below (*infra*, paras. 7.152-7.154). We also note that these scenarios are premised on the same two factors that are mentioned in Section 752(c) of the Tariff Act of 1930, i.e. "import volumes" and "dumping margins". However, it is important to note that the manner in which these two factors are being used in the SPB's factual scenarios differs from the way Section 752(c) of the Tariff Act of 1930 treats them. The Statute directs the USDOC to evaluate these two factors in each sunset review. On its face, however, it does not require the USDOC to attach a decisive weight to them with respect to the likelihood determination. In fact, apart from the fact that it requires the USDOC to consider these two factors in its likelihood determinations, the Statute does not mention any factual scenario in which these two factors would play a certain role such that it would ultimately lead to an affirmative likelihood determination. In our view, therefore, the Statute on its face not only does not support Argentina's allegations regarding an irrefutable presumption of likelihood, but to the contrary seems to indicate that no such irrefutable presumption exists.

[68] 19 U.S.C. § 1675a(c) (Exhibit ARG-1 at 1157).

[69] We do not understand Argentina to challenge the "good cause" provision of the Statute *per se*. We therefore do not discuss the implications of these provisions in the context of Argentina's claim.

7.149 We note that, under US law, the SAA provides an authoritative interpretation of the Statute.[70] Therefore, in order to interpret the above statutory provisions we shall take into consideration the following relevant provisions of the SAA:

> (3) Likelihood of Dumping
>
> Section 221 of the bill adds section 752(c) which establishes standards for determining the likelihood of continuation or recurrence of dumping. Under section 752(c)(1), Commerce will examine the relationship between dumping margins, or the absence of margins, and the volume of imports of the subject merchandise, comparing the periods before and after the issuance of an order or the acceptance of a suspension agreement. For example, declining import volumes accompanied by the continued existence of dumping margins after the issuance of an order may provide a strong indication that, absent the order, dumping would be likely to continue, because the evidence would indicate that the exporter needs to dump to sell at pre-order volumes. In contrast, declining (or no) dumping margins accompanied by steady or increasing imports may indicate that foreign companies do not have to dump to maintain market share in the United States and that dumping is less likely to continue or recur if the order were revoked.
>
> The Administration believes that the existence of dumping margins after the order, or the cessation of imports after the order, is highly probative of the likelihood of continuation or recurrence of dumping. If companies continue to dump with the discipline of the order in place, it is reasonable to assume that dumping would continue if the discipline were removed. If imports cease after the order is issued, it is reasonable to assume that the exporters could not sell in the United States without dumping and that, to re-enter the U.S. market, they would have to resume dumping.
>
> New section 752(c)(2) provides that, for good cause shown, Commerce also will consider other information regarding, price, cost, market or economic factors it deems relevant. Such factors might include the market share of foreign producers subject to the antidumping proceeding; changes in exchange rates, inventory levels, production capacity, and capacity utilisation; any history of sales below cost of production; changes in manufacturing technology of the industry; and prevailing prices in relevant markets. In practice, this will permit interested parties to provide information indicating that observed patterns regarding dumping margins and import volumes are not necessarily indicative of the likelihood of dumping. The list of factors is illustrative, and the Administration intends that Commerce will analyze such information on a case-by-case basis.[71] (emphasis added)

7.150 We note that the SAA also provides that certain patterns in dumping margins and import volumes following the imposition of the measure are "highly probative" or provide a "strong indication" of the likelihood of continuation or recurrence of dumping in the event of revocation of the order. This language suggests that these factors are important but not necessarily determinative. Further, the SAA also makes it clear that other factors can also be considered by the USDOC if good cause is shown by the exporters involved in the sunset review as to why that other factor is relevant to the USDOC's likelihood determination. The SAA even provides an illustrative list of such other factors, which includes changes in exchange rates, inventory levels and production capacity. The SAA specifically states that this will permit interested parties to provide information indicating that observed patterns regarding dumping margins and import volumes "are not necessarily indicative" of likelihood, and indicates that the USDOC "will analyze such information on a case-by-case basis".

[70] The SAA (Exhibit ARG-5 at 4040).
[71] The SAA (Exhibit ARG-5 at 4213-4214).

Thus, not only does the SAA contain nothing that would cause us to disregard the plain meaning of the Statute, but to the contrary the SAA confirms that the Statute does not provide for the irrefutable presumption alleged by Argentina. It follows that our analysis concerning the Statute (read in conjunction with the SAA) ends on the basis of its text. We therefore do not need to go further to evaluate other factors, such as the alleged consistent application of the Statute, in order to complete our analysis regarding the Statute.

Conclusion

7.151 The Tariff Act of 1930, interpreted in light of the SAA, does not contain an irrefutable presumption of likelihood for purposes of USDOC's sunset determinations.

The Sunset Policy Bulletin

Relevant provisions of the Sunset Policy Bulletin

7.152 Finally, we note the following provisions of the SPB:

> **II Sunset Reviews in Antidumping Proceedings**
>
> *A. Determination of Likelihood of Continuation or Recurrence of Dumping*
>
> ...
>
> 3. Likelihood of Continuation or Recurrence of Dumping
>
> …
>
> [T]he Department normally will determine that revocation of an antidumping order or termination of a suspended dumping investigation is likely to lead to continuation or recurrence of dumping where—
>
> (a) dumping continued at any level above *de minimis* after the issuance of the order or the suspension agreement, as applicable;
>
> (b) imports of the subject merchandise ceased after issuance of the order or the suspension agreement, as applicable; or
>
> (c) dumping was eliminated after the issuance of the order or the suspension agreement, as applicable, and import volumes for the subject merchandise declined significantly.
>
> The Department recognizes that, in the context of a sunset review of a suspended investigation, the data relevant to the criteria under paragraphs (a) through (c), above, may not be conclusive with respect to likelihood. Therefore, the Department may be more likely to entertain good cause arguments under paragraph II.C in a sunset review of a suspended investigation.
>
> 4. No Likelihood of Continuation or Recurrence of Dumping
>
> …
>
> [T]he Department normally will determine that revocation of an antidumping order or termination of a suspended dumping investigation is not likely to lead to continuation

> or recurrence of dumping where dumping was eliminated after issuance of the order or the suspension agreement, as applicable, and import volumes remained steady or increased. Declining margins alone normally would not qualify because the legislative history makes clear that continued margins at any level would lead to a finding of likelihood. See section II.A.3, above. In analyzing whether import volumes remained steady or increased, the Department normally will consider companies' relative market share. Such information should be provided to the Department by the parties.
>
> The Department recognizes that, in the context of a sunset review of a suspended investigation, the elimination of dumping coupled with steady or increasing import volumes may not be conclusive with respect to no likelihood. Therefore, the Department may be more likely to entertain good cause arguments under paragraph II.C in a sunset review of a suspended investigation.
>
> ...
>
> C. *Consideration of Other Factors*
>
> Section 752(c)(2) of the Act provides that, if the Department determines that good cause is shown, the Department also will consider other price, cost, market or economic factors in determining the likelihood of continuation or recurrence of dumping. The SAA at 890, states that such other factors might include,
>
> the market share of foreign producers subject to the antidumping proceeding; changes in exchange rates, inventory levels, production capacity, and capacity utilization; any history of sales below cost of production; changes in manufacturing technology in the industry; and prevailing prices in relevant markets.
>
> The SAA at 890, also notes that the list of factors is illustrative, and that the Department should analyze such information on a case-by-case basis.
>
> Therefore, the Department will consider other factors in AD sunset reviews if the Department determines that good cause to consider such other factors exists. The burden is on an interested party to provide information or evidence that would warrant consideration of the other factors in question. With respect to a sunset review of a suspended investigation, where the Department determines that good cause exists, the Department normally will conduct the sunset review consistent with its practice of examining likelihood under section 751(a) of the Act.[72] (emphasis added)

7.153 We note that Section II.A.3 of the SPB provides that the USDOC will "normally" make an affirmative likelihood determination in cases where one of three factual scenarios is present. These factual scenarios are based on the same two factors that the Tariff Act, as interpreted by the SAA, directs the USDOC to consider in each sunset review, i.e. "dumping margins" and "import volumes". We note, however, that these factors are being treated by the SPB in a manner that differs from the framework within which the Tariff Act treats them. As we stated above, although Section 752(c) of the Act requires that the USDOC consider these two factors in all sunset reviews, in no way does it establish a presumption whereby the existence of these factors would lead to an affirmative likelihood determination *per se*. The SPB, however, presents these two factors in three different factual settings, which will "normally" lead to an affirmative finding of likelihood.

[72] Sunset Policy Bulletin (Exhibit ARG-35 at 18872-18874).

7.154 Section II.A.3 of the SPB contains three scenarios. First is the existence of a dumping margin above *de minimis*; the second one relates to the case where imports cease following the imposition of the measure; and the third is where dumping disappears but import volumes decline following imposition. On its face, Section II.A.3 seems to contain a presumption of likelihood in cases where one of these factual scenarios is present.

7.155 According to the standard that we outlined above (*supra*, paras. 7.141-7.144), the issue here is whether the SPB directs the USDOC to treat the mentioned two factors, as presented in these three factual scenarios, as determinative/conclusive or simply indicative. If we find that the SPB requires the USDOC to treat them as conclusive it will follow that Section II.A.3 of the SPB is inconsistent with Article 11.3 of the Agreement. Alternatively, if these factors are not conclusive but simply indicative we will find Section II.A.3 to be consistent with Article 11.3.

7.156 In this context, we note that the word "normally" in the chapeau of Section II.A.3 qualifies the provisions of this section. It provides that in cases where one of these three factual scenarios is present the USDOC will "normally" find likelihood. The existence of "normally" suggests that the SPB envisions that there may be situations where likelihood may not be found even if one of these three scenarios is present. The United States asserts that the use of "normally" is incompatible with the notion of an irrefutable presumption.[73] However, we find no clarification in the SPB which supports the proposition that the word "normally" provides the USDOC with such discretion. To the contrary, we note that Section II.A.3 indicates that in certain circumstances its provisions relating to these three factual scenarios may not be conclusive. In this respect, Section II.A.3 provides:

> The Department recognizes that, in the context of a sunset review of a suspended investigation, the data relevant to the criteria under paragraphs (a) through (c), above, [dumping margins and import volumes] may not be conclusive with respect to likelihood.[74] (emphasis added)

7.157 This portion of Section II.A.3 indicates that the provisions relating to the three factual scenarios may not be conclusive in the context of the sunset reviews of a suspended investigation, and arguably it is for this reason that the term "normally" was in Section II.A.3. This further suggests that these scenarios may be conclusive in the context of the sunset reviews of final anti-dumping duties. Yet, in our view, the SPB is not sufficiently clear as to whether the provisions of Section II.A.3 relating to the three factual scenarios are determinative for purposes of the USDOC's likelihood determinations.[75] Given our finding above that neither the Tariff Act nor the SAA contains any presumption regarding the USDOC likelihood determinations, we have not found any provision in these two measures that would clarify this point either.

Consistent application of the Sunset Policy Bulletin

7.158 Given that neither the SPB itself nor the Tariff Act or the SAA resolves the issue of whether Section II.A.3 of the SPB envisions that dumping margins and import volumes should be treated as conclusive in sunset reviews, we shall analyse evidence submitted by Argentina regarding the manner in which the provisions of the mentioned section have so far been implemented by the USDOC. In exhibits ARG-63 and ARG-64, Argentina submitted empirical evidence regarding the USDOC's consistent application of Section II.A.3 of the SPB. ARG-63 covers the sunset reviews carried out by the USDOC until September 2003, whereas ARG-64 covers the period October-December 2003.

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[73] First Written Submission of the United States, para. 178.

[74] Sunset Policy Bulletin (Exhibit ARG-35 at 18872). A similar sentence is contained in Section II.A.4 of the Sunset Policy Bulletin (Exhibit ARG-35 at 18872-18873).

[75] We find support for this proposition in the Appellate Body decision in *US – Corrosion-Resistant Steel Sunset Review*. See, Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 179.

Argentina asserts that these statistics demonstrate that the USDOC has relied on one of the three factual scenarios set out in Section II.A.3 of the SPB in every sunset review in which it found likelihood. The United States contends that these statistics fail to demonstrate the alleged irrefutable presumption. According to the United States, if at all, only statistics relating to the sunset reviews in which the interested parties contested the existence of likelihood can provide guidance. The United States argues that out of the 291 sunset reviews cited in ARG-63 only 35 were in this category. The United States acknowledges that the USDOC found likelihood in all of these 35 sunset reviews but contends that that fact alone does not prove the irrefutable presumption alleged by Argentina. More specifically, the United States submits:

> It may well be that in these 35 cases, the evidence presented a scenario that satisfied one or more of the criteria that the Sunset Policy Bulletin identifies as indicia of likelihood. If so, the respondent interested parties may have been unable to demonstrate that the facts of their case called for a departure from the "normal" conclusion. It could be the case that one or more, or maybe all, of these parties may have been in the situation where they were not capable of competing in the US market without dumping. We simply do not know.[76]

7.159 Argentina disagrees with the US view that only sunset reviews in which interested parties contested the existence of likelihood can be taken into account. According to Argentina, interested parties' participation is immaterial regarding the investigating authority's obligation to determine likelihood under Article 11.3. Argentina argues, however, that even accepting the US position in this respect, the fact that the USDOC found likelihood in these 35 sunset reviews on the basis of the factual scenarios of the SPB still proves Argentina's claim.[77]

7.160 We asked the United States to explain its views as to whether the statistics provided by Argentina in ARG-63 and ARG-64 were factually correct. The United States submitted the following response:

> The United States has not examined each and every sunset review cited by Argentina in Exhibit ARG-63 and Exhibit ARG-64. To the extent that the United States has addressed these exhibits in its written submissions, the United States has no reason to believe that the overall total of sunset reviews conducted and the ultimate outcomes in those sunset reviews as alleged by Argentina is significantly flawed.[78] (emphasis added)

7.161 In response to questioning from the Panel, the United States stated that these statistics were irrelevant to the question of whether the USDOC perceived Section II.A.3 of the SPB as conclusive in its sunset determinations. According to the United States, these statistics can at best indicate a repeated pattern of similar responses to a set of circumstances, which, according to the United States and as found by a WTO panel, can not be challenged as such in WTO dispute settlement proceedings. The United States also contends that the data submitted by Argentina focuses only on the results of individual sunset reviews conducted by the USDOC and ignores the particular circumstances of each review.[79]

7.162 Regarding the issue of whether the consistent application of a Member's law can be taken into account by WTO panels in cases dealing with an alleged WTO-inconsistency of that law, we find support in the following finding of the Appellate Body in *US-Carbon Steel*:

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[76] First Written Submission of the United States, para. 186.
[77] Second Written Submission of Argentina, paras. 83-84.
[78] Response of the United States to Question 14(a) from the Panel Following the Second Meeting.
[79] Response of the United States to Question 14(b) from the Panel Following the Second Meeting.

> Thus, a responding Member's law will be treated as WTO-*consistent* until proven otherwise. The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case.[80] (footnote omitted, emphasis added)

This finding was also cited and confirmed by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*.[81]

7.163 Therefore, given that the text of the SPB, or the other legal instruments challenged by Argentina, does not answer the question of whether Section II.A.3 of the SPB directs the USDOC to treat evidence concerning "dumping margins" and "import volumes" as conclusive in its likelihood determinations, we consider it appropriate to analyse evidence submitted by Argentina regarding the consistent application of these provisions in deciding whether Section II.A.3 of the SPB is inconsistent with Article 11.3 of the Agreement.

7.164 We note that ARG-63 and ARG-64 contain, *inter alia*, data on the name of the sunset review, the date of the USDOC's determination, whether domestic interested parties or exporters participated in the review, the type of sunset review conducted, the outcome of the review and the legal basis of the determination. In addition, Argentina also provided the texts of the individual determinations in these sunset reviews.

7.165 At the outset, it should be noted that we based our analysis on the statistics regarding the determinations made before the date of initiation of these panel proceedings, i.e. Argentina's request for consultations.[82] An analysis of the statistics provided by Argentina demonstrates that the USDOC applied the contested provisions of the SPB in each sunset review and found likelihood of continuation or recurrence in each one of these sunset reviews on the basis of one of the three scenarios contained in Section II.A.3 of the SPB. We recall that the United States neither challenged nor disproved the factual correctness of these statistics. We therefore find that the evidence submitted by Argentina in exhibit ARG-63 demonstrates that the USDOC does in fact perceive the provisions of Section II.A.3 of the SPB as conclusive regarding the issue of likelihood of continuation or recurrence of dumping in the case of revocation of an order. As explained above, this runs counter to the requirement of Article 11.3 to carry out a rigorous examination and to base its determinations on a sufficient factual basis.

Conclusion

7.166 On the basis of the above considerations, we find the provisions of Section II.A.3 of the SPB to be inconsistent with Article 11.3 of the Agreement.

7.167 We find it important to mention that although our finding of inconsistency is based on the evidence stemming from the consistent application of Section II.A.3 of the SPB, it does not necessarily mean that the complaining party has to produce statistical evidence that demonstrates a

[80] Appellate Body Report, *US – Carbon Steel*, *supra*, note 15, para. 157.
[81] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 168.
[82] We note, however, that the statistics pertaining to the rest of the period, i.e. until the end of December 2003, follow the same pattern that we have observed on the basis of the period ending as of Argentina's request for consultations.

particular pattern of behaviour in a certain number or percentage of cases. As the Appellate Body stated, "[t]he nature and extent of the evidence required to satisfy the burden of proof will vary from case to case".[83] We find that in the circumstances of the present proceedings the evidence submitted by Argentina in ARG-63 is sufficient to demonstrate that Section II.A.3 of the SPB directs the USDOC to treat evidence with respect to "import volumes" and "dumping margins" as conclusive for purposes of the latter's sunset determinations.

7.168 Having found Section II.A.3 of the SPB to be inconsistent with Article 11.3, we need not, and do not, consider it necessary to rule on Argentina's claim that the US practice in this respect is also inconsistent with Article 11.3 for the same reasons.

7.169 Similarly, having found Section II.A.3 of the SPB to be WTO-inconsistent in this respect, we do not address Argentina's alternative claim under Article X:3(a) of the GATT 1994.

Impact of the finding regarding the Sunset Policy Bulletin on the consistency of the Statute

7.170 We find it necessary to address the issue of whether our finding of inconsistency with respect to the SPB has any impact on the status of the Tariff Act in this regard. We recall that Argentina requested that the Panel analyse the provisions of the Tariff Act, the SAA and the SPB in conjunction with one another with respect to the present claim. We also recall our finding above that Section 752(c) of the Tariff Act, interpreted in light of the relevant provisions of the SAA, does not contain any presumption with regard to the USDOC's likelihood determinations. To the contrary, we found that both the Tariff Act and the SAA state clearly that the USDOC can, and in fact "shall", take into account other relevant factors upon good cause shown.

7.171 In our view, the SPB does not purport to interpret the provisions of the Tariff Act. This is evidenced in the preamble of the SPB, which reads in relevant part:

> The proposed policies are intended to complement the applicable statutory and regulatory provisions by providing guidance on methodological or analytical issues not explicitly addressed by the statute and regulations.[84] (emphasis added)

7.172 The preamble states that the SPB is designed to complement, not interpret, the provisions of the Tariff Act. Therefore, the provisions of the SPB in general, and those of Section II.A.3 in particular, can not change the meaning of the relevant provisions of the Tariff Act, including Section 752(c) that we analysed and found to be consistent with Article 11.3 of the Agreement for purposes of the present claim.

7.173 Assuming *arguendo* that the SPB did purport to interpret the provisions of the Tariff Act, our conclusion would not change. We found above (*supra*, para. 7.148) that the relevant provision of the Tariff Act, i.e. Section 752(c), does not contain any presumption and in fact explicitly provides that the USDOC shall consider factors other than import volumes and dumping margins in its likelihood determinations where good cause is shown. This demonstrates that the Statute contains an explicit provision as to the factors that the USDOC has to consider in its likelihood determinations. It follows that the SPB's provisions can not in any event change the plain meaning of the Tariff Act in this regard.

[83] Appellate Body Report, *US – Carbon Steel*, *supra*, note 15, para. 157.
[84] Sunset Policy Bulletin (Exhibit ARG-35 at 18871).

3. US Law's Standard for the Likelihood of Continuation or Recurrence of Injury Determinations in Sunset Reviews

(a) Arguments of parties

(i) Argentina

7.174 Argentina submits that Sections 752(a)(1) and (5) of the Tariff Act violate Articles 11.1, 11.3, 3.1, 3.2, 3.4, 3.7 and 3.8 of the Agreement because these provisions require the USITC to determine whether there would be a likelihood of continuation or recurrence of injury "within a reasonably foreseeable time" and they stipulate that the effects of the revocation of the duty may not be imminent but may manifest themselves over a longer period of time. According to Argentina, this standard goes too far into the future compared with the proper "likely" standard set out in Article 11.3.

(ii) United States

7.175 The United States contends that the statutory provisions under US law regarding the standard by which the USITC has to determine likelihood of continuation or recurrence of injury in sunset reviews are consistent with Article 11.3 of the Agreement. According to the United States, Article 11.3 does not impose a time-frame within which likelihood determinations in a sunset review have to be made.

(b) Arguments of third parties

(i) Korea

7.176 Korea argues that the meaning of the term "likely" under Article 11.3 is "probable". However, the standard established by the US Statute and the SAA fails to meet this standard.

(ii) Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

7.177 Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu contends that the provisions of Article 3 of the Anti-Dumping Agreement apply in the context of sunset reviews. Although Article 11.3 is silent as to the standard and methodologies which Members must follow in sunset reviews, it was not the drafters' intention to leave this matter to the complete discretion of the investigating authorities.

(c) Evaluation by the Panel

7.178 Argentina bases its claim on the Tariff Act and the SAA. As stated above (*supra*, para. 7.149), we shall analyze the provisions of the Tariff Act in light of the provisions of the SAA because of the SAA's relevance under US law as the authoritative tool for the interpretation of the Statute.

7.179 Section 752(a)(1) of the Tariff Act reads, in relevant part:

> (1) In general
>
> ...The Commission shall determine whether revocation of an order, or termination of a suspended investigation, would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time...[85] (emphasis added)

7.180 Section 752(a)(5) of the Tariff Act reads, in relevant part:

[85] 19 U.S.C. § 1675a(a)(1) (Exhibit ARG-1 at 1155).

> (5) Basis for determination
>
> The presence or absence of any factor which the Commission is required to consider under this subsection shall not necessarily give decisive guidance with respect to the Commission's determination of whether material injury is likely to continue or recur within a reasonably foreseeable time if the order is revoked or the suspended investigation is terminated. In making that determination, the Commission shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time.[86] (emphasis added)

7.181 The SAA provides, in relevant part:

> A "reasonably foreseeable time" will vary from case-to-case, but normally will exceed the "imminent" timeframe applicable in a threat of injury analysis. New Section 752(a)(5) expressly states that the effects of revocation or termination may manifest themselves only over a longer period of time. The Commission will consider in this regard such factors as the fungibility or differentiation within the product in question, the level of substitutability between the imported and domestic products, the channels of distribution used, the methods of contracting (such as spot sales or long-term contracts), and lead times for delivery of goods, as well as other factors that may only manifest themselves in the longer term, such as planned investment and the shifting of production facilities.[87] (emphasis added)

7.182 At the outset, we note that on its face Section 752(a)(1) of the Tariff Act provides for the "likely" standard for the USITC's likelihood determinations. However, compared with the provisions of Article 11.3, the Tariff Act goes one step further and requires the USITC to inquire whether revocation of the duty would be likely to lead to the continuation or recurrence of injury within a reasonably foreseeable time. In other words, the Statute specifies the temporal aspect of the USITC's likelihood determinations in sunset reviews. Section 752(a)(5), read in conjunction with the above-quoted portion of the SAA, provides that although the meaning to be given to the concept of "reasonably foreseeable time" will vary from case-to-case, it is clear that this standard means a longer period of time than the imminence standard of Article 3.7 of the Agreement, which applies to threat of material injury determinations in investigations.

7.183 The issue is, therefore, whether this additional provision of US law regarding the temporal aspect of the USITC's sunset determinations changes the likely standard into a more flexible one, which renders that law inconsistent with Article 11.3, or the other provisions of the Agreement cited by Argentina.

7.184 We note that Article 11.3, the provision that contains the main substantive requirements that apply to sunset reviews, does not mention the time-frame on which the investigating authorities should base their sunset review determinations. Nor does Article 11.3 require the investigating authorities to specify the time-frame on which their likelihood determination is based. All that Article 11.3 requires is that the investigating authority determine on a sufficient factual basis that injury is likely to continue or recur should the duty be revoked. We are of the view, therefore, that the US Statute that requires the USITC to determine whether injury is likely to continue or recur within a reasonably foreseeable time does not conflict with the "likely" standard of Article 11.3.

7.185 That does not mean, however, that there is no limitation in terms of the temporal aspect of sunset determinations. Arguably, there is at least a logical limitation that would make it impossible for an investigating authority to base its sunset determinations on an unreasonably long period of time

[86] 19 U.S.C. § 1675a(a)(5) (Exhibit ARG-1 at 1156).
[87] The SAA (Exhibit ARG-5 at 4211).

into the future. We note in this regard that an assessment regarding whether injury is likely to continue or recur that focuses too far in the future would be highly speculative, and that it might be very difficult to make a properly reasoned and supported determination in this regard. The issue, however, is whether the standard provided for under US law is inconsistent with that standard, and we see no reason to believe that the "reasonably foreseeable time" standard adopted by the United States would pose such difficulties.

7.186 Argentina submits that Article 11.3 requires an investigating authority to determine whether termination of a measure would be likely to lead to the continuation or recurrence of injury upon expiry of the measure. According to Argentina, by defining the "reasonably foreseeable time" as longer than "imminent" the US statutory provisions run counter to the "likely" standard of Article 11.3.[88] We understand Argentina to argue that the likelihood determination must be based on the circumstances as of the date of the proposed revocation of the measure.

7.187 We do not agree with the proposition that Article 11.3 necessarily requires that the investigating authority base its likelihood of continuation or recurrence of injury determination upon the expiry of the duty. As we already stated, Article 11.3 does not impose a particular time-frame on which the investigating authority has to base its likelihood determination. Further, in our view, the investigating authority does not have to base its likelihood determination on a uniform time-frame with respect to each injury factor that it takes into consideration. The time-frame regarding different injury factors may be different from one another depending on the circumstances of each sunset review. For instance, in a case where the exporters have excessive inventories, the investigating authority's evaluation of likely volume of dumped imports can be based on a relatively short time-frame. On the other hand, an analysis regarding the cash flows or productivity of the domestic industry may necessarily have to be based on a longer time-frame.

7.188 Argentina also contends that the cited provisions of the Tariff Act are inconsistent with Articles 3.7 and 3.8 of the Agreement. We understand Argentina to argue that because Articles 3.7 and 3.8 of the Agreement contain provisions about future injury determinations, they are relevant to likelihood of continuation or recurrence of injury determinations in sunset reviews. It follows that these two provisions impose additional obligations on the investigating authorities in their sunset determinations.

7.189 We note that there is a certain similarity between a threat of injury analysis in an anti-dumping investigation and a likelihood of continuation or recurrence of injury determination in a sunset review in that they both require prospective analysis. Hence, it could be argued that Article 3.7 provides context for the interpretation of Article 11.3. In our view, however, the textual differences outlined below preclude the importation of a completely different test from Article 3.7 into Article 11.3.

7.190 Article 3 is titled "Determination of Injury". Footnote 9 to Article 3 sets out three types of injury that can establish the basis of investigating authorities' injury determinations in anti-dumping investigations.[89] One of these is "threat of material injury", which is governed by the provisions of Articles 3.7 and 3.8 of the Agreement. Article 11 is titled "Duration and Review of Anti-Dumping Duties and Price Undertakings". More specifically, Article 11.3 sets out rules that apply to likelihood of continuation or recurrence of injury determinations in sunset reviews. The determinations set out in Articles 3.7 and 11.3 are substantively different from one another. In this regard, we also

[88] Second Written Submission of Argentina, para. 202.

[89] Footnote 9 reads:

> Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

incorporate our analysis regarding the applicability of Article 3 in sunset reviews (*infra*, section VII.E.3(c)(i)). We therefore consider that on the basis of a textual analysis of Articles 3.7 and 3.8 on the one hand and Article 11.3 on the other, it becomes clear that they operate in highly distinct factual situations. It follows that the provisions of Articles 3.7 and 3.8 do not apply to sunset reviews.[90]

7.191 We note that our analysis based on the text of the Agreement is supported by the Appellate Body's ruling in *US – Corrosion-Resistant Steel Sunset Review*, in which the differences between an anti-dumping investigation and a sunset review were highlighted. The Appellate Body stated that investigations and reviews are two distinct processes with different purposes.[91] It follows that it is normal that they may be subject to different rules and disciplines where circumstances so dictate. This is not to suggest that no provision of the Agreement that applies to investigations can apply to sunset reviews. Indeed, the Appellate Body has decided with respect to some of the provisions of the Agreement that they also apply to sunset reviews.[92] Similarly, in this report, we have found that certain provisions of Article 6 of the Agreement also apply to sunset reviews.[93] However, we do not see any reason to reach the same conclusion with respect to Articles 3.7 and 3.8.

7.192 The overall scheme in which threat of material injury determinations are made in investigations is remarkably different from that of a sunset review. The focus of the inquiry in a sunset review is the likelihood of continuation or recurrence of injury in the event of revocation of the order, while in the case of an original investigation imports are not subject to an anti-dumping measures at the time the analysis is performed. In an investigation, the investigating authority engages in a threat of material injury analysis only if there is no present material injury. In a sunset review, however, factors giving rise to material injury may be present as of the date of the proposed revocation of the measure. In other words, in a sunset review, there is a history of injury in the records of the investigating authority. In our view, therefore, it is entirely sensible that threat of material injury determinations in investigations and likelihood of continuation or recurrence of injury determinations in sunset reviews be governed by different rules.

(i) Conclusion

7.193 On the basis of the above considerations, we find that Sections 752(a)(1) and (5) of the Tariff Act are not WTO-inconsistent in respect of the "within a reasonably foreseeable" time-frame that they contain regarding the USITC's likelihood determinations in sunset reviews.

D. CLAIMS RELATING TO THE USDOC'S LIKELIHOOD DETERMINATION IN THE OCTG SUNSET REVIEW

1. Arguments of Parties

(a) Argentina

7.194 Argentina argues that the USDOC's decision to conduct an expedited sunset review and the application of the waiver provisions of US law in the case of OCTG from Argentina violated

[90] We note the US statement that the obligation to determine likelihood of continuation or recurrence of injury under Article 11.3 is a fourth type of determination regarding injury, separate from the three other types of injury determinations set out in footnote 9 of the Agreement. See, Response of the United States to Question 20(a) from the Panel Following the Second Meeting. We disagree with the United States on this issue. By concluding that Articles 3.7 and 3.8 do not apply to sunset reviews, we are by no means implying that Article 11.3 contains such a fourth category of injury determination.

[91] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, paras. 106-107.

[92] See, for instance, Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, paras. 109, 151 and 158.

[93] See, for instance, *supra*, paras. 7.108-7.112.

Article 11.3 because the USDOC failed to conduct a review and to make a likelihood determination. According to Argentina, the USDOC failed to base its determinations on fresh facts gathered during the sunset review. Rather, inconsistently with Articles 2 and 11.3, it relied on the dumping margin obtained in the original investigation and reported that margin to the USITC as the likely dumping margin at which dumping was found to be likely to continue or recur. The fact that this original dumping margin was calculated through the practice of "zeroing" also made the USDOC's reliance on that margin in this sunset review inconsistent with Article 11.3.

7.195 Argentina contends that the conduct of an expedited sunset review and the application of the waiver provisions violated Articles 6.1 and 6.2 because Siderca, the only Argentine exporter that submitted a substantive response to the notice of initiation of the sunset review at issue, was denied a full opportunity to submit evidence and to defend its interests in this sunset review. Argentina also argues that the USDOC did not take the provisions of Article 6.8 and Annex II of the Agreement into account in its decision to use facts available.

7.196 Finally, Argentina submits that in this sunset review the USDOC also violated Articles 12.2 and 12.2.2 because it is impossible to discern the basis of the USDOC's decision to conduct an expedited review. In particular, Argentina argues that the public notice does not contain information about dumping determinations in this sunset review and that it is not clear whether the basis for the USDOC's decision to expedite was the "waiver" provision under Section 751(c)(4), or the "facts available" provision under Section 751(c)(3)(B) of the Tariff Act.

(b) United States

7.197 The United States argues that the USDOC carried out a WTO-consistent sunset review in this case. The United States submits that the USDOC did not determine that Siderca had waived its right to participate in the instant sunset review. The USDOC decided to conduct an expedited sunset review because the respondents' share in the total imports of the subject product into the United States was significantly less than 50 per cent. The United States contends that the USDOC based its determinations in this sunset review on the information from the original investigation and the information submitted by interested parties in their substantive responses to the notice of initiation in this sunset review.

7.198 The United States asserts that Siderca was given notice of the information required and a full opportunity to submit evidence and to defend its interests in the sunset review at issue, but it did not avail itself of some of these opportunities to submit information. In its sunset determinations the USDOC considered the information Siderca submitted in its substantive response to the questionnaire. Therefore, the USDOC did not act inconsistently with Articles 6.1 and 6.2.

7.199 The United States contends that the Final Sunset Determination and the accompanying Decision Memorandum explain the bases for the USDOC's sunset determinations in this sunset review and therefore the USDOC did not act inconsistently with Article 12.2.

2. Arguments of Third Parties

(a) European Communities

7.200 The European Communities contends that the USDOC's decision to conduct an expedited sunset review simply because of Siderca's share in the volume of total imports of the subject product into the United States was inconsistent with Article 11.3 of the Agreement. Since this decision also resulted in the exclusion of relevant evidence it also violated Articles 6.1 and 6.2.

3. Evaluation by the Panel

(a) Relevant facts

7.201 In addition to Argentina, three other countries were subject to the USDOC part of the OCTG sunset review.[94] With respect to all four countries, the USDOC concluded that the revocation of the orders would likely lead to the continuation or recurrence of dumping.

7.202 With regard to all of these four countries, the USDOC's likelihood determination was based on the existence of dumping margins and reduced import volumes following the imposition of the original anti-dumping duties.[95] The USDOC decided that since dumping had continued over the life of the orders and import volumes had dropped significantly as compared to the pre-order levels, dumping was likely to continue or recur in the event of revocation.

7.203 There were no affirmative waivers with respect to Argentine exporters subject to this sunset review. In other words, no Argentine exporter explicitly waived participation. The only Argentine exporter that cooperated with the USDOC and for which an individual dumping margin was calculated in the original investigation was Siderca. Following the imposition of the order Siderca stopped exporting OCTG to the United States. However, the USDOC determined that other Argentine exporter(s) had exported the subject product to the United States during the period of application of the measure. The USDOC did not identify these exporter(s) in its final determination, nor did it point to evidence in the record establishing the identity of these exporter(s).[96]

7.204 Since these other Argentine exporter(s) did not submit a response to the notice of initiation of this sunset review, they were deemed to have waived their right to participate under Section 351.218(d)(2)(iii) of the USDOC's Regulations. It is therefore factually undisputed that deemed waivers provisions of US law were applied in this sunset review with respect to one or more Argentine exporter(s) other than Siderca.

7.205 Following the initiation of the sunset review at issue, Siderca was the only Argentine exporter that submitted a substantive response to the notice of initiation. We recall that according to Section 351.218(e)(1)(ii)(A) of the USDOC's Regulations, in cases where the exporters from a particular country that submit a complete substantive response to the notice of initiation of a sunset review altogether account for less than 50 per cent of the total exports of the subject product from that country during the five-year period of application of the measure concerned, that aggregate response is deemed to be inadequate. An inadequate response triggers the conduct of an expedited – as opposed to full - sunset review. Accordingly, although Siderca's substantive response to the notice of initiation was complete, i.e. it contained all the information the US law required, since Siderca's share in the total exports of OCTG from Argentina during the five-year period of application of the measure at issue was below 50 per cent, the USDOC conducted an expedited sunset review. Following the submission of its substantive response to the notice of initiation, Siderca did not make any further submissions to the USDOC.

7.206 In its sunset determination with regard to Argentina, the USDOC considered the information submitted in Siderca's complete substantive response to the notice of initiation as well as some other evidence from other sources, such as import statistics. Having found that dumping continued over the life of the measure and that import volumes declined significantly, in its order-wide determination

[94] The other countries were Italy, Japan and Korea. See, *Issues and Decision Memorandum* (Exhibit ARG-51 at 1).

[95] *Issues and Decision Memorandum* (Exhibit ARG-51 at 5).

[96] However, the United States stated that a company called Acindar, which was subject to an administrative review following the completion of the sunset review at issue, might have shipped the subject product to the United States during the initial period of application of the anti-dumping duty at issue. See, Response of the United States to Questions 12(a) and 13(a) from the Panel Following the First Meeting.

with respect to Argentina, the USDOC determined that dumping would be likely to continue or recur should the duty be revoked.

(b) Alleged violations of Articles 11.3 and 2 of the Agreement

7.207 As an initial matter, we note Argentina's assertion that the application of the waiver provisions and the conduct of an expedited sunset review violated Article 11.3 of the Agreement because the USDOC did not make the requisite likelihood determination of Article 11.3 when concluding that dumping was likely to continue or recur should the duty be revoked.[97]

7.208 Regarding the issue of whether or not the USDOC made a likelihood determination in this sunset review, we note that the contents of the USDOC's *Issues and Decision Memorandum* clearly reveals that such a determination was made. Therefore, there is no doubt that the USDOC made a determination as such. The question is whether that determination conformed to the provisions of the Agreement. With that in mind, we now turn to the various aspects of the USDOC's sunset determination that are being challenged by Argentina.

7.209 Argentina contends that in the instant sunset review, the USDOC based its likelihood of continuation or recurrence of dumping determinations on past data. It did not gather fresh evidence that would support a forward-looking likelihood analysis. Instead, the USDOC merely relied on the dumping margin from the original investigation as the basis of its likelihood determination in the instant sunset review.

7.210 The United States submits that in its likelihood determination in the instant sunset review, the USDOC relied on the dumping margins found in the original investigation, the depressed import volumes and the information submitted by the interested parties. According to the United States, Article 11.3 of the Agreement requires nothing more.

7.211 The issue is whether the USDOC's likelihood determination in this sunset review rested on a sufficient factual basis.[98] In this respect, we recall our finding above that on its face Article 11.3 does not impose a particular methodology to follow in sunset determinations. However, as we stated above, the Article 11.3 obligation to "determine" the likelihood of continuation or recurrence of dumping requires the investigating authority to make a reasoned finding on the basis of positive evidence that dumping is likely to continue or recur should the measure be revoked.

7.212 With that in mind, we turn to the USDOC's *Issues and Decision Memorandum* which reads in relevant parts:

> [T]he Department indicated that normally it will determine that revocation of an antidumping order is likely to lead to continuation or recurrence of dumping where (a) dumping continued at any level above *de minimis* after the issuance of the order, (b) imports of the subject merchandise ceased after the issuance of the order, (c)

[97] First Written Submission of Argentina, paras. 148 and 155.

[98] We note that, regarding the sufficiency of the factual basis of an investigating authority's likelihood determination in sunset reviews, the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* endorsed the following findings of that panel:

> In order to continue the imposition of the measure after the expiry of the five-year application period, it is clear that the investigating authority has to determine, on the basis of positive evidence, that termination of the duty is likely to lead to continuation or recurrence of dumping and injury. An investigating authority must have a sufficient factual basis to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence. (footnote omitted, emphasis added)
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> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 114.

> dumping was eliminated after the issuance of the order and import volumes for subject merchandise declined significantly.[99] (emphasis added)
>
> ...
>
> We note that there have been above *de minimis* margins for the investigated companies throughout the history of the orders, except for one company covered by the order on Japan.[100] (emphasis added)
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> ...
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> Based on this analysis, the Department finds that the existence of dumping margins after the issuance of the orders is highly probative of the likelihood of continuation or recurrence of dumping. Therefore, given that dumping continued after the issuance of the orders, average imports continued at levels far below pre-order levels from 1995 through 1999, and respondent interested parties waived their right to participate in these reviews or failed to submit adequate substantive responses, we determine that dumping is likely to continue if the orders were revoked.[101] (emphasis added)
>
> ...
>
> In the Argentine case, there has been no decline in dumping margins coupled with an increase in imports. Rather, absent an administrative review, the dumping margin from the original investigation is the only indicator available to the Department with respect to the level of dumping. Because 1.27 [sic] per cent is above the 0.5 per cent *de minimis* standard applied in sunset reviews, we find that dumping has continued over the life of the Argentine order and is likely to continue if the order were revoked.[102] (emphasis added)

7.213 We note that the USDOC's likelihood determination in the instant sunset review is premised on two findings: (a) that dumping continued above *de minimis* levels over the life of the order, and (b) that import volumes declined following the imposition of the order.

7.214 Argentina asserts that the USDOC's finding that dumping had continued over the life of the order was devoid of factual support because Siderca had not made any consumption shipments to the United States during this period and no administrative reviews were carried out to determine whether shipments made by other Argentine exporters were dumped. Therefore, the USDOC could not reasonably conclude that dumping continued over the life of the order.

7.215 The United States contends that the USDOC did not use the original dumping margin as the basis of its sunset determination in the instant sunset review. The USDOC made its likelihood determination on the basis of the existence of dumping during the life-span of the measure at issue. Following that likelihood determination, the USDOC sent the original dumping margin to the USITC as the margin that was likely to continue or recur.

7.216 In order to clarify the basis of the USDOC's determination that dumping had continued over the life of the measure, we put the following question to the United States following our first meeting with the parties:

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[99] *Issues and Decision Memorandum* (Exhibit ARG-51 at 4).
[100] *Issues and Decision Memorandum* (Exhibit ARG-51 at 5).
[101] *Issues and Decision Memorandum* (Exhibit ARG-51 at 5).
[102] *Issues and Decision Memorandum* (Exhibit ARG-51 at 5).

> The Panel notes that the USDOC's *Issues and Decision Memorandum* in the instant sunset review mentions that it was determined that dumping continued over the life of the measure in question and that the margin of dumping did not decline in the same period. Please explain the factual basis of that determination, in particular, please indicate whether the USDOC calculated a dumping margin for Siderca or any other Argentine exporter after the imposition of the original measure.[103]

7.217 The United States responded as follows:

> In the sunset review, Commerce found that dumping continued to exist during the five years preceding the sunset review because there were shipments of Argentine OCTG during four of those five years and dumping duties were assessed on those same imports.[104] (footnote omitted)

7.218 We note that parties' views differ as to what was the basis of the USDOC's finding that dumping continued over the life of the measure. Argentina argues that the USDOC's likelihood determination was based on the 1.36 per cent margin of dumping from the original investigation whereas the United States submits that it was based on the existence of the shipments of the subject product to the United States and the continued collection of the duty, not the margin from the original investigation *per se*.

7.219 In our view, the above-quoted parts of the USDOC's *Issues and Decision Memorandum* demonstrate that the USDOC relied on the existence of the original dumping margin when concluding that dumping continued over the life of the order. The issue therefore is whether the existence of a dumping margin from the original investigation can be interpreted to mean that dumping continued over the life of the measure. In our view, it can not. The original dumping margin reflects the result of the dumping margin calculations in the original investigation, which establish the basis for the anti-dumping measure to be imposed in that investigation. The existence of the original dumping margin can not be the basis of a factual determination that dumping continued over the life of the measure. Exporters subject to the measure might have changed their export or home market prices, or, their cost of production might have changed. Thus, if an investigating authority relies upon the existence of dumping over the life of the measure as part of its sunset determination, it has to have an adequate factual basis for so concluding. This can be, *inter alia*, a determination made as part of a duty assessment process carried out under Article 9 of the Agreement, or a review under Article 11.2. In our view however, the original determination of dumping by itself cannot represent a sufficient factual basis for concluding that dumping continued during the life of the measure, let alone representing an adequate factual basis to conclude that dumping is likely to continue or recur after the expiry of the order. The purpose of a sunset review is to examine whether the facts continue to justify the imposition of an anti-dumping measure. The USDOC, however, did not engage in that inquiry because it simply relied on the existence of the dumping margin from the original investigation.

7.220 Assuming *arguendo* that the basis of the USDOC's finding that dumping continued over the life of the measure was, as the United States asserts, the continued shipments of the subject product and the continued collection of the duty, rather than the existence of the original dumping margin *per se*, our analysis would not change. In our view, the fact that some imports of the subject product continued to be shipped from Argentina to the United States and that anti-dumping duties continued to be collected on these shipments over the life of the order does not represent an adequate factual basis for the proposition that dumping continued in that period. [105]

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[103] Question 23 from the Panel Following the First Meeting.

[104] Response of the United States to Question 23 from the Panel Following the First Meeting.

[105] We note that Argentine exporters subject to the anti-dumping duty at issue could request an administrative review in order to have their dumping margins calculated by the USDOC and have the duties

(i) Conclusion

7.221 We recall that the USDOC's likelihood determination in this sunset review was based on two factual findings, i.e. first dumping continued over the life of the measure and second import volumes declined following the imposition. We have found that the factual basis of the first one is not proper. We therefore conclude that the USDOC's likelihood determination in the instant sunset review was inconsistent with Article 11.3 of the Anti-Dumping Agreement.

7.222 We recall that in the OCTG sunset review, deemed waivers provisions of US law were applied to Argentine exporter(s) other than Siderca. The implication of this is that the USDOC was required to make an affirmative likelihood determination with respect to these exporter(s). We recall that we found deemed waivers provisions to be inconsistent with the investigating authorities' obligation to determine likelihood of continuation or recurrence of dumping under Article 11.3. Although the USDOC's final determination does not refer to these company-specific determinations, logically these determinations must be a relevant part of the factual basis of the USDOC's overall country-wide likelihood determination in the OCTG sunset review. In our view, the application of deemed waivers provisions to Argentine exporters other than Siderca invalidated the factual basis of the overall country-wide determination. Therefore, in addition to our above-stated considerations, we also find that the application of these provisions in the OCTG sunset review was inconsistent with Article 11.3 of the Agreement.

7.223 We note that Argentina also asserts that the dumping margin from the original investigation was calculated through the so-called methodology of zeroing and therefore could not be relied upon by the USDOC in its likelihood determination in this sunset review. It follows, in Argentina's view, that the USDOC violated Articles 2.4 and 11.3 of the Agreement by relying on this margin in its likelihood determinations. Having found that the USDOC erred in this sunset review by relying on the existence of this dumping margin in its determination that dumping continued over the life of the measure, we need not, and do not, evaluate various aspects of the methodology through which that original dumping margin was obtained.

(c) Alleged violations of Article 6 of the Agreement

(i) Nature of the obligations in Articles 6.1, 6.2, 6.8 and Annex II of the Agreement and their applicability in sunset reviews

7.224 Argentina contends that the application of waiver provisions and the conduct of an expedited sunset review in the OCTG sunset review violated Articles 6.1 and 6.2 of the Agreement. According to Argentina, the conduct of an expedited review also violated Article 6.8 and Annex II of the Agreement.

7.225 We note that Argentina's claims here are based on the assumption that Articles 6.1, 6.2 and 6.8 and Annex II of the Agreement apply to sunset reviews. According to Argentina, these provisions apply to sunset reviews by virtue of the cross-reference in Article 11.4. The United States, however, argues that this cross-reference incorporates into sunset reviews only those provisions of Article 6 that deal with evidence and procedure. According to the United States, the same holds true for the provisions of Annex II; they also apply to sunset reviews to the extent they concern evidence and procedure.

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paid refunded, if necessary. In our view, however, given the low dumping margin (1.36 per cent) and the low volume of imports made during the period of application of the measure at issue, the fact that no Argentine exporter requested the initiation of an administrative review could by no means be conclusive as to whether or not these sales in question were dumped.

7.226 Therefore, the initial issue that we need to resolve is whether Articles 6.1, 6.2 and 6.8 and Annex II apply to sunset reviews. In this context, we recall our above observation regarding the nature of the obligations set out in Articles 6.1 and 6.2 of the Agreement (*supra*, paras. 7.113-7.117). We also recall our finding that these two articles apply to sunset reviews because they contain rules that deal with evidence and procedure as set out in Article 11.4 of the Agreement. In addition to Articles 6.1 and 6.2, we consider that Article 6.8 and Annex II also apply to sunset reviews because their provisions concern "evidence and procedure". Article 6.8 explains under what circumstances an investigating authority is allowed to base its determinations on the facts available. Annex II contains detailed provisions to be followed by investigating authorities when resorting to facts available under Article 6.8.

(ii) Examination of the consistency of the USDOC's determination with Articles 6.1 and 6.2 of the Agreement

7.227 Argentina argues that Article 6.1 was violated by the USDOC because the conduct of an expedited review and the application of the waiver provisions prevented Siderca from submitting evidence to the USDOC. According to Argentina, the USDOC ignored the information submitted by Siderca.[106]

7.228 We recall that in the OCTG sunset review, waiver provisions of US law were not applied to Siderca. Certainly Siderca did not explicitly waive its right to participate. Nor was it deemed by the USDOC to have waived participation because it submitted a complete substantive response to the notice of initiation. Although Argentine exporters other than Siderca were deemed to have waived their right to participate, that did not, and in fact could not possibly, have an effect on Siderca's procedural rights under Article 6.1 in this sunset review. Therefore, we disagree with Argentina's statement that the application of waiver provisions deprived Siderca from submitting evidence to the USDOC.

7.229 It is factually correct that in the OCTG sunset review the USDOC carried out an expedited review. The issue therefore is what effect the conduct of an expedited sunset review had on Siderca's procedural rights under Article 6.1.

7.230 We note that the USDOC's final *Issues and Decision Memorandum* clearly demonstrates that the information Siderca submitted in its substantive response to the notice of initiation was considered by the USDOC.[107] Argentina has not directed our attention to any fact which demonstrates that the USDOC prevented Siderca from submitting evidence or that the information submitted by Siderca was not taken into consideration by the USDOC.

7.231 We also note that in addition to its substantive response to the notice of initiation, Siderca had the opportunity to submit a rebuttal brief to the USDOC, which it did not.[108] Siderca could also

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[106] First Written Submission of Argentina, para. 167.

[107] In this regard, we note the following parts of the USDOC's Memorandum:

> With respect to the Argentine order, Siderca argues that revocation of the order would not result in antidumping margins above *de minimis*. It states that Siderca's margin is less than the WTO's standard for *de minimis* in the antidumping agreement at Article 5.8, and, therefore, there is no basis to conclude that dumping is likely to recur under the standard in Article 11.
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> ...
>
> In response to Siderca's comments in the Argentine case, the SAA and the Sunset Policy Bulletin provide that declining or no dumping margins accompanied by steady or increasing imports may indicate that a company does not have to dump in order to maintain market share...

Issues and Decision Memorandum (Exhibit ARG-51at 4-5).

[108] In this regard, Section 351.218(d)(4) of the Regulations provides:

submit its views to the USDOC as to the USDOC's adequacy determination and the appropriateness of conducting an expedited sunset review in this case, which it chose not to.[109] We do not know whether it would have been enough to satisfy the requirements of Article 6.1 had Siderca used these other opportunities to submit information to the USDOC. However, the fact is that it did not.

7.232 Argentina also submits that the application of waiver provisions and the conduct of an expedited sunset review in the OCTG sunset review violated Article 6.2 of the Agreement because this precluded Siderca from defending its interests as set out in Article 6.2.

7.233 We recall that Article 6.2 provides:

> Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally. (emphasis added)

7.234 Article 6.2 generally deals with the right of interested parties to defend their interests in an investigation and, by operation of Article 11.4, in a sunset review. More specifically, it provides that the investigating authority, if so requested, must provide interested parties an opportunity to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered.

7.235 In response to questioning from the Panel regarding the procedural rights conferred upon interested parties in expedited sunset reviews, the United States stated that hearings were not generally held in expedited sunset reviews.[110] Given the explicit provision of Article 6.2 that hearings have to be arranged when so requested by interested parties, it becomes clear that in the OCTG sunset review Siderca was subjected to a procedure that fell short of the requirements of Article 6.2 of the Agreement in respect of hearings. The reason why the USDOC carried out an expedited sunset review was Siderca's share in the total imports of the subject product. In other words, had exporters that had exported the subject product to the United States in the five-year period of application of this measure made a complete submission in response to the notice of initiation Siderca would have had the right to require that the USDOC arrange a hearing to allow interested parties to exchange their views with others. In our view, the fact that certain exporters do not participate in a sunset review can not justify depriving cooperating exporters of their procedural rights under Article 6.2.

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(4)*Rebuttal to substantive response to a notice of initiation.* Any interested party that files a substantive response to a notice of initiation under paragraph (d)(3) of this section may file a rebuttal to any other party's substantive response to a notice of initiation not later than five days after the date the substantive response is filed with the Department. (Exhibit US-3 at 13522).

[109] In this regard, Section 351.309(e) of the Regulations provides:

(e) *Comments on adequacy of response and appropriateness of expedited sunset review.* (i) *in general.* Where the Secretary determines that respondent interested parties provided inadequate response to a Notice of Initiation ... interested parties...that submitted a complete substantive response to the Notice of Initiation ... may file comments on whether an expedited sunset review ... is appropriate based on the adequacy of response to the notice of initiation. (Exhibit US-3 at 13524).

[110] Response of the United States to Question 2(d) from the Panel Following the First Meeting.

Conclusion

7.236 We therefore find that the USDOC acted consistently with Article 6.1 of the Agreement, but inconsistently with Article 6.2 in the OCTG sunset review.

(iii) Alleged violations of Article 6.8 and Annex II of the Agreement in the OCTG review

7.237 **Argentina** contends that the USDOC's conduct of an expedited sunset review violated Article 6.8 and Annex II of the Agreement because the USDOC applied facts available to Siderca on the grounds that Siderca had failed the adequacy test of US law that triggered the expedited sunset review. According to Argentina, Article 6.8 does not permit the use of facts available on such grounds. Siderca fully cooperated with the USDOC, thus the USDOC could not possibly use facts available against Siderca. Argentina also asserts that the USDOC did not use facts available in the manner set out in Article 6.8 and Annex II.

7.238 The **United States** submits that the USDOC did not apply facts available with respect to Siderca. Rather, it applied facts available in the context of its order-wide likelihood determination. The United States also contends that as part of facts available the USDOC used the information Siderca submitted in its substantive response to the notice of initiation. According to the United States, therefore, the USDOC did not act inconsistently with Article 6.8 or Annex II of the Agreement.[111]

7.239 **We** note that in the OCTG sunset review, because of Siderca's zero per cent share in the total imports of the subject product, the USDOC carried out an expedited sunset review in which it based its determinations on facts available. We also note that Section 351.308(f) of the USDOC's Regulations, the provision of US law regarding the information to be used by the USDOC in an expedited sunset review where facts available are used, confirms the US assertion that the USDOC applied facts available *vis-à-vis* Argentina, and not Siderca.[112] It is therefore factually clear that in the instant sunset review the USDOC applied facts available on an order-wide basis and not *vis-à-vis* Siderca. We have seen nothing in the record of this sunset review that would suggest the contrary. We finally note that the USDOC's *Issues and Decision Memorandum* states that as part of facts available, information submitted by Siderca was considered by the USDOC in its determinations.[113]

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[111] First Written Submission of the United States, paras. 214 and 221.
In this context, we note the following statement of the United States:
The *Final Sunset Determination*, the *Decision Memorandum*, and the *Adequacy Memorandum*, however, each clearly state that Siderca filed a complete substantive response. Commerce's *Adequacy Memorandum* and the *Decision* Memorandum also make clear that Commerce's decision to expedite the review was based on the failure of Argentine producers/exporters of OCTG, other than Siderca, to respond to the notice of initiation. Consequently, Commerce determined to expedite the sunset review and to use facts available in making the final sunset determination because the Article 11.3 likelihood determination is made on an order-wide basis and Siderca represented zero exports to the United States of OCTG during the five-year period preceding the sunset review. (footnotes omitted)
First Written Submission of the United States, para. 243.

[112] Section 351.308(f) of the USDOC's Regulations reads in relevant part:
(f) *Use of facts available in a sunset review*. Where the Secretary determines to issue final results of sunset review on the basis of facts available, the Secretary will normally rely on:
(1) Calculated countervailing duty rates or dumping margins, as applicable, from prior Department determinations; and
(2) Information contained in parties' substantive responses to the Notice of Initiation filed under § 351.218(d)(3), consistent with section 752(b) or 752(c) of the Act, as applicable. (emphasis added)
19 C.F.R. § 351.308(f) (Exhibit US-3 at 13524).

[113] See, *supra*, note 107.

7.240 Therefore, the issue is whether the USDOC violated Article 6.8 and therefore Annex II of the Agreement in its use of facts available on an order-wide basis in the OCTG sunset review. In our view, it did not.

7.241 We note that the USDOC used facts available in its likelihood determination for Argentina. This was a determination that covered, in addition to Siderca, other Argentina exporter(s) that had exported the subject product to the United States during the period of application of this measure. In our view, the impact of facts available, if any, was on these other Argentina exporters who did not cooperate with the USDOC.[114] This is because by using facts available, the USDOC reached a likelihood determination for all Argentine exporters. Since these other exporters had not made themselves known to the USDOC, the USDOC used the information submitted by Siderca and other information in the record in reaching a conclusion with respect to these exporters.

7.242 We see no harm caused to Siderca because of the USDOC's use of facts available. The information submitted in Siderca's only submission to the USDOC, i.e. its substantive response to the notice of initiation, was considered by the USDOC. Further, as we noted above, Siderca chose not to use two additional opportunities that were available under US law to submit information, or make comments, to the USDOC.

7.243 We note that as part of this claim Argentina also argues that the USDOC acted inconsistently with Article 6.9 of the Agreement. The nature of Argentina's argument in connection with this article is not, however, entirely clear. In its second written submission, Argentina asserted that the USDOC's determination based on facts available violated, among others, Article 6.9 of the Agreement.[115] In its first oral submission, Argentina submitted that the USDOC violated Article 6.9 by not disclosing the essential facts forming the basis of the USDOC's decision to carry out an expedited sunset review.[116]

7.244 We consider that Argentina's argumentation in this regard has not been developed such that it would allow us to address and resolve it as an independent claim. Even if it had been sufficiently substantiated by Argentina, resolving such a claim would not, in our view, have a significant contribution to the resolution of the dispute at issue generally. We note that we have found certain substantive inconsistencies in the USDOC's determinations in the OCTG sunset review. Having made these findings of inconsistency regarding the substance of the USDOC's determinations, entertaining another claim under Article 6.9 of the Agreement, which is purely procedural, would not have any significant value added with respect to the United States' bringing its measure into conformity with its WTO obligations. We therefore decline to make any ruling in this regard.

Conclusion

7.245 Under these circumstances, therefore, we find that the USDOC did not act inconsistently with Article 6.8 and Annex II of the Agreement in its use of facts available.

(d) Alleged violations of Article 12 of the Agreement

7.246 **Argentina** asserts that the USDOC violated Article 12.2 of the Agreement by failing to explain the basis of its sunset determinations in its final determination. First, Argentina submits that the USDOC did not explain whether the basis of its determinations was the waiver provisions of US law or the provisions relating to facts available. Second, Argentina submits that the USDOC acted

[114] Argentina is not arguing that the USDOC's use of facts available in this sunset review violated these other Argentine exporters' rights under Article 6.8. In any event, in our view, the use of facts available could not possibly lead to a violation of Article 6.8 with respect to these exporters given that they did not cooperate with the USDOC.

[115] Second Written Submission of Argentina, paras. 123-125.

[116] First Oral Submission of Argentina, para. 63.

inconsistently with Articles 12.2.1 and 12.2.2 by failing to include in its final determination fresh information collected during the sunset review regarding Siderca's dumping margins.

7.247 The **United States** submits that the USDOC's final determination contains the bases for the USDOC's likelihood determination. According to the United States, Article 12.2.2 does not impose any substantive obligation on the investigating authorities in sunset reviews.

7.248 **We** note that Article 12 is entitled "Public Notice and Explanation of Determinations". It sets forth the investigating authorities' obligation to give public notice of certain decisions/determinations made at various stages of an investigation. Paragraph 3 of Article 12 states that the provisions of that Article apply *mutatis mutandis* to reviews under Article 11. Therefore, the provisions of Article 12 apply to sunset reviews with necessary changes that the nature of sunset reviews may necessitate.

7.249 With that in mind, we now turn to Argentina's first argument, that it is impossible to discern the basis for the USDOC's determination. We note that regarding the content of public notices, Article 12.2 of the Agreement that Argentina cites in this context provides in relevant part:

> Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities.

7.250 In light of the obligation set forth in Article 12.2, we shall inquire whether the USDOC's final determination in the instant sunset review contained sufficient information as to the USDOC's findings and conclusions on the relevant issues of fact and law in the instant sunset review. In this context, we note the following portions of the USDOC's *Issues and Decision Memorandum*:

> Although the Department received a substantive response on behalf of Siderca, the Department explained in its August 22, 2000 adequacy determination that because, during the period 1995 to 1999, the average annual share of Siderca's exports of the subject merchandise *vis-à-vis* the total Argentine exports of the subject merchandise during the same period was significantly below the fifty-per cent threshold...the Department determined Siderca's substantive response to be inadequate.[117]
>
> In the instant sunset reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to Section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation.[118]
>
> Therefore, given that dumping continued after the issuance of the orders, average imports continued at levels far below pre-order levels from 1995 through 1999, and respondent interested parties waived their right to participate in these review or failed to submit adequate substantive responses, we determine that dumping is likely to continue if the orders were revoked.[119]
>
> In the Argentine case, however, the Department determined to conduct an expedited review because of its finding that Siderca did not provide adequate substantive responses.[120] (emphasis added)

7.251 We note that the memorandum generally provides that Argentina was treated differently from the other countries subject to the sunset review by stating that Siderca did not provide an adequate

[117] *Issues and Decision Memorandum* (Exhibit ARG-51 at 3).
[118] *Issues and Decision Memorandum* (Exhibit ARG-51 at 5).
[119] *Issues and Decision Memorandum* (Exhibit ARG-51 at 5).
[120] *Issues and Decision Memorandum* (Exhibit ARG-51 at 7).

substantive response to the notice of initiation, whereas the respondents in other countries waived their right to participate in the sunset review by failing to file a complete substantive response. However, in the second paragraph quoted above, the USDOC seems to state that all interested parties waived their right to participate in this sunset review by not submitting an adequate substantive response. This seems to be at odds with the above-outlined structure of US law regarding waivers (*supra*, para. 7.84) and the submission of an adequate response to the notice of initiation in sunset reviews (*supra*, note 40). In response to questioning from the Panel, the United States pointed out that the phrase "this constitutes a waiver of participation" refers to the interested parties that failed to submit a substantive response to the notice of initiation whereas Siderca, as an interested party that did submit such a response, was not deemed to have waived its right.

7.252 In light of the above, we are of the view that the existence of this inconsistent statement regarding the legal basis under US law on which Siderca was treated by the USDOC does not render this determination inconsistent with Article 12.2 of the Agreement because when viewed in its entirety the memorandum states that Siderca and the other respondents were treated differently and that Siderca had not waived its right to participate in this sunset review.

7.253 Regarding the second argument raised by Argentina, that the USDOC failed to comply with Article 12.2.2 because its final determination did not contain fresh evidence regarding its likelihood of continuation or recurrence of dumping determinations, we note that Argentina is implying that Article 12.2 imposes certain substantive obligations on investigating authorities. However, neither Article 12.2 nor the other paragraphs of Article 12 contain substantive obligations regarding the conduct of sunset reviews. The substantive requirements of the Agreement regarding sunset reviews have to be found in the substantive provisions such as Article 11.3 and the treaty interpreter should refrain from interpreting procedural provisions of the Agreement, such as Articles 12 and 6, in a way to impose additional substantive obligations on investigating authorities. In this context, we find useful the following finding of the panel in *US – Corrosion-Resistant Steel Sunset Review*:

> In other words, by finding that the provisions of Article 6.10 may contain evidentiary and procedural obligations that are, in general, applicable in sunset reviews, we do not (and cannot) find that Article 6.10, by virtue of the cross-reference in Article 11.4, operates so as to super-impose an *additional* substantive requirement of re-calculation of the likely dumping margin in sunset reviews, a requirement that not even Japan argues is found in the text of Article 11.3, or elsewhere in the text of the Anti-Dumping Agreement. We, as a treaty interpreter, are not allowed to derive substantive obligations out of the application of the evidentiary and procedural provisions of Article 6.[121] (footnote omitted)

We note that the panel's view on this issue was also upheld by the Appellate Body.[122]

(i) Conclusion

7.254 We therefore decline to sustain Argentina's claim under Article 12 of the Agreement.

[121] Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("*US – Corrosion-Resistant Steel Sunset Review*"), WT/DS244/R, adopted 9 January 2004, as modified by the Appellate Body Report, WT/DS244/AB/R, para. 7.206.

[122] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 155.

E. CLAIMS RELATING TO THE USITC'S LIKELIHOOD DETERMINATION IN THE OCTG SUNSET REVIEW

1. Introduction

7.255 The USITC part of the OCTG sunset review concerned five countries, i.e. Argentina, Italy, Japan, Korea and Mexico. Because both the domestic industry and the respondent interested party groups submitted adequate responses, the USITC carried out a full sunset review.[123] The USITC carried out a cumulative analysis with respect to these five countries.[124] The USITC determined that material injury would be likely to continue or recur in the case of revocation of the order on OCTG from Argentina, Italy, Japan, Korea and Mexico.[125]

2. Temporal Aspect of the USITC's Likelihood Determination

(a) Arguments of parties

(i) Argentina

7.256 Argentina submits that the application of Sections 752(a)(1) and (5) of the Tariff Act in the instant sunset review was inconsistent with Articles 11.3 and 3 of the Agreement. According to Argentina, the USITC's determination merely cites the relevant provisions of the Act and the SAA and does not specify what "reasonably foreseeable time" means for purposes of the instant sunset review.

(ii) United States

7.257 The United States argues that because Article 11.3 is silent as to the time-frame relevant to sunset reviews, the USITC's determination can not be inconsistent with Articles 3 and 11.3 of the Agreement on the grounds that it did not specify the time-frame on which it was based.

(b) Evaluation by the Panel

7.258 Argentina argues in the first place that the fact that the USITC applied Sections 752(a)(1) and (5) of the Tariff Act in the instant sunset review made its determinations WTO-inconsistent. We recall, however, our above finding that the US statutory provisions relating to the time-frame on the basis of which the USITC makes its likelihood determinations in sunset reviews are not WTO-inconsistent (*supra*, para. 7.193). We can not, therefore, find that their application in the OCTG sunset review were necessarily WTO-inconsistent.

7.259 Argentina argues that even if the US statutory provisions containing this standard are WTO-consistent, the USITC failed to apply these provisions properly to the evidence before it in the instant sunset review. Argentina asserts that the USITC acted inconsistently with Article 11.3 of the Agreement by failing to explain the parameters of the reasonably foreseeable period of time on the basis of which it found injury to be likely to continue or recur.[126] We recall our analysis that Article 11.3 does not require investigating authorities to specify the time-frame on which they are basing their likelihood of continuation or recurrence of injury determinations (*supra*, para. 7.184). Article 11.3 provides that the investigating authority must establish on the basis of a sufficient factual

[123] Although the USITC found that the Japanese exporters' response was not adequate, it nevertheless decided to conduct a full sunset review as to Japan for reasons of administrative efficiency. USITC's Sunset Determination (Exhibit ARG-54 at 2).

[124] USITC's Sunset Determination (Exhibit ARG-54 at 14).

[125] USITC's Sunset Determination (Exhibit ARG-54 at 16-17).

[126] First Written Submission of Argentina, paras. 277-278; Second Written Submission of Argentina, para. 206.

basis that there is a likelihood of continuation or recurrence of injury. We therefore see no WTO-inconsistency in the USITC's failure to specify the time period that it considered to be reasonably foreseeable for purposes of its likelihood determinations in the instant sunset review.

(i) Conclusion

7.260 In light of the above considerations, we decline Argentina's claim regarding the application by the USITC of Sections 752(a)(1) and (5) of the Tariff Act in the OCTG sunset review.

3. Standard Applied by the USITC

(a) Arguments of parties

(i) Argentina

7.261 Argentina submits that the USITC failed to apply the "likely" standard of Article 11.3 in the sunset review at issue. According to Argentina, although the relevant provision of the US Statute and the USITC's determination in the instant sunset review contains the word "likely", the USITC in fact applied a different standard in the instant sunset review. According to Argentina, "likely" means "probable". In this sunset review, however, the USITC applied a "possibility" standard instead of the proper likely standard of Article 11.3 in respect of its determinations regarding the likely volume of dumped imports, the likely price effect of such imports and their likely impact on the US domestic industry. Thus, the USITC determined that injury would be likely to continue or recur on the basis of facts that demonstrated that a certain outcome was possible, rather than probable. Argentina also argues that regarding these three aspects, the USITC failed to carry out an objective examination on the basis of positive evidence, inconsistently with Articles 11.3, 3.1 and 3.2 of the Agreement.

7.262 Argentina also alleges violations of Articles 3.4 and 3.5 of the Agreement in the instant sunset review.

(ii) United States

7.263 The United States submits that in the instant sunset review the USITC applied the "likely" standard provided for under Article 11.3. The United States disagrees with Argentina's view that likely only means probable. According to the United States, Article 11.3 of the Agreement uses the word "likely", and not "probable", hence finding a decisive synonym for likely would not shed more light on the meaning of that term.

7.264 The United States also disputes Argentina's allegations regarding the standard applied with respect to the three aspects of the USITC's sunset determination in this case, the likely volume of dumped imports, the likely price effect of such imports and their likely impact on the US domestic industry. The United States generally argues that Article 3 – including Article 3.1 – does not apply to sunset reviews. According to the United States, the dictates of Article 3.1 are potentially incompatible with the nature of sunset determinations under Article 11.3. The United States nevertheless submits that the violations alleged by Argentina with regard to Article 3.1 are groundless because the USITC's determinations demonstrate that it did not act inconsistently with these provisions.

7.265 The United States also disputes Argentina's claims regarding Articles 3.4 and 3.5.

(b) Arguments of third parties

(i) European Communities

7.266 The European Communities agrees with Argentina that the provisions of Article 3 of the Anti-Dumping Agreement apply *mutatis mutandis* in the context of sunset reviews. According to the European Communities, given the introductory wording of Article 3.1, the absence of an explicit cross-reference in Article 11.3 to Article 3 is irrelevant. The European Communities also agrees with Argentina that the required standard in sunset determinations is "likely", not "possible". According to the European Communities, the USITC did not correctly apply the "likely" standard in the instant sunset review.

(ii) Japan

7.267 Japan argues that the provisions of Article 3 apply to injury determinations in sunset reviews under Article 11.3. Therefore, the requirements of Articles 3.1, 3.2, 3.4 and 3.5 have to be fulfilled in such reviews.

(c) Evaluation by the Panel

(i) Applicability of Article 3 in sunset reviews

7.268 We note that the majority of Argentina's claims challenging the USITC's determinations in the OCTG sunset review are premised on various paragraphs of Article 3 of the Agreement, solely or together with Article 11.3. Parties' views as to the applicability of Article 3 in sunset reviews, however, diverge. Argentina submits generally that Article 3 of the Agreement applies to sunset reviews. In this regard, Argentina relies mainly on the provisions of footnote 9 of the Agreement that specifies the three types of injury, and on previous Appellate Body decisions. According to the United States, however, Article 3 does not apply to sunset reviews carried out under Article 11.3 because the nature of the inquiry is different under these two provisions. Article 3 applies to a determination of "injury" whereas the focus of the inquiry in a sunset review is a determination of the "likelihood of continuation or recurrence of injury".

7.269 Given the central role of Article 3 in Argentina's arguments raised in support of its claims relating to the USITC's actions in the OCTG sunset review and the divergence between parties' views on this matter, we find it useful to outline at this juncture our views regarding the applicability of Article 3 in sunset reviews.

7.270 We note that neither Article 11.3 nor any other paragraph of Article 11 contains any provision as to whether the provisions of Article 3 in general, or those of certain specific paragraphs thereof in particular, apply to sunset reviews. Nor does Article 3 contain any cross-reference to that effect. However, there are textual indications in Article 3 that may suggest that its provisions define the scope of injury determinations throughout the Agreement. For instance, the introductory phrase in Article 3.1 ("for purposes of Article VI of GATT 1994") and the phrase "[u]nder this Agreement" in footnote 9 indicate that the concept of injury should be understood in the manner set out in Article 3 throughout the Agreement. In this context, we also incorporate our above analysis regarding the textual analysis of Articles 3 and 11.3 of the Agreement (*supra*, paras. 7.184-7.191).

7.271 We note that the panel in *US – Corrosion-Resistant Steel Sunset Review* also opined that the term injury should be understood in the manner described in Article 3. However, that panel concluded that these phrases indicated that Article 3's scope of application was not limited to

investigations, hence it also generally applied to sunset reviews.[127] That panel then went on and analysed whether a particular paragraph of Article 3, namely paragraph 3, was applicable in sunset reviews and decided that because of its text Article 3.3 was an exception to its general observation and hence it did not apply to sunset reviews.

7.272 To the extent that that panel found that the above-cited phrases found in Article 3 and footnote 9 thereto make the provisions of Article 3 generally applicable to sunset reviews, we disagree. We note that the nature of the inquiries in investigations and sunset reviews is significantly different. Regarding the differences between original investigations and sunset reviews, we note the following observation of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*:

> In considering the nature of a likelihood determination in a sunset review under Article 11.3, we recall our statement in *US – Carbon Steel*, in the context of the *SCM Agreement*, that:
>
> > … original investigations and sunset reviews are distinct processes with different purposes. The nature of the determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation.[128]
>
> This observation applies also to original investigations and sunset reviews under the Anti-Dumping Agreement. In an original anti-dumping investigation, investigating authorities must determine whether *dumping exists* during the period of investigation. In contrast, in a sunset review of an anti-dumping duty, investigating authorities must determine whether the expiry of the duty that was imposed at the conclusion of an original investigation would be *likely to lead to continuation or recurrence of dumping*.[129]

7.273 In our view, the Appellate Body's reasoning regarding the differences between original investigations and sunset reviews pertaining to dumping determinations equally applies to the injury side of investigations and sunset reviews. The focus of the injury determinations in investigations is to determine the existence of injury during the period of investigation whereas sunset reviews are about the likelihood of continuation or recurrence of injury in the event of revocation of an order that

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[127] In this regard, we note the following statements of the panel in *US – Corrosion-Resistant Steel Sunset Review*:

> First, Article 3 is entitled "Injury". This title is linked to footnote 9 of the *Anti-Dumping Agreement*, which indicates that: "[u]nder this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article." This seems to demonstrate that the term "injury" as it appears throughout the *Anti-Dumping Agreement* – including Article 11 – is to be construed in accordance with this footnote, unless otherwise specified. This would seem to support the view that the provisions of Article 3 concerning injury may be generally applicable throughout the *Anti-Dumping Agreement* and are not limited in application to investigations. Article 11 does not seem to explicitly specify otherwise in the case of sunset reviews.
>
> There are other textual indications that the Article 3 injury obligations may generally apply throughout the Agreement. For example, the use of the language "for purposes of Article VI of GATT 1994" in Article 3.1 also suggests that, in general, the obligations in Article 3 pertaining to injury may apply throughout the *Anti-Dumping Agreement*, i.e. they are not limited to investigations. (footnote omitted)

Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 121, paras. 7.99-7.100.

[128] (original footnote) Appellate Body Report, *US – Carbon Steel*, para. 106.

[129] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, paras. 106-107.

has already been in place for up to five years. Just as the Appellate Body stated that an investigating authority is not required to make a dumping determination in a sunset review[130], we consider that an investigating authority is not required to make an injury determination in a sunset review. It follows, then, that the obligations set out in Article 3 do not normally apply to sunset reviews.

7.274 If, however, an investigating authority decides to conduct an injury determination in a sunset review, or if it uses a past injury determination as part of its sunset determination, it is under the obligation to make sure that its injury determination or the past injury determination it is using conforms to the relevant provisions of Article 3.[131] For instance, Article 11.3 does not mention whether an investigating authority is required to calculate the price effect of future dumped imports on the prices of the domestic industry. In our view, this means that an investigating authority is not necessarily required to carry out that calculation in a sunset review. However, if the investigating authority decides to do such a calculation, then it would be bound by the relevant provisions of Article 3 of the Agreement. Similarly, if, in its sunset injury determinations, an investigating authority uses a price effect calculation made in the original investigation or in the intervening reviews, it has to assure the consistency of that calculation with the existing provisions of Article 3.

7.275 However, this does not mean that we will disregard the provisions of Article 3 in our analysis regarding the USITC's determinations in the instant review. Just as the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* pointed out regarding the definition of dumping set out in Article 2.1 of the Agreement[132], we consider that throughout the Agreement – including sunset reviews – the term injury should be understood and interpreted as set out in Article 3 of the Agreement, including footnote 9 thereto. The Agreement contains no other definition of injury made for purposes of sunset reviews. Therefore, although we find that the provisions of various paragraphs of Article 3 do not necessarily apply in sunset reviews, we shall in our analysis be mindful of the definition of injury set out in footnote 9 and the parameters of injury determinations as generally set out in Article 3. We shall find guidance in Article 3 where appropriate.

7.276 It follows from the above-outlined analysis that we will entertain Argentina's claims under Article 3 only to the extent the USITC made an injury determination – as opposed to a likelihood of continuation or recurrence of injury – in the OCTG sunset review, or in cases where the USITC used an injury determination from the original OCTG investigation or the intervening reviews and Argentina alleges that the USITC failed to make the necessary corrections to these original injury determinations to make them consistent with the current provisions of Article 3.

(ii) Claims relating to the USITC's determinations regarding the likely volume of dumped imports, their likely price effect and their likely impact on the US domestic industry

7.277 Argentina contends that the USITC applied a standard different from the "likely" standard of Article 11.3 in the instant sunset review. According to Argentina, the USITC applied a "possibility" standard instead of the "likely" standard of Article 11.3 of the Agreement which according to Argentina means "probable". In the view of Argentina, the fact that the USITC did not apply the likely standard can be seen through an analysis of its determinations relating to the likely volume of dumped imports, their likely price effect and their likely impact of the US domestic industry. Argentina also asserts that the USITC violated Articles 3.1 and 3.2 of the Agreement in its determinations relating to these three factors because it failed to carry out an objective examination on the basis of positive evidence. Argentina concedes, however, that the US Statute and the USITC's sunset determination contains the word "likely".

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[130] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 123.

[131] We find support for this proposition in the Appellate Body's findings in *US – Corrosion-Resistant Steel Sunset Review*. See, Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, paras. 126-130.

[132] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 126.

7.278 We note that Argentina's claim regarding the USITC's injury analysis with respect to the likely volume of dumped imports, the likely price effect of such imports and their likely impact of the US domestic industry is two-fold. First, Argentina asserts that with regard to each one of these three factors the USITC failed to apply the likely standard of Article 11.3. Second, Argentina contends with respect to the same three aspects of the USITC's determinations that the USITC failed to conduct an objective examination on the basis of positive evidence, inconsistently with Articles 3.1 and 3.2. Hence, in the context of this claim Argentina claims violations of Article 11.3 as well as Articles 3.1 and 3.2 of the Agreement.

7.279 In accordance with our above-framed approach regarding the applicability of Article 3 of the Agreement to sunset reviews, we find it useful to first inquire whether the USITC made a determination of injury or a determination of the likelihood of continuation or recurrence of injury in the instant sunset review. We note that the USITC's determination makes clear that it is about the likelihood of continuation or recurrence of injury, rather than a determination of injury.[133] Nor does Argentina argue that what the USITC did in this case was a determination of injury. Similarly, Argentina does not assert that in the OCTG review the USITC used an injury determination from the original OCTG investigation that is now inconsistent with the provisions of Article 3 of the Agreement. We will therefore only entertain Article 11.3 aspects of Argentina's claim and decline those relating to Article 3.

7.280 However, we note that the crux of Argentina's claim is that the USITC either did not establish facts properly or did not evaluate them objectively or did not base them on a sufficient factual basis. We recall that the above-described standard of review (*supra*, paras. 7.1-7.5) applicable to the present proceedings provides that we should find that the USITC acted in a WTO-consistent way if it established the facts properly and evaluated them in an objective and unbiased manner. It follows that the substance of Argentina's claim under Articles 3.1 and 3.2, the alleged failure to carry out an objective examination on the basis of positive evidence, directly overlaps with the standard of review that we shall apply in this case. For the purposes of the present claim, the fact that we will not consider Article 3 aspects of Argentina's claim here will not bring about any practical difference in terms of the outcome of our analysis.

7.281 We will apply, therefore, the above-described standard of review in determining whether the USITC acted consistently with the Agreement regarding these three aspects of its determinations in the instant sunset review. If we find that the USITC's establishment of facts was proper and that these facts were evaluated in an unbiased and objective manner, we will not find an inconsistency even if we might have reached a different conclusion on the basis of the same facts. Given that the issue is whether the USITC's likelihood determination was based on a proper establishment of facts and on an unbiased and objective evaluation thereof, in case we find that either one of these criteria is not met we will find a violation of Article 11.3, not 3.1 or 3.2.

7.282 Having set out our approach with regard to Argentina's present claim, we now turn to the legal arguments Argentina raised in this context.

7.283 We recall our above observation that Argentina concedes that on its face the USITC's determination in the OCTG sunset review contains the word "likely". The USITC's final determination reads, in relevant part:

> Based on the record in these five-year reviews, we determine under section 751(c) of the Tariff Act of 1930, as amended ("the Act"), that revocation of the antidumping duty orders on Oil Country Tubular Goods ("OCTG") other than drill pipe ("casing and tubing") from Argentina, Italy, Japan, Korea, and Mexico and of the countervailing duty order on casing and tubing from Italy would be <u>likely to lead to</u>

[133] See, for instance, pages 1, 16 and 33 of the USITC's Sunset Determination (Exhibit ARG-54).

> continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[134] (emphasis added)

We note that, as Argentina agrees, on its face the USITC's determination references the likely standard of Article 11.3.

7.284 However, Argentina puts forward other arguments in its effort to prove that notwithstanding the standard spelled out in its final determination, the USITC did in fact use a different standard in the sunset review at issue. In this respect, Argentina first asserts that the USITC's statements in different fora reveals the fact that it interprets "likely" to mean "possible" rather than "probable". One such alleged admission relates to the USITC's statement before a US court that "likely" does not mean "probable", but something else. The second relates to the USITC's views expressed before a NAFTA panel in which the USITC allegedly stated that "likely" does not necessarily mean "probable".

7.285 We note that the standard set out in Article 11.3 of the Agreement for the investigating authorities' sunset determinations is "likely". This standard applies to the likelihood of continuation or recurrence of dumping as well as injury determinations in sunset reviews, and this is precisely the standard that the USITC applied. It seems to us that the essence of Argentina's claim is not that the USITC applied the wrong standard, but that it erred in determining that the likely standard was met. Our task is to reach a decision on Argentina's allegation that the USITC erred in the instant sunset review in the application of the likely standard of Article 11.3. Hence, the USITC's statements before US courts or before a NAFTA panel regarding the meaning of likely as used in Article 11.3 of the Agreement are not relevant to our consideration as to whether the USITC's determination in this sunset review present proceedings satisfied Article 11.3's likely standard.

7.286 We therefore turn to the specific aspects of the USITC's determination in the instant sunset review, regarding which Argentina alleges that the USITC failed to apply Article 11.3's likely standard.

Likely volume of dumped imports

7.287 Argentina submits that the USITC's analysis of the likely volume of dumped imports was not based on an objective examination of the evidence in the record.

7.288 We note that the USITC's analysis of the likely volume of dumped imports is found on pages 17-20 of the USITC's Sunset Determination. This part of the determination contains a detailed discussion of the issues relating to the likely volume of dumped imports. On page 17, the USITC starts its analysis with the relevant findings in the original investigation and then discusses the developments during the period of application of the measure. In the following pages, the USITC provides supporting arguments for its conclusion that there will be a significant volume of dumped imports in the event of revocation. Regarding capacity utilization, although the USITC acknowledges that the exporters' capacity utilization rates were high, it concludes that these foreign producers can devote more of their productive capacity from other types of tubular products to casing and tubing[135] because these two groups of products are produced in the same production lines with the same machinery. The USITC then explains the reasons on the basis of which it made this determination. In this context, the USITC mentions five reasons.

7.289 Argentina challenges the USITC's reasoning on three grounds and asserts therefore that the USITC's determination was not based on an objective examination of the evidence in the record.

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[134] USITC's Sunset Determination (Exhibit ARG-54 at 1).

[135] OCTG includes two different product sub-groups: "Casing and tubing" and "drill pipe". The like product definition in the OCTG sunset review at issue included "casing and tubing", but not "drill pipe". See, USITC's Sunset Determination (Exhibit ARG-54 at 1-4).

7.290 The main argument that Argentina raises in this respect relates to the USITC's finding that Tenaris[136] could re-orient more of its production capacity to the US market. Argentina does not dispute the fact that Tenaris could shift its production capacity used in the production of other types of pipe and tube products to casing and tubing. Indeed, Argentina states that the only way for Tenaris to increase its exports of casing and tubing into the United States would be through shifting more of its capacity to the production of this product.[137] Argentina asserts, however, that there was no positive evidence in the record of the OCTG sunset review that would support the USITC's finding that Tenaris had an incentive to shift its production in such a way. Therefore, the issue is whether the USITC's determination that Tenaris could shift its productive capacity from other pipe and tube products to casing and tubing had a sufficient factual basis in the record.

7.291 We note that the USITC identified five supporting arguments for its determination that subject producers, including Tenaris, could devote more of their productive capacity to the US market. The USITC's determination reads, in relevant part:

> The recent*** capacity utilization rates represent a potentially important constraint on the ability of these subject producers to increase shipments of casing and tubing to the United States. Nevertheless, the record indicates that these producers have incentives to devote more of their productive capacity to producing and shipping more casing and tubing to the U.S. market.
>
> First, ... While the Tenaris companies seek to downplay the importance of the U.S. market relative to the rest of the world, they acknowledge that it is the largest market for seamless casing and tubing in the world. Given Tenaris' global focus, it likely would have a strong incentive to have a significant presence in the U.S. market, including the supply of its global customers' OCTG requirements in the U.S. market.
>
> Second, casing and tubing are among the highest valued pipe and tube products, generating among the highest profit margins....
>
> Third, the record in these reviews indicates that prices for casing and tubing on the world market are significantly lower than prices in the United States...We have considered respondents' arguments that the domestic industry's claims of price differences are exaggerated, but nevertheless conclude that there is on average a difference sufficient to create an incentive for subject producers to seek to increase their sales of casing and tubing to the United States.
>
> Fourth, subject country producers also face import barriers in other countries, or on related products...
>
> Finally, we find that industries in ***of the subject countries are dependent on exports for the majority of their sales...
>
> We therefore find that, in the absence of the orders, the likely volume of cumulated subject imports, both in absolute terms and as a share of the U.S. market, would be significant.[138] (footnotes omitted)

7.292 We note that Argentina challenges two of these five points highlighted by the USITC. Therefore, we shall first entertain Argentina's arguments regarding these two points before reaching

[136] Tenaris is the name of a group of companies including Siderca. See, First Written Submission of Argentina, footnote 37. Therefore, for purposes of our analysis, we consider that Tenaris refers to Siderca.

[137] First Written Submission of Argentina, para. 244.

[138] USITC's Sunset Determination (Exhibit ARG-54 at 19-20).

our conclusion regarding Argentina's main claim that the USITC's determination regarding the likely volume of dumped imports was not based on an objective examination of the evidence in the record.

7.293 Argentina first contends that the USITC's finding regarding the existence of trade barriers in third-country markets was only based on an antidumping order imposed by Canada against Korea. Since the USITC could not cite any other trade barrier against the other four countries subject to this sunset review, Argentina asserts that this finding was not based on positive evidence.

7.294 The USITC's determination reads, in relevant part:

> Fourth, subject country producers also face import barriers in other countries, or on related products. Argentine, Japanese, and Mexican producers are subject to antidumping duty orders in the United States on seamless standard, line, and pressure pipe, which are produced in the same production facilities as OCTG. Korean producers are subject to import quotas on welded line pipe shipped to the United States and U.S. antidumping duty orders on circular, welded, non-alloy steel pipe. Canada currently imposes 67 per cent antidumping duty margins on casing from Korea.[139] (footnotes omitted)

7.295 We note that the USITC referred to a number of trade barriers. However, of these barriers only one related to the subject product, i.e. Canadian anti-dumping measure on casing and tubing from Korea. Others concerned related products, i.e. products that could be produced in the same production lines as casing and tubing. The issue therefore is whether the USITC erred in considering that certain exporters that were subject to trade barriers with respect to certain product types, which could be produced in the same production lines as casing and tubing, might shift their production to casing and tubing, which could enter the US market free of the anti-dumping measure at issue in these proceedings. Given that it is undisputed between the parties that such shifting was technically possible, we see no reason why the USITC could not make such an inference in the circumstances of the instant sunset review. It is only normal to expect a producer to seek to maximize its profits, which, in this case, would be possible through shifting production to casing and tubing in order to enter the US market free of the anti-dumping duty at issue had it been revoked. We therefore consider that this aspect of the USITC's conclusion was reasoned in light of the evidence in the record.

7.296 Next, Argentina submits that the USITC's analysis concerning the price differences between the US and the world markets was based on anecdotal evidence rather than independent reports. We note that the USITC's report cites the testimony of three individuals in this sector as evidence of this price differentiation and it cites no objection raised by interested parties in this respect.[140] Argentina is not raising any argument as to the correctness of the substance of this testimony. Nor has it brought to our attention another piece of evidence that might support the opposite finding in this regard. Argentina's claim in this regard therefore is limited to the kind of evidence the USITC relied upon. Keeping in mind our standard of review with respect to factual determinations by an investigating authority, and conscious that there are no rules in the Anti-Dumping Agreement as to the type of evidence that can support an investigating authority's findings, we are of the view that the USITC's reference to the testimonies of individuals who are knowledgeable in the relevant sector was proper.

7.297 Argentina also argues that the fact that the producers forming Tenaris already had long-term contracts with their customers indicated to the USITC that Tenaris was not likely to increase its exports to the United States in the event of revocation. This is because these producers would not turn away their long-term customers for the sake of increasing their exports to the United States. The United States asserts, and the USITC's Final Determination states, that given the difference between the US and world market prices, the United States' being the world's largest OCTG market and casing

[139] USITC's Sunset Determination (Exhibit ARG-54 at 20).
[140] USITC's Sunset Determination (Exhibit ARG-54 at 21, footnote 128).

and tubing's being the highest valued pipe and tube product, the USITC was justified in concluding that Tenaris had a strong incentive to increase exports to the United States. We find it reasonable to conclude from these facts that Tenaris had an incentive to increase its exports to the United States should the measure be revoked. In our view, a determination that certain producers have an incentive to increase their exports towards a certain market is one that can be made on the basis of an analysis of various factors, such as the size of the target market, differences between prices and qualities and other costs associated with the shipment of the subject product. In the circumstances of the instant sunset review, we see no element in the USITC's Final Determination which would support the assertion that the USITC's determination on this matter was based on an improper establishment of facts or a biased or unobjective evaluation thereof.

Conclusion

7.298 In light of the above considerations, we conclude that Argentina has failed to prove that the USITC's determinations concerning the likely volume of dumped imports were WTO-inconsistent and therefore decline this aspect of Argentina's claim.

Likely price effects of dumped imports

7.299 The USITC's discussion of the issues relating to the likely price effect of dumped imports is found on pages 20 and 21 of its Final Determination. Here too, the USITC starts its analysis by citing the relevant findings in the original investigation. It then discusses the determinations made during the period of application of the order and mentions that price underselling continued over the life of the measure. The USITC then concludes:

> Given the likely significant volume of subject imports, the high level of substitutability between the subject imports and domestic like product, the importance of price in domestic purchasing decision, the volatile nature of U.S. demand, and the underselling by the subject imports in the original investigation and during the current review period, we find that in the absence of the orders, casing and tubing from Argentina, Italy, Japan, Korea and Mexico likely would compete on the basis of price in order to gain additional market share. We find that such price-based competition by subject imports likely would have significant depressing or suppressing effects on the prices of the domestic like product.[141] (footnote omitted)

7.300 Argentina argues that the USITC's findings regarding the likely price effects of dumped imports were not based on an objective examination of the evidence in the record. First, according to Argentina, the USITC's price underselling analysis was based on a limited set of comparisons.

7.301 We note the following part of the USITC's determination in this regard:

> While direct selling comparisons are limited because the subject producers had a limited presence in the U.S. market during the period of review, the few direct comparisons that can be made indicate that subject casing and tubing generally undersold the domestic like product especially in 1999 and 2000.[142] (footnote omitted)

7.302 Argentina does not dispute the fact that the USITC did carry out some sort of price comparison. According to Argentina, however, the base of this comparison was not adequate because of the limited number of comparisons involved.

[141] USITC's Sunset Determination (Exhibit ARG-54 at 21).
[142] USITC's Sunset Determination (Exhibit ARG-54 at 21).

7.303 In our view, a price comparison made as part of a sunset determination does not necessarily require a threshold in terms of the number of comparisons used. In fact, in sunset reviews, depending on the volume of imports following the imposition of the measure the number of such comparisons may inevitably be limited. It may even be impossible to do any comparison in cases where imports completely cease following the imposition. In this case, the USITC carried out a number of price comparisons as part of its price effect analysis. The USITC's determination explains that the reason for the limited number of price comparisons was the low volume of imports following the imposition of the measure at issue. Argentina does not dispute this fact. Argentina does not contend that the USITC, for instance, acted selectively in making these comparisons or that the methodology used was biased or otherwise improper. The simple fact that the number of price comparisons was limited does not make this aspect of the USITC's determination inconsistent with Article 11.3 of the Agreement. We therefore consider that under the circumstances of this case the USITC's calculations were adequate because the volume of export sales into the US market were limited in the period of application of the measure.

7.304 Argentina also argues that the USITC's determination that price was an important factor in the purchasing decisions in the US market was flawed because the documents in the record show that purchasers attached a similar importance to factors other than price. We note that the staff report that accompanied the USITC's determination in the instant sunset review demonstrates that purchasers in the US market ranked eight factors between 1.8 and 2.0 on a scale of importance from 0 to 2.0. Price, being one of such factors, was ranked 1.8.[143] In our view, the fact that other factors are also important does not diminish the importance of price in purchasing decisions. The USITC did not state that price was the only important factor, or even the most important factor; it just stated that it was an important factor.

7.305 In light of these circumstances, we do not consider that the USITC erred in relying on this fact in its determinations merely because of the fact that some other factors were also ranked similarly to price. This alone does not suffice to prove that the USITC's likely price effects analysis was not based on an objective examination of the evidence in the record, as Argentina asserts.

Conclusion

7.306 On the basis of the above, we are of the view that the USITC's determination regarding the likely price effect of dumped imports was based on an objective examination of the evidence in the record.

Likely impact of dumped imports on the US industry

7.307 Argentina argues that the USITC's determinations regarding the likely impact of future imports on the US industry were not based on an objective examination of the evidence in the record. According to Argentina, the USITC's flawed determination regarding the likely volume and price effects of dumped imports fatally affected its examination of the adverse impact of such imports on the US industry.

7.308 In the relevant part of its determination, the USITC once again commences its analysis by citing its relevant findings in the original investigation and continues with the findings made during the period of application of the measure. The USITC clearly finds that the state of the domestic industry as of the date of the sunset review at issue is positive. However, on the basis of its earlier findings regarding the likely volume of dumped imports and their likely price effects, it nevertheless concludes that these imports are likely to have an adverse impact on the US industry. The determination reads, in relevant parts:

[143] Staff Report Annexed to USITC's Sunset Determination (Exhibit ARG-54 at II-19).

> On balance, we find that the domestic industry's condition has improved since the orders went into effect as reflected in most indicators over the period reviewed, and we do not find the industry to be currently vulnerable.
>
> We find, however, as discussed above, that revocation of the orders likely would lead to a significant increase in the volume of subject imports which likely would undersell the domestic like product and significantly depress or suppress the domestic industry's prices. Moreover, in the original investigations, subject imports captured market share and caused price effects despite a significant increase in apparent consumption in 1993 and 1994 as compared to 1992. In these reviews, we find that a significant increase in subject imports is likely to have negative effects on both the price and volume of the domestic producers' shipments despite strong demand conditions in the near term. We find that these developments likely would have a significant adverse impact on the production, shipments, sales, market share, and revenues of the domestic industry. This reduction in the domestic industry's production, shipments, sales, market share, and revenues would result in erosion of the domestic industry's profitability as well as its ability to raise capital and make and maintain necessary capital investments.[144] (emphasis added)

7.309 Argentina contends that given the positive trends in the state of the domestic industry as of the date of the determination, the USITC should have made the opposite conclusion. According to Argentina, given the positive state of the US industry, the USITC must have made its conclusion on the basis of its findings in the original investigation.

7.310 We note that the USITC's determination references the USITC's findings in the original investigation as well as its determinations in the instant sunset review regarding the likely volume and prices effect of dumped imports and concludes that these developments would have a significant adverse impact on various aspects of the state of the US industry in the future. It is therefore not linked solely to the findings in the original investigation. Therefore, the issue here is whether, given its findings in the original investigation and those in the instant sunset review regarding the likely volume of dumped imports and their likely price effect, the USITC could conclude that the likely imports would have an adverse impact on the US industry.

7.311 In our view, the USITC did not act inconsistently with Article 11.3 of the Agreement in its determination regarding the likely impact of future dumped imports on the US industry. In this context, we recall our above analysis regarding the nature of the inquiry under Article 11.3 of the Agreement (*supra*, para. 7.211). Just as on the dumping side of sunset determinations, there is nothing in Article 11.3 that requires an investigating authority to follow a particular method in the likelihood of continuation or recurrence of injury determinations. As long as the investigating authority's determination is based on a sufficient factual basis and it reflects an objective examination of these facts, it will meet the requirements of Article 11.3. In this case, the USITC found that imports were likely to increase and to have a negative effect on the prices of the US industry in the event of revocation of the measure at issue. Then, the USITC found that this likely increase in imports and their likely price effect would have a negative impact on the US industry. In the circumstances of the case at hand, we find it proper to conclude that the likely increased volume and negative price effect of dumped imports would also have a negative impact on the state of the US industry. Further, in our view, the USITC's observations regarding the state of the US industry as of the date of the sunset review at issue do not preclude it from nevertheless finding that the US industry is likely to be affected by the increase in the volume and the negative effect of the prices of the likely dumped imports.

[144] USITC's Sunset Determination (Exhibit ARG-54 at 22-23).

Conclusion

7.312 On the basis of the above explanations, we find that under the circumstances of this sunset review, the USITC's determinations regarding the likely consequent impact of the likely dumped imports on the US industry was not inconsistent with Article 11.3 of the Agreement.

4. Alleged violation of Article 3.4 of the Agreement

(a) Arguments of parties

(i) Argentina

7.313 Argentina submits that in this sunset review the USITC violated Article 3.4 of the Agreement by failing to address some of the fifteen injury factors listed therein.

(ii) United States

7.314 Regarding Argentina's arguments under various paragraphs of Article 3, the United States generally argues that Article 3 does not apply to sunset reviews. The United States nevertheless submits that the violations alleged by Argentina with regard to Article 3.4 are groundless because the USITC's determinations demonstrate that it did not act inconsistently with these provisions.

(b) Arguments of third parties

(i) European Communities

7.315 The European Communities agrees with Argentina that the provisions of Article 3 of the Anti-Dumping Agreement apply *mutatis mutandis* in the context of sunset reviews. According to the European Communities, given the introductory wording of Article 3.1, the absence of an explicit cross-reference in Article 11.3 to Article 3 is irrelevant. The European Communities also agrees with Argentina that the required standard in sunset determinations is “likely”, not “possible”. According to the European Communities, in the instant sunset review the USITC did not apply the “likely” standard correctly.

(ii) Japan

7.316 Japan argues that the provisions of Article 3 apply to injury determinations in sunset reviews under Article 11.3. Therefore, the requirements of Articles 3.1, 3.2, 3.4 and 3.5 have to be fulfilled in such reviews.

(c) Evaluation and conclusion by the Panel

7.317 We note that Argentina's claim here is based solely on Article 3.4 of the Agreement. In line with our above analysis regarding the applicability of Article 3 to sunset reviews (*supra*, paras. 7.268-7.276), we decline Argentina's claim.

5. Alleged violation of Article 3.5 of the Agreement

(a) Arguments of parties

(i) Argentina

7.318 According to Argentina, the USITC failed to conduct the causal link analysis required under Article 3.5 of the Agreement because it failed to inquire whether there would be other factors that would also affect the domestic industry in the event of revocation of the anti-dumping duty.

(ii) United States

7.319 The United States generally argues that Article 3 does not apply to sunset reviews. The United States nevertheless submits that the violations alleged by Argentina with regard to Article 3.5 are groundless because the USITC's determinations demonstrate that it did not act inconsistently with these provisions.

(b) Arguments of third parties

(i) European Communities

7.320 The European Communities agrees with Argentina that the provisions of Article 3 of the Anti-Dumping Agreement apply *mutatis mutandis* in the context of sunset reviews. According to the European Communities, given the introductory wording of Article 3.1, the absence of an explicit cross-reference in Article 11.3 to Article 3 is irrelevant. The European Communities also agrees with Argentina that the required standard in sunset determinations is "likely", not "possible". According to the European Communities, in the instant sunset review, the USITC did not correctly apply the "likely" standard.

(ii) Japan

7.321 Japan argues that the provisions of Article 3 apply to injury determinations in sunset reviews under Article 11.3. Therefore, the requirements of Articles 3.1, 3.2, 3.4 and 3.5 have to be fulfilled in such reviews.

(c) Evaluation and conclusion by the Panel

7.322 We note that Argentina's claim here is based solely on Article 3.5 of the Agreement. In line with our above analysis regarding the applicability of Article 3 to sunset reviews (*supra*, paras. 7.268-7.276), we decline Argentina's claim.

6. Cumulation

(a) Arguments of parties

(i) Argentina

7.323 Argentina argues that the USITC's use of the cumulation methodology in its sunset determinations in the instant sunset review was inconsistent with Articles 11.3 and 3.3 of the Agreement. According to Argentina, Article 3.3 limits the use of cumulation to investigations. Therefore, investigating authorities can not use cumulation in sunset reviews. In the alternative, Argentina argues that if cumulation can be used in sunset reviews, then the conditions set forth in Article 3.3 regarding the use of cumulation must be fulfilled. In this case, since the USITC used cumulation without respecting these conditions, it acted inconsistently with Articles 11.3 and 3.3.

Argentina also submits that the low "possibility" standard used by the USITC in order to resort to cumulation also conflicted with the "likely" standard of Article 11.3. This is because in the absence of cumulation, the USITC would not be able to find likelihood of continuation or recurrence of injury with respect to Argentina. By using a low standard to resort to cumulation, the USITC also disregarded the more general "likely" standard of Article 11.3.

(ii) United States

7.324 The United States submits that there is no provision in the Agreement that prohibits the use of cumulation in sunset reviews. Therefore, WTO Members are generally free to use this methodology in such reviews. According to the United States, the texts of Articles 3.3 and 5.8 of the Agreement confirm that the numerical criteria set out in Article 3.3 of the Agreement regarding the use of cumulation are limited to investigations and do not extend to sunset reviews. Thus, the United States argues that the USITC did not act inconsistently with the Agreement by using cumulation in the instant sunset review without taking into consideration the requirements of Article 3.3.

(b) Evaluation by the Panel

7.325 Argentina asserts in the first place that cumulation can not be used at all in sunset reviews. In the alternative, Argentina submits that if the Agreement does not disallow the use of cumulation in sunset reviews, then the investigating authorities in sunset reviews have to take into account the requirements of Article 3.3 where they decide to use cumulation.

7.326 Argentina argues that according to Article 3.3 cumulation can only be used in investigations. Argentina bases its argument on the text of the Agreement and submits that there is no cross-reference either in Article 11 or in Article 3.3 that would allow the use of cumulation in sunset reviews. According to Argentina, the object and purpose of Article 11 or the other provisions of the Agreement can not support the view that cumulation can be used in sunset reviews either.

7.327 We note that Article 31.1 of the *Vienna Convention* provides that a treaty should be interpreted on the basis of its text, read in context and in the light of its object and purpose.[145] With that in mind, we turn once again to the text of Article 11.3, which provides:

> Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.[22] The duty may remain in force pending the outcome of such a review.
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>
> [22] When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9

[145] Article 31.1 of the *Vienna Convention on the Law of Treaties* ('*Vienna Convention*'), which is generally accepted as reflecting a customary rule of interpretation of public international law referred to in Article 3.2 of the *DSU*, reads as follows:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."
> (1969) 8 *International Legal Materials* 679.

> that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

7.328 The text of Article 11.3 does not mention whether cumulation can or can not be used in sunset reviews. Nor can one find any direct guidance on this matter in the other provisions of the Agreement. Unlike the cross-references in Articles 11.4 and 12.3 that make certain provisions of Articles 6 and 12, respectively, applicable in the context of sunset reviews, no such cross-reference can be found to shed light on the issue of whether or not cumulation can be used in sunset reviews.

7.329 Article 3.3 of the Agreement provides:

> Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

7.330 We note that Article 3.3 does not answer the question of whether cumulation is allowed generally throughout the Anti-Dumping Agreement. It sets forth certain conditions for the use of cumulation. Parties, however, disagree as to whether these conditions are limited to investigations, or whether they also apply to sunset reviews.

7.331 The first issue therefore is whether the lack of clear language specifically allowing the use of cumulation in sunset reviews means that it can not be used in such reviews. Put differently, the issue is whether Article 3.3 is an authorization for cumulation or whether it establishes conditions for the use of cumulation in investigations. If Article 3.3 were considered as authorizing cumulation, it might be concluded that it is only allowed under the circumstances described therein, i.e. it can not be used in sunset reviews. If, however, Article 3.3 were considered as a provision that establishes conditions for the use of cumulation in investigations, then it might be concluded that cumulation is generally permitted, including in sunset reviews, but is subject to certain restraints in investigations, as set out in Article 3.3. In this case, cumulation in sunset reviews would not be inconsistent with the Agreement.

7.332 We interpret the lack of a clear provision in the Agreement as to whether cumulation is generally allowed to mean that cumulation is permitted in sunset reviews.

7.333 We note, in addition, that all paragraphs of Article 3 of the Agreement, except paragraph 3, contain the term "dumped imports".[146] The same term can also be found in other instances such as in Articles 4.1, 5.2, 5.8, 8.5, 10.2 and 10.6 of the Agreement. In our view, the use of "dumped imports" without any specification of the country in which these imports originate, such as "dumped imports originating in an exporting country" or a similar limiting language, suggests that the drafters foresaw that the investigating authorities would generally base their injury determinations on dumped imports from all countries subject to the investigation. It follows that the Agreement generally allows the use of cumulation and that Article 3.3 is not an authorization for cumulation. Rather, it sets out the conditions that must be fulfilled when cumulation is used in investigations.

[146] Paragraph 3 of Article 3 contains the phrase "imports of a product from more than one country". In our view, the reason why Article 3.3, unlike other paragraphs of Article 3, does not mention "dumped imports" is because it is designed to set out what needs to be done before cumulation can be used in investigations. It is therefore bound to mention imports from more than one country.

7.334 Argentina argues that the use of the word "duty" in the singular, as opposed to the plural, in Articles 11.1 and 11.3 indicates the drafters' intention not to allow cumulation in sunset reviews.[147] Argentina has not, however, specified precisely why the use of "duty" in the singular had to be interpreted as precluding cumulation in sunset reviews. We understand Argentina to argue that had drafters intended to allow cumulation in sunset reviews, they would have used the word "duties" instead of "duty". We find it difficult to agree with a view that attempts to derive such a far-reaching substantive meaning from the use of a word in the singular rather than the plural, or *vice versa*. We note, for instance, that the title of Article 11 contains the word "duties" and not "duty". This, in our view, further indicates that the drafters did not intend to convey their message as to the use of cumulation in sunset reviews by the use of the word "duty" in the singular or the plural. Had they had such an intention they would have done it clearly. We therefore decline to accept Argentina's argument in this regard.

7.335 Having concluded that cumulation is generally allowed throughout the Agreement, including sunset reviews, the next issue we have to address is whether the conditions for the use of cumulation set out in Article 3.3 also apply to sunset reviews. Argentina contends that if the Panel finds that cumulation is allowed in sunset reviews, then it should also find that the conditions of Article 3.3 regarding the use of cumulation apply to sunset reviews. We disagree.

7.336 We note that paragraph 3 of Article 3 is the only paragraph that contains the word "investigation" under Article 3. In our view, therefore, by its own terms Article 3.3 limits its scope of application to investigations. In this respect, we note that this particular issue was also raised in *US – Corrosion-Resistant Steel Sunset Review* and that panel opined:

> As stated above, even if the provisions of Article 3, including the definition of injury in footnote 9, are generally applicable throughout the *Anti-Dumping Agreement*, paragraph 3 of Article 3 is exceptional, in that it alone explicitly refers to the term "investigations". Nowhere else in the text of any other paragraph of Article 3 is the word "investigation" mentioned. Therefore we are of the view that Article 3.3, by its own terms, is limited in application to investigations and does not apply to sunset reviews. It follows that the cross-reference in Article 3.3 to the negligibility standard in Article 5.8 does not apply to sunset reviews.[148]

We agree with this view, and therefore find that the conditions set forth in Article 3.3 do not apply in sunset reviews.

7.337 Finally, we note Argentina's argument that the low standard applied by the USITC in its recourse to cumulation in this sunset review also conflicted with the "likely" standard of Article 11.3. We note that Argentina challenged the standard applied by the USITC in the instant sunset review as a separate claim under which it raised detailed arguments. In our view, therefore, it is not proper to interpret Article 3.3 of the Agreement in a manner that would create extra substantive obligations for investigating authorities in terms of the standard they apply in their substantive determinations in sunset reviews.

(i) Conclusion

7.338 We therefore reject Argentina's claim that the USITC acted inconsistently with Articles 3.3 and 11.3 of the Agreement in its use of cumulation in the instant sunset review.

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[147] First Written Submission of Argentina, para. 282; Second Written Submission of Argentina, para. 189.

[148] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 121, para. 7.102.

F. CONSEQUENTIAL CLAIMS UNDER THE ANTI-DUMPING AGREEMENT, THE WTO AGREEMENT AND THE GATT

1. Arguments of Parties

(a) Argentina

7.339 Argentina submits that US law as such and as applied in this sunset review also violated Articles 1, 18.1 and 18.4 of the Anti-Dumping Agreement, Article XVI:4 of the WTO Agreement and Article VI of the GATT 1994.

7.340 Argentina is submitting these claims as consequential claims. In other words, in Argentina's view, any violation of the Agreement would also lead to the violation of one or more of these provisions.[149]

(b) United States

7.341 The United States argues that since the measures identified by Argentina with regard to its substantive claims are not WTO-inconsistent, there may be no consequential violations of the kind alleged by Argentina.

2. Evaluation and conclusion by the Panel

7.342 We note that the only basis for Argentina's consequential claims flows out of a violation with regard to Argentina's substantive claims raised in these proceedings. Therefore, addressing these consequential claims will provide no further guidance in terms of the implementation of our findings. We therefore exercise judicial economy with respect to Argentina's consequential claims and do not make any ruling on them.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 In conclusion, we find that:

(a) In respect of waiver provisions of US law:

(i) The provisions of Section 751(c)(4)(B) of the Tariff Act relating to affirmative waivers are inconsistent with the investigating authorities' obligation to determine likelihood of continuation or recurrence of dumping under Article 11.3 of the Anti-Dumping Agreement,

(ii) The provisions of Section 351.218(d)(2)(iii) of the USDOC's Regulations relating to deemed waivers are inconsistent with the investigating authorities' obligation to determine likelihood of continuation or recurrence of dumping under Article 11.3 of the Anti-Dumping Agreement,

(iii) The provisions of Section 351.218(d)(2)(iii) of the USDOC's Regulations relating to deemed waivers are inconsistent with Articles 6.1 and 6.2 of the Anti-Dumping Agreement,

(b) In respect of the alleged irrefutable presumption of likelihood under US law, the provisions of Section II.A.3 of the SPB are as such inconsistent with the investigating

[149] We note that the title of Section V in which Argentina presented these claims in its second written submission reads "Consequential Violations Under Article VI of the GATT 1994, Articles 1 and 18 of the Antidumping Agreement, and Article XVI:4 of the WTO Agreement".

authorities' obligation to determine likelihood of continuation or recurrence of dumping under Article 11.3 of the Agreement,

(c) In respect of US law's standard for the likelihood of continuation or recurrence of injury determinations in sunset reviews, Sections 752(a)(1) and (5) of the Tariff Act are not inconsistent with Article 11.3 of the Anti-Dumping Agreement,

(d) In respect of the USDOC's determinations in the OCTG sunset review:

(i) The USDOC acted inconsistently with Articles 11.3 and 6.2 of the Anti-Dumping Agreement,

(ii) The USDOC did not act inconsistently with Articles 12, 6.1, 6.8 and Annex II of the Anti-Dumping Agreement,

(e) In respect of the USITC's determinations in the OCTG sunset review:

(i) The USITC did not act inconsistently with Article 11.3 of the Anti-Dumping Agreement in its application of Sections 752(a)(1) and (5) of the Tariff Act,

(ii) The USITC did not act inconsistently with Article 11.3 of the Anti-Dumping Agreement in respect of its determinations relating to the likely volume of dumped imports, their likely price effect and their likely impact on the US domestic industry,

(iii) The USITC did not act inconsistently with Articles 11.3 and 3.3 of the Anti-Dumping Agreement in its use of cumulation.

8.2 Under Article 3.8 of the *DSU*, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that, to the extent the United States has acted inconsistently with the provisions of the Anti-Dumping Agreement, it has nullified or impaired benefits accruing to Argentina under that agreement. We therefore recommend that the Dispute Settlement Body request the United States to bring its measures mentioned in paragraph 8.1(a)(i), (ii), (iii), 8.1(b) and 8.1(d)(i) above into conformity with its obligations under the WTO Agreement.

8.3 Argentina requests that the Panel suggest that the United States bring its measures into conformity with its WTO obligations by revoking the anti-dumping order and repealing or amending the laws and regulations at issue.

8.4 The United States has not made a specific argument regarding this claim of Argentina. The United States requests the Panel to reject Argentina's claims in their totality.

8.5 We note that Article 19.1 of the *DSU* states that WTO panels may suggest ways the Member concerned could implement their recommendations.[150] In the circumstances of the present proceedings, however, we see no particular reason to make such a suggestion and therefore decline Argentina's request.

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[150] Article 19.1 of the *DSU* reads:
Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations. (footnotes omitted).

ANNEX A

FIRST WRITTEN SUBMISSIONS BY THE PARTIES

[1] Argentina confirmed, by its letter dated 12 December 2003, that all references made to Exhibit ARG-56 in Argentina's first written submission, must now be understood as being made to Exhibit ARG-56 *bis*.

ANNEX A-1

FIRST WRITTEN SUBMISSION OF ARGENTINA

15 October 2003

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I. INTRODUCTION

A. ANTI-DUMPING DUTIES CANNOT EXIST IN PERPETUITY

1. This dispute raises an issue of fundamental importance to the integrity of the multilateral trading system: whether WTO Members must respect agreed WTO disciplines regarding the use of anti-dumping measures.

2. During the Uruguay Round, the drafters of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") agreed on rules that struck a carefully calibrated balance between Members' rights and obligations concerning anti-dumping measures. Members recognized the right of importing countries to use anti-dumping measures in order to counteract injurious dumping. At the same time, they established rules to prevent the abuse of anti-dumping measures. Members set out clear rules governing the imposition, maintenance, and termination of anti-dumping duties. Indeed, this careful balance was a key element of the overall package of rights and obligations accepted by Argentina, the United States, and other WTO Members at the conclusion of the Round.

3. Among the most important disciplines regarding anti-dumping measures are those set out in Article 11 of the Anti-Dumping Agreement. Article 11.1 requires that anti-dumping orders must be limited in three significant respects: duration ("only as long as necessary"); magnitude ("only to the extent necessary"); and purpose ("to counteract dumping which is causing injury").

4. As one panel recently noted, Article 11.1 "contains a general, unambiguous and mandatory requirement that anti-dumping duties 'shall remain in force only as long as and to the extent necessary' to counteract injurious dumping." The panel added that Article 11.1 states "a general and overarching principle, the modalities of which are set forth in paragraphs 2 and 3."[1] This general principle is expressed substantively throughout Article 11, including in the "sunset review" provisions of Article 11.3.

5. The general obligation set forth in Article 11.3 – that anti-dumping measures shall be terminated after five years – established a clear temporal limitation on the use of anti-dumping duties. Thus, the drafters of the Uruguay Round agreements accepted that anti-dumping measures could not exist in perpetuity but rather would be subject to strict time limitations unless specified requirements could be satisfied to permit their continued maintenance. Specifically, Article 11.3 requires that the authorities conduct a review and make a determination of whether termination of an anti-dumping measure would be likely to lead to continuation or recurrence of dumping and injury. Any findings of likely dumping and likely injury must be based on positive evidence.

6. Indeed, the Appellate Body made clear that "[i]f [a WTO Member] does not conduct a sunset review, or, having conducted such a review, it does not make such a positive determination, the duties must be terminated."[2]

7. The United States has failed to respect these binding WTO disciplines on the application and maintenance of anti-dumping measures. In general terms:

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[1] Panel Report, *European Communities – Anti-Dumping duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, para. 7.113 ("*Pipe Fittings from Brazil*").

[2] Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, adopted 19 December 2002, para. 63 ("*Steel from Germany*").

- The United States has not adequately implemented the Article 11.3 disciplines into US law, regulations, procedures, and practices.

- In the conduct of the "sunset review" of the anti-dumping measure on Oil Country Tubular Goods ("OCTG") from Argentina, the United States acted inconsistently with mandatory preconditions for continuing the measure.

8. The Appellate Body recently adopted a strict construction of the sunset review provisions of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), in part because of its stated wish not to contravene "the requirements of Article 3.2, repeated in Article 19.2 of the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), that our findings and recommendations 'cannot add to or diminish the rights and obligations provided in the covered agreements'."[3] It is important to stress that Article 3.2 of the DSU has two, equally important components: rights and obligations. A primary right of Argentina under Article 11.3 of the Anti-Dumping Agreement was to have the duties on OCTG terminated after five years. Concomitantly, a primary obligation of the United States under the same provision was to terminate the duties on OCTG from Argentina after five years. The United States could rely on the exception to the primary obligation in Article 11.3 – continuation of the anti-dumping measure – only with strict compliance with the requirements under Article 11.3 to conduct a "review" and make a "determination" based on "evidence" that "dumping" and "injury" would be "likely" to continue or recur. As will be argued in this submission, the United States failed to satisfy the requirements for continuing the measure, thereby infringing Argentina's rights.

9. If the system of dispute resolution under the DSU leads to interpretations of provisions of the Anti-Dumping Agreements that fail to give terms their common meaning, the system will fail to preserve the careful balance of rights and obligations agreed by the Members. In this case, the principal obligation/right created by Article 11.3 – termination of anti-dumping measures after five years – must not be diminished. Otherwise, the limited exception for maintaining an anti-dumping measure will supersede the principal obligation of Article 11.3. Failure to give the terms of Article 11.3 their common meaning would undermine the principle of effective treaty interpretation recognized under the DSU and expressed by the Appellate Body in *United States – Gasoline*.[4]

10. Reduced to its core, Argentina's position is that the United States must respect the limits on the use and maintenance of anti-dumping measures, as well as the right of WTO Members to have anti-dumping duties terminated and not exist in perpetuity.

B. HISTORY OF US TRADE REMEDY PROCEEDINGS AGAINST ARGENTINE OCTG

11. The Argentine OCTG producer and exporter, Siderca S.A.I.C. ("Siderca"), has had a long experience with US trade remedy laws. This long experience provides important context for evaluating the decision by the US Government to continue the anti-dumping measure on OCTG from Argentina. Siderca's experience can be summarized as follows:

12. 1984: In 1984, the US industry filed anti-dumping and countervailing duty petitions against OCTG imports, including those from Argentina/Siderca. The anti-dumping investigation ended in a finding of no injury.[5] At that time, US law imposed certain requirements on the practice of cumulation, and the imports were not analyzed on a cumulative basis. The negative injury

[3] *Id.* at para. 91.

[4] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, at 16-17, 23 ("*United States – Gasoline*").

[5] *Oil Country Tubular Goods from Argentina and Spain*, 50 Fed. Reg. 21,147 (Int'l Trade Comm'n 1985)(final injury determ.)(ARG-19).

determination, therefore, ended the investigation without the issuance of an anti-dumping order. However, because of transition provisions of US law implementing the Tokyo Round Agreement on Subsidies and Countervailing Measures, the United States did not extend an injury determination to Argentina for the purposes of countervailing duty investigations. The US Department of Commerce (the "Department") determined that Siderca enjoyed a subsidy equal to 0.90 per cent, slightly above the *de minimis* level provided for under US law at the time (0.5 percent). Because the United States did not extend the injury test to Argentina, the Department imposed a countervailing duty ("CVD") order in the amount of 0.90 per cent on exports from Siderca.[6]

13. 1985: After a change in US law regarding the cumulation provision, the US OCTG industry re-filed the anti-dumping case that it had lost six months earlier. This prompted another full investigation of imports from producers in several countries, including Siderca. Siderca again participated fully in the investigation, and this time the Department issued a decision of no dumping.[7] Accordingly, this second attempt by the US industry to have an anti-dumping order cover Siderca's exports also failed.

14. 1986-1994: During this period, the Department conducted eight, separate CVD reviews of the initial 0.90 per cent CVD order issued in 1984.[8] Each year, Siderca and the Government of Argentina fully complied with the investigation. In nearly every year, the Department concluded that there was no subsidy. In one year, the Department recalculated a subsidy of 0.83 per cent, again slightly above the 0.5 *de minimis* level.[9] Despite these no or extremely small subsidy findings, Siderca and the Argentine Government were forced to participate in these reviews year after year, expending significant resources, both internal and external. Most importantly, because of the US system of retrospective assessment, Siderca and the importers had to accept the commercial risk that the duties might be increased retroactively at any time due to administrative decisions in the CVD reviews. In 1997, this process of continuous annual reviews finally ended when the US Government recognized that it lacked the legal authority, retroactive to 1991, to continue collecting countervailing duties under orders imposed without conducting an injury test. Therefore, the US Government revoked the countervailing duty order applicable to Argentine OCTG, ending the decade-old CVD case.[10]

15. 1995: The US industry filed two, simultaneous new dumping cases involving Siderca, one against OCTG (the one under consideration in this proceeding) and the other against small-diameter seamless pipe. Siderca was not able to defend both cases simultaneously, and was forced to make a business judgment about which case was more significant commercially. Therefore, Siderca notified

[6] *Oil Country Tubular Goods from Argentina*, 49 Fed. Reg. 46,564 (Dep't Comm. 1984)(final countervailing determ.)(ARG-18).

[7] *Oil Country Tubular Goods from Argentina*, 51 Fed. Reg. 20,240 (Dep't Comm. 1986)(final anti-dumping determ.)(ARG-20).

[8] *Oil Country Tubular Goods from Argentina*, 52 Fed. Reg. 846 (Dep't Comm. 1987)(final countervailing admin. review for the period 1985)(ARG-21); *Oil Country Tubular Goods from Argentina*, 56 Fed. Reg. 38,116 (Dep't Comm. 1991)(final countervailing admin. reviews for the periods 1987 and 1988)(ARG-22); *Oil Country Tubular Goods from Argentina*, 56 Fed. Reg. 64,493 (Dep't Comm. 1991)(final countervailing admin. review for the period 1989) (ARG-23); *Oil Country Tubular Goods from Argentina*, 62 Fed. Reg. 55,589 (Dep't Comm. 1997)(final countervailing admin. review for the period 1991)(ARG-33); *Oil Country Tubular Goods from Argentina*, 62 Fed. Reg. 24,639 (Dep't Comm. 1997)(final countervailing admin. reviews and termination of admin. reviews)(ARG-30).

[9] *Oil Country Tubular Goods from Argentina*, 56 Fed. Reg. 38,116 (Dep't Comm. 1991)(final countervailing admin. reviews)(recalculating a subsidy of 0.93 per cent for the period 1988)(ARG-22).

[10] *Oil Country Tubular Goods from Argentina*, 62 Fed. Reg. 41,361 (Dep't Comm. 1997)(revocation of countervailing duty order)(ARG-31).

the Department that it was not able to defend the small-diameter seamless pipe case and, as a result, the Department issued a punitive anti-dumping order in the amount of 108.13 per cent.[11]

16. In the OCTG case, Siderca defended itself in the anti-dumping investigation as it had done in 1984 and 1985, and as it had done in the eight countervailing duty reviews. The Department issued a negative preliminary determination; that is, it found that Siderca was not dumping OCTG in the United States.[12] This was consistent with the previous determination that Siderca was not engaging in price discrimination. However, in the final determination, the Department made an affirmative finding of dumping, calculating an anti-dumping margin of 1.36 per cent, slightly above the 0.5 per cent *de minimis* level in effect at that time.[13] There was no substantive change in information that led to the affirmative final determination compared to the negative preliminary determination. Instead, the Department made a small adjustment in its analysis of third-country sales, raising the price of those sales by approximately 6 per cent, which then artificially caused a small dumping margin on certain of Siderca's sales.[14] The effect of this adjustment was to cause small dumping margins on certain of the sales. Combined with the US practice of zeroing out the negative dumping margins, this small amount of dumping caused by the adjustment was sufficient to raise the overall anti-dumping margin above the *de minimis* level, specifically to 1.36 per cent. Ironically, the differential on which the US authorities based the adjustment was the direct result of Siderca's efforts to abide by the US countervailing duty law.

17. This is the context leading up to the sunset determination under review by this panel. It is a context that shows near constant pressure by the US industry on Argentine OCTG exports, a near constant need for the Argentine industry and Government to defend itself in the US proceedings, a long demonstrated history of fair trading by Siderca, and more than a decade of investigation by the Department of the OCTG industry. During this entire period, there were two negative determinations of dumping, several no subsidy findings, with the only affirmative subsidy findings not exceeding one per cent, and a small anti-dumping margin of 1.36 per cent that was issued on controversial grounds resulting from Siderca's effort to abide by US law. Throughout this period, Siderca had to participate, and participated fully, in three anti-dumping investigations, one CVD investigation, several CVD administrative reviews, and four anti-dumping administrative reviews[15] for the purpose of proving that it did not ship to the United States.

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[11] *Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Argentina*, 60 Fed. Reg. 31,953 (Dep't Comm. 1995)(final anti-dumping determ.)(ARG-25).

[12] *Oil Country Tubular Goods from Argentina*, 60 Fed. Reg. 13,119 (Dep't Comm. 1995)(amended prelim. anti-dumping determ.)(ARG-24).

[13] *Oil Country Tubular Goods from Argentina*, 60 Fed. Reg. 33,539 (Dep't Comm. 1995)(final anti-dumping determ.)(ARG-26); *Oil Country Tubular Goods from Argentina*, 60 Fed. Reg. 41,055 (Dep't Comm. 1995)(anti-dumping duty order)(ARG-27).

[14]The adjustment arose from a differential rebate level in the two relevant export markets (the United States and China). At that time, the Argentine Government administered a program to rebate indirect taxes incurred during the production and sales process. This practice was then, and continues to be, a legitimate fiscal program under certain conditions. The level of rebate applicable to Siderca's exports was 15 per cent. However, because Siderca was subject to constant CVD reviews in the United States, and because of the uncertainty of the retrospective review system, the Argentine Government agreed to reduce the level of export rebates on shipments to the United States by 6.7 per cent. At the final stage of the anti-dumping investigation, the Department made a "circumstance of sale" adjustment equal to the amount of the difference between the rebates received on exports to the two markets.

[15] *Oil Country Tubular Goods from Argentina*, 62 Fed. Reg. 18,747 (Dep't Comm. 1997)(rescinded admin. review)(ARG-29); *Oil Country Tubular Goods from Argentina*, 63 Fed. Reg. 49,089 (Dep't Comm. 1998)(rescinded anti-dumping admin. review)(ARG-36); *Oil Country Tubular Goods from Argentina*, 64 Fed. Reg. 4,069 (Dep't Comm. 1999)(rescinded anti-dumping admin. review)(ARG-38); *Oil Country Tubular Goods from Argentina*, 65 Fed. Reg. 8,948 (Dep't Comm. 2000)(rescinded anti-dumping admin. review)(ARG-43).

II. FACTUAL BACKGROUND

A. THE ANTI-DUMPING INVESTIGATION GIVING RISE TO THE ANTI-DUMPING DUTY ORDER ON ARGENTINE OCTG

18. The anti-dumping investigation giving rise to the US anti-dumping measure against Argentine OCTG began in 1994 and was completed in 1995. The investigation was initiated prior to the entry into force of the WTO Agreement, but the measure was issued eight months after the entry into force of the WTO Agreement (August 1995). As such, under US law, the investigation was governed by the pre-WTO laws and regulations.

19. The US industry's petition in the original investigation identified Siderca as the only producer and exporter of OCTG from Argentina. The Department justified the initiation of an investigation of Argentine OCTG based on the information related to Siderca that the petitioners provided in the petition. Siderca was the only Argentine producer and exporter considered to be a mandatory respondent for the investigation, and was the only party to which the Department issued a questionnaire. The Department conducted a full investigation of Siderca and calculated a dumping margin of 1.36 per cent for Siderca.[16] Even though this amount was below the 2 per cent *de minimis* level established in Article 5.8 of the WTO Agreement, the investigation was governed by pre-WTO legislation, which established a *de minimis* level of 0.5 per cent. Therefore, the 1.36 per cent dumping margin was considered sufficient to justify the issuance of an anti-dumping duty order.

20. Under the US retrospective system of assessing anti-dumping duties, the dumping margin calculated in the original investigation serves as a deposit rate for future imports. Final assessment then occurs after the opportunity for an administrative review of any imports, the deposit rate is adjusted to reflect the results of any review, and definitive duties are assessed in the amount established in the review.

21. Following the imposition of the US anti-dumping measure on Argentine OCTG, Siderca chose to stop exporting to the US market because of the difficulties and uncertainty presented by the US system of administrative reviews and the retrospective system of assessment of duties. This was demonstrated through a series of annual reviews initiated by the Department. Each August from 1996-1999 (covering the five-year period relevant to the sunset review that forms the basis of this dispute), representatives of the US industry requested an annual review of shipments by Siderca. Under US law and practice, the petitioners are required to identify the exporter for which it requests a review, and each time during this period, the US industry requested a review only of Siderca. For example, the US industry's letter requesting the second review states: "Review is requested of Siderca because it is the only known producer of oil country tubular goods in Argentina . . . ."[17] As a result of such requests, the Department initiated a review in each of the four years following the issuance of the anti-dumping order on OCTG from Argentina, publishing an "initiation notice" naming Siderca as the exporter to be reviewed. In certain of the reviews, the Department also issued an anti-dumping questionnaire.[18]

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[16] *Oil Country Tubular Goods from Argentina*, 60 Fed. Reg. 33,539 (Dep't Comm. 1995)(final anti-dumping determ.)(ARG-26).

[17] Letter from Schagrin Associates to the Honourable William M. Daley of 29 August 1997 ("Oil Country Tubular Goods from Argentina: Request for Administrative Review") at 2 (ARG-58).

[18] *Initiation of Anti-Dumping and Countervailing Duty Reviews*, 61 Fed. Reg. 48,882 (Dep't Comm. 1996)(initiating review for the period 11 August 1995, through 31 July 1996)(ARG-28); *Initiation of Anti-Dumping and Countervailing Duty Reviews*, 62 Fed. Reg. 50,292 (Dep't Comm. 1997)(initiating review for the period 1 August 1996, through 31 July 1997)(ARG-32); *Initiation of Anti-Dumping and Countervailing Duty Reviews*, 63 Fed. Reg. 51,893 (Dep't Comm. 1998)(initiating review for the period 1 August 1997, through 31 July 1998)(ARG-37); *Initiation of Anti-Dumping and Countervailing Duty Reviews*, 64 Fed. Reg. 53,318 (Dep't Comm. 1999)(initiating review for the period 1 August 1998, through 31 July 1999)(ARG-41).

22. In each of the four reviews requested of Siderca, Siderca replied by stating that it did not export OCTG to the United States for consumption in the United States during the review period, and as a result asked that the review be rescinded. In all cases, this "no shipment certification" led to additional questions from the Department and additional comments from the US industry. In all cases, the Department ultimately agreed with Siderca's certification that it made no shipments and therefore rescinded the annual reviews because there were no shipments to review.

B. SUNSET REVIEW OF OCTG FROM ARGENTINA

23. On 3 July 2000, the Department automatically initiated a sunset review of the anti-dumping duty order on OCTG from Argentina, in addition to the sunset reviews of OCTG from Italy, Japan, Korea, and Mexico.[19] The Petitioners responded to the initiation notice and filed substantive responses as well as briefs arguing that revocation of the order would be likely to lead to recurrence or continuation of dumping, and that the anti-dumping duty order should be continued.[20]

24. Siderca also responded to the initiation notice and filed a complete substantive response arguing that revocation of the order would not be likely to lead to continuation or recurrence of dumping and that the Department should therefore revoke the order on OCTG from Argentina.[21] Siderca was the only Argentine OCTG producer/exporter investigated by the Department in the original anti-dumping investigation in 1994-95. In addition, Siderca was the only Argentine producer/exporter for which annual reviews were requested for the years ending July 1996, 1997, 1998, and 1999, and conducted during the five-year period relevant to sunset proceedings conducted by the Department and the US International Trade Commission (the "Commission").

25. Siderca's substantive response satisfied all of the requirements set forth in 19 C.F.R. §§ 351.218(d)(3)(ii)(A)-(I) and 19 C.F.R. §§ 351.218(d)(3)(iii)(A)-(E) necessary for the submission to be "complete." In its response, Siderca stated that it did not export OCTG to the United States during the five-year period examined in the sunset review. Siderca also stated that, consequently, there was no finding of dumping other than the 1.36 per cent dumping margin calculated in the original investigation.[22] However, on 22 August 2000, the Department determined that Siderca's otherwise complete substantive response to the Department's notice of initiation of the sunset review was "inadequate" solely on the following basis:

> During the five-year period from 1995 to 1999, the combined-average annual percentage of Siderca's exports of OCTG to the United States with respect to the total exports of the subject merchandise to the United States was significantly below 50 per cent. Because the respondent accounts for significantly less than the 50 per cent threshold that the Department normally will consider to be an adequate foreign response (as provided in section 351.218(e)(1)(ii)(A)), we recommend that you determine Siderca's response to be inadequate and that we should conduct an

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[19] *See Notice of Initiation of Five-Year ("Sunset") Reviews*, 65 Fed. Reg. 41,053 (Dep't Comm. 2000) (ARG-44). The ITC also initiated its sunset review on 3 July 2000. *Oil Country Tubular Goods From Argentina, Italy, Japan, Korea, and Mexico*, 65 Fed. Reg. 41,088 (Int'l Trade Comm'n 2000)(notice of institution of sunset reviews)(ARG-45).

[20] *Issues and Decision Memorandum for the Sunset Reviews of the AD Orders on Oil Country Tubular Goods from Argentina, Italy, Japan, and Korea* (Dep't Comm., 31 October 2000)(final results) at 3-4 (ARG-51).

[21] *See* Substantive Response of Siderca to the Department's Initiation of Sunset Review of the AD Order on OCTG from Argentina (2 August 2000)(ARG-57).

[22] *Oil Country Tubular Goods from Argentina*, 60 Fed. Reg. 33,539 (Dep't Comm. 1995)(final anti-dumping determ.)(ARG-26).

> expedited (120 day) sunset review (as provided for at section 751(c)(3)(B) of the Act and at section 351.218(e)(1)(ii)(C) of the Department's regulations).[23]

26. In its *Issues and Decision Memorandum*, dated 31 October 2000 (and incorporated by reference into the Department's Sunset Determination), the Department stated:

> Although the Department received a substantive response on behalf of Siderca, the Department explained in its 22 August 2000 adequacy determination that because, during the period 1995 to 1999, the average annual share of Siderca's exports of the subject merchandise vis-a-vis the total Argentine exports of the subject merchandise during the same period was significantly below the fifty-per cent threshold provided for in section 351.218(e)(1)(ii)(A) of the Sunset Regulations, the Department determined Siderca's substantive response to be inadequate.[24]

27. Based on its determination that Siderca's response was inadequate, the Department stated "[i]n the instant reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation."[25]

28. In its 7 November 2000 Final Determination in the sunset review (which incorporates the Department's *Issues and Decision Memorandum*), the Department stated that revocation of the anti-dumping duty on OCTG from Argentina would be likely to lead to continuation or recurrence of dumping. The Department stated that the margin of likely dumping was 1.36 per cent, the same rate as in the original investigation. The Department then reported this rate to the Commission as the likely dumping margin to prevail in the event of termination. [26]

29. In the Commission's Sunset Determination,[27] the Commission conducted a cumulative injury analysis. The Commission also distinguished its sunset findings on the basis of the type of OCTG products under review.

30. With regard to casing and tubing, the Commission found that there was no likelihood that subject imports of casing and tubing from Argentina, Italy, Japan, Korea, and Mexico would have no discernible adverse impact on the domestic industry if the orders were revoked.[28] It based its determination on the following factors: (1) despite declines in imports since imposition of the order, producers in each of the subject countries continued to export to the United States, and had retained

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[23] *Oil Country Tubular Goods from Argentina: Adequacy of Respondent Interested Party Response to the Notice of Initiation*, A-357-810 (Dep't Comm., 22 August 2000) at 2 (ARG-50).

[24] *Issues and Decision Memorandum for the Sunset Reviews of the AD Orders on Oil Country Tubular Goods from Argentina, Italy, Japan, and Korea* (Dep't Comm., 31 October 2000)(final results) at 3 ("*Issues and Decision Memorandum*") (ARG-51).

[25] *Id.* at 5.

[26] *Oil Country Tubular Goods from Argentina, Italy, Japan, and Korea*, 65 Fed. Reg. 66,701 (Dep't Comm. 2002)(final results sunset review)(ARG-46).

[27] *Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico*, USITC Pub. 3434, Inv. Nos. 701-TA-364, 731-TA-711, and 713-716 (June 2001) ("Commission's Sunset Determination") (ARG-54).

[28] In determining whether imports compete with each other and with the domestic like product, the Commission considers the following factors: (1) the degree of fungibility between the imports from different countries and between imports and the domestic like product; (2) the presence of sales or offers to sell in the same geographical markets of imports from different countries and the domestic like product; (3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product; and (4) whether the imports are simultaneously present in the market. *See, e.g., Wieland Werke, AG v. United States*, 718 F. Supp. 50, 52 (CIT 1989)(ARG-9).

active channels of distribution in the United States; (2) the importance of price considerations to purchasers, along with other prevailing conditions of competition, and (3) the fact that foreign producers produced other tubular products on the same machinery used to produce casing and tubing and thus could easily shift production between the subject merchandise and other products.[29]

31. The Commission also found a likelihood of a reasonable overlap of competition among imports from the subject countries. First, it determined that the subject imports and the domestic like product were fungible, in that they were made to the same specifications, including relevant API certification requirements.[30] It based this conclusion on questionnaire responses from US producers, importers, and purchasers.

32. Second, it found that the subject imports and the domestic like product were sold through similar channels of distribution, particularly to steel distributors.[31] In this regard, it discounted evidence presented by Siderca that much of their production was sold to end-users, stating that, notwithstanding this fact, the majority of subject imports were still sold to distributors.

33. Third, the Commission found that sales of subject imports and the domestic like product occurred in the same geographic market.[32] It noted that both US distributors and importers reported selling on a nationwide basis, and that sales of both imports and domestic casing and tubing were concentrated in Texas and the Gulf region.

34. Finally, the Commission noted that subject casing and tubing imports and domestic casing and tubing were simultaneously present in the market in each year during the investigation period (1992-94), and there was no information on the record of the reviews that indicated that this situation would change if the orders were to be revoked.[33]

35. With respect to the likelihood analysis, the Commission considered the likely volume, the likely price effects, and the likely impact on the domestic industry. With regard to the volume of subject imports, the Commission concluded: "[W]e find that the volume of subject imports is likely to increase significantly in the event of revocation."[34] The Commission made several findings in order to buttress this conclusion. First, the Commission pointed to the existence of "substantial" available capacity in the subject countries and concluded that, notwithstanding high capacity utilization rates in those countries, "the record indicates that these producers have incentives to devote more of their productive capacity to producing and shipping more casing and tubing to the US market." [35] In this respect, the Commission found that producers in the subject countries were "export-oriented," and that in particular, those producers would focus on the US market.[36] The Commission emphasized that the "Tenaris alliance,"[37] with its global focus, would likely have a strong incentive to have a significant presence in the US market.[38] Further, the Commission found

[29] *Commission's Sunset Determination*) at 10-11 (citing Staff Report at II-17, attached) (ARG-54).
[30] *Id.* at 12 (citing Staff Report at I-18, II-17, attached).
[31] *Id.* at 13 (citing Staff Report at I-20, II-1-II-3, attached).
[32] *Id.* (citing *Oil Country Tubular Goods from Argentina, Austria, Italy, Japan, Korea, Mexico, and Spain*, USITC Pub. 2911, Inv. Nos. 701-TA-363 and 364, and 731-TA-711-717 (August 1995) at I-22, and Staff Report at II-4).
[33] *Id.* at 14 (citing *Oil Country Tubular Goods from Argentina, Austria, Italy, Japan, Korea, Mexico, and Spain*, USITC Pub. 2911, Inv. Nos. 701-TA-363 and 364, and 731-TA-711-717 (August 1995) at I-23).
[34] *Id.* at 17.
[35] *Id.* at 19.
[36] *Id.* at 20.
[37] The Commission explained: "NKK, TAMSA, and Siderca are all members of the Tenaris alliance which has long-term global contracts with large oil and gas companies with operations in the United States." *Id.* at 23, n.153.
[38] *Id.* at 19.

that (1) there were significant differences between US and world-market prices for casing and tubing, with US prices being consistently higher, and (2) foreign producers faced significant import barriers in third-country markets.[39]

36. The Commission made several findings on the issue of the importance of price in purchasing decisions. Responding purchasers ranked quality as their prime purchasing criterion just as frequently as price, and product availability was considered as important to purchasers just as frequently as price.[40] The Commission acknowledged that there was no clear trend in responses to the question of whether price differences or differences in factors other than price were significant in competition between US product and subject imports of casing and tubing.[41] The Commission disregarded data that showed that purchasers ranked factors such as delivery time, delivery terms, availability, and product quality as higher than price in importance, and ranked factors such as discounts offered, reliability of supply, and product consistency as equal in importance.[42]

37. With regard to the Commission's analysis of the impact of imports on the domestic industry, the Commission recited relevant factors in mere checklist form:

> In these reviews, we find that a significant increase in subject imports is likely to have negative effects on both the price and volume of the domestic producers' shipments despite strong demand conditions in the near term. We find that these developments likely would have a significant adverse impact on the production, shipments, sales, market share, and revenues of the domestic industry. This reduction in the domestic industry's production, shipments, sales, market share, and revenues would result in erosion of the domestic industry's profitability as well as its ability to raise capital and make and maintain necessary capital investments.[43]

The Commission determined that the revocation of the anti-dumping duty order on OCTG (other than drill pipe – i.e., casing and tubing) from Argentina and the other cumulated countries would be likely to lead to continuation or recurrence of material injury to the US industry within a reasonably foreseeable time.[44]

III. PROCEDURAL BACKGROUND

38. On 7 October 2002, Argentina requested consultations with the United States regarding determinations of the Department and the Commission arising out of the sunset reviews of OCTG from Argentina, as well as certain US laws, regulations, procedures, and practices relating to sunset reviews.[45] Argentina indicated that it considered the identified measures to be inconsistent with Articles 1, 2, 3, 6, 11, 12, 18, and Annex II of the Anti-Dumping Agreement, Articles VI and X of the GATT 1994, and Article XVI:4 of the WTO Agreement.

39. Consultations were held on 14 November 2002, and 17 December 2002. The consultations failed to resolve the dispute.

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[39] *Id.* at 19-20.
[40] *Id.* at II-17 (Staff Report).
[41] *Id.* at II-18 n.71 (Staff Report).
[42] *Id.* at II-19 (Staff Report).
[43] *Id.* at 22-23.
[44] *Id.*
[45] *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina: Request for Consultation by Argentina*, WT/DS268/1 (7 October 2002).

40. On 3 April 2003, Argentina requested the establishment of a panel.[46] The Panel was established by the Dispute Settlement Body on 19 May 2003. On 22 August 2003, Argentina requested the Director General, pursuant to Article 8.7 of the DSU, to determine the composition of the panel.[47] On 4 September 2003, the Director General wrote to the parties, communicating the final composition of the panel, as follows:

Chairman:	Mr. Paul O'Connor
Members:	Mr. Bruce Cullen
	Dr. Faizullah Khilji.[48]

IV. EXECUTIVE SUMMARY OF ARGENTINA'S CLAIMS

41. Argentina's claims are summarized as follows:

A. CERTAIN US SUNSET REVIEW STATUTORY, REGULATORY, AND ADMINISTRATIVE PROVISIONS ARE WTO-INCONSISTENT AS SUCH

- 19 USC. § 1675(c)(4) and 19 C.F.R. § 351.218(d)(2)(iii) (the "waiver provisions") mandate that the Department find likelihood of continuation or recurrence of dumping without the conduct of a "review," without any analysis and, hence, without the required "determination," in violation of Article 11.3 of the Anti-Dumping Agreement. Article 11.3 requires the authority to conduct a review and make a determination regarding whether expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. In the absence of such a review and determination by the authority, Article 11.3 mandates that anti-dumping measures be terminated after five years (see section VII.A.1);

- 19 USC. § 1675(c)(4) and 19 C.F.R. § 351.218(d)(2)(iii) also violate US obligations under Article 6 of the Anti-Dumping Agreement, which apply to sunset reviews by virtue of the cross-reference contained in Article 11.4. Argentina submits that the waiver provisions violate Article 6.1 because they preclude respondent interested parties from being able to present evidence. The waiver provisions deny respondent interested parties the ability to defend their interest in sunset reviews in violation of Article 6.2 (see section VII.A.2);

- The US statutory requirements that the Commission determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" (19 USC. § 1675a(a)(1)) and that the Commission "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time" (19 USC. § 1675a(a)(5)) are inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 11.1 and 11.3 of the Anti-Dumping Agreement. By adding the phrase "within a reasonably foreseeable time" and including a time frame that is not "imminent" but rather relates to "a longer period of time," US law requires ("shall consider") speculation and an open ended analysis for possible future injury. The Commission's market forecasting and sheer speculation is inconsistent with WTO requirements to assess whether termination of an anti-dumping duty order would be likely to lead to recurrence of injury at the time of termination – not at some distant, undefined point in

[46] *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina: Request for Establishment of a Panel by Argentina*, WT/DS268/2 (3 April 2003).

[47] On 1 September, the Director General communicated the composition of the panel to Argentina and the United States. However, one of the individuals nominated to serve on the panel informed the Secretariat that she was a citizen of the United States. The Secretariat then met with the parties, and it was agreed that another individual should be appointed in her place.

[48] *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina: Constitution of the Panel Established at the Request of Argentina*, WT/DS268/3 (9 September 2003).

the future. Speculation about market conditions several years into the future is inconsistent with the requirements of Article 11.3 and Article 3 of the Anti-Dumping Agreement (see section VIII.C.1);

- The principal obligation of Article 11.3 of the Anti-Dumping Agreement requires that anti-dumping measures be terminated after five years of imposition, unless the authorities satisfy the requirements for maintenance of the measure. The Department's consistent practice in sunset review cases demonstrates an irrefutable presumption employed by the Department that dumping is likely to continue or recur in the event of termination. This presumption violates Article 11.3. To date there have been 217 sunset reviews conducted by the Department where the domestic industry has participated in the sunset proceeding. The Statement of Administrative Action ("SAA") and the Department's *Sunset Policy Bulletin* establish the irrefutable presumption employed by the Department in these cases. In 100 per cent of the Department's sunset reviews in which the domestic industry participated the Department determined that dumping would be likely to continue or recur.[49] In these cases no respondent has been able to overcome the criteria prescribed by the SAA and the *Sunset Policy Bulletin* for termination[50] (see section VII.B.);

B. THE DEPARTMENT'S SUNSET REVIEW WAS INCONSISTENT WITH US WTO OBLIGATIONS

- The Department's determination to conduct an expedited sunset review, and its conduct of an expedited review, on the basis that Siderca's OCTG exports to the United States were less than 50 per cent of the total OCTG exports from Argentina to the United States, were inconsistent with the requirements of Articles 11.3, 11.4, 6.1, 6.2, 6.8, and Annex II of the Anti-Dumping Agreement. Notwithstanding Siderca's full cooperation and submission of a complete substantive response consistent with the Department's regulatory requirements, the Department deemed Siderca's response to be inadequate solely on the basis of import data and, hence, denied Siderca the opportunity to defend its interest (see section VII.C.1);

- The Department's determination to conduct an expedited sunset review, and its conduct of an expedited review, were inconsistent with US obligations under the Anti-Dumping Agreement. The Department rendered a determination of likelihood of continuation or recurrence of dumping without any analysis, in violation of Article 11.3 of the Anti-Dumping Agreement, which requires the authority to conduct a review in order to make a determination of whether termination of the duty would be likely to lead to continuation or recurrence of dumping and injury. In the absence of the requisite analysis and a determination based on positive evidence, the anti-dumping measure on OCTG from Argentina should have been terminated (see section VII.C.2);

- The Department's conduct of an expedited sunset review and application of the waiver provisions to Siderca: (1) violated Article 6.1 of the Agreement because the Department precluded the opportunity for Siderca to present evidence; (2) violated Article 6.2 because the Department denied Siderca its ability to defend its interest; and (3) resulted in the application of facts available in violation of the requirements of Article 6.8 (see section VII.C.3);

- The Department's determination to conduct an expedited sunset review, and the Department's Sunset Determination, which incorporated the Department's *Issues and Decision Memorandum* by reference, violated Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement

[49] US Department of Commerce Sunset Reviews (ARG-63).
[50] *Id.*

because the Department failed to provide public notice and explanations in sufficient detail of its findings on all issues of fact and law (see section VII.C.4);

- The Department's Sunset Determination was inconsistent with Article 11.3 of the Anti-Dumping Agreement because the Department failed to apply the disciplines of Article 2, failed to conduct a prospective analysis, failed to make a determination of "likely" (or "probable") dumping, and failed to base its determination on positive evidence. Indeed, the Department's reliance on the decline in Siderca's exports in the wake of the anti-dumping measure as the sole basis for its likelihood determination was inconsistent with Article 11.3 of the Anti-Dumping Agreement. In addition, the Department's reliance on the original margin of dumping of 1.36 per cent, calculated using the WTO-inconsistent practice of zeroing negative margins for purposes of its likelihood decision, as well as its reporting of that margin to the Commission, were inconsistent with Article 11.3 and Article 2 of the Anti-Dumping Agreement (see section VII.D.);

- Separate and apart from whether US anti-dumping laws and regulations regarding sunset reviews are deemed to establish an unlawful presumption, or are otherwise found to be consistent per se with US WTO obligations, and irrespective of whether the SAA and *Sunset Policy Bulletin* are "measures" that can be subject to challenge, the data drawn from the Department's sunset review determinations demonstrate that the Department failed to administer in an impartial and reasonable manner US anti-dumping laws, regulations, decisions and rulings with respect to the Department's conduct of sunset reviews of anti-dumping duty orders, in violation of Article X:3(a) of the GATT 1994 (see section VII.E.).

C. THE COMMISSION'S SUNSET REVIEW WAS INCONSISTENT WITH US WTO OBLIGATIONS

- The Commission's Sunset Determination that termination of the duty would be likely to lead to continuation or recurrence of injury was inconsistent with Article 11.3 of the Anti-Dumping Agreement because the Commission's standard for determining likely injury was inconsistent with Article 11.3. The Commission applied a much lower standard for determining the likelihood of injury than that which is required by Article 11.3 (see section VIII.A);

- The Commission's Sunset Determination violated Articles 3.1, 3.2, 3.4, 3.5, and 11.3 of the Anti-Dumping Agreement because the Commission did not conduct an objective examination of the record or base its determination on positive evidence. The Commission's conclusions regarding the likely volume of imports, the likely price effects, and the likely impact of imports on the domestic industry can in no way be considered to be objective when those conclusions are viewed in light of a neutral examination of the information on the record. Moreover, the purported bases relied on by the Commission in support of its likely injury finding simply do not constitute positive evidence as required by Article 3.1 of the Anti-Dumping Agreement (see sections VIII.B.1-3);

- In assessing the likelihood of continuation or recurrence of injury to the domestic industry, the Commission failed to evaluate all the relevant economic factors and indices having a bearing on the state of the industry, including those enumerated in Article 3.4 of Anti-Dumping Agreement, thereby violating that provision. The Commission also failed to satisfy the causation requirements of Article 3.5 (see sections VIII.B.3 and 4);

- The Commission's application of 19 USC. § 1675a(a)(1) and 19 USC. § 1675a(a)(5) in the sunset review of OCTG from Argentina was inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 11.1 and 11.3 of the Anti-Dumping Agreement. By applying the standard "within a reasonably foreseeable time" (19 USC. § 1675a(a)(1)) and using a time frame that is not

"imminent" but rather relates to "a longer period of time" (19 USC. § 1675a(a)(5)), the Commission speculated and conducted an open-ended analysis for possible future injury. The Commission's market forecasting and sheer speculation was inconsistent with WTO requirements to assess whether termination of an anti-dumping duty order would be likely to lead to recurrence of injury at the time of termination – not at some distant, undefined point in the future. Speculation about market conditions several years into the future was inconsistent with the requirements of Articles 11.1, 11.3, 3.1, 3.2, 3.4, 3.5, 3.7, and 3.8 of the Anti-Dumping Agreement (see section VIII.C.2);

- The Commission's application of a cumulative injury analysis of OCTG imports from Korea, Italy, Japan, Mexico, and Argentina to determine whether termination of the anti-dumping duty on Argentine OCTG imports would be likely to lead to continuation or recurrence of injury was inconsistent with Article 11.3 of the Anti-Dumping Agreement, which precludes the use of a cumulative injury analysis in sunset reviews. Alternatively, if cumulation is permitted in sunset reviews, the Commission's decision to cumulate in the instant case violated Article 3.3 of the Anti-Dumping Agreement by failing to comply with the explicit restrictions on cumulation set forth therein. In addition, the Commission's decision to cumulate was inconsistent with the likely standard of Article 11.3 and with the evidentiary standards of Article 3, as interpreted by the Appellate Body in *Steel from Germany* (see sections VIII.D, E, and F).

D. CONSEQUENTIAL VIOLATIONS OF THE ANTI-DUMPING AGREEMENT, THE GATT 1994, AND THE WTO AGREEMENT

- Because the United States violated its obligations under the Anti-Dumping Agreement, it also violated the provisions of Article VI of the GATT 1994, Articles 1 and 18 of the Anti-Dumping Agreement, and Article XVI:4 of the WTO Agreement (see section IX).

V. OVERVIEW OF US SUNSET REVIEW LAW

A. SUNSET REVIEWS UNDER US LAW

1. Introduction

42. Following the Uruguay Round, US anti-dumping law was amended to provide for five-year "sunset" reviews of anti-dumping orders.[51] Among other amendments to the Tariff Act of 1930, the Uruguay Round Agreements Act ("URAA") established a mechanism for the automatic review of certain anti-dumping duty orders, suspended anti-dumping duty investigations, and countervailing duty orders.

43. As with the administration of US trade remedy laws generally, and the conduct of anti-dumping and countervailing duty investigations, the responsibility for the conduct of sunset reviews is bifurcated between the Department and the Commission. The Department determines whether "revocation" of an anti-dumping or countervailing duty order, or termination of a suspended investigation, would be likely to lead to continuation or recurrence of dumping or of a countervailable subsidy. The Commission is required to determine whether revocation of an anti-dumping or countervailing duty order, or termination of a suspended investigation, would be likely to lead to continuation or recurrence of injury.

44. Under US law, sunset reviews are initiated automatically, rather than following substantiation by the authorities, or based upon a request by an interested party. The regulations implementing the

[51] *See* 19 USC. § 1675(c)(ARG-1); 19 USC. § 1675a (ARG-1).

URAA provide for two kinds of sunset reviews: (i) "Expedited Review" and (ii) "Full Review."[52] As described below, in certain situations US law mandates a finding of likely dumping without a review.

2. Procedures for determining the type of sunset review conducted: Expedited review or full review

45. Whether a domestic interested party has requested a review, as well as considerations concerning the content and "adequacy" of the interested parties' required submissions, dictate which type of "review"[53] the Department and the Commission will conduct.

46. Within 15 days from the notice of initiation of the sunset review, the Department's regulations require domestic interested parties to file a notice of intent to participate in the sunset review.[54] If no domestic interested party expresses a desire to participate, the Department will issue a final determination revoking the order within 90 days.[55] However, if any domestic interested party indicates an intent to participate, the Department will conduct a review. Submissions by respondent interested parties to the notice of initiation of the sunset review that are deemed to be "inadequate" trigger expedited reviews. If both sides submit "adequate" responses, the Department conducts a full review.

47. In determining whether responses are "adequate," US law draws a sharp distinction between domestic and respondent parties. Domestic interested parties will normally be considered to have provided an adequate response if the Department determines that at least one domestic interested party files a "complete substantive response."[56] On the other hand, respondent interested parties are normally considered to have provided an adequate response only if "complete substantive responses" are filed by those accounting for more than 50 per cent of total exports of the subject merchandise from that country (on a volume or value basis) to the United States over the five calendar years preceding the initiation notice.[57] If the Department determines that a respondent interested party has not satisfied its 50 per cent threshold it will normally conduct an expedited sunset review based on "facts available," without considering information submitted by such interested party and without further investigation.[58]

48. Within 30 days from the notice of initiation, all interested parties must file a complete substantive response to the Department's notice of initiation of the sunset review.[59] Respondent parties, however, are required to report substantially more information than domestic parties.[60]

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[52] *See* 19 USC. §§ 1675(c)(3)-(5)(ARG-1).

[53] Argentina's description of US law is not intended to suggest that Argentina concedes that the Department does in all circumstances conduct a "review" and make a "determination" as required by Article 11.3 of the Anti-Dumping Agreement.

[54] 19 C.F.R. § 351.218(d)(ARG-3).

[55] 19 USC. § 1675(c)(3)(A) provides that "[i]f no [domestic producer] interested party responds to the notice of initiation under this subsection, the administering authority shall issue a final determination, within 90 days after the initiation of a review, revoking the order . . . ." (ARG-1).

[56] 19 C.F.R. § 351.218(e)(1)(i)(A)(ARG-3).

[57] 19 C.F.R. § 351.218(e)(1)(ii)(A)(ARG-3).

[58] 19 C.F.R. § 351.218(e)(1)(ii)(C)(2)(ARG-3).

[59] 19 C.F.R. §§ 351.218(d)(3)(i)(ARG-3). 19 C.F.R. § 351.218(d)(3)(ii)(A)-(I) sets forth the required information that must be filed by all interested parties and the additional information that must be filed by respondent interested parties in order for a response to be deemed complete. All parties are required to submit contact information, statement of intent, and indication of willingness to participate, statement regarding the likely effects of revocation, and any factual arguments regarding historical dumping margins or import volumes.

[60] *See* 19 C.F.R. §§ 351.218(d)(3)(iii)(A)-(E)(ARG-3). The information burden imposed on respondent parties – a burden not shared by US parties – includes the respondent parties' weighted-averaged dumping rates, the volume and value of the exporter's shipments for the last five years, the volume and value of the exporter's

3. Effect of conduct of expedited sunset review

49. The Department conducts an expedited review if a respondent interested party's substantive response is "inadequate," or deemed by the Department to be "inadequate" based solely on the percentage of the company's US exports irrespective of the amount of information actually provided by the defendant. 19 USC. § 1675(c)(3)(B) provides that "if interested parties provide inadequate responses to a notice of initiation, the administering authority, within 120 days after the initiation of the review, or the Commission, within 150 days after such initiation, may issue, without further investigation, a final determination based on the facts available . . . ."

4. Effect of a "waiver" determination by the Department in a sunset review

50. The US statute affords parties the option of not participating in the proceedings before both the Department and the Commission. As indicated by the express terms in the provision, 19 USC. § 1675(c)(4)(A) pertains only to respondent interested parties:

> An interested party described in section [1677(9)(A) or (B)] of this title may elect not to participate in a review conducted by the [Department] under this subsection and to participate only in the review conducted by the Commission.

51. In addition to an "elective waiver" provided for by statute, the Department sometimes employs a "deemed waiver" in practice. The "deemed waiver" rule also pertains only to respondent interested parties. US parties are not similarly exposed to the jeopardy of a deemed waiver. The effect of a waiver is clear:

> In a review in which an interested party waives its participation pursuant to this paragraph, the administering authority shall conclude that revocation of the order or termination of the investigation would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) with respect to that interested party.[61]

52. As noted, the statutory language is mandatory; the Department "shall" determine likely dumping if it deems a respondent interested party to have waived its participation, whether by failing to submit a response or by failing to have exports to the United States in the amount of 50 per cent or more of the total exports of subject merchandise to the United States.[62]

53. In addition to the statutory waiver provisions, the Department's regulations equate "waiver of participation in a sunset review before the Department" with "the failure by a respondent interested party to file a complete substantive response to a notice of initiation."[63]

5. Implementing US Uruguay Round obligations: The *Statement of Administrative Action* ("SAA")

54. The US Statement of Administrative Action, by its own terms, provides the authoritative statement on how the United States will implement its obligations under the WTO Agreements, including the GATT 1994 and the Anti-Dumping Agreement:

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shipments in the year preceding the dumping investigation, the percentage of the respondent's total exports to the United States, and the volume and value of the exporter's shipments for the two most recent fiscal quarters.

[61] 19 USC. § 1675(c)(4)(B)(ARG-1)(emphasis added).

[62] 19 C.F.R. § 351.218(d)(2)(iii) and 19 C.F.R. § 351.218(e)(1)(ii)(A)(ARG-3).

[63] 19 C.F.R. § 351.218(d)(2)(iii)(ARG-3).

> [The SAA] represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law. Furthermore, the Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretation and commitments set out in this Statement. Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretation of those agreements includes in this statement carry particular authority.[64]

55. US courts have recognized the unique status of the SAA in the legislative scheme. For instance, in *Micron Technology Corp., Inc. v. United States*,[65] the Federal Circuit based its decision on a reading of both the language of the statute and the SAA.[66] While there is nothing unusual about a court looking to the legislative history of a statutory provision to assist in its interpretation, the court in *Micron* evaluated the plain meaning of both the statute and the SAA, in a side-by-side exercise.[67] Indeed, the Court stated that "[t]he SAA, of course, is more than mere legislative history."[68] The Court also cited to the US law that provides that the SAA "'shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application'."[69] Significantly, the Court interpreted the statute based on the mandate of the SAA, and held that the meaning and effect of the statutory provision had changed, notwithstanding statements in the House and Senate reports that the legislation did not change US law on the point.[70]

56. WTO panels such as the one in *United States – Measures Treating Export Restraints as Subsidies*, have recognized this point, noting that:

> The United States acknowledges "the status of the SAA as an authoritative interpretive tool" . . . . While the United States indicates that the SAA cannot change the meaning of, or override, the statute to which it relates, "[a]s a general proposition, [] in terms of legislative history, the SAA ranks supreme" . . . . It is clear to us that the [Uruguay Round Agreements Act] grants to the SAA unique legal status as an authoritative interpretation of the *URAA*, which the US courts must take into account. The text of the SAA confirms this by characterising itself as "an authoritative interpretation . . . both for purposes of US international obligations and domestic law." The SAA went through an approval process in Congress, and was in fact approved by Congress at the same time as the *URAA*. The United States itself acknowledges that 'there is no disagreement between the parties about the status of the SAA as an authoritative interpretive tool." Finally, it is clear that no other form of legislative history has higher authority than the SAA with regard to the meaning of the statute. The United States indicates that "If, hypothetically, on a particular

[64] *US Statement of Administrative Action*, accompanying the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 stat. 4809 (1994), at 656, *reprinted in* 1994 USC.C.A.N. 4040 ("SAA")(ARG-5).
[65] 243 F.3d 1301 (Fed. Cir. 2001)(ARG-7).
[66] *Id.* at 1308.
[67] *Id.* at 1308-09.
[68] *Id.* at 1309.
[69] *Id.*
[70] *Id.* at 1310.

> interpretive issue, the SAA said 'X' and some other document of legislative history (e.g., a committee report) said 'Y,' the interpretation should be 'X.'"[71]

57. The unique authority of the SAA has also been repeatedly recognized by courts in the United States.[72]

6. The Department of Commerce *Sunset Policy Bulletin*

58. The Department's *Sunset Policy Bulletin*[73] adopts the standards of the SAA and states that the Department "normally" will determine that dumping is likely to continue or recur where:

- dumping continued at any level above *de minimis* [(*i.e.*, above 0.5 per cent)] after the issuance of the order or the suspension agreement, as applicable;

- imports of the subject merchandise ceased after the issuance of the order or the suspension agreement, as applicable, or

- dumping was eliminated after the issuance of the order or the suspension agreement, as applicable, and import volumes for the subject merchandise declined significantly.[74]

- In analyzing whether import volumes remained steady or increased, the Department normally will consider companies' relative market share.[75]

7. The Department's "likelihood" determination

59. The SAA outlines the many instances in which the Department will determine that dumping is likely to continue or recur.[76] The SAA does not contain guidance as to particular circumstances that

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[71] Panel Report, *United States – Measures Treating Export Restraints as Subsidies*, WT/DS194/R, adopted 23 August 2001, paras. 8.97-8.98 ("*US Exports Restraints*") (footnotes omitted).

[72] *See e.g.*, *SKF USA, Inc. v. United States*, 263 F.3d 1369, 1373 n.3 (Fed. Cir. 2001) ("The SAA, of course, is more than mere legislative history. Congress has instructed that '[t]he statement of administrative action approved by the Congress . . . shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.'"); *Micron Technology, Inc.*, 243 F.3d at 1305 n.3 (ARG-7)("[T]he SAA is 'an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.'"); *AK Steel Corp. v. United States*, 226 F.3d 1361, 1368 (Fed. Cir. 2000)(ARG-6) ("When confronted with a change in statutory language, we would normally assume Congress intended to effect some change in the meaning of the statute. . . . Here, however, the SAA prevents us from making such an assumption and we have revised our opinion primarily to address the authoritative weight given the SAA in the statute.")(citations omitted); *Allied Tube and Conduit Corp. v. United States*, 127 F. Supp. 2d 207, 217 (CIT 2000)(ARG-12) ("The Federal Circuit and this Court have recognized the controlling nature of the SAA and have used it as an authoritative guide in interpreting the Uruguay Round Agreements."); *Micron Technology, Inc. v. United States*, 40 F. Supp. 2d 481, 484-485 (CIT 1999)(ARG-11)("In addition, the Court finds that, contrary to Micron's argument, the relevant language from the SAA should not be dismissed as mere legislative history. As Commerce notes, Congress expressly approved the SAA as the authoritative expression governing application of the URAA in judicial proceedings.").

[73] *Policies Regarding the Conduct of Five-Year ("Sunset") Reviews*, 63 Fed. Reg. 18,871 (Dep't Comm., 1998)("*Sunset Policy Bulletin*")(ARG-35).

[74] *Id*. at 18,872.

[75] *Id*. at 18,873.

[76] SAA at 889-890 (ARG-5).

would warrant the Department finding that dumping is not likely to continue or recur in a sunset review.

60. As noted above, the Department is required by statute to conduct a review to determine whether revocation of the anti-dumping duty order would be likely to lead to continuation or recurrence of dumping.[77]

61. However, the making of such a determination is highly circumscribed by the SAA. The SAA states that:

> The determination called for in these types of [sunset] reviews is *inherently predictive and speculative*. There may be more than one likely outcome following revocation or termination. The possibility of other likely outcomes does not mean that a determination that revocation or termination is likely to lead to continuation or recurrence of dumping or countervailable subsidies, or injury, is erroneous, as long as the determination of likelihood of continuation or recurrence is reasonable in light of the facts of the case. In such situations, the order or suspended investigation will be continued.[78]

62. In the context of sunset reviews, the SAA outlines the many instances in which, under US law, the Department will determine that dumping is likely to continue or recur:

> [The Bill] establishes standards for determining the likelihood of continuation or recurrence of dumping. Under section 752(c)(1), Commerce will examine the relationship between dumping margins, or the absence of margins, and the volume of imports of the subject merchandise, comparing the periods before and after the issuance of an order or the acceptance of a suspension agreement. For example, *declining import volumes* accompanied by the continued existence of dumping margins after the issuance of an order may provide a strong indication that, absent an order, dumping would be likely to continue, because the evidence would indicate that the exporter needs to dump to sell at pre-order volumes. . . .
>
> The Administration believes that existence of *dumping margins after the order*, or the *cessation of imports after the order*, is highly probative of the likelihood of continuation or recurrence of dumping. If companies *continue to dump* with the discipline of an order in place, it is reasonable to assume that dumping would continue if the discipline were removed. . . .
>
> *[T]he existence of zero or de minimis dumping margins at any time while the order was in effect shall not in itself require Commerce to determine that there is no likelihood of continuation or recurrence of dumping.* Exporters may have ceased dumping because of the existence of an order or suspension agreement. Therefore,

[77] 19 USC. § 1675(c)(1)(ARG-1). 19 USC. §§1675a(c)(1)(A)-(B)(ARG-1) set forth additional requirements with respect to the Department's likelihood determination, including that in conducting the sunset review, the Department "shall consider":

> the weighted average dumping margins determined in the investigation and subsequent reviews, and
>
> the volume of imports of the subject merchandise for the period before and the period after the issuance of the anti-dumping duty order or acceptance of the suspension agreement.

[78] SAA at 883 (ARG-5)(emphasis added).

> the present absence of dumping is not necessarily indicative of how exporters would behave in the absence of the order or agreement.[79]

8. The Commission's "likelihood" determination

63. As noted above, the Commission is required to conduct a review to determine whether revocation of the anti-dumping duty order would be likely to lead to continuation or recurrence of injury. 19 USC. §§1675a(a)(1)-(7) establish additional requirements with respect to the Commission's sunset review.

64. Subsections 1675a(a)(1)-(3) direct the Commission to consider whether any improvement in the state of the domestic industry is due to the anti-dumping duty order and whether the industry is vulnerable to injury if the order were revoked. In addition, the statute directs the Commission to consider additional factors, including whether the exporting country has actual or potential excess capacity; whether the exporter has existing inventories of subject merchandise or likely increases in subject merchandise; whether the exporter has the potential for product-shifting; whether the exporter faces barriers in importing the subject merchandise to third countries; whether underselling by the exporter is likely, compared to domestic products; and whether imports would depress or suppress the price of like domestic goods.

65. Subsections 1675a(4)-(5) direct the Commission to consider certain factors bearing on the impact on the domestic industry.[80]

66. Importantly, however, the SAA provides specific guidance on how the Commission should evaluate the factors identified in the statute in the conduct of sunset review proceedings:

> [T]he Commission must consider whether there has been *any improvement* in the state of the domestic industry that is related to the imposition of the order or the acceptance of a suspension agreement. The Commission should *not* determine that there is no likelihood of continuation or recurrence of injury simply because the industry has *recovered after the imposition of an order* or acceptance of a suspension agreement, because one would expect that the imposition of an order or acceptance of a suspension agreement would have some beneficial effect on the industry. Moreover, an *improvement* in the state of the industry related to an order or acceptance of a suspension agreement may suggest that the state of the industry is *likely to deteriorate* if the order is revoked or the suspended investigation terminated.[81]

67. Subsection 1675a(a)(7) gives the Commission discretion to conduct a cumulative injury analysis in sunset reviews:

> For purposes of this subsection, the Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which reviews under section 1675(b) or (c) of this title were initiated on the same day, if such imports would be likely to compete with each other and with domestic like products in the United States market. The Commission shall not cumulatively

[79] *Id.* at 889-890 (emphasis added).

[80] These include, but are not limited to, "(A) likely declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity, (B) likely negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment, and (C) likely negative effects on the existing development and production efforts of the industry . . . ." 19 USC. §§ 1675a(4)(A)-(C)(ARG-1).

[81] SAA at 884 (ARG-5)(emphasis added).

> assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry.

VI. STANDARD OF REVIEW, BURDEN OF PROOF, AND THE SUBSTANTIVE WTO OBLIGATIONS AT ISSUE IN THIS DISPUTE

A. STANDARD OF REVIEW

68. The relevant provisions establishing the standard of review in this case are Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement. As the Appellate Body noted recently, "the two provisions complement each other."[82]

69. Article 11 of the DSU requires a panel to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." Article 17.6 of the Anti-Dumping Agreement sets out a special standard of review that complements Article 11 of the DSU.

70. Article 17.6(i) requires a panel to review the investigating authorities' "establishment" and "evaluation" of the pertinent facts.[83] The Appellate Body has clarified the standard applicable to factual review under the Anti-Dumping Agreement as follows:

> Article 17.6(i) sets forth the appropriate standard to be applied by *panels* in examining the WTO-consistency of the *investigating authorities'* establishment and evaluation of the facts under other provisions of the Anti-Dumping Agreement. Thus, panels must assess if the establishment of the facts by the investigating authorities was *proper* and if the evaluation of those facts by those authorities was *unbiased and objective.* If these broad standards have not been met, a panel must hold the investigating authorities' establishment or evaluation of the facts to be inconsistent with the Anti-Dumping Agreement.[84]

71. In the recent compliance panel appeal in the *Bed Linens* case, the Appellate Body provided additional guidance on the applicable standard under Article 17.6(i):

> In *US – Hot-Rolled Steel*, we stated that "[a]lthough the text of Article 17.6(i) is couched in terms of an obligation on *panels* . . . the provision, at the same time, in effect defines when *investigating authorities* can be considered to have acted inconsistently with the Anti-Dumping Agreement." We further explained that the text of Article 17.6(i) of the Anti-Dumping Agreement, as well as that of Article 11 of the DSU, "requires panels to 'assess' the facts and this . . . clearly necessitates an active review or examination of the pertinent facts."[85]

72. Thus, in accordance with the guidance provided by the Appellate Body, this Panel will need to undertake an "active review or examination of the pertinent facts" pertaining to the sunset review determinations relating to OCTG from Argentina, and the decision by the US Government to continue

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[82] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India: Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, para. 164 ("*Bed Linen from India*").

[83] *See United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, para. 55 ("*Hot-Rolled Steel from Japan*").

[84] *Id.* at para. 56.

[85] Appellate Body Report, Recourse to Article 21.5, *Bed Linen from India*, para. 163.

the anti-dumping measure beyond the five year period prescribed by Article 11.3 of the Anti-Dumping Agreement.

73. The second subparagraph of Article 17.6 applies to a panel's review of whether measures in dispute rest upon a permissible interpretation of the Anti-Dumping Agreement.[86]

74. A panel's objective assessment of whether the US measures identified by Argentina are consistent with the Anti-Dumping Agreement and the GATT 1994 is guided by its interpretation of the relevant provisions of those agreements in accordance with customary rules of interpretation of public international law, as codified in the *Vienna Convention on the Law of Treaties*.[87] The general rules of interpretation of the *Vienna Convention* require a panel to interpret treaty provisions in good faith in accordance with their ordinary meaning, in their context, and in light of the treaty's object and purpose.[88] Thus, the treaty language defines the extent of Members' rights and obligations. One of the corollaries of this general rule is that "interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[89]

75. Article 3.2 of the DSU reaffirms that the role of the WTO dispute settlement system is to preserve the rights and obligation of Members under the covered agreements, and to "clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." Article 17.6(ii) of the Anti-Dumping Agreement similarly provides that panels are to interpret the relevant provisions of the Anti-Dumping Agreement "in accordance with customary rules of interpretation of public international law." In *Hot-Rolled Steel from Japan*, the Appellate Body explained that "a permissible interpretation is one which is found to be appropriate *after* application of the pertinent rules of the *Vienna Convention.*"[90]

76. In sum, under the applicable legal standard of review, a panel must make an objective assessment of the legal provisions at issue and their applicability to the dispute. The panel must then interpret the pertinent treaty provisions in accordance with the customary rules of interpretation of public international law and assess whether each measure rests upon a permissible interpretation of the Anti-Dumping Agreement and the GATT 1994.[91]

B. BURDEN OF PROOF

77. In WTO dispute settlement proceedings, the burden of proof rests with the Member asserting the particular claim or defense. As stated by the Appellate Body,

> [T]he burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to

[86] Appellate Body Report, *Hot-Rolled Steel from Japan*, para. 60.

[87] *Id.* (referencing the Vienna Convention on the Law of Treaties, adopted 22 May 1969, 1155 U.N.T.S. 331)("*Vienna Convention*")). *See* Appellate Body Report, *United States – Gasoline*, at 16-17; Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, at 104-06 ("*Appellate Body Report, Japanese Taxes on Alcoholic Beverages*").

[88] *See Vienna Convention*, Art. 31(ARG-59).

[89] Appellate Body Report, *United States – Gasoline*, at 23.

[90] Appellate Body Report, *Hot-Rolled Steel from Japan*, para. 60.

[91] *Id*. at para. 62.

> the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[92]

78. In the context of this dispute, concerned with WTO compatibility of the decision to continue the definitive anti-dumping measures applicable to OCTG from Argentina imposed by the United States, Argentina bears the burden of presenting a *prima facie* case of violation of provisions of the Anti-Dumping Agreement and the GATT 1994. A *prima facie* case is "one which, in the absence of effective *refutation* by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."[93] Thus, where Argentina presents a *prima facie* case in respect of a claim, the burden then shifts to the United States to provide an "effective refutation" of Argentina's case.

C. SUBSTANTIVE OBLIGATIONS AT ISSUE IN THIS DISPUTE

1. The primary obligation of Article 11.3 of the Anti-Dumping Agreement is termination of anti-dumping measures

79. The matter before this Panel concerns the application of definitive anti-dumping measures by the United States pursuant to sunset reviews governed by Article 11.3 of the Anti-Dumping Agreement. The Panel's objective assessment of the matter will include an interpretation of Article 11 of the Anti-Dumping Agreement, which provides in relevant part as follows:

> *Duration and Review of Anti-Dumping Duties and Price Undertakings*
>
> 11.1 An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.
>
> …
>
> 11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review.
>
> 11.4 The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

80. Thus, the Anti-Dumping Agreement makes clear that anti-dumping duties are to be limited in scope and duration, and that a continuation of the order beyond five years requires strict compliance

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[92] Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, p. 14 ("*Woven Shirts from India*").

[93] Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, para. 7.49 ("*H-Beams from Poland*")(*citing* Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products*, adopted 13 February 1998, WT/DS26 and 48/AB/R, para. 104 ("*EC – Hormones*").

with the conditions set out in the Agreement. The panel in *Pipe Fittings from Brazil*, recently recognized this point, stating that:

> By virtue of Article 11.1 of the Anti-Dumping Agreement, an anti-dumping duty may only continue to be imposed if it remains "necessary" to counteract injurious dumping. *Article 11.1 contains a general, unambiguous and mandatory requirement that anti-dumping duties "shall remain in force only as long as and to the extent necessary" to counteract injurious dumping.* It furnishes the basis for the review procedures contained in Article 11.2 (and 11.3) by stating a general and overarching principle, the modalities of which are set forth in paragraph 2 (and 3) of that Article.[94]

81. The Appellate Body put the matter succinctly:

> Article 11.1 of the Anti-Dumping Agreement is categorical that "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury."[95]

82. Similarly, in *Steel from Germany*, the Appellate Body interpreted Article 21.3 of the SCM Agreement, which parallels Article 11.3 of the Anti-Dumping Agreement.[96] Article 21.3 of the SCM Agreement and Article 11.3 of the Anti-Dumping Agreement are essentially identical provisions, save the subject matter coverage.

83. The Appellate Body in *Steel from Germany* explained that the primary obligation of Article 21.3 is termination of the measure after five years. Continuation of the measure is the exception, and only if the requirements of the Agreement are strictly complied with:

> [W]e wish to underline the thrust of Article 21.3 of the SCM Agreement. An automatic *time-bound* termination of countervailing duties that have been in place for five years from the original investigation or a subsequent comprehensive review is *at the heart of this provision*. Termination of a countervailing duty is the rule and its continuation is the exception. The continuation of a countervailing duty must therefore be based on a *properly conducted review and a positive determination* that the revocation of the countervailing duty would 'be likely to lead to continuation or recurrence of subsidization and injury.'[97]

84. The Appellate Body affirmed the essence of the Article 21.3 obligation: "Article 21.3 prohibits the continuation of countervailing duties unless a review is undertaken and the prescribed determination, based on adequate evidence, is made."[98] The Appellate Body emphasized that continuation of a measure is permitted only when the specified conditions of Article 21.3 are satisfied:

> Article 21.3 imposes an explicit temporal limit on the maintenance of countervailing duties. For countervailing duties that have been in place for five years, the terms of Article 21.3 require their termination *unless* certain specified conditions are met. Specifically, a Member is permitted *not* to terminate such duties only if it conducts a review and, in that review, determines that the prescribed conditions for the continued

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[94] Panel Report, *Pipe Fittings from Brazil*, para. 7.113.

[95] Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, para. 81 ("*Pipe Fittings from Brazil*") (emphasis added).

[96] Appellate Body Report, *Steel from Germany*, paras. 58-118.

[97] *Id.* at para. 88 (emphasis added).

[98] *Id.* at para. 117.

> application of the duty are satisfied. The prescribed conditions are "that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury". If, in a sunset review, a Member makes an affirmative determination that these conditions are satisfied, it may continue to apply countervailing duties beyond the five-year period set forth in Article 21.3. If it does not conduct a sunset review, or, having conducted such a review, it does not make such a positive determination, the duties must be terminated.[99]

85. The Appellate Body also explained that the obligation contained in Article 21.3 must be interpreted in its immediate context of Article 21, which places several conditions on the continuation of countervailing duty measures:

> Turning to the immediate context of Article 21.3, we observe the title to Article 21 of the SCM Agreement reads 'Duration and Review of Countervailing Duties and Undertakings.' The first paragraph of Article 21 stipulates that a countervailing duty 'shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.' We see this as a general rule that, after the imposition of a countervailing duty, the continued application of that duty is subject to certain disciplines. These disciplines relate to the *duration* of the countervailing duty ('only as long as necessary'), its *magnitude* ('only to the extent necessary'), and its *purpose* ('to counteract subsidization which is causing injury'). Thus, the general rule of Article 21.1 underlines the requirement for periodic review of countervailing duties and highlights the factors that must inform such reviews.[100]

86. This interpretation is directly relevant to the interpretation of the Anti-Dumping Agreement. Article 11 of the Anti-Dumping Agreement, in parallel to that of Article 21 of the SCM Agreement, is entitled "Duration and Review of Antidumping Duties and Price Undertakings." The first paragraph of Article 11 similarly stipulates that an anti-dumping duty "shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury."

87. Thus, like the SCM Agreement, the Anti-Dumping Agreement also incorporates disciplines that prescribe clear limitations regarding the duration of the anti-dumping duty ("only as long as necessary"), its *magnitude* ("only to the extent necessary"), and its *purpose* ("to counteract dumping which is causing injury").

88. To paraphrase the Appellate Body's interpretation of the SCM Agreement, the Anti-Dumping Agreement is "aimed at striking a *balance* between the right to impose [anti-dumping] duties to [counteract dumping] that is causing injury, *and the obligations that Members must respect* in order to do so." As Argentina sets out below, the United States ignored this balance, and failed to uphold its obligations under the Anti-Dumping Agreement in its Sunset Determination on OCTG from Argentina.

2. The plain and ordinary meaning of the term "likely" in Article 11.3 is "probable." Hence, an anti-dumping duty can be maintained only if it is probable that dumping and injury would continue or recur if the anti-dumping measure were terminated

89. Pursuant to the customary rules of interpretation of public international law, as codified under the *Vienna Convention*, a treaty shall be interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty in their context, and in the light of its object and purpose. This

[99] *Id.* at para. 63 (emphasis in original).
[100] *Id.* at para. 70 (emphasis in original).

interpretive approach applies to all WTO provisions, including those under Article 11 of the Anti-Dumping Agreement.

90. Article 11.3 provides that an existing order shall be terminated unless "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury." The panel in *DRAMS From Korea* commented on the ordinary meaning of the word "likely" as used in Article 11.3, noting "that 'likelihood' or 'likely' carries with it the ordinary meaning of 'probable.'"[101] Both the ordinary meaning of the term "likely" and the context of Article 11.3 require the application of a "probability" standard to the question of whether injury will continue or recur. In other words, the continuation or recurrence of dumping and injury must be more likely than not.[102]

91. Indeed, the United States itself has asserted before the WTO that the term "likely" means "probable." In *Steel from Germany*, the United States expressly stated that "[t]he word 'likely' carries with it the ordinary meaning of 'probable.'"[103] The United States declared this interpretation in discussing the parallel provision of Article 11.3 in the SCM Agreement. The US statement thus bears directly on the interpretation of Article 11.3 of the Anti-Dumping Agreement.

92. Both US and WTO jurisprudence make clear that "likely" does not have the same meaning as "possible." In order to make a determination that is consistent with Article 11.3, the Department and the Commission must find that it is "likely" (*i.e.*, more probable than not) that termination of the anti-dumping measure will lead to the continuance or recurrence of dumping and injury, respectively.
As will be demonstrated below, the "likely" standards applied by the Department and the Commission conflict with the ordinary meaning of Article 11.3.

3. The obligations in Articles 2, 3, 6 and 12 of the Anti-Dumping Agreement are applicable to reviews conducted under Article 11.3

94. In clarifying WTO Members' rights and obligations under Article 11.3, the *Vienna Convention* rules of treaty interpretation provide that a panel must give the terms of the provision their ordinary meaning and must interpret them in their context – both the immediate context (*i.e.*, the other paragraphs of Article 11) and the broader context (*i.e.*, the other provisions of the Anti-Dumping Agreement, and the WTO Agreements as a whole), in accordance with the object and purpose of the specific provisions.

95. The terms of Article 11 mandate compliance with the following provisions of the Anti-Dumping Agreement:

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[101] Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Semiconductors (DRAMs) of One Megabit or Above from Korea*, WT/DS99/R, circulated 7 November 2000, para. 6.48 n.494 ("*DRAMs from Korea*").

[102] Similarly, the only decisions of the US Court of International Trade (two involving the same case) to address the question are in accord that the term "likely" in the US anti-dumping statute as used in the sunset review context should be given its ordinary meaning of "probable." *See Usinor Industeel, S.A. v. United States*, No. 01-00006, slip. op. 02-39 at 13 (CIT 29 April 2002) ("*Usinor I*")(ARG-14); *Usinor Industeel, S.A. v. United States*, No. 01-00006, slip. op. 02-152 at 2 (CIT 20 December 2002) ("*Usinor II*)(ARG-16); and *Nippon Steel Corp. v. United States*, No. 01-00103, slip. op. 02-153 at 7-8 (CIT 24 December 2002)(ARG-17). The grounds for remand in *Nippon Steel* were essentially the same as those in the *Usinor* cases (*i.e.*, the Commission failed to apply the plain and ordinary meaning of the term "likely").

[103] Oral Statement of the United States at the First Meeting of the Panel, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213 (29-30 January 2002), para. 6.

- *Article 2 (Dumping)*: Article 2.1 defines "dumping" "for the purposes of the Agreement." Thus, the definition of "dumping" applies for all purposes under the Anti-Dumping Agreement, including sunset reviews under Article 11.

- *Article 3 (Injury)*: Article 3 of the Anti-Dumping Agreement applies to reviews conducted under Article 11. The jurisprudence establishes that the broad scope of the definition of injury in Article 3 ("under this agreement") applies to "injury" for all purposes under the Agreement, including Article 11.3. Footnote 9 to Article 3, "*Determination of Injury*," provides "*Under this Agreement the term 'injury'* shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of injury to a domestic industry or material retardation to the establishment of such an industry and *shall be interpreted in accordance with the provisions of this Article*."[104] The Appellate Body has held that "the obligations in Article 3.1 apply to *all* injury determinations undertaken by Members,"[105] and has reaffirmed this proposition, stating "Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation with respect to the injury determination."[106] Given the broad scope of the definition of injury in Article 3 ("under this agreement"), as recognized by the Appellate Body, Article 3 applies to "injury" under Article 11.3. Moreover, the Panel in the recent *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products From Japan* case stated that:

> Article 3 is entitled "Injury." This title is linked to footnote 9 of the Anti-Dumping Agreement, which indicates that: "[u]nder this Agreement the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article." This seems to demonstrate that the term "injury" as it appears throughout the Anti-Dumping Agreement – including Article 11 – is to be construed in accordance with this footnote, unless otherwise specified. This would seem to support the view that the provisions of Article 3 concerning injury may be generally applicable throughout the Anti-Dumping Agreement and are not limited in application to investigations. Article 11 does not seem to explicitly specify otherwise in the case of sunset reviews.

There are other textual indications that the Article 3 injury obligations apply throughout the Agreement. For example, the use of the language "for purposes of Article VI of GATT 1994" in Article 3.1 also suggests that, in general, the obligations in Article 3 pertaining to injury may apply throughout the Anti-Dumping Agreement, i.e. they are not limited to investigations.[107]

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[104] Emphasis added. The report of the *DRAMS from Korea* panel provides the following support for this proposition: "We note that, by virtue of note 9 of the AD Agreement, the term 'injury' in Article 11.2 'shall be interpreted in accordance with the provisions of Article 3.'" Panel Report, *DRAMS from Korea*, para. 6.59 n.501. The panel's ruling in *DRAMS from Korea* applies equally in this case with respect to Article 11.3.

[105] Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, para. 114 (emphasis added) ("*H-Beams from Poland*").

[106] Appellate Body Report, *Hot-Rolled Steel from Japan*, para. 192 (*quoting* Appellate Body Report, *H-Beams from Poland*, para. 106).

[107] There was not a definitive ruling from the panel on this issue, since the panel said that this was "an issue we need not and do not decide." Panel Report, *United States – Sunset Reviews of Anti-Dumping Duties on*

- *Article 6 (Evidence)*: Article 6 of the Anti-Dumping Agreement applies to reviews conducted under Article 11 as mandated by the explicit terms of Article 11.4: "The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article." Thus, *all* provisions of Article 6 apply to all reviews under Article 11.

- *Article 12 (Notice)*: Article 12 of the Anti-Dumping Agreement applies to reviews conducted under Article 11 because Article 12.3 provides that "[t]he provisions of A[rticle 12] shall apply *mutatis mutandis*[108] to the initiation and completion of reviews pursuant to Article 11 . . . ." Article 12.3 applies all of the Article 12 disciplines regarding notice and the need for sufficient explanations to sunset review proceedings under Article 11.

- *Article 18 (Final Provisions)*: Article 18.3 of the Anti-Dumping Agreement expressly provides that "the provisions of this Agreement shall apply to investigations, *and reviews of existing measures* initiated pursuant to applications made on or after the date of entry into force of the WTO Agreement." (Emphasis added.) Thus, the Anti-Dumping Agreement applies to sunset reviews of anti-dumping measures imposed prior to the entry into force of the WTO Agreement.

96. Through these provisions the United States had an obligation to (1) terminate the anti-dumping measure on Argentine OCTG unless, (2) it conducted a substantive review and (3) made a determination (4) based on evidence, that (5) dumping (in accordance with the requirements of Article 2) and (6) injury (in accordance with the requirements of Article 3 requirements) would be (7) "likely" (the common meaning of which is "probable") to continue or recur if the anti-dumping measure were terminated.

VII. THE DEPARTMENT'S SUNSET DETERMINATION AND THE DEPARTMENT'S DETERMINATION TO CONDUCT AN EXPEDITED SUNSET REVIEW WERE INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT AND GATT 1994

97. While previous WTO panels and the Appellate Body have considered challenges to the Department's sunset review proceedings, this case is unique in several respects, including that it is the first dispute in which a WTO panel is being asked to review the application of the sunset review "waiver" and "expedited review" provisions of US sunset law and the Department's regulations.

98. The key facts relevant to the Department's Sunset Determination are recalled briefly as follows. Siderca had not shipped any OCTG to the United States for consumption during the relevant period for purposes of the sunset review. Siderca stated this to the Department. (Siderca made similar "no-shipment" representations during each of the relevant administrative review periods. The Department conducted "non-shipment" reviews and in each instance verified Siderca's claims that the company had not exported OCTG to the United States.) The Department's import data, however, showed the existence of some Argentine OCTG imports to the United States. Because Siderca's total exports of OCTG to the United States (zero exports) were less than 50 per cent of total OCTG exports

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Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244, circulated 14 August 2003, paras. 7.99-7.101 ("*Sunset Review of Steel from Japan*").

[108] Black's Law Dictionary provides the following definition of *mutatis mutandis*: "With necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices and the like." In other words, *mutatis mutandis* provides for changes in detail while preserving substance.

from Argentina to the United States, however, the Department determined Siderca's response to be "inadequate."[109]

99. The Department then determined that because Siderca's response was deemed to be "inadequate," the company was similarly deemed to have "waived" its right to participate in the sunset review.[110] The Department deemed Argentina to have waived its right to participate because of the "inadequate" response to the initiation notice. [111]

100. It is difficult to discern the actual basis for the Department's determination – whether the Department relied on the "waiver" provision, 19 USC. § 1675(c)(4)(B)("In a review in which an interested party waives its participation pursuant to this paragraph, the administering authority shall conclude that revocation of the order. . . . would be likely to lead to continuation or recurrence of dumping . . ."), or the "facts available" provision, 19 USC. § 1675(c)(3)(B) ("If interested parties provide inadequate responses to a notice of initiation, the administering authority . . . may issue, without further investigation, a final determination based on the facts available . . . "). The Department's determination purports to rely on both provisions.[112] However, as explained below, the basis for the simultaneous application of these provisions to a single respondent is unclear.

101. These provisions are mutually exclusive: a respondent either waives its right to participate, or it attempts to participate and the Department determines that the application of facts available is necessary. Argentina submits that the application of either provision to the sunset review of OCTG from Argentina violates the requirements of Article 11.3 of the Anti-Dumping Agreement.

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[109] *Oil Country Tubular Goods From Argentina: Adequacy of Respondent Interested Party Response to the Notice of Initiation*, A-357-810 (Dep't Comm., 22 August 2000)(ARG-50).

[110] *Issues and Decision Memorandum* at 4-5 (ARG-51)("In the instant reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation.").

[111] The Department's *Issues and Decision Memorandum* states:

> As discussed in section II.A.3 of the *Sunset Policy Bulletin*, the SAA at 890, and the House Report at 63-64, if companies continue dumping with the discipline of an order in place, the Department may reasonably infer that dumping would continue if the discipline were removed. We note that there have been above de minimis margins for the **investigated companies throughout the history of the orders**, except for one company covered by the order on Japan. Consistent with section 752(c) of the Act, the Department also considered the volume of imports before and after issuance of the order. According to the import statistics provided by domestic interested parties and, as confirmed by Census IM 145 reports statistics, **imports of subject merchandise** decreased in 1995 and, since 1996, have significantly decreased from their pre-order levels. Based on this analysis, the Department finds that the existence of dumping margins after the issuance of the orders is highly probative of the likelihood of continuation or recurrence of dumping. **Therefore, given that dumping continued after the issuance of the orders, average imports continued at levels far below pre-order levels from 1995 to 1999, and respondent interested parties waived their right to participate in these reviews or failed to submit adequate substantive responses, we determine that dumping is likely to continue if the orders were revoked.**
>
> *Issues and Decision Memorandum* at 5 (ARG-51) (emphasis added).

[112] This case is not the only case in which it is difficult to determine the basis for the Department's determination. Indeed, in 166 sunset reviews, the Department cited to both the "waiver" provision, 19 USC. § 1675(c)(4), and the "facts available" provision, 19 USC. § 1675(c)(3)(B) – two mutually exclusive provisions – as the basis for its determination. *See* US Department of Commerce Sunset Reviews (ARG-63).

102. The operation of the waiver provision in this case precluded the Department from conducting a review and making the determination required by Article 11.3 of the Anti-Dumping Agreement. Instead, the waiver provision mandates a finding of likely dumping without any analysis. Accordingly, Argentina believes that the US waiver provisions and the Department's application of those provisions violate US obligations under the Anti-Dumping Agreement as such and as applied in this case.

103. Whether the Department based its determination on the "waiver" provision – 19 USC. § 1675(c)(4) – or the "facts available" provision – 19 USC. § 1675(c)(3)(B) – the Department failed in either event to conduct a "review" and make a "determination" that expiry of the duty would be likely to lead to continuation or recurrence of dumping, as required by Article 11.3 of the Anti-Dumping Agreement. Furthermore, regardless of whether the waiver provision was actually applied in this case, the provision can be challenged as such. 19 USC. § 1675(c)(4)(B) mandates that the Department forego a "review" and automatically find that dumping would be likely to continue or recur when a company is deemed to have waived its right to participate in the sunset review. Such a finding is required without a review and an analysis under the standard leading to a "determination" as required by Article 11.3 of the Anti-Dumping Agreement.

104. Section A below describes Argentina's challenge to the waiver provisions as being inconsistent "as such" with Article 11.3, and Articles 6.1 and 6.2 of the Anti-Dumping Agreement.

105. Section B sets forth Argentina's argument that US law, the SAA, and the *Sunset Policy Bulletin* establish an irrefutable presumption that dumping is likely to occur, and that this irrefutable presumption is demonstrated by the Department's consistent sunset review practice.

106. Section C below describes Argentina's challenge to the Department's determination to conduct, and its conduct of, an expedited sunset review of OCTG from Argentina, and application of the waiver provisions and/or facts available provisions in violation of Articles 11, 2, 6, and 12 of the Anti-Dumping Agreement.

107. Section D sets forth the Argentina's challenge to the Department's likelihood determination, as applied.

108. Section E demonstrates that, in the alternative, the United States is in violation of GATT Article X:3(a).

A. THE US SUNSET REVIEW WAIVER PROVISIONS, 19 USC. § 1675(C)(4) AND 19 C.F.R. § 351.218(D)(2)(III), ARE INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT: WHEN A RESPONDENT INTERESTED PARTY IS DEEMED TO HAVE "WAIVED" ITS RIGHT TO PARTICIPATE IN A SUNSET REVIEW, THE WAIVER PROVISIONS PRECLUDE THE DEPARTMENT FROM CONDUCTING A "REVIEW" AND MAKING A "DETERMINATION" WHETHER EXPIRY OF THE DUTY WOULD BE LIKELY TO LEAD TO CONTINUATION OR RECURRENCE OF DUMPING, AND INSTEAD MANDATE A FINDING OF LIKELY DUMPING WITHOUT ANY ANALYSIS

1. The US Sunset Review Waiver Provisions, as such, violate the Anti-Dumping Agreement because they prohibit the Department from conducting a "review" and making a "determination" as required by Article 11.3. Instead, these provisions mandate that the Department render a "likely" dumping determination without any substantive, prospective analysis of the facts existing at the time of the sunset review in order to make the determination required by Article 11.3

109. The US sunset review waiver provisions, as such, violate the Anti-Dumping Agreement because, pursuant to these provisions, the Department neither conducts a "review" nor makes a

"determination" that expiry of the duty would be likely to lead to continuation or recurrence of dumping, as required by Article 11.3. Instead, these provisions mandate that the Department render a "likely" dumping determination without any analysis of the facts existing at the time of the sunset review in violation of Article 11.3.

110. The use of the word "determine" in Article 11.3 indicates that the drafters contemplated positive action by the authority to satisfy the obligation set out in the provision. The plain and ordinary meaning of "determine" is "to establish or ascertain definitely, as after consideration, investigation, or calculation."[113] The use of the term "determine" in Article 11.3 thus requires that the authority take action in order to reach a conclusion. Indeed, there is nothing in the meaning of the word "determine" or structure of Article 11.3 that contemplates passivity on the part of the administering authority in satisfying the obligation. This is consistent with the meaning ascribed by the *Section 301* panel to the term "determination," albeit in a slightly different context, that of interpreting Article 23.2(a) of the DSU. The panel noted that some of the relevant dictionary meanings of the word "determination" included "the action of coming to a decision." The panel added that:

> Without there being a need precisely to define what a "determination" in the sense of Article 23.2(a) is, we consider that – given its ordinary meaning – a "determination" implies a high degree of firmness or immutability, i.e. a more or less final decision by a Member in respect of the WTO consistency of a measure taken by another Member.[114]

111. The use of the term "determine" in Article 11.3 thus requires that the authority take action in order to reach a conclusion. Passivity on the part of the administering authority cannot satisfy the obligation under Article 11.3. The requirement of Article 11.3 is unambiguous: anti-dumping measures must be terminated after five years, unless a "review" is conducted and the authority "determines" that termination would be likely to lead to continuation or recurrence of dumping and injury. As stated by the *Sunset Review of Steel from Japan* panel:

> The text of Article 11.3 contains an obligation "to determine" likelihood of continuation or recurrence of dumping. The requirement to make a "determination" concerning likelihood therefore *precludes an investigating authority from simply assuming that likelihood exists.* In order to continue the imposition of the measure after the expiry of the five-year imposition period, it is clear that the investigating authority has to determine, on the basis of *positive evidence*, that termination of the duty is likely to lead to continuation or recurrence of dumping. An investigating authority must have a *sufficient factual basis to allow it to draw reasoned and adequate conclusions* concerning the likelihood of such continuation or recurrence.[115]

112. In *Steel from Germany*, the panel held that the "sufficient factual basis" for the purposes of sunset reviews "should rest on the evaluation of the evidence that it has gathered during the original investigation, the intervening reviews and finally the sunset review."[116] The panel further confirmed that in sunset reviews, "an investigating authority should collect relevant facts and base its likelihood analysis on those facts. . . . Such relevant facts may be in the possession of either the investigating

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[113] The American Heritage Dictionary 388 (2d ed. 1982)(ARG-60).

[114] Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, n.657 ("*United States – Section 301*").

[115] Panel Report, *Sunset Review of Steel from Japan*, para. 7.177.

[116] Panel Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/R, adopted 19 December 2002, para. 8.96 ("*Steel from Germany*").

authorities or the interested parties."[117] Even though the authorities make a prospective assessment in sunset reviews, their determination nevertheless "must itself have an adequate basis in fact" at the time of the review.[118]

113. In *Steel from Germany*, the panel stated that "one of the components of the likelihood analysis in a sunset review under Article 21.3 is an assessment of the likely rate of subsidization" (or under Article 11.3 of the Anti-Dumping Agreement, the rate of dumping).[119] The panel held as follows:

> The facts necessary to assess the likelihood of subsidization in the event of revocation may well be different from those which must be taken into account in an original investigation. Thus, in assessing the likelihood of subsidization in the event of revocation of the CVD, an investigating authority in a sunset review may well consider, *inter alia*, the original level of subsidization, any changes in the original subsidy programmes, any new subsidy programmes introduced after the imposition of the original CVD, any changes in government policy, and any changes in relevant socio-economic and political circumstances.[120]

114. Because the facts in the original investigation may differ from those existing at the time of the sunset review, the investigating authority must gather and evaluate updated facts during the sunset review in order to make the substantive and meaningful determination required under Article 11.3 of the Anti-Dumping Agreement. As the panel in *Steel from Germany* stated:

> Article 21.3 reflects the application of the general rule set out in Article 21.1 – that a CVD shall remain in place only as long as necessary – in the specific instance where five years have elapsed since the imposition of a CVD. Article 21.2 reflects the same general rule in a different circumstance, when a reasonable period has elapsed since the imposition of the duty, and it is deemed necessary to review the need for the continued imposition of the duty. We also note that one of the principal objects of the SCM Agreement is to regulate the imposition of CVD measures. Article 21.3 effectuates that purpose by providing that after five years, a CVD should be terminated unless the investigating authorities determine that there is a likelihood of continuation or recurrence of subsidisation and injury.[121]

115. Unless the administering authority considers all information presented by interested parties, the establishment of the facts cannot be proper and the evaluation of the facts cannot be considered unbiased and objective, as required by Article 17.6(i) of the Anti-Dumping Agreement.[122]

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[117] *Id.* at para. 8.95.
[118] *Id.* at para. 8.96.
[119] *Id.*
[120] *Id.* at para. 8.96.
[121] *Id.* at para. 8.91.
[122] In *Hot-Rolled Steel from Japan*, the Appellate Body explained that Article 17.6(i) of the Anti-Dumping Agreement requires panels to determine:

> [F]irst, whether the investigating authorities' "*establishment* of the facts was *proper*" and, second, whether the authorities' "*evaluation* of those facts was *unbiased and objective*'"(emphasis added). Although the text of Article 17.6(i) is couched in terms of an obligation on *panels* – panels "shall" make these determinations – the provision, at the same time, in effect defines when *investigating authorities* can be considered to have acted inconsistently with the Anti-Dumping Agreement in the course of their "establishment" and "evaluation" of the relevant facts. In other words, Article 17.6(i) sets forth the appropriate standard to be applied by *panels* in examining the WTO-consistency of the *investigating authorities' e*stablishment and evaluation of the facts under other provisions of the Anti-Dumping Agreement. Thus, panels must assess if the establishment of the facts by the investigating authorities was *proper* and if the evaluation of those facts by those authorities

116. In order to comply with Article 11.3 of the Anti-Dumping Agreement, an investigating authority would have to establish a "sufficient factual basis" for the determination required to be made in sunset reviews. The investigating authorities' determination "should rest on the evaluation of the evidence that it has gathered during the original investigation, the intervening reviews and finally the sunset review."[123] The investigating authorities must make a "fresh determination, based on credible evidence."[124]

117. In the case of the US waiver provisions, there simply is no "determination" or "review" and the Article 11.3 requirements for continuation of the anti-dumping measure are not satisfied. To paraphrase the *Section 301* panel, there is no "action of coming to a decision."

2. The US Sunset Review Waiver Provisions are inconsistent with Articles 11.3, 11.4, 6.1, and 6.2 of the Anti-Dumping Agreement

118. The obligations of Article 6 are applicable to sunset reviews under Article 11.3 by virtue of the cross-reference in Article 11.4 ("the provisions of Article 6 regarding evidence and procedure shall apply to any review conducted under this Article [Article 11]").[125] In the present case, the United States violated its obligations under Article 6, thereby consequently violating Article 11.4.

119. In *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, the Appellate Body underscored "the importance of the obligations contained in Article 6," of the Anti-Dumping Agreement, which it said established a "framework of procedural and due process obligations."[126]

120. Article 6.1 of the Anti-Dumping Agreement mandates that "all interested parties in an anti-dumping investigation shall be given . . . ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question." The Department's regulations regarding the "deemed waiver" of the right of a respondent party to participate in a sunset review violate Article 6.1 because they foreclose the opportunity for interested parties to present evidence regarding the likelihood of continuation or recurrence of dumping in order to inform the determination that the Department must make in its sunset review. These parties hardly have an "ample opportunity to present … evidence which they consider relevant" when the Department relies on the waiver provisions and "deems" parties to have waived their right to participate in the review. These provisions deny the parties any opportunity to present relevant evidence. The waiver provisions of the Department cannot be reconciled with the obligations of the United States under Article 6.1.

121. The waiver provisions similarly violate Article 6.2 of the Anti-Dumping Agreement because it does not provide interested parties with "a full opportunity for the defense of their interests." Interested parties have no opportunity – let alone a full opportunity – to defend their interests because the Department refuses to gather and consider information that would enable it to determine whether

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was *unbiased and objective*. If these broad standards have not been met, a panel must hold the investigating authorities' establishment or evaluation of the facts to be inconsistent with the Anti-Dumping Agreement. Para. 56.

[123] Panel Report, *Steel from Germany*, para. 8.95.

[124] Appellate Body Report, *Steel from Germany*, para. 88.

[125] The panel in *Steel from Germany* confirmed that "Article 12 of the [SCM] Agreement, which governs, *inter alia*, the collection of evidence, is specifically incorporated into Article 21." Panel Report, *Steel from Germany*, para. 8.115.

[126] Appellate Body Report, *Pipe Fittings from Brazil*, para. 138.

termination of an anti-dumping measure would be likely to lead to continuation or recurrence of dumping.

122. Indeed, as the Panel in Sunset Review of Steel from Japan confirmed:

> Articles 6.1 and 6.2 make it clear that interested parties have a broadly-defined right to submit evidence to the investigating authority during a sunset review and are entitled to a full opportunity for the defence of their interests.[127]

123. In sum, the waiver provisions violate US obligations under Article 6 of the Anti-Dumping Agreement, by virtue of the cross-reference contained in Article 11.4, and therefore consequentially, Articles 11.3 and 11.4. The waiver provisions violate Article 6.1 because they preclude respondent interested parties from being able to present evidence. The waiver provisions deny respondent interested parties of an ability to defend their interest in sunset reviews in violation of Article 6.2.

B. THE DEPARTMENT'S SUNSET DETERMINATION IS INCONSISTENT WITH ARTICLE 11.3 OF THE ANTI-DUMPING AGREEMENT BECAUSE IT WAS BASED ON AN IRREFUTABLE PRESUMPTION UNDER US LAW AS SUCH THAT TERMINATION OF THE ANTI-DUMPING MEASURE WOULD BE LIKELY TO LEAD TO CONTINUATION OR RECURRENCE OF DUMPING

1. The Department's sunset review practice unequivocally demonstrates an irrefutable presumption that dumping would be likely to continue or recur

124. The Department's Sunset Determination is inconsistent with Article 11.3 of the Anti-Dumping Agreement because it was based on an irrefutable presumption under US law that termination of the anti-dumping measure would be likely to lead to continuation or recurrence of dumping. The unlawful presumption in US law is evidenced by the consistent practice of the Department in the conduct of sunset reviews.

125. The Appellate Body in *Steel from Germany* explained that while it would be difficult for a single case to serve as conclusive evidence of the Department's practice, a comprehensive examination of all US sunset reviews and an analysis of the methodology used by the Department in those reviews might provide such an evidentiary basis:

> We are not persuaded that the conduct of a single sunset review can serve as conclusive evidence of USDOC practice, and thereby, of the meaning of United States law. This is particularly so in the absence of information as to the number of sunset reviews that have been conducted, the methodology employed by USDOC in other reviews, and the overall results of such reviews. . . . Accordingly, the evidentiary foundation upon which the European Communities sought to have the Panel draw an inference from USDOC practice seem to us to have been a weak one...[128]

126. Argentina has undertaken a review of all of the Department's sunset reviews in order to provide empirical evidence in support of its claims. As of September 2003, the Department of Commerce has conducted 291 sunset reviews of anti-dumping duty orders. Argentina has analyzed all 291 of these sunset reviews and has recorded the Department's findings for each in Argentina's Exhibit ARG 63, entitled, "US Department of Commerce Sunset Reviews." Specifically, for each sunset proceeding, Argentina tracked information falling under nine major categories: (1) "Title," (2) "Case Number," (3) "Date," (4) "Outcome in Sunset Reviews in Which Domestic Industry

[127] Panel Report, *Sunset Review of Steel from Japan*, para. 7.255.
[128] Appellate Body Report, *Steel from Germany*, para. 148 (footnote omitted).

Participated," (5) "Domestic Industry Participation," (6) "Foreign Interested Party Participation," (7) "Type of Proceeding," (8) "Stated Basis for Likelihood Determination," and (9) "Stated Basis for Determination of Likely Margin." Each of these categories is represented as a heading on the table.[129]

127. For each of the sunset reviews in which the Department determined that dumping would be likely to continue or recur, Argentina analyzed and recorded the stated basis (or bases) for the Department's determination, which included potentially overlapping bases for the likelihood determination: (a) the existence of *continued dumping margins* – whether from the original investigation or an administrative review – as identified in the SAA and the *Sunset Policy Bulletin*; (b) a finding that *imports ceased* as identified in the SAA and the *Sunset Policy Bulletin*; and (c) a *decline in the volume of imports* as identified in the SAA and the *Sunset Policy Bulletin*.

128. The Department's reliance on these three factors to the exclusion of the prospective analysis required by Article 11.3 of the Anti-Dumping Agreement is demonstrated by the Department's consistent practice in sunset reviews.[130]

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[129] (1) "**Title**" simply refers to the title of the anti-dumping order that is the subject of the sunset review. (2) "**Case Number**" refers to the case number assigned to the sunset review by the Department. (3) "**Date**" refers to the date on which the Department issued its final results of the sunset review. (4) "**Outcome in Sunset Reviews in Which Domestic Industry Participated**" records whether, in the sunset proceedings in which the domestic industry participated, the Department issued a finding that dumping would be likely or not likely to continue or recur. (5) "**Domestic Industry Participation**" records whether a domestic interested party: (a) participated in the sunset review; (b) did not respond to the notice of the initiation of the sunset review; or (c) responded to the notice of initiation, but later withdrew its participation from the sunset review. (6) "**Foreign Interested Party Participation**" records whether the foreign interested parties: (a) provided any response to the notice of initiation of the sunset review; (b) provided an "adequate" response to the notice of initiation of the sunset review pursuant to 19 C.F.R. § 351.218(e)(1)(ii)(A); (c) filed an affirmative statement of waiver, declining to participate in the sunset review; or (d) filed a response to the notice of initiation of the sunset review, but the Department considered its response to be "inadequate" by virtue of 19 C.F.R. § 351.218(e)(1)(ii)(A). (7) **"Type of Proceeding"** records whether the Department: (a) revoked the order within 90 days; (b) conducted a "full" review pursuant to 19 C.F.R. § 351.218(e)(2); (c) conducted an "expedited" review pursuant to 19 USC. § 1675(c)(3)(B) and 19 C.F.R. § 351.218(e)(1)(ii)(C)(2); or (d) issued a mandatory likelihood determination pursuant to 19 USC. § 1675(c)(4)(B) and 19 C.F.R. § 351.218(d)(2). (Please note that the Department frequently purports to conduct both an expedited review on the basis of the facts available and to issue a likelihood determination pursuant to the statutory mandate. As a result, the occurrence rates of the four different types of sunset proceedings do not add up to 100 per cent in Exhibit ARG 63, as would be expected. (8) "**Stated Basis for Likelihood Determination**" records, for the sunset reviews in which the Department determined that dumping would be likely to continue or recur, the stated basis (or bases) for its determination. There are four potentially overlapping bases for the likelihood determination: (a) the existence of *continued dumping margins* – whether from the original investigation or an administrative review – pursuant to the SAA and the *Sunset Policy Bulletin*; (b) a finding that *imports ceased* pursuant to the SAA and the *Sunset Policy Bulletin*; and (c) a *decline in the volume of imports* pursuant to the SAA and the *Sunset Policy Bulletin*. The table also reflects a fourth category (d), which provides for a prospective analysis as required by Article 11.3 of the Anti-Dumping Agreement. This category has no data because, it has never been undertaken by the Department. (9) "**Stated Basis for Determination of Likely Margin**" records for the sunset reviews in which the Department decided to continue the order, the stated basis for the Department's "likely margin" calculation. The possible sources from which to derive the likely dumping margin are: (a) the original investigation and (b) an administrative review. The table also reflects third category, (c), fresh information gathered during the course of the sunset review (i.e., a prospective analysis), as required by Article 11.3 of the Anti-Dumping Agreement. There are no entries for this category as well.

[130] *See* US Department of Commerce Sunset Reviews (ARG-63). Review of the 291 sunset reviews of anti-dumping duty orders conducted by the Department reveals the following. In 217 of these reviews, at least one domestic interested party participated in the proceeding; the Department concluded that dumping would likely continue or recur in all of these reviews. The Department revoked the order 74 times. In 65 of these revocations, the domestic industry declined to participate in the proceeding, and in the remaining 9, the domestic industry responded to the notice of initiation of the sunset review, but later withdrew from the proceeding. In

129. The results of Argentina's analysis demonstrate the irrefutable presumption:

- In 100 per cent of the sunset reviews in which a domestic interested party participated in the proceeding, the Department determined that dumping was likely to continue or recur;

- In 100 per cent of the revocations issued by the Department, the domestic industry either did not participate in the sunset proceeding or subsequently withdrew from the sunset proceeding;

- In 100 per cent of the sunset reviews for which the Department determined that dumping was likely to continue or recur, the Department failed to conduct a prospective analysis, as required by Article 11.3 of the Anti-Dumping Agreement;

- In 100 per cent of the sunset reviews for which the Department determined that dumping was likely to continue or recur, the Department cited the authority of the SAA and the Department's *Sunset Policy Bulletin*;

- In 100 per cent of the sunset reviews for which the Department determined that dumping was likely to continue or recur, no respondent was able to overcome the irrefutable presumption that dumping would likely continue or recur established by the SAA and the *Sunset Policy Bulletin* criteria (*i.e.*, existence of continued dumping margins, cessation of imports, or decline in volume).

130. In 166 sunset proceedings, or well over half of all sunset reviews conducted by the Department (57.4 per cent of the total number of sunset reviews), the Department applied the waiver provisions, which mandate that the Department "shall conclude that revocation of the order or termination of the investigation would be likely to lead to continuation or recurrence of dumping." Such determinations cannot be defended as being objective – indeed the outcome is mandated by statute. Respondents cannot overcome the presumption, because the statute precludes the possibility of any analysis in such cases.

131. Argentina also analyzed and recorded the stated basis for the Department's "likely margin" determined by the Department and reported to the Commission. The possible sources the Department used to determine the likely dumping margin are: (a) the original investigation rate and (b) an administrative review rate. The Department never used fresh information gathered during the course of the sunset review (*i.e.*, a prospective analysis), as required by Article 11.3 of the Anti-Dumping Agreement.

132. The evidence once again speaks for itself:

- In 100 per cent of the sunset reviews for which the Department determined that dumping was likely to continue or recur, the Department failed to calculate a current dumping margin derived from fresh information gathered during the course of the sunset review (i.e., perform a prospective analysis), as required by Article 11.3 of the Anti-Dumping Agreement; and

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17 of the sunset reviews in which the Department concluded that dumping would likely continue or recur, the Department declined to allow a foreign interested party to participate, despite the fact that the party submitted a response to the notice of initiation. In 77 per cent of the sunset proceedings in which the domestic industry participated (167 reviews), the Department indicated that it issued a finding that dumping would likely continue or recur pursuant to the statutory mandate of 19 USC. § 1675(c)(4)(B)("waiver provision"). In 88 per cent of the sunset proceedings in which the domestic industry participated (191 reviews), the Department stated that it conducted an expedited review on the basis of the facts available. The Department undertook a full review in less than 10 per cent of the total sunset reviews it has conducted.

- In 100 per cent of the sunset reviews for which the Department determined that dumping was likely to continue or recur, the Department relied on the margin from the original investigation or a previous administrative review as the basis for its determination of the "likely" margin.

133. In sum, to date there have been 217 sunset reviews conducted by the Department where the domestic industry has participated in the Department's sunset proceeding.[131] In 100 per cent of these cases the Department determined that dumping would be likely to continue or recur.[132] Furthermore, as the basis for its likelihood determination in these cases, the Department referenced the SAA and *Sunset Policy Bulletin* in 100 per cent of these cases, and cited at least one of the three criteria prescribed by the SAA and *Sunset Policy Bulletin*.[133] Similarly, the Department relied on the SAA and the *Sunset Policy Bulletin* in 100 per cent of the cases in determining the likely margin to prevail.

134. In the four cases (less than 2 per cent) where the Department did not cite one of the three SAA/*Sunset Policy Bulletin* criteria as the sole basis for its likely dumping determination, it seemingly did so only because none of the criteria were present – and therefore the anti-dumping measure should have been terminated in those cases.[134] Nevertheless, in each of those instances, the Department instead found "good cause" to consider other factors pursuant to 19 USC. § 1675a(c)(2) and 19 C.F.R. § 351.218(e)(2)(iii), and found alternative grounds for its determination that dumping would be likely to continue or recur.[135] Consequently, it is clear from a review of the Department's sunset practice that the Department, in fact, does not conduct a review and make a determination of whether expiry of the duty would be likely to lead to continuation or recurrence of dumping as required by Article 11.3.

135. A particularly egregious example of the Department's ritualistic and mechanical recitation of the SAA and *Sunset Policy Bulletin* criteria to the exclusion of substantive analysis of the actual likelihood of continuation or recurrence of dumping is the case involving *Industrial Nitrocellulose from Yugoslavia*. In that sunset review, the Department conducted an expedited review based on the failure of the respondents to submit a response in the proceeding. Following its consistent practice, the Department determined that revocation of the anti-dumping duty order would be likely to lead to continuation or recurrence of dumping at the margins found in the original investigation.[136] The Department made no other factual inquiry during the review.

136. In the Commission's sunset review in the same case, however, the Commission determined that injury was not likely to continue or recur (despite the fact that the respondents also did not participate in the Commission's sunset review).[137] The Commission relied on the fact that the sole

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[131] For purposes of this discussion, Argentina does not consider the instances in which no domestic interested party participated in the sunset proceeding to constitite a "review" because, in such circumstance, the Department will simply terminate the anti-dumping order within ninety days of the notice of initiation without conducting a sunset review. *See* 19 USC. § 1675(c)(3)(B)(ARG-1); 19 C.F.R. § 315.218(d)(1)(iii)(B)(ARG-3).

[132] US Department of Commerce Sunset Reviews (ARG-63).

[133] *Id.*

[134] *Issues and Decision Memorandum for the Sunset Review of the AD Order on Gray Portland Cement and Cement Clinker from Venezuela* (Dep't Comm., 18 February 2000)(prelim. results) at 3-5 (ARG-47); *Issues and Decision Memorandum for the Sunset Review of the AD Order on Uranium from Russia* (Dep't Comm., 27 June 2000)(final results) at 15-17 (ARG-48); *Issues and Decision Memorandum for the Sunset Review of the AD Order on Uranium from Uzbekistan* (Dep't Comm., 27 June 2000)(final results) at 9-11 (ARG-49); *Sugar and Syrups from Canada*, 64 Fed. Reg. 48,362, 48,363-64 (Dep't Comm. 1999)(final results sunset reviews)(ARG-40).

[135] *Id.*

[136] *Industrial Nitrocellulose from Yugoslavia*, 64 Fed. Reg. 57,852, 57,853-54 (Dep't Comm. 1999)(final results sunset review)(ARG-42).

[137] *Industrial Nitrocellulose from Brazil, China, France, Germany, Japan, Korea, the United Kingdom, and Yugoslavia*, USITC Pub. 3342, Inv. Nos. 731-TA-96 and 439-445 (August 2000) at 11 (ARG-53).

Yugoslavian producer/exporter was no longer capable of exporting to the United States because the company's sole production facility was destroyed as a result of military action, and US trade sanctions prohibited imports into the United States:

> The record of these reviews indicates that the Yugoslav producer's facilities were destroyed or severely damaged as a result of military action and that the United States has continuing sanctions against imports from Serbia . . . . We find, given the destruction of the only known INC production facility in Yugoslavia and the lack of any indication in the record of these reviews that Yugoslav INC production and exports to the United States are likely to resume in the reasonably foreseeable future, that INC imports from Yugoslavia would be likely to have no discernible adverse impact on the domestic industry.[138]

137. Accordingly, it is clear to Argentina that when the *Sunset Policy Bulletin* states that the Department "normally"[139] will find likely dumping when any one of the three criteria (continued dumping margins; cessation of imports; or decline in import volume) are present, this more accurately means that the Department will use any one of the three basic criteria[140] in order to justify its results-oriented likelihood conclusion. At the same time, however, it is clear that where none of the SAA and *Sunset Policy Bulletin* criteria can be met in order to make a finding of likely dumping, the Department will nonetheless consider alternative information in order to justify a finding of likely dumping. Thus, because it is the Department's consistent practice to employ in its sunset reviews an irrefutable presumption of likely dumping, the United States is acting inconsistently with Article 11.3 of the Anti-Dumping Agreement.

2. The Statutory Provisions, 19 USC. §§ 1675(c) and 1675a(c), implementing the US obligation under Article 11.3, cannot be interpreted independently from the further instruction provided by the SAA and *Sunset Policy Bulletin*. Taken together, the US Sunset Statutory Provisions, the SAA, and the *Sunset Policy Bulletin* establish an irrefutable presumption that is inconsistent with Article 11.3 of the Anti-Dumping Agreement

138. In deciding whether dumping would likely continue or recur upon termination of an anti-dumping duty order, the Department's determination is governed by 19 USC. §§ 1675(c) and 1675a(c), as well as the further instruction provided by the SAA and the *Sunset Policy Bulletin*. The statutory provisions, 19 USC. §§ 1675(c) and 1675a(c), implementing the US obligation under Article 11.3, cannot be interpreted independently from the further instruction provided by the SAA and *Sunset Policy Bulletin*. Taken together, the US sunset statutory provisions, the SAA, and the *Sunset Policy Bulletin* prescribe a standard that is inconsistent with Article 11.3 of the Anti-Dumping Agreement.

139. Methodologies and practice that prescribe a standard can be subject to WTO challenge. In *United States – Countervailing Measures Concerning Certain Products from the European*

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[138] *Id.*

[139] The *Sunset Policy Bulletin* states that "the Department normally will determine that revocation of an anti-dumping order or termination of a suspended dumping investigation is likely to lead to continuation or recurrence of dumping where [any one of the three prescribed situations is found]." *Sunset Policy Bulletin* at 18,872 (ARG-35).

[140] The three criteria are "(a) dumping continued at any level above *de minimis* after the issuance of the order or the suspension agreement, as applicable; (b) imports of the subject merchandise ceased after issuance of the order or suspension agreement, as applicable; or (c) dumping was eliminated after the issuance of the order or the suspension agreement, as applicable, and import volumes for the subject merchandise declined significantly." *Id.*

Communities ("*United States – CVDs on EC Products*"),[141] the Appellate Body upheld the Panel's finding that a certain US practice, "the same person methodology, was inconsistent with the SCM Agreement,"[142] both as such and as applied with respect to administrative and sunset reviews conducted under Articles 21.2 and 21.3, respectively. As a result, the Appellate Body recommended that the United States bring its administrative practice into conformity with its obligations under the SCM Agreement.[143] The Appellate Body also found that the administrative practice was inconsistent with sunset review rules under Article 21.3 of the SCM Agreement.[144]

140. The administrative practice found to be WTO-inconsistent in *United States – CVDs on EC Products* is similar in a key respect to the Department's sunset review procedures and consistent administrative practice at issue in OCTG from Argentina. The Department's consistent sunset review practice, in combination with guidance from the SAA and the *Sunset Policy Bulletin*, is also contrary to the obligation to conduct a "review" and make a "determination" that is based on positive information.

141. As noted above, the SAA provides the authoritative statement on how the United States will implement its obligations under the WTO Agreements, including the Anti-Dumping Agreement and the GATT 1994.[145] Both US courts[146] and WTO panels have recognized this point. For example, the WTO panel in *US Export Restraints*, stated the following regarding the SAA:

> It is clear to us that the [Uruguay Round Agreements Act] grants to the SAA unique legal status as an authoritative interpretation of the *URAA*, which the US courts must take into account. The text of the SAA confirms this by characterising itself as "an authoritative interpretation . . . both for purposes of US international obligations and domestic law."[147]

142. By outlining the instances in which the Department should determine that dumping is likely to continue or recur, the SAA clarifies the standard the Department will apply in making its likelihood decision pursuant to 19 USC. §§ 1675(c) and 1675a(c). The SAA states:

> [19 USC. § 1675a(c)] establishes standards for determining the likelihood of continuation or recurrence of dumping. Under [§ 1675(c)(1)], Commerce will examine the relationship between dumping margins, or the absence of margins, and the volume of imports of the subject merchandise, comparing the periods before and after the issuance of an order or the acceptance of a suspension agreement. For

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[141] WT/DS212/AB/R, adopted on 8 January 2003.

[142] *Id.* at para. 151 (emphasis in original).

[143] *Id.* at para. 162.

[144] *Id.* at para. 150.

[145] "[The SAA] represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law. Furthermore, the Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretation and commitments set out in this Statement. Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretation of those agreements includes in this Statement carry particular authority." SAA at 656 (ARG-5).

[146] *See, e.g.*, *SKF USA, Inc. v. United States*, 263 F.3d 1369, 1373 n.3 (Fed. Cir. 2001)(ARG-8)("The SAA, of course, is more than mere legislative history. Congress has instructed that '[t]he statement of administration actions approved by the Congress . . . shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the Uruguay Round Agreements Act] in any judicial proceeding in which a question arises concerning such interpretation or application.'"); *Micron Technology, Inc. v. United States*, 243 F.3d 1301, 1305 n.3 (Fed. Cir. 2001)(ARG-7).

[147] Panel Report, *US Export Restraints*, paras. 8.97-8.98 (footnotes omitted).

> example, declining import volumes accompanied by the continued existence of dumping margins after the issuance of an order may provide a strong indication that, absent an order, dumping would be likely to continue, because the evidence would indicate that the exporter needs to dump to sell at pre-order volumes.
>
> . . . .
>
> [E]xistence of dumping margins after the order, or the cessation of imports after the order, is highly probative of the likelihood of continuation or recurrence of dumping.[148]

143. In addition to the US statute and the SAA, the *Sunset Policy Bulletin* provides further direction as to the methodology the Department will employ in deciding whether revocation of an anti-dumping duty order would likely lead to continuance or recurrence of dumping. The US courts and federal agencies view the *Sunset Policy Bulletin* as a distillation of, and similar in status to, the SAA. The Department, for example, repeatedly describes the *Sunset Policy Bulletin* as flowing directly from the legislative history surrounding the URAA, and, in particular, the SAA:

> Drawing on the guidance provided in the legislative history accompanying the Uruguay Round Agreements Act ("URAA"), specifically the Statement of Administrative Action ("the SAA"), H.R. Doc. No. 103-316, vol. 1 (1994), the House Report, H.R. Rep. No. 103-826, pt. 1 (1994), and the Senate Report, S. Rep. No. 103-412 (1994), the Department issued its *Sunset Policy Bulletin* providing guidance on methodological and analytical issues, including the bases for likelihood determinations.[149]

144. Moreover, US courts have recognized that the *Sunset Policy Bulletin* is a direct distillation of the SAA. For example, in the context of reviewing the Department's sunset determination in a CVD proceeding, the CIT in *AG der Dillinger Huettenwerke v. United States*[150] cited the *Sunset Policy Bulletin* and noted that "[t]he *Sunset Policy Bulletin* parallels the language of the SAA."[151]
With regard to the Department's likelihood determination in a sunset review, the *Sunset Policy Bulletin* instructs that:

> [T]he Department normally will determine that revocation of an anti-dumping order or termination of a suspended dumping investigation is likely to lead to continuation or recurrence of dumping where –
>
> (a) dumping continued at any level above *de minimis* after the issuance of the order or the suspension agreement, as applicable;
>
> (b) imports of the subject merchandise ceased after issuance of the order or suspension agreement, as applicable; or

[148] SAA at 889-90.
[149] *E.g.*, *Potassium Permanganate from the People's Republic of China*, 64 Fed. Reg. 16,907 (Dep't Comm. 1999)(final results sunset review)(ARG-39).
[150] 193 F. Supp. 2d 1339 (CIT 2002)(ARG-15a).
[151] *Id.* at 1351-52, and n.18.

> (c) dumping was eliminated after the issuance of the order or the suspension agreement, as applicable, and import volumes for the subject merchandise declined significantly.[152]

146. These criteria are not surprising as they are the natural consequences of the imposition of an anti-dumping measure. In contrast to these factors, however, Article 11.3 of the Anti-Dumping Agreement directs that "any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition" unless the requirements for continuation of measure are satisfied. Article 11.3 establishes the principal obligation that anti-dumping measures shall be terminated after the requisite five-year period.[153] The United States fails to implement this obligation. As demonstrated above, the irrefutable presumption established by the SAA and the *Sunset Policy Bulletin* directs the Department to take an approach contrary to the requirements of Article 11.3. Indeed, rather than undertake a substantive analysis of whether expiry of the duty would be likely to lead to continuation or recurrence of dumping, the SAA and Policy Bulletin direct the Department to apply a simple checklist in deciding whether dumping would likely continue or recur. Accordingly, the Department considers whether there are dumping margins (whether they exist from the original investigation or subsequent administrative review), whether imports of the subject merchandise ceased, and whether import volumes of the subject merchandise declined. So long as the Department finds that any one of these three basic circumstances exists, the Department will forego analysis and simply conclude that dumping would be likely to continue or recur. Empirical evidence demonstrates the ease of finding that at least one of these criteria is satisfied. Of the 217 sunset reviews[154] that the Department has conducted to date, the Department found that at least one of these three criteria was satisfied in 98.1 per cent of the cases.[155]

147. Consequently, the Department's Sunset Determination was inconsistent with Article 11.3 of the Anti-Dumping Agreement because it was based on an irrefutable presumption under US law that termination of the anti-dumping measure would be likely to lead to continuation or recurrence of dumping. The unlawful presumption in US law is evidenced by the consistent practice of the Department in the conduct of sunset reviews.

C. THE DEPARTMENT'S DETERMINATION TO CONDUCT AND ITS CONDUCT OF AN EXPEDITED SUNSET REVIEW OF OCTG FROM ARGENTINA, AND ITS APPLICATION OF THE WAIVER PROVISIONS TO SIDERCA, WERE INCONSISTENT WITH ARTICLES 11, 2, 6, AND 12 OF THE ANTI-DUMPING AGREEMENT

1. The Department's determination to expedite the review of Argentina solely on the basis that Siderca's shipments to the United States constituted less than 50 per cent of the total exports from Argentina was inconsistent with the Anti-Dumping Agreement

148. In this case, the Department deemed Siderca to have provided an "inadequate" response solely on the basis that the company's OCTG exports to the United States were less than 50 per cent of the total OCTG exports from Argentina during the relevant period. Accordingly, the Department purportedly decided to conduct an expedited sunset review under US law and regulations. Argentina contends that the decision to use the expedited review procedures in this case precluded the

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[152] *Sunset Policy Bulletin* at 18,872 (ARG-35).

[153] *See* Appellate Body Report, *Steel from Germany*, para. 88.

[154] For purposes of this discussion, we do not consider the instances in which no domestic interested party participated in the sunset proceeding to be a "review." As explained above, in such instance, the Department will simply terminate the anti-dumping order within ninety days of the notice of initiation without conducting a sunset review. *See* 19 USC. § 1675(c)(3)(B)(ARG-1); 19 C.F.R. § 351.218(d)(1)(iii)(B)(3)(ARG-3).

[155] US Department of Commerce Sunset Reviews (ARG-63).

Department from actually conducting a "review" and making a "determination" as required by Article 11.3. Pursuant to 19 C.F.R. § 351.218(e)(ii)(c)(2), if the Department determines that a respondent interested party has not satisfied the 50 per cent exports threshold test, it will "normally" conduct an expedited sunset review based on "facts available" without considering information submitted by such interested party and without further investigation.

149. 19 USC. § 1675(c)(3)(B) provides that "if interested parties provide inadequate responses to a notice of initiation, the administering authority, within 120 days after the initiation of the review, or the Commission, within 150 days after such initiation, may issue, without further investigation, a final determination based on the facts available . . . ."

150. In the Department's determination to expedite, it noted that "[d]uring the five-year period from 1995 to 1999, the combined-average annual percentage of Siderca's exports of OCTG to the United States with respect to the total of exports of the subject merchandise to the United States was significantly below 50 per cent."[156] Since this fell below the 50 per cent threshold that the Department "normally will consider to be an adequate foreign response," the Department recommended that Siderca's response should be considered inadequate, and that an expedited review should be conducted. The Department's *Issues and Decision Memorandum* stated:

> Without a substantive response from respondent interested parties in the cases of Italy, Japan, and Korea, and an inadequate response in the case of Argentina, the Department, pursuant to 19 CFR 351.218(e)(1)(ii)(C), determined to conduct expedited, 120-day reviews of these orders.[157]

151. The Department's determination to expedite shows that it completely failed to conduct a "review" and to make a "determination" as required by Article 11.3 of the Anti-Dumping Agreement. In this sunset proceeding, Siderca was the only exporter investigated in the original investigation, and it was the only exporter for which the US industry had requested a review after imposition of the anti-dumping order between 1995 and 1999 (see Sections I.B. and II.A., above). Yet the Department merely assumed that its import statistics were correct, and that Siderca must necessarily fail the "50 per cent threshold" test for adequacy. The Department did nothing to resolve the apparent conflict in the data, but rather proceeded directly to an "expedited" review, and a "waiver" determination. As explained above, these decisions led directly to an affirmative conclusion that dumping would likely continue or recur, without any substantive "review" or "determination."

152. Given the Department's statement that it "did not receive an adequate response from respondent interested parties" (again, the reference is to all of them, without qualification), coupled with the Department's finding that Siderca did not submit an "adequate" response, the waiver determination seems to have applied to all respondent parties. [158]

153. The Department's analysis and conclusions seem to pertain to *all* of the respondent countries. The Department refers to "companies," "imports of subject merchandise," "orders" – all in the plural without any other qualifying language.[159] In addition, the Department stated that "respondent interested parties waived their right to participate in these reviews or failed to submit adequate

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[156] *Oil Country Tubular Goods from Argentina: Adequacy of Respondent Interested Party Response to the Notice of Initiation*, A-357-810 (Dep't Comm., 22 August 2000) at 2 (ARG-50).

[157] *Issues and Decision Memorandum* at 3 (ARG-51).

[158] *See Issues and Decision Memorandum* at 5(ARG-51)("Therefore, given that dumping continued after the issuance of the orders, average imports continued at levels far below pre-order levels from 1995 to 1999, and respondent interested parties waived their right to participate in these reviews or failed to submit adequate substantive responses, we determine that dumping is likely to continue if the orders were revoked.").

[159] *Issues and Decision Memorandum* at 5 (ARG-51).

substantive responses." Then the Department refers, once again, to the failure of respondent companies "to submit adequate substantive responses." The Department's discussion of Siderca's comments that immediately follows represents almost an afterthought that on its face did not affect the Department's determination "that dumping is likely to continue if the orders were revoked" for all four countries.

154. The only reason for the Department's additional discussion regarding the likely margin for Siderca appears to be petitioners' request that the Department use a higher rate than that from the original determination. The petitioners wanted the Department to use the petitioners' suggested rate from the petition.

155. As demonstrated below, the Department did not conduct a "review" or make a "determination" as required under Article 11.3 of the Anti-Dumping Agreement. Moreover, the Department's determination to conduct an expedited sunset review, and its conduct of an expedited review, solely on the basis of Siderca's OCTG exports to the United States being less than 50 per cent of the total OCTG exports from Argentina to the United States, were inconsistent with the requirements of Articles 11.3, 6, and Annex II of the Anti-Dumping Agreement. Notwithstanding Siderca's full cooperation and submission of a complete substantive response consistent with the Department's regulatory requirements, the Department deemed Siderca's response to be inadequate solely on the basis of the company's exports and, therefore, that Siderca waived its participation. Hence, the Department denied Siderca the opportunity to defend its interest.

2. In the Expedited Sunset Review of OCTG from Argentina, and the application of the Waiver Provisions to Siderca, the Department did not conduct a "review" or make a "determination" as required under Article 11.3 of the Anti-Dumping Agreement

156. In the expedited sunset review of OCTG from Argentina, the Department's determination of likelihood of dumping, and the likely level of such dumping, was inconsistent with Article 11.3 and Article 2 of the Agreement. As noted above, Article 11.3 requires a forward-looking analysis of the likelihood of continuation or recurrence of dumping.

157. In order to be consistent with Articles 11.1 and 11.3, Members must ensure that anti-dumping duties remain "in force only as long and to the extent necessary to counteract dumping which is causing injury." In order to fulfill this obligation, Members must conduct a substantive review of current facts and make a meaningful, prospective, determination as required by the Anti-Dumping Agreement.[160] In this case, the Department did not collect any new data to determine whether termination would likely lead to continuation or recurrence of dumping. The Department determined that Siderca's response to the notice of initiation of a sunset review was inadequate because it did not meet the 50 per cent test set out in the Department's anti-dumping regulations. The Department therefore conducted an expedited sunset review without gathering and analyzing the relevant facts, as required by Article 11.3. In addition, the Department deemed Siderca to have waived its participation in the sunset review, and therefore issued a statutorily mandated finding of likely dumping. Thus, the Department did not fulfill its obligation to conduct a "review" make a "determination" pursuant to Article 11.3.

158. In accordance with the mandate established by the SAA and the *Sunset Policy Bulletin*, during the sunset review the Department used the rate of dumping established in the original investigation, and did not gather or evaluate additional facts at the time of the sunset review. The conduct of the expedited review regulation and the application of the waiver provisions thus violated Article 11.3

[160] See discussion regarding reviews under the SCM Agreement in Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2002, para. 53 ("*Lead from UK*").

because the Department did not establish a "sufficient factual basis" for its determination in the sunset reviews. The Department did not rest its determination "on the evaluation of the evidence that it ha[d] gathered during the original investigation, the intervening reviews and finally the sunset review."[161] In fact, the Department did not conduct an administrative review, and denied, by virtue of the waiver, Siderca's right to participate in the sunset review. The Department further violated Article 11.3 because it merely used the rate established in original investigations, rather than making a "fresh determination, based on credible evidence."[162] An investigating authority must have a "sufficient factual basis" to allow it to draw "reasoned and adequate conclusions" concerning the likelihood of continuation or recurrence of dumping.[163]

159. The Department did not use Siderca's recent sales or cost data to calculate an up-to-date and accurate anti-dumping margin. Instead, the Department used only findings from the original investigation to "determine" whether termination of the order would likely lead to a continuation or recurrence of dumping.

160. The reasoning of the Appellate Body in *Steel from Germany* provides authoritative guidance as to the nature of a sunset review where the rate of dumping at the time of the sunset review is very low: "[t]here must be persuasive evidence that the revocation of the duty would nevertheless lead to injury to the domestic industry. Mere reliance by the authorities on the injury determination made in the original investigation will not be sufficient."[164] Indeed, on the contrary, Article 11.3 of the Anti-Dumping Agreement requires investigating authorities to determine[165] whether "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury."

161. In *Steel from Germany*, the panel held that a "sufficient factual basis" for the purposes of sunset reviews "should rest on the evaluation of the evidence that it has gathered during the original investigation, the intervening reviews and finally the sunset review."[166] The panel further confirmed that in sunset reviews, "an investigating authority should collect relevant facts and base its likelihood analysis on those facts . . . . Such relevant facts may be in the possession of either the investigating authorities or the interested parties."[167] Even though the authorities must make a prospective assessment, their determination "must itself have an adequate basis in fact"[168] at the time of the review.

162. The panel stated in *Steel from Germany* that "one of the components of the likelihood analysis in a sunset review under Article 21.3 is an assessment of the likely rate of subsidization" – or under Article 11.3 of the Anti-Dumping Agreement, the rate of dumping.[169] In *Steel from Germany*, the panel held as follows:

> The facts necessary to assess the likelihood of subsidization in the event of revocation may well be different from those which must be taken into account in an original investigation. Thus, in assessing the likelihood of subsidization in the event of revocation of the CVD, an investigating authority in a sunset review may well consider, *inter alia*, the original level of subsidization, any changes in the original subsidy programmes, any new subsidy programmes introduced after the imposition of

[161] Panel Report, *Steel from Germany*, para. 8.95.
[162] Appellate Body Report, *Steel from Germany*, para. 88.
[163] Panel Report, *Sunset Review of Steel from Japan*, para. 7.177.
[164] Appellate Body Report, *Steel from Germany*, para. 88 (emphasis added).
[165] *See* discussion in section VII.A.1 above.
[166] Panel Report, *Steel from Germany*, para. 8.95.
[167] *Id.* at para. 8.115.
[168] *Id.* at para. 8.96.
[169] *Id.*

> the original CVD, any changes in government policy, and any changes in relevant socio-economic and political circumstances.[170]

163. As noted above, because the facts and circumstances in the original investigation may differ from those existing at the time of the sunset review, the investigating authority must gather and evaluate updated facts and current information during the sunset review in order to make the substantive and meaningful determination required under Article 11.3 of the Anti-Dumping Agreement. The Appellate Body explained the obligations related to sunset provisions (albeit in the context of the SCM Agreement):

> Article 21.3 reflects the application of the general rule set out in Article 21.1 – that a CVD shall remain in place only as long as necessary – in the specific instance where five years have elapsed since the imposition of a CVD. Article 21.2 reflects the same general rule in a different circumstance, when a reasonable period has elapsed since the imposition of the duty, and it is deemed necessary to review the need for the continued imposition of the duty. We also note that one of the principal objects of the SCM Agreement is to regulate the imposition of CVD measures. Article 21.3 effectuates that purpose by providing that after five years, a CVD should be terminated unless the investigating authorities determine that there is a likelihood of continuation or recurrence of subsidisation and injury.[171]

164. The Department's determination to conduct an expedited sunset review, its conduct of an expedited review, and the application of the waiver provisions to Siderca, were inconsistent with US obligations under the Anti-Dumping Agreement. The Department rendered a determination of likelihood of continuation or recurrence of dumping without any analysis, in violation of Article 11.3 of the Anti-Dumping Agreement, which requires the authority to conduct a review in order to make a determination of whether termination of the duty would be likely to lead to continuation or recurrence of dumping and injury. In the absence of the requisite analysis and a determination based on positive evidence, the anti-dumping measure on OCTG from Argentina should have been terminated.

165. Argentina recalls the Appellate Body's statement in *Steel from Germany*: "If [a WTO Member] does not conduct a sunset review, or, having conducted such a review, it does not make such a positive determination, the duties must be terminated."[172]

3. The Department's Expedited Sunset Review and the application of the Waiver Provisions to Siderca were inconsistent with US obligations under Articles 11 and 6

166. Article 6.1 of the Anti-Dumping Agreement mandates that "all interested parties in an anti-dumping investigation shall be given . . . ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question."

167. The conduct of the expedited review and the application of the waiver provisions to Siderca, in the sunset review of OCTG from Argentina violated Article 6.1 because it prevented Siderca from presenting evidence for meaningful consideration by the Department regarding the likelihood of continuation or recurrence of dumping in order to inform its determination under Article 11.3. The Department acknowledged that Siderca both filed a complete substantive response to the notice to initiate a sunset review, and notified its willingness to participate fully in the instant sunset review.[173]

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[170] *Id.*

[171] *Id.* at para. 8.91.

[172] Appellate Body Report, *Steel from Germany*, para. 63.

[173] *Oil Country Tubular Goods from Argentina: Adequacy of Respondent Interested Party Response to the Notice of Initiation*, A-357-810 (Dep't Comm., 22 August 2000)(ARG-50).

Nevertheless, the Department ignored the information presented by Siderca. Thus, the company hardly had an "ample opportunity to present . . . evidence which [it] consider[ed] relevant" when the Department deemed Siderca to have waived its right to participate at all.

168. The conduct of the expedited review and the application of the waiver provisions to Siderca in the sunset review of OCTG from Argentina also violated Article 6.2, because Siderca did not have a full opportunity to defend its interests. In particular, Siderca could not defend its interests because the Department deemed Siderca to have waived its right to participate.

169. Moreover, when the margin of dumping is small – as in the case when the margin is 1.36 per cent – the investigating authority must gather and evaluate "persuasive evidence" in order to justify a determination that the revocation of the duty would lead to injury to the domestic industry, and "mere reliance" by the authorities on determinations made in the original investigation will not be sufficient.[174] The Department's conduct of an expedited review and its application of the waiver provisions violated both aspects of this standard. First, the Department did not collect any evidence – to say nothing of "persuasive evidence" – that would justify a determination (ultimately, made by the Commission) that the revocation of the duty would nevertheless lead to injury to the domestic industry. Second, instead of conducting a fresh determination based on credible evidence, the Department did exactly what has been ruled not to be sufficient: it relied exclusively on the determination made in the original investigation.

170. The drafters of the Anti-Dumping Agreement provided for the use of "facts available" as a last resort when investigating authorities are faced with recalcitrant and uncooperative parties. Article 6.8 and Annex II permit an investigating authority to make determinations based on "facts available" only when an interested party "refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation." The Department's conduct of an expedited sunset review for OCTG from Argentina violated Article 6.8 of the Anti-Dumping Agreement because the Department applied facts available based on Siderca's alleged failure of the Department's "50 per cent threshold" test. In doing so, the Department acted inconsistently with Article 6.8 and Annex II, which do not permit the use of "facts available" in such situations. Even worse, the Department did nothing to resort to facts available in a way consistent with the Anti-Dumping Agreement. The Department constrained its determination to some specific facts. In the instant case, it looked for the presence of any of the three criteria prescribed in the SAA as "highly probative" of a likelihood of continuation or recurrence of dumping, and when it found one of them, the Department made a final determination of likelihood or recurrence of dumping on the basis of this arbitrary criterion. As a result, in the sunset determination of OCTG from Argentina, the Department decided not to comply with the principal obligation in Article 11.3 (termination of the measure) because: (1) the Department found as a fact available that Siderca had stopped shipping to the US market after the imposition of the 1995 anti-dumping order, which is one of the criteria cited in the SAA as "highly probative" of a likelihood of continuation or recurrence of dumping; and (2) the Department resorted to another fact available in the file, the 1.36 per cent dumping margin calculated for Siderca during the 1994/95 investigation, which the Department considered to be conclusive of the likelihood of future dumping and the extent of the future dumping.

171. In sum, the conduct of the expedited review, and the application of the waiver provisions to Siderca in the sunset review of OCTG from Argentina violated US obligations under Article 6 of the Anti-Dumping Agreement, by virtue of the cross-reference contained in Article 11.4. The conduct of an expedited review and the application of the waiver provisions violated Article 6.1 because it precluded Siderca from being able to present evidence. The conduct of an expedited review and the application of the waiver provisions denied Siderca the ability to defend its interest in sunset reviews in violation of Article 6.2. Finally, the conduct of an expedited review resulted in the application of

[174] *See* Appellate Body Report, *Steel from Germany*, para. 88 (emphasis added)(footnote omitted).

facts available in a manner inconsistent with the requirements of Article 6.8 and Annex II of the Agreement.

4. The Department's Determination to Expedite and the Department's Sunset Determination in the Sunset Review of OCTG from Argentina were inconsistent with Article 12 of the Anti-Dumping Agreement

172. Article 12.3 provides that the Article 12 disciplines on notice and explanations apply to sunset review proceedings under Article 11: "The provisions of [Article 12] shall apply *mutatis mutandis* to the initiation and completion of sunset reviews pursuant to Article 11 . . . ."

173. Article 12 of the Anti-Dumping Agreement requires the administering authority to provide public notice and transparent explanations of its anti-dumping determinations, including both preliminary and final determinations in a sunset review. Specifically, the requirements for these determinations in a sunset review are set forth in Article 12.2, which states in relevant part that "[public] notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." Article 12.2.2 further amplifies Article 12.2:

> A public notice of conclusion . . . of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty . . . shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . . . In particular, the notice or report shall contain the information described in subparagraph 2.1. . . .

174. The Department provided public notice of its sunset review of OCTG from Argentina in its Department's Determination to Expedite, and the Department's Sunset Determination, which incorporated the Department's *Issues and Decision Memorandum* by reference. The Department's notice and explanations in these documents were inconsistent with the Department's obligations under Articles 12.2 and 12.2.2 in several respects.

175. Because Siderca's total exports of OCTG to the United States (zero exports) were less than 50 per cent of total OCTG exports from Argentina to the United States, the Department determined Siderca's response to be "inadequate." The Department then determined that because Siderca's response was inadequate, the company had "waived" its right to participate in the sunset review.[175] The Department deemed Argentina to have waived its right to participate either because of an "inadequate" response to the initiation notice.[176]

176. The Department's notice violates the requirements of Article 12.2 because it is impossible to discern the actual basis for the Department's determination – whether on the "waiver" provision, 19 USC. § 1675(c)(4), or the "facts available" provision, 19 USC. § 1675(c)(3)(B). The Department's determination purports to rely on both. As explained above in the introduction to Section VII, these provisions are mutually exclusive, and both cannot serve as the basis for the Department's determination to conduct an expedited review and to make the required determination under Article 11.3.

177. The Department's Sunset Determination also violated Article 12.2.

[175] *Oil Country Tubular Goods From Argentina: Adequacy of Respondent Interested Party Response to the Notice of Initiation*, A-357-810 (Dep't Comm., 22 August 2000)(ARG-50).

[176] *Issues and Decision Memorandum* at 4-5 (ARG-51).

178. First, the Department's public notice does not transparently set forth its "conclusions reached on . . . issues of fact and law" in contravention of its obligation under Article 12.2. In particular, the actual basis for the Department's affirmative likelihood determination is not discernible from its public notice. As discussed above, the Department stated in its *Issues and Decision Memorandum* that it considered Siderca's inadequate response to constitute a waiver of participation under 19 C.F.R. § 351.218(d)(2), indicating that it issued a determination of likelihood pursuant to the mandate of 19 USC. § 1675(c)(4)(B). The *Issues and Decision Memorandum* also states, however, that the Department made its likelihood determination on the basis of the facts available pursuant to 19 C.F.R. § 351.218(e)(1)(ii)(C). Thus, the Department's public notice does not transparently explain whether it issued its likelihood determination pursuant to statutory mandate or made a determination based on the facts available.[177] Accordingly, the Department violated Article 12.2 by not clearly setting forth the basis for its likelihood determination in the public notice.

179. Second, the public notice of the sunset review of OCTG from Argentina does not contain "all relevant information on the matters of fact . . . which have led to the imposition of final measures[,]" as required by Article 12.2.2. As discussed previously, Article 11.3 requires the Department to collect and evaluate current information during the sunset review. In its sunset review of OCTG from Argentina, however, the Department relied completely on information obtained during the original investigation. Thus, its public notice of the conclusion of the sunset review did not contain "all relevant information on the matters of fact." For example, as the factual basis for its likely margin determination, the Department noted in its *Issues and Decision Memorandum* that Siderca's dumping margin had not decreased over the life of the anti-dumping order. The Department, however, had not conducted any administrative reviews of OCTG from Argentina since issuance of the order, nor did it gather fresh information during the course of the sunset proceeding in order to calculate a current dumping margin for Siderca. Thus, the Department did not have any positive evidence to support its finding that Siderca's dumping margin had not decreased. Consequently, by not including any relevant information to support its factual determination that Siderca's dumping margin had not decreased in its public notice, the Department acted inconsistently with its obligations under Article 12.2.2.

180. Finally, the Department violated Article 12.2.2 by not including in its public notice the "information described in subparagraph 2.1." Among other information, subparagraph 2.1 of Article 12 requires that public notice of a final determination in a sunset review contain "the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2 [(*Determination of Dumping*).]" As noted above, however, during the course of its sunset review of OCTG from Argentina, the Department did not undertake a fresh analysis based on updated facts of whether Siderca was currently dumping. Instead, as the Department explained in its *Issues and Decision Memorandum*, it simply relied on the dumping margin found for Siderca in the original investigation. As a result, the Department's public notice of conclusion of the sunset review of OCTG from Argentina is completely devoid of any information concerning the calculation of a dumping margin under Article 2, contrary to the United States's obligations under Article 12.2.2.

D. ARTICLE 11.3 ESTABLISHES PARAMETERS FOR THE ARTICLE 11.3 OBLIGATION: ARTICLE 2 DISCIPLINES APPLY; REVIEWS ARE PROSPECTIVE IN NATURE AND THUS REQUIRE FRESH INFORMATION; DUMPING MUST BE "PROBABLE;" REVIEWS ARE SUBJECT TO THE EVIDENTIARY REQUIREMENTS OF ARTICLE 6; AND THE LIKELY DETERMINATION MUST BE BASED ON

[177] Moreover, this implausible result was not limited to the sunset review of OCTG from Argentina. In the public notifications of the final results of 166 sunset reviews, the Department indicated that it issued both an expedited likelihood determination on the basis of the facts available and a likelihood determination pursuant to statutory mandate, a result that is impossible on its face. *See* US Department of Commerce Sunset Reviews (ARG-63).

POSITIVE EVIDENCE. THE DEPARTMENT FAILED TO SATISFY THESE OBLIGATIONS IN ITS LIKELIHOOD DETERMINATION AND WITH REGARD TO THE LIKELY MARGIN REPORTED TO THE COMMISSION

181. The Department's reliance on the 1.36 per cent anti-dumping margin established in the original investigation back in 1995 simply cannot serve as a legal basis for the Department's determination that dumping would be likely to continue or recur. Indeed, that rate is less than the 2 per cent *de minimis* rate of the Anti-Dumping Agreement and, therefore, would not support a finding in a new investigation. Furthermore, the 1.36 per cent margin – calculated on the basis of the Department's practice of "zeroing" negative dumping margins – results in a flawed dumping margin that cannot serve as a legal basis for the Department's likelihood determination. Nor can the fact that Siderca stopped shipping to the United States following the imposition of the Antidumping measure – one of the SAA/*Sunset Policy Bulletin* checklist items – be considered positive evidence of likely dumping in the event of termination of the anti-dumping measure, as required by Article 11.3.

1. The Department's likelihood determination is inconsistent with the Anti-Dumping Agreement

182. Article 11.3 establishes parameters for the obligation of WTO Members to conduct a review and make a determination of whether expiry of the duty would be likely to lead to continuation or recurrence of dumping after the measure has been in place five years:

- First, the rules of Article 2 apply to reviews conducted under Article 11.3 because the Article 11.3 analysis entails a determination of whether "dumping" is likely. Article 2 makes clear that its rules regarding determinations of dumping are established "for the purpose of [the Antidumping] Agreement," which includes Article 11.3.

- Second, the Article 11.3 analysis is prospective in nature, which means that the determination cannot be based on stale information, but rather must be based on "fresh" data indicative of whether future dumping would be likely in the event of termination.

- Third, the requirement in Article 11.3 that continuation or recurrence of dumping must be "likely" in the event of termination means that the continuation or recurrence of dumping must be "*probable.*" Hence, it is not sufficient that dumping would be "possible." Dumping must be more probable than not to satisfy the Article 11.3 standard.

- Finally, in addition to the above, any such determination under Article 11.3 must be based on positive evidence and, pursuant to Article 11.4, must satisfy "the provisions of Article 6 regarding evidence and procedure."

183. First, Article 2 of the Anti-Dumping Agreement establishes the rules for dumping determinations "for the purpose of this Agreement." Article 2 sets forth the rules for determining whether a company is or is not dumping. Therefore, in the conduct of a review conducted under Article 11.3, the administering authority in satisfying this obligation must resort to disciplines in Article 2.

184. Second, the analysis required by Article 11.3 is prospective in nature. Therefore, the authorities need to rely on current information to make a prospective analysis of whether dumping would be likely to continue or recur. Exclusive reliance on 5 year old data from an original investigation cannot satisfy this standard. In the expedited sunset review of OCTG from Argentina,

the Department's determination of likelihood of dumping and the likely level of such dumping violated Article 11.3 and Article 2 of the AD Agreement because it was based upon past information not determinative of future dumping. In accordance with US law, the Department did not collect new data to determine whether termination would likely lead to continuation or recurrence of dumping.[178] Only by first requesting and then carefully reviewing current information could the Department reliably assess, in a WTO-consistent manner, the "likelihood" of future dumping and the level of any "likely" margin if the order were terminated. The Department's reliance on stale information necessarily resulted in speculation as to whether or not dumping would be likely to continue or recur were the order to be revoked.

185. As the Panel in *Sunset Review of Steel from Japan* observed:

> Indeed, this textual difference leads us to conclude that evidence relating to the existence (or absence) of dumping that may be examined by an investigating authority under Article 11.3 is not limited to a full-blown determination of dumping made pursuant to Article 2. That Article 2 may inform the *type* of information that an investigating authority may consider relevant for the purposes of an Article 11.3 sunset review likelihood determination does not, in our view, impose an obligation upon an investigating authority in a sunset review that relies upon evidence relating to dumping since the imposition of the order to rely *only* upon a determination of dumping that fully conforms to the dictates of Article 2.
>
> By this, we do not mean to say that the Anti-Dumping Agreement is devoid of any obligation governing the requisite nature of a sunset review likelihood determination. The text of Article 11.3 contains an obligation "to determine" likelihood of continuation or recurrence of dumping. The requirement to make a "determination" concerning likelihood therefore precludes an investigating authority from simply assuming that likelihood exists. In order to continue the imposition of the measure after the expiry of the five-year imposition period, it is clear that the investigating authority has to determine, on the basis of positive evidence, that termination of the duty is likely to lead to continuation or recurrence of dumping. An investigating authority must have a sufficient factual basis to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence.[179]

186. Third, the ordinary meaning of the term "likely" as used in Article 11.3 is "probable." Both the connotative and denotative meaning of the term "likely" are the same. *Blacks Law Dictionary* defines the term "likely" as "[p]robable" and "[i]n all probability."[180] *Webster's Dictionary* provides a similar definition, equating the term "likely" to something being "probable" and having a "high probability" of occurring or being true or being "very probable."[181] Consequently, in accordance with the evaluation required by Article 11.3, if the evidence indicates that dumping is unlikely – or if the evidence is inconclusive – upon the expiry of the order, the Department cannot conclude that dumping would be "likely." It is not sufficient that dumping would be "possible;" dumping must be more probable than not to satisfy the Article 11.3 standard.

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[178] US law provides that when the Department issues an affirmative dumping determination in a sunset review, the Department shall provide to the Commission a calculation of the magnitude of the dumping margin likely to prevail if the anti-dumping order is revoked. *See* 19 USC. § 1675a(c)(3)(ARG-1). Instead of calculating a dumping margin based on current information, the Department referenced information from its original determination.

[179] Panel Report, *Sunset Review of Steel From Japan*, paras. 7.176-7.177.

[180] Black's Law Dictionary 834 (5th ed. 1979)(ARG-61)(citing *Horning v. Gerlach*, 139 Cal. App. 470, 34 P.2d 504, 505 and *Neely v. Chicago Great Western R. Co.*, Mo. App., 14 S.W.2d 972, 978).

[181] Webster's New Collegiate Dictionary 660 (1979)(ARG-62).

187. Finally, Article 11.4 states that "[t]he provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article." Any determination under Article 11.3 must be based on positive evidence and be consistent with the evidentiary requirements of Article 6. As set forth above in detail, the Department's determination that Siderca's response was inadequate and therefore the company had waived its participation in the sunset review is inconsistent with the requirements of Article 6.

188. In sum, regarding the Department's likelihood determination, the Department cannot rely on the 1.36 per cent anti-dumping margin established (based on the practice of zeroing) in the original investigation as the basis for a determination that dumping would be likely to continue or recur. How does this determination apply Article 2 disciplines? How is it the result of a prospective analysis? How can it possibly be considered to be "likely"? And where is the evidence to support the Department's determination?

2. The likely margin of dumping of 1.36 per cent determined by the Department and reported to the Commission

189. The Department determined that if the order were revoked, the likely dumping margin to prevail would be 1.36 per cent. This margin was calculated by the Department in the original investigation based on its practice of "zeroing" negative dumping margins.[182] The margin was then reported to the Commission for purposes of the Commission's sunset review and its likelihood determination. The Department's calculation of this margin violated Article 11.3 and Article 2 of the Agreement.

190. Article 2 of the Anti-Dumping Agreement applies to reviews conducted under Article 11 because Article 2.1 defines "dumping" "for the purposes of the Agreement." Thus, the definition of the term "dumping" for the purposes of Article 11 is established under Article 2, and the authorities conducting a sunset review are required to comply with the disciplines set out in Article 2. Consequently, once a Member undertakes either to *calculate a dumping margin* or to *rely on a dumping margin* – that margin must be consistent with the requirements of Article 2.

191. In *Steel from Germany*, the Appellate Body ruled that in a sunset review, "in order to establish the continuing need for countervailing duties, an investigating authority will have to make a finding on *subsidization*, i.e., whether or not the subsidy continues to exist. If there is no longer a subsidy, there would no longer be any need for a countervailing duty."[183] The Appellate Body then went on to evaluate the existence of a subsidy under the substantive provisions of the SCM Agreement.

192. Similarly, in order to establish in a sunset review whether a need continues to continue anti-dumping duties, an investigating authority will have to make a finding on *dumping, i.e.*, whether or not subject imports continue to be dumped, and, if so at what rate. This evaluation requires an analysis that complies with the provisions of Article 2. This is particularly important in the instant case when taking into account that the margin calculated in the original investigation was based on the practice of zeroing negative margins, which has been found to be inconsistent with WTO rules on calculating dumping margins.

[182] Dep't Commerce Margin Calculations for Final Determ. in OCTG from Argentina (A-357-810)(ARG-52); *see also Carbon Steel Flat Products from Korea*, 63 Fed. Reg. 13,170, 13,174 (Dep't Comm. 1998)(final admin. review)(stating that, under the Department's practice, "negative dumping margins are systematically disregarded, because there is no basis in the anti-dumping law to use negative margins as an offset or a 'credit' against positive margins.")(ARG-34).

[183] Appellate Body Report, *Lead from the UK*, para. 54.

193. The Department failed to respect the disciplines of Article 2 in its determination of a margin of 1.36 per cent to report to the Commission as the likely margin to prevail in the event of termination.

E. THE UNITED STATES FAILED TO ADMINISTER IN AN IMPARTIAL AND REASONABLE MANNER US ANTI-DUMPING LAWS, REGULATIONS, DECISIONS AND RULINGS WITH RESPECT TO THE DEPARTMENT'S SUNSET REVIEWS OF ANTI-DUMPING DUTY ORDERS, IN VIOLATION OF ARTICLE X:3(A) OF THE GATT 1994

194. Argentina explains in sections VIII.B.1. and B.2., above, that the US law, the SAA, and the *Sunset Policy Bulletin* establish an irrefutable presumption, as demonstrated by the Department's consistent practice, that is inconsistent with Article 11.3. If the panel does not agree that the SAA and the *Sunset Policy Bulletin* are measures that can be challenged, then Argentina submits that the United States failed to administer in an impartial and reasonable manner US anti-dumping laws, regulations, decisions and rulings with respect to the Department's sunset reviews of anti-dumping duty orders, in violation of Article X:3(a) of the GATT 1994.

195. As explained above, this argument is wholly separate and apart from Argentina's claims relating to whether certain aspects of US anti-dumping laws and regulations regarding sunset reviews are inconsistent per se with US WTO obligations. Moreover, whether the SAA and *Sunset Policy Bulletin* constitute "measures" that can be subject to challenge is not relevant to this claim. The results of the Department's sunset review determinations, drawn from the Department's own records, demonstrates that the Department failed to administer in an impartial and reasonable manner US anti-dumping laws, regulations, decisions and rulings with respect to the Department's conduct of sunset reviews of anti-dumping duty orders, in violation of Article X:3(a) of the GATT 1994.

1. Sunset reviews of anti-dumping duty orders are subject to GATT Article X:3(a)

196. Article X:3(a) provides:

> Each [Member] shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

197. The "laws, regulations, decisions and rulings" are described in paragraph 1 of Article X as follows:

> Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any [Member], pertaining to . . . rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports . . . .

198. Sunset reviews of anti-dumping duty orders clearly fall within the types of laws and regulations enumerated in Article X:1. In *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, the Panel stated that "[t]here can be no doubt that the US anti-dumping laws and regulations are 'laws' and 'regulations' of general application 'pertaining to . . . rates of duty, taxes or other charges, or to other requirements, restrictions or other prohibitions on imports or exports' within the meaning of Article X:1 of *GATT 1994*."[184]

[184] Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted on 1 February 2001, para. 6.49 n.62 (emphasis added) ("Steel from Korea").

199. Because sunset reviews of anti-dumping orders fall within the types of laws and regulations set out in Article X:1, they are subject to the disciplines of Article X:3(a).

200. Recent panel reports have suggested that "for a Member's action to violate Article X:3(a) that action should have a significant impact on the overall administration of that Member's law and not simply on the outcome of the single case in question."[185] For example, the Panel in *Hot-Rolled Steel from Japan*, in dismissing a claim under Article X:3(a), noted that "Japan has not even alleged, much less established, a pattern of decision-making with respect to the specific matters it is raising which would suggest a lack of uniform, impartial and reasonable administration of the US anti-dumping law."[186] By contrast, Argentina will establish a clear and undeniable "pattern of decision making" by US authorities with respect to the participation of the domestic industry. In every instance in which the domestic industry participated in the sunset review, the Department made an affirmative determination of likely dumping.

201. Argentina would recall that the *Bovine Hides* Panel stated:

> Article X:3(a) requires an examination of the *real effect that a measure might have on traders operating in the commercial world*. This, of course, does not require a showing of trade damage, as that is generally not a requirement with respect to violations of the GATT 1994. But it can involve an examination of whether there is a *possible impact on the competitive situation* due to alleged partiality, unreasonableness or lack of uniformity in the application of customs rules, regulations, decisions, etc."[187]

202. The following section will show the "real effect on traders operating in the commercial world" of the conduct of sunset reviews by the Department of Commerce.

2. The Department of Commerce sunset reviews violate GATT Article X:3(a)

203. From the entry into force of the WTO Agreement until the present (September 2003), the Department of Commerce has conducted 291 sunset reviews of anti-dumping duty orders. As discussed in Section VII.B.1. above, Argentina has analyzed all 291 of these sunset reviews and has recorded the Department's findings for each in Argentina's Exhibit ARG-63, entitled, "US Department of Commerce Sunset Reviews."[188]

204. Argentina's comprehensive analysis of all of the sunset reviews conducted by the Department demonstrates a lack of impartiality and reasonableness on the part of the United States in its administration of US anti-dumping laws, regulations, procedures, and practice relating to the Department's conduct of sunset reviews of anti-dumping duty orders.

205. According to the Department's own records:

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[185] Panel Report, *Sunset Review of Steel from Japan*, para. 7.310.

[186] Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted on 23 August 2001, para. 7.268 ("Hot-Rolled Steel from Japan").

[187] Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, adopted on 16 February 2001, para. 11.77 ("*Argentina – Bovine Hides*") (emphasis added).

[188] *See* supra note 123 and accompanying text for an explanation of the methodology Argentina employed to construct Exhibit ARG-63.

- In 100 per cent of the sunset reviews in which a domestic interested party participated in the proceeding, the Department determined that dumping was likely to continue or recur;

- In 100 per cent of the revocations issued by the Department, the domestic industry either did not participate in the sunset proceeding or subsequently withdrew from the sunset proceeding;

- In 100 per cent of the sunset reviews for which the Department determined that dumping was likely to continue or recur, the Department failed to conduct a prospective analysis, as required by Article 11.3 of the Anti-Dumping Agreement.

206. As noted above in Section VII.B.1., the sunset review of *Industrial Nitrocellulose from Yugoslavia* is particularly illustrative of the unreasonable and biased nature of the Department's administration of its sunset review procedures.[189]

207. Moreover, as further evidence of the unreasonable administration of the Department's sunset review laws, regulations, procedures and practices, in 19 sunset proceedings (including the review of the order on OCTG from Argentina), the Department denied a foreign interested party's attempt to participate in the sunset proceeding on the sole basis that respondent's total exports to the United States were less than 50 per cent of the total exports shipped to the United States from the respondent's country during the five calendar years preceding the notice of initiation.

208. Such an arbitrary approach to making a determination as to whether even *to permit* a respondent to defend its interests and participate in a sunset review cannot be regarded as reasonable. That the 50 per cent rule applies only to respondents highlights the failure to apply the rule in an impartial manner.

209. An examination of this record shows the "real effect," in this case the harmful effect, that the Department's sunset reviews have on foreign traders "operating in the commercial world." It is also clear that the Department's consistent violations of U.S obligations under Article X:3(a) impact on the competitive position of such foreign traders, given the clear systemic bias against foreign traders in favor of US industry. This also demonstrates the partiality and unreasonableness in the application by the Department of US sunset review laws.

210. In sum, separate and apart from whether US anti-dumping laws and regulations regarding sunset reviews are deemed to be consistent per se with US WTO obligations, and irrespective of whether the SAA and *Sunset Policy Bulletin* are "measures" that can be subject to challenge, the data drawn from the Department's own records demonstrates that the Department failed to administer in an impartial and reasonable manner US anti-dumping laws, regulations, decisions and rulings with respect to the Department's conduct of sunset reviews of anti-dumping duty orders, in violation of Article X:3(a) of the GATT 1994.

[189] *Industrial Nitrocellulose from Yugoslavia*, 64 Fed. Reg. 57,852 (Dep't Comm. 1999)(final results sunset reviews)(ARG-42); *Industrial Nitrocellulose from Brazil, China, France, Germany, Japan, Korea, the United Kingdom, and Yugoslavia*, USITC Pub. No. 3342, Inv. Nos. 731-TA-96 and 439-445 (August 2000) at 11 (ARG-53).

VIII. THE COMMISSION'S SUNSET REVIEW WAS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT AND THE GATT 1994

A. IN THE SUNSET REVIEW OF OCTG FROM ARGENTINA, THE COMMISSION APPLIED AN INCORRECT STANDARD FOR DETERMINING WHETHER TERMINATION OF THE ANTI-DUMPING DUTY MEASURE WOULD BE "LIKELY TO LEAD TO CONTINUATION OR RECURRENCE OF . . . INJURY" AND VIOLATED ARTICLES 11.3 AND 3.1 OF THE ANTI-DUMPING AGREEMENT

211. The Commission failed to apply the correct standard for determining whether termination of the anti-dumping measure on OCTG from Argentina would be likely to lead to continuation or recurrence of injury. The standard applied by the Commission led to an affirmative finding of injury based on speculation about "possible" injury[190] or injury based on "a concept that falls in between 'probable' and 'possible' on a continuum of relative certainty."[191] The Commission failed to apply a "likely" standard in the sunset review of OCTG from Argentina in violation of Article 11.3 of the Anti-Dumping Agreement.

212. The ordinary meaning of the term "likely" as used in Article 11.3 is "probable" and not "possible" or any other standard less than "likely" ("probable"). Both the connotative and denotative meaning of the term "likely" are the same. *Black's Law Dictionary* defines the term "likely" as "[p]robable" and "[i]n all probability."[192] *Webster's Dictionary* provides a similar definition, equating the term "likely" to something being "probable" and having a "high probability" of occurring or being true or being "very probable."[193] Similarly, *Black's Law Dictionary* defines the term "probable" as "likely."[194]

213. That the Commission generally applies a "possible" standard in all sunset reviews, including in OCTG from Argentina, is based on the guidance in the SAA:

> The determination called for in these types of [sunset] reviews is *inherently predictive and speculative*. There may be more than one likely outcome following revocation or termination. The *possibility of other likely outcomes* does not mean that a determination that revocation or termination is likely to lead to continuation or recurrence of dumping or countervailable subsidies, or injury is erroneous, as long as the determination of likelihood of continuation or recurrence is reasonable in light of the facts of the case. In such situations, the order or suspended investigation will be continued.[195]

214. The standard applied by the Commission in the review of OCTG from Argentina for determining whether revocation would be likely to lead to continuation or recurrence of injury allowed for an affirmative finding of injury based simply on speculation about "possible" injury in the absence of the anti-dumping measure. As established above, Article 11.3 states unambiguously that an anti-dumping duty order "shall be terminated" after five years unless such termination would be "*likely to lead to continuation or recurrence of dumping and injury.*"

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[190] *See* SAA at 883 (ARG-5)("There may be more than one likely outcome following revocation or termination. The possibility of other likely outcomes does not mean that a determination that revocation or termination is likely to lead to continuation or recurrence of dumping or countervailable subsidies, or injury is erroneous…").

[191] Int'l Trade Comm'n Remand Determ. Pursuant to *Usinor Industeel S.A., et al v. United States*, No. 01-00006, July 2002) at 7 ("*Unisor Remand Determinaton*")(ARG-56).

[192] Black's Law Dictionary 834 (5th ed. 1979)(ARG-61)(citing *Horning v. Gerlach*, 139 Cal. App. 470, 34 P.2d 504, 505 and *Neely v. Chicago Great Western R. Co.*, Mo. App., 14 S.W.2d 972, 978).

[193] Webster's New Collegiate Dictionary 660 (1979)(ARG-62).

[194] Black's Law Dictionary 1081 (5th ed. 1979).

[195] SAA at 883 (ARG-5)(emphasis added).

215. Based on the SAA guidance, the Commission interprets "likely" in this phrase to mean that any determination – negative or affirmative – is permissible because either outcome is "possible." The Commission's equation of "possible" with "likely" cannot be reconciled with Article 11.3. Under the standard articulated in the SAA and applied by the Commission in this case, however, anti-dumping duty measures will be maintained as long as injury is merely "possible" in the absence of an order.

216. In a relatively recent remand determination that the Commission issued pursuant to an order by the United States Court of International Trade, the Commission confirmed that it has followed the approach of not giving the term "likely" its ordinary meaning of "probable" in all of the sunset review decisions that it had considered as of 1 July 2002, which would include the sunset review of OCTG from Argentina. The Commission stated:

> To comply with the Court's remand determination, the Commission must apply a fundamental term in the statute, 'likely,' as it pertains to five-year reviews. We have applied the term "likely" in over 250 sunset reviews. We have looked to the SAA in applying the term and have applied the term in a consistent manner.[196]

217. In that remand determination, the Commission offered the explanation that:

> In our view, the term "likely" captures a concept that falls in between "probable" and "possible" on a continuum of relative certainty.[197]

218. As is evident from the Commission's statement, it concedes that in "over 250 sunset reviews" (including the review of OCTG from Argentina), for purposes of its determination of whether material injury was likely to recur, the Commission "did not equate 'likely' with 'probable." By its own admission, the Commission's consistent practice is not to apply a "probable" standard.

219. Through the SAA, the US Government directed the Commission to apply, and the Commission applied, a standard for determining whether revocation of an order would likely lead to a continuation or recurrence of dumping and injury that is inconsistent with the requirements of Article 11.3 of the Anti-Dumping Agreement.

220. The SAA provides specific guidance on what the Commission should evaluate in sunset review proceedings:

> [T]he Commission must consider whether there has been *any improvement* in the state of the domestic industry that is related to the imposition of the order or the acceptance of a suspension agreement. The Commission should *not* determine that there is no likelihood of continuation or recurrence of injury simply because the industry has *recovered after the imposition of an order* or acceptance of a suspension agreement, because one would expect that the imposition of an order or acceptance of a suspension agreement would have some beneficial effect on the industry. Moreover, an *improvement* in the state of the industry related to an order or acceptance of a suspension agreement may suggest that the state of the industry is *likely to deteriorate* if the order is revoked or the suspended investigation terminated.[198]

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[196] *Usinor Remand Determination* at 5 (ARG-56).
[197] *Id.* at 7.
[198] SAA at 884 (ARG-5)(emphasis added).

221. Based on the above, the Commission failed to apply the correct standard for determining whether termination of the anti-dumping measure on OCTG from Argentina would be likely to lead to continuation or recurrence of injury. The standard applied by the Commission led to an affirmative finding of injury based on speculation about "possible" injury or injury based on "a concept that falls in between 'probable' and 'possible' on a continuum of relative certainty."[199] Irrespective of the standard applied generally, it is clear that the Commission failed to apply the "likely" standard in the sunset review of OCTG from Argentina in violation of Article 11.3 of the Anti-Dumping Agreement.

222. The Commission disagrees that the term "likely" should be interpreted consistent with its ordinary and WTO-consistent meaning as "probable." Rather the Commission employs a "possible" standard (as prescribed by the SAA) or, as the Commission also explains, "[i]n our view, the term 'likely' captures a concept that falls in between 'probable' and 'possible' on a continuum of relative certainty."[200]

223. Article 11.3 does not allow the authority to base its determination on "possibilities" or on "a continuum of relative certainty." Article 11.3 of the Agreement provides only two choices. The Commission must decide simply whether or not injury would be likely to continue or recur if the order were terminated.

224. Litigation in US courts over the Commission's application of the term "likely" in sunset cases further demonstrates that the plain meaning of the term is "probable."[201] The failure of the Commission to equate "likely" with "probable" constituted remandable error under US law in the *Usinor* case:

> The Commission devotes a substantial portion of the *Remand Determination* to arguing that "the term 'likely' captures a concept that falls in between 'probable' and 'possible' on a continuum of relative certainty . . . . The court rejects the Commission's attempt to diminish the clear statutory standard by adopting a purposely ambiguous standard, a moving target somewhere between "possible" and "probable," in order to couch almost any affirmative determination as consistent with the Uruguay Round Agreements Act . . . .[202]

225. Other decisions reveal that US courts are in accord in the interpretation of "likely" to mean "probable," and that the Commission does not apply a "likely" standard. In *Nippon Steel Corp. v. United States*, the Court of International Trade also addressed the issue of whether reading the term "likely" to mean "probable" misstated the likelihood standard. The court found "that likely means probable within the context of 19 USC. §§ 1675(c) and 1675a(a)."[203] Similarly, in *AG Der Dillinger Hüttenwerke, Eko v. United States*, the court, in discussing "likely," stated "[t]his means more likely so than not. It is not simply a toss-up."[204]

226. In accordance with the evaluation required by Article 11.3, if the evidence does not demonstrate the "likely" outcome upon the expiry of the order, the Commission cannot conclude that

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[199] *Usinor Remand Determination* at 5 (ARG-56).

[200] *Id.*

[201] *See Usinor I* at 13 (ARG-14*); Usinor II* at 2 (ARG-16); and *Nippon Steel Corp. v. United States*, No. 01-00103, slip. op. 02-153 at 7-8 (CIT 24 December 2002)(ARG-17). The grounds for remand in *Nippon Steel* were essentially the same as those in the *Usinor* cases (*i.e.*, the Commission failed to apply the plain and ordinary meaning of the term "likely").

[202] *Usinor II* at 4-6 (ARG-16).

[203] *Nippon Steel Corp*., slip op. 02-153 at 7-8 (ARG-17).

[204] *AG Der Dillinger Hüttenwerke v. United States*, No. 00-09-00437, slip. op. 02-107 at 18 n.14 (CIT 5 Sept. 2002)(Department of Commerce sunset review of countervailing duties)(ARG-15).

injury is "likely." It is not sufficient that injury is "possible;" injury must be more probable than not to satisfy the Article 11.3 standard. More specifically, the Anti-Dumping Agreement mandates that investigating authorities must resolve whether the evidence affirmatively demonstrates that volume is "likely" to increase, that prices are "likely" to be suppressed or depressed, and that material injury is "likely," in the event of revocation.

227. As noted above, the panel in *DRAMS From Korea* commented on the ordinary meaning of the word "likely" as used in Article 11:

> We also note that "likelihood" or "likely" carries with it the ordinary meaning of "probable". That being so, it seems to us that a "likely standard" amounts to the view that where recurrence of dumping is found to be probable as a consequence of revocation of an anti-dumping duty, this probability would constitute a proper basis for entitlement to maintain that anti-dumping duty in force.[205]

228. In the context of a revocation review pursuant to section 751 of the Act, the *DRAMS from Korea* panel concluded that the word "likely" when used with respect to the continuation or recurrence of injury and dumping should be interpreted in accordance with its normal meaning of "probable." The panel found that "[a] finding that an event is 'likely' implies a greater degree of certainty that the event will occur than a finding that the event is not 'not likely.'" Similarly, in the context of a sunset review, Article 11 requires the Commission to interpret the term "likely" consistent with its ordinary meaning and usage as "probable" rather than merely as "possible."[206]

229. The Commission's interpretation in sunset reviews of the term "likely" as something less than "probable" contradicts the position taken by the United States in *United States – Countervailing Duties on Certain Corrosion Resistant Carbon Steel Flat Products from Germany* where the United States argued before the Panel that 'likely' as used in Article 21.3 of the SCM Agreement "carries with it the ordinary meaning of probable."[207]

230. In applying the standard set forth in the SAA, the Commission ignored or discounted directly relevant evidence as to whether revocation would likely lead to material injury.[208] The Commission's Sunset Determination makes clear that the Commission based its determinations on the mere

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[205] Panel Report, DRAMS from Korea, para. 6.48 n.494. The case involved a dispute as to the appropriateness of the Department's determination regarding whether to terminate an anti-dumping duty order because dumping had not occurred for at least three years and dumping was not likely to recur in the future – the Department invoked the a "not likely" standard (i.e., in its revocation review). Under the Department's regulations in effect at the time, the Department would revoke an order if it concluded, among other things, that exporters or producers had sold the merchandise at not less than fair value for at least three years and it was "not likely" that they would in the future sell the subject merchandise at less than normal value. See 19 C.F.R. § 353.25(a)(2)(ii) (1996)(ARG-4). The panel determined that the Department's use of the term "not likely" in this context was inconsistent with the United States obligations under the AD Agreement because it did not properly enable the Department to determine whether "continued imposition of the duty is necessary to offset dumping," as required under Article 11.2 of the WTO Anti-Dumping Agreement. See Panel Report, *DRAMS From Korea*, paras. 6.52-6.58.

[206] See Appellate Body Report, *United States – Gasoline*, para. 23; Vienna Convention, Art. 31.

[207] Oral Statement of the United States at the First Meeting of the Panel, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213 (29-30 January 2002), para.6.

[208] Indeed, the Commission determined subsequently in a separate OCTG anti-dumping duty investigation that "there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury, or that the establishment of an industry is materially retarded, by reason of imports of oil country tubular goods." *See Oil Country Tubular Goods From Austria, Brazil, China, France, Germany, India, Indonesia, Romania, South Africa, Spain, Turkey, Ukraine, and Venezuela*, Inv. Nos. 701-TA-428, 731-TA-992-994 and 996-1005 (Int'l Trade Comm'n 2002)(prelim. determ.)(ARG-55).

"possibility" that termination of the anti-dumping measure might result in material injury, rather than the "probability" that it would so result.

231. On several occasions, the Commission engaged in the kind of predictive and speculative analysis that is prescribed by the SAA and prohibited by Article 11.3 of the Anti-Dumping Agreement.[209] For example, when discussing the question of whether Tenaris[210] would, in the event the order on OCTG from Argentina were revoked, increase its shipments to the United States market, the Commission noted Tenaris' global focus, then hypothesized that given that focus, it would likely have a strong incentive to increase its shipments to the United States.[211] Such a finding is nothing more than a finding that such shipments were conceivably possible, rather than a determination, based upon hard evidence on the record, that such shipments were probable. The Commission concluded that, inasmuch as many of Tenaris' oil and gas company customers had operations in the United States, it was possible that Tenaris would seek to supply those operations. It did not, however, cite to any evidence showing that those supply efforts were planned or ongoing. It would have been equally possible, depending on current drilling patterns, for the Commission to determine that Tenaris would seek to concentrate its sales to non-US markets.

232. Similarly, the Commission predicts that imports will cause price suppression in the US market upon revocation of the orders primarily on the basis of the facts that some imports undersold the domestic product during the original investigations, that domestic and imported products are highly substitutable, and that price is an important factor in purchasing decisions.[212] The leap from these facts to the conclusion that, upon revocation of the orders, subject imports would suppress US market prices for the subject merchandise is obviously speculative, inasmuch as it ignores the fact that other conditions in the market (e.g., demand for the product) may have a significant role to play in whether prices of the subject product rise or fall.

233. The Commission based its determination on the "possibility" that revocation might result in material injury. The Commission thus failed to apply the "likely to recur" standard and simply concluded that a finding of injury could be based on the theoretical "possibility" of injury after revocation of the subject orders. The Commission also violated Article 3.1 by conducting the investigation so as to increase the likelihood of or render inevitable its determining that the domestic industry would be injured.

[209] According to the SAA, "[t]he determination called for in these types of [sunset] reviews is inherently predictive or speculative. There may be more than one likely outcome following revocation or termination." SAA at 883 (ARG-5).

[210] The Commission refers interchangeable throughout its determination to "the Tenaris alliance," the "Tenaris group," or simply "Tenaris," as consisting of the following four companies: NKK (Japan), TAMSA (Mexico), Dalmine (Italy), and Siderca (Argentina). *See e.g., Commission's Sunset Determination* at 12 n.71 ("alliance"), 13 ("alliance"), 13 n.73 ("group"), 19 ("Tenaris"), 19 n.124 ("Tenaris"), and 23 n.153 ("alliance")(ARG-54). The Commission focused its analysis on Tenaris and largely failed to undertake any analysis specific to Siderca.

[211] *Id.* at 19.

[212] *Id.* at 21.

B. THE COMMISSION FAILED TO CONDUCT AN "OBJECTIVE EXAMINATION" OF THE RECORD AND FAILED TO BASE ITS DETERMINATION ON "POSITIVE EVIDENCE" REGARDING WHETHER TERMINATION OF THE ANTI-DUMPING DUTY MEASURE WOULD BE LIKELY TO LEAD TO CONTINUATION OR RECURRENCE OF INJURY IN VIOLATION OF THE ANTI-DUMPING AGREEMENT

1. The requirements of Articles 3.1 apply to reviews conducted under Article 11.3

234. Article 3 of the Anti-Dumping Agreement applies to reviews conducted under Article 11. The WTO jurisprudence establishes that the broad scope of the definition of injury in Article 3 applies to "injury" for all purposes under the Agreement. As explained above, footnote 9 to Article 3, "*Determination of Injury*," provides "*Under this Agreement the term 'injury'* shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of injury to a domestic industry or material retardation to the establishment of such an industry and *shall be interpreted in accordance with the provisions of this Article*."[213] The Appellate Body has held that "the obligations in Article 3.1 apply to *all* injury determinations undertaken by Members,"[214] and has reaffirmed this proposition, stating "Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation' with respect to the injury determination."[215]

235. The Panel in *Sunset Review of Steel from Japan* stated that:

> Article 3 is entitled "Injury." This title is linked to footnote 9 of the Anti-Dumping Agreement, which indicates that: "[u]nder this Agreement the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article." This seems to demonstrate that the term "injury" as it appears throughout the Anti-Dumping Agreement – including Article 11 – is to be construed in accordance with this footnote, unless otherwise specified. This would seem to support the view that the provisions of Article 3 concerning injury may be generally applicable throughout the Anti-Dumping Agreement and are not limited in application to investigations. Article 11 does not seem to explicitly specify otherwise in the case of sunset reviews.
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> Other textual indications demonstrate that the Article 3 injury obligations apply throughout the Agreement. For example, the use of the language "for purposes of Article VI of GATT 1994" in Article 3.1 also suggests that, in general, the obligations in Article 3 pertaining to injury may apply throughout the Anti-Dumping Agreement, i.e. they are not limited to investigations. [216]

236. Article 3.1 provides:

> A determination of injury for purposes of Article VI of the GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of dumped imports and the effect of dumped imports on prices in the domestic market

[213] Emphasis added.
[214] Appellate Body Report, *H-Beams from Poland*, para. 114 (emphasis added).
[215] Appellate Body Report, *Hot-Rolled Steel from Japan*, para. 192 (quoting Appellate Body Report, *H-Beams from Poland*, para. 106).
[216] Panel Report, *Sunset Review of Steel from Japan*, para. 7.99. There was not a definitive ruling from the panel on this issue, since the panel said that this was "an issue we need not and do not decide." *Id.* para. 7.101.

> for like products, and (b) the consequent impact of these imports on domestic producers of such products.

237. In *Hot Rolled Steel from Japan*, the Appellate Body reaffirmed that Article 3.1 of the Anti-Dumping Agreement sets out clear requirements that must be followed by WTO Members in anti-dumping proceedings:

> [T]his general obligation "informs the more detailed obligations" in the remainder of Article 3. The thrust of the investigating authorities' obligation, in Article 3.1, lies in the requirement that they base their determination on "positive evidence" and conduct an "objective examination." The term "positive evidence" relates, in our view, to the quality of the evidence that authorities may rely upon in making a determination. The word "positive" means, to us, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible.
>
> The term "objective examination" aims at a different aspect of the investigating authorities' determination. While the term "positive evidence" focuses on the facts underpinning and justifying the injury determination, the term "objective examination" is concerned with the investigative process itself. The word "examination" relates, in our view, to the way in which evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word "objective", which qualifies the word "examination" indicates essentially that the "examination" process must conform to the dictates of the basic principles of good faith and fundamental fairness." In short, an "objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favoring the interests of any interested party, or group of interested parties in the investigation.[217]

238. The standards set out in Article 3.1 apply to determinations in sunset reviews. In *HFCS from the United States*, the Panel stated, "Article 3.1 requires that a determination of injury, including threat of injury, involve[s] an examination of the impact of imports."[218] The Appellate Body in the same *HFCS* case recognized the "close relationship between the various paragraphs of Article 3 of the Anti-Dumping Agreement."[219] Further, in *H-Beams from Poland*, the Appellate Body stated that "Article 3.1 informs the more detailed obligations in succeeding paragraphs,"[220] and that "as in Article 3.1, which overarches and informs it, it is the *nature* of the evidence that is being addressed in Article 3.7."[221]

239. More recently, the Panel in *Sunset Review of Steel from Japan* suggested (although it was not required to decide the point) that "the provisions of Article 3 concerning injury may be generally applicable throughout the Anti-Dumping Agreement and are not limited in application to investigations. Article 11 does not seem to explicitly specify otherwise in the case of sunset reviews." Moreover, the Panel also observed:

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[217] Appellate Body Report, *Hot-Rolled Steel from Japan*, paras. 192-193 (footnotes omitted).

[218] Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted on 24 February 2000, para. 7.131 ("*HFCS from the United States")*.

[219] Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States: Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted on 21 November 2001, para. 123 ("*HFCS from the United States")*.

[220] Appellate Body Report, *H-Beams from Poland*, para. 106.

[221] *Id*. at para. 108.

> There are other textual indications that the Article 3 injury obligations may generally apply throughout the Agreement. For example, the use of the language "for purposes of Article VI of GATT 1994" in Article 3.1 also suggests that, in general, the obligations pertaining to injury may apply throughout the Anti-Dumping Agreement, i.e., they are not limited to investigations.[222]

240. In the OCTG sunset review, instead of conducting an "objective" examination of the record and basing its determination of the likelihood of injury on "positive evidence" established on the record, the Commission ignored, or improperly discounted, evidence directly relevant to whether revocation would likely lead to material injury. In lieu of such directly applicable positive evidence, the Commission based its determination on unsubstantiated assertions and speculation regarding the "possibility" that termination might result in material injury. The Commission thus failed to apply the "likely to recur" standard and simply concluded that a finding of injury could be based permissibly on a theoretical "possibility" of injury after termination of the anti-dumping measure. As the *Sunset Review of Steel from Japan* panel stated, "the requirement to make a 'determination' concerning likelihood . . . precludes an investigating authority from *simply assuming that likelihood exists*."[223] The "objective examination" mandated by the Agreement could not have been, and was not, conducted by the Commission by virtue of the fact that the Commission does not apply a WTO-consistent "likely" standard.

241. As Argentina has explained at the beginning of Section VIII.A., above, the guiding principle established by the SAA and applied by the Commission in this case (that "[t]here may be more than one likely outcome following revocation or termination")[224] is a "possibility" standard, which is inconsistent with the "probability" standard set forth in Article 11.3.

2. The Commission's conclusions with respect to the volume of imports, price effects on the domestic like product, and impact of imports on the domestic industry demonstrate the Commission's failure to conduct an objective examination in violation of Articles 11.3, 3.1, and 3.2 of the Anti-Dumping Agreement. The Commission's findings were not based on "positive evidence" of likely injury in the event of termination, in violation of Articles 11.3, 3.1, and 3.2 of the Anti-Dumping Agreement

242. As demonstrated above, the provisions of Article 3 apply to the likelihood analysis. Consequently, in a sunset review, Articles 3.1 and 3.2 require the Commission to conduct "an objective examination" and base its determination on "positive evidence" after considering the *volume* of the dumped imports, the effect of the dumped imports on *prices* in the domestic market for like products, and the consequent *impact* of these imports on domestic producers of such products.

(a) The Commission's findings on likely volume were not based on an objective examination of the evidence and do not constitute positive evidence of likely injury volume of imports

243. With regard to the volume of subject imports, the Commission concluded "we find that the volume of subject imports is likely to increase significantly in the event of revocation." The Commission made several findings in an attempt to support its conclusion. First, the Commission pointed to the existence of "substantial" available capacity in the subject countries and concluded that, notwithstanding high capacity utilization rates in those countries, "the record indicates that these producers have incentives to devote more of their productive capacity to producing and shipping more casing and tubing to the US market."[225] Along those lines, the Commission alleged that producers in

[222] Panel Report, *Sunset Review of Steel from Japan*, para. 7.100 (footnote omitted).
[223] *Id.* at para.7.177.
[224] SAA at 883 (ARG-5).
[225] *Commission's Sunset Determination* at 19 (ARG-54).

the subject countries were "export-oriented," and that in particular, those producers would focus on the US market.[226] The Commission emphasized that the "Tenaris Group," with its global focus, would likely have a strong incentive to have a significant present in the US market.[227] Second, the Commission found further that (1) there were significant differences between US and world-market prices for casing and tubing, with US prices being consistently higher, and (2) foreign producers faced significant import barriers in third-country markets.[228]

244. There are significant flaws in the Commission's volume analysis such that its conclusion, that subject imports would be likely to increase in the event of revocation, cannot be said to be the result of an objective examination of the record. First, with regard to the "Tenaris Group," there is simply no evidence in the record that Tenaris could re-orient production that is committed under existing contracts. The only way subject producers could significantly increase shipments would be to shift production away from other pipe and tube products towards casing and tubing.[229] No "positive evidence" demonstrated that the subject producers had an incentive to shift production. The "positive evidence" provided by the subject producers in their questionnaire responses to the Commission showed their existing production was committed by virtue of either long-term contracts or long-standing relationships with customers that required them to supply OCTG and other pipe and tube products. The Commission did not cite any "positive evidence" that the so-called "incentive" to ship to the United States would justify breaking long-term contracts and turning away long-term customers. The subject producers also provided "positive evidence" in their questionnaire responses that they focused on end-users in order to provide those end-users with service-related components for other commodity pipe and tube products. The Commission ignored or summarily dismissed such evidence.[230] Thus, despite the alleged "export-orientation" of foreign producers, the Commission failed to show that exports would enter the United States as opposed to other export markets.

245. Second, with regard to trade barriers in third-country markets, the Commission could point to only one outstanding order on the subject merchandise: an anti-dumping order in Canada against imports from Korea.[231] The Commission could not cite any third-country trade barriers facing producers in the other four countries subject to investigation. This is hardly the "positive evidence" required to support a conclusion that increased exports would be likely to enter the US market.

246. Finally, the Commission alleged that price differentials between the US and world markets meant that foreign producers would seek to ship primarily to the United States. The Commission, however, based its conclusion on anecdotal reports from its hearing and not on any independent investigation.[232] The Commission's reliance on this anecdotal evidence does not constitute the kind of "objective examination" that Article 3 requires.

(b) The Commission's findings on likelihood of negative price effects were not based on an objective examination of the evidence and do not constitute positive evidence of likely injury

247. The Commission's key finding on negative price effects was that "increases in subject import sales volume . . . would be achieved through lower prices."[233] The Commission, however, failed to reference <u>any</u> evidence (let alone "positive evidence") to support this conclusion.

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[226] *Id.* at 20.
[227] *Id.* at 19.
[228] *Id.* at 19-20.
[229] *Id.*
[230] *Id.* at 19 n.126.
[231] *Id.* at 20 and at IV-6 to IV-8 (Staff Report).
[232] *Id.* at 19 n.128.
[233] *Id.* at 21.

248. The Commission attempted to support its conclusion by alleging the following: (1) subject imports generally undersold the domestic like product; (2) there was a high level of substitutability between subject imports and the domestic like product; (3) price was an important factor in purchasing decisions; (4) there would likely be a significant volume of subject imports; and (5) US demand for the subject product was volatile.[234] The majority of these findings are unsupported by the evidence on the record.

249. As an initial point, because there were negligible Argentine OCTG exports, the Commission's analysis necessarily focused on the volume of *shipments from Italy, Mexico, Japan, and Korea*, and their prices, in order to determine whether injury would likely continue or recur if the duty on *Argentine imports* were terminated. Two additional points also deserve attention. First, as the Commission acknowledged, its underselling analysis was based on a very limited set of comparisons.[235] Moreover, the Commission failed to note that at the end of the period examined, in 2000, domestic prices increased markedly.[236] It is completely illogical – and in no way objective – for the Commission to conclude that, where prices are increasing toward the end of the period examined, imports will enter at lower prices and cause injury. Second, the Commission points to the volatile nature of US demand but fails to explain how this factor signifies that imports will enter the US market at lower prices. At any rate, the Commission cites no evidence for the proposition that demand for OCTG was unusually volatile during the period examined.

250. The Commission's findings on the issue of the importance of price in purchasing decisions are similarly not based on any "positive evidence." Price is an important, although not determinative, factor to purchasers. Responding purchasers ranked quality as their primary purchasing criterion just as frequently as price, and product availability was considered as important to purchasers just as frequently as price.[237] Commission staff acknowledged that there was no clear trend in responses to the question of whether price differences or differences in factors other than price were significant in competition between US product and subject imports of casing and tubing.[238] The Commission also ignored data that showed that purchasers ranked factors such as delivery time, delivery terms, availability, and product quality as higher than price in importance, and ranked factors such as discounts offered, reliability of supply, and product consistency as equal in importance.[239] The Commission's selective interpretation of the record before it clearly demonstrates that the Commission did not undertake an "objective examination" of this issue.

251. Finally, as noted above, the Commission's finding that, upon revocation, there would likely be a significant increase in import volume, is not supported by the record evidence.

(c) The Commission's findings on likelihood of adverse impact were not based on an objective examination of the evidence and do not constitute positive evidence of likely injury

252. With regard to whether adverse impact on the domestic industry was likely in the event of revocation, the Commission concluded that "a significant increase in subject imports is likely to have negative effects on both the price and volume of the domestic producers' shipments despite strong

[234] *Id.* at 20-21.

[235] *Id.* at 21 ("While direct selling comparisons are limited because the subject producers had a limited presence in the US market during the period of review, the few direct comparisons that can be made indicate that subject casing and tubing generally undersold the domestic like product especially in 1999 and 2000") (emphasis added).

[236] *Id.* at V-9 to V-11 (Staff Report).

[237] *Id.* at II-17 (Staff Report).

[238] *Id.* at II-18 n.71 (Staff Report).

[239] *Id.* at II-19 (Staff Report).

demand conditions in the near term."[240] The Commission's findings on this score, however, compel the opposite conclusion.

253. The Commission determined that domestic producers' shipments were at their highest level in calendar year 2000, the most recent period the Commission examined.[241] The Commission also found that domestic production capacity increased by 23 per cent, and production quantity by 39 per cent, over the period the Commission examined.[242] Operating income, which was negative in 1999, switched to a substantial profit in 2000. Although the domestic industry's market share declined over the period examined, the Commission noted that the share was taken, not by the countries under investigation, but by nonsubject imports.[243] Finally, the Commission concluded that demand conditions were projected to be strong in the near term.[244]

254. Given these positive trends, the Commission noted only that during its original investigation, there were adverse volume and price effects of imports despite strong US demand.[245] The Commission apparently assumed that if increased demand had coexisted with adverse volume and price effects of imports during the original investigation, that must also be possible at the time of its "determination." The Commission, however, cites absolutely no evidence to support this assumption. In the end, despite all of the above positive evidence demonstrating that injury would not be likely in the event of termination of the anti-dumping measure on OCTG, the Commission concluded that termination of the measure would have an adverse impact because subject import volumes would increase, and therefore prices would decline. As noted above, the Commission failed to substantiate the basis for these conclusions. Consequently, the Commission's flawed analysis with regard to volume and price effects fatally infected its analysis concerning the likely impact of subject imports.

3. The Commission failed to evaluate all relevant economic factors and indices having a bearing on the state of the industry, including all of the factors enumerated in Article 3.4 of the Anti-Dumping Agreement

255. Article 3.4 of the Anti-Dumping Agreement requires an examination of actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity, factors affecting domestic prices, the magnitude of the margin of dumping, actual and potential negative effects on cash flow, inventories, employment, wages, growth, and ability to raise capital or investments.

256. The Appellate Body has affirmed that "Article 3.4 requires a mandatory evaluation of all of the factors listed in that provision."[246] Thus, the administering authority's failure to evaluate even one factor would constitute a violation of Article 3.4. Evaluation by the authority cannot be a "mechanical exercise," but must be "based on a thorough evaluation of the state of the industry and . . . contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury."[247]

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[240] *Id.* at 22-23.
[241] *Id.* at 22.
[242] *Id.* at 22-23.
[243] *Id.* at 22.
[244] *Id.* at 19.
[245] *Id.* at 22.
[246] Appellate Body Report, *H-Beams from Poland*, para. 128 (emphasis added).
[247] Panel Report, *H-Beams from Poland*, para. 7.236 (emphasis added). The Appellate Body agreed with the panel report in entirety. *See* Appellate Body Report, *H-Beams from Poland*, para. 125. Prior WTO panels have determined that a WTO permissible evaluation of the required Article 3.4 factors must be more than a mere recitation or listing of the mandatory factors. Rather a proper analysis must be based on positive record evidence and entail an objective examination in accordance with Article 3.1. Panel Report, *H-Beams from Poland*, para. 7.236.

257. The requirements imposed by Article 3.4 were recently summarized by the Panel in *EC – Pipe Fittings*:

> The Agreement requires that each listed Article 3.4 factor be addressed . . . . The provision requires *substantive, rather than purely formal, compliance* . . . . The term "evaluate" is defined as: "To work out the value of . . . ; To reckon up, ascertain the amount of; to express in terms of the known; To determine or fix the value of; To determine the significance, worth of condition of usually by careful appraisal or study." *These definitions reveal that an "evaluation" is a process of analysis and assessment requiring the exercise of judgement on the part of the investigating authority. It is not simply a matter of form, and the list of relevant factors to be evaluated is not a mere checklist.* As the relative weight or significance of a given factor may naturally vary from investigation to investigation, the investigating authority must therefore assess the role, relevance and relative weight of each factor in the particular investigation. *Where the authority determines that certain factors are not relevant or do not weigh significantly in the determination, the authority may not simply disregard such factors, but must explain their conclusion as to the lack of relevance or significance of such factors.* The assessment of the relevance or materiality of certain factors, including those factors that are judged to be not central to the decision, must therefore be at least implicitly apparent from the determination. Silence on the relevance or irrelevance of a given factor would not suffice.[248]

258. The Commission's determination did not address several of the mandatory issues, and several were only addressed in conclusory form. Indeed, the Commission's discussion of the majority of the Article 3.4 factors was limited to mere a recitation of them:

> In these reviews, we find that a significant increase in subject imports is likely to have negative effects on both the price and volume of the domestic producers' shipments despite strong demand conditions in the near term. We find that these developments likely would have a significant adverse impact on the production, shipments, sales, market share, and revenues of the domestic industry. This reduction in the domestic industry's production, shipments, sales, market share, and revenues would result in erosion of the domestic industry's profitability as well as its ability to raise capital and make and maintain necessary capital investments.[250]

259. The Commission provided little more than a "mere checklist." As the chart below indicates, the Commission either failed to consider many factors or simply mentioned others. The Commission's approach to the Article 3.4 factors was a "purely formal, rather than substantive compliance" – precisely the approach that the *Pipe Fittings* Panel found did not meet the requirements of Article 3.4. The Commission failed to even identify several of the Article 3.4 factors in its findings, let alone "evaluate" them.

FACTORS CONSIDERED UNDER ARTICLE 3.4

Factor	Referenced	Not Considered
Declines (actual or potential) in:		
Sales	X[1]	
Profits	X[1]	
Output	X[1]	

[248] Panel Report, *Pipe Fittings from Brazil*, paras. 7.310 and 7.314 (footnote omitted; emphasis added).
[249] *Commission's Sunset Determination* at 22 (ARG-54).

Factor	Referenced	Not Considered
Market Share	X	
Productivity		X
Return on Investments		X
Capacity Utilization	X	
Factors Affecting Domestic Prices		X
Margin of Dumping		X
Actual and Potential Negative Effects on:		
Cash Flow		X
Inventories		X
Employment		X
Wages		X
Growth		X
Ability to Raise Capital or Investments	X	

[1] The Commission referenced these factors, but increases, not declines, were cited.

260. Thus the Commission's failure to evaluate all of the fifteen factors in Article 3.4, and its failure to adequately evaluate those factors that it purportedly relied upon, violated Articles 3.4. The Commission provided substantive analysis of only four of the fifteen mandatory factors. The remaining eleven factors were either ignored or subject to the kind of "mechanical exercise" that the Appellate Body indicated would not be consistent with Article 3.4.

261. The panel in *H-Beams from Poland* panel also addressed how the Article 3.4 factors should be analyzed as a whole consistent with the requirements of the AD Agreement:

> [P]ositive movements in a number of factors would require a *compelling* explanation of why and how, in light of such apparent positive trends, the domestic industry was, or remained, injured within the meaning of the Agreement. In particular, we consider that such a situation *would require a thorough and persuasive explanation* as to whether and how such positive movements were outweighed by any other factors and indices which might be moving in a negative direction during the I[nvestigative] P[eriod].[251]

262. The Commission failed to provide anything remotely approaching a "compelling . . . thorough and persuasive explanation" of its determination regarding the likely impact of imports of OCTG from Argentina on the domestic industry.

263. Because anti-dumping measures are intended to offset injury to a domestic industry, they cannot be used to accelerate market expansion of an already healthy domestic industry. Thus, the Commission's examination of the likely impact of subject imports on the domestic industry was inconsistent with Article 3.4.

264. As discussed above, a sunset review evaluates the likelihood of injury in the event of termination. In this sense the analysis is prospective. A likelihood of future injury analysis thus

[250] *See Commission's Sunset Determination* at 22-23.
[251] Panel Report, *H-Beams from Poland*, para. 7.249 (emphasis added).

entails elements of both Articles 3.4 and Article 3.7 of the Anti-Dumping Agreement. Injury determinations under Article 3.7 must be "based on facts and not merely on allegation, conjecture or remote possibility." Moreover, Article 3.7 requires the circumstances under which injury would occur to be *imminent*. As discussed above, the Commission's injury determination was not based on "positive evidence," but instead on evidence that, at best, showed injury to be merely speculative. The Commission's determination also was not based on a finding that injury was "imminent," but rather that injury could occur "within a reasonably foreseeable time." As discussed in greater detail below, this standard does not comply with Article 11.3 requirements.

265. The Commission's failure to evaluate all of the fifteen factors in Article 3.4 is also inconsistent with an analysis of threat of injury under Article 3.7. The panel in *HFCS from the United States* confirmed that the factors in Article 3.4 must be considered whenever any determination of injury is made, whether material injury or threat of material injury:

> In our view, this language makes it clear that the listed factors in Article 3.4 must be considered in all cases. There may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required. In a threat of injury case, for instance, the AD Agreement itself establishes that consideration of the Article 3.7 factors is also required. But consideration of the Article 3.4 factors is required in every case, even though such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry or a particular case, and therefore is not relevant to the actual determination. Moreover, the consideration of each of the Article 3.4 factors must be apparent in the final determination of the investigating authority.[252]

266. A WTO-permissible evaluation of each factor must include an objective examination and positive evidence in the record. The Appellate Body has reaffirmed that investigating authorities must comply with this standard in threat of injury determinations as well as material injury ones.[253] As in a threat determination, the analysis of injury in sunset reviews involves a prospective examination of the likely impact of imports on the domestic industry. Under such circumstances, the Commission must fully examine each of the fifteen factors based on positive evidence. The Commission failed to do so in the sunset review of the anti-dumping order on OCTG from Argentina.

4. The Commission failed to analyse the issue of whether, if the anti-dumping measure were revoked, the continuation or recurrence of injury to the domestic industry would be caused by imports of Argentine OCTG, in violation of Article 11.3 and 3.5 of the Anti-Dumping Agreement

267. Moreover, the Commission failed to analyze the issue of whether, if the order on OCTG from Argentina were revoked, the continuation or recurrence of injury to the domestic industry would be caused by imports of the subject merchandise. As noted above, the provisions of Article 3 apply to sunset reviews conducted under Article 11.3.[254] Under Article 3.5 of the Anti-Dumping Agreement, an administering authority must demonstrate that "the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement."

268. The Appellate Body in *Certain Hot-Rolled Steel from Japan* laid out a framework within which the Commission could have conducted such a causation analysis. That framework involved the following obligations on the part of the Commission: (1) an identification of the factors that could

[252] Panel Report, *HFCS from the United States*, para. 7.128.
[253] Appellate Body Report, *H-Beams from Poland*, para. 108.
[254] *See* discussion in section VIII.B.1. above.

be causing injury to the domestic industry; (2) a determination of whether these factors are operating simultaneously; (3) a determination of whether these factors are having an injurious effect; (4) a distinction between the injurious effects (if any) of dumped imports versus injurious effects of other known factors; and (5) ensuring that domestic injury caused by other factors is not attributed to dumped imports. With regard to (4) and (5), the Appellate Body held that the Commission had failed to separate and distinguish the effects of dumped imports from the effects of other factors, and that this failure directly contradicted the language in Article 3.5 of the Agreement.[255]

269. In the review of OCTG from Argentina, the Commission similarly has failed to separate and distinguish the potential injurious effects of other causal factors from the potential effects of the dumped imports. Nowhere in the Commission's opinion is there any analysis of whether injury would be caused by factors other than subject imports, were the anti-dumping order on OCTG from Argentina to be revoked. In particular, in the section of the opinion discussing the likely impact on the domestic industry of the revocation of the orders (pertaining to Argentina, Italy, Japan, Korea, and Mexico), the Commission focuses solely on the likely effects of alleged increases in imports, without a thorough examination of other characteristics of the market (e.g., expected changes in demand) that might affect the condition of the domestic industry upon revocation of the orders. Hence, the Commission's approach violated Article 3.5 of the Agreement.

C. THE US STATUTORY REQUIREMENTS THAT THE COMMISSION DETERMINE WHETHER INJURY WOULD BE LIKELY TO CONTINUE OR RECUR "WITHIN A REASONABLY FORESEEABLE TIME" (19 USC. § 1675A(A)(1)) AND THAT THE COMMISSION "SHALL CONSIDER THAT THE EFFECTS OF REVOCATION OR TERMINATION MAY NOT BE IMMINENT, BUT MAY MANIFEST THEMSELVES ONLY OVER A LONGER PERIOD OF TIME" (19 USC. § 1675A(A)(5)), ARE INCONSISTENT WITH ARTICLES 11.1, 11.3 AND 3 OF THE ANTI-DUMPING AGREEMENT

1. 19 USC. §§ 1675a(a)(1) and (5) are inconsistent as such with Articles 11.3 and 3 of the Anti-Dumping Agreement

270. The US anti-dumping statute requires that in a sunset review the Commission must determine whether injury would be likely to continue or recur "within a reasonably foreseeable time."[256] The statute further mandates that the Commission "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time."[257] The SAA reaffirms this statutory language and explains that the 'reasonably foreseeable time' . . . normally will exceed the 'imminent' time frame applicable in a threat of injury analysis."[258] The SAA further specifies that the Commission shall consider "factors that may only manifest themselves in the longer term."[259]

271. The absence of temporal limitations on the possibility of future injury, coupled with speculation regarding future market conditions – the central features of these statutory provisions – are inconsistent with the standard under Article 11.3 of the Anti-Dumping Agreement. The Commission's market forecasting and speculation is inconsistent with WTO requirements to assess whether termination of an anti-dumping duty order would be likely to lead to recurrence of injury *upon revocation of the order*. The term "imminent" is not defined in the statute. As applied in US

[255] Appellate Body Report, *Hot-Rolled Steel from Japan*, paras. 222-223.
[256] 19 USC. § 1675a(a)(1)(ARG-1).
[257] 19 USC. § 1675a(a)(5)(ARG-1).
[258] SAA at 887 (ARG-5).
[259] *Id.*

law, however, the term "imminent" has been used to describe events potentially occurring several years into the future.[260]

272. The US statutes defining a "reasonably foreseeable time," as longer than an "imminent" time, are inconsistent with the Anti-Dumping Agreement that requires the determination to be based upon injury upon "expiry" of the order.[261] Footnote 9 to Article 3 defines the types of injury recognized under Article 3 for purposes of the Anti-Dumping Agreement: material injury to a domestic industry, threat of material injury to a domestic industry, or material retardation of the establishment of such an industry. The US statutory provisions permit the Commission to find injury without support of "positive evidence," that is based on sheer speculation, and that is far less immediate than the time frame contemplated by "threat of injury" as set forth in Article 3.7.

273. These provisions of US law are inconsistent with the obligations in Articles 3.7 and 3.8 of the Anti-Dumping Agreement. A likelihood of future injury analysis in accordance with Article 11.4 necessary entails elements of both Articles 3.4 and Article 3.7. Injury determinations under Article 3.7 must be "based on facts and not merely on allegation, conjecture or remote possibility." Moreover, Article 3.7 requires the circumstances under which injury would occur to be *imminent*. The Commission's injury determination was not based on "positive evidence" but rather conjecture and speculation. Furthermore, such conjecture and speculation as to the factors causing likely injury were not deemed to be "imminent" but rather might occur "within a reasonably foreseeable time." US law does not define, nor has the Commission articulated, what constitutes "a reasonably foreseeable time."[262] The virtually unbridled discretion of the Commission in making its determinations as to whether injury is likely to continue or recur conflicts with the requirements of the Anti-Dumping Agreement. Speculation by an investigating authority about market conditions several years into the future is inconsistent with Article 11.3 and Article 3.

274. Similarly, US law imposes an obligation on the Commission inconsistent with the mandate of Article 3.8, which provides that

> With respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be considered and decided with special care.

275. These provisions of US law operate to release the Commission from the constraints and safeguards built into Articles 3.7 and 3.8 of the Anti-Dumping Agreement in cases involving future injury. Article 3.8 requires that Members "considered and decided" with "special care" in the application of anti-dumping measures based on future injury findings. By extending the period of time outward (with no limitations) within which the Commission must consider whether domestic producers might be injured, the statutory provisions fail to satisfy the "likely" analysis mandated by Articles 11.3, 3.1, 3.2, 3.4, 3.7, and 3.8 of the Anti-Dumping Agreement.

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[260] *See, e.g., Asociacion de Productores de Salmon y Trucha de Chile AG v. United States Int'l Trade Comm'n*, 180 F. Supp. 2d 1360, 1371-72 (CIT 2002)(ARG-13)("Both the dictionary definition and case law from the CIT demonstrate that the statutory term 'imminent' only means impending . . . [and not necessarily immediate]") (ARG-13); *Goss Graphics Systems v. United States*, 33 F. Supp. 2d 1082, 1102-04 (CIT 1998)(ARG-10)(basis for threat of injury finding was a decline in the industry's market share that was projected to manifest itself over two years into the future).

[261] The Commission has never defined what constitutes a "reasonably foreseeable time." The Commission provides no parameters and simply makes such decisions on a case-by-case basis.

[262] *Commission's Sunset Determination* at 7-8 and n.41 (ARG-54).

2. The Commission's application of 19 USC. §§ 1675a(a)(1) and (5) in it the Sunset Review of OCTG from Argentina was inconsistent with Articles 11.3 and 3 of the Anti-Dumping Agreement

276. As applied in this case, the Commission provides no clue as to what time period it considered to be a "reasonably foreseeable time" in making its decision that injury to the domestic industry would be likely to continue or recur if the orders were revoked. It merely quotes the SAA, which provides that "a 'reasonably foreseeable time' will vary from case-to-case, but normally will exceed the 'imminent' time frame applicable in a threat of injury analysis . . . ."[263] Thus, the Commission interprets the SAA language as giving it carte blanche to define the concept of "reasonably foreseeable time" any way it wishes, depending on the circumstances of each investigation.

277. The Commission cites to certain factors enumerated in the SAA that it "should" consider in defining what its "reasonably foreseeable time" should be, in particular: (1) the fungibility or differentiation within the product in question, (2) the level of substitutability between the imported and domestic products, (3) the channels of distribution used, (4) the methods of contracting (e.g., spot sales or long-term contracts), (5) lead times for delivery of goods, and (6) planned investment and the shifting of production facilities.[264] In these reviews, however, the Commission (with one exception) fails to analyze any of these factors in determining what length of time it considers reasonably foreseeable.[265] For example, the Commission alludes to the issues of fungibility and channels of distribution in the section of its opinion discussing the likelihood of a reasonable overlap of competition, but fails to link these analyses to any conclusions concerning the time frame within which injury is likely to continue or recur.[266] Consequently, even if the statutory language were consistent with the Anti-Dumping Agreement, the Commission failed to apply the statutory language to the evidence before it to conclude that revocation of the orders would likely lead to continuation or recurrence of injury.

D. THE COMMISSION'S APPLICATION OF A "CUMULATIVE" INJURY ANALYSIS IN THE SUNSET REVIEW OF THE ANTI-DUMPING DUTY MEASURE ON OCTG WAS INCONSISTENT WITH ARTICLES 11.3 AND 3.3 OF THE ANTI-DUMPING AGREEMENT

278. The Commission's application of a cumulative injury analysis in the sunset review of OCTG from Argentina violated Article 11.3 and Article 3.3.

279. Article 11.3 of the Anti-Dumping Agreement provides each WTO Member with the right to have an anti-dumping measure affecting its exports removed after five years, unless doing so would be likely to lead to continuation or recurrence of injury. The United States never made such a finding in this case. The Commission never analyzed the effect of removing the anti-dumping measure on Argentine OCTG. Rather, the Commission performed a cumulative assessment, which essentially conditioned Argentina's right under Article 11.3 upon the actions of exporters from other WTO Members, and the Commission's interpretation of those actions.

280. There is no basis in the text of Article 11.3 to suggest that Argentina's rights to have anti-dumping measures expire were intended to be conditioned in this way. Instead, Argentina has a right to expect termination, unless there is a finding based on positive evidence that termination of the anti-

[263] *Id.*
[264] *Id.* at n.40.
[265] Commission Koplan defines "reasonably foreseeable time" as "the length of time it is likely to take for the market to adjust to a revocation or termination." *Id.* at 8 n.41. Even Commissioner Koplan, however, although mentioning the enumerated factors in the SAA, does not provide any indication as to the parameters of that time period.
[266] *Id.* at 12-13.

dumping measure on Argentine OCTG (not all anti-dumping measures on OCTG from other countries) would be likely to lead to a continuation or recurrence of injury.

281. The US position regarding cumulative assessment is inconsistent with the plain meaning of Article 11.3, and the object and purpose of the sunset provision.

282. First, the specific reference in the text of Article 11.3 to "an anti-dumping duty" is singular and not plural, which on its face refers to one measure, and not multiple anti-dumping measures. Indeed, the United States takes the position that sunset reviews must be conducted on an *order-wide* basis.[267]

283. Second, the text of Article 3.3 makes clear that cumulation is permitted only in investigations. Moreover, there is no cross-reference in Article 3.3 to Article 11.3.

284. Third, there is no explicit cross-reference to either cumulation or to Article 3.3 in the immediate context of Article 11 (*i.e.*, Articles 11.1, 11.2, 11.4, or 11.5) or in the broader context of the Anti-Dumping Agreement. In *Steel from Germany*, the Appellate Body considered whether any *de minimis* standard was intended to apply to sunset reviews by "implication" with an analysis of the text of Article 21.3 and Article 11.9. The Appellate Body found no such implication. The Appellate Body examined the provisions of Article 21.4 and 21.5, which contain explicit cross-references to other SCM Agreement provisions. The Appellate Body concluded that these explicit cross-references to other provisions, combined with the absence of cross-referencing to the *de minimis* provision, indicated that the drafters intended there to be no *de minimis* standard applicable to Article 21.3.

285. Fourth, neither an analysis of the object and purpose of the sunset provisions nor consideration of the object and purpose of the Anti-Dumping Agreement suggests that a cumulated injury approach analysis is somehow implied in Article 11.3. In fact, the opposite is true: WTO Members agreed to provisions that would ensure that anti-dumping measures would not continue in perpetuity.

286. Fifth, the reasoning of the Appellate Body suggests that it understands that the injury analysis in a sunset review is not conducted on a cumulated basis: "Thus, in our view, the terms 'subsidization' and 'injury' each have an independent meaning in the SCM Agreement which is not derived by reference to the other. It is *unlikely* that very low levels of subsidization could be demonstrated to *cause* 'material' injury." *Steel from Germany*, para. 81 (italics in original). Such a statement would be true only where the injury analysis is not conducted on a cumulated basis.

287. Finally, it is important to emphasize that this is an issue of first impression at the WTO. Indeed, the Panel in *Sunset Review of Steel from Japan* confirmed that:

> According to Japan, the logical consequence of the US proposition that the quantitative criteria set out in Article 3.3 do not apply in sunset reviews is that the US administering authorities cannot cumulate in sunset reviews. However, Japan clarified that it is *not* arguing before us that cumulation cannot be used at all in the injury component of a sunset review. For this reason, we do not address the more general issue of whether or not cumulation is permitted in sunset reviews.[268]

[267] US First Written Submission, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244 (7 October 2002), para. 162.

[268] Panel Report, *Sunset Review of Steel from Japan*, para. 7.104 (citing Second Oral Submission of Japan, para. 51; Response of Japan to Question 22 from the Panel).

E. ASSUMING *ARGUENDO* THAT ARTICLES 3.3 AND 11.3 DO NOT PRECLUDE CUMULATION IN ARTICLE 11.3 REVIEWS, THEN THE TERMS OF ARTICLE 3.3 APPLY TO ANY SUCH CUMULATIVE ANALYSIS IN A SUNSET REVIEW. APPLICATION OF EITHER THE *DE MINIMIS* OR NEGLIGIBILITY REQUIREMENTS (BOTH OF WHICH MUST BE SATISFIED) WOULD HAVE PREVENTED CUMULATION IN THIS CASE. THE COMMISSION'S CUMULATIVE INJURY ANALYSIS IN THE COMMISSION'S SUNSET DETERMINATION FAILED TO SATISFY THE ARTICLE 3.3 REQUIREMENTS

288. Assuming *arguendo* that Articles 3.3 and 11.3 do not preclude cumulation in Article 11.3 reviews, then the terms of Article 3.3 must be applied to any such cumulative analysis in a sunset review. Indeed, the application of either the *de minimis* or negligibility requirements (both of which must be satisfied) would have prevented cumulation in this case. The Commission's cumulative injury analysis in the Commission's Sunset Determination thus failed to satisfy the Article 3.3 requirements.

289. Article 11.3's use of the word "injury" in the mandate that the authorities determine whether termination of the anti-dumping measure "would be likely to lead to continuation or recurrence of dumping and injury" means, as explained above, that the requirements of Article 3 apply to such determination.

290. In any event, as applied in this case, cumulation would have been prevented as a result of the clear language of Article 3.3 of the Agreement. Article 3.3 provides, in relevant part, that:

> Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the like domestic product.

291. For Argentina, the margin of dumping found by the Department of Commerce in its sunset determination was only 1.36 per cent, far below the 2 per cent level that the Agreement establishes as *de minimis*.[269] Moreover, the volume of imports from Argentina during the period examined never exceeded 3 per cent of total imports, which is the standard for negligibility under the Anti-Dumping Agreement.[270] Accordingly, it was a clear violation of Articles 11.3 and 3.3 the Anti-Dumping Agreement for the Commission to cumulate imports from Argentina with those from Italy, Japan, Korea, and Mexico in these sunset reviews.

[269] *Commission's Sunset Determination* at I-14 (Staff Report)(ARG-54)(citing 65 Fed. Reg. 66,701, 7 November 2000). Paragraph 8 of Article 5 of the Agreement provides that "the margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price."

[270] *Commission's Sunset Determination* at IV-3, table IV-1 (Staff Report)(ARG-54). In 2000, by quantity, imports from Argentina represented 2.9 per cent of total imports, and were less than 1.0 per cent of such imports in each of the four preceding calendar years. These percentages are all below the 3 per cent standard established by US law. 19 USC. § 1677(24)(A)(i)(ARG-2).

F. THE COMMISSION'S USE OF A CUMULATED INJURY ANALYSIS IN THIS SUNSET REVIEW WAS INCONSISTENT WITH ARTICLES 11.3 AND 3.1 OF THE ANTI-DUMPING AGREEMENT BECAUSE IT PREVENTED THE COMMISSION FROM APPLYING A "LIKELY" STANDARD, AND WAS NOT BASED ON POSITIVE EVIDENCE

292. The Commission's application in this case of the cumulation provision of the anti-dumping statute is inconsistent with the Agreement in another fundamental respect. Article 11.3 of the Agreement provides that the administering authority shall terminate anti-dumping duties after expiration of a five-year period unless the authority determines that removing the duty would be likely to lead to continuation or recurrence of injury. As noted above, the Article 11.3 standard of likelihood of continuation or recurrence of injury involves the probability that the result in question will occur. However, in reaching its decision to cumulate in this case, the Commission considered whether imports from each subject source have any possible discernible adverse impact on the domestic industry.[271] The Commission cumulated the imports because it did not find that the imports would have no discernible adverse impact on the domestic industry.

293. Inasmuch as the language in the standard applied by the Commission is written in the form of two negative clauses,[272] an equivalent reading of the language is that the Commission cumulated imports of subject merchandise from sources that, considered individually, have any possible adverse impact on the domestic industry. This low standard runs directly counter to the "likely" standard established by Article 11.3.[273] While the Commission applied this low standard to the decision to cumulate and not directly to its decision of likelihood of injury, it cannot be seriously argued that an affirmative likelihood of injury determination could have been made in this case without a decision to cumulate the imports from the investigated countries.

294. The Commission's use of a "possibility" standard for cumulation also conflicts with the reasoning of the Appellate Body in *Steel from Germany*, and the evidentiary requirements of Article 3.1 of the Anti-Dumping Agreement. The Appellate Body stated "[i]t is *unlikely* that very low levels of subsidization could be demonstrated to *cause* 'material' injury,"[274] and it added that "[w]here the level of subsidization at the time of the review is very low, there must be persuasive evidence that revocation of the duty would nevertheless lead to injury to the domestic industry."[275] As stated above, Argentina believes that the practice of cumulation itself is inconsistent with Articles 11.3 and 3.3 of the Agreement, and that it conflicts with the above-quoted reasoning of the Appellate Body. The low "possibility" standard that the Commission used in deciding whether to cumulate in this case made cumulation unavoidable, and allowed the Commission to make an affirmative "likelihood" determination without the type of "persuasive evidence" required by the Appellate Body.

IX. THE IDENTIFIED US MEASURES ARE INCONSISTENT WITH ARTICLE VI OF THE GATT 1994, ARTICLES 1 AND 18 OF THE ANTI-DUMPING AGREEMENT, AND ARTICLE XVI:4 OF THE WTO AGREEMENT

295. The measures identified by Argentina in its Panel request, including the Department's determination to conduct an expedited review, the Department's Sunset Determination, the

[271] *Commission's Sunset Determination* at 6, 10-16.

[272] *See* 19 USC. § 1675a(a)(7) ("…The Commission shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry.")

[273] *See* Panel Report, *DRAMS From Korea* at paras. 6.48, 6.52-6.58. The panel found that "[a] finding that an event is 'likely' implies a greater degree of certainty that the event will occur than a finding that the event is not 'not likely.'"

[274] Appellate Body Report, *Steel from Germany*, para. 81 (italics in original).

[275] *Id.* at para. 88.

Commission's Sunset Determination, the Department's Determination to Continue the Order, and the relevant US laws, regulations, policies and procedures, are inconsistent with the obligations of the United States with Article VI of the GATT 1994, Articles 1, 18.1 and 18.4 of the Anti-Dumping Agreement, as well as Article XVI:4 of the WTO Agreement.

A. THE US MEASURES VIOLATE THE BASIC PRINCIPLES OF THE ANTI-DUMPING AGREEMENT, AS PROVIDED IN ARTICLE 1

296. Article 1 of the Anti-Dumping Agreement ("Principles") states that:

> An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations. [footnote omitted]

297. Article 1 thus provides that anti-dumping measures, including those related to sunset reviews, can be applied only under the circumstances provided for in GATT Article VI. The application of GATT Article VI, in turn, is governed by the provisions of the Anti-Dumping Agreement. Therefore, any breach of a provision of the Agreement, by definition, entails a consequential violation of Article 1.

298. As noted by the Panel in the *1916 Anti-Dumping Act* dispute:

> As far as Article 1 is concerned, we note that if we find a violation of other provisions of the Anti-Dumping Agreement, it will be demonstrated that an anti-dumping investigation under the 1916 Act is not "initiated or conducted in accordance with the provisions of this Agreement" and a breach of Article 1 will be established.[276]

299. Argentina has demonstrated in this submission that the identified US measures, both as such as applied, violate the obligations of the United States under the Anti-Dumping Agreement. Therefore, the identified US measures also violate Article 1.

B. THE IDENTIFIED US MEASURES, WHICH CONSTITUTE A "SPECIFIC ACTION AGAINST DUMPING," VIOLATE ARTICLE 18.1 OF THE AGREEMENT

300. Article 18.1 states that:

> No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement. [footnote omitted]

301. The Appellate Body recently explained the two "conditions precedent" that must be met for Article 18.1 to apply:

> The first is that a measure must be "specific" to dumping or subsidization. The second is that a measure must be "against" dumping or subsidization. These two

[276] *United States – Anti-Dumping Act of 1916*, Complaint by the European Communities, Report of the Panel, para. 6.208. The Panel considering the complaint by Japan reached the same conclusion: see *United States – Anti-Dumping Act of 1916*, Complaint by Japan, Report of the Panel, para. 6.264. The Appellate Body upheld these findings regarding the violation of Article 1: Appellate Body Report, *United States – Anti-Dumping Act of 1916*, paras. 134-135.

> conditions operate together and complement each other . . . . If . . . it is established that a measure meets these two conditions, and thus falls within the scope of the prohibitions in [that provision], it would then be necessary to move to a further step in the analysis and to determine whether the measure has been "taken in accordance with the provisions of GATT 1994", as interpreted by the Anti-Dumping Agreement. . . . If it is determined that this is not the case, the measure would be inconsistent with Article 18.1 of the Anti-Dumping Agreement. . . . .[277]

302. A "specific action against dumping" of exports is an "action that is taken in response to situations presenting the constituent elements of 'dumping'."[278] The "constituent elements of dumping", in turn, are "found in the definition of dumping in Article VI:1 of the GATT 1994, as elaborated in Article 2 of the Anti-Dumping Agreement."[279] A measure can be considered to have been taken 'against' dumping where it creates "'opposition' to dumping . . . such that it dissuades [this practice], or creates an incentive to terminate [it]."[280]

303. It is uncontroversial that the US measures identified by Argentina are all "specific actions against dumping of exports," in this case exports of OCTG from Argentina. The US sunset review laws, by their own terms, are predicated upon the existence of a dumping order, and can only operate in such circumstances. The "constituent elements of dumping" clearly exist. The dumping order against OCTG from Argentina, and the continuation of this order following the Sunset Determinations, were incontestably taken as measures "against" dumping. These threshold issues can therefore be disposed of quickly.

304. Then Panel then needs to "move to a further step in the analysis," as stated by the Appellate Body, to "determine whether the measure has been 'taken in accordance with the provisions of GATT 1994', as interpreted by the Anti-Dumping Agreement." Argentina's submission has demonstrated numerous violations of the Anti-Dumping Agreement by the United States. As such, by definition the measures have not been taken in accordance GATT Article VI, as interpreted by the Anti-Dumping Agreement.

305. Moreover, DSU Article 3.8 provides in part that:

> In cases where there is an infringement of the obligations assumed under a covered agreement, the action is *considered* prima facie to constitute a case of nullification or impairment.

306. The United States has infringed its obligations under the Anti-Dumping Agreement and the GATT 1994, and as such has nullified or impaired the benefits accruing to Argentina under these agreements.[281]

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[277] Appellate Body Report, *United States – Continued Dumping and Subsidy Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted on 27 January 2003, para. 236 ("*United States – Continued Dumping and Subsidy Act*").

[278] Appellate Body Report, *United States – Anti-Dumping Act of 1916*, para. 130.

[279] *Id.* at paras.105-106 and 130; Appellate Body Report, *United States – Continued Dumping and Subsidy Act*, para. 240.

[280] Appellate Body Report, *United States – Continued Dumping and Subsidy Act*, para. 259.

[281] In the *Byrd Amendment* case, the Appellate Body stated:

> We conclude that, to the extent we have found that the CDSOA is inconsistent with Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement, the [Byrd Amendment] nullifies or impairs benefits accruing to the appellees in this dispute under those Agreements.

C. THE UNITED STATES HAS FAILED TO ENSURE CONFORMITY OF ITS MEASURES WITH ITS WTO OBLIGATIONS, IN VIOLATION OF ARTICLE 18.4 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:4 OF THE WTO AGREEMENT

307. Article 18.4 of the Anti-Dumping Agreement provides that:

> Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

308. Any violation of any provision of the Anti-Dumping Agreement therefore triggers a consequential violation of Article 18.4 of the Anti-Dumping Agreement.

309. Article XVI:4 of the WTO Agreement states:

> Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

310. Any violation of any provision of a covered agreement will similarly trigger a consequential violation of Article 18.4 of Article XVI:4.

311. In the *Byrd Amendment* case the Appellate Body found that:

> As a consequence of our finding that the United States has acted inconsistently with Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement, we uphold the Panel's finding that the United States has failed to comply with Article 18.4 of the Anti-Dumping Agreement, Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.[282]

312. Other cases have also followed this approach. For example, the *Hot-Rolled Steel from Japan* Panel concluded that a certain US law was:

> inconsistent with Article 9.4 of the AD Agreement, and . . . therefore the United States has acted inconsistently with its obligations under Article 18.4 of the AD Agreement and Article XVI:4 of the Marrakesh Agreement by failing to bring that provision into conformity with its obligations under the AD Agreement.[283]

313. Therefore, a finding by this Panel that the United States has acted inconsistently with any of its obligations under the Anti-Dumping Agreement will necessitate a finding that it has also acted inconsistently with Article 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement.

Appellate Body Report, *United States – Continued Dumping and Subsidy Act*, para. 304.

[282] *Id.* at para. 302.
[283] Panel Report, *Hot-Rolled Steel from Japan*, para. 8.1.

X. CONCLUSION

314. As demonstrated herein, Argentina respectfully requests that the panel find the following violations by the United States of the Anti-Dumping Agreement, the GATT 1994, and the WTO Agreement:

A. US SUNSET REVIEW STATUTORY, REGULATORY, AND ADMINISTRATIVE PROVISIONS AS SUCH VIOLATE THE ANTI-DUMPING AGREEMENT AND THE WTO AGREEMENT

- By mandating that the Department issue a likelihood of dumping determination, without the conduct of a review, without any substantive analysis, and without making the requisite determination, 19 USC. § 1675(c)(4) and 19 C.F.R. § 218(d)(2)(iii) (the "waiver provisions") violate Article 11.3 of the Anti-Dumping Agreement;

- By precluding respondent interest parties the ability to provide information and to defend their interest in a manner inconsistent with the requirements of the Anti-Dumping Agreement, 19 USC. § 1675(c)(4) and 19 C.F.R. § 218(d)(2)(iii) violate Articles 6.1 and 6.2 of the Anti-Dumping Agreement;

- By requiring that the Commission determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" (19 USC. § 1675a(a)(1)) and that the Commission "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time" (19 USC. § 1675a(a)(5)), these statutory provisions violate Articles 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 11.1, and 11.3 of the Anti-Dumping Agreement;

- By establishing an irrefutable presumption that dumping is likely to continue or recur in the event of termination of the anti-dumping measure, the SAA (pages 888-889) and the Department's *Sunset Policy Bulletin* (section II.A.3), as further demonstrated by the Department's consistent practice, violate Article 11.3 of the Agreement.

B. THE DEPARTMENT'S SUNSET REVIEW DETERMINATION VIOLATES THE ANTI-DUMPING AGREEMENT AND THE GATT 1994

- By conducting an expedited sunset review on the basis of Siderca's OCTG exports to the United States being less than 50 per cent of the total OCTG exports from Argentina to the United States, the Department violated Articles 6.1, 6.2, 6.8, and Annex II of the Anti-Dumping Agreement;

- By conducting an expedited sunset review, the Department rendered a determination of likelihood of continuation or recurrence of dumping without any analysis, in violation of Article 11.3 of the Anti-Dumping Agreement.

- By conducting an expedited review and applying the waiver provisions to Siderca, the Department violated Articles 6.1, 6.2, 6.8, and Annex II of the Anti-Dumping Agreement;

- By failing to provide public notice and explanations in sufficient detail the findings of all issues of fact and law in the Department's determination to conduct an expedited review, and the Department's Sunset Determination, which incorporated the Department's *Issues and Decision Memorandum* by reference, the Department violated Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement;

- By failing to apply the correct standard, by failing to conduct a prospective analysis, by failing to make a determination of likelihood of dumping on the basis of positive evidence, the Department's Sunset Determination is inconsistent with Article 11.3 of the Anti-Dumping Agreement;

- In the alternative, if the Panel finds that the SAA and the *Sunset Policy Bulletin* are not measures which can be challenged under the DSU (the finding requested by the fourth item in Section A, above), then by failing to administer in an impartial and reasonable manner US anti-dumping laws, regulations, decisions and rulings with respect to the Department's conduct of sunset reviews of anti-dumping duty orders, the United States violated Article X:3(a) of the GATT 1994.

C. THE COMMISSION'S SUNSET REVIEW DETERMINATION VIOLATES THE ANTI-DUMPING AGREEMENT

- By failing to apply to a "likely" or "probable" standard, the Commission violated Articles 3.1 and 11.3 of the Anti-Dumping Agreement;

- By failing to conduct an objective examination of the record and to base its determination on positive evidence, the Commission violated Articles 3.1, 3.2, 3.4, 3.5, and 11.3 of the Anti-Dumping Agreement;

- By failing to evaluate all the relevant economic factors and indices having a bearing on the state of the industry, including those enumerated in Article 3.4 of Anti-Dumping Agreement, the Commission violated Article 3.4. By failing to assess a causal relationship between the dumped imports and the injury to the domestic industry, the Commission also failed to satisfy the causation requirements of Article 3.5 of the Anti-Dumping Agreement;

- By cumulatively assessing the effects of OCTG imports from Korea, Italy, Japan, and Mexico to determine whether termination of the anti-dumping duty on Argentine OCTG imports would be likely to lead to continuation or recurrence of injury, the Commission violated Articles 3.3 and 11.3 of the Anti-Dumping Agreement, which preclude the use of a cumulated injury analysis in sunset reviews; and

- In the alternative, if a cumulated injury analysis is permitted in sunset reviews, by failing to apply the *de minimis* and negligibility requirements of Article 3.3 to the review of OCTG from Argentina, the Commission violated Articles 3.3 and 11.3 of the Anti-Dumping Agreement, as application of either of these provisions would have precluded the Commission from conducting a cumulated injury analysis in the case of the sunset review of OCTG from Argentina. Finally, the Commission's use of a cumulated injury analysis violated the "likely" standard of Article 11.3 and resulted in an injury determination that was not based on positive evidence.

D. CONSEQUENTIAL VIOLATIONS BY THE UNITED STATES OF THE ANTI-DUMPING AGREEMENT, THE GATT 1994, AND THE WTO AGREEMENT

- Because the United States violated its obligations under the Anti-Dumping Agreement, it also violated the provisions of Article VI of the GATT 1994, Articles 1 and 18 of the Anti-Dumping Agreement, and Article XVI:4 of the WTO Agreement.

- By failing to ensure the conformity with the above noted laws, regulations and administrative procedures with its WTO obligations, the United States has violated Article 18.4 of the Anti-Dumping Agreement; and

- By failing to ensure the conformity with the above noted laws, regulations and administrative procedures with its WTO obligations, the United States has violated Article XVI:4 of the WTO Agreement.

XI. REQUEST FOR SUGGESTIONS FROM THE PANEL ON THE MANNER IN WHICH THE UNITED STATES SHOULD IMPLEMENT THE PANEL'S RECOMMENDATIONS

315. Article 19.1 of the DSU provides that where a panel concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.

316. DSU Article 19.1 also provides that in addition to its recommendations, the panel may suggest ways in which the Member concerned could implement the recommendations. Argentina would request the Panel to make such recommendations in the present case.

317. In light of the pervasive and fundamental violations by the United States of its WTO obligations, as demonstrated in this submission, Argentina respectfully requests that the panel suggest that the United States implement the recommendations by terminating the anti-dumping duties on OCTG from Argentina, and by repealing its WTO-inconsistent laws, regulations, and procedures or by amending such laws, regulations, and procedures to eliminate the WTO-inconsistencies.

318. The following essential facts provide context for this request.

319. Pursuant to Article 11.3 of the Anti-Dumping Agreement, the United States had a clear and unambiguous obligation to terminate the US anti-dumping measure on Argentine OCTG, unless the United States determined that termination of the measure would be likely to lead to continuation or recurrence of both dumping and injury. As Argentina has demonstrated, the United States failed to make the requisite determinations regarding likelihood of dumping and injury. The Department did not conduct the required review, nor did it make the required determination of likelihood of dumping. Instead, the Department determined Siderca to have submitted an inadequate response and therefore to have waived its participation in the sunset review. The Commission also failed to make the required determination of likelihood of injury. In its review, the Commission failed to respect the disciplines of Article 3, failed to conduct an objective examination, and failed to base its decision on positive evidence. Instead, the Commission examined the cumulative effects of OCTG exports from other countries, and determined that termination of anti-dumping duties on Argentine OCTG could *possibly* (not "probably" or "likely") cause injury at some, undefined "*reasonably foreseeable time,*" to the US industry in the event of termination.

320. The US anti-dumping measure on Argentine OCTG should have been terminated in 2000. However, the duties were not terminated, and have remained in place for almost nine years since their imposition. The nearly decade-long imposition of duties coupled with the pervasive violations of the Anti-Dumping Agreement associated with the US sunset proceedings highlights the importance that the panel make a specific suggestion regarding the manner in which the United States should implement its findings.

321. In light of the obligations in Article 11.3, the chance to renew the duties in the sunset review determination arise only at the time of the expiry of the five year period of the duty. Such a review

can be conducted only once. Additionally, as stated in Article 11.1, which provides context for the obligation in Article 11.3, the duty "shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." If in this context, an authority failed to conduct the review according to the Anti-Dumping Agreement, then there is no chance for that Member to cure in a subsequent proceeding. Otherwise, the principal obligation of Article 11.3 (*i.e.*, termination of the duties) will be defeated because Members would always be able to continue the measure and delay any substantive analysis until after the dispute settlement process.

322. Argentina recalls the Appellate Body's statement in *Steel from Germany*: "If [a WTO Member] does not conduct a sunset review, or, having conducted such a review, it does not make such a positive determination, the duties must be terminated."[284]

323. Accordingly, the United States had an obligation to terminate the anti-dumping measure on OCTG from Argentina in order to comply with its obligation under Article 11.3. Argentina respectfully notes that the infringement of its right to have the measure terminated after five years cannot be cured by subjecting Siderca to additional US reviews. Argentina sees no other way than termination of the measure for the United States to comply with its obligations under Article 11.3. Argentina respectfully requests that the panel, in addition to making specific findings of WTO violations, suggest that the United States implement the panel's recommendations by terminating the anti-dumping duties on OCTG from Argentina, and by repealing or amending WTO-inconsistent laws, regulations, procedures, and administrative provisions.

[284] Appellate Body Report, *Steel from Germany*, para. 63.

ANNEX A-2

FIRST WRITTEN SUBMISSION OF THE UNITED STATES

7 November 2003

TABLE OF CONTENTS

I. INTRODUCTION

1. A centrepiece of the first submission of Argentina in this dispute is Argentina's purported study of the sunset review practice of the US Department of Commerce ("Commerce"), in which Argentina claims to have exhaustively researched all of Commerce's sunset review determinations and proven empirically that Commerce maintains an "irrefutable presumption" that a continuation or recurrence of dumping is likely, thereby generating an injustice in 100 per cent of the 217 cases that Argentina considered relevant.[1]

2. As the United States will demonstrate, when one takes a closer look at this "study," what one really finds is that in 87 per cent of the 291 sunset reviews considered by Argentina – 252 reviews – the issue of likelihood of dumping was not contested by one side or the other. So why does Argentina make the egregiously erroneous claim that 217 Commerce sunset reviews were decided improperly?

3. The United States suspects that the answer relates to the fact that Argentina has a very weak case. With respect to its claims concerning inconsistencies with Article 11.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), Argentina is handicapped by the fact that: (1) Article 11.3 is the only provision of the AD Agreement that sets forth the substantive requirements for determining whether an order should be revoked five years after its imposition; and (2) the terms of Article 11.3 are very limited. It is hard to establish an inconsistency with an obligation when the obligation does not exist. However, the bulk of Argentina's case involves an attempt to do precisely that.

4. With respect to the factual issues concerning the specific determinations by Commerce and the US International Trade Commission ("ITC") in their sunset reviews of oil country tubular goods ("OCTG") from Argentina, Argentina's situation is no better. As will be seen, these determinations are supported by the evidence of record, and Argentina's attempts to impugn these determinations border on the frivolous. For example, Argentina complains that Commerce denied an Argentine producer/exporter its rights under Articles 6.1 and 6.2 of the AD Agreement to submit information and argument in the sunset review on OCTG. Yet, as the United States will demonstrate, the record clearly shows that the company in question declined to take advantage of the ample opportunities provided under US law to submit such material, and instead chose to limit itself to a mere 4-page, double-spaced submission.

5. These are but a few examples, but they are representative of the emptiness of Argentina's claims. Because facts like these pose problems for Argentina, it needs something like its study to distract from the real issues in this case, and from the fact that the United States has not acted inconsistently with any of its obligations under the AD Agreement, the *Marrakesh Agreement Establishing the World Trade Organization* ("WTO Agreement"), or the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

6. In terms of the structure of this submission, in Section II, the United States discusses the procedural background of this case, particularly as it relates to various claims by Argentina that are not within the Panel's terms of reference. In Section III, the United States sets forth the factual background to this dispute, describing the US system of sunset reviews and the particular determinations made in OCTG from Argentina. In Section IV, the United States sets forth its request that the Panel make preliminary rulings that various claims by Argentina are not within the Panel's terms of reference. Finally, in Section V, the United States responds to the substantive arguments made by Argentina in its First Submission.

[1] The "study" in question is contained in Exhibit ARG-63.

II. PROCEDURAL BACKGROUND

7. Although Commerce published its continuation of the anti-dumping duty order on OCTG from Argentina on 25 July 2001, Argentina did not request consultations with the United States until 7 October 2002.[2] A first round of consultations took place in Geneva on 14 November 2002, and a second round of consultations took place in Washington, D.C., on 17 December 2002.

8. On 3 April 2003, Argentina requested the establishment of a panel.[3] Upon receipt of the request, the United States immediately identified three categories of defects in the request. In Section IV, below, the United States is requesting preliminary rulings with respect to two of these defects.[4]

9. The first category of defects has to do with Argentina's failure to include in its panel request "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" with respect to a broad range of legislative and regulatory materials that Argentina purports to be challenging. In order to fully appreciate the nature and degree of Argentina's failure, it is necessary to describe the structure of the panel request in some detail.

10. The panel request begins with several descriptive paragraphs chronicling the determinations made by US authorities and the consultations between the parties. This introductory material is then followed by two sections – A and B – which in turn contain several numbered paragraphs. These numbered paragraphs collectively appear to describe the measures Argentina is challenging and the claims made with respect to these measures.[5]

11. Section A deals with the "dumping" side of a sunset review. Section A.1 contains an "as such" complaint about 19 USC. § 1675(c)(4) – a US statutory provision dealing with sunset reviews – and 19 C.F.R. § 351.218(e) – a provision of the Commerce regulations dealing with sunset reviews. Sections A.2-A.5 contain "as applied" complaints about various aspects of the determination made, and the procedures applied, by Commerce in its sunset review of the anti-dumping duty order on OCTG from Argentina.

12. Section B of the panel request deals with the "injury" side of a sunset review. Section B.3 contains an "as such" complaint about 19 USC. §§ 1675a(a)(1) and 1675a(a)(5), both of which are US statutory provisions dealing with sunset reviews. Sections B.1-B.2 and B.4 contain "as applied" complaints about various aspects of the determination made by the ITC in its sunset review of the anti-dumping duty order on OCTG from Argentina.

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[2] WT/DS268/1 (10 October 2002).

[3] WT/DS268/2 (4 April 2003).

[4] The third category of defects relates to the fact that Argentina's panel request purported to challenge several items that do not constitute "measures." As explained by the United States at the meeting of the Dispute Settlement Body ("DSB") on 15 April 2003, these items were: (1) the Statement of Administrative Action – or "SAA" – accompanying the Uruguay Round Agreements Act; (2) Commerce's *Sunset Policy Bulletin*; and (3) what Argentina characterized as Commerce's "Determination to Expedite." *See* WT/DSB/M/147 (1 July 2003), para. 33 (copy attached as Exhibit US-1). To the extent that Argentina, in its first submission, persists in treating these items as "measures," the United States has dealt with this defect as a substantive issue rather than as a subject of its request for preliminary rulings.

[5] As discussed below, Argentina subsequently did confirm before the DSB that its claims were contained in Sections A and B of the panel request. With one exception, the United States is not requesting preliminary rulings on the consistency of Sections A and B with Article 6.2 of the DSU.

13. On page 4 of the panel request, however, Sections A and B are followed by the following two paragraphs:[6]

> Argentina also considers that certain aspects of the following US laws, regulations, policies, and procedures related to the determinations of the Department and the Commission are inconsistent with US WTO obligations, to the extent that any of these measures mandate action by the Department or Commission that is inconsistent with US WTO obligations or preclude the Department or Commission from complying with US WTO obligations:
>
> - Sections 751(c) and 752 of the Tariff Act of 1930, as amended, codified at Title 19 of the United States Code §§ 1675(c) and 1675a; and the US Statement of Administrative Action (regarding the Agreement on Implementation of GATT Article VI) accompanying the Uruguay Round Agreements Act (the SAA), H.R. Doc. No. 103-316, vol. 1;
>
> - The Department's *Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Anti-Dumping and Countervailing Duty Orders*; Policy Bulletin, 63 Federal Register 18871 (16 April 1998) (*Sunset Policy Bulletin*);
>
> - The Department's sunset review regulations, codified at Title 19 of the United States Code of Federal Regulations § 351.218; and the Commission's sunset review regulations, codified at Title 19 of the United States Code of Federal Regulations §§ 207.60-69 (Subpart F).
>
> Argentina considers that the Department's Determination to Expedite, the Department's Sunset Determination, the Commission's Sunset Determination, the Department's Determination to Continue the Order and the above mentioned US laws, regulations, policies and procedures are inconsistent with the following provisions of the Anti-Dumping Agreement, the GATT 1994, and the WTO Agreement:
>
> - Articles 1, 2, 3, 6, 11, 12, 18 and Annex II of the Anti-Dumping Agreement;
>
> - Articles VI and X of the General Agreement on Tariffs and Trade (GATT) 1994; and
>
> - Article XVI:4 of the WTO Agreement.
>
> (Underscoring added).

14. In the first sentence of the first quoted paragraph on page 4, Argentina uses the word "also." This suggests that the WTO inconsistencies alluded to on page 4 are in addition to, and different from, the claims set forth in Sections A and B.

15. Argentina then proceeds to assert in the first sentence that "certain aspects" of the subsequently named laws, regulations, etc., are inconsistent with US WTO obligations "as such," because they either mandate WTO-inconsistent behaviour or preclude WTO-consistent behaviour.

[6] For ease of reference, the United States hereafter will refer to the quoted paragraphs as "Page 4" of the panel request, notwithstanding that portions of other paragraphs are included on page 4.

However, Argentina provides absolutely no explanation as to how any aspect (or aspects) of these items is WTO-inconsistent. Instead, it simply lists the items, notwithstanding the fact that each of the items is voluminous and contains multiple requirements or statements. Then, on the next paragraph on page 4, Argentina simply lists entire articles from the AD Agreement, the GATT 1994, and the WTO Agreement. Unfortunately for anyone trying to discern the nature of Argentina's problems, almost all of these WTO provisions consist of multiple paragraphs and contain multiple obligations. Argentina then merely asserts that all of the "measures" it has identified up to that point are inconsistent with the cited articles.

16. Argentina makes no effort to link a particular article to a particular alleged measure, or to otherwise describe the legal basis of the complaint in order to describe the problem. There is no explanation of the facts and circumstances describing the substance of the dispute accompanying these citations to entire articles. As a result, it is impossible to discern precisely what Argentina purports to be complaining about on page 4.

17. A second set of defects appears in Sections B.1, B.2, and B.3 of Argentina's panel request, which deal with the sunset review determination of the ITC. In Sections B.1 and B.2, Argentina alleges an inconsistency with Article 6 of the AD Agreement in its entirety. In section B.3, Argentina alleges an inconsistency with Article 3 of the AD Agreement in its entirety. Both Articles 3 and 6, however, consist of multiple paragraphs and contain multiple obligations, and it seems implausible that Argentina is alleging that the ITC's determination or the relevant provisions of the US statute are inconsistent with each one of those obligations.[7] Significantly, elsewhere in the request, Argentina was able to identify with precision the particular paragraphs of Articles 3 and 6 with which the US measures allegedly were inconsistent.

18. Because of the above-noted defects, Argentina's panel request failed to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly," as required by Article 6.2 of the DSU. At the meeting of the DSB on 15 April 2003, the United States noted these defects, and suggested that Argentina withdraw its panel request and submit a new request that complied with Article 6.2 of the DSU.[8]

19. Instead of correcting the defects in its panel request, Argentina attempted to explain them away by means of a statement it made at the DSB meeting of 19 May 2003.[9] In the case of the first defect – the ambiguity concerning Argentina's "as such" challenge on page 4 of the panel request – Argentina stated as follows: "It was Argentina's intention (as the panel request clearly provided) to set forth the particular claims in the paragraphs contained in Sections A and B of the document."[10]

20. Unfortunately, this attempt at clarification by Argentina did not necessarily eliminate the confusion concerning page 4 of the panel request. For example, on page 4, Argentina refers to the ITC's sunset regulations and asserts that "certain aspects" of these regulations are WTO-inconsistent. However, nowhere in any of the paragraphs contained in Sections A or B – the true location, according to Argentina, of its claims – is there any reference to the ITC's regulations. If, as Argentina asserted before the DSB, its claims are only contained in Sections A and B, does this mean that Argentina is not making any claims regarding the ITC's regulations? Or, if Argentina is making a claim regarding these regulations, what is the nature of that claim and where is it described in the panel request? Put differently, if Argentina has a problem with the ITC's regulations, what is that problem and why is that problem not presented clearly in the panel request?

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[7] Indeed, as will be discussed below, in the relevant portions of its first submission, Argentina does not assert inconsistencies with Article 3 in its entirety, and does not assert *any* inconsistencies with Article 6.

[8] WT/DSB/M/147 (1 July 2003), paras. 30-33 (copy attached as Exhibit US-1).

[9] WT/DSB/M/150 (22 July 2003) (copy attached as Exhibit US-2).

[10] *Id*., para. 32.

21. With respect to the second defect, Argentina did not attempt to argue that it was possible to discern from the panel request the nature of Argentina's problem. Instead, it argued that a US panel request in an earlier dispute allegedly shared the same shortcomings as Argentina's request.[11] In addition, it argued that the questions presented by Argentina to the United States during the consultations somehow should have informed the United States of the nature of the claims embodied in Argentina's general references to Articles 3 and 6 of the AD Agreement.

22. Because Argentina refused to correct the deficiencies in its panel request, the DSB had no choice under the negative consensus rule but to establish a panel on the basis of that request at its 19 May meeting.[12]

23. Argentina's First Submission, submitted on 15 October 2003, added to the list of Argentina's procedural errors by raising matters that were not included in its panel request. These matters are as follows:

– The claim in Section VII.B.1 of Argentina's first submission that Commerce's sunset review practice, both as such and as applied, is inconsistent with Article 11.3 of the AD Agreement.

– The claim in Section VII.B.2 of Argentina's first submission that, taken together, the US sunset statutory provisions, the SAA, and the *Sunset Policy Bulletin* are, as such, inconsistent with Article 11.3 of the AD Agreement.

– The claim in Section VII.E of Argentina's first submission that Commerce sunset reviews collectively – not the sunset review on OCTG from Argentina – are inconsistent with Article X:3(a) of GATT 1994.

– The claim in Section VIII.C.2 of Argentina's first submission that the ITC's application of 19 USC. §§ 1675a(a)(1) and (5) in the sunset review of OCTG from Argentina was inconsistent with Articles 11.3 and 3 of the AD Agreement.

– The claim in Section IX of Argentina's first submission that the US measures identified by Argentina are inconsistent with Article VI of the GATT 1994, Articles 1 and 18 of the AD Agreement, and Article XVI:4 of the WTO Agreement.

III. FACTUAL BACKGROUND

24. Some of Argentina's claims purport to relate to the US sunset review system, as such, while other claims relate to determinations made by Commerce and the ITC in the sunset review on OCTG from Argentina. Other claims appear to relate to the US sunset review system as applied generally. In order to facilitate the Panel's understanding of the issues raised, the United States first will provide an overview of how the United States conducts sunset reviews, followed by a discussion of the specific sunset review determination involving OCTG from Argentina.

[11] *Id*., para. 33.
[12] *Id*., para. 38.

A. SUNSET REVIEWS UNDER US LAW

1. The Statute[13]

25. In 1995, the United States amended its anti-dumping duty statute to include provisions for the conduct of five-year, or so-called "sunset," reviews of anti-dumping duty measures, including anti-dumping duty orders.[14] Commerce and the ITC each conduct sunset reviews pursuant to sections 751(c) and 752 of the Act.[15] Commerce has the responsibility for determining whether revocation of an anti-dumping duty order would be likely to lead to continuation or recurrence of dumping.[16] The ITC conducts a review to determine whether revocation of an anti-dumping duty order would be likely to lead to continuation or recurrence of material injury.

26. Under section 751(d)(2) of the Act, an anti-dumping duty order must be revoked after five years unless Commerce and the ITC make affirmative determinations that dumping and injury would be likely to continue or recur.[17]

(a) Statutory Provisions Related to Commerce's Determination

27. Under the statute, Commerce automatically initiates a sunset review on its own initiative within five years of the date of publication of an anti-dumping duty order.[18] Thereafter, a review can follow one of three basic paths.

28. First, if no domestic interested party responds to the notice of initiation, Commerce will revoke the order within 90 days after the initiation of the review.[19]

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[13] This section provides a general overview of the US statutory provisions relating to sunset reviews. To be clear, however, the only provisions of the US statute that Argentina is challenging "as such" and that are within the Panel's terms of reference are sections 751(c)(4), 752(a)(1), and 752(a)(5) of the Tariff Act of 1930, as amended.

[14] The US anti-dumping duty and countervailing duty statute is found in title VII of the Tariff Act of 1930, as amended ("the Act"), 19 USC. 1671 *et seq*. Title II of the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (1994), amended title VII in order to bring it into conformity with US WTO obligations. Concurrent with the passage of the URAA, Congress approved a "Statement of Administrative Action" (or "SAA"). H.R. Doc. No. 316, 103d Cong., 2d Sess., Vol. 1 (1994). The United States has attached as Exhibit US-11, the portions of the SAA dealing specifically with sunset reviews. The SAA itself is not a statute or law, but instead is legislative history, albeit legislative history that provides authoritative interpretative guidance in respect of the statute to which it relates. *See United States - Measures Treating Export Restraints as Subsidies*, WT/DS194/R, Report of the Panel, adopted 23 August 2001, paras. 8.99-100 (discussing the status in US law of the SAA) [hereinafter "*Export Restraints*"]. As demonstrated below, the SAA itself is not within the terms of reference of this Panel, but could properly be considered by the Panel for purposes of interpreting, as a matter of fact, the meaning of those statutory provisions that Argentina is challenging "as such" and that are within the Panel's terms of reference; *i.e.*, sections 751(c)(4), 752(a)(1), and 752(a)(5) of the Act.

The United States also notes that the term "anti-dumping duty order" is the US law equivalent of the term "definitive duty" in the AD Agreement.

[15] Sections 751(c) and 752 of the Act (Exhibit ARG-1).

[16] Under the US anti-dumping duty law, the term "revocation" is equivalent to the concept of "termination" and "expiry of the duty" as used in Article 11.3 of the AD Agreement.

[17] Section 751(d)(2) of the Act (Exhibit ARG-1).

[18] Sections 751(c)(1) and (2) of the Act (Exhibit ARG-1); *see also* 19 C.F.R. 351.218(c)(1) (Exhibit ARG-1).

[19] Section 751(c)(3)(A) of the Act (Exhibit ARG-1). The term "domestic interested parties" is a shorthand expression for the interested parties defined in section 771(9)(C)-(G) of the Act. These are the types of interested parties who are eligible to file a petition for the imposition of anti-dumping duties.

29. Second, if the responses to the notice of initiation are "inadequate," Commerce will conduct an expedited sunset review and issue its final determination within 120 days after the initiation of the review.[20]

30. Third, if the responses to the notice of initiation are adequate, Commerce will conduct a full sunset review and issue its final determination within 240 days after the initiation of the review.[21] Commerce normally will consider the response to the notice of initiation to be adequate if it receives complete responses from a domestic interested party and respondent interested parties accounting on average for more than 50 per cent of the total exports of subject merchandise.[22]

31. In both expedited and full sunset reviews, respondent interested parties may elect to waive participation in the sunset review conducted by Commerce, without prejudice to their participation in the sunset review conducted by the ITC.[23] The purpose of this procedure is to avoid forcing respondent interested parties to incur the time and expense of participating in the Commerce side of a sunset review when they wish only to contest the likelihood of continuation or recurrence of injury on the ITC side.

32. As mentioned above, Commerce has the responsibility of determining whether revocation of an anti-dumping duty order would be likely to lead to continuation or recurrence of dumping. If Commerce's determination is negative – *i.e.*, if Commerce finds that there is no such likelihood – Commerce must revoke the order.[24] If Commerce's determination is affirmative, however, Commerce transmits its determination to the ITC, along with a determination regarding the magnitude of the margin of dumping that is likely to prevail if the order is revoked.[25]

(b) Statutory Provisions Related to the ITC's Determination

33. Section 751(c) of the Act requires the ITC to conduct a review no later than five years after issuance of an order or the suspension of an investigation, or a prior review, and to determine whether revocation of the order or termination of the suspended investigation would likely lead to the continuation or recurrence of material injury.[26] Section 752(a)(1) of the Act specifically addresses the ITC's determination in a section 751(c) review. This provision states that "the ITC shall determine whether revocation of an order, or termination of a suspended investigation, would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time."[27] More generally, section 752(a) of the Act specifies several factors for the ITC's consideration in making determinations in five-year reviews, including the likely volume, likely price effects and likely impact of subject imports on the domestic industry if the anti-dumping duty order is revoked.

34. Section 752(a)(7) grants the ITC discretion to engage in a cumulative analysis if: (1) reviews are initiated on the same day; and (2) imports would be likely to compete with one another and with the domestic like product in the United States market. It further provides that the ITC shall not cumulate imports from a country if those imports are likely to have no discernible adverse impact.

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[20] Section 751(c)(3)(B) of the Act (Exhibit ARG-1).
[21] Section 751(c)(5)(A) of the Act (Exhibit ARG-1).
[22] 19 C.F.R. 351.218(e)(1) (Exhibit ARG-3). The term "respondent interested parties" is a shorthand expression for the interested parties defined in section 771(9)(A)-(B) of the Act. These parties typically consist of foreign manufacturers, producers or exporters, or the US importer of subject merchandise, or an association of such persons.
[23] Section 751(c)(4)(A) of the Act (Exhibit ARG-1).
[24] Section 751(d)(2) of the Act (Exhibit ARG-1).
[25] Section 752(c) of the Act (Exhibit ARG-1).
[26] Section 751(c) (Exhibit ARG-1).
[27] Section 752(a)(1) (Exhibit ARG-1).

2. The Regulations

(a) Commerce Regulations

35. In 1997, following the enactment of the URAA, Commerce revised its anti-dumping and countervailing duty regulations so as to bring them into conformity with the amended statute.[28] These revised regulations contained substantive provisions with respect to anti-dumping proceedings, as well as procedural provisions applicable to both anti-dumping and countervailing duty proceedings. These regulations, however, contained minimal guidance with respect to sunset reviews, essentially setting forth only the time frame for initiation and completion of such reviews.

36. In 1998, in anticipation of the over 300 pre-URAA orders (referred to as "transition orders")[29] eligible for revocation by 1 January 2000, Commerce issued additional regulations addressing in greater detail the procedures for participation in, and conduct of, sunset reviews.[30] These Sunset Regulations created a framework both to implement statutory requirements and to provide a clear, transparent process. *Inter alia*, they specified the information to be provided by parties participating in a sunset review[31] and the deadlines for required submissions.[32]

37. The Sunset Regulations describe specifically the information required to be provided by all interested parties in a sunset review.[33] In addition, the regulations invite parties to submit, with the required information, "any other relevant information or argument that the party would like [Commerce] to consider."[34] These regulations constitute the standard request for information in sunset reviews and function as the standard questionnaire.

38. With respect to deadlines for required submissions, the Sunset Regulations provide that substantive responses to a notice of initiation are due 30 days after the date of publication in the *Federal Register* of the notice of initiation.[35] Rebuttals to substantive responses are due five days after the date the substantive response is filed.[36] The regulations also state that Commerce normally will not accept or consider any additional information from a party after the time for filing rebuttals has expired.[37]

39. Commerce's regulations also provide for "expedited" sunset review procedures where the domestic interest parties choose not to participate, or where substantive responses received from respondent interested parties are inadequate for Commerce's use in a full sunset proceeding.[38] Where domestic interested parties choose not to participate, the regulations provide that Commerce will make a negative likelihood determination and revoke the order.[39] Where the foreign interested parties

[28] Where, as in the case of the US anti-dumping duty law, Congress entrusts an administrative agency with the administration of a statute, it is common for the agency to promulgate regulations that elaborate on, or clarify, the statute. While regulations are subordinate to the statute, they typically have the force of law if validly promulgated and consistent with the statute.

[29] Section 751(c)(6)(C) of the Act (Exhibit ARG-1).

[30] *Procedures for Conducting Five-Year ("Sunset") Reviews of Anti-Dumping and Countervailing Duty Orders* ("Sunset Regulations"), 63 FR 13516 (20 March 1998) (codified at 19 C.F.R. part 351) (Exhibit US-3).

[31] 19 C.F.R. 351.218(d)(3) (Exhibit ARG-3).

[32] 19 C.F.R. 351.218(d)(3)-(4) (Exhibit ARG-3).

[33] 19 C.F.R. 351.218(d)(1)-(4) (Exhibit ARG-3).

[34] 19 C.F.R. 351.218(d)(3)(iv)(B) (Exhibit ARG-3).

[35] 19 C.F.R. 351.218(d)(3)(i) (Exhibit ARG-3).

[36] 19 C.F.R. 351.218(d)(4) (Exhibit ARG-3).

[37] 19 C.F.R. 351.218(d)(4) (Exhibit ARG-3).

[38] 19 C.F.R. 351.218(d)(2) (Exhibit ARG-3).

[39] 19 C.F.R. 351.218(d)(1)(iii) (Exhibit ARG-3).

fail to provide adequate responses, the regulations provide that Commerce will examine the information on the record of the sunset review proceeding and normally will base its likelihood determination on the basis of facts available prior to the determination to expedite the review – the dumping margins from the original investigation and any administrative reviews, as well as any information supplied by the interested parties.[40]

40. The purpose of the "expedited" procedures is to provide all interested parties the option of concentrating their efforts on the ITC's injury proceeding, should they believe that such an approach would be in their best interests. Respondent interested parties may opt to file a formal waiver of their right to participate in the proceeding or, alternatively, they simply may choose not to respond to the notice of initiation. In addition, Commerce's regulations also provide the opportunity for interested parties to comment on the adequacy of the substantive and rebuttal responses and to address the appropriateness of conducting an expedited sunset review.[41]

(b) ITC Regulations

41. The ITC has its own set of regulations pertaining to sunset reviews, which are set forth at 19 C.F.R. 207.60-69.[42] With respect to institution of a sunset review, under its regulations, the ITC initially determines whether to conduct a full review (which would generally include a public hearing, the issuance of questionnaires, and other procedures) or an expedited review. First, the ITC determines whether individual responses to the notice of institution are adequate. Second, based on those responses deemed individually adequate, the ITC determines whether the collective responses submitted by two groups of interested parties – domestic interested parties (producers, unions, trade associations, or worker groups), and respondent interested parties (importers, exporters, foreign producers, trade associations, or country governments) – demonstrate a sufficient willingness among each group to participate and provide information requested in a full review.[43] In its sunset review on OCTG, the ITC conducted a full review.

42. As demonstrated below in connection with the United States' request for preliminary rulings, even though Argentina refers to them cryptically in its panel request, the ITC regulations are not within the Panel's terms of reference, and Argentina does not advance any claims concerning them in its First Submission.

3. Commerce's *Sunset Policy Bulletin*[44]

43. In April 1998, Commerce issued a policy bulletin related to sunset reviews.[45] Commerce issued the policy bulletin to apprise interested parties of its anticipated methodologies and to assist Commerce staff in their conduct of sunset reviews. As described in the Bulletin, Commerce normally will determine that revocation of an anti-dumping order is likely to lead to continuation or recurrence of dumping where (1) dumping continued at any level above *de minimis* after the issuance of the

[40] 19 C.F.R. 351.308(f) (Exhibit US-3).
[41] 19 C.F.R. 351.309(e) (Exhibit US-3).
[42] A copy of the ITC's sunset review regulations is attached as Exhibit US-4.
[43] 19 C.F.R. 207.62(a) (Exhibit US-4).
[44] The United States would like to make it clear that the following discussion of the *Sunset Policy Bulletin* is designed merely to provide the Panel with a complete picture of the US sunset review process. As demonstrated below, the Bulletin is not within the Panel's terms of reference, is not a "measure," and, even if it were considered a measure, is not a mandatory measure and, thus, cannot be challenged "as such."
[45] *Policies Regarding the Conduct of Five-Year ("Sunset") Reviews of Anti-Dumping and Countervailing Duty Orders; Policy* Bulletin ("*Sunset Policy Bulletin*"), 63 FR 18871 (16 April 1998) (Exhibit ARG-35). Commerce and other administrative agencies will sometimes issue informal documents such as policy bulletins when they wish to provide guidance to the public and agency staff, but are not yet in a position to make such guidance binding and mandatory by promulgating regulations.

order; (2) imports of the subject merchandise ceased after issuance of the order; or (3) dumping was eliminated after the issuance of the order and import volumes for the subject merchandise declined significantly.

44. The Bulletin also provides guidance as to how to determine the magnitude of the dumping margin that would be likely to prevail if the anti-dumping order were revoked. Commerce normally will select the margins from the investigation, because these margins are the only calculated rates that reflect the behaviour of exporters without the discipline of an order in place.[46] Commerce may select a more recently calculated margin for a particular company if dumping margins declined or if dumping was eliminated after the issuance of the order and import volumes remained steady or increased.[47]

45. The *Sunset Policy Bulletin* provides a sketch of what Commerce, given particular factual scenarios, will "normally" do. It is not binding on either Commerce or private parties, but instead describes how Commerce anticipated acting on a regular, standard or ordinary basis. The *Sunset Policy Bulletin* does not suggest that Commerce will *always* find a likelihood of continuation or recurrence given the factual scenarios above.

B. CERTAIN OCTG FROM ARGENTINA

1. The Anti-Dumping Duty Investigation Order

46. On 28 June 1995, Commerce published its final affirmative anti-dumping duty determination on OCTG from Argentina.[48] In its final determination, Commerce found that the Argentine producer of OCTG that it had investigated – Siderca S.A.I.C. ("Siderca") – was dumping the subject merchandise in the United States. For Siderca, Commerce calculated a dumping margin of 1.36 per cent based on Siderca's sales to the United States during the period of investigation. Also, based on Siderca's dumping margin, Commerce calculated an "all others" duty rate applicable to OCTG from other Argentine sources of OCTG.[49]

47. On 10 August 1995, the ITC published notice of its final affirmative injury determination involving OCTG from Argentina.[50] On 11 August 1995, Commerce issued an anti-dumping duty order on certain OCTG from Argentina.[51]

48. No administrative reviews of the anti-dumping duty order on certain OCTG from Argentina were requested or conducted prior to the sunset review.

2. The Sunset Review and Determination

(a) Commerce's Determination of Likelihood of Continuation or Recurrence of Dumping

49. On 3 July 2000, Commerce published its notice of initiation of the sunset review of the anti-dumping duty order on certain OCTG from Argentina.[52] In the notice, Commerce, as is its normal

[46] *Sunset Policy Bulletin*, 63 FR at 18873 (Exhibit ARG-35).
[47] *Id.*
[48] Final Determination of Sales At Less Than Fair Value: Oil Country Tubular Goods from Argentina, 60 Fed. Reg. 33539 (28 June 1995) ("Commerce Investigation Final") (Exhibit ARG-26).
[49] *Id*. at 33550.
[50] 60 Fed. Reg. 40855 (Exhibit US-5). The full version of the ITC's opinion was published as a separate document in USITC Pub. 2911 (August 1995).
[51] Anti-Dumping Duty Order: Certain Oil Country Tubular Goods From Argentina, 60 Fed. Reg. 41055 (11 August 1995) ("Anti-Dumping Duty Order") (Exhibit US-6).

practice, highlighted the deadline for filing a substantive response in the sunset review and the information that was required to be contained in the response.[53] Commerce also explicitly referred parties to the applicable regulation concerning requests for an extension of filing deadlines.[54]

50. On 2 August 2000, Siderca and domestic interested parties[55] filed their substantive responses.

51. In its substantive response, Siderca did not state that it would not export OCTG to the United States if the order were revoked, nor did it state that it would not dump OCTG in the United States if the order were revoked.[56] Instead, Siderca merely argued that the dumping margin from the original investigation was not large enough to support a determination that dumping was likely to continue or recur in the absence of the duty. Specifically, Siderca argued that its 1.36 per cent dumping margin from the investigation was below the 2 per cent *de minimis* standard of Article 5.8 of the AD Agreement, which Siderca asserted applied to sunset reviews.[57] Siderca also stated that it believed that it was the only producer of OCTG in Argentina.[58] It acknowledged that it did not export OCTG to the United States during the five-year period preceding the sunset review, but did not assert that there were no other exporters of OCTG from Argentina to the United States.[59] Siderca did not provide any additional evidence or argument for Commerce's consideration on the likelihood issue in its substantive response. In addition, Commerce did not receive any substantive responses from Argentine exporters of OCTG during the sunset review, nor did any other Argentine exporter supply information for inclusion in Siderca's substantive response.

52. On 7 August 2000, Commerce received rebuttal comments on behalf of domestic interested parties in response to Siderca's comments. Siderca did not submit a substantive rebuttal brief or any other factual information or legal argument in the sunset review.

53. On 22 August 2000, Commerce determined to conduct an expedited sunset review because it had not received a complete substantive response from exporters accounting for more than 50 per cent of Argentine exports to the United States during the relevant period.[60] Siderca did not comment on Commerce's determination to expedite the sunset review, notwithstanding that it had a right to do so under Commerce's regulations.[61]

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[52] Initiation of Five-year ("Sunset") Reviews of Anti-Dumping and Countervailing Duty Orders or Investigations of Oil Country Tubular Goods ("Sunset Initiation"), 65 FR 41053, 41054 (3 July 2000) (Exhibit ARG-44).

[53] *Sunset Initiation*. The information requirements concerning substantive responses to notices of initiation of sunset reviews are set forth at 19 C.F.R. 351.218(d)(3) (Exhibit ARG-3).

[54] *Sunset Initiation*. 19 C.F.R. 351.302(c) provides that a party may request an extension of a specific time limit. 19 C.F.R. 351.302(b) provides that unless expressly precluded by statute, Commerce may, for good cause, extend any time limit established by its regulations. The US anti-dumping duty statute does not contain deadlines for submission of information in a sunset review. A copy of 19 C.F.R. 351.302 is attached as Exhibit US-7.

[55] The domestic interested parties consisted of Bethlehem Steel Corporation, IPSCO Tubulars, Inc., Lone Star Steel Company, Maverick Tube Corporation, Newport Steel and Koppel Steel Divisions of NS Group, Grant-Prideco, North Star Steel Ohio, and US Steel Group, a unit of USX Corporation.

[56] Exhibit ARG-57.

[57] Exhibit ARG-57, page 3.

[58] *Id*.

[59] *Id*., page 4.

[60] "Commerce Memorandum on Adequacy of Response to Notice of Initiation," dated 22 August 2000 (Exhibit ARG-50); *see also* 19 C.F.R. 351.218(e)(1)(ii)(A)-(B) (Exhibit ARG-3).

[61] 19 C.F.R. 351.309(e) (Exhibit US-3).

54. On 7 November 2000, Commerce published its final expedited sunset determination, finding that continuation or recurrence of dumping was likely.[62] Commerce found that dumping had continued over the life of the order because there had been no administrative reviews and the dumping margin from the original investigation was the only indicator available to Commerce. Based on its findings that there was no decline in dumping margins and that the volume of imports had decreased after issuance of the order and remained at below pre-order levels, Commerce determined that there was a likelihood of continuation or recurrence of dumping.[63]

55. As required under US law, Commerce also reported to the ITC the magnitude of the margin of dumping likely to prevail if the order were revoked.[64] In deciding the magnitude of the margin likely to prevail to report to the ITC, Commerce considered the fact that import volumes had declined over the period preceding the sunset review. Commerce determined to report to the ITC the margins of 1.36 per cent calculated in the original investigation for Siderca and "all others," because they were the only margins indicative of exporter behaviour without the discipline of an order in place.[65]

(b) The ITC's Determination of Likelihood of Continuation or Recurrence of Injury

56. In its final determination in the original investigation, the ITC made separate injury determinations for the two types of OCTG (casing and tubing and drill pipe), because it found these to be separate domestic like products.[66]

57. On 3 June 2000, the ITC instituted sunset reviews,[67] and on 25 October 2000, decided to conduct full reviews to determine whether revocation of the anti-dumping and countervailing orders on casing and tubing from Argentina, Italy, Japan, Korea, and Mexico, and on drill pipe from Argentina, Italy and Mexico would likely lead to continuation or recurrence of material injury.[68]

58. On 10 July 2001, the ITC published notice of its final determination in the sunset review, and issued its full opinion in a separate publication.[69] The ITC determined that revocation of the order on drill pipe from Japan was likely to lead to continuation of material injury within a reasonably foreseeable time, but that revocation of the orders on drill pipe from Mexico and Argentina was *not* likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. As a result, the anti-dumping duty orders on drill pipe from Mexico and Argentina were revoked.

59. With respect to casing and tubing, the ITC determined to evaluate the effects of subject casing and tubing imports from Mexico, Argentina, Italy, Japan and Korea on a cumulated basis.[70]

60. The ITC identified a number of conditions of competition as relevant to its sunset review, including (as most relevant to this dispute) that:

– The United States is the largest OCTG market in the world.[71]

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[62] *Final Results of Expedited Sunset Reviews: Oil Country Tubular Goods From Argentina, et al.* ("*Commerce Sunset Final*"), 65 FR 66701 (7 Nov. 2000) (Exhibit ARG-46), and accompanying Decision Memorandum ("Commerce Sunset Final Decision Memorandum") (Exhibit ARG-51).

[63] *Commerce Sunset Final Decision Memorandum*, page 5 (Exhibit ARG-51)

[64] *Id.*, pages 6-7; *see also* section 752(c)(3) of the Act (Exhibit ARG-1).

[65] *Commerce Sunset Final Decision Memorandum*, page 7 (Exhibit ARG-51).

[66] *See* Exhibit US-5.

[67] *See* Exhibit ARG-45.

[68] 65 Fed. Reg. 63889 (Exhibit US-8).

[69] The ITC's notice was published at 66 Fed. Reg. 35997 (Exhibit US-9), and its full opinion was published as *Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico*, USITC Pub. 3434, Inv. Nos. 701-TA-364, 731-TA-711, and 713-716 (June 2001) (Exhibit ARG-54) [hereinafter "ITC Report"].

[70] ITC Report at 10-14.

– Based in part on rising oil and gas prices, which appeared to be driven by long-term factors, the ITC found demand for casing and tubing to be currently strong and to be projected to remain strong in the reasonably foreseeable future. The ITC noted, however, that the volatility of the forces affecting oil and gas supply and demand globally made such forecasts difficult.[72]

– Production facilities in subject countries and in the United States produced a variety of products in addition to OCTG. The ITC found that producers could easily shift production away from other tubular products toward production of OCTG and vice versa. The ITC also found that OCTG commanded among the highest prices among tubular products, giving producers an incentive to make as much OCTG as possible in relation to other products.[73]

– The ITC noted the consolidation of five foreign producers of seamless casing and tubing (four of which were located in subject countries) into the Tenaris Alliance. Tenaris operated as a unit, submitting a single bid for OCTG contracts, and its customer base included large multi-national oil and gas companies that had operations in the United States.[74]

61. Against that background, the ITC considered the evidence gathered in the reviews. It noted that during the original period of investigation, subject imports of casing and tubing rose from 1992 to 1994. The ITC explained that after the orders went into effect subject imports decreased but remained a factor in the US market. The ITC concluded that the current import volume and market share of subject imports were substantially below the levels of the original investigation, but that this likely reflected the restraining effects of the orders.[75]

62. The ITC explained that the volume of subject imports would likely increase significantly if the orders were revoked. Because it found that foreign casing and tubing producers could shift with relative ease between production of casing and tubing and production of other pipe and tube products, the ITC considered foreign producers' operations with respect to casing and tubing and with respect to all pipe and tube products produced on the same machinery and equipment as casing and tubing.[76]

63. The ITC concluded that there was substantial available capacity in the subject countries for increasing exports of casing and tubing to the United States. The ITC explained that producers had incentives to devote more of their productive capacity to producing and shipping more casing and tubing to the US market. The ITC considered Tenaris' assertion that its preference to sell directly to end-users would limit its participation in the US market if the orders were revoked. The ITC explained that Tenaris was the dominant supplier of OCTG products and related services to all of the world's major oil and gas drilling regions, except the United States. It noted that Tenaris sought worldwide contracts with oil and gas companies, and that many of Tenaris' existing customers were global oil and gas companies with operations in the United States. While the Tenaris companies sought to downplay the importance of the US market, they acknowledged that it was the largest market for seamless casing and tubing in the world. Given Tenaris' global focus, the ITC found "it likely would have a strong incentive to have a significant presence in the US market, including the supply of its global customers' OCTG requirements in the US market."[77]

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[71] ITC Report at 15.
[72] ITC Report at 15.
[73] ITC Report at 16.
[74] ITC Report at 16.
[75] ITC Report at 17.
[76] ITC Report at 17.
[77] ITC Report at 18-19.

64. The ITC explained a second incentive for producers of the subject merchandise to devote more capacity to producing casing and tubing for the US market. Casing and tubing were among the highest valued pipe and tube products, generating among the highest profit margins. Accordingly, producers generally had an incentive, where possible, to shift production in favor of these products from other pipe and tube products that were manufactured on the same production lines.[78]

65. A third incentive identified by the ITC was that prices for casing and tubing on the world market were significantly lower than prices in the United States. The ITC considered respondents' arguments that the domestic industry's claims of price differences were exaggerated, but it concluded that there was on average a difference sufficient to create an incentive for subject producers to seek to increase their sales of casing and tubing to the United States.[79]

66. The fourth incentive was that producers and exporters in the subject countries faced import barriers in other countries and on other pipe products (produced in the same facilities) in the United States. Finally, the ITC found that industries in at least some of the subject countries depended on exports for the majority of their sales. Japan and Korea, in particular, had very small home markets and depended nearly exclusively on exports.[80]

67. On these bases, the ITC concluded that, in the absence of the orders, the likely volume of cumulated subject imports, both in absolute terms and as a share of the US market, would be significant.[81]

68. In evaluating potential price effects, the ITC first reviewed the price effects findings it made in the original investigation, which reflected conditions before the orders were imposed. It found that the domestic and imported products were generally substitutable and that price was one of the most important factors in purchasing decisions. It concluded that, despite mixed evidence as to instances of underselling and overselling, underselling by subject imports was significant.[82]

69. The ITC also found in the original investigations that cumulated subject imports suppressed domestic prices to a significant degree, despite the unclear trend in domestic and import prices. The ITC found that the significant volumes of casing and tubing available from the cumulated subject countries effectively prevented domestic producers from raising prices, even though they were experiencing high manufacturing costs. Because imported and domestic casing and tubing were relatively close substitutes, changes in relative prices were likely to cause purchasers to shift among supply sources. As the ITC noted, purchasers repeatedly stated that subject imports exerted downward pressure on domestic prices.[83]

70. Turning to the evidence gathered in the reviews, the ITC found that the trend in prices of US-made casing and tubing since 1995 had varied by product. It noted that for most products domestic prices peaked in 1998, fell significantly in 1999, then rebounded in 2000. The ITC also found that direct selling comparisons were limited, because the subject producers had a limited presence in the US market during the period of review. Nevertheless, it found that the few direct comparisons that could be made indicated that subject casing and tubing generally undersold the domestic like product, especially in 1999 and 2000.[84]

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[78] ITC Report at 19.
[79] ITC Report at 19-20.
[80] ITC Report at 20.
[81] ITC Report at 20.
[82] ITC Report at 20-21.
[83] ITC Report at 21.
[84] ITC Report at 21.

71. The ITC also noted that subject imports were highly substitutable for domestic casing and tubing, and that price was a very important factor in purchasing decisions. Accordingly, the ITC found that the increases in subject import sales volume that were likely to occur would be achieved through lower prices.[85]

72. The ITC found that in the absence of the orders, casing and tubing from Mexico, Argentina, Italy, Japan and Korea likely would compete on the basis of price in order to gain additional market share. The ITC concluded that "such price-based competition by subject imports likely would have significant depressing or suppressing effects on the prices of the domestic like product."[86]

73. The ITC reviewed its impact findings from the original investigation, which reflected conditions prior to the imposition of the orders. The adverse impact of the cumulated subject imports in the original determinations was reflected in the poor operating performance of the domestic industry (despite a sharp increase in US consumption) and in the decline in market share.[87]

74. The ITC further found that the large volumes of cumulated subject imports, which purchasers generally viewed as good substitutes for the domestic product, were inhibiting the domestic industry from increasing market share and from raising prices. The ITC thus found in the original investigations that suppliers had to compete for market share and that the lowest price would generally prevail. In addition, the ITC determined that the adverse impact of cumulated subject imports was reflected in the inability of the domestic industry to raise prices sufficiently to cover costs between 1992 and 1994.[88]

75. With regard to the evidence gathered during the reviews, the ITC noted that the current condition of the domestic industry was positive, that the industry had recovered after the orders were imposed, and that it appeared to have benefited from the discipline imposed by the orders. The ITC also noted that the industry's performance indicators rose and fell with the volatile swings in demand. It found that, on balance, the domestic industry's condition had improved since the orders went into effect, as reflected in most indicators over the period reviewed, and it did not find the industry to be currently vulnerable.[89]

76. The ITC further found, however, for the reasons previously given, that revocation of the orders likely would lead to a significant increase in the volume of subject imports, which likely would undersell the domestic like product and significantly depress or suppress the domestic industry's prices. With regard to demand, the ITC noted that in the original investigations, subject imports captured market share and caused price effects despite a significant increase in apparent consumption in 1993 and 1994 as compared to 1992. In these reviews, it found that, despite strong demand conditions in the near term, a significant increase in subject imports would likely have negative effects on both the price and volume of the domestic producers' shipments. The ITC found further that these developments likely would have a significant adverse impact on the production, shipments, sales, market share, and revenues of the domestic industry. As the ITC also found, this reduction in the domestic industry's production, shipments, sales, market share, and revenues would result in the erosion of the domestic industry's profitability, as well as its ability to raise capital and make and maintain necessary capital investments.[90]

[85] ITC Report at 21.
[86] ITC Report at 21.
[87] ITC Report at 20-21.
[88] ITC Report at 21-22.
[89] ITC Report at 22.
[90] ITC Report at 22.

77. On this basis, the ITC determined that revocation of the anti-dumping and countervailing duty orders on imports of casing and tubing from Mexico, Argentina, Italy, Korea and Japan would be likely to lead to the continuation or recurrence of material injury to the domestic industry in the reasonably foreseeable future.[91]

(c) Notice of Continuation of the Order

78. On 15 December 2000, the United States published notice of the continuation of the anti-dumping duty order on certain oil country tubular goods from Argentina based on the determinations by Commerce and the ITC finding likelihood of continuation or recurrence of dumping and injury, respectively.[92]

IV. REQUEST FOR PRELIMINARY RULINGS

A. INTRODUCTION

79. The Appellate Body has stated that: "A defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence."[93] According to the Appellate Body: "This requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings."[94]

80. In this dispute, this fundamental due process requirement has been denied the United States for several reasons. First, Argentina's request for the establishment of a panel failed to comply with the requirements of Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). Specifically, with respect to a major portion of Argentina's panel request, Argentina failed to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." As a result, the United States could not discern from the panel request "what case it has to answer, and what violations have been alleged," and was unable to "begin preparing its defence."

81. As explained earlier, there are essentially two categories of defects in Argentina's panel request that made it impossible for the United States to discern the nature of Argentina's problems. The United States raised both of these defects before the DSB. With respect to the defect concerning Sections B.1-B.3 of the panel request, Argentina simply refused to acknowledge that the defects existed. The United States requests that the Panel find that the claims falling within this category are not within the Panel's terms of reference due to Argentina's failure to comply with Article 6.2 of the DSU.

82. In the case of the defects concerning page 4, Argentina did appear to acknowledge that there was a problem, and offered before the DSB an interpretation of its panel request, stating essentially that portions of its panel request should be disregarded. The United States, therefore, requests that the Panel accept Argentina's proposed clarification at face value and find that the claims falling within this category are not within the Panel's terms of reference due to Argentina's failure to comply with Article 6.2 of the DSU.

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[91] ITC Report at 22-23.

[92] Continuation of Anti-Dumping and Countervailing Duty Orders on Oil Country Tubular Goods From Argentina, Italy, Japan, Korea, and Mexico, and Partial Revocation of Those Orders from Argentina and Mexico With Respect to Drill Pipe, 66 Fed. Reg. 38630 (25 July 2001) (Exhibit US-10).

[93] *Thailand - Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel H-Beams from Poland*, WT/DS122/AB/R, Report of the Appellate Body adopted 5 April 2001, para. 88 ("*Thai Angles*").

[94] *Id*.

83. An additional source of the denial of due process to which the United States is entitled is that in its First Submission, Argentina has raised matters that were not within the scope of that portion of its panel request that was in conformity with the requirements of Article 6.2. The United States requests that the Panel find that these matters are not within its terms of reference.

B. BECAUSE PAGE 4 OF ARGENTINA'S PANEL REQUEST FAILS TO CONFORM TO THE REQUIREMENTS OF ARTICLE 6.2 OF THE DSU, THE PANEL SHOULD FIND THAT THE CLAIMS SET FORTH ON PAGE 4 ARE NOT WITHIN THE PANEL'S TERMS OF REFERENCE

84. Article 6.2 of the DSU provides, in pertinent part, as follows:

> The request for the establishment of a panel shall . . . identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.
>
> The Appellate Body recently summarized these requirements as follows:[95]
>
> There are . . . two distinct requirements, namely identification of *the specific measures at issue*, and the provision of a *brief summary of the legal basis of the complaint* (or the *claims*). Together, they comprise the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.
>
> The requirements of precision in the request for the establishment of a panel flow from the two essential purposes of the terms of reference. First, the terms of reference define the scope of the dispute. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the *due process* objective of notifying the parties and third parties of the nature of a complainant's case. When faced with an issue relating to the scope of its terms of reference, a panel must scrutinize carefully the request for establishment of a panel "to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU."
>
> As we have said previously, compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be "cured" in the subsequent submissions of the parties during the panel proceedings. Nevertheless, in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced. Moreover, compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances.

85. The Appellate Body also has provided the following guidance concerning the requirement for a summary:[96]

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[95] *United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr. 1, Report of the Appellate Body adopted 19 December 2002, paras. 125-127 (footnotes omitted; italics in original) [hereinafter "*US - German Steel*"].

[96] *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, Report of the Appellate Body adopted 12 January 2000, para. 120 [hereinafter "*Korea Dairy Safeguard*"].

> In its fourth requirement, Article 6.2 demands only a summary – and it may be a brief one – of the legal basis of the complaint; but the summary must, in any event, be one that is "sufficient to present the problem clearly". It is not enough, in other words, that "the legal basis of the complaint" is summarily identified; the identification must "present the problem clearly".

86. For the reasons set forth below, page 4 of Argentina's panel request utterly fails to comply with the requirement to "present the problem clearly."

1. Page 4 of the Panel Request does not "present the problem clearly"

87. Three aspects of page 4 of Argentina's panel request make it impossible to determine what Argentina's problems are. First, in the first paragraph on page 4, while Argentina identifies five discrete alleged "measures," it asserts that it is challenging only "certain aspects" of those five "measures," and then fails to identify what those "certain aspects" are.[97] Second, in the second paragraph on page 4, Argentina indiscriminately lumps together various articles from three different WTO agreements, almost all of which consist of multiple paragraphs and contain multiple obligations. Finally, Argentina provides absolutely no narrative description on page 4 of the legal basis of the complaint. As a result, it is impossible to discern the nature of Argentina's problems.

88. With respect to the alleged "measures," consider section 751(c), a provision of the Tariff Act of 1930 cited on page 4 of the panel request. Section 751(c) consists of six paragraphs, each of which deals with a different aspect of sunset reviews and each of which contains different requirements.[98] Significantly, in Section A.1 of the panel request, Argentina states that it is challenging paragraph (4) of section 751(c) as such because it allegedly precludes Commerce from making the type of determination called for by the AD Agreement.[99] On page 4, however, Argentina states that it "also" is complaining about "certain aspects" of section 751(c) as such. The use of the word "also" suggests that the complaint on page 4 regarding section 751(c) involves something different from the complaint described in Section A.1, but the use of the cryptic phrase "certain aspects" makes it impossible to determine the precise portion of section 751(c) that Argentina is complaining about on page 4. This ambiguity is puzzling, given that the references in Section A.1 to paragraph 4 of section 751(c) demonstrate that Argentina is capable of greater precision.

89. A similar problem exists with respect to the other "measures" referred to in the first paragraph on page 4: section 752 of the Tariff Act of 1930,[100] the SAA,[101] the *Sunset Policy Bulletin*,[102] the

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[97] The United States places quotation marks around the word "measures," because it does not agree that all of the documents identified by Argentina constitute measures for purposes of WTO dispute settlement.

[98] See Exhibit ARG-1.

[99] In Section A.1, Argentina cites to 19 USC. §1675(c)(4), which is the US Code citation for section 751(c)(4) of the Tariff Act of 1930.

[100] Section 752 is included in Exhibit ARG-1. Section 752 – which deals with likelihood determinations by Commerce and the ITC in sunset reviews and "changed circumstances" reviews – consists of three subsections, which, in turn, cumulatively contain sixteen paragraphs. In Section B.3 of the panel request, Argentina states that it is complaining about two specific statutory requirements that appear in paragraphs (1) and (5), respectively, of subsection (a) of section 752. On page 4, however, Argentina shifts to ambiguity. Again, the use of the word "also" indicates that Argentina is complaining about something in addition to what it is complaining about in Section B.3, but the use of the phrase "certain aspects" makes it impossible to determine precisely what that something is.

[101] With respect to the SAA, Argentina does not even bother to provide the page number(s) on which the alleged WTO inconsistency(ies) appears. The SAA contains eighty-nine pages of text dealing with the AD Agreement. Even if one limits one's search to the thirteen pages of text directly relating to sections 751(c) and 752, it is impossible to discern from the panel request the precise content of those thirteen pages that Argentina

Commerce regulations,[103] and the ITC regulations.[104] In essence, in the first paragraph on page 4, Argentina does nothing more than identify six different "laws, regulations, policies and procedures" and assert that "certain aspects" of these voluminous materials are problematic, without providing a clue as to what those problematic aspects are.

90. In addition to this vague description of the "measures," in the second paragraph on page 4, Argentina indiscriminately lists six articles and one annex of the AD Agreement, two articles of the GATT 1994, and one article of the WTO Agreement. Because almost all of the articles consist of multiple paragraphs and contain multiple obligations, the reader must guess at the identity of the particular obligation(s) contained within an article with which a particular "measure" allegedly is inconsistent.

91. More fundamentally, in view of the absence on page 4 of any narrative description of the problem, or of any indication of how the obligations in these listed articles are linked to the listed measures, the reader is left to guess at how each measure allegedly breaches an obligation. It is implausible to believe that Argentina is claiming that each of the "measures" is inconsistent with each of the obligations contained in each of the articles cited. Yet, without any recitation of the facts and circumstances describing the substance of these claims, the reader has no choice but to guess at the identity of these claims. There is, quite simply, no "brief summary of the legal basis of the complaint sufficient to present the problem clearly," as required by Article 6.2 of the DSU.

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considers to be WTO-inconsistent. The pages of the SAA dealing with sections 751(c) and 752 are attached as Exhibit US-11.

[102] The portion of the Bulletin dealing with sunset reviews in anti-dumping proceedings consists of three major sections, with eleven subsections. Argentina does not indicate the subsection – or even the section – it considers to be problematic, and it is impossible to discern from the panel request the precise content of the Bulletin that Argentina considers to be WTO-inconsistent. The *Sunset Policy Bulletin* is included in Exhibit ARG-35.

[103] With respect to the Commerce regulations, on page 4 Argentina at least limits its challenge to one section of the regulations, section 351.218. However, section 351.218 consists of six subsections – (a) through (f) – that take up six pages in the US Code of Federal Regulations and contain multiple requirements. In Section A.1 of the panel request, Argentina indicates that it is complaining about paragraph (e) of section 351.218, and Argentina identifies by paragraph the provisions of the AD Agreement with which paragraph (e) allegedly is inconsistent. Again, however, the use of "also" suggests that on page 4 Argentina is complaining about some aspect of section 351.218(e) other than what is complained about in Section A.1 of the panel request, but the use of the phrase "certain aspects" makes it impossible to determine precisely what that something is. A copy of section 351.218 is attached as Exhibit ARG-3.

In this regard, in its first submission, the focus of Argentina's wrath is no longer section 351.218(e), but section 351.218(d)(2)(iii). See Argentina's first submission, Section VII.A. This switch is misleading given the express reference in the panel request to section 351.218(e), and the omission of any reference to section 351.218(d)(2)(iii). However, unlike page 4, Section A.1 of the panel request at least had a narrative explanation indicating that Argentina had a problem with the concept of "waiver" under the US anti-dumping law. Thus, while the ability of the United States to defend itself certainly was not helped by this particular "bait-and-switch" gambit of Argentina, the United States is not asserting that the prejudice it experienced thereby was of such a degree as to warrant a preliminary objection. It does, however, serve to highlight the problems the United States encountered with respect to page 4 of the panel request, where there was no narrative explanation to assist the United States in deciphering Argentina's jumble of "measures" and obligations.

[104] With respect to the ITC's regulations, Argentina cites to ten different sections of those regulations. These sections collectively establish a variety of mostly procedural requirements concerning sunset reviews. Argentina does not indicate which section – let alone the subsection – of the regulations it is complaining about, and it is implausible that Argentina is complaining about all ten sections. A copy of sections 207.60-69 of the ITC's regulations is attached as Exhibit US-4. As noted above, in its first submission, Argentina has not pursued any claims regarding the ITC's regulations.

92. The Appellate Body has found that "where the articles listed establish not one single, distinct obligation, but rather multiple obligations . . . the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2."[105] Consistent with this finding, panels have found, for example, that references to Article 6, Article 9, or Article 12 of the AD Agreement are not sufficiently specific to satisfy the requirements of Article 6.2 of the DSU.[106] Although this type of defect can be overcome if a panel request "also sets forth facts and circumstances describing the substance of the dispute,"[107] page 4 of Argentina's panel request is devoid of any such explanatory material. To paraphrase the Appellate Body, page 4 of "the request [does not] give any indication as to *why* or *how*" the "measures" are inconsistent with US WTO obligations.[108] In short, page 4 of Argentina's panel request does not come anywhere close to satisfying the Article 6.2 obligation to "present the problem clearly."

93. Moreover, Argentina has offered no explanation for its failure to comply with Article 6.2. In Sections A and B of the request, Argentina demonstrates that it is perfectly capable (in most instances) of identifying with precision specific US statutory and regulatory provisions and linking those provisions to specific paragraphs of WTO agreements. In addition, Argentina had more than one year in which to draft its panel request.

94. It is possible that Argentina may attempt to argue that the United States somehow knows from the discussions at the consultations the nature of Argentina's problems set forth on page 4 of the panel request. Should Argentina make such an argument, the United States would have to vehemently disagree. As a factual matter, the consultations were singularly unenlightening as to the nature of the alleged WTO inconsistencies about which Argentina is complaining. For example, during the consultations, Argentina *never* discussed the ITC's regulations. More importantly, however, even if the consultations had been more informative as to the nature of Argentina's problems, that would not have absolved Argentina of its obligation to comply with Article 6.2 of the DSU. As one panel has found:[109]

> Article 6.2 requires that a panel request provide the necessary information, regardless of whether the same information, or additional information, is already available to the responding party through different channels, *e.g.*, previous discussions between the parties ... . [I]t is a corollary of the due process objective inherent in Article 6.2 that a complaining party, as the party in control of the drafting of a panel request, should bear the risk of any lack of precision in the panel request.

95. In summary, with respect to page 4 of Argentina's panel request, because it is impossible to discern what Argentina's problems are, the request fails to comply with the requirements of Article 6.2 of the DSU.

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[105] *Korea Dairy Safeguard*, para. 124.

[106] *European Communities - Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, Report of the Panel, as modified by the Appellate Body, adopted 18 August 2003, para. 7.14(7) (discussing Articles 6, 9 and 12 of the AD Agreement) [hereinafter "*EC - Pipe Fittings*"]; and *Thailand - Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel H-Beams from Poland*, WT/DS122/R, Report of the Panel, as modified by the Appellate Body, adopted 28 September 2000, paras. 7.28-7.29 (discussing Article 6 of the AD Agreement) [hereinafter "*Thai Angles (Panel)*"].

[107] *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, Report of the Panel adopted 28 January 2000, para. 7.15 [hereinafter "*Mexico HFCS*"].

[108] *US - German Steel*, para. 170 (italics in original).

[109] *Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/12, Preliminary Ruling by the Panel issued 21 July 2003, para. 25 [hereinafter "*Canada Wheat Exports*"].

2. The United States has been prejudiced by Argentina's failure to comply with Article 6.2 of the DSU

96. The United States has been prejudiced by Argentina's failure to comply with Article 6.2 of the DSU.[110] With respect to the purpose underlying the requirements of Article 6.2 of the DSU, the Appellate Body previously has explained that: "A defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence. [...] This requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings."[111]

97. In the case of page 4 of Argentina's panel request, the ability of the United States to begin preparing its defence was delayed because, due to Argentina's failure to comply with Article 6.2, the United States did not "know what case it has to answer." As mentioned before, the United States did not, for example, even know which section(s) of the ITC's regulations Argentina is complaining about or the specific WTO provision(s) with which the unidentified section(s) allegedly are inconsistent, and it is unreasonable to expect the United States to have begun preparing defences against all the possible combinations of measures/claims that Argentina might possibly set forth in its first written submission.[112] If this denial of a due process right that the Appellate Body has characterized as "fundamental" does not constitute prejudice, then nothing does.

98. Moreover, as noted above, it is apparent from Sections A and B of the panel request that Argentina was capable of drafting its complaints with precision. The failure to employ similar precision on page 4 leaves one with the unavoidable impression that the shift from precision to extreme ambiguity was not inadvertent.

99. Finally, this is not a case where the respondent failed to object earlier in the proceeding.[113] The United States identified the defects in Argentina's panel request at the first meeting of the DSB at which the request was on the agenda, made it clear at that time that it did not understand the substance of Argentina's complaint, and requested that Argentina submit a new panel request that complied with Article 6.2 of the DSU. Unfortunately, Argentina refused to remedy the defects in its panel request, thereby leaving the United States with no choice but to seek redress from the Panel.

3. The Panel should find that the claims set forth on Page 4 of Argentina's Panel Request are not within the Panel's Terms of Reference

100. Given Argentina's failure to comply with Article 6.2 of the DSU, the Panel should find that the claims set forth on page 4 of Argentina's panel request are not within the Panel's terms of reference.

101. In fact, Argentina appears to have conceded as much at the DSB meeting of 19 May. To recall, in response to the problems identified by the United States with respect to page 4 of the panel

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[110] The United States assumes, for purposes of argument, that a failure to comply with Article 6.2 can be excused by a finding that the respondent has not been prejudiced.

[111] *Thailand - Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel H-Beams from Poland*, WT/DS122/AB/R, Report of the Appellate Body adopted 28 September 2000, para. 88 [hereinafter "*Thai Angles* (AB)"].

[112] Indeed, the United States still does not know the nature of Argentina's problem with the ITC's regulations, because Argentina's first submission does not discuss those regulations.

[113] *See United States - Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R, WT/DS178/R, Report of the Panel, as modified by the Appellate Body, adopted 21 December 2000, para. 5.42.

request, Argentina stated that: "It was Argentina's intention (as the panel request clearly provided) to set forth the particular claims in the paragraphs contained in Sections A and B of the document."[114]

102. The United States would take issue with Argentina's assertion concerning the clarity of its panel request. Nonetheless, if Argentina continues to abide by what it told the DSB, then it should have no problem with a finding that its claims are limited to those set forth in Sections A and B. Such a finding would remedy, at least somewhat, the prejudice to the United States. With one exception, discussed below, the United States believes that it understood the nature of the Argentine claims set forth in Sections A and B, and was able to begin preparing its defence with respect to those claims prior to the receipt of Argentina's First Submission.[115] Because these would be the only claims to which the United States would have to respond, it no longer would be prejudiced by its inability to begin preparing a defence in response to the claims – whatever they may be – included on page 4 of the panel request.

C. BECAUSE SECTIONS B.1, B.2 AND B.3 OF ARGENTINA'S PANEL REQUEST DO NOT PRESENT THE PROBLEM CLEARLY WITHIN THE MEANING OF ARTICLE 6.2 OF THE DSU, THE PANEL SHOULD FIND THAT ARGENTINA'S CLAIMS IN THOSE SECTIONS ALLEGING INCONSISTENCIES WITH ARTICLE 3 AND ARTICLE 6 OF THE AD AGREEMENT ARE NOT WITHIN THE PANEL'S TERMS OF REFERENCE

103. The second category of defects in Argentina's panel request appear in Sections B.1, B.2 and B.3 of the request, which read as follows:[116]

> B. The Commission's Sunset Determination was inconsistent with the Anti-Dumping Agreement and the GATT 1994:
>
> 1. The Commission's application of the standard for determining whether the termination of anti-dumping duty measure would be "likely to lead to continuation or recurrence of ... injury" was inconsistent with Articles 11, 3 and 6 of the Anti-Dumping Agreement. The Commission failed to apply the plain and ordinary meaning of the term "likely" and instead applied a lower standard in assessing whether injury would continue or recur in the event of termination, in violation of Articles 11.1, 11.3, 11.4, 3.1, 3.2, 3.3, 3.4, 3.5, and 6 of the Anti-Dumping Agreement.
>
> 2. The Commission failed to conduct an "objective examination" of the record and failed to base its determination on "positive evidence" regarding whether termination of the anti-dumping duty measure "would be likely to lead to continuation or recurrence" of injury. In particular, the Commission's conclusions with respect to the volume of imports, price effects on domestic like products, and impact of imports of the domestic industry demonstrate the Commission's failure to conduct an objective examination in violation of Articles 11, 3, and 6. The Commission's findings on these issues do not constitute "positive evidence" of likely injury in the event of termination, in violation of Articles 11.1, 11.3, 11.4, 3.1, 3.2, 3.3, 3.4, 3.5, and 6 of the Anti-Dumping Agreement.

[114] WT/DSB/M/150 (1 July 2003), para. 32.

[115] As discussed below, however, the United States objects to Argentina's inclusion in its first submission of matters not within the scope of Sections A and B of its panel request. In addition, the United States reserves the right to object should Argentina's future submissions also include claims that do not fall within the scope of Sections A and B of its panel request.

[116] WT/DS268/2 (4 April 2003), pages 3-4.

> 3. The US statutory requirements that the Commission determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" (19 USC. § 1675a(a)(1)) and that the Commission "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time" (19 USC. § 1675a(a)(5)) are inconsistent with Articles 11.1, 11.3 and 3 of the Anti-Dumping Agreement.

104. The defect in these three paragraphs is that Sections B.1 and B.2 allege an inconsistency with Article 6 of the AD Agreement in its entirety, while Section B.3 alleges an inconsistency with Article 3 of the AD Agreement in its entirety. These allegations do not comply with the Article 6.2 requirement to "present the problem clearly," because Articles 3 and 6 each consist of multiple paragraphs and contain multiple obligations. It is implausible that Argentina is claiming that the ITC acted inconsistently with each one of these obligations.[117] Without more, however, it is impossible to determine from the panel request the obligation(s) with which US law or the ITC's actions allegedly are inconsistent; *i.e.*, it is impossible to discern the nature of Argentina's problem.

105. The Appellate Body previously has clarified that the consistency of panel requests with the requirements of Article 6.2 must be analyzed on a case-by-case basis:[118]

> Identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all. But it may not always be enough. There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of *clarity* in the statement of the legal basis of the complaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2.
>
> Consistent with the Appellate Body's reasoning, prior panels have found that the mere listing of entire articles of the AD Agreement fails to comply with Article 6.2 of the DSU.[119]

106. In this dispute, the circumstances are such that the mere listing of Article 3 or Article 6 does, indeed, "fall short of the standard of Article 6.2." This is demonstrated by the fact that elsewhere in its panel request, Argentina was able to cite to specific paragraphs of Articles 3 and 6. In Sections A.1-A.3, Argentina alleged inconsistencies with Articles 6.1, 6.2, 6.6, 6.8, 6.9 and 6.10. In Sections B.1-B.2 and B.4, Argentina alleged inconsistencies with Articles 3.1, 3.2, 3.3, 3.4 and 3.5. Thus, Argentina's failure to cite particular paragraphs of Article 6 in Sections B.1 and B.2, and its

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[117] Indeed, based on its first submission, it appears that Argentina is not claiming that the United States acted inconsistently with Articles 3 and 6 in their entirety. With respect to Section B.3 and Argentina's claims that US statutory requirements are inconsistent, as such, with Article 3, in its first submission Argentina has claimed inconsistencies with Articles 3.1, 3.2, 3.4, 3.7 and 3.8. Argentina's first submission, paras. 270-275. With respect to Sections B.1 and B.2 and Argentina's claims regarding the ITC's application of the "likely" standard and the ITC's alleged failure to engage in an "objective examination" based on "positive evidence," in its first submission *Argentina does not mention Article 6 at all*. *Id*., Sections VIII.A and VIII.B.

[118] *Korea Dairy Safeguard*, para. 124 (footnote omitted; italics in original).

[119] *EC - Pipe Fittings*, para. 7.14(7) (discussing Articles 6, 9 and 12 of the AD Agreement); and *Thai Angles*, paras. 7.28-7.29 (discussing Article 6 of the AD Agreement).

failure to cite particular paragraphs of Article 3 in Section B.3, must be due to the fact that: (1) Argentina was unsure as to the claims it intended to make; or (2) it knew what claims it intended to make, but wished to conceal that information for the time being. Neither motivation, however, constitutes an excuse for failing to comply with Article 6.2 of the DSU.

107. Argentina's suggestion to the DSB that the questions it posed at the consultations somehow enabled the United States to discern the meaning of Argentina's general references to Articles 3 and 6 is factually incorrect and legally irrelevant.[120] As a factual matter, the questions posed by Argentina shed little light on the nature of Argentina's complaints. In the case of Article 6, Argentina asked only *one* question. Included under the rubric of "General Questions Regarding Substantive Obligations of the Anti-Dumping Agreement Applicable to Reviews Conducted Under Article 11.3", this question was as follows: "Does the United States consider that the requirements of Article 6 of the Anti-Dumping Agreement apply to reviews under Article 11.3? If so, what are the specific requirements of Article 6 that apply to reviews conducted under Article 11.3?"[121] This question provided absolutely no information about Argentina's problem. It did not even ask about the sunset review on OCTG from Argentina. Instead, it did nothing more than solicit the views of the United States – not Argentina – on the general relationship, in the abstract, between Article 6 and Article 11.3.

108. Argentina's questions concerning Article 3 were no more illuminating. Questions 49 and 50 of the 14 November questions asked about Article 3.3 and the concept of cumulation.[122] In the second set of questions presented at the 17 December consultations, Questions 18-20 asked for US views, in the abstract, concerning Article 3.3, Question 21 asked whether the provisions of Article 3 are mandatory or discretionary in anti-dumping investigations, and Questions 22-23 and 33 asked about the relationship, in the abstract, between Article 3 and Article 11.3. None of these questions shed any light on the nature of the problem reflected in Argentina's reference to Article 3 in Section B.3 of its panel request. To the extent that four of these nine questions related to Article 3.3 of the AD Agreement, one might conclude that Argentina had a concern about the use of cumulation in sunset reviews. However, cumulation appears to be the subject of Section B.4 of the panel request, not Section B.3.

109. In any event, it is legally irrelevant whether the questions posed by Argentina at consultations were informative as to Argentina's concerns at that time. The legally relevant question is whether Argentina's panel request complies with the requirements of Article 6.2 of the DSU. As noted above: "Article 6.2 requires that a panel request provide the necessary information, regardless of whether the same information, or additional information, is already available to the responding party through different channels, *e.g.*, previous discussions between the parties."[123]

110. The United States has been prejudiced by this failure of Argentina to comply with the requirements of Article 6.2. As in the case of page 4 of Argentina's panel request, the United States' ability to begin preparing its defence has been impaired because, as a result of Argentina's failure to comply with Article 6.2, the United States did not "know what case it has to answer."

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[120] Before the DSB, Argentina asserted that the 86 questions presented by Argentina at the consultations enabled the United States to discern the nature of the problem underlying Argentina's general reference to Articles 3 and 6 in the disputed sections of the panel request. Exhibit US-2, para. 34.

[121] This question was Question 5 of the questions posed by Argentina at the 14 November consultations. A copy of these questions, along with the questions posed by Argentina at the 17 December consultations, is attached as Exhibit US-12.

[122] *Id*.

[123] *Canada Wheat Exports*, para. 25.

111. Accordingly, the United States requests that the Panel find that the claims of inconsistency with Article 6 of the AD Agreement set forth in Sections B.1 and B.2 of Argentina's panel request, and the claim of inconsistency with Article 3 of the AD Agreement set forth in Section B.3 of the panel request, are not within the Panel's terms of reference.

D. THE PANEL SHOULD FIND THAT CERTAIN MATTERS INCLUDED IN ARGENTINA'S FIRST SUBMISSION ARE NOT WITHIN THE PANEL'S TERMS OF REFERENCE BECAUSE THOSE MATTERS WERE NOT INCLUDED IN ARGENTINA'S PANEL REQUEST

112. The Panel was established with standard terms of reference, which means that the Panel's terms of reference are limited to the matters raised in Argentina's panel request.[124] As the Appellate Body has previously explained: "The jurisdiction of a panel is established by that panel's terms of reference, which are governed by Article 7 of the DSU. A panel may consider only those claims that it has the authority to consider under its terms of reference. A panel cannot assume jurisdiction that it does not have."[125]

113. In its first submission, Argentina has raised five matters that are not included in Section A or B of its panel request.[126] These matters consist of the following:

> 1. Argentina's claim that Commerce's sunset review practice, both as such and as applied, is inconsistent with Article 11.3 of the AD Agreement, because it is allegedly based on an irrefutable presumption. This matter is discussed in Section VII.B.1 of Argentina's First Submission, at paras. 124-137.
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> 2. Argentina's claim that 19 USC. §§ 1675(c) and 1675(a)(c), the SAA, and the *Sunset Policy Bulletin*, taken together, establish an irrefutable presumption that is inconsistent with Article 11.3 of the AD Agreement. This matter is discussed in Section VII.B.2 of Argentina's First Submission, at paras. 138-147.
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> 3. Argentina's claim that Commerce's sunset review practice is inconsistent with Article X:3(a) of the GATT 1994. This matter is discussed in Section VII.E of Argentina's First Submission, at paras. 194-210.
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> 4. Argentina's claim that the ITC's application of 19 USC. §§ 1675a(a)(1) and (5) in the sunset review of OCTG from Argentina is inconsistent with Articles 11.3 and 3 of the AD Agreement. This matter is discussed in Section VIII.C.2 of Argentina's First Submission, at paras. 276-277.
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> 5. Argentina's claim that the US measures it has identified are inconsistent with Article VI of the GATT 1994, Articles 1 and 18 of the AD Agreement, and Article XVI:4 of the WTO Agreement. This matter is discussed in Section IX of Argentina's First Submission, at paras. 295-313.

114. As explained below, none of these matters falls within the scope of Sections A or B of Argentina's panel request. Therefore, they are not within the Panel's terms of reference.

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[124] Constitution of the Panel Established at the Request of Argentina; Note by the Secretariat, WT/DS268/3 (9 September 2003).

[125] *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, Report of the Appellate Body adopted 16 November 1998, para. 92.

[126] As demonstrated above, the matters covered by page 4 of the panel request – whatever they may be – are not within the Panel's terms of reference due to Argentina's failure to comply with Article 6.2 of the DSU. Accordingly, the United States addresses only the question of whether the new matters contained in Argentina's first submission fall within the scope of Sections A or B of the panel request.

1. Argentina's claim that Commerce's sunset review practice, both as such and as applied, is inconsistent with Article 11.3 of the AD Agreement

115. In Section VII.B.1 of its First Submission, Argentina claims that Commerce's sunset review practice, both as such and as applied, is inconsistent with Article 11.3 of the AD Agreement.[127] According to Argentina: "[B]ecause it is the Department's consistent practice to employ in its sunset reviews an irrefutable presumption of likely dumping, the United States is acting inconsistently with Article 11.3 of the Anti-Dumping Agreement."[128]

116. The only portion of Argentina's panel request that makes any reference at all to an "irrefutable presumption" is Section A.4. However, Section A.4 does not contain an allegation that Commerce practice, either as such or as applied, is inconsistent with Article 11.3 of the AD Agreement. Instead, the only action alleged to be inconsistent with Article 11.3 as a result of this "irrefutable presumption" is the "Department's Sunset Determination;" *i.e.*, Commerce's sunset review determination in OCTG from Argentina.[129] Although Section A.4 contains a reference to Commerce practice, Argentina cites this practice simply as evidence of the irrefutable presumption that Commerce allegedly applied in the OCTG sunset review. Argentina makes no claim that the practice itself is inconsistent with Article 11.3, either as such or as applied. Moreover, none of the other paragraphs in Section A of the panel request can be construed as encompassing Argentina's claim concerning Commerce practice.

117. In addition, if Argentina actually is claiming that Commerce practice as applied in sunset reviews other than the review on OCTG from Argentina is inconsistent with Article 11.3, then the United States also objects on the grounds that no Commerce sunset review determination other than that involving OCTG from Argentina is enumerated in the panel request, and this matter was not the subject of consultations between the United States and Argentina. Articles 4.3, 4.7 and 6.2 of the DSU make it clear that there must be consultations on a matter before a panel can be requested. However, the only specific Commerce sunset review on which consultations occurred was the review involving OCTG from Argentina.

2. Argentina's claim that 19 USC. §§ 1675(c) and 1675(a)(c), the SAA, and the *Sunset Policy Bulletin*, taken together, establish an irrefutable presumption that is inconsistent with Article 11.3 of the AD Agreement

118. In Section VII.B.2 of its First Submission, Argentina claims that 19 USC. §§ 1675(c) and 1675a(a)(c), the SAA, and the *Sunset Policy Bulletin*, taken together, establish an irrefutable presumption that is inconsistent with Article 11.3 of the AD Agreement. According to Argentina: "Taken together, the US sunset statutory provisions, the SAA, and the *Sunset Policy Bulletin* prescribe a standard that is inconsistent with Article 11.3 of the Anti-Dumping Agreement."[130]

119. Again, the only portion of Argentina's panel request that makes any reference at all to an "irrefutable presumption" is Section A.4. However, Section A.4 does not contain an allegation that the statute, the SAA, or the Bulletin – taken together or in isolation – is inconsistent with Article 11.3 of the AD Agreement. Instead, the only action alleged to be inconsistent with Article 11.3 as a result

[127] Argentina's discussion of this particular matter is somewhat confused, and it is not entirely clear as to whether Argentina is making both an "as such" and an "as applied" claim. In an excess of caution, the United States assumes that Argentina is making both.

[128] Argentina's first submission, para. 137.

[129] Specifically, in its panel request, Argentina asserts that: "The Department's Sunset Determination is inconsistent with Article 11.3 of the Anti-Dumping Agreement . . . because it was based on a virtually irrefutable presumption ... ." WT/DS268/2, page 3.

[130] Argentina's first submission, para. 138.

of the alleged "irrefutable presumption" is the "Department's Sunset Determination;" *i.e.*, Commerce's sunset review determination in OCTG from Argentina.[131] Although Section A.4 contains a reference to "US law" and "the Department's *Sunset Policy Bulletin*," Argentina simply cites these as the source of the presumption that Commerce allegedly applied in the OCTG sunset review determination.[132] Argentina makes no claim in Section A.4 that the statutory provisions, the SAA and/or the Bulletin themselves are inconsistent with Article 11.3, either as such or as applied. Moreover, none of the other paragraphs in Section A of the panel request can be construed as encompassing such a claim.

120. Finally, other portions of Argentina's panel request make it clear that Argentina knows how to formulate a claim challenging US law "as such." In Section A.1 of the request, Argentina clearly states its belief that: "US laws, regulations, and procedures regarding 'expedited' sunset reviews are inconsistent with" the AD Agreement. Likewise, in Section B.3, Argentina states that: "The US statutory requirements . . . are inconsistent with" the AD Agreement. The fact that Argentina did not make a comparable claim in Section A.4 can only be due to the fact that no such claim was intended. The inclusion of such a claim in Argentina's first submission simply constitutes a belated and impermissible attempt to expand the jurisdiction of the Panel.

3. Argentina's claim that Commerce's sunset review practice is inconsistent with Article X:3(a) of the GATT 1994

121. In Section VII.E of its First Submission, Argentina claims that Commerce's sunset review practice, both as such and as applied, is inconsistent with Article X:3(a) of the GATT 1994.[133] According to Argentina: "[T]he data drawn from the Department's own records demonstrates that the Department failed to administer in an impartial and reasonable manner US anti-dumping laws, regulations, decisions and rulings with respect to the Department's conduct of sunset reviews of anti-dumping duty orders, in violation of Article X:3(a) of the GATT 1994."[134]

122. The only portion of Argentina's panel request that makes any reference at all to Article X:3(a) is Section A.4. However, Section A.4 does not contain an allegation that Commerce practice, either as such or as applied, is inconsistent with Article X:3(a). Instead, the only action alleged to be inconsistent with Article X:3(a) is the "Department's Sunset Determination;" *i.e.*, Commerce's sunset review determination in OCTG from Argentina.[135] Although Section A.4 contains a reference to Commerce practice "in sunset reviews," Argentina cites this practice simply as evidence of the alleged irrefutable presumption that was used in the review of OCTG from Argentina. Argentina makes no claim that the practice itself is inconsistent with Article X:3(a), either as such or as applied. Moreover, none of the other paragraphs in Section A of the panel request can be construed as encompassing a claim concerning the consistency of Commerce practice with Article X:3(a).

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[131] Specifically, in its panel request, Argentina asserts that: "The Department's Sunset Determination is inconsistent with Article 11.3 of the Anti-Dumping Agreement . . . because it was based on a virtually irrefutable presumption ... ." WT/DS268/2, page 3.

[132] Neither Section A.4 nor any other portion of Section A mentions the SAA.

[133] Here, too, Argentina's discussion is somewhat confused, and it is not entirely clear as to whether Argentina is making both an "as such" and an "as applied" claim. In an excess of caution, the United States assumes that it is making both.

[134] Argentina's first submission, para. 210.

[135] Specifically, in its panel request, Argentina asserts that: "The Department's Sunset Determination is inconsistent with . . . Article X:3(a) of the GATT 1994 because it was based on a virtually irrefutable presumption ... ." WT/DS268/2, page 3.

4. Argentina's claim that the ITC's application of 19 USC. §§ 1675a(a)(1) and (5) in the Sunset Review of OCTG from Argentina is inconsistent with Articles 11.3 and 3 of the AD Agreement

123. In Section VIII.C.2 of its First Submission, Argentina claims that the ITC's application of 19 USC. §§ 1675a(a)(1) and (5) in the sunset review of OCTG from Argentina is inconsistent with Articles 11.3 and 3 of the AD Agreement. According to Argentina: "[E]ven if the statutory language were consistent with the Anti-Dumping Agreement, the ITC failed to apply the statutory language to the evidence before it to conclude that revocation of the orders would likely lead to continuation or recurrence of injury."[136]

124. Section 1675a(a)(1) requires the ITC to determine whether injury would be likely to continue or recur "within a reasonably foreseeable time," while section 1675a(a)(5) requires that the ITC "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time." The only portion of the panel request that refers to these provisions – and the concepts they embody – is Section B.3. However, it is quite clear from the text that the claim in Section B.3 relates to the statutory provisions "as such", and not "as applied." In Section B.3, Argentina states that: "The US statutory requirements . . . are inconsistent" with the AD Agreement. Section B.3 contains no reference to the "application" of these statutory provisions, either in general or in the sunset review of OCTG from Argentina.

125. Moreover, other portions of Argentina's panel request make it clear that Argentina knows how to formulate a claim challenging US law "as applied." In Section A.2, Argentina complains about Commerce's "application" of its expedited sunset review procedures in the OCTG review, and in Section A.5, Argentina complains about Commerce's "application" of the "likely" standard. In Section B.1, Argentina complains about the ITC's "application" of the "likely" standard, and in Section B.4 complains about the ITC's "application" of a cumulative injury analysis. The fact that Argentina did not make a comparable claim in Section B.3 about the ITC's "application" of the standards in 19 USC. §§ 1675a(a)(1) and (5) can only be due to the fact that no such claim was intended. Instead, the inclusion of such a claim in Argentina's first submission again simply constitutes a belated and impermissible attempt to expand the jurisdiction of the Panel.

5. Argentina's claim that the US measures it has identified are inconsistent with Article VI of the GATT 1994, Articles 1 and 18 of the AD Agreement, and Article XVI:4 of the WTO Agreement

126. In Section IX of its First Submission, Argentina claims that all of the "measures" it identified in its panel request are inconsistent with Article VI of the GATT 1994, Articles 1 and 18 of the AD Agreement, and Article XVI:4 of the WTO Agreement. These claims are consequential claims in the sense that they depend upon a finding that some other provision of the AD Agreement or GATT 1994 has been breached.

127. However, neither Section A nor Section B of Argentina's panel request refers to these provisions. Instead, the only portion of Argentina's panel request that makes any reference at all to Article VI, Articles 1 and 18, and Article XVI:4 is page 4. As demonstrated above, however, the claims set forth on page 4 are not within the Panel's terms of reference.

128. These dependent claims also are not within the Panel's terms of reference to the extent that they are dependent on a claim that itself is not within the Panel's terms of reference.

[136] Argentina's first submission, para. 277.

E. CONCLUSION

129. The portions of the panel request to which the United States is not objecting demonstrate that Argentina knows perfectly well how to file a panel request that conforms with the obligations of Article 6.2 of the DSU. This only tends to highlight the clearly defective nature of the remainder of Argentina's panel request.

130. The requirements of Article 6.2 exist for a reason, a reason which the Appellate Body has succinctly summarized as follows: "A defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence."[137] Here, Argentina has denied the United States that to which it is entitled by Article 6.2.

V. GENERAL LEGAL PRINCIPLES

A. SCOPE AND STANDARD OF REVIEW

131. Articles 17.5 and 17.6 of the AD Agreement set forth standards concerning the scope and standard of review in disputes involving anti-dumping measures to which panels must adhere. With respect to the "scope" of review, Article 17.5(ii) of the AD Agreement directs a panel to limit its review to the facts that were before the investigating authority when it made its determination. With respect to the sunset review on OCTG from Argentina made by Commerce and the ITC, this means the evidence contained in the administrative records of Commerce and the ITC, respectively.[138] This concept is consistent with the fact that where a panel is reviewing the WTO-consistency of an action taken by an administrative agency, a panel is not to act as a trier-of-fact in the first instance or to otherwise engage in a *de novo* review of the evidence before the agencies.

132. With respect to the standard of review, Article 17.6(i) of the AD Agreement addresses a panel's review of the facts, providing as follows:

> in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, *even though the panel might have reached a different conclusion, the evaluation shall not be overturned.* (Emphasis added.)

133. In other words, panels are not to conduct their own *de novo* evaluation of the facts if the domestic investigating authority's establishment of the facts was proper and if its evaluation of the facts was unbiased and objective. This applies even if the panel – had it stood in the shoes of that authority originally – might have decided the matter differently.

134. Finally, with respect to the standard of review and a panel's review of interpretative issues, Article 17.6(ii) provides as follows:

> the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

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[137] *Thai Angles* (AB), para. 88.

[138] *See, e.g., Mexico - HFCS*, para. 7.43 ("[W]e are required to consider this dispute on the basis of the facts before the investigating authority, pursuant to Article 17.5(ii) of the AD Agreement.").

135. This means, for example, that if dictionary definitions reveal that a treaty term has more than one ordinary meaning, an authority's measure that is based on one of those meanings could be permissible and in conformity with the AD Agreement.[139]

B. BURDEN OF PROOF: ARGENTINA BEARS THE BURDEN OF PROVING ITS CLAIMS

136. It is well-established that the complaining party in a WTO dispute bears the burden of coming forward with argument and evidence that establish a *prima facie* case of a violation.[140] If the balance of evidence and argument is inconclusive with respect to a particular claim, the Panel must find that the complaining party, Argentina, failed to establish that claim.[141]

137. For the reasons discussed below, the United States believes that Argentina has failed to meet its burden to establish a *prima facie* case. In the event the Panel should find to the contrary, however, Argentina's claims are also rebutted below.

VI. LEGAL ARGUMENT

A. SECTION 751(C)(4) OF THE ACT AND SECTION 351.218(D)(2)(III) OF COMMERCE'S SUNSET REGULATIONS – THE "WAIVER" PROVISIONS – ARE NOT INCONSISTENT, AS SUCH, WITH THE AD AGREEMENT

138. Argentina claims that section 751(c)(4) of the Act and section 351.218(d)(2)(iii) of Commerce's Sunset Regulations (the so-called "waiver" provisions) are inconsistent, as such, with the AD Agreement. First, Argentina claims that these provisions preclude Commerce from conducting a sunset review and making a determination as to whether the expiry of the duty would lead to the continuation or recurrence of dumping, as required by Article 11.3 of AD Agreement. In particular, Argentina contends that when a respondent interested party is found to have waived participation in a sunset review, these provisions improperly require Commerce to find that the revocation of the order would be likely to lead to the continuation or recurrence of dumping without requiring Commerce to make any substantive likelihood determination.[142] Second, Argentina claims that these provisions are inconsistent with Articles 6.1 and 6.2 of the AD Agreement because they foreclose opportunities for a respondent interested party to present evidence or to defend its interests in a sunset review.[143]

139. As demonstrated below, Argentina's claims are based on a misrepresentation of the purpose and operation of the "waiver" provisions, and therefore have no merit. An accurate understanding of these provisions reveals that they do not mandate WTO-inconsistent behaviour or preclude WTO-consistent behaviour.

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[139] *Argentina - Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, Report of the Panel adopted 19 May 2003, paras. 7.337-7.343 (Argentina did not act inconsistently with Article 4.1 of the AD Agreement where its action was consistent with one, if not all, dictionary definitions of the phrase "major proportion.").

[140] *See, e.g., United States - Measures Affecting Imports of Woven Shirts and Blouses from India*, WT/DS33/AB/R, Report of the Appellate Body, adopted 23 May 1997, page 14; *EC Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body adopted 13 February 1998, para. 104; and *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, Report of the Panel, as modified by the Appellate Body, adopted 12 January 2000, para. 7.24.

[141] *See, e.g., India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, Report of the Panel, as affirmed by the Appellate Body, adopted 22 September 1999, para. 5.120.

[142] Argentina's first submission, paras. 114-117.

[143] Argentina's first submission, paras. 121-122.

140. Before turning to the provisions themselves, however, it is important to recognize the limited extent to which the AD Agreement actually addresses sunset reviews. Indeed, the sole provision of the AD Agreement generating the need to conduct sunset reviews is Article 11.3. Article 11.3 provides as follows:

> Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.[22] The duty may remain in force pending the outcome of such a review.
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> [22] When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

141. Thus, Article 11.3 establishes the simple requirement that five years after an order's imposition, it must either be terminated or a review must be conducted to determine whether termination of that order "would be likely to lead to continuation or recurrence of dumping and injury." Outside of this standard and the requirement to initiate a review or revoke the order, the text of Article 11.3 contains no provisions governing the conduct of sunset reviews, the type of evidence sufficient to satisfy the "likelihood test" or the methodologies or modes of analysis to be used in reaching a sunset determination. As articulated succinctly by the panel in *US – Japan Sunset*:

> Article 11.3 is silent as to how an authority should or must establish that dumping is likely to continue or recur in a sunset review. That provision itself prescribes no parameters as to any methodological requirements that must be fulfilled by a Member's investigating authority in making such a "likelihood" determination.[144]

142. To be sure, there are a few other provisions in the AD Agreement that reference sunset reviews by referencing reviews in general. Article 11.4 explains that any review under Article 11 "shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review" and that the provisions of Article 6 regarding "evidence and procedure shall apply to any review carried out under this Article." Article 12.3 states that the transparency and notice provisions of Article 12 apply "*mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11." Neither Article 6 nor Article 12, however, contains any provisions regarding the methodologies or analysis to be employed in making the determination of whether dumping and injury is likely to continue or recur. Attempts to read into Article 11.3 substantive obligations allegedly contained in other provisions of the AD Agreement have been soundly rejected.[145] In sum, aside from the obligations contained in Article 11.3 and those provisions of Articles 6 and 12

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[144] *See United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, Appeal Notified 15 September 2003, para. 7.166. [hereinafter *US – Japan Sunset*].

[145] In *US - German Steel*, para. 112, the Appellate Body found that Article 22.1 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") – the counterpart to Article 12.1 of the AD Agreement – did not create an evidentiary standard applicable to the initiation of sunset reviews. In *US - Japan Sunset*, para. 7.33, the panel followed *US - German Steel* and found that Article 12.1 of the AD Agreement likewise does not create an evidentiary standard applicable to the initiation of sunset reviews.

discussed above, the AD Agreement leaves the conduct of sunset reviews to the discretion of the Member concerned.

1. The Waiver Provisions are not inconsistent with the obligation to conduct a "review" and make a "determination" under Article 11.3 of the AD Agreement

143. Argentina claims that section 751(c)(4) of the Act and section 351.218(d)(2)(iii) of Commerce's Sunset Regulations "preclude" Commerce from making a "determination" and from conducting a "review" in accordance with the obligations of Article 11.3. Argentina argues that section 751(c)(4) and section 351.218(d)(2)(iii) of Commerce's Sunset Regulations are inconsistent with Article 11.3 because they (1) "preclude" Commerce from conducting sunset reviews, and (2) require Commence to make an affirmative determination of likelihood without further inquiry in cases where a respondent interested party fails to respond to the notice of initiation in a sunset review proceeding.[146] In order to understand why these claims are unfounded, it is first necessary to understand what these US statutory and regulatory provisions provide and do not provide.

144. Section 751(c)(4)(A) provides that a respondent interested party may "waive" participation in a sunset review proceeding. This allows, but does not require, a respondent interested party to participate solely in the ITC's portion of the sunset review concerning the likelihood of continuation or recurrence of injury.[147] Should a respondent interested party explicitly choose to waive participation in Commerce's sunset review proceeding, section 751(c)(4)(B) directs Commerce to conclude that revocation of the order would be likely to lead to continuation or recurrence of dumping.[148]

145. Section 351.218(d)(2) of Commerce's Sunset Regulations provides: (1) the time, form and content for an express waiver; (2) that failure to respond to a notice of initiation will be taken as an implied waiver; and (3) that a waiver, whether express or implied, shall preclude acceptance of further information from the waiving party.[149] Section 351.218(d)(2)(iii) – the specific provision that Argentina complains of in its first submission – provides that where a respondent interested party fails to respond to Commerce's notice of initiation of a sunset review, the waiver of that respondent interested party is presumed or implied.

146. Argentina's claim fails in two significant respects. First, Argentina narrowly reads section 751(c)(4) and section 351.218(d)(2)(iii) in isolation from other statutory and non-statutory elements of US laws and regulations governing the conduct of sunset reviews. As discussed in detail below, it is clear that Section 751(c)(4) and section 351.218(d)(2)(iii) do not, in fact, preclude Commerce from conducting a sunset review as required by Article 11.3, because, when a respondent interested party fails to respond to Commerce's notice of initiation of a sunset review, the affirmative likelihood determination described in section 751(c)(4)(B) is limited to the party that failed to respond.[150]

147. In addition, section 751(c)(4) does not alter or amend the requirements under other provisions of US law for Commerce to initiate and conduct sunset reviews generally in accordance with

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[146] Argentina's first submission, paras. 114-117.
[147] 19 USC. § 1675(c)(4)(A) (Exhibit ARG-1).
[148] 19 USC. § 1675(c)(4)(B) (Exhibit ARG-1).
[149] 19 C.F.R. § 351.218(d)(2) (Exhibit ARG-3).
[150] *See* section 751(c)(4)(B) of the Act, providing that the affirmative likelihood determination resulting from the waiver described in section 751(c)(4)(A) only applies "with respect to that party." 19 USC. § 1675(c)(4)(B) (Exhibit ARG-1); *see also*, SAA at 881 ("If Commerce receives such a waiver, Commerce will conclude that revocation or termination would be likely to lead to continuation or recurrence of dumping or countervailable subsidies with respect to that submitter.") (Emphasis added) (Exhibit US-11). The United States notes that the portion of the SAA submitted by Argentina as Exhibit ARG-5 conveniently omits page 881.

Article 11.3. Principally, under section 751(c)(1) of the Act, Commerce remains obligated, five years after an order's imposition, to "conduct a review to determine . . . whether revocation of the . . . anti-dumping duty order . . . would be likely to lead to continuation or recurrence of dumping ... ."[151] In addition, section 751(c)(2) provides that "[n]ot later than 30 days before the fifth anniversary of the date described in paragraph (1), the administering authority shall publish ... a notice of initiation of a review."[152]

148. Commerce regulations elaborate on these statutory obligations by providing details about the timing of initiations, what is required to respond to a notice of initiation, and what information Commerce requires from interested parties.[153] Section 751(c)(4) and section 351.218(d)(2)(iii) of Commerce's Sunset Regulations provide for a "waiver" where respondent interested parties do not choose to participate in Commerce's sunset review proceeding. The result of such a waiver is that, with respect to the party waiving its right to participate, Commerce will conclude that revocation of the order would be likely to lead to continuation or recurrence of dumping for that non-responding party.[154] Section 751(c)(4) is not a provision which precludes the conduct of a sunset review. Indeed, regardless of whether a respondent interested party affirmatively waives participation or Commerce finds that the failure of the respondent interested party to file a substantive response or a complete substantive response constitutes a waiver, Commerce is still required by US law and its own regulations to initiate and conduct the required sunset review.

149. Second, Argentina improperly reads Article 11.3 to require Commerce to conduct a full sunset review proceeding even where the respondent interested parties have indicated – either by means of an affirmative waiver or by a failure to respond – that they have no interest in participating in the review and where all existing evidence supports a determination that revocation would be likely to lead to continuation or recurrence of dumping. Nothing in Article 11.3 specifically or the AD Agreement generally requires authorities to engage in such a waste of their own resources and the resources of private parties.[155]

150. Argentina argues that by concluding that revocation would be likely to lead to continuation or recurrence of dumping in instances where a respondent interested party waives its participation by failing to respond to Commerce's notice of initiation, Commerce somehow fails to "determine" – within the meaning of Article 11.3 – whether dumping would be likely to continue or recur.[156] This argument, however, fundamentally overlooks the practical consequences that waiver has on the alternative conclusion. When viewed in light of these consequences, it is clear that section 751(c)(4) and section 351.218(d)(2)(iii) are not obstacles to Commerce making the required likelihood determination.

151. The consequence of a respondent interested party's decision not to participate in Commerce's review is the absence of information critical to the determination of whether dumping would be likely

[151] 19 USC. § 1675(c)(1) (Exhibit ARG-1).

[152] 19 USC. § 1675(c)(2) (Exhibit ARG-1). Section 751(c)(3) provides truncated time-lines for completion of sunset reviews in instances where interested parties do not respond or provide inadequate substantive responses to Commerce's notice of initiation. 19 USC. § 1675(c)(3) (Exhibit ARG-1).

[153] 19 C.F.R. § 351.218(a)-(d) (Exhibit ARG-3).

[154] 19 USC. § 1675(c)(4)(B) (Exhibit ARG-1); 19 C.F.R. § 351.218(d)(2) (Exhibit ARG-3).

[155] The SAA in discussing section 751(c)(3) states that this provision "is intended to eliminate needless reviews. This section will promote administrative efficiency and ease the burden on agencies by eliminating needless reviews while meeting the requirements of the [AD and SCM] Agreements. If parties provide no or inadequate information in response to a notice of initiation, it is reasonable to conclude that they would not provide adequate information if the agencies conducted a full-fledged review. However, where there is sufficient willingness to participate and adequate indication that parties will submit information requested throughout the proceeding, the agencies will conduct a full review." SAA, at 880 (Exhibit US-11).

[156] Argentina's first submission, para. 109.

to continue or recur with respect to that non-responding party – specifically, information with respect to that foreign producer's or exporter's (1) view as to the likely effect of revocation,[157] (2) volume and value of exports of subject merchandise to the United States prior to the sunset review and the original investigation,[158] (3) percentage of the total exports of subject merchandise to the United States,[159] and (4) position as to the existence of other information suggesting whether or not it is likely to continue or resume dumping after revocation of the order.[160] Such information is within the control of foreign producers and exporters and cannot generally be obtained readily from other sources. Thus, an affirmative statement from a foreign producer or exporter that it will not participate in Commerce's review, or the failure of the respondent interested party to file a substantive response or a complete substantive response, leaves Commerce in the position of having to base its determination on the views of domestic interested parties and information already contained in the administrative record of the sunset review proceeding. This information includes prior and current dumping margins, Commerce's original investigation determination, and any information provided by interested parties, both the domestic and foreign interested parties, in their substantive responses and rebuttal responses.[161]

152. Under Commerce's Sunset Regulations, domestic interested parties must notify their intent to participate in Commerce's review within 15 days of initiation (15 days prior to when respondent interested parties are to submit their waivers, if any). A failure to do so results in automatic revocation.[162] Thus, domestic interested parties who do *not* believe revocation would be likely to lead to continuation or recurrence of dumping and, thus, no longer view continuation of the order as necessary, will simply decline to state an intention to participate in the review and effectively agree to the automatic revocation of the order.

153. In other words, it is to be expected that if domestic interested parties do submit substantive responses, those responses inevitably will contain information that is supportive of, and not opposed to, an affirmative finding of likelihood. Therefore, if a respondent interested party does not submit information or argument in favor of revocation, the only interested party information on the record with respect to that respondent would be that of domestic interested parties in support of an affirmative finding of likelihood and continuation of the order. To the extent that other respondent interested parties have submitted information for consideration in the sunset review proceeding, Commerce also considers that information in making its final sunset determination.

154. It seems evident that Commerce could conduct a "review" and "determine" that revocation would be likely to lead to continuation or recurrence of dumping with respect to a particular respondent interested party where that same party failed to file a complete substantive response to Commerce's notice of initiation of the sunset review. It is clear that the words "review" and "determine" do not contain the broad substantive rules suggested by Argentina. "Review" may be defined as "a formal assessment of something with the intention of instituting change if necessary."[163] "Determine" may be defined as to "[c]ome to a judicial decision; make or give a decision about something ... [c]onclude from reasoning or investigation, deduce."[164] "Deduce" is further defined as to "[i]nfer, draw as a logical conclusion (*from* something already known or assumed); derive by a

[157] 19 C.F.R. § 351.218(d)(3)(ii)(F) (Exhibit ARG-3).
[158] 19 C.F.R. § 351.218(d)(3)(iii)(B)-(C), (E) (Exhibit ARG-3).
[159] 19 C.F.R. § 351.218(d)(3)(iii)(D) (Exhibit ARG-3).
[160] 19 C.F.R. § 351.218(d)(3)(iv)(A)-(B) (Exhibit ARG-3).
[161] *See* 19 C.F.R. § 351.308(f) (Exhibit US-3); and the SAA, at 879-880 (Exhibit US-11).
[162] 19 C.F.R. §§ 351.218(d)(1)(i) and 351.218(d)(iii)(B) (Exhibit ARG-3).
[163] *Concise Oxford English Dictionary* (10th ed. 2001) (Exhibit US-24); *see also New Shorter Oxford English Dictionary* 2582 (1993) (defining "review" as "[a]n inspection, an examination ... [a] general survey or reconsideration of some subject or thing ... a retrospect, a survey of the past").
[164] New Shorter Oxford English Dictionary 651 (1993).

process of reasoning."[165] Thus, while Article 11.3 – through the use of the words "review" and "determine" – arguably requires Commerce to conduct a formal assessment of whether dumping is likely to continue or recur that is supported by some type of reasoning and evidence, it does not provide the procedures for conducting such an assessment or the analytical approach or evidence to be employed in the assessment.

155. Where respondent interested parties have failed to respond to Commerce's notice of initiation of a sunset review, section 351.218(d)(2)(iii) provides that these non-responding parties will be considered to have waived their rights to participate in the proceeding.[166] Although the determination to expedite a sunset review is made on a "case-by-case" basis, section 351.218(e)(1)(ii)(A) of Commerce's Sunset Regulations provides that Commerce normally will expedite the review where it has not received substantive responses from foreign interested parties representing more than 50 per cent of the total exports of the subject merchandise for the five-year period preceding the sunset review.[167] When Commerce has not received an adequate response from foreign interested parties (in the aggregate), section 351.218(e)(1)(ii)(C) of Commerce's Sunset Regulations provides that Commerce will make its final likelihood determination on the basis of the facts available.[168]

156. Section 351.308(f) of Commerce's Sunset Regulations provides that when Commerce makes a likelihood determination on the basis of "facts available," Commerce normally will rely on dumping margins from the original investigation and any subsequent administrative reviews, as well as any information submitted by interested parties in their substantive responses.[169] Thus, even in cases where there is an inadequate response from foreign interested parties to the notice of initiation, Commerce will make the final likelihood determination on the evidence developed during the sunset review proceeding to date.

157. Thus, with respect to the statutory instruction in section 751(c)(4)(B) that Commerce conclude that revocation would be likely to lead to continuation or recurrence of dumping with respect to a waiving respondent interested party, this instruction merely reflects the extent and type of information upon which Commerce would have to base its sunset determination in cases where a respondent interested party waived participation. Section 351.218(d)(2)(iii) addresses this lack of participation and the failure to supply the necessary information where a respondent interested party fails to respond to the notice of initiation of a sunset review. As such, section 751(c)(4) and section 351218(d)(2)(iii) are not provisions that "preclude" Commerce from conducting a "review" and "determin[ing]" whether dumping is likely to continue or recur.

158. Argentina also fails to understand the role of these provisions in furthering compliance with another important obligation of the AD Agreement relating to sunset reviews. Article 11.4 instructs as follows:

> "The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously ... ."

159. Article 6.14, in turn, provides as follows:

> The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching

[165] *Id*. at 613.
[166] 19 C.F.R. 351.218(d)(2)(iii) (Exhibit ARG-3).
[167] 19 C.F.R. 351.218(e)(1)(ii)(A) (Exhibit ARG-3).
[168] 19 C.F.R. 351.218(e)(1)(ii)(C) (Exhibit ARG-3).
[169] 19 C.F.R. 351.308(f) (Exhibit US-3).

> preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

160. "Expeditious" is defined as "promptly and efficiently."[170] Thus, the AD Agreement should not operate as a bar to the completion of reviews in as promptly and efficiently a manner as possible. The waiver provisions of US law effectuate the expeditious completion of reviews by allowing a determination to be made in a sunset review as soon as it becomes evident that a finding of likelihood may be warranted. In other words, when a respondent interested party has chosen not to participate, the statute instructs Commerce to make such an affirmative finding of likelihood because the evidence before Commerce demonstrates that there is a likelihood of dumping *with respect to the waiving party* if the order were to expire. Under these circumstances, a full-fledged sunset review would be fruitless and a waste of administrative and party resources[171] – a result in direct contravention of the instructions of Articles 6.14 and 11.4 of the AD Agreement.

2. Section 751(c)(4) of the Act and Section 351.218(d)(2)(iii) of Commerce's Sunset Regulations are not inconsistent with Articles 6.1 and 6.2 of the AD Agreement

161. Argentina also claims that the provision in US law for expedited sunset reviews is inconsistent with certain obligations in Article 6 of the AD Agreement regarding evidence and procedure. Specifically, Argentina claims that section 751(c)(4) of the Act and section 351.218(d)(2)(iii) of Commerce's Sunset Regulations preclude Commerce, in expedited sunset reviews, from observing the obligations contained in: (1) Article 6.1 that all interested parties have "ample opportunity to present in writing all evidence which they consider relevant," and (2) Article 6.2 that all interest parties have a "full opportunity for the defence of their interests."[172]

162. As an initial matter, it is important to remember that any difference in the rules governing evidence and procedure in expedited as compared to full reviews is not relevant to whether US laws and regulations concerning expedited reviews mandate WTO-inconsistent action. Indeed, because the evidentiary and procedural rules used in expedited reviews are consistent with the obligations of the AD Agreement, it is irrelevant that in so-called "full sunset reviews" the United States goes beyond what is required of it under the AD Agreement. In other words, that the United States may afford parties expanded opportunities to submit evidence and argument in a full sunset review is a matter of US policy, not an obligation under the AD Agreement, and is not grounds to find fault with the evidentiary and procedural rules governing expedited sunset reviews.

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[170] *Merriam-Webster Online Dictionary* (2002) (Exhibit US-25); *see also New Shorter Oxford English Dictionary* 886 (1993) (defining "expeditious" as "[s]peedily performed or given; conducive to speedy performance").

[171] Moreover, in light of the task before Commerce immediately following the entry into force of the WTO Agreement – conducting reviews of 325 existing orders – prolonging reviews in cases where respondent interested parties have waived participation would be an inefficient use of administrative resources, taking resources away from those contested reviews involving large amounts of factual information and devoting them to needlessly extended reviews involving little, if any, disagreement among the parties and a limited factual record. Section 751(c)(4) is, thus, a means to allow Commerce to distribute its limited resources effectively to the more contested and complicated of cases.

[172] Argentina First Written Submission, paras. 120-122. Articles 6.1 and 6.2 apply to sunset reviews by virtue of the cross-reference in Article 11.4 to Article 6.

(a) Section 751(c)(4) and Section 351.218(d)(iii)(2) Are Not Inconsistent with the Obligation Under Article 6.1 to Provide Ample Opportunity to Submit Written Information

163. As to its substantive claims under Article 6, Argentina fails to demonstrate that either section 751(c)(4) or section 351.218(d)(4)(iii) impinges on any of the obligations it cites. Article 6.1 states as follows:

> All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

164. Under US sunset laws and regulations, interested parties in expedited sunset reviews are afforded "ample opportunity to present in writing all evidence which they consider relevant." Specifically, section 351.218(d)(3) of Commerce's Sunset Regulations provides that interested parties will have 30 days from the notice of initiation of the review to submit substantive responses. In addition to identifying information that is required of interested parties,[173] section 351.218(d)(3)(iv)(B) of Commerce's Sunset Regulations provides that parties may provide "*any* other relevant information or argument that the party would like [Commerce] to consider."[174] Further, in section 351.218(d)(4) of Commerce's Sunset Regulations, interested parties are afforded the opportunity to rebut evidence and argument submitted in other parties' substantive responses within five days of their submission.[175]

165. Moreover, in cases where Commerce determines that the response to the notice of initiation from the respondent interested parties is inadequate, section 351.309(e) of Commerce's Sunset Regulations affords interested parties the opportunity to comment on whether an expedited review is appropriate.[176] Thus, US law and Commerce's regulations expressly provide parties with opportunities to provide Commerce with *any* relevant information, to rebut any relevant information and argument submitted by other parties, and to comment on the appropriateness of conducting an expedited review in the first instance. Thus, Commerce's Sunset Regulations fulfill the obligations of Article 6.1 by informing the interested parties of the type of information that will be required in every sunset review and by providing opportunities for submission of comments, rebuttal comments and *any* other information the interested party believes is relevant to the proceeding.

166. Finally, it should be emphasized that the provisions alleged by Argentina to be inconsistent with Article 6.1 – section 751(c)(4) and section 351.218(d)(2)(iii) – are provisions that govern the failure of a respondent interested party to participate in a sunset review proceeding in the first instance. These provisions do not dictate the type or amount of information that respondent interested parties may submit in a sunset review, but, instead, are relevant only when a respondent interested

[173] Commerce regulations request that interested parties submit their contact information and that of any legal counsel; the identification of the subject merchandise and country subject to review; the citation and date of the notice of initiation; an expression of their willingness to participate and provide information in the review; information and argument with respect to the likelihood of continuation or recurrence of dumping and the likely dumping margin; and summaries of any findings of duty absorption, scope clarifications, circumvention and/or changed circumstances. In addition, from respondent interested parties, Commerce asks for the party's individual weighted average dumping margin from the investigation and any subsequent reviews, the party's value and volume of exports of subject merchandise for the five years preceding the year of the review's initiation (including quarterly data for the last three years); the party's value and volume of the party's exports of subject merchandise for the calendar year preceding the year of initiation of the original anti-dumping investigation; and the party's percentage of total exports of subject merchandise for the five calendar years preceding the review's initiation. 19 C.F.R. § 351.218(d)(3)(ii)-(iii) (Exhibit ARG-3).

[174] 19 C.F.R. § 351.218(d)(3)(iv)(B) (emphasis added) (Exhibit ARG-3).

[175] 19 C.F.R. § 351.218(d)(4) (Exhibit ARG-3).

[176] 19 C.F.R. § 351.309(e) (Exhibit US-3).

party has not responded to the notice of initiation of the sunset review by making the required first submission, the substantive response. In other words, these provisions operate when a respondent interested party has chosen not to avail itself of the Article 6.1 rights that other provisions of the regulations guarantee.

(b) Section 751(c)(4) of the Act and Section 351.218(d)(2)(iii) of Commerce's Sunset Regulations Are Not Inconsistent with Article 6.2 of the AD Agreement

167. Article 6.2 addresses an interested party's right to "a full opportunity for the defence of their interests" and provides in relevant part:

> Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interest, so that opposing views may be present and rebuttal arguments offered.

168. There is nothing in section 751(c)(4), section 351.218(d)(2)(iii), or any other provision of the US statute or regulations governing sunset reviews that precludes or impedes this opportunity. Indeed, as explained above, interested parties are given ample opportunity to submit written information and argument, rebut information and argument submitted by other parties, and even comment on the appropriateness of conducting an expedited review.

169. Furthermore, under Commerce's Sunset Regulations, Commerce "normally" will conduct an expedited review when the aggregate response from the respondent interested parties is found to be inadequate.[177] Thus, nothing in US sunset laws or regulations would preclude Commerce from conducting a full sunset review, notwithstanding the lack of an adequate response from respondent interested parties, were the circumstances found to warrant a full sunset review.

170. Regardless of whether an expedited or full review is conducted, all interested parties are afforded the right to fully defend their interests. The respondent interested party who submits a substantive response in an expedited sunset review is afforded the same opportunity to have its substantive response considered in the final likelihood determination, to rebut evidence and argument submitted by other parties, and to comment on the appropriateness of an expedited review. Indeed, section 351.308(f)(2) of Commerce's Sunset Regulations provides that Commerce normally will consider the substantive submissions of the interested parties in making the likelihood determination in an expedited sunset review. Argentina has not demonstrated that simply because Commerce conducts an expedited, rather than a full, sunset review, either section 751(c)(4) or section 351.218(d)(2)(iii) precludes respondent interested parties from having a full opportunity for the defence of their interests.[178]

[177] 19 C.F.R. § 351.218(e)(1)(ii)(c)(2) (Exhibit ARG-3).

[178] Although the United States demonstrates below that all the foreign interested parties in the sunset review of OCTG from Argentina were afforded their full rights of defence, assuming *arguendo* that this were not the case, it would not be enough for a Member asserting an "as such" claim to establish that, in a particular case, a full right of defence may have been lacking. To find a violation "as such," Argentina would have to establish that US sunset laws or regulations actually preclude the full right of defence. *See United Sates - Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, Report of the Panel adopted 30 August 2002, para. 6.22 [hereinafter "*US - Section 129*"], citing to *United States - Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, Report of the Appellate Body adopted 26 September 2000, paras. 88-89.

B. THE PANEL SHOULD REJECT ARGENTINA'S CLAIMS CONCERNING AN ALLEGED "IRREFUTABLE PRESUMPTION" AND ITS INCONSISTENCY WITH ARTICLE 11.3 OF THE AD AGREEMENT

171. In Section VII. B of its First Submission, Argentina includes a series of claims that are somewhat difficult to identify, but seem to amount to a recycled version of Argentina's arguments in Section VII.A that Commerce does not conduct a "review" or make a "determination." As the United States understands this section, the claims are based on the factual assertion that Commerce has a practice in sunset reviews of making an irrefutable presumption of a likelihood of continuation or recurrence of dumping.[179] Based on this factual assertion, Argentina claims that: (1) the practice and the instruments on which it allegedly is based are inconsistent, as such, with Article 11.3 of the AD Agreement;[180] (2) the practice and the instruments on which it allegedly is based are inconsistent, as applied generally, with Article 11.3 of the AD Agreement;[181] and (3) the Commerce determination in the sunset review involving OCTG from Argentina is inconsistent with Article 11.3 to the extent that it applied the alleged practice/presumption.[182]

172. As the United States has demonstrated above, the Panel need not consider claim (1), because it is not within the Panel's terms of reference. Nevertheless, in this section, the United States will respond to Argentina's substantive arguments concerning all three claims. As demonstrated below, Argentina's claims must fail because: (1) the alleged irrefutable presumption does not exist; (2) the instruments that allegedly give raise to this irrefutable presumption do not constitute challengeable measures for purposes of the DSU; and (3) even if the instruments were subject to challenge, two of them – the *Sunset Policy Bulletin* and Commerce practice – are not "mandatory" within the meaning of the mandatory/discretionary distinction.

1. Argentina's "irrefutable presumption" does not exist

173. As noted above, all of Argentina's claims in Section VII.B of its first submission hinge upon the existence of a Commerce "irrefutable presumption" in sunset reviews that a continuation or recurrence of dumping is likely. As the party asserting this fact, Argentina bears the burden of proving it. Argentina fails to satisfy this burden, because, in fact, the alleged irrefutable presumption does not exist.

174. Significantly, Argentina cannot point to any document that establishes its "irrefutable presumption." It does not allege that any US statutory provision establishes the presumption, nor could it, because there is no such provision. Instead, it turns to three items: the SAA, the *Sunset Policy Bulletin*, and supposed Commerce "practice." Let us examine each of these items in turn.

175. With respect to the SAA, Argentina quotes the following passage as evidence of its alleged "irrefutable presumption":[183]

> [19 USC. § 1675a(c)] establishes standards for determining the likelihood of continuation or recurrence of dumping. Under [§ 1675(c)(1)], Commerce will

[179] Section VII.B itself is ambiguous as to the precise source of this alleged practice.

[180] In its first submission, para. 138, Argentina asserts that: "Taken together, the US sunset statutory provisions, the SAA, and the *Sunset Policy Bulletin* prescribe a standard that is inconsistent with Article 11.3 of the Anti-Dumping Agreement." This appears to be an "as such" claim.

[181] In its first submission, para. 137, Argentina asserts that: "Thus, because it is the Department's consistent practice to employ in its sunset reviews an irrefutable presumption of likely dumping, the United States is acting inconsistently with Article 11.3 of the Anti-Dumping Agreement." This appears to be an "as applied" claim concerning Commerce's behaviour in sunset reviews in general, not just the review on OCTG from Argentina.

[182] *See* Argentina's first submission, paras. 124 and 147.

[183] Argentina's first submission, para. 142, quoting from the SAA at 889-90 (underscoring added).

> examine the relationship between dumping margins, or the absence of margins, and the volume of imports of the subject merchandise, comparing the periods before and after the issuance of an order or the acceptance of a suspension agreement. For example, declining import volumes accompanied by the continued existence of dumping margins after the issuance of an order may provide a strong indication that, absent an order, dumping would be likely to continue, because the evidence would indicate that the exporter needs to dump to sell at pre-order volumes.
>
> . . . .
>
> [E]xistence of dumping margins after the order, or the cessation of imports after the order, is highly probative of the likelihood of continuation or recurrence of dumping.

176. "Irrefutable" means "[u]nable to refute or disprove."[184] The phrases in the above-quoted passage like "For example," "provide a strong indication," and "highly probative" are not indicative of a presumption that cannot be refuted or disproved, assuming they give rise to a presumption at all. Thus, this passage from the SAA – the only passage on which Argentina relies – cannot be the source of its alleged "irrefutable presumption."

177. Another item cited by Argentina as a potential source for its "irrefutable presumption" is the *Sunset Policy Bulletin*, from which Argentina quotes the following:[185]

> [T]he Department normally will determine that revocation of an anti-dumping order or termination of a suspended dumping investigation is likely to lead to continuation or recurrence of dumping where –
>
> (a) dumping continued at any level above *de minimis* after the issuance of the order or the suspension agreement, as applicable;
>
> (b) imports of the subject merchandise ceased after issuance of the order or suspension agreement, as applicable; or
>
> (c) dumping was eliminated after the issuance of the order or the suspension agreement, as applicable, and import volumes for the subject merchandise declined significantly.
>
> Argentina asserts that the three criteria identified in quoted passage are "the natural consequences of the imposition of an anti-dumping measure."[186] The implication is that because these consequences *always* will follow the imposition of an anti-dumping measure, Commerce's consideration of them gives rise to the "irrefutable presumption;" *i.e.*, because one or more of these consequences always will be present, there can be no refutation of the presumption of likelihood.

178. There are at least two problems with this argument. First, the quoted passage clearly states that Commerce "normally" will determine likelihood where the described facts are present. The use of "normally" is incompatible with the notion of an "*irrefutable* presumption."

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[184] *New Shorter Oxford English Dictionary* (1993), page 1419.

[185] Argentina's first submission, para. 145, quoting from the *Sunset Policy Bulletin* at 18,872 (underscoring added). Note that the term "suspension agreement" used in the quoted passage is the US term for an "undertaking" within the meaning of Article 8 of the AD Agreement.

[186] *Id*., para. 146.

179. Second, Argentina is wrong when it suggests that the criteria set forth in the quoted passage are the "natural" or only consequences of the imposition of an anti-dumping measure. To the contrary, these criteria are only indicia of the consequences of the imposition of an anti-dumping measure *with respect to firms that must dump* in order to maintain a presence in the US market.[187] If firms have to dump to remain competitive in the US market, one would not be surprised to see "dumping continued at [a] level above *de minimis* after the issuance of the order or the suspension agreement, as applicable." Likewise, if firms have to dump to remain competitive in the US market, one might expect to find that "imports of the subject merchandise ceased after issuance of the order or suspension agreement, as applicable." Finally, if firms must dump to be successful in the US market, one likely consequence is that "dumping was eliminated after the issuance of the order or the suspension agreement, as applicable, and import volumes for the subject merchandise declined significantly."

180. However, there is at least one other consequence of the imposition of an anti-dumping measure that is equally "natural" – to use Argentina's terminology – at least for firms that are capable of competing fairly. This consequence is that after the imposition of an anti-dumping measure, dumping is eliminated and import volumes for the subject merchandise remain steady or increase. If this scenario should take place – and the scenario does not seem on its face to be implausible – it would seem to be an indicator of no likelihood of a continuation or recurrence of dumping that Commerce ought to take into account.

181. In fact, that is precisely what Commerce in the *Sunset Policy Bulletin* explains it normally will do:[188]

> [T]he Department normally will determine that revocation of an anti-dumping order or termination of a suspended dumping investigation is not likely to lead to continuation or recurrence of dumping where dumping was eliminated after issuance of the order or the suspension agreement, as applicable, and import volumes remained steady or increased.

Notwithstanding that this statement appears on the same page and in the same column of the *Federal Register* as the passage quoted by Argentina, Argentina avoids any reference to it, for obvious reasons: it completely undermines Argentina's case and rather spoils Argentina's story. This passage demonstrates that the Bulletin does nothing more than describe what Commerce "normally" will do when presented with different factual scenarios. Sometimes Commerce "normally" will determine likelihood, and at other times it "normally" will not.

182. This is hardly evidence of an "irrefutable presumption" of likelihood. Moreover, Argentina offers no evidence – let alone demonstrates – that it is impossible in all cases for firms subject to an anti-dumping measure to maintain or increase their presence in the US market without dumping. Put differently, Argentina offers no evidence that the only way for a firm to maintain its presence in the US market is to dump.

183. The final piece of "evidence" offered by Argentina is its exhibit ARG-63, which purports to exhaustively analyze Commerce's practice in sunset reviews and demonstrate the existence of the "irrefutable presumption." In fact, Exhibit ARG-63 does nothing of the sort.

184. What Exhibit ARG-63 actually shows is that the overwhelming majority of Commerce sunset reviews are uncontested by one side or the other. Of the 291 sunset reviews discussed in Exhibit

[187] The United States says "indicia" because as demonstrated by the use of the word "normally," the criteria in the quoted passage are not dispositive.

[188] *Sunset Policy Bulletin* at 18,872 (ARG-35).

ARG-63, 74 were reviews in which no domestic industry party participated and in which Commerce revoked the anti-dumping order in question.[189] In addition, if one looks closely at Exhibit ARG-63, one finds that there were 178 cases in which respondent interested parties chose not to participate either by not responding to Commerce's notice of initiation, submitting an affirmative waiver in response to the notice of initiation, or a combination of the two.[190] Thus, of the 291 sunset reviews discussed in Exhibit ARG-63, 87 per cent of those reviews were uncontested. Even if one limits oneself to the 217 reviews in which at least one domestic interested party expressed an interest, 82 per cent of those reviews were uncontested by respondent interested parties.

185. By the US count, this leaves 35 cases (only 13 per cent) where the parties may have contested the existence of likelihood to some extent. In these cases, Commerce found likelihood, but that fact does not establish the existence of an "irrefutable presumption." Argentina appears to assert that the fact that "no respondent was able to overcome the irrefutable presumption that dumping would likely continue or recur established by the SAA and the *Sunset Policy Bulletin* criteria" proves that these documents do, in fact, establish such a presumption.[191] This is nothing more than circular reasoning, because it assumes the existence in these documents of an "irrefutable presumption." As demonstrated above, however, these documents do not establish an "irrefutable presumption."

186. It may well be that in these 35 cases, the evidence presented a scenario that satisfied one or more of the criteria that the *Sunset Policy Bulletin* identifies as indicia of likelihood. If so, the respondent interested parties may have been unable to demonstrate that the facts of their case called for a departure from the "normal" conclusion. It could be the case that one or more, or maybe all, of these parties may have been in the situation where they were not capable of competing in the US market without dumping. We simply do not know.

187. However, there is one case, the record of which is before the Panel, and which speaks volumes about the emptiness of Argentina's "analysis." That case is the Commerce sunset review of OCTG from Argentina and Siderca's response to the Commerce notice of initiation, which Argentina includes as Exhibit ARG-57 to its First Submission.

188. Notwithstanding the fact that Siderca had other opportunities to submit information and argument, and notwithstanding Argentina's claims of rampant inconsistencies with Article 6, Exhibit ARG-57 represents the sum total of what Siderca had to say about the issue of likelihood of dumping. This limited statement is revealing in many ways.

189. In Exhibit ARG-57, Siderca did not assert that it would not export subject merchandise to the United States if the order were revoked. It did not even assert that it would not dump subject merchandise in the United States if the order were revoked. Instead, all that it said was that: "Revocation of the order would not result in anti-dumping margins above *de minimis*."[192]

190. If Exhibit ARG-57 is an example of the quality of the factual and legal submissions of respondent interested parties in Commerce sunset reviews, then it is small wonder that the percentage of affirmative likelihood determinations is high in those few cases where likelihood is contested.

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[189] Argentina's self-serving and unsubstantiated assertion in footnote 131 of its first submission that these sunset reviews are not really "reviews" is just that: self-serving and unsubstantiated.

[190] The cases break down as follows: (1) in 160 cases, no respondent interested party submitted a response to Commerce's notice of initiation; (2) in 5 cases, respondent interested parties submitted an affirmative waiver of participation; and (3) in 13 cases, there was a combination of no responses and affirmative waivers from the respondent interested parties.

[191] Argentina's first submission, para. 129, fifth bullet.

[192] Exhibit ARG-57, page 2. Siderca then goes on to refer to the *de minimis* standard for investigations in Article 5.8 of the AD Agreement, a standard which does not even apply to sunset reviews under Article 11.3.

Assuming *arguendo* that a presumption even exists, Exhibit ARG-57 does not establish that the presumption is irrefutable. Instead, it establishes that in at least one case, no serious attempt was made to refute it.

191. The remainder of Argentina's argument concerning the existence of its "irrefutable presumption" is nothing more than a repetition of its arguments in Section VII.A of its first submission concerning Commerce's alleged failure to conduct a "review" and "determine" something.[193] This has nothing to do with whether an "irrefutable presumption" exists.

192. In summary, Argentina fails to meet its burden of proof; *i.e.*, it fails to establish the existence of its alleged "irrefutable presumption." As a result, all of its claims in Section VII.B must fail.

2. Assuming *arguendo* that a Commerce "irrefutable presumption" actually exists, the *Sunset Policy Bulletin* and Commerce "practice", as such, cannot be found to be inconsistent with Article 11.3 of the AD Agreement

193. Even if one assumed *arguendo* that a Commerce "irrefutable presumption" actually exists, the *Sunset Policy Bulletin* and Commerce's practice, as such, cannot be found to be inconsistent with Article 11.3 of the AD Agreement. Neither the Bulletin nor Commerce practice constitutes a "measure," and even if they were considered measures, neither mandates WTO-inconsistent action nor precludes WTO-consistent action.

194. For something to be a measure for purposes of the WTO, it must "constitute an instrument with a functional life of its own" – *i.e.*, it must "*do* something concrete, independently of any other instruments."[194] Neither the Bulletin nor Commerce practice constitutes a legal instrument with a functional life of its own under US law. Whatever authority Commerce has to act comes from the statute and its regulations. Neither the Bulletin nor Commerce practice authorizes Commerce to do anything.

195. With respect to the Bulletin, it has no independent legal status, but rather is comparable to agency precedent. The purpose of the Bulletin is to provide guidance with respect to sunset reviews and Commerce's conduct of them, both in terms of the procedural and substantive issues that may arise. However, Commerce is not bound by the Bulletin as it would be by the statute or its regulations. Like agency precedent, Commerce may depart from the Bulletin in any particular case, so long as it explains its reasons for doing so.

196. Therefore, it is not surprising that the panel in *US - Japan Sunset* found that the Bulletin did not constitute a measure. According to that panel:[195]

> The Bulletin provides guidance on certain methodological issues regarding the applicable statutory and regulator provisions. In our view . . . the Bulletin, in and of itself, does not mandate any obligatory behaviour. On its face, the Bulletin clearly states that sunset reviews are to be carried out in accordance with the provisions of the Statute and the Regulations. Japan has pointed to no other provision in the US legislation that would suggest that the Bulletin can in fact operate independently from other legal instruments under US law in such a way as to mandate a particular course of action.

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[193] *See, e.g.*, Argentina's first submission, para. 131, in which Argentina complains about Commerce's failure to use "fresh information gathered during the course of the sunset review (*i.e.*, a prospective analysis), as required by Article 11.3 of the Anti-Dumping Agreement."

[194] *Export Restraints*, para. 8.85 (italics in original).

[195] *US - Japan Sunset*, paras. 7.125-7.126.

> We therefore find that the *Sunset Policy Bulletin*, in and of itself, is not a legal instrument that operates so as to mandate a course of action. It follows that the Bulletin can not constitute a measure that can be challenged in WTO dispute settlement proceedings.

197. Argentina has not provided any evidence to support the notion that the Bulletin constitutes a measure with an independent functional life of its own. The only piece of information Argentina has provided is a quote from a US court decision which states that "[t]he *Sunset Policy Bulletin* parallels the language of the SAA."[196] However, this statement merely indicates that the Bulletin's language parallels that of the SAA. It says nothing about the legal status of the Bulletin.

198. The same principles apply with respect to Commerce practice. It is well-established that Commerce is not bound by its own administrative practice, but instead may depart from it as long as it explains its reasons for doing so.[197] Therefore, it is not surprising that prior panels have found that Commerce's administrative practice does not constitute a measure for purposes of the WTO. As explained by the panel in the *India Steel Plate* case:[198]

> The practice India has challenged is not, on its face, within the scope of the measures that may be challenged under Article 18.4 of the AD Agreement. In particular, we do not agree with the notion that the practice is an "administrative procedure" in the sense of Article 18.4 of the Agreement. It is not a pre-established rule for the conduct of anti-dumping investigations. Rather, ... a practice is a repeated pattern of similar responses to a set of circumstances – that is, it is the past decisions of the USDOC . . . . India argues that at some point, repetition turns the practice into a "procedure", and hence into a measure. We do not agree. That a particular response to a particular set of circumstances has been repeated, and may be predicted to be repeated in the future, does not, in our view transform it into a measure. Such a conclusion would leave the question of what is a measure vague and subject to dispute itself, which we consider an unacceptable outcome. Moreover, we do not consider that merely by repetition, a Member becomes obligated to follow its practice. If a Member were obligated to abide by its practice, it might be possible to deem that practice a measure. The United States, however, has asserted that under its governing laws, the USDOC may change a practice provided it explains its decision.

The panel in the *US - Japan Sunset* case also found that "practice as such can not be challenged before a WTO panel."[199]

199. Even if the Bulletin and Commerce's practice could be regarded as measures, they nonetheless could not be considered WTO-inconsistent because neither "measure" is "mandatory;" *i.e.*, neither requires WTO-inconsistent action or precludes WTO-consistent action.[200] The Appellate Body and several panels have explained the distinction between mandatory and discretionary measures. A Member may challenge, and a WTO panel may find against, a measure "as such" only if

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[196] Argentina's first submission, para. 144, quoting from *AG Dillinger Huettenwerke v. United States*, 193 F. Supp. 2d 1339 (CIT 2002) (Exhibit ARG-15a).

[197] *See, e.g., Rhodia, Inc. v. United States*, 240 F. Supp. 2d 1247, 1253 (CIT 2002), in which Commerce's reviewing court, the US Court of International Trade, stated as follows: "As long as Commerce properly explains its reasons, and its practice is reasonable and permitted by the statute, Commerce's practice can and should continue to change and evolve."

[198] *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R, Report of the Panel adopted 29 July 2002, para. 7.22 (citation omitted) [hereinafter "*US - India Plate*"].

[199] *US – Japan Sunset*, para. 7.131.

[200] *Export Restraints*, paras. 8.126-8.132.

the measure "mandates" action that is inconsistent with WTO obligations, or "precludes" action that is WTO-consistent.[201] In accordance with the normal WTO rules on the allocation of the burden of proof, it is up to the complaining party to demonstrate that any challenged measure mandates WTO-inconsistent action or precludes WTO-consistent action.[202]

200. Argentina has not provided any evidence whatsoever that Commerce is bound by either the Bulletin or its administrative practice. This is not surprising, because, as demonstrated above, as a matter of US law, Commerce is not so bound. However, if Commerce is not bound by these instruments, they cannot be said to mandate any action by Commerce, let alone WTO-inconsistent action.

201. While Argentina does not provide any evidence about the status of the Bulletin or Commerce administrative practice under US law, it does cite *US - Countervailing Measures* for the proposition that practice can be subject to WTO challenge.[203] However, Argentina's reliance on *US - Countervailing Measures* is misplaced.

202. In *US - Countervailing Measures*, the panel's characterization of its findings relating to Commerce's "method" was not appealed, and the Appellate Body did no more than accept the panel's characterization. Moreover, at the panel stage, this issue was also not disputed; the EC was challenging two Commerce privatization methodologies applied in twelve specific countervailing duty investigations, and the United States focused its argumentation on the substantive issues. That the panel referred to these methodologies in this manner, and the Appellate Body thereafter, thus provides no guidance as to how either a panel or the Appellate Body would answer the question of whether non-binding administrative precedent, or practice, can be independently challenged as a measure, and whether, if it could be so challenged, it mandates a breach of a particular obligation. To the contrary, when panels have been faced with this question, they have uniformly concluded that US administrative practice cannot, as such, be challenged as a measure.[204]

203. And, as mentioned before, even if administrative practice could be challenged as a measure, the Appellate Body has consistently applied the mandatory/discretionary distinction to find that measures that do not mandate a breach of an obligation do not breach that obligation. Thus, the findings in *US-Countervailing Measures*, as discussed above, do not support Argentina's assertion that either the Bulletin or Commerce practice can be challenged "as such."[205]

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[201] *United States - Anti-Dumping Act of 1916* ("*1916 Act*"), WT/DS136/AB/R, WT/DS162/AB/R, Report of the Appellate Body adopted 26 September 2000, paras. 88-89; *United States - Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, Report of the Appellate Body adopted 2 February 2002, para. 259; *see also Export Restraints*, paras. 8.77-8.79; *US - Section 129*, para. 6.22.

[202] *Brazil – Export Financing Programme for Aircraft – Second Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW//2, Report of the Panel, adopted 23 August 2001, paras. 5.49-5.50.

[203] Argentina's first submission, para. 139, citing *United States - Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, Report of the Appellate Body adopted 8 January 2003 [hereinafter *US - Countervailing Measures*].

[204] *E.g.*, *US - India Plate*, paras. 7.22-7.24; *Export Restraints*, paras. 8.126, 8.129-8.130.

[205] With respect to the SAA, it is simply legislative history, albeit legislative history of an authoritative nature. Under the US legal system, legislative history may be used to interpret a statute, but cannot change the meaning of , or override, the statute to which it relates. As found by the panel in *US Export Restraints*, para. 8.99, the SAA does not have "an operational life or status independent of the statute such that it could, on its own, give rise to a violation of WTO rules. Independent of the statute, the SAA does not *do* anything; rather it interprets (i.e., informs the meaning of) the statute." (Italics in original). Thus, the SAA, in principle, could be taken into account for purposes of determining whether the US *statute* imposes the "irrefutable presumption" alleged by Argentina. However, as demonstrated above, the SAA, in fact, does not contain an "irrefutable presumption," nor does it require the statute to be interpreted so as to impose one.

3. Assuming *arguendo* that a Commerce "irrefutable presumption" actually exists, the *Sunset Policy Bulletin* and Commerce "practice," as applied generally, cannot be found to be inconsistent with Article 11.3 of the AD Agreement

204. In paragraph 137 of its First Submission, Argentina alleges that "because it is the Department's consistent practice to employ in its sunset reviews an irrefutable presumption of likely dumping, the United States is acting inconsistently with Article 11.3 of the Anti-Dumping Agreement." This appears to be a claim that Commerce practice, as applied generally, is inconsistent with Article 11.3.

205. The United States is not certain what Argentina means by this claim of "practice, as applied generally." However, it appears to be nothing more than an attempt to get around the extensive body of panel reports finding that "practice as such can not be challenged before a WTO panel."[206]

206. Argentina bears the burden of proof with respect to this claim. In the view of the United States, Argentina has not satisfied its burden to present a *prima facie* case in that it has not explained how a general practice can suddenly become subject to challenge if the label "as applied" is substituted for the label "as such." In addition, Argentina also has failed to demonstrate that the "irrefutable presumption" on which this claim is based exists.

4. Commerce's Sunset Determination in OCTG from Argentina was not inconsistent with Article 11.3 because of an "irrefutable presumption"

207. Although most of Section VII.B of Argentina's first submission seems to be devoted to an "as such" claim regarding Commerce sunset review practice, the heading to Section VII.B and the very last paragraph – paragraph 147 – do refer to the Commerce sunset determination in OCTG from Argentina.[207] According to Argentina, this determination "was inconsistent with Article 11.3 of the Anti-Dumping Agreement because it was based on an irrefutable presumption under US law ... ."[208]

208. This claim must be rejected because, as demonstrated above, Argentina has failed to prove that there is an "irrefutable presumption" under US law. In addition, Argentina has failed to demonstrate that an "irrefutable presumption" was applied in the OCTG case. To the contrary, the United States has already demonstrated that the one Argentine company that responded to Commerce's notice of initiation – Siderca – did not make any attempt to show that it would not dump if the order were revoked. Instead, it merely asserted that any dumping margins would be *de minimis* based on the standard applicable to initial anti-dumping investigations. Thus, assuming *arguendo* that any sort of presumption exists at all, what Siderca's response shows is not that the presumption is "irrefutable," but rather that it was "unrefuted" in the OCTG case.

C. COMMERCE'S SUNSET DETERMINATION IN OCTG FROM ARGENTINA IS NOT INCONSISTENT WITH ARTICLES 11, 2, 6, OR 12 OF THE AD AGREEMENT

209. In Section VII.C of its First Submission, Argentina essentially recycles many of its "as such" arguments regarding these procedures, this time in the context of the Commerce sunset determination in OCTG from Argentina. As demonstrated above, however, Commerce's expedited sunset review procedures are not inconsistent, as such, with US obligations under the AD Agreement. If these procedures are not WTO-inconsistent "as such," they do not automatically become WTO-inconsistent

[206] *US - Japan Sunset*, para. 7.130.

[207] As noted in Section IV, above, Argentina's panel request claimed an inconsistency with Article 11.3 based on the use of an irrefutable presumption *only* in connection with the sunset review of OCTG from Argentina.

[208] Argentina's first submission, para. 147.

when they are applied. Instead, Argentina must prove that the manner in which these procedures were applied resulted in an inconsistency with one of the AD Agreement provisions that it cites. Argentina fails to make such a showing.

1. Commerce's Determination to "expedite" the Sunset Review of OCTG from Argentina is not inconsistent with the AD Agreement

210. Argentina's first claim with respect to Commerce's application of US expedited sunset laws, regulations, and procedures is that "Siderca was deemed to have waived its right to participate in the sunset review, despite its full cooperation with" Commerce and in violation of Articles 11 and 6 of the AD Agreement.[209]

211. The facts, however, do not support Argentina's claim. Most importantly, Siderca was not deemed to have waived its right to participate in the sunset review. Rather, in keeping with section 351.218(d)(3) of Commerce's Sunset Regulations, Commerce found that Siderca submitted a complete substantive response to the notice of initiation.[210] Commerce also found, however, that no other respondent interested party submitted a complete substantive response and that the "combined-average percentage of Siderca's exports of OCTG to the United States with respect to the total exports of the subject merchandise to the United States was significantly below 50 per cent."[211] Thus, in accordance with section 351.218(e)(1)(ii)(A) of Commerce's Sunset Regulations, Commerce determined to expedite the sunset review of the anti-dumping duty order on OCTG from Argentina.[212]

212. Additional evidence that Commerce did not deem Siderca to have waived participation in the sunset review is Commerce's own regulatory waiver provision. Section 351.218(d)(2) of Commerce's Sunset Regulations ("Waiver of response by a respondent interested party to a notice of initiation") reads:

> (i) *Filing a statement of waiver.* A respondent interested party may waive participation in a sunset review before the Department [of Commerce] under section 751(c)(4) of the Act by filing a statement of waiver ... .
>
> (ii) *Contents of statement of waiver.* Every statement of waiver must include a statement indicating that the respondent interested party waives participation in the sunset review ...
>
> (iii) *No response from a respondent interested party.* The Secretary [of Commerce] will consider the failure by a respondent interested party to file a complete substantive response to a notice of initiation under paragraph (d)(3) of this section as a waiver of participation in a sunset review before the Department [of Commerce].[213]

213. As these provisions make clear, there are two methods for a respondent interested party to waive its right to participate in a sunset review: (1) submit a statement affirmatively waiving participation; or (2) fail to submit a substantive response to Commerce's notice of initiation and allow Commerce to deem its non-response as a waiver of its right to participation. Importantly, with respect

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[209] Argentina's first submission, paras. 148-155.

[210] Adequacy Memorandum, at 1-2 (Exhibit ARG-50).

[211] *Id.* In fact, by its own admission, Siderca had zero exports of subject merchandise to the United States in the five years preceding the initiation of the sunset review of OCTG from Argentina. *See* Exhibit ARG-57.

[212] *Id.*

[213] 19 C.F.R. § 351.218(d)(2)(iii) (emphasis added) (Exhibit ARG-3).

to the latter, Commerce's waiver regulation provides that when a respondent interested party fails to submit a substantive response, that failure will be deemed a waiver of *that* respondent interested party's participation in the sunset review.[214] As a general matter, Commerce is bound to follow its own regulations.[215] Consequently, Commerce would not have had the authority under its regulations to "deem" Siderca to have waived its right to participate in the sunset review of OCTG from Argentina because Siderca did not fail to file an adequate response but, rather, filed a complete substantive response.[216]

214. Argentina also claims that Commerce's expedited sunset review resulted in the application of facts available despite Siderca's "full cooperation with [Commerce]." Argentina again misstates the facts. In the sunset review of OCTG from Argentina, Commerce received only one complete substantive response from a respondent interested party – Siderca's. Thus, as to the non-responding respondent interested parties, Commerce was left in a position – consistent with Article 6.8 of the AD Agreement – to apply facts available. Pursuant to the Sunset Regulations, Commerce used for the final sunset determination as the facts available all the information on the record of the sunset review up to that time: (1) the findings of dumping from the original investigation; and (2) the information contained in the substantive responses of the interested parties, Siderca and the domestic interested parties.[217] Therefore, although Commerce used the facts available to make the final sunset determination of likelihood, Commerce did not apply facts available to the issue of whether there was a likelihood that dumping would continue or recur if the order were revoked with respect to Siderca specifically, because the sunset determination is made on an order-wide basis, not a company-specific basis.[218]

2. Commerce conducted a sunset review for the anti-dumping order of OCTG from Argentina and fully considered all record information in making the Final Sunset Determination

215. Argentina argues that because Commerce conducted an expedited sunset review, it "did not in fact conduct a 'review' within the meaning of Article 11.3" of the anti-dumping duty order on OCTG from Argentina.[219] As explained above, US laws and regulations providing for the conduct of expedited sunset reviews do not violate any of the provisions of the AD Agreement. As such, their mere application in the instant review is not proof of an inconsistency with any provision of the AD

[214] *See* 63 Fed. Reg. at 13518 (Exhibit US-3); *see also* SAA, at 881, discussing waiver provision in the statute at section 751(c)(3) (Exhibit US-11).

[215] *See Oy v. United States*, 61 F.3d 866, 871 (Fed. Cir. 1995) ("As a general rule, an agency is required to comply with its own regulations."); *Paralyzed Veterans v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998) ("It is axiomatic that an agency must act in accordance with applicable statutes and its regulations."). The Federal Circuit ("Fed. Cir") is the Court of Appeals for challenges to Commerce and ITC determinations in anti-dumping and countervailing duty cases.

[216] Commerce's Issues and Decision Memo states "[i]n the instant reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation." *See Sunset Decision Memorandum* at 5 (Exhibit ARG-51). Although based on this language it may appear that Commerce deemed all respondent interested parties to have waived their participation in the OCTG sunset review, in fact, Commerce was only referring to those respondent interested parties from which it received *no* substantive responses. Throughout its Issues and Decision Memo, Commerce summarized and responded to arguments and evidence presented by Siderca in its substantive response, indicating that it did not, in fact, treat Siderca as having waived its participation in the review. *See id.; see also* 19 C.F.R. § 351.218(d)(2)(i) (stating that if a respondent interested party waives its right to participate, Commerce "will not accept or consider any unsolicited submissions from that party during the course of the review"). (Exhibit ARG-3).

[217] 19 C.F.R. § 351.308(f) (Exhibit US-3).

[218] In this regard, in *US - Japan Sunset*, para. 8.1(e)(ii), the panel found that the analysis of likely dumping on an "order-wide" basis was not inconsistent with Article 11.3.

[219] Argentina's first submission, paras. 158-159.

Agreement. Commerce did conduct a "review" of the order on OCTG from Argentina within the meaning of Article 11.3 of the AD Agreement.

216. In the sunset review of OCTG from Argentina, Commerce received complete substantive responses from several domestic interested parties and from Siderca, the sole respondent interested party to submit a substantive response.[220] No Argentine producer or exporter of OCTG, other than Siderca, submitted information or participated in any fashion in the sunset review, nor did any respondent interested party supply information for submission in Siderca's substantive response.[221] Based on these facts, Commerce determined that the non-responding respondent interested parties had waived their rights to participate and, thus, Commerce expedited the sunset review.[222]

217. In an expedited sunset review, section 351.308(f) of the Sunset Regulations provides for the use of facts available for the final sunset determination. As "facts available," section 315.308(f) also provides that Commerce normally will examine the findings of dumping from the original investigation and any subsequent administrative reviews, and the information supplied by the interested parties in their substantive responses. Commerce made its final likelihood determination using this information.

218. Commerce considered both the fact that dumping was found in the original investigation and the information supplied by the interested parties, including the information supplied by Siderca in its substantive response. Commerce determined that dumping continued to exist throughout the history of the order, that US imports of OCTG from Argentina had decreased significantly after imposition of the order, and that imports had remained at this depressed level since the imposition of the anti-dumping order.[223] Commerce also addressed the only comment made by Siderca in its substantive submission, which concerned the *de minimis* standard to be applied in a sunset review.[224] Consequently, Commerce determined that dumping was likely to continue or recur if the order were to expire based on the information submitted by the interested parties in the sunset review and the results in the prior proceeding.[225]

219. Similarly, as explained above, Argentina has failed to establish that Commerce's conduct of an expedited sunset review "precluded" Commerce from being able to "determine" whether dumping was likely to continue or recur. To the extent Argentina is suggesting that section 351.308(f) limits Commerce's ability to make the likelihood determination, section 351.308(f) merely provides that Commerce *normally* will use the facts available criteria in making the likelihood determination, but nothing in the Sunset Regulations or elsewhere in US law precludes Commerce from considering other information, even where facts available are used.[226] Indeed, for example, Commerce used import statistics generated by Commerce's Census Bureau to verify the import levels of OCTG from

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[220] *Final Sunset Determination*, 65 Fed. Reg. at 66701 (Exhibit ARG-46).

[221] *See generally*, Siderca's Substantive Response (Exhibit ARG- 57).

[222] *See* Adequacy Memorandum, at 2 (Exhibit ARG-50).

[223] Section 351.308(f) also provides that Commerce normally will consider dumping found in any administrative reviews as "facts available" when making the likelihood determination in a sunset review. Exhibit US-3. In the case of OCTG from Argentina, there were no administrative reviews of the order for the five-year period preceding the sunset review. *See Decision Memorandum*, at 5 (Exhibit ARG-51).

[224] *Decision Memorandum*, at 5 (Exhibit ARG-51). In its substantive submission, Siderca, citing to Article 5.8 of the AD Agreement, suggested that the *de minimis* standard of 2 per cent applicable to investigations should be applied in sunset reviews. Exhibit ARG-57, at 2. In the *Final Sunset Determination*, Commerce explained that the *de minimis* standard for sunset reviews is 0.5 per cent and that the record evidence demonstrated that the likely margin was 1.36 per cent, above *de minimis* for a sunset review. *Decision Memorandum*, at 5 (Exhibit ARG-51).

[225] *Decision Memorandum*, at 5 (Exhibit ARG-51).

[226] Section 351.308(f) (Exhibit US-3).

Argentina for the five-year period preceding the sunset review.[227] There was no other information in this case, nor did any interested party supply additional information for Commerce to consider in making the likelihood determination. Therefore, the mere fact that Commerce conducted an expedited sunset review of OCTG from Argentina does not result in a violation of Article 11.3 of the AD Agreement.

3. Commerce complied with the evidentiary and procedural requirements of Article 11.3 and Article 6 in the OCTG Sunset Review

220. Article 11.4 of the AD Agreement establishes that for sunset reviews, the "provisions of Article 6 regarding evidence and procedure shall apply ... ." Relying on this cross-reference, Argentina claims that Commerce's determination to expedite was inconsistent with Articles 6.1, 6.2, and 6.8, and Annex II of the AD Agreement.[228] None of these articles, however, includes provisions that make Commerce's determination to expedite inconsistent with US WTO obligations. In fact, Commerce fully complied with its Article 11.4 obligation in its determination to expedite.

221. Specifically, Commerce provided Siderca with the notice and opportunity to present evidence, argument, and rebuttal required by Articles 6.1 and 6.2. In addition, Commerce did not apply "facts available" with respect to Siderca's participation when it expedited the sunset review. Consequently, insofar as its treatment of Siderca in the sunset review proceeding is concerned, Commerce did not act inconsistently with Article 6.8 or Annex II.

(a) Commerce Afforded Siderca the Notice and Opportunity Required by Article 6.1

222. Article 6.1 requires that interested parties "shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question." Article 6.1 thus establishes a general rule regarding the notice and opportunity to participate that interested parties should enjoy. Through Commerce's notice of initiation of the sunset review and Commerce's Sunset Regulations, Siderca was on notice regarding what information was required and what information Commerce considered relevant to its determination to conduct an expedited review. Moreover, Siderca had opportunities to present relevant evidence on this issue, and any other relevant issue, and Siderca availed itself of at least one of these opportunities. Accordingly, Commerce complied with Article 6.1 of the AD Agreement.

223. On 3 July 2000, Commerce initiated the sunset review and published a notice of initiation in the *Federal Register*.[229] The notice of initiation identified the relevant statutory and regulatory provisions at issue, as well as the *Sunset Policy Bulletin*. Moreover, the notice of initiation specified the information initially required from interested parties in their notices of intent to participate, as described at section 351.218(d) of Commerce's Sunset Regulations. The notice of intent to participate provision requires, *inter alia*, that respondent interested parties, provide "[f]or each of the five calendar years (or fiscal years, if more appropriate) preceding the year of publication of the notice of initiation, on a volume basis (or value basis, if more appropriate), that party's percentage of the total exports of subject merchandise . . . to the United States."[230]

224. The Sunset Regulations make clear that the respondent interested parties' percentage of total exports is an important factor in determining whether Commerce conducts a full or expedited sunset

[227] *Decision Memorandum*, at 4-5 (Exhibit ARG-51). In making the determination to expedite the sunset review, Commerce used the USITC's Trade Database. *Adequacy Memorandum*, at 2 (Exhibit ARG-50).

[228] Argentina's first submission, paras. 166-171.

[229] 65 Fed. Reg. 41053 (Exhibit ARG-44).

[230] 19 C.F.R. § 351.218(d)(2)(iii)(D) (Exhibit ARG-3).

review. In particular, the regulations state that Commerce "normally will conclude that respondent interested parties have provided adequate response to a notice of initiation where it receives complete substantive responses . . . from respondent interested parties accounting on average for more than 50 per cent, on a volume basis (or value basis, if appropriate), of the total exports of subject merchandise to the United States over the five calendar years preceding the year of publication of the notice of initiation."[231]

225. On notice and apprised of the information that Commerce required for the sunset review, Siderca took the opportunity to present in writing the evidence and argument that Siderca (presumably) considered relevant regarding the sunset review, including information on its percentage of total exports. On 2 August 2000, Siderca filed a complete and timely substantive response to the notice of initiation.[232] In that response, Siderca asserted that it was the only Argentine producer of oil country tubular goods, and noted that since it did not export subject merchandise to the United States over the preceding five years, it had *no* share of the total exports to the United States.[233]

226. Siderca's statement that it had a zero share of total US exports was supported by relevant trade data.[234] However, record evidence indicated that there were imports of OCTG from Argentina during the five-year period preceding the sunset review. According to the ITC Trade Database, there were imports of the subject merchandise from Argentina in four of the five years preceding the publication of the notice of initiation.[235] Based on this data and the other evidence before it, Commerce determined that Siderca's percentage of total exports to the United States was significantly below 50 per cent[236] and that it was appropriate to conduct an expedited sunset review.[237]

227. In addition to explaining its share of total exports to the United States, the substantive response Siderca submitted in the sunset review proceeding addressed only two substantive issues: the likelihood determination generally and the *de minimis* standard it believed should be applied in a sunset review.[238] Commerce considered Siderca's comments on these issues and took those comments into account when it issued the final sunset determination on OCTG from Argentina.[239]

228. Although Siderca chose not to make any other submissions during the course of the sunset review beyond its 2 August 2000 substantive response, it is undisputed that Siderca had opportunities to do so. During an expedited sunset review, there are several opportunities for participating parties to make written submissions. In addition to the substantive response to the notice of initiation, participating parties may also file comments on Commerce's initial determination of the adequacy of

[231] 19 C.F.R. § 351.218(e)(1)(ii)(A) (Exhibit ARG-3).
[232] *See* Siderca Substantive Response (Exhibit ARG-57).
[233] Siderca Substantive Response, at 3-4 (Exhibit ARG-57).
[234] *See Adequacy Memorandum*, at 2 (Exhibit ARG-50).
[235] *See Adequacy Memorandum*, at 2 (Exhibit ARG-50); and US Steel Group, Substantive Response, at 12 (2 August 2000); North Star Steel Ohio, Substantive Response, at 3, Attachment 1 (2 August 2000) (Exhibit US-23).
[236] It should be noted that Commerce's examination of the respondent interested parties' percentage of total exports is consistent with the order-wide basis upon which Commerce conducts sunset reviews. Namely, Commerce makes a likelihood determination with respect to all producers/exporters of a particular product from a particular country, not just those that file substantive responses to the notice of initiation. *US – Japan Sunset*, paras. 7.207-208, rejected a claim that Commerce's order-wide approach was inconsistent with the AD Agreement.
[237] *See Adequacy Memorandum*, at 2 (Exhibit ARG-50).
[238] Siderca Substantive Submission, at 2-3 (Exhibit ARG-57).
[239] *See Decision Memorandum*, at 5 (Exhibit ARG-51).

the response[240] and may submit a rebuttal to any other party's substantive response to the notice of initiation.[241]

229. The fact that Siderca did not take advantage of these other opportunities, as well as Commerce's consideration of Siderca's substantive response in the sunset review, belie any notion that Siderca was prejudiced by the determination to expedite the sunset proceeding. In short, Siderca had notice of the information Commerce considered relevant to the determination to expedite, and Siderca had the opportunity on several occasions to present to Commerce whatever other information and argument Siderca considered relevant. The text of Article 6.1 requires nothing more.

(b) Siderca Was Afforded An Opportunity For A Full Defense of Its Interests in Accordance With Article 6.2

230. Article 6.2 of the AD Agreement provides for the rights of interested parties to "a full opportunity for the defence of their interests," and states in relevant part:

> Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interest, so that opposing views may be present and rebuttal arguments offered.

231. Argentina claims that Siderca was denied the opportunity to fully defend its interests in accordance with Article 6.2, because Commerce allegedly applied the waiver provisions to Siderca and deemed Siderca to have waived its rights to participate in the sunset review.[242] Again, as demonstrated above in connection with Argentina's "as such" claim, there is simply nothing in US law, regulation, or procedure governing sunset reviews that precludes or impedes this opportunity. To the contrary, interested parties are given ample opportunity to submit written information and argument, rebut information and argument submitted by other parties, and to comment on the appropriateness of conducting an expedited review.

232. Argentina makes no showing that in the OCTG sunset review, Commerce failed to act in accordance with US law and regulation. Instead, the record is clear that in the OCTG sunset review, Siderca chose to limit its participation to a 4-page, double-spaced presentation.[243]

233. Section 351.218(e)(1)(ii)(C) and section 351.308(f) of Commerce's Sunset Regulations provide for the use of facts available only in situations where interested parties fail to provide information requested for Commerce's sunset review determination. Specifically, these provisions permit expedited sunset reviews on the basis of facts available only in situations where interested parties' response to Commerce's notice of initiation is inadequate.[244] An inadequate response is one that lacks required information or is simply not submitted.[245] Thus, only in situations where interested parties fail to provide necessary information, do these provisions permit an expedited review determination on the basis of facts available.

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[240] 19 C.F.R. § 351.309(e) (Exhibit US-3).
[241] 19 C.F.R. § 351.218(d)(4) (Exhibit ARG-3).
[242] Argentina's first submission, para. 168-170.
[243] *See* Exhibit ARG-57.
[244] 19 USC. § 1675(c)(3)(B) (Exhibit ARG-1).
[245] 19 C.F.R. § 351.218(e)(1)(ii) ("[T]he Secretary normally will conclude that respondent interested parties have provided adequate response to a notice of initiation where it receives complete substantive responses ... .") (Exhibit ARG-3); *see also* 19 C.F.R. § 351.218(e)(i)(I)("[T]he Secretary normally will conclude that domestic interested parties have provided adequate response . . . where it receives a complete substantive response ... .") (Exhibit ARG-3).

Argentina attempts to confuse the issue by referring to Commerce's adequacy test (the so-called "50 per cent threshold" test) provided in section 351.218(e)(1)(ii)(A) of Commerce's Sunset Regulations.[246] Section 351.218(e)(1)(ii)(A) provides that an adequate response from respondent interested parties exists if Commerce receives substantive responses from "respondent interested parties accounting on average for more than 50 per cent, on a volume basis (or value basis, if appropriate), of the total exports of subject merchandise to the United States over the five calendar years preceding the year of publication of the notice of initiation."[247] Argentina argues that section 351.218(e)(1)(ii)(A) has the effect of requiring an expedited sunset review and, in turn, the use of facts available in this case where Siderca did *not* fail to submit necessary information in violation of Article 6.8.[248]

235. Argentina misinterprets section 351.218(e)(1)(ii)(A) of Commerce's Sunset Regulations. The section is not a provision requiring the use of facts available. Rather, it serves a ministerial function of allowing Commerce to decide when the conduct of an expedited review is appropriate when the number of respondent interested parties who provide a substantive response to the notice of initiation is inadequate.[249] An "adequate" number of responses is normally required, because Commerce makes its likelihood determination on an order-wide basis.[250] As such, Commerce must decide on an aggregate basis whether the response from respondent interested parties, as a group, is adequate to warrant a full sunset review. A determination that the aggregate response from respondent interested parties is inadequate and, thus, that a expedited review is warranted, is not a determination that an individual respondent interested party, who supplied a complete substantive response, would be likely to resume or continue dumping if the order were revoked.

236. In fact, Commerce regulations provide that, when resorting to facts available in an expedited sunset review, Commerce should "normally" rely on dumping margins from prior determinations and "information contained in parties' substantive responses to the Notice of Initiation filed under § 351.218(d)(3)."[251] Section 351.218(d)(3) of Commerce's Sunset Regulations provide for the submission of information from both domestic and respondent interested parties. In other words, in using facts available in an expedited sunset review, Commerce does not disregard information submitted by respondent interested parties who may have responded to the notice of initiation, but who did not in the aggregate account for 50 per cent or more of subject exports. To the contrary, Commerce considers this information as part of the facts available in making its likelihood determination. This approach is in accordance with the obligations contained in Article 6.8 of the AD Agreement.

237. In the sunset review of OCTG from Argentina, as discussed above, Siderca filed a complete substantive response to the notice of initiation. In its substantive response, Siderca only raised two issues. As previously noted, Siderca's entire substantive response was a mere four pages of double-spaced text.[252] Siderca did not file any additional information on its own behalf or on behalf of the Argentine exporters of OCTG, as allowed by section 351.218(d)(3)(iv) of Commerce's Sunset Regulations. In addition, Siderca did not file any comments on Commerce's decision to expedite the

[246] Argentina's first submission, para.170.

[247] 19 C.F.R. § 351.218(e)(2)(ii) (Exhibit ARG-3).

[248] Argentina's first submission, para. 170.

[249] The sunset statute provides that when interested parties' response to the notice of initiation is inadequate, Commerce may conduct an expedited sunset review. The statute does not specify what to do in the event that some, but not all, interested party responses to initiation are inadequate. Thus, Commerce, in its role as the administering authority, determined that for respondent interested parties a response from such parties accounting for 50 per cent or more of subject imports would be deemed an adequate response. *See* 19 USC. § 1675(c)(3)(B) (Exhibit ARG-1); 19 C.F.R. § 351.218(e)(1)(ii)(A) (Exhibit ARG-3).

[250] *See Sunset Policy Bulletin*, 63 Fed. Reg. at 18872 (Exhibit ARG-35).

[251] 19 C.F.R. § 351.308(f)(2) (Exhibit US-3).

[252] *See* Exhibit ARG-57.

sunset review, as allowed by section 351.309(e) of Commerce's Sunset Regulations. In sum, Argentina's claims that Siderca did not have an adequate opportunity to defend its interests because the sunset review was expedited in this case ring hollow, because Siderca did not avail itself of the opportunities made available by the Sunset Regulations for such defence in an expedited sunset review.

3. Commerce's Final Sunset Determination in OCTG from Argentina is not inconsistent with the obligation contained in Article 12 of the AD Agreement

238. Argentina claims that Commerce's *Final Sunset Determination* and the accompanying *Decision Memorandum* in OCTG from Argentina are inconsistent with provisions of Article 12 because these documents allegedly fail to provide public notice and an adequate explanation of the decisions made in the sunset review.[253] Specifically, Argentina claims that the *Final Sunset Determination* and the *Decision Memorandum* are inconsistent with Article 12.2 because they fail to adequately explain the bases for Commerce's likelihood determination.[254] In addition, Argentina claims that these documents are inconsistent with Article 12.2.2 because they do not contain all relevant factual information necessary to make the likelihood determination.[255] As discussed below, Argentina mischaracterizes Commerce's factual and legal conclusions. In addition, with regard to Argentina's claim under Article 12.2.2, Argentina is attempting to use that provision as a vehicle for creating substantive standards for sunset reviews that simply cannot be found in the text of Article 11.3.

239. Article 12 establishes the "investigating authorities' obligations relating to public notice and explanation of determinations throughout an investigation."[256] Through Article 12.3, the provisions of Article 12 apply "*mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11 ... ."

240. Argentina's first claim under Article 12 is that because Argentina is unable to discern from the *Final Sunset Determination* and the accompanying *Decision Memorandum* "the actual basis for the Department's affirmative likelihood determination," Commerce acted inconsistently with Article 12.2.[257] Article 12.2 requires public notice of any determinations made in a sunset review and mandates that "[e]ach such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities."

241. However, as discussed in detail above, Commerce did provide notice and detailed explanations of its determinations in the *Final Sunset Determination*, the *Decision Memorandum*, and the *Adequacy Memorandum*, all of which were publicly available. Nonetheless, Argentina claims that it cannot discern the precise US statutory provision – section 751(c)(4) or section 751(c)(3)(B) – upon which Commerce's final affirmative sunset determination was based. In addition, Argentina alleges that these US statutory provisions are somehow "mutually exclusive" and, thus, cannot both serve as a basis for the *Final Sunset Determination* in OCTG from Argentina.

242. Here, Argentina simply continues to misstate the facts of the OCTG sunset review and the meaning of US law. First, the cited statutory provisions are not mutually exclusive in their application as alleged by Argentina. On the contrary, as explained above, they work in conjunction in cases where a respondent interested party choose to waive participation in the Commerce-

[253] Argentina's first submission, para. 172-174.
[254] Argentina's first submission, para. 178.
[255] Argentina's first submission, para. 179-180.
[256] *US – Japan Sunset*, para. 7.30.
[257] Argentina's first submission, para. 178.

administered portion of the sunset review proceeding. Section 751(c)(4) provides for a respondent interested party to elect waiver of participation, while section 751(c)(3)(B) provides for the use of facts available where the aggregate response from respondent interested parties is inadequate. A determination that the aggregate response to the notice of initiation is inadequate can be based on the respondent interested parties electing waiver, or failing to respond, or in providing inadequate substantive responses, or on any combination of these scenarios.[258]

243. Second, as a matter of fact and of law, Siderca did not waive its right to participate in the sunset review nor did Commerce find that Siderca had done so. Argentina repeatedly attempts to confuse the issue by alternatively referring to Siderca and Argentina as the respondent interested party when addressing the waiver issue. The *Final Sunset Determination*, the *Decision Memorandum*, and the *Adequacy Memorandum*, however, each clearly state that Siderca filed a complete substantive response.[259] Commerce's *Adequacy Memorandum* and the *Decision Memorandum* also make clear that Commerce's decision to expedite the review was based on the failure of Argentine producers/exporters of OCTG, other than Siderca, to respond to the notice of initiation.[260] Consequently, Commerce determined to expedite the sunset review and to use facts available in making the final sunset determination because the Article 11.3 likelihood determination is made on an order-wide basis and Siderca represented zero exports to the United States of OCTG during the five-year period preceding the sunset review.

244. Finally, as the *Final Sunset Determination* and the *Decision Memorandum* clearly explain, Commerce used, as fact available in accordance with section 351.308(f) of Commerce's Sunset Regulations, margins from the original investigation and the information submitted in the sunset review, including the information submitted by Siderca, as the bases for the affirmative likelihood determination.[261] The *Decision Memorandum* explains that Commerce found dumping throughout the history of the OCTG order and that the existence of dumping margins after imposition of the duty is highly probative of the likelihood of dumping in the absence of the duty.[262] In addition, Commerce found that import volumes had decreased and remained depressed since the order was issued, indicating that the Argentine producers/exporters of OCTG may have had to dump to maintain market share.[263]

245. In light of these facts and in the absence of any rebuttal evidence from respondent interested parties – including Siderca – Commerce made an affirmative likelihood determination because it determined that the Argentine producers/exporters could not sell OCTG in the United States without dumping if the order were to be revoked. Although Argentina may disagree with the outcome, the *Final Sunset Determination* and the accompanying *Decision Memorandum* clearly explain the bases for Commerce's final affirmative likelihood determination and nothing in Article 12.2 requires more. Consequently, Commerce's *Final Sunset Determination* and the accompanying *Decision Memorandum* fulfil the obligations to provide public notice under Article 12.2.

246. In addition to its public notice claim under Article 12.2, Argentina claims that Article 12.2.2 requires that "fresh information" be gathered and that a dumping margin be calculated in accordance

[258] Argentina's own study of Commerce sunset reviews shows that these scenarios can exist in combination. For example, on page 1 of Exhibit ARG-63, the data for Case 7 (bearings from France) shows that there were affirmative waivers of participation from some respondent interested parties, combined with no responses from others.

[259] *Final Sunset Determination*, 65 Fed. Reg. at 66701 (Exhibit ARG-46); *Decision Memorandum*, at 3 (Exhibit ARG-51); and *Adequacy Memorandum*, at 1 (Exhibit ARG-50).

[260] *Decision Memorandum*, at 3 (Exhibit ARG-51); and *Adequacy Memorandum*, at 2 (Exhibit ARG-50).

[261] *Decision Memorandum*, at 4-5 (Exhibit ARG-51).

[262] *Decision Memorandum*, at 5 (Exhibit ARG-51).

[263] *Decision Memorandum*, at 5 (Exhibit ARG-51).

with Article 2.1 of the AD Agreement in a sunset review.[264] Argentina is wrong, because Article 12.2.2 does not impose any such substantive obligations.

247. Article 12.2.2 is a notice and report provision that requires an authority to provide explanations regarding matters of fact and law, the reasons or bases for any determinations, as well as the reasons for the acceptance and rejection of arguments and claims made in the proceeding. Article 12.2.2 does not contain substantive obligations for the conduct of, or for the methodologies to be used, in a sunset review. Nothing in Article 12 generally or Article 12.2.2 specifically contains any substantive provisions regarding the methodologies or analysis to be employed in making the determination of whether dumping and injury is likely to continue or recur.

248. In the past, attempts to read substantive obligations into Article 11.3 on the basis of unrelated requirements in Article 12 have been rejected.[265] The Panel should similarly reject Argentina's attempt to do so here.

D. COMMERCE'S ANALYSIS OF DUMPING IN THE CONTEXT OF THE LIKELIHOOD AND "MARGIN LIKELY TO PREVAIL" DETERMINATIONS IN THE SUNSET REVIEW ON OCTG FROM ARGENTINA WERE NOT INCONSISTENT WITH ARTICLE 11.3 OF THE AD AGREEMENT

249. Argentina claims that in the sunset review on OCTG from Argentina, Commerce was obligated, under Articles 2, 6, and 11.3 of the AD Agreement, to calculate and base its likelihood determination on a current and future amount of dumping.[266] As demonstrated below, Argentina is wrong.

1. Article 11.3 does not require a quantification of dumping or the use of any particular methodology for making the likelihood determination

250. Customary rules of interpretation of public international law dictate that the words of a treaty form the starting point for the process of interpretation. The text of Article 11.3 provides that a definitive anti-dumping duty must be terminated after five years unless the authorities determine that "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury." The focus of a sunset review under Article 11.3 is on future behaviour; *i.e.*, whether dumping and injury are likely to continue or recur in the event of expiry of the duty, not whether or to what extent dumping or injury currently exists. Thus, neither the precise amount of dumping in any one year, nor the precise amount of likely future dumping, is of central significance to the results of the review; indeed, such precision is certainly not required.[267]

251. Under Article 11.3, authorities are required to determine whether continuation or recurrence of dumping is likely. Article 11.3 does not, however, set forth a methodology to be used in performing this likelihood analysis. Nor does Article 11.3 require quantification of past or future amounts of dumping. This is reinforced by note 22 of Article 11.3, which provides that "[w]hen the

[264] Argentina's first submission, para. 179, 180.

[265] *US - German Steel*, para. 112 (finding that Article 22.1, the provision in the SCM Agreement corresponding to Article 12.1 of the AD Agreement, does not establish evidentiary standards applicable to the initiation of sunset reviews); and *US - Japan Sunset*, para. 7.33 (Article 12.1 does not establish evidentiary standards applicable to the initiation of sunset reviews).

[266] Argentina's first submission, paras. 181-196.

[267] See, e.g., *United States - Anti-Dumping Duty on Dynamic Random Access Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, Report of the Panel adopted 19 March 1999, para. 6.43 [hereinafter *Korea – DRAMS*] (discussing prospective analysis, albeit in the context of a different type of review). Although there is no requirement to quantify the amount of dumping likely to continue or recur, as discussed below, the United States does so under its domestic law. Commerce transmits this information to the ITC.

amount of the anti-dumping duty is determined on a retrospective basis, a finding in the most recent assessment proceeding ... that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty." No specific amount of dumping – even the most current – is decisive as to whether dumping is likely to continue or recur.

252. Argentina claims that the rules of Article 2 apply in their entirety to sunset reviews conducted under Article 11.3 because Article 11.3 requires a determination whether "dumping" is likely.[268] While correct that the term "dumping" appears in both Article 2 and Article 11.3, Argentina incorrectly ascribes all of the obligations contained in Article 2 to sunset reviews under Article 11.3.

253. As its heading indicates, Article 2 sets forth obligations concerning the "Determination of Dumping." Within Article 2, Article 2.1 provides the general definition that a product is considered to be "dumped" where the export price of that product is less than the comparable price in the comparison market. The remaining provisions of Article 2 set forth, in significant detail, how the margin of dumping, *i.e.* the amount of dumping, is to be calculated.

254. Article 11.3 requires that an authority determine whether "expiry of the duty would be likely to lead to continuation or recurrence of dumping ... ." In other words, Article 11.3 requires a determination whether *dumping* is likely to recur – dumping, as defined by Article 2.1, meaning generally that the export price of a product is less than the normal value of that product. Article 11.3 does not require a determination that a particular *amount of dumping* is likely to continue or recur in the future, *i.e.*, if and when the duty is terminated – for the very reason that it would be impossible to make such a determination.

255. A determination of dumping consistent with the Article 2 rules requires, *inter alia*, that actual amounts of prices, costs, and profit be used in the proscribed calculation methodology. In a sunset review, an authority is considering what will happen in the future. It is self-evident that there are no values for prices, costs, and profits that have not yet occurred. Argentina's claim, that the requirements of Article 2 literally apply in a sunset review under Article 11.3, fails for this very reason.

256. This is not to say that Article 2 has no implications or application in Article 11.3 sunset reviews. As previously noted, Article 2.1 provides that, for the purposes of the AD Agreement, a product is considered to be "dumped" where the export price of that product is less than the comparable price in the comparison market. Article 2, therefore, provides the general meaning of the term "dumping" as it is used throughout the AD Agreement, including in Article 11.3. The panel in *US – Japan Sunset* reached this same conclusion.[269]

257. In the instant review, Commerce considered evidence that dumping continued over the life of the order and that import volumes declined significantly after the imposition of that order. As a result, Commerce found that dumping was likely to continue or recur in the future if the order were terminated. Nothing more is required under Article 11.3.

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[268] Argentina's first submission, paras. 182, 183.

[269] *US – Japan Sunset*, para. 7.168 ("We thus do not believe that the substantive disciplines in Article 2 governing the calculation of dumping margins in making a *determination of* dumping apply in making a *determination of likelihood of continuation or recurrence of* dumping under Article 11.3."). In so stating, the panel was drawing the distinction between the obligation to calculate a margin of dumping in accordance with the methodologies proscribed by Article 2 – *i.e.* to determine the magnitude of the margin of dumping – and the obligation in a sunset review under Article 11.3 to make a determination of the likelihood that "dumping" – *i.e.*, the mere existence of dumping – would be likely to continue or recur if the duty were to expire.

2. The margins determined in Commerce's original investigation, and the methodologies used to derive them, cannot be challenged before this Panel

258. Argentina maintains that the margin calculations in the investigation, which were considered by Commerce in making its sunset determinations, were performed in a manner that was inconsistent with WTO requirements, particularly the requirements of Article 2. Those specific margins and the methodologies used to derive them, however, cannot now be challenged before this Panel.

259. Article 18.3 of the AD Agreement provides that "the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement." The AD Agreement thus applies only to investigations that were based on US dumping petitions filed after 1 January 1995, the date of entry into force of the WTO Agreement with respect to the United States. The anti-dumping investigation in this case was initiated on the basis of a petition filed prior to 1 January 1995. Thus, the specific margins calculated by Commerce in the original investigation, and the calculation methodologies used to derive them, cannot be challenged before this Panel.

260. An analogous situation was presented in *Korea DRAMs*. In that case, the United States maintained that a WTO dispute arising out of the final results of the third administrative review of the order did not provide an appropriate forum in which to challenge a product scope determination made during the original investigation. The United States pointed out that (1) the product scope determination had been made in an investigation prior to the creation of the WTO and the entry into force of the AD Agreement, and (2) product scope issues were not revisited during the third administrative review. The United States asserted, therefore, that claims regarding product scope were inadmissible under Article 18.3 of the AD Agreement. The panel agreed with the United States, finding that the AD Agreement applies only to those parts of a pre-WTO measure that "are included in the scope of a post-WTO review."[270] In the instant case, the specific amounts of the original dumping margins were not revisited in the sunset review. Consequently, those margins, and the methodologies used to derive them, cannot be challenged before this Panel.

3. Commerce fully complied with its obligations under the AD Agreement in making the affirmative likelihood determination

261. Argentina claims that Commerce's likelihood determination was not based on "positive evidence" and that, as a result, Commerce's sunset review proceeding on OCTG from Argentina violated Article 6 obligations regarding evidence and procedure.[271] As discussed above, Argentina's Article 6 claims relating to Siderca's participation in the sunset review are based on an incorrect factual premise, because Commerce found that Siderca had filed a complete substantive response and did not find that Siderca had waived its rights to participate in the sunset review. In addition, Commerce afforded Siderca and the other Argentine producers/exporters opportunities to supply whatever comment, argument, or information they wished in defence of their interests in the sunset review of OCTG from Argentina in accordance with sections 351.218(d)(3)(ii)(G) and 351.218(d)(3)(iv)(B) of Commerce's Sunset Regulations.[272]

262. Indeed, Commerce's sunset questionnaire explicitly requests that interested parties, which would include Siderca and the Argentine OCTG exporters, provide "[a] statement regarding the likely

[270] *Korea DRAMs*, para. 6.14.
[271] Argentina's first submission, para. 187.
[272] 19 C.F.R. § 351.218(d)(3)(ii)(G) (interested party is required to provide, in its substantive response, factual information, argument, and reason concerning the dumping margin likely to prevail for that party if the order is revoked); 19 C.F.R. § 351.218(d)(3)(iv)(B) (provides for submission of "any other relevant information that the party would like [Commerce] to consider.") (Exhibit ARG-3).

effects of revocation of the order . . . , which must include any factual information, argument, and reason to support such statement."[273] Commerce requested information from Siderca and the Argentine exporters and the fact that Siderca failed to answer the questions in a more thorough manner is not an error that can be ascribed to Commerce.

263. As detailed above, Commerce considered the margins from the original investigation and the information submitted by the interested parties in the sunset review proceeding. Commerce reasonably found that the existence of dumping margins and depressed import volumes since the imposition of the duty indicated that it was likely that dumping of OCTG from Argentina would continue or recur if the order were revoked.[274] There is no indication that the quality of the evidence considered for the final sunset determination was compromised in any way. Thus, Commerce's examination of whether revocation of the order would be likely to lead to the continuation or recurrence of dumping was based on credible and undisputed evidence, and the sunset review proceeding in OCTG from Argentina complied with the obligation contained in Article 6.

264. Argentina makes a series of unsupported and unsubstantiated claims that Commerce's affirmative likelihood determination in the OCTG sunset review violated Articles 2 , 6 and 11.3 of the AD agreement.[275] First, Argentina claims that Commerce cannot rely on "5 year old data from an original investigation" because a likelihood determination under Article 11.3 requires "fresh" data indicating the likelihood of future dumping.[276] Argentina does not explain what "fresh" data need be collected or how this information may be indicative of future dumping. Indeed, nothing in Article 11.3 dictates the information that an authority must gather, or the methodologies that it must employ, to determine the likelihood of continuation or recurrence of dumping.

265. Argentina also overlooks the fact that Commerce based its likelihood determination on evidence concerning import volumes over the life of the order and the information supplied by the interested parties, in addition to the dumping margins found in the original investigation. Moreover, "current information" is not the issue in a sunset review conducted pursuant to Article 11.3.[277] Rather, the issue under Article 11.3 is whether dumping and injury are likely to continue or recur in the event of the expiry of the duty, an inherently forward-looking inquiry.

266. Argentina also claims that the evidence supporting an affirmative likelihood determination made under Article 11.3 must indicate that dumping in the future is "probable," not just "possible."[278] In this regard, Argentina appears to claim that Commerce's likelihood determination is not supported by evidence demonstrating that there is a probability that dumping will continue or recur if the order were revoked. In its written submission to this Panel, Argentina does not explain how Commerce's likelihood determination fails to meet this "standard."[279] Nevertheless, as explained above, Commerce found that the existence of dumping margins over the life of the order and the depressed import volumes since the imposition of the duty were highly probative of the future behaviour of Argentine exporters of OCTG.[280] Nothing submitted by the interested parties nor any other information on the record of the sunset review of OCTG from Argentina contradicts these findings.

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[273] 19 C.F.R. § 351.218(d)(3)(ii)(F) (Exhibit ARG-3).

[274] *Decision Memorandum*, at 4-5 (Exhibit ARG-51).

[275] Argentina's first submission, paras. 182-188.

[276] Argentina's first submission, para. 184.

[277] *See* footnote 22, Article 11.3 of the AD Agreement, stating that "a finding in the most recent assessment proceeding . . . that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty."

[278] Argentina's first submission, para. 186.

[279] *See* Argentina's first submission, paras. 182 and 187.

[280] *Decision Memorandum*, at 5 (Exhibit ARG-51).

4. There is no obligation under Article 11.3 of the AD Agreement to calculate or consider a margin likely to prevail upon expiry of the duty

267. Under US law, Commerce is required to determine whether the expiry of the duty is likely to lead to continuation or recurrence of dumping. If Commerce's likelihood determination is affirmative, it must report to the ITC the magnitude of the margin likely to prevail.[281] In making the sunset injury determination, the ITC "may consider the magnitude of the margin of dumping."[282] The fact that Commerce reports a margin to the ITC is a construct of US law, however, and not an obligation imposed by the AD Agreement.

268. Argentina maintains that, pursuant to Article 2 and Article 11.3, as applied in the instant case, the margins reported to the ITC as the rates of dumping likely to prevail in the event of revocation were improperly identified by Commerce.[283] Argentina is wrong, because there simply is no obligation under the AD Agreement to consider the magnitude of the margin likely to prevail in determining likelihood of continuation or recurrence of injury in a sunset review under Article 11.3. For this reason, the Panel should not and need not consider Argentina's arguments concerning the manner in which Commerce identified the margins that it reported to the ITC.

E. THE PANEL SHOULD REJECT ARGENTINA'S CLAIM UNDER ARTICLE X:3(A) OF GATT 1994

269. Having failed to demonstrate that US law and the application of that law are contrary to the AD Agreement, in Section VII.E of its First Submission, Argentina attempts to recycle its claims one last time by turning to Article X:3(a) of the GATT 1994. Argentina seems to allege that even if the Panel finds that none of the "measures" identified by Argentina are inconsistent – either as such or as applied – with any of the provisions of the AD Agreement cited by Argentina, the Panel nonetheless should find that these "measures" are inconsistent with the Article X:3(a) requirement that certain laws, regulations, judicial decisions and administrative rulings of general application be administered in a uniform, impartial, and reasonable manner.

270. At the outset, the United States reiterates that this claim is not within the Panel's terms of reference. In Section A.4 of Argentina's panel request, the claim under Article X:3(a) is made with respect to the specific Commerce sunset determination in OCTG from Argentina. Nevertheless, Argentina fails to demonstrate that Commerce has not administered US sunset review laws and regulations in a uniform, impartial and reasonable manner.

271. Focusing on the ordinary meaning of Article X:3(a)'s terms, "uniform" is defined as "[o]f one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times."[284] Interpreting the same provision in a challenge to Argentina's administration of its customs laws, a panel explained that the term "uniform" means that the

> laws should not vary, that every exporter and importer should be able to expect treatment of the same kind, in the same manner both over time and in different places and with respect to other persons. Uniform administration requires that Members ensure that their laws are applied consistently and predictably ... . This is a requirement of uniform administration of ... laws and procedures between individual

[281] Section 752(c)(3) (Exhibit ARG-1).
[282] Section 752(a)(6) (Exhibit ARG-1).
[283] Argentina's first submission, paras. 189-193.
[284] *New Shorter Oxford English Dictionary* 3488 (1993).

> shippers and even with respect to the same person at different times and different places.[285]

272. "Impartial" means "[n]ot partial; not favouring one party or side more than another; unprejudiced, unbiased; fair."[286] Treatment in an unbiased and fair manner is distinguishable from identical treatment. For example, the panel in *US – Japan Sunset* rejected Japan's contention that requiring foreign producers/exporters to provide more information than domestic produces in Commerce's sunset review resulted in the partial administration of US sunset laws.[287] The panel explained that because "foreign exporters will be the main source of information regarding dumping, or likelihood of continuation or recurrence of dumping," the quantity of information required from foreign exporters will necessarily differ.[288]

273. "Reasonable" means "[i]n accordance with reason; not irrational or absurd."[289] In *Argentina – Bovine Hides*, the panel found the administration of Argentine customs law unreasonable because there was "no reason" for allowing Argentinean hide buyers to see documents containing their customers' business confidential information.[290]

274. Taken together the terms of Article X:3(a) require, that in administering US sunset review laws and regulations, Commerce must act in a manner that is consistent, unbiased and not irrational or absurd. As to the first of these requirements, one of Argentina's principal claims is that the various "measures" alleged by Argentina "establish an irrefutable presumption, as demonstrated by [Commerce's] consistent practice, that is inconsistent with Article 11.3."[291] Needless to say, it strains logic to understand how Argentina can sustain a claim that Commerce has violated Article X:3(a)'s demand for consistent application of sunset review laws and regulations when, at the same time, Argentina complains about Commerce's "consistent practice."

275. With respect to the requirements for an impartial and reasonable administration of US sunset laws and regulations, Argentina has provided no evidence of bias or that Commerce has administered US laws and regulations in an irrational or absurd manner. As demonstrated above, Argentina's "irrefutable presumption" does not exist, and a deconstruction of Argentina's "analysis" of 291 Commerce sunset reviews shows that in 87 per cent of the cases, the issue of likelihood of dumping simply was not contested. In the 13 per cent of the cases where likelihood was contested, Argentina provides no evidence – let alone proves – that those cases were decided in an impartial or unreasonable manner.

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[285] *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, Report of the Panel adopted 16 February 2001, para. 11.83 [hereinafter "*Argentina - Bovine Hides*"].

[286] *New Shorter Oxford English Dictionary* 1318 (1993).

[287] *US – Japan Sunset*, para. 7.306.

[288] *Id; see also Argentina – Bovine Hides* Panel Report, paras 11.99-.101 (finding that in providing private parties access to confidential business information of parties with conflicting commercial interests constituted a partial administration of Argentine customs laws).

[289] *New Shorter Oxford English Dictionary* 2496 (1993).

[290] *Argentina – Bovine Hides*, paras. 11.87, 11.91-.92.

[291] Argentina's first submission, para. 194.

F. THE ITC APPLIED THE CORRECT STANDARD FOR DETERMINING WHETHER TERMINATION OF THE ANTI-DUMPING DUTY ORDER WOULD BE LIKELY TO LEAD TO CONTINUATION OR RECURRENCE OF INJURY, AND THE ITC'S DETERMINATION OF LIKELIHOOD IN THE SUNSET REVIEW OF OCTG FROM ARGENTINA WAS CONSISTENT WITH ARTICLE 11. 3 AND ARTICLE 3.1 OF THE AD AGREEMENT

276. Argentina argues that the ITC's application of the standard for determining whether revocation of the anti-dumping order would be likely to lead to continuation or recurrence of injury was inconsistent with AD Agreement Article 11.3 because the ITC failed to apply the ordinary meaning of the term "likely." Argentina's argument that the ITC misinterpreted the word "likely" in Article 11.3 rests on two premises: first, that "likely" can only mean probable; and second, that the ITC disregarded this meaning and interpreted "likely" to mean "possible."[292] Neither of these premises is correct. Argentina also asserts, incorrectly, that the SAA directs the ITC to apply a standard that is inconsistent with Article 11.3.

277. Before turning to the interpretation of the word "likely" itself, it is worth recalling the fundamental nature of the inquiry called for by a sunset review. The determination of whether revocation of an order "would be likely to lead to" continuation or recurrence of injury is an inherently predictive inquiry. In this respect, as the Appellate Body has already recognized in the context of countervailing duty proceedings, a sunset review is fundamentally different from an original investigation:[293]

> We further observe that original investigations and sunset reviews are distinct processes with different purposes. The nature of the determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation. For example, in a sunset review, the authorities are called upon to focus their inquiry on what would happen if an existing countervailing duty were to be removed. In contrast, in an original investigation, the authorities must investigate the existence, degree and effect of any alleged subsidy in order to determine whether a subsidy exists and whether such subsidy is causing injury to the domestic industry so as to warrant imposition of a countervailing duty.

278. The panel in *US – Japan Sunset* also explained:[294]

> [O]riginal investigations and sunset reviews are distinct processes with different purposes, and that the text of the *Anti-Dumping Agreement* distinguishes between investigations and reviews. We base our view on several elements, not least that under the text of the Anti-Dumping Agreement, the nature of the determination to be made in a sunset review differs in certain fundamental respects from the nature of the determination to be made in an original investigation.

279. Thus, a sunset review – whether of a countervailing duty or anti-dumping duty order – necessarily involves less certainty and precision than would be attainable in an original investigation based on a retrospective analysis.[295] For example, in an original anti-dumping investigation, authorities examine the current condition of an industry without the benefit of an order in place to

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[292] Argentina's submission is confusing on this point. In some places it asserts that the ITC used a standard based on injury being "possible." Argentina's first submission, paras. 213, 214, 215, and 222. Elsewhere, Argentina refers to the ITC's application of a standard that "falls in between 'probable' and 'possible' on a continuum of relative certainty." Argentina's first submission, paras. 211 and 221.

[293] *US – German Steel*, para. 87.

[294] *US – Japan Sunset*, para. 7.8.

[295] *See US – Japan Sunset*, para. 7.178.

determine whether dumped imports are causing, or threatening to cause, material injury. In an original investigation, the condition of the industry is determined, *inter alia*, on the basis of existing evidence quantifying the domestic industry's sales, profits, output, operating income, market share, productivity, return on investment, capacity utilization, inventories and employment rates.

280. In a sunset review, on the other hand, authorities, in deciding whether to revoke the order, examine the likely volume of imports in the future that have been restrained by the discipline of the order and the likely impact in the future of that volume on a domestic industry that has enjoyed the benefit of an anti-dumping order for the past five years. Because of the presence of the order, it may be the case that at the time of a sunset review, dumped imports have ceased and the domestic industry is no longer experiencing, or being threatened with, material injury. In a sunset review, the investigating authority does not have the benefit of existing evidence regarding the future state of the domestic industry. Rather, in a sunset review, the investigating authority must engage in counterfactual analysis to determine whether a prospective change in the status quo – *i.e.*, revocation of the order – would be likely to lead to continuation or recurrence of injury. Thus, a determination of likelihood inherently involves less certainty and exactness than in an original investigation. "In light of the fundamental qualitative differences in the nature of these two distinct processes, . . . it [is] not . . . surprising . . . that the textual obligations pertaining to each of the two processes may differ."[296]

281. In the sunset review on OCTG, the ITC applied the standard set out in both Article 11.3 and US law. Specifically, the ITC determined whether revocation of the anti-dumping and countervailing duty orders would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[297] As an aid to determining whether revocation would be likely to lead to continuation or recurrence of injury, the US statute requires the ITC to consider, *inter alia*, "the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked ... ."[298] In this case, the ITC examined each of these factors. For example, with respect to likely volume, the ITC found that the significant increases in import volume during the original investigation, substantial excess capacity in several of the subject countries, and a strong incentive on the part of producers in several of the subject countries to establish a significant presence in the large, relatively higher-priced US market, among other things, supported the conclusion that "in the absence of the orders, the likely volume of cumulated subject imports, both in absolute terms and as a share of the US market, would be significant."[299] In other words, the text of the ITC analysis shows that it expected injury to recur if the anti-dumping orders were to be revoked. The ITC did not find merely that injury was possible. Thus it is clear that the ITC properly applied the standard set out in Article 11.3. There is nothing in the determination to indicate that the ITC applied any standard other than the Article 11.3 standard.

282. This brings us back to the meaning of the word "likely." Argentina's claim that the ITC applied the wrong standard in its sunset review in the OCTG case is based on Argentina's assertion that the term "likely" must be interpreted to mean "probable." Article 11.3 does not use the word "probable." It refers to "likely," which is the term used in the US statute and the term used by the ITC. It is incorrect to conclude that "likely" can only mean "probable." Dictionaries define "likely" in various ways.[300] Thus seeking a synonym for "likely" as Argentina does would not advance the understanding of that term.

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[296] *US – Japan Sunset*, para. 7.8.

[297] ITC Report at 1.

[298] 19 USC. §1675a(a) (Exhibit ARG-1).

[299] ITC Report at 20.

[300] *See, e.g.*, *Ballentine's Law Dictionary* (3d ed. 1969) ("likely" is "not more than 'probable' and sometimes less than 'probable' depending upon the context," "the word 'likely' is used in the sense of sometimes more than possible, and less than probable") (Exhibit US-13); *The Random House Dictionary of the English Language* (1966) (likely means "seeming to fulfil requirements or expectations") (Exhibit US-14); *The*

283. It is true that the US Court of International Trade, in interpreting "likely" under US law, has found "probable" to be a synonym for "likely."[301] However, contrary to Argentina's suggestion that "probable" entails a higher degree of certainty than employed by the ITC, the Court has stated that it "has not interpreted 'likely' to imply any degree of certainty."[302] Therefore, on remand from the Court to apply the "likely" standard consistent with the Court's articulation, the ITC's determinations did not change.[303] Moreover, the one ITC remand determination reviewed by the Court on this question was affirmed.[304]

284. Argentina is also incorrect in arguing that, based on guidance from the SAA, the ITC applies a standard in which any determination – affirmative or negative – is permissible.[305] The SAA simply recognizes the inherently predictive nature of the inquiry involved in a sunset review, explaining that "[t]here may be *more than one* likely outcome following revocation."[306] The SAA explains further that

> [t]he possibility of other likely outcomes does not mean that a determination that revocation . . . is likely to lead to continuation or recurrence of . . . injury . . . is erroneous, as long as the determination of likelihood of continuation or recurrence is reasonable in light of the facts of the case.[307]

285. The SAA thus does nothing more than explain that the "likely" standard in sunset reviews does not mean that a continuation or recurrence of injury must be inevitable. The SAA simply recognizes that there may be more than one possible outcome when projecting into the future. Contrary to Argentina's assertion, the SAA does not direct the ITC to apply a standard that is inconsistent with Article 11.3. Moreover, the ITC has never interpreted "likely" to mean "possible."

286. For the foregoing reasons, the ITC applied the correct standard for determining whether termination of the anti-dumping duty orders at issue would be likely to lead to continuation or recurrence of injury, and the ITC's determination was otherwise consistent with Article 11. 3 of the AD Agreement.

G. ARTICLE 3 DOES NOT APPLY TO SUNSET REVIEWS

287. Argentina asserts that Article 3 of the AD Agreement applies in its entirety to sunset reviews conducted under Article 11.3.[308] Argentina also claims that in its sunset review in the OCTG case, the ITC acted inconsistently with specific paragraphs of Article 3.

288. This series of claims by Argentina is premised on the notion that Article 3 does, in fact, apply to sunset reviews under Article 11.3. In this section, the United States explains why this fundamental

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American Heritage Dictionary of the English Language (3rd ed.) (likely means "[w]ithin the realm of credibility; plausible") (Exhibit US-15); *Webster's Third New Int'l Dictionary of the English Language* (1981) (unabridged) (likely means "having a better chance of occurring than not") (Exhibit US-16).

[301] *Usinor Industeel v. United States*, Slip Op. 02-70, at 43-44 (CIT 19 July 2002) (Exhibit US-17).

[302] *Usinor Industeel v. United States*, Slip Op. 02-152 at 6 (CIT 20 December 2002) (Exhibit US-18).

[303] *Usinor Remand Determination* at 14 (USITC July 2002) (Exhibit US-19).

[304] *Usinor Industeel v. United States*, Slip Op. 02-152 at 24 (20 December 2002) (US-18).

[305] Argentina's first submission, para. 215.

[306] SAA at 883 (emphasis added) (Exhibit US-11).

[307] *Id*.

[308] Argentina's first submission, para. 234.

premise is wrong, and that Article 3 does *not* apply to sunset reviews. In subsequent sections, the United States will address Argentina's claims concerning specific paragraphs of Article 3.

289. The inapplicability of Article 3 to sunset reviews under Article 11.3 is clear based on an analysis of the text of these treaty provisions. First, Article 3 addresses a "determination of injury," whereas Article 11.3 calls for a determination of "recurrence of injury." The nature of the two determinations are entirely different, as explained below.[309] Moreover, there are no cross-references in Article 3 to Article 11, or in Article 11 to Article 3.

290. Argentina relies on footnote 9 to Article 3 to support its position that Article 3 applies to sunset reviews.[310] The language of footnote 9 proves just the opposite. Footnote 9 states:

> Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

291. The text of footnote 9 to Article 3 existed in its present form in the Tokyo Round Anti-Dumping Code prior to the adoption of the Article 11.3 provision for sunset reviews at the conclusion of the Uruguay Round, with the only exception that the prior text referred to the "Code," whereas footnote 9 refers to the "Agreement."[311] Further, footnote 9, like its precursor in the Anti-Dumping Code, is simply a drafting device that avoids unnecessary repetitions of the principle that actionable injury can take any of three distinct forms: present injury, threat of material injury, or material retardation of the establishment of an industry.

292. It is clear that (i) "material injury," (ii) "threat of material injury," (iii) "material retardation of the establishment of a domestic industry," and (iv) the likelihood of "continuation or recurrence of . . . injury" are each separate conditions, with separate elements, some of which are specified in the AD Agreement and some of which are implied. The drafters of the AD Agreement had the option of including the "likelihood of continuation or recurrence of injury" condition in footnote 9, but chose not to do so.

293. Applying the definition of "injury" in footnote 9 to the determination of "recurrence of injury" in Article 11.3 – as Argentina would have it – would lead to absurd results. It would mean that the inquiry in a sunset review would become whether expiry of the duty would be likely to lead to *continuation or recurrence of* material injury to a domestic industry, *threat of material injury to a domestic industry or material retardation of the establishment* of such an industry. Article 11.3 does not contemplate determinations of a continuation or recurrence of threat or material retardation as a basis for continuing to apply an anti-dumping duty after a sunset review.

294. Another textual indication that footnote 9 does not apply to sunset reviews is the phrase "unless otherwise specified" in the footnote. Article 11.3 does specify otherwise: it states that in a sunset review investigating authorities are to determine the likelihood of a continuation or recurrence of injury, rather than engage in a "determination of injury" within the meaning of footnote 9 to Article 3.

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[309] *Cf. US – Japan Sunset*, para. 7.167 (stating that there is a "substantial difference" between the reference in Article 11.3 to a determination of likelihood of continuation or recurrence of dumping and the reference in Article 2 to a determination of dumping).

[310] Argentina's first submission, para. 234.

[311] In the AD Code, the footnote was footnote 2 to Article 3.

295. In addition, footnote 9 is attached to the heading of Article 3, which is "Determination of Injury," and Article 3.1 speaks of – presumably – the same "injury" as a "determination of injury for purposes of Article VI of GATT 1994." Article VI of GATT 1994 does not mention sunset reviews, thereby further reinforcing the conclusion that footnote 9 does not apply to sunset reviews.

296. The inapplicability of Article 3 to sunset reviews under Article 11.3 is further underscored by the absence of any cross-references in Article 11.3 to Article 3. The existence of cross-references in paragraphs 4 and 5 of Article 11 to other articles of the AD Agreement indicate that the drafters would have been explicit had they intended to make the disciplines of Article 3 applicable to sunset reviews.[312]

297. The fact that Article 3 does not apply to sunset reviews is clear not only from the text of the AD Agreement, but also in view of the nature of a sunset review. As mentioned previously, the focus of a review under Article 11.3 differs from that of an original investigation under Article 3. As the Appellate Body observed in the context of sunset reviews under the SCM Agreement: "original investigations and sunset reviews are distinct processes with different purposes."[313] The difference between the nature and practicalities of the inquiry in an original investigation and of the inquiry in a sunset review demonstrate that the tests for each cannot be identical.

298. In an original investigation, the investigating authorities examine the current condition of an industry that has been exposed to the effects of unrestrained, dumped imports that are competing without remedial measures in place. In doing so, the authorities must examine the volume, price effects and impact of the unrestrained imports on a domestic industry that may be indicative of present injury or threat of material injury.

299. Five years later, in an Article 11.3 sunset review, the investigating authorities must determine whether "expiry of the duty would be likely to lead to continuation or recurrence of . . . injury." Under US law, the ITC examines the *likely* volume of imports *in the future* that have been restrained for the last five years by the anti-dumping duty order, the *likely* price effects *in the future* of such imports, and the *likely* impact of the imports *in the future* on the domestic industry that has been operating in a market where the remedial order has been in place.

300. As a result of the order, dumped imports may have decreased or exited the market altogether or, if they have maintained their presence in the market, they may be priced higher than they were during the original investigation, when they were entering the market unencumbered by any additional duties. With the presence of the order, it would not be surprising that no injury or causal link presently exist, a fact recognized by the standard of "continuation or recurrence of injury."

301. Thus, the inquiry contemplated pursuant to Article 11.3 is counterfactual in nature, and entails the application of a decidedly different analysis with respect to the volume, price and impact. Indeed, there may no longer be either any subject imports or material injury once an anti-dumping order has been in effect for five years. The authority must then decide the likely impact of a prospective change in the status quo; *i.e.*, the revocation of the anti-dumping duty order and the elimination of its restraining effects on volumes and prices of imports. The differences in the nature and practicalities

[312] *Cf. US – Japan Sunset*, Panel Report para. 7.166 (stating that the existence of cross-references in Articles 11.4 and 11.5 to other articles of the AD Agreement, and the absence of such a cross-reference in Article 11.3 to Article 2, indicates that the disciplines of Article 2 are not applicable to sunset reviews); and *US - German Steel*, para. 69 (stating that the existence of cross-references in the SCM Agreement suggests that when the negotiators of the Agreement intended the disciplines of one provision to apply to another, they expressly provided for such application).

[313] *US - German Steel*, para. 87.

of the inquiry in an original investigation and in a sunset review demonstrate that the requirements for the two inquiries cannot be identical.

302. Although Article 3 does not apply to sunset reviews, the United States recognizes that some of the provisions of Article 3 may provide guidance as to the type of information that may be relevant to the examination in a sunset review of whether material injury is likely to continue or recur.[314]

H. THE PANEL SHOULD REJECT ARGENTINA'S CLAIMS UNDER ARTICLE 3.1 OF THE AD AGREEMENT

303. In Section VIII.B of its First Submission, Argentina claims that in its sunset review of OCTG from Argentina, the ITC failed to conduct an "objective examination" and failed to base its determination on "positive evidence" as required by Article 3.1 of the AD Agreement. The Panel should reject Argentina's claims, because: (1) Article 3.1 does not apply to sunset review under Article 11.3; and (2) assuming *arguendo* that Article 3.1 does apply to sunset reviews, the ITC did not act inconsistently with Article 3.1.

1. Article 3.1 does not apply to sunset reviews

304. Argentina claims concerning Article 3.1 are premised on the notion that Article 3.1 applies to sunset reviews. Article 3.1 provides as follows:

> A determination of injury for purposes of Article VI of the GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of dumped imports and the effect of dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

305. As explained above, the provisions of Article 3 are not applicable to sunset reviews. In addition to the reasons given above, there are further textual indications in Article 3.1 as to why it specifically is not applicable to sunset reviews. In a sunset review, authorities are required to evaluate the likelihood in the future of a continuation or recurrence of injury if the dumping order is lifted. Imports may not even be present in the market at the time of the sunset review, and they may not be sold at dumped prices. How then can investigating authorities comply with Article 3.1 and examine "the volume of dumped imports and the effect of dumped imports on prices?" It is apparent that the requirements of Article 3.1 do not apply to sunset reviews because the dictates of Article 3.1 are potentially incompatible with the nature of the inquiry in a sunset review.

306. The panel and Appellate Body reports that Argentina relies on are either not relevant or not conclusive on the question of whether Article 3.1 applies to sunset reviews. Argentina quotes the Appellate Body report in *Thai Angles* to the effect that "the obligations in Article 3.1 apply to *all* injury determinations undertaken by Members."[315] Argentina takes this statement out of context, however. *Thai Angles* did not involve a sunset review, and thus the applicability of Article 3 to Article 11.3 was not before the Appellate Body. The fact that Article 3.1 applies to all "injury" determinations does not mean that it also applies to all "continuation or recurrence of injury" determinations.

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[314] *Cf. US – Japan Sunset*, paras. 7.174 and 7.176 (stating that, although Article 2 does not apply to sunset reviews, it "provides guidance" as to, or "may inform," the type of information that may be relevant to a sunset review examination of the presence or absence of dumping since imposition of the order).

[315] Argentina's first submission, para. 234, quoting from *Thai Angles (AB)*, para. 114 (emphasis added by Argentina).

307. Argentina relies also on *US - Japan Sunset*, but as Argentina itself acknowledges, the panel made no definite finding in that report concerning the applicability of the provisions of Article 3 to sunset reviews under Article 11.3.[316] Finally, Argentina relies on the Appellate Body report in *Hot-Rolled Steel from Japan.*[317] This report discusses the relevance of Article 3.1 to the more detailed obligations in the rest of Article 3, and it elaborates on the meaning of the terms "positive evidence" and "objective examination," but it does not address the question of the applicability of the provisions of Article 3 to Article 11 (nor could it as the dispute did not involve a sunset review). There is no merit to Argentina's suggestion that any of the cited WTO reports supports the applicability of Article 3 disciplines to sunset reviews.

2. The ITC's Sunset Determination was consistent with Article 3.1, because it was based on a proper establishment of the relevant facts, an unbiased and objective evaluation of those facts, and positive evidence

308. The United States recognizes that an authority's establishment of the facts in a sunset review must be "proper," that the evaluation of those facts must be "unbiased and objective,"[318] and that the determination of whether expiry of the duty would be likely to lead to continuation or recurrence of injury should be based on positive evidence.[319]

309. Argentina argues that the ITC failed to conduct an "objective examination" based on "positive evidence" in accordance with Article 3.1. As explained above, Article 3.1 does not apply to sunset reviews. Nonetheless, the ITC's sunset determination was based on a proper establishment of the relevant facts and an unbiased and objective evaluation of those facts, was based on positive evidence, and, accordingly, effectively satisfies the requirements of Article 3.1, were that provision applicable.

310. The Appellate Body has explained that an objective examination is one that is made in "an unbiased manner, without favouring the interests of any interested party, or group of interested parties"[320] and that "positive evidence" relates to the "quality of the evidence" such that it must be "of an affirmative, objective and verifiable character, and that it must be credible."[321] As discussed below, the ITC carefully reviewed an extensive array of factors and evidence relative to the likely volume, price effect and impact of dumped imports on the domestic industry. Argentina has failed to show that the ITC's determination was biased in favour of any interested party or that the quality of the evidence considered was compromised in any way.[322]

311. Indeed, the Argentine respondent's arguments before the ITC in the sunset proceeding did not involve claims of bias or any flaw in the quality of existing evidence. That the ITC may have attributed a different weight or meaning to record evidence than the Argentine respondent would have preferred, does not go to whether the ITC conducted an "objective" examination based on "positive" evidence.[323]

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[316] Argentina's first submission, paras. 235 and 239.

[317] Argentina's first submission, paras 234 and 237, discussing *US - Hot-Rolled Steel*.

[318] AD Agreement, Article 17.6(i).

[319] *US – Japan Sunset*, para. 7.177.

[320] *US – Hot-Rolled Steel*, para. 193; *EC – Pipe Fittings*, para. 132.

[321] *US – Hot-Rolled Steel*, para. 192; *EC – Pipe Fittings*, para. 132.

[322] Indeed, the ITC made a negative likelihood determination with respect to drill pipe, resulting in the partial revocation of the anti-dumping duty order on OCTG from Argentina.

[323] *Cf. EC – Pipe Fittings*, para. 128 (stating, in the context of whether the panel made an "objective" and "unbiased" review pursuant to AD Agreement Article 17.6(i), that it is "not sufficient for [the complaining party] simply to disagree with the Panel's weighing of the evidence" and that a panel does not err in declining "to accord the evidence the weight that one of the parties sought to have accorded to it") (internal quotations and footnotes omitted).

312. Argentina's claims with regard to the likely volume of imports, likely price effects of imports, and likely adverse impact of imports are discussed in turn below.

(a) The ITC's Findings on the Likely Volume of Imports

313. Argentina challenges the ITC's finding that the volume of imports of OCTG casing and tubing would be likely to increase significantly in the event of revocation of the order. Before addressing Argentina's specific arguments, it may be useful to review the basis for the ITC's finding.

314. The ITC first reviewed its findings as to the volume of imports in its original injury determination. In that determination, the ITC found that the rate of increase in the volume of cumulated subject imports was far greater than the overall increase in consumption between 1992 and 1994. The ITC also found that the market share of subject imports by both volume and value rose significantly, nearly doubling from 1992 to 1994, and that domestic producers' market share declined substantially.

315. The ITC noted that after the anti-dumping duty orders went into effect, subject imports decreased, but remained a factor in the US market. The ITC found that while current import volume and market share of subject imports was substantially below the levels of the original investigation, current levels likely reflected the restraining effects of the orders.

316. The ITC considered foreign producers' operations not just with respect to OCTG casing and tubing, but with respect to all pipe and tube products produced on the same machinery and equipment as casing and tubing.[324] It did so because it had found that pipe and tube producers in the subject countries produced a variety of other tubular products in addition to OCTG (such as standard, line, and pressure pipe, mechanical tubing, pressure tubing, and structural pipe and tubing) on the same equipment in the same production facilities. These producers thus could easily shift production away from other tubular products toward production of OCTG and vice versa. Argentina does not challenge this finding. The ITC also found that of all the tubular products that could be produced in these facilities, OCTG commanded among the highest prices in the market, and producers thus had an incentive to make as much OCTG as possible in relation to other products.[325] Again, Argentina does not challenge this finding.

317. The ITC found there to be substantial available capacity in the subject countries for increasing exports of casing and tubing to the United States.

318. With respect to producers in Japan, the ITC noted that in the original investigations, the import volume, market share, and production capacity of casing and tubing from Japan were the largest of the subject countries. During the original investigation, Japanese producers had reported excess capacity. Only one of the four Japanese producers identified in the original investigation participated in the sunset review. (The ITC noted that another of the four original producers, Nippon, may have closed its OCTG plant). The participating producer, NKK, apparently represented a lesser share of total Japanese production. The ITC noted the reported capacity of NKK, and taking into account the fact that other Japanese producers chose not to provide the ITC with data, concluded that there was significant available capacity among other Japanese producers.[326]

319. With respect to producers in Korea, the ITC took note of their unused capacity and compared it in size to total US consumption.[327]

[324] ITC Report at 17.
[325] ITC Report at 16.
[326] ITC Report at 18.
[327] ITC Report at 19.

320. With respect to producers in the other subject countries (Argentina, Italy and Mexico), the ITC recognized that their "recent ... capacity utilization rates represent a potentially important constraint on the ability of these subject producers to increase shipments of casing and tubing to the United States."[328]

321. Despite the apparently high capacity utilization rates of producers in Argentina, Italy and Mexico, the ITC found that these producers, and the producers in Japan and Korea, would have incentives to devote more of their productive capacity to producing and shipping more casing and tubing to the US market, for the following reasons.

322. First, the ITC found that the alliance of five foreign producers known as Tenaris[329] would be likely to have a strong incentive to expand its presence in the United States if the orders were revoked. The ITC's analysis of this issue is worth quoting in full:[330]

> Tenaris is the dominant supplier of OCTG products and related services to all of the world's major oil and gas drilling regions except the United States. Tenaris states that it is the only entity that can serve oil and gas companies on a global basis, and that it seeks worldwide contracts with such companies. Many of Tenaris' existing customers are global oil and gas companies with operations in the United States.[124] While the Tenaris companies seek to downplay the importance of the US market relative to the rest of the world, they acknowledge that it is the largest market for seamless casing and tubing in the world. Given Tenaris' global focus, it likely would have a strong incentive to have a significant presence in the US market, including the supply of its global customers' OCTG requirements in the US market.[126]

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[124] Tenaris argues that the global oil and gas companies with which it has business outside the United States represent only 12-14 per cent of US oil and gas rigs. TAMSA Posthearing Br. Exhibit 3. The domestic industry asserts that these firms have a substantially greater US presence. Domestic Producers' Prehearing Br. at 46. We find that these global companies have a significant US presence using either estimate.

[126] As described above, we do not find that Tenaris' preference to sell directly to end users as opposed to distributors is likely to limit significantly its participation in the US market.

323. The second reason that the ITC found that the subject producers would have an incentive to devote more of their capacity to shipping casing and tubing to the US market is that casing and tubing were among the highest valued pipe and tube products, generating among the highest profit margins.[331] The third factor (related to the second) that the ITC relied on is that prices for casing and tubing on the world market were significantly lower than prices in the United States.[332]

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[328] ITC Report at 19.

[329] The members of Tenaris are: Siderca in Argentina, Dalmine in Italy, TAMSA in Mexico, NKK in Japan, and Algoma in Canada. The ITC found that the Tenaris companies operate as a unit, submitting a single bid for contracts to supply OCTG products and related services; and that Tenaris' customer base includes large multi-national oil and gas companies, many of which have operations in the United States. ITC Report at 16.

[330] ITC Report at 19.

[331] ITC Report at 19.

[332] ITC Report at 19-20.

324. Fourth, the ITC found that subject country producers also faced import barriers in other countries, or on related products. The ITC noted that: (i) Argentine, Japanese, and Mexican producers were subject to anti-dumping duty orders in the United States on seamless standard, line, and pressure pipe (which are produced in the same production facilities as OCTG); (ii) Korean producers were subject to import quotas on welded line pipe shipped to the United States and US anti-dumping duty orders on circular, welded, non-alloy steel pipes; and (iii) Canada imposed an anti-dumping duty of 67 per cent on casing from Korea.[333]

325. The fifth reason that the ITC found that the subject producers would have an incentive to devote more of their capacity to shipping casing and tubing to the US market is that industries in at least some of the subject countries were heavily export-dependent. The ITC noted that Japan and Korea in particular had very small home markets and depended nearly exclusively on exports.[334]

326. Argentina argues that the ITC's analysis of the likely volume of imports is flawed in three respects. None of Argentina's arguments stand up to scrutiny.

327. First, Argentina argues that there was no evidence that Tenaris could re-orient to the United States production that was committed under existing contracts.[335] The record in the OCTG sunset review, however, plainly supports the ITC's finding. As an initial matter, the ITC found – and Argentina does not dispute – that "Tenaris is the dominant supplier of OCTG products and related services to all of the world's major oil and gas drilling regions except the United States."[336] As the only major market not already dominated by Tenaris, the United States represented the best growth opportunity for the Tenaris producers. Given that the United States was by far the largest market for OCTG,[337] Tenaris had a strong incentive to increase its share of the US market.[338]

328. Tenaris's current contracts with its customers also supported this conclusion. Tenaris described itself as the only entity that could serve oil and gas companies on a global basis, and stated that it sought worldwide contracts with such companies.[339] In fact, the Tenaris producers already had contracts with global oil and gas companies that covered all operations outside the United States.[340] Tenaris's own desire for worldwide contracts with its existing customers – which could be satisfied only by contracts that covered the world's largest market for OCTG – constituted a very strong incentive to increase US shipments.[341] While Argentina claims that the ability of the subject

[333] ITC Report at 20.
[334] ITC Report at 20.
[335] Argentina's first submission, para. 244.
[336] ITC Report at 19 (emphasis added).
[337] *Id*. The director of one of the largest distributors of OCTG in the United States testified at the ITC hearing that: "[t]he United States is half the world for the purposes of OCTG and I can guarantee you that none of these producers has overlooked that fact." Transcript of US International Trade Commission Hearing (8 May 2001) ("Hearing Tr.") at 55 (Mr. Stewart, Hunting Vinson) (Exhibit US-20).
[338] The chief executive officer of one of the world's largest distributors of OCTG stated at the ITC hearing: "I know that [Tenaris] had been pushing for more North American business and is especially eager to get into Alaska. It is simply not imaginable that [Tenaris] or the other subject companies would stay out of the United States which buys as much OCTG as the rest of the world combined and has the highest prices." Hearing Tr. at 56 (Mr. Chaddick, Sooner, Inc.) (Exhibit US-20).
[339] ITC Report at 19.
[340] The president and chief executive officer of one of the largest distributors of OCTG in the United States testified at the ITC hearing that: "[m]any of these end users already have single source deals for international supply and they very much want to extend these arrangements to the United States." Hearing Tr. at 59 (Mr. Ketchum, Red Man Pipe and Supply) (Exhibit US-20).
[341] The director of one of the largest distributors of OCTG in the United States testified at the ITC hearing that: "[t]hey [the Tenaris companies] are already positioning themselves to serve as global suppliers to the major end users and they know that you just cannot do that if you are not in this market."). Hearing Tr. at 55 (Mr. Stewart, Hunting Vinson) (Exhibit US-20).

producers to increase shipments was limited by contracts, many of those contracts were with the very end users most eager to see subject imports enter the US market.[342] Indeed, testimony at the hearing indicated that customers already buying OCTG from the subject producers would immediately import the subject product if these orders were revoked.[343]

329. Perhaps most importantly, the record in the ITC's review showed that "prices for casing and tubing on the world market are significantly lower than prices in the United States."[344] Indeed, one major distributor testified that Tenaris "could dramatically undersell the going price in the United States and still get greater returns than they currently do from their international sales."[345] This price gap represents a very strong incentive not only to increase shipments to the United States, but to shift sales from other markets to serve US customers.

330. Second, Argentina argues that the ITC could point to only one trade barrier in third country markets, the 67 per cent dumping duty in Canada against imports from Korea.[346] Argentina appears to overlook the fact that the ITC examined import barriers that the producers of casing and tubing faced in other countries and on related products (lower-priced products that were produced in the same facilities as casing and tubing) in the United States. As detailed above, the ITC took into consideration that OCTG producers in four of the five countries subject to the sunset review at issue (Argentina, Japan, Korea, and Mexico) faced import restrictions in the United States on a variety of other pipe and tube products.[347] There was clearly ample "positive evidence" that the existence of import barriers tended to support a conclusion that increased exports would be likely to enter the US market.

331. Third, Argentina attacks the ITC's finding that foreign producers had an incentive to export OCTG casing and tubing to the United States because prices in the United States were significantly higher than in other markets. Specifically, Argentina contends that the ITC's finding of a price differential was based "on anecdotal reports from its hearing and not on any independent investigation."[348] This statement completely misrepresents the ITC's analysis of this issue. In fact, the "anecdotal reports" in question were sworn statements by some of the largest OCTG distributors in the world.[349] (Witnesses who testify at ITC hearings in sunset reviews must swear to the truthfulness of their testimony and are subject to criminal prosecution for perjury.) Furthermore, the ITC specifically stated that it considered – but was not persuaded by – the arguments of foreign producers that these price differences were exaggerated.[350] In short, the evidence shows that the ITC

[342] This director testified that "[m]ost of the major end users already purchase from these subject producers internationally and the end users are unwavering in their desire to see the extremely low priced OCTG that they get internationally extended to the US market." *Id*. (Exhibit US-20).

[343] The president and chief executive officer of one of the largest distributors of OCTG in the United States testified at the ITC hearing that: "I recently spoke with a major end use[r] who told me that he could get a far lower price from his international supplier which happened to be one of the foreign producers subject to the orders here. He also said that if these orders were revoked, he would immediately switch to the same foreign producer to supply his needs." Hearing Tr. at 58 (Mr. Ketchum, Red Man Pipe and Supply) (Exhibit US-20).

[344] ITC Report at 19 (emphasis added).

[345] Hearing Tr. at 56 (Mr. Chaddick) (Exhibit US-20).

[346] Argentina's first submission, para. 245.

[347] ITC Report page 20.

[348] Argentina's first submission, para. 246.

[349] *See, e.g.*, Hearing Tr. at 54 (Mr. Stewart) ("International prices are significantly below those prevailing in the United States; in most cases 20 to 25 per cent below.") (Exhibit US-20); *id*. at 56 (Mr. Chaddick) ("{Tenaris's} prices in international {markets} have been as much as 40 per cent lower than United States prices.").

[350] ITC Report at 20. As noted above, the "positive evidence" standard does not preclude the existence of any evidence that runs counter to an investigating authority's conclusion. If it did, the standard of review for panels in Article 17.6(i) of the AD Agreement would be superfluous.

did conduct an independent investigation of this issue by considering the relevant evidence submitted by both parties – and that this evidence demonstrated the existence of a substantial price gap between the United States and the rest of the world.

332. Together, the evidence concerning the import volume trends in the original investigation, the importance of the US market, Tenaris's desire for global contracts, the desire of its end users to purchase imports in this market, the evidence of import barriers on OCTG and related products, and the price gap between world markets and the United States strongly supports the ITC's finding that subject producers had strong incentives to shift into this market and that the subject imports were likely to increase in volume. Argentina's arguments to the contrary are without merit.

(b) The ITC's Findings on the Likely Price Effects of Imports

333. Argentina challenges the ITC's finding that revocation of the orders would likely result in negative price effects.[351] Before addressing Argentina's specific arguments, it may be useful to review the basis for the ITC's finding.

334. The ITC determined that "in the absence of the orders, casing and tubing from Argentina, Italy, Japan, Korea, and Mexico likely would compete on the basis of price in order to gain additional market share."[352] The ITC further determined that "such price-based competition by subject imports likely would have significant depressing or suppressing effects on the prices of the domestic like product."[353] These conclusions rested on a number of findings, including:

- the likely significant volume of imports;
- the high level of substitutability between the subject imports and the domestic like product;
- the importance of price in purchasing decisions;
- the volatile nature of US demand;
- the underselling by the subject imports in the original investigations and the current review period.[354]

335. Argentina has not seriously challenged any of these findings. As demonstrated above, Argentina's contentions concerning the likely volume of imports are without merit. Argentina has not even challenged the ITC's findings with respect to substitutability. Argentina's remaining arguments are groundless and should be rejected.

336. With respect to the significance of price in purchasing decisions, Argentina contends that "{p}rice is an important, although not determinative, factor to purchasers."[355] The ITC, however, never found that price was a "determinative" factor; it simply held that "price is a very important factor in purchasing decisions."[356] Given that Argentina concedes that price is an "important" factor, it would appear that Argentina has no basis to complain about this finding. In any event, the record plainly showed that purchasers identified "price" as the most important factor in purchasing decisions far more often than any other factor except for "quality," and that price far outstripped quality among purchasers ranking their second and third most important factors.[357] Furthermore, given that all

[351] Argentina's first submission, paras. 247-251.
[352] ITC Report at 21.
[353] *Id.*
[354] *Id.*
[355] Argentina's first submission, para. 250.
[356] ITC Report at 21.
[357] *Id.* at II-17.

parties agreed that subject casing and tubing was interchangeable with the domestic like product,[358] and that customers would accept any high-quality, API-certified product regardless of origin,[359] the record demonstrates that quality would be less of an issue in purchasing decisions, increasing the importance of price. These facts clearly support the ITC's finding on the importance of price.

337. As for the volatile nature of demand, Argentina contends that the ITC failed to explain why this factor was significant, and that the ITC did not cite any evidence that demand for OCTG was unusually volatile during the period examined.[360] These arguments are unavailing. Certain forecasts showed that demand for OCTG was likely to remain strong in the near future.[361] Nevertheless, all forecasts are by their nature imprecise and such forecasts are inherently suspect given the volatility of the forces affecting oil and gas supply and demand globally.[362] Thus, as it considered the likely effect of revoking these orders, the ITC could not assume that strong levels of demand would insulate domestic producers from the negative price effects of subject imports.[363]

338. As for underselling by imports, Argentina's complaints relate solely to the ITC's discussion of underselling during the current review period.[364] But the ITC itself placed little weight on this point, as it recognized that the orders had significantly reduced the volume of subject imports.[365] What was much more significant to the ITC – and what Argentina completely ignores in its submission – is the fact that underselling by subject imports during the original investigations drove down US prices.[366] This evidence, which Argentina has not refuted or even challenged, strongly supports the ITC's finding on price effects, for it shows the effect of subject imports on US prices in the absence of anti-dumping and countervailing duty orders.

339. Finally, Argentina maintains that the ITC failed to recognize that domestic prices increased at the end of the period examined, and that it is "completely illogical" to conclude that, where prices are increasing, imports will enter at lower prices and cause injury.[367] The record in the ITC's review refutes these claims. First, the ITC did recognize that domestic prices rose at the end of the period of review – although they remained below 1998 levels.[368] Second, evidence from the original investigation strongly supports a finding that imports can drive down domestic prices even during a period of strong demand.[369] Thus, it was completely logical for the ITC to conclude that whatever current prices may be, imports would drive down or suppress the price of the domestic like product if the orders were revoked.

340. In conclusion, Argentina's criticisms of the ITC's findings with respect to price effects are without merit. Assuming *arguendo* that Article 3.1 applies to sunset reviews under Article 11.3, the ITC's findings on this point should be found to be consistent with the requirements of Article 3.1.

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[358] *Id.* at 12.
[359] *Id.*
[360] Argentina's first submission, para. 249.
[361] ITC Report at 15.
[362] *Id.*
[363] It should also be noted that there was no need for the ITC to demonstrate that the OCTG market had been "unusually volatile"; the ITC made clear in its discussion of the point that OCTG market is always volatile. Id.
[364] Argentina's first submission, para. 249.
[365] ITC Report at 21.
[366] *Id.* at 20-21.
[367] Argentina's first submission, para. 249..
[368] ITC Report at 21 ("For most products, domestic prices peaked in 1998, fell significantly in 1999, then rebounded in 2000.").
[369] *Id.* at 22 ("{I}n the original investigations, subject imports captured market share and caused price effects despite a significant increase in apparent consumption in 1993 and 1994 as compared to 1992.").

(c) The ITC's Findings on the Likely Impact of Imports

341. Argentina challenges the ITC's finding that revocation of the orders would likely result in an adverse impact on the domestic industry.[370]

342. The ITC found that the condition of the domestic industry had improved since the anti-dumping duty orders had been imposed, and that the current condition of the domestic industry was "positive."[371] Nonetheless, the ITC found that revocation of the orders likely would lead to a significant increase in the volume of subject imports, which likely would undersell the domestic like product and significantly depress or suppress the domestic industry's prices, leading to a significant adverse impact on the domestic industry. The ITC noted that in the original investigation, a significant increase in demand had not precluded subject imports from gaining market share and having adverse price effects.

343. Argentina argues essentially that the ITC's findings as to the likely impact of imports on the domestic industry are flawed because of the alleged deficiencies in the findings regarding the likely volume and price effects of imports, on which the ITC's impact finding rests. Argentina's arguments concerning volume and price effects are without any merit, for the reasons discussed above, and its claim regarding the adverse impact finding should be rejected for the same reasons.

I. THE ITC SUNSET DETERMINATION ON OCTG FROM ARGENTINA IS NOT INCONSISTENT WITH ARTICLE 3.4 OF THE AD AGREEMENT

344. Argentina claims that the ITC acted inconsistently with Article 3.4 of the AD Agreement by failing to evaluate all of the economic factors enumerated therein in its OCTG sunset determination.[372] Article 3.4 provides:

> The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.
>
> (Emphasis added).

345. As explained above, the provisions of Article 3 do not govern sunset reviews. Therefore, the ITC sunset determination in OCTG from Argentina cannot be found to be inconsistent with Article 3.4.

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[370] Argentina's first submission, paras. 252-254.

[371] ITC Report at 22. Argentina's recitation of the evidence which the ITC reviewed in reaching this conclusion is somewhat selective, and does not reveal the extreme volatility in the domestic industry's performance over the period that the ITC examined. For example, the ITC noted that domestic producers' shipments fluctuated dramatically during the period of review, declining from 1,410,088 short tons in 1998 to 1,055,770 short tons in 1999, and rising again to 2,005,644 short tons in 2000. ITC Report at 22. Financial results were similarly volatile: from 1995 to 1997 operating income increased from a loss of $0.6 million to a profit of $174 million, before declining to a loss of $129 million in 1999, and then rising to a profit of $130 million in 2000. *Id.* Given this volatility in the domestic industry's performance, it is inaccurate to speak of "positive trends," as Argentina does. Argentina's first submission, para. 254.

[372] Argentina's first submission, paras. 255-266.

346. In addition to the reasons given above regarding Article 3 in general, there are further textual indications in Article 3.4 as to why it specifically is not applicable to sunset reviews. There may be no "dumped imports" at the time of a sunset review, and consequently there may be no "impact" for the investigating authority to examine. There also may not be any "actual and potential" declines evident or reflected in the information before the investigating authority at the time of the sunset review, by virtue of the absence of imports. In short, the obligations described in Article 3.4 cannot practicably be applied to all sunset reviews, and certainly could not be applied to sunset reviews in the same systematic and comprehensive manner that has been required in original dumping investigations.

347. Nevertheless, the United States notes that the report of the ITC staff in the OCTG sunset review, which is appended to the ITC published determination and which the ITC adopted,[373] presented detailed information concerning each of the Article 3.4 factors, as follows:

Factor (* indicates that the ITC discussed this factor specifically)	**Location in ITC Report**
Declines (actual or potential) in	
Sales *	p. III-6, Table III-9
Profits *	p. III-6, Table III-9
Output *	p. III-1, Table III-1
Market Share *	p. IV-3, Table IV-1
Productivity	p. III-4, Table III-7
Return on Investments	p. III-6, Table III-9
Capacity Utilization *	p. III-1, Table III-1
Factors Affecting Domestic Prices	Part V
Margin of Dumping	p. V-1
Actual or Potential Negative Effects on:	
Cash Flow	p. III-6, Table III-9
Inventories	p. III-4, Table III-5
Employment	p. III-4, Table III-7
Wages	p. III-4, Table III-7
Growth	p. III-6, Table III-9
Ability to Raise Capital or Investments *	p. III-13, Table III-32

J. THE ITC SUNSET DETERMINATION ON OCTG FROM ARGENTINA IS NOT INCONSISTENT WITH ARTICLE 3.5 OF THE AD AGREEMENT

348. Argentina argues that the ITC failed to comply with the obligations of Article 3.5 to analyze any causal link between subject imports and injury to the domestic industry, and that it failed to "separate and distinguish the potentially injurious effects of other causal factors from the potential effects of the dumped imports."[374]

349. Article 3.5 provides:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all

[373] Transcript of 15 June 2001 ITC Meeting at 5 (Exhibit US-21).
[374] Argentina's first submission, paras. 267-269.

> relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.
>
> (Emphasis added).

350. As explained above, the provisions of Article 3 are not applicable to sunset reviews. In addition to the reasons given above, there are further textual indications in Article 3.5 as to why it specifically is not applicable to sunset reviews.

351. First, Article 3.5 refers to the "dumped imports and speaks of such imports in the present tense as "causing injury." However, in a sunset review there may be no dumped imports. As a result of the order, such imports may have decreased or exited the market altogether, or if they have maintained their presence in the market, they may be priced higher than they were during the original investigation, when they were entering the market unencumbered by any additional duties.

352. Second, Article 3.5 refers to existing "injury" and describes an existing causal link between dumped imports and that injury. However, in a sunset review, with an anti-dumping order in place, there may be no current injury or causal link; indeed, it would be surprising if there were given the remedial effect of an anti-dumping duty order. This is implicit in the reference in Article 11.3 to the "continuation or recurrence of injury."

353. Third, Article 3.5 refers to "any known factors other than the dumped imports which at the same time are injuring the domestic industry." (Emphasis added). In a sunset review, where the focus is on evaluating the likely effect of imports upon expiry of the duty (*i.e.*, at some point in the future), other factors "which at the same time are injuring the domestic industry" will not be "known" to the investigating authority.

354. In sum, it is clear from the text of Article 3.5 that the obligations contained in that article does not extend to sunset reviews.

355. Furthermore, the United States notes that even if Article 3.5 were applicable, Argentina has not identified which "other causal factors" the ITC should have considered. Argentina asserts that the ITC failed to consider "other characteristics of the market (*e.g.*, expected changes in demand)" in the section of the determination discussing the likely impact of revocation on the domestic industry.[375] The ITC described a number of conditions of competition that informed its analysis in the sunset review.[376] These included a review of forecasts of future demand, which suggested that demand would remain strong.[377] Strong demand is, of course, not likely to be "another cause" of injury.

[375] Argentina's first submission, para. 269.
[376] ITC Report, pages 14-16.
[377] ITC Report, pages 15-16.

K. THE TIME FRAME IN WHICH INJURY WOULD BE LIKELY TO RECUR

1. The US Statutory Provisions as to the time frame in which injury would be likely to recur are not inconsistent with Articles 11.3 and 3 of the AD Agreement

356. Argentina claims that the US statutory requirements contained in Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930, as amended, are inconsistent "as such" with AD Agreement Articles 11.3 and 3.[378] Sections 752(a)(1) and 752(a)(5) instruct the ITC in a sunset review to determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" and to "consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time."[379]

357. Argentina misconstrues Article 11.3. Article 11.3 does not specify the time frame relevant to a sunset inquiry. Argentina's suggestion that Members are required to assess the likelihood of recurrence "upon revocation of the order"[380] or "upon expiry of the order"[381] are without any basis in the text of the Agreement. Article 11.3 only requires a determination of whether revocation "would be likely to lead to continuation or recurrence of injury." At most, the words "to lead to" suggest that the recurrence of injury need not be immediate – that it need not occur "upon" revocation of the order.

258. In the absence of any specific provision in Article 11.3, Members remain free to determine under their own laws and procedures the time frame relevant in sunset inquiries. It is inherently reasonable for the United States to consider the likelihood of continuation or recurrence "within a reasonably foreseeable time" and that the "effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time." The legislative history underlying the US statutory provisions provides the ITC with guidance on the factors that it should consider in deciding what the appropriate time-frame should be in any particular case.[382]

359. Argentina also seeks to invoke provisions of Article 3 that do not apply to sunset reviews. Both Article 3.7 and 3.8 by their terms pertain to threat determinations, not to sunset reviews, (notwithstanding Argentina's attempt to extend the application of these provisions to all "cases involving future injury").[383]

360. In sum, the AD Agreement is silent on the question of the relevant time frame within which injury would be likely to recur. This is left to the discretion of Members, and the standard adopted in US law is reasonable. As such, it cannot be found to be inconsistent with Article 11.3 or any provision of Article 3 (assuming *arguendo* that Article 3 applies to sunset reviews).

[378] Argentina's first submission, paras. 270-275. In the heading preceding paragraph 270 of its submission (heading "C') and in the Executive Summary of its claims (para. 41) Argentina asserts that these US statutory provisions are also inconsistent with AD Agreement Article 11.1.

[379] 19 USC. §§ 1675a(a)(1), 1675a(a)(5) (Exhibit ARG-1).

[380] Argentina's first submission, para. 271.

[381] Argentina's first submission, para. 272.

[382] The SAA, at 887, explains that the factors that the ITC should consider include "the fungibility or differentiation within the product in question, the level of substitutability between the imported and domestic products, the channels of distribution used, the methods of contracting (such as spot sales or long-term contracts), and lead times for delivery of goods, as well as other factors that may only manifest themselves in the longer term, such as planned investment and the shifting of production facilities." (Exhibit US-11).

[383] Argentina's first submission, para. 275.

2. The ITC's application of the Statutory Provisions as to the time frame in which injury would be likely to recur was not inconsistent with Articles 11.3 and 3 of the AD Agreement

361. Argentina claims that the ITC's application of the US statutory requirements contained in Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930, as amended, in the sunset review on OCTG from Argentina was inconsistent with AD Agreement Articles 11.3 and 3.[384]

362. As discussed above in Section IV, this claim is not with the Panel's terms of reference. Nonetheless, there is no substantive merit to Argentina's claim. Because, as explained in the preceding section, Article 11.3 is silent on the time frame relevant to a sunset review and imposes no obligations in this respect, the ITC cannot be found to have acted inconsistently with Article 11.3 or Article 3 by failing to specify the precise period that it considered relevant.

L. THE ITC DID NOT ACT INCONSISTENTLY WITH ANY PROVISION OF THE AD AGREEMENT BY CONDUCTING A CUMULATIVE ANALYSIS IN THE OCTG SUNSET REVIEW

1. The AD Agreement does not prohibit cumulation in sunset reviews

363. Argentina argues that because cumulation is not expressly permitted in Article 11.3, the ITC is prohibited from engaging in a cumulative analysis in a sunset review.[385] Argentina's position turns elementary principles of treaty interpretation on their head. The treaty interpreter is to interpret the ordinary meaning of the terms of the treaty in their context and in light of its object and purpose.[386] Accordingly, the genesis of any obligation or right arising under the WTO Agreement is the text of the relevant provision.[387] Absent a textual basis, the rights of Members cannot be circumscribed.

364. Even if a prohibition on cumulation could somehow be inferred from the text of Article 11.3, such a prohibition would be illogical and run counter to the overall object and purpose of the AD Agreement (*i.e.*, to provide a remedy to protect domestic industries from injury caused by dumped imports). The Appellate Body explained the rationale behind the practice of cumulation in investigations in its recent report in *EC - Pipe Fittings*:

> A cumulative analysis logically is premised on a recognition that the domestic industry faces the impact of the "dumped imports" as a whole and that it may be injured by the total impact of the dumped imports, even though those imports originate from various countries. If, for example, the dumped imports from some countries are low in volume or are declining, an exclusively country-specific analysis may not identify the causal relationship between the dumped imports from those countries and the injury suffered by the domestic industry. The outcome may then be that, because imports from such countries could not *individually* be identified as causing injury, the dumped imports from these countries would not be subject to anti-dumping duties, even though they are in fact causing injury.[388]

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[384] Argentina's first submission, paras. 276-277.

[385] Argentina's first submission, paras. 278-287.

[386] Vienna Convention on the Law of Treaties, art. 31(1); *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Report of the Appellate Body adopted 20 May 1996, Sec. III.B.

[387] *See United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Report of the Appellate Body adopted 6 November 1998, para. 114; *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body adopted 1 November 1996, Sec. G.

[388] *EC-Pipe Fittings*, para. 116.

365. In light of the recognition that imports from a group of countries may cumulatively cause injury even though imports from individual countries in this group do not, it would be illogical to require that sunset reviews be conducted only on a country-specific basis. Such a requirement would permit anti-dumping duties to expire even though the expiry of the duty would be likely to lead to continuation or recurrence of injury.

366. Argentina's arguments in support of its contention that cumulation is prohibited in sunset reviews are unpersuasive. The one reference in the text of Article 11.3 to "the duty" in the singular is not conclusive.[389]

367. Argentina claims that cumulation is inconsistent with "the object and purpose of the sunset provision," which Argentina suggests is the expiry of dumping duties.[390] As a preliminary matter, we note that the relevant principle of treaty interpretation goes to the object and purpose of *the treaty*, and not particular treaty provisions.[391] To the extent that the purpose of Article 11.3 is relevant, Argentina simply misconstrues it. If that purpose were simply to rescind anti-dumping duties, there would be no need to enquire as to whether expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.

368. Argentina seeks to bolster its argument that cumulation is not permitted in sunset reviews by noting that there is no explicit cross-reference to cumulation or to Article 3.3 in the context of Article 11.[392] This argument has no merit. A cross-reference to an obligation is necessary where the drafters seek to assert a broader obligation. However, there is no need to cross-reference to a permissive authority where a right exists absent its limitation in the Agreement.

369. Argentina's reference to *US - German Steel* and its suggestion that the Appellate Body "understands that the injury analysis in a sunset review is not conducted on a cumulated basis"[393] is entirely unconvincing. The question of whether cumulation was permitted in sunset reviews was not before the Appellate Body. In fact, that dispute related entirely to the Commerce role in sunset reviews.

370. Finally, Argentina overlooks the fact that cumulation in anti-dumping investigations was a widespread practice among GATT contracting parties prior to the adoption of Article 3.3 in the Uruguay Round, even though the Tokyo Round Anti-Dumping Code was silent on the subject.[394]

371. In sum, because Article 11.3 is silent on the subject of cumulation, a prohibition on cumulation in sunset reviews should not be read into Article 11.3.

2. The ITC did not act inconsistently with Article 3.3 of the AD Agreement because Article 3.3 does not apply to sunset reviews

372. Argentina argues that if Articles 3.3 and 11.3 do not preclude cumulation in sunset reviews, then the obligations of Article 3.3 apply so as to render the ITC's cumulative analysis in the Argentina

[389] Contrary to Argentina's assertion in paragraph 282 of its first submission, Article 11.3 does not refer to "an anti-dumping duty." Nor does Article 11.3 equate a "duty" with a "measure."
[390] Argentina's first submission, para. 285.
[391] Vienna Convention on the Law of Treaties, Art. 31(1).
[392] Argentina's first submission, para. 284.
[393] Argentina's first submission, para. 286.
[394] *See, e.g.*, the GATT Uruguay Round, A Negotiating History (1986-1992), (T. Stewart, Ed.) at 1475-1478, 1594, and 1598 (Exhibit US-22).

OCTG case inconsistent with the terms of that provision.[395] Argentina's attempts to read the requirements of Article 3.3 into Article 11.3 should be rejected.

373. As explained above, the provisions of Article 3 are not applicable to sunset reviews. Moreover, Argentina's position is directly at odds with recent panel and Appellate Body reports construing the meaning of Article 3.3.

374. As the panel in *US – Japan Sunset* concluded, while AD Agreement Article 3.3 establishes certain prerequisites for the conduct of a cumulative injury analysis in anti-dumping investigations, it does not apply to Article 11.3 reviews.[396] Article 3.3 provides that:

> Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

375. By the plain meaning of Article 3.3's text – "subject to anti-dumping *investigations*" – the limitations on cumulation there imposed apply only to investigations.[397] Article 11 contains no cross-reference to Article 3 that would render it applicable to Article 11 reviews. Moreover, Article 3 does not cross-reference Article 11. The lack of similar cross-references with respect to Articles 3 and 11 provide contextual support that Article 3's negligibility requirement is inapplicable to Article 11 reviews.[398]

376. The reference in Article 3.3 to Article 5.8 likewise makes clear that the requirements of Article 3.3 are inapplicable to Article 11 reviews. The text of Article 5.8 limits its application to anti-dumping investigations.[399] As the panel recently stated in *US – Japan Sunset*: "There is . . . no textual indication in Article 5.8 that would suggest or require that the obligation in Article 5.8 also applies to sunset reviews. Nor is there any such suggestion or requirement in the other provisions of Article 5."[400]

377. Moreover, there is no reference in Article 11.3 to Article 5 (in contrast to Article 11's reference to Articles 6 and 8). In reversing a panel's determination that the *de minimis* threshold applicable to countervailing duty investigations applied to sunset reviews, the Appellate Body stated:

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[395] Argentina's first submission, paras. 288-291.

[396] *US – Japan Sunset*, para. 7.102.

[397] See *US – Japan Sunset*, paras. 7.97-7.98.

[398] *See US – Japan Sunset*, paras. 7.95, 7.98; *cf., id.*. paras. 7.27, 7.68, 7.71 (noting that the lack of cross-reference in AD Agreement Article 11 to the provisions of Article 5 indicate that the drafters did not intend for the provision of Article 5 to apply to sunset reviews); *US – German Steel*, paras. 81 and 105 (noting the same with respect to the parallel provisions in the SCM Agreement).

[399] AD Agreement, Art. 5.8 ("An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible.") (underline added).

[400] *US – Japan Sunset*, paras. 7.70, 7.103.

> [T]he technique of cross-referencing is frequently used in the SCM Agreement. ... These cross-references suggest to us that, when the negotiators of the SCM Agreement intended that the disciplines set forth in one provision be applied in another context, they did so expressly. In light of the many express cross-references made in the SCM Agreement, we attach significance to the absence of any textual link between Article 21.3 reviews and the *de minimis* standard set forth in Article 11.9 [of the SCM Agreement].[401]

378. More recently, the panel in *US – Japan Sunset* rejected Japan's contention that the negligibility standard of Article 5.8 applies to Article 11.3 reviews:

> [A] textual interpretation of Article 3.3 allows an examination consistent with our examination relating to the alleged application to sunset reviews of the *de minimis* standard in Article 5.8. That is, on the basis of our textual analysis of Article 5 made in reaching our finding that the *de minimis* standard of Article 5.8 does not apply to sunset reviews (*supra*, para. 7.70), we consider that the text of Article 5 similarly fails to support the proposition that the negligibility standard of Article 5.8 applies to sunset reviews.[402]

379. In addition, the application of Article 5.8's negligibility thresholds would be unworkable in the context of sunset reviews. In sunset reviews, the investigating authorities are tasked with determining *likely* import volumes not only at some point in the future, but also under different conditions, namely a market without the discipline of an anti-dumping order. Precise numerical thresholds appropriate for characterization of *current* import volumes in investigations of current injury, or immediate threat thereof, are simply not workable for characterizing likely volumes of dumped imports in determinations of whether injury will continue or recur in the future and under different conditions. The predictive nature of sunset reviews suggests a need for a flexible standard for cumulation, rather than the strict numerical negligibility threshold applied in the investigative phase.

380. In sum, because of the express language of both Articles 3.3 and 5.8, the lack of any cross-reference in Article 11.3 to Articles 3.3 or 5.8, findings in recent panel and Appellate Body reports, and the impracticability of applying a strict numerical threshold to likely future import volumes, any restrictions on cumulation contained in Articles 3.3 and 5.8, which might arguably otherwise apply, do not extend to sunset reviews.

M. NONE OF THE "MEASURES" IDENTIFIED BY ARGENTINA ARE INCONSISTENT WITH ARTICLE VI OF THE GATT 1994, ARTICLES 1 OR 18 OF THE AD AGREEMENT, OR ARTICLE XVI:4 OF THE WTO AGREEMENT

381. In Section IX of its First Submission, Argentina claims that the measures identified by Argentina in its panel request are inconsistent with Article VI of the GATT 1994, Articles 1, 18.1 and 18.4 of the AD Agreement, and Article XVI:4 of the WTO Agreement.[403] As demonstrated in Section IV.C.5, above, these dependent claims are not within the Panel's terms of reference.

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[401] *US – German Steel*, AB Report, para. 69.

[402] *US – Japan Sunset*, Panel Report, para. 7.103.

[403] Specifically, Argentina refers to "[t]he measures identified . . . in its Panel request, including the Department's determination to conduct an expedited review, the Department's Sunset Determination, the Commission's Sunset Determination, the Department's Determination to Continue the Order, and the relevant US laws, regulations, policies and procedures ... ." Argentina's first submission, para. 295.

382. In addition, these claims are all dependent claims in that they depend upon a finding of an inconsistency with an obligation contained in some other provision of the AD Agreement. Because, as demonstrated above, none of the "measures" identified by Argentina – either in its panel request or in its first submission – are inconsistent with provisions of the AD Agreement, they are, by definition, not inconsistent with the provisions making up Argentina's dependent claims. Moreover, with respect to Argentina's "as such" claims, as discussed above, to the extent that the "measures" challenged by Argentina are not "measures" at all or are not "mandatory" measures, there can be no violation of Article 18.4 of the AD Agreement or Article XVI:4 of the WTO Agreement.

383. Finally, to the extent that any of Argentina's dependent claims are based upon claims that, as demonstrated in Section IV, above, are not within the Panel's terms of reference, they must be rejected.

384. Argentina's discussion of its dependent claims, however, raises one additional issue; namely, whether certain Commerce and ITC determinations identified by Argentina as "measures" actually constitute measures for purposes of the AD Agreement and the DSU. One determination which is particularly problematic is what Argentina has referred to as the "Department's Determination to Expedite."[404] During the consultations, the United States explained to Argentina its position that while this determination could be challenged in WTO dispute settlement as part of a challenge to a *bona fide* measure, the Determination to Expedite itself did not constitute a separately challengeable measure. When, in its panel request, Argentina persisted in treating this interlocutory determination as a discrete measure, the United States made its position on this issue clear by means of the following statement to the DSB:[405]

> This Determination to Expedite - which Argentina classified as a "measure" - was in reality nothing more than a preliminary, interlocutory decision made by a Department of Commerce official in the course of the sunset review on OCTG from Argentina. Indeed, as indicated in Argentina's panel request, the so-called "measure" was nothing more than an internal Commerce Department memorandum deciding to conduct an expedited review, as opposed to a full sunset review. As such, it was no different than any of the myriad types of decisions made in the course of an anti-dumping investigation or review, such as a decision to conduct onsite verification or not, extend the deadline for a preliminary or final determination, limit the number of exporters involved, etc., etc. Hundreds, perhaps thousands, of discrete preliminary decisions went into what eventually became an anti-dumping measure. However, paragraph 4 of Article 17 of the Anti-Dumping Agreement made clear that only certain specified types of measures could be the subject of a panel proceeding. These did not include preliminary decisions. Accordingly it was clear that Argentina could not challenge this "Determination to Expedite" as a measure in its own right.

385. The United States continues to believe that the Determination to Expedite may be challenged as part of a challenge to a *bona fide* anti-dumping measure, but that it is not a measure in its own right. In the view of the United States, a contrary position would be a recipe for chaos given the vast number of interlocutory decisions that must be made in the course of an anti-dumping proceeding. Therefore, in its findings, the Panel should make clear that the Determination to Expedite is not a measure.

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[404] *See, e.g.*, Argentina's first submission, Section VII.C.1, VII.C.4, and para. 295.
[405] WT/DSB/M/147, para. 33 (Exhibit US-1).

VII. CONCLUSION

386. Based on the foregoing, the United States respectfully requests that the Panel reject Argentina's claims in their entirety.

387. In addition, based on the foregoing, the United States respectfully requests that the Panel make the following preliminary rulings:

(a) Because page 4 of Argentina's panel request fails to conform to the requirements of Article 6.2 of the DSU, the claims set forth on page 4 are not within the Panel's terms of reference.

(b) Because Sections B.1, B.2 and B.3 of Argentina's panel request do not conform to the requirements of Article 6.2 of the DSU, Argentina's claims in those sections alleging inconsistencies with Article 3 and Article 6 of the AD Agreement are not within the Panel's terms of reference.

(c) Because the following matters were not included in Argentina's panel request, they are not within the Panel's terms of reference:

(i) Argentina's claim that Commerce's sunset review practice, both as such and as applied, is inconsistent with Article 11.3 of the AD Agreement;

(ii) Argentina's claim that 19 USC. §§ 1675(c) and 1675(a)(c), the SAA, and the *Sunset Policy Bulletin*, taken together, establish an irrefutable presumption that is inconsistent with Article 11.3 of the AD Agreement

(iii) Argentina's claim that Commerce's sunset review practice is inconsistent with Article X:3(a) of the GATT 1994

(iv) Argentina's claim that the ITC's application of 19 USC. §§ 1675a(a)(1) and (5) in the sunset review of OCTG from Argentina is inconsistent with Articles 11.3 and 3 of the AD Agreement

(v) Argentina's claim that the US Measures it has identified are inconsistent with Article VI of the GATT 1994, Articles 1 and 18 of the AD Agreement, and Article XVI:4 of the WTO Agreement.

ANNEX A-3

SUBMISSION FROM ARGENTINA ON THE REQUEST BY THE UNITED STATES FOR PRELIMINARY RULINGS UNDER ARTICLE 6.2 OF THE DSU

4 December 2003

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I. INTRODUCTION

1. Argentina regrets that the United States has sought to divert the attention of the Panel from the important substantive issues before it by making this unnecessary request for Preliminary Rulings. Argentina's Request for Establishment of a Panel[1] is detailed, specific and clear, and complies fully with Article 6.2 of the DSU.

2. The fact that the United States has put such considerable effort into this procedural challenge speaks volumes about the strength of the US case on the merits. The United States claimed in its first submission that "Argentina has a very weak case."[2] If this were so, the United States would not have put in such extensive – although unavailing – argumentation on the Panel's terms of reference. The United States seeks to eliminate some of Argentina's claims through procedural devices in order to prevent the Panel from adjudicating on the merits. This submission will demonstrate that the US procedural challenge is baseless and that the Panel should decide the case on the merits.

3. Argentina is also surprised that the United States has chosen this route, particularly in light of its recent condemnation of such conduct in the *Canada Wheat Board* dispute. In that case, the United States asserted before the Panel that:

> What Canada is really asking is for this Panel to impose a new requirement on complaining parties: namely, for the panel request to summarize the arguments to be presented in the first submission. However, such a requirement is not included in Article 6.2 of the DSU. Moreover, the Appellate Body in *EC Bananas* clearly rejected this notion.
>
> Also, [this idea], if adopted, would result in procedural disputes in each and every case brought under the DSU. If the panel request has to summarize the complaining party's arguments, every subsequent submission of the complaining party would be subject to challenge that one or more arguments, or sub-arguments, should be disregarded as being inadequately summarized in the panel request. This process would not result in any additional fairness or better reports. Instead, it would just encourage preliminary motions and procedural disputes.[3]

4. Argentina agrees fully with the United States that panel requests do not have to "summarize the arguments to be presented in the first submission," and shares the US concern that such a process will not "result in any additional fairness or better reports" but will "just encourage preliminary motions and procedural disputes."

5. Argentina therefore remains puzzled that in the present case, the United States has chosen to disregard the sound advice it offered to the *Canada Wheat Board* Panel.

6. That said, Argentina will respond fully to the allegations made by the United States in its Request for Preliminary Rulings. Argentina will begin by briefly highlighting some of the

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[1] Request for Establishment of a Panel by Argentina, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/2 (3 April 2003) ("Argentina's Panel Request").

[2] US first submission, para. 3.

[3] Oral Statement of the United States at the First Panel Meeting, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276 (6 June 2003) paras. 3 and 4. Available from the web site of the United States Trade Representative: www.ustr.gov.

jurisprudence that should guide the Panel in its interpretation of Article 6.2. Argentina will then respond specifically to the three categories of allegations made by the United States: (i) the so-called "Page Four" claims; (ii) the claims under Sections B.1, B.2 and B.3; and (iii) the "certain matters" that the United States asserts were not included in Argentina's Panel Request.

7. Argentina also notes at the outset that the United States bears the burden of proving that Argentina's Panel Request does not comply with DSU Article 6.2.[4] As Argentina will argue below, the United States has failed to discharge this burden in the present case.

II. DSU ARTICLE 6.2

8. Article 6.2 of the DSU provides in part as follows:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

9. As noted by the Appellate Body in the *Korea – Dairy* case:

> When parsed into its constituent parts, Article 6.2 may be seen to impose the following requirements. The request must: (i) be in writing; (ii) indicate whether consultations were held; (iii) identify the specific measures at issue; and (iv) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.[5]

10. The United States has challenged Argentina's compliance with the third and fourth of these requirements, i.e. to "identify the specific measures at issue," and to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

11. As noted in the US first submission, the Appellate Body recently summarized the purpose of the terms of reference in WTO disputes. As it stated in the *Steel from Germany* appeal:

> The requirements of precision in the request for the establishment of a panel flow from the two essential purposes of the terms of reference. First, the terms of reference define the scope of the dispute. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the *due*

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[4] As the Appellate Body stated in *Wool Shirts and Blouses*:

> [W]e find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.

Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, p. 14.

[5] Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, para. 120 ("*Korea – Dairy*").

> *process* objective of notifying the parties and third parties of the nature of a complainant's case.
>
> . . . .
>
> Moreover, compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances.[6]

12. The jurisprudence has also made clear that the key "attendant circumstance" that must be considered in determining whether the requirements of Article 6.2 have been met is whether the defending party can demonstrate to the panel that it has suffered prejudice during the course of the panel proceedings. This will be discussed in greater detail below.

13. Therefore, before proceeding to the more specific elements of Article 6.2, it is worthwhile to summarize the general principles of Article 6.2 as enunciated by the Appellate Body:

> the terms of reference serve the due process objective of providing notice to the defending party and the third parties of the nature of the complainant's case. Any finding that Article 6.2 has been violated is tantamount to a finding that due process rights have been violated;
>
> compliance with the requirements of Article 6.2 must be determined by considering the panel request as a whole, and not simply on the basis of isolated portions; and
>
> compliance must be assessed in the light of "attendant circumstances," including actual prejudice to the defendant during the course of the panel proceedings.

14. With these general observations in mind, Argentina now turns to the specific arguments raised by the United States in the present case.

III. ARGENTINA'S "PAGE FOUR" CLAIMS ARE WITHIN THE PANEL'S TERMS OF REFERENCE

A. US COMPLAINT

15. The United States first alleges that page four of Argentina's Panel Request ("Page Four") fails (i) to identify the specific measures at issue, (ii) to identify the legal basis for the complaint, and (iii) to provide a narrative description of the legal basis of the complaint.[7] As a result, the United States argues, Page Four does not comply with the requirement under Article 6.2 of the DSU to "present the problem clearly."

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[6] Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, adopted 19 December 2002, paras. 126 and 127 ("*Steel from Germany*").

[7] US First Submission, para. 87. More specifically, with respect to the alleged failure to identify the specific measures at issue, the United States argues that, "in the first paragraph on Page 4, while Argentina identifies five discrete 'measures,' it asserts that it is challenging only 'certain aspects' of those five 'measures,' and then fails to identify what those 'certain aspects' are." *Id.* With respect to the alleged failure to identify the legal basis for the complaint, the United States argues that, "in the second paragraph on Page 4, Argentina indiscriminately lumps together various articles from three different WTO agreements, almost all of which consist of multiple paragraphs and contain multiple obligations." *Id.*

B. RELEVANT WTO JURISPRUDENCE

1. Identification of measures

16. The Appellate Body made clear in the *EC – Computer Equipment* case that whether a panel request adequately "identifies the specific measure at issue" depends on whether it satisfies the due process requirements of Article 6.2. Argentina quotes the relevant portion of that decision below:

> Whether these terms [("LAN equipment" and "PCs with multimedia capacity," which were included in the Panel request)] are sufficiently precise to "identify the specific measure at issue" under Article 6.2 of the DSU *depends, in our view, upon whether they satisfy the purposes of the requirements of that provision.*
>
> In *European Communities – Bananas*, we stated that:
>
> > It is important that a panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint.
>
> The European Communities argues that the lack of precision of the term, LAN equipment, resulted in a violation of its right to due process which is implicit in the DSU . . . We . . . note that the term, LAN equipment, was used in the consultations between the European Communities and the United States prior to the submission of the request for the establishment of a panel . . . . We do not see how the alleged lack of precision of the terms, LAN equipment and PCs with multimedia capability, in the request for the establishment of a panel affected the rights of defence of the European Communities *in the course* of the panel proceedings. As the ability of the European Communities to defend itself was not prejudiced by a lack of knowing the measures at issue, *we do not believe that the fundamental rule of due process was violated by the Panel.*[8]

17. This ruling has been followed in a number of cases, including most recently, in the Preliminary Ruling in the *Canada Wheat Board* case, where the Panel stated:

> In considering whether a panel request can be said to have identified the specific, or precise, measures at issue, we find relevant the statement by the Appellate Body [in the *EC – Computer Equipment* case] that whether the actual terms used in a panel request to identify the measures at issue are sufficiently precise to meet the requirements of Article 6.2 "depends . . . upon whether they satisfy the purposes of [those] requirements". We also find relevant the statement by the Appellate Body that "compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances."
>
> . . . .

[8] Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62, 67, 68/AB/R, adopted 22 June 1998, paras. 68-70 ("*EC – Computer Equipment*")(first and third emphasis added). This has been followed in other cases, including *Canada Aircraft II*: Panel Report, *Canada – Export Credits and Loan Guarantees for Regional Aircraft,* WT/DS222/R, adopted 19 February 2002.

> Whether sufficient information is provided on the face of the panel request will depend, as noted above, on whether the information provided serves the purposes of Article 6.2, and in particular its due process objective, as well as the specific circumstances of each case, including the type of measure that is at issue.[9]

18. Thus, in assessing whether Argentina's Panel Request adequately identified the specific measures at issue, the Panel must evaluate the fundamental underlying issue of whether the request satisfies the due process objective of Article 6.2. In this regard, the Panel must consider whether the specific formulation used by Argentina on Page Four of its panel request, when that document is read as a whole, caused actual prejudice to the United States during the course of the Panel proceedings. This issue will be examined in greater detail below.

2. Identification of the legal basis of the complaint

(a) Claims versus Arguments

19. WTO jurisprudence establishes that a request for the establishment of a panel must set out claims, rather than the arguments in support of those claims. In *EC – Bananas*, the Appellate Body upheld this principle in unambiguous terms:

> We accept the Panel's view that it was sufficient for the Complaining Parties to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements. In our view, there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.[10]

20. Thus, to comply with Article 6.2 of the DSU, a complaining party need only "list the provisions of the specific agreements alleged to have been violated." There is no obligation to set out "detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements."[11] Argentina's Panel Request provides the detail required by Article 6.2. As the United States is well aware, there is no need for Argentina to develop the arguments that support the claims identified in its panel request.

(b) Minimum Requirements

21. The Appellate Body in the *Korea – Dairy* case affirmed this principle. Commenting on its earlier ruling on this issue in *EC – Bananas*, the Appellate Body in *Korea – Dairy* noted that it:

> [A]greed with the conclusion of the panel that, in that case, the listing of the articles of the agreements claimed to have been violated satisfied the *minimum* requirements of Article 6.2 of the DSU. In view of all the circumstances surrounding that case, we

[9] *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain: Preliminary Ruling by the Panel*, WT/DS276/12 (21 July 2003) paras. 17 and 20.

[10] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, para. 141 ("*EC – Bananas*"). This test has been applied in many subsequent WTO cases.

[11] *Id.*

> concurred with the panel that the European Communities had not been misled as to what claims were in fact being asserted against it as respondent.[12]

22. The Appellate Body added, in a passage also quoted by the United States in its first submission, that:

> There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of *clarity* in the statement of the legal basis of the complaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2.[13]

23. The Appellate Body in *Korea – Dairy* concluded that:

> [W]hether the mere listing of the articles claimed to have been violated meets the standard of Article 6.2 must be examined on a case-by-case basis. In resolving that question, *we take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated.* [14]

24. Therefore, even the "mere listing" of the provision claimed to have been violated can satisfy the "minimum prerequisite" of Article 6.2. The "mere listing" will be considered to be insufficient only in cases where the defending party is able to demonstrate to the Panel that it has suffered actual prejudice during the course of the panel proceedings. In this case, when Argentina's Panel Request is read as a whole, it is clear that Argentina did far more than merely list provisions.

(c) Prejudice to the Defending Party

25. Moreover, even if the Article cited in the panel request contains multiple obligations, the mere listing of such an Article will still meet the requirements of Article 6.2, absent actual prejudice. Even in the *Korea – Dairy* case, where the Appellate Body found that the EC panel request should have been more detailed, it denied Korea's request under Article 6.2:

> *Korea failed to demonstrate to us that the mere listing of the articles asserted to have been violated has prejudiced its ability to defend itself in the course of the Panel proceedings*. Korea did assert that it had sustained prejudice, but offered no supporting particulars in its appellant's submission nor at the oral hearing. We, therefore, deny Korea's appeal relating to the consistency of the European Communities' request for the establishment of a panel with Article 6.2 of the DSU.[15]

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[12] Appellate Body Report, *Korea – Dairy*, para. 123.
[13] *Id*. at para. 124.
[14] *Id*. at para. 127 (emphasis added).
[15] *Id.* at para. 131 (emphasis added). The *Korea – Dairy* report is of particular relevance since the complaining party in that case invoked Articles that had contained multiple obligations. As noted by the Appellate Body:

> [W]e note that the European Communities' request for a panel, after identifying the Korean safeguard measure at issue, listed Articles 2, 4, 5 and 12 of the Agreement on Safeguards and

26. The *EC – Bed Linen* panel summarized the WTO case law as follows:

> It seems that even if the panel request is insufficient on its face, *an allegation that the requirements of Article 6.2 of the DSU are not met will not prevail where no prejudice is established*.
>
> In essence, the Appellate Body seems to set a two-stage test to determine the sufficiency of a panel request under Article 6.2 of the DSU: first, examination of the text of the request for establishment itself, in light of the nature of the legal provisions in question; second, an assessment of whether the respondent has been prejudiced by the formulation of claims in the request for establishment, given the actual course of the panel proceedings.[16]

27. The requirement that the defending party must demonstrate actual prejudice has been upheld in numerous cases, and is recognized by the United States. The US statement in the *Canada Wheat Board* case asserted this point vigorously:

> [T]he Appellate Body in *EC – Bananas* made clear that a panel request may adequately state a claim if the request simply cites the pertinent provision of the WTO agreement.
>
> The Appellate Body confirmed this construction in *Korea – Dairy*. The Appellate Body did find a problem with the panel request: namely, the request cited too broadly to the Agreement on Safeguards and Article XIX of the GATT 1994, so that it was difficult to determine which obligations in those provisions were at issue. But, the Appellate Body repeated the distinction, set forth in *Bananas*, between claims and arguments. And, even though the panel request in *Korea – Dairy* was insufficiently precise, the Appellate Body nonetheless did *not* dismiss the claims . . . .
>
> [*E*]*ven if* a panel request is insufficiently detailed "to present the problem clearly," the panel is not automatically deprived of jurisdiction over the matter. Rather, the panel must examine, based on the "particular circumstances of the case," whether the defect has prejudiced the ability of the responding party to defend itself. In *Korea – Dairy*,

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> Article XIX of the GATT 1994. Article XIX of the GATT 1994 has three sections and a total of five paragraphs, each of which has at least one distinct obligation. Articles 2, 4, 5 and 12 of the Agreement on Safeguards also have multiple paragraphs, most of which have at least one distinct obligation. The Agreement on Safeguards in fact addresses a complex multi-phased process from the initiation of an investigation, through evaluation of a number of factors, determination of serious injury and causation thereof, to the adoption of a definitive safeguard measure.

Id. at para. 129. The Panel request was nevertheless found to be consistent with DSU Article 6.2 because, as noted above, Korea could not establish actual prejudice. *Id.* at para. 131. The *US – Lamb Safeguards* panel, commenting on the Appellate Body decision in *Korea – Dairy*, noted that: "the Appellate Body identified these provisions [in the Safeguards Agreement] as an example of a situation in which the mere listing of articles, in and of itself, *may* fall short of the standard of DSU Article 6.2 (which seems to imply that it *may* suffice in other situations)." Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177,178/R, adopted 16 May 2001, para. 5.27 ("*US – Lamb Safeguards*").

[16] Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, paras. 6.25-6.26 ("*EC – Bed Linen*")(emphasis added).

> the Appellate Body found that even although the panel request was inadequate, the responding party had failed to show prejudice, and dismissal was not warranted.[17]

28. Thus, as the United States itself correctly recognizes, a defending party must demonstrate actual prejudice during the course of the panel proceedings as a prerequisite to successfully challenge a panel request under DSU Article 6.2.

29. Moreover, as the Party asserting the DSU Article 6.2 claim, the United States has the burden of demonstrating that it suffered prejudice in this case because it was unable to defend its interest. The United States has failed to discharge this burden.

3. Narrative description

30. Despite US claims to the contrary, Article 6.2 does not require a "narrative description." Rather, as noted above, Article 6.2 requires identification of the measure, as well as a brief summary of the legal basis of the complaint, sufficient to present the problem clearly. Where the complaining party included a narrative description in its panel request, however, the panel has in some cases considered that description to be relevant in determining whether a complaining party has met the obligations covered by Article 6.2.

31. For example, the *High Fructose Corn Syrup* Panel considered the fact that the Panel request set forth sufficient factual background as to the nature of the dispute:

> The United States' request for establishment in this case does not merely list the articles alleged to have been violated. The request also sets forth facts and circumstances describing the substance of the dispute. In our view, the request is sufficiently detailed to set forth the legal basis of the complaint so as to inform the defending Member, Mexico, and potential third parties of the claims made by the United States.
>
> We find that Mexico has not demonstrated to us that it was prejudiced in its ability to defend its interests in the course of the proceedings in this dispute. Mexico asserts that it had to wait until the first written submission of the United States, more than four months after the request for establishment, to have a clear idea of what the United States' arguments in support of its assertions were. Mexico argues that as a result of the failure of the United States to present the problem clearly and specify the factual and legal basis for the request, it was obliged to spend that time working "in the dark". In its comments on interim review, Mexico asserts that this resulted in the expenditure or squandering of resources that could otherwise have been devoted to preparing a timely defence.
>
> In our view, the totality of the United States' request for establishment sets out claims with sufficient specificity to present the problem clearly and allow Mexico to defend its interests. Mexico's assertions as to the effect of the alleged inadequacies in the request for establishment do not, in our view, rise to the level of demonstrating that Mexico's rights of defense in this panel proceeding were affected, given the actual course of the panel proceedings.[18]

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[17] Oral Statement of the United States at the First Panel Meeting, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276 (6 June 2003), paras. 6-8.

[18] Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000, paras. 7.15-7.17 ("*High Fructose Corn Syrup*").

32. Thus, the complaining party may point to the existence of a narrative description in a panel request to counter claims that a defending party has been prejudiced.

C. THE CHALLENGED MEASURES AND THE LEGAL BASIS OF ARGENTINA'S COMPLAINT HAVE BEEN ADEQUATELY IDENTIFIED

33. As an initial observation, Argentina notes that the US laws, regulations, policies and procedures identified in its panel request are limited, specific, and identified with precision. Argentina has referred to the provisions of the US statutory, regulatory and administrative regime – including the US practice – that deal with sunset reviews in antidumping cases, which together represent a small subset of US trade remedy laws, regulations and administrative procedures.

34. With respect to the requirement to "identify the specific measure at issue," the *Canada Wheat Board* case is instructive, in that it sets out the standard as to when a measure will not be considered as adequately identified. It is thus useful to consider Argentina's Panel Request in light of the *Canada Wheat Board* standard.

35. In *Canada Wheat Board*, the US panel request used such formulations as "the laws, regulations, and actions of the Government of Canada and the [Canadian Wheat Board] related to exports of wheat."[19] The Panel found that this formulation fell short of the standard set out in Article 6.2, since the US request, "by creating considerable uncertainty as to the identity, number and content of the laws and regulations which it [was] challenging, [did] not provide adequate information on its face to identify the specific measures at issue."[20] Therefore, the US panel request left the defending party "little choice . . . but to undertake legal research and exercise judgement in order to establish the precise identity of the laws and regulations implicated by the panel request."[21] The *Canada Wheat Board* Panel therefore concluded that, "taken as a whole, the United States' panel request [did] not sufficiently establish the identity of the 'laws' and 'regulations' at issue . . . ."[22]

36. In contrast to the vague references to "laws and regulations related to exports of wheat" that were found to be insufficient in the *Canada Wheat Board* panel request, Page Four of Argentina's Panel Request precisely identifies the US measures at issue, specifically enumerating:

> • Sections 751(c) and 752 of the Tariff Act of 1930, as amended, codified at Title 19 of the United States Code §§ 1675(c) and 1675a; and the US Statement of Administrative Action (regarding the Agreement on Implementation of GATT Article VI) accompanying the Uruguay Round Agreements Act (the SAA), H.R. Doc. No. 103-316, vol. 1;
>
> • The Department's *Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Anti-Dumping and Countervailing Duty Orders*; Policy Bulletin, 63 Federal Register 18871 (16 April 1998) (Sunset Policy Bulletin);
>
> • The Department's sunset review regulations, codified at Title 19 of the United States Code of Federal Regulations § 351.218; and the Commission's sunset review

[19] *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain: Preliminary Ruling by the Panel*, WT/DS276/12 (21 July 2003), para. 7.

[20] *Id.* at para. 24.

[21] *Id.* Canada had argued that "any number of laws, regulations and actions may be related to the export of wheat but have no relevance to the instant claim." *Id.* at para. 8. It said that there were "dozens of 'laws and regulations' that could be the subject of the United States panel request as worded." *Id.*

[22] *Id.* at para. 28.

regulations, codified at Title 19 of the United States Code of Federal Regulations §§ 207.60-69 (Subpart F).[23]

37. Given this degree of precision, one may safely conclude that the United States has no need to "undertake legal research" or "exercise judgment" to establish the "precise identity of the laws and regulations implicated by the panel request."

38. Moreover, as noted above, the Appellate Body has made clear that the panel request has to be read "as a whole." The *New Oxford Dictionary of English* defines "whole" as "all of; entire." This means that the Panel needs to read "all of" Argentina's Panel Request (i.e., the "entire" panel request), and cannot focus exclusively on Page Four or on the use of the word "also."

1. Argentina's Panel Request must be read as a whole

39. Page Four of Argentina's Panel Request cannot be read in isolation from the more specific claims enumerated in Sections A and B. As the United States acknowledged, Argentina made this clear at the DSB meeting of 19 May 2003.[24]

40. Instead of divorcing Page Four from the rest of the request, the panel needs to consider the document in its entirety – the factual description, the specific claims set out in Sections A and B, and the concluding sections on Page Four. Together, they present the entirety of Argentina's claims. Read as a whole, Argentina's Panel Request properly identifies the specific US measures at issue.

41. The US claim appears to hinge largely on the use of the word "also" on Page Four, which, according to the United States, suggests that the WTO inconsistencies alluded to on Page Four are in addition to, and different from, the claims set forth in Section A and B.[25]

42. Three points should be noted here. First, according to *Webster's Collegiate Dictionary*, the word "also" means, among other things, "likewise," which in turn means "in a like manner." Put more succinctly, the word "also" is synonymous with the term "moreover." Thus, Argentina used the word "also" on Page Four to convey that it was elaborating on previous pages, rather than, as the United States alleges, describing something different than what was enumerated on the previous pages of the panel request.[26] Second, it is important to consider the context in which the word "also" appeared. The request said "Argentina also considers" that certain US laws are WTO-inconsistent, not that Argentina considers that "certain US laws are also WTO-inconsistent." In other words, even if one accepted the US request to read Page Four in isolation of the rest of the panel request, the word "also" (which means "likewise/moreover") related to the views of Argentina, rather than to the enumeration of a completely new set of measures. Third, Argentina's reference to US laws in that sentence was not completely open-ended, as the United States suggests, but rather was immediately qualified by the term "related to the determinations of the Department and the Commission." Argentina describes the "determinations of the Department and the Commission" in detail throughout the panel request – in the introductory factual section, in Sections A and B, and on Page Four.

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[23] Argentina's Panel Request, Page Four.

[24] US first submission, para. 101.

[25] US first submission, para. 88 and at n.103.

[26] Argentina confirmed this in its statement before the DSB at the 19 May 2003, meeting: "It was Argentina's intention (as the panel request clearly provided) to set forth the particular claims in the paragraphs contained in Sections A and B of the document." Dispute Settlement Body: Minutes of Meeting held on 19 May 2003, WT/DSB/M/150, para. 32. Thus, Sections A and B contain the essence of Argentina's claims. Because Argentina's Panel Request must be read as a whole, however, Sections A and B cannot be interpreted independently from Page Four. Accordingly, Page Four of the panel request elaborates on the claims provided in Sections A and B, as indicated by the word "also."

43. Read "as a whole," Argentina's Panel Request thus identified the US measures at issue with specificity, including those enumerated on Page Four.

44. Equally important, the United States has not sustained any prejudice. In fact, in crafting its preliminary objection, the United States turns the principle of DSU Article 6.2 on its head. Indeed, rather than reading Argentina's Panel Request as a whole, as the Appellate Body indicated is a requirement, the United States artificially severs Page Four of Argentina's request, parses the isolated language on Page Four, and then contends that in this context the United States cannot discern the nature of the particular claims on Page Four. The US position is untenable. Considering the panel request as a whole, it is quite clear which violations are being alleged by Argentina. Indeed, Argentina has set out the WTO-inconsistencies with precision.

2. A full narrative description, while not required, has been provided

45. Argentina recalls that Article 6.2 does not specifically require a "narrative description." Nonetheless, as in *High Fructose Corn Syrup*, Argentina's Panel Request, read as a whole, sets out detailed factual background as to the nature of the dispute. The first part of the panel request sets out the facts such as the conclusions from the original investigation, the conclusions of the sunset review, the determination to expedite, and the determination to continue the order. The request also includes reference to determinations of the US Department of Commerce and the US International Trade Commission. Argentina's request "does not merely list the articles alleged to have been violated. The request also sets forth *facts and circumstances describing the substance of the dispute.*"[27] Consequently, as in *High Fructose Corn Syrup*, the "request is sufficiently detailed to set forth the legal basis of the complaint so as to inform the defending Member . . . and potential third parties of the claims made . . . ."[28]

3. The United States has not suffered prejudice during the course of the panel proceedings

46. Although the "no prejudice" issue first arises in the context of the US complaints about Page Four, the failure of the United States to substantiate prejudice undermines <u>all</u> of its claims under Article 6.2. Therefore, Argentina's comments below apply to all aspects of the US Preliminary Request.

47. As noted above, the *EC – Bed Linen* panel provided a succinct summary of the requirement under Article 6.2 to demonstrate prejudice: "an allegation that the requirements of Article 6.2 of the DSU are not met *will not prevail* where no prejudice is established."[29]

48. Moreover, it should be recalled that the test applied by the Appellate Body under Article 6.2 includes an assessment as to whether the responding party was prejudiced "given the actual course of the panel proceedings."[30] The "panel proceedings" in the present case have barely begun – indeed, the first meeting of the panel with the parties has not even taken place.

49. Prior Panels have rightly determined that whether there is prejudice <u>during</u> the panel proceedings can only be determined at the <u>end</u> of such proceedings. For example, this was the position taken by the Panel in *Canada Aircraft*:

[27] Panel Report, *High Fructose Corn Syrup*, para. 7.15 (emphasis added).
[28] *Id.*
[29] Panel Report, *EC – Bed Linen*, para. 6.25 (emphasis added).
[30] *Id.* at para. 6.26.

> Canada asked the Panel to rule on the consistency of Brazil's request for establishment with Article 6.2 of the DSU prior to the deadline for the parties' first written submissions. We recall our finding that there is no requirement in the DSU for panels to rule on preliminary issues prior to the parties' first written submissions. Nor is there any established practice to this effect, for there are numerous panel reports where rulings on preliminary issues have been reserved until the final report. Furthermore, we have stated above that we *will decide this preliminary issue by determining whether any alleged imprecision in Brazil's request for establishment prejudiced Canada's due process right of defence during the panel process. We can necessarily only undertake such an analysis at the end of the panel process*.[31]

50. A similar ruling was made by the Panel in *Thailand H-Beams*. In that case, Thailand raised its Article 6.2 claim in its first written submission, just at the United States did in the present case. As in *Canada Aircraft*, the *Thailand H-Beams* Panel said that it was too soon to determine whether the defending party had suffered prejudice during the panel proceedings:

> At the first substantive meeting, we denied Thailand's request for an *immediate* preliminary ruling . . . and indicated that we would issue our ruling and supporting reasons in the Panel report. Referring to the Appellate Body report in *Korea – Dairy*, we informed the parties that we would evaluate whether, *given the actual course of the Panel proceedings*, Thailand was prejudiced in its ability to defend itself by the alleged lack of specificity of the Panel request.[32]

51. Regardless of when any determination of prejudice should be made, the more important point is that the United States has failed to substantiate <u>any</u> prejudice actually sustained by the United States.

52. Indeed, it is striking that in the extremely long US submission on the panel's terms of reference, the United States offers nothing more than a few curt statements that simply assert, but do not substantiate, a claim of prejudice.

53. The United States is evidently aware that its inability to demonstrate actual prejudice is a major – indeed fatal – weakness in its Article 6.2 request. The United States would seemingly prefer that the Panel ignore or skim over the lack of prejudice in this case. Unfortunately for the US position, the Appellate Body has made clear that actual prejudice is a prerequisite to a successful challenge to a panel request under Article 6.2.

54. How has the United States "substantiated" its claim of prejudice? The United States argues only that its "ability . . . to begin preparing its defense was delayed because, due to Argentina's failure to comply with Article 6.2, the United States did not 'know what case it has to answer.'"[33]

55. The cases have ruled that such assertions simply do not constitute demonstrated or substantiated prejudice for the purposes of DSU Article 6.2. For example, as the *High Fructose Corn Syrup* decision stated, complaints about having to "spend time working in the dark" are insufficient to establish a violation of DSU Article 6.2.[34] Instead, the actual prejudice that must be shown must rise

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[31] Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, para. 9.33 (emphasis added).

[32] Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, paragraph 7.1 ("*Thailand – H-Beams*") (second emphasis added).

[33] US First Submission, paras. 97 and 110.

[34] Panel Report, *High Fructose Corn Syrup*, para. 7.16.

to the level of a *violation of due process rights*, as the Appellate Body in *EC – Computer Equipment* made clear.[35]

56. Moreover, a review of the US first submission confirms that in no way have the "due process rights" of the United States been violated. The United States has provided detailed (albeit unconvincing) argumentation on the full range of claims, demonstrating clearly that the United States is fully aware of Argentina's claims, and has responded substantively to them.

57. Prior panels have found that such substantive submissions fully refute any claim that the defending party was "prejudiced." In *US – Lamb Safeguards*, the Panel found that:

> [T]he US first written submission and its oral statement at the first substantive meeting contain detailed and comprehensive *arguments* rebutting the complainants' *arguments* on all claims . . . .
>
> . . . .
>
> In its answers to questions and in its rebuttal submission, the United States again provided very detailed and comprehensive arguments on the claims before us.
>
> In light of the foregoing, therefore, we do not believe that the United States has submitted sufficient "supporting particulars" to persuade us of its assertion that it has been prejudiced in its ability to defend itself in the actual course of the proceedings in this dispute. As noted above, as a matter of fact, the US submissions have been very thorough and detailed. . . . Our conclusion that the United States has not submitted sufficient supporting particulars to establish that it suffered prejudice in its ability to defend itself in the actual course of this proceeding confirms our above consideration that the panel requests in this case were sufficiently specific to meet the requirements of DSU Article 6.2.[36]

58. The *Korea Beef* Panel reached a similar conclusion:

> After reviewing Korea's submissions, its answers to the parties' as well as to the Panel's questions during the course of the present proceedings, the Panel remains of the opinion that Korea clearly understood the matter at issue. The Panel considers that Korea was not misled by the requests for establishment of panels . . . .[37]

59. As in *US – Lamb Safeguards*, the United States in the present case has provided "very detailed and comprehensive arguments" to respond to Argentina's claims. As with the submissions in *Korea Beef*, the US first submission in this case also shows that the United States has "clearly understood the matters at issue" and it has "not been misled" by Argentina's Panel Request.

60. The "thorough and detailed" substantive response submitted by the United States in its first submission negates any notion of actual prejudice to the United States. The Panel should have little difficulty concluding that the United States has not demonstrated sufficient "supporting particulars" to prove its assertion that it has been prejudiced in its ability to defend itself.

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[35] Appellate Body Report, *EC – Computer Equipment*, para. 70.

[36] Panel Report, *US – Lamb Safeguards*, paras. 5.51-5.53.

[37] Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161,169/R, adopted 10 January 2001, para. 816 ("*Korea – Beef*").

61. It should also be noted that previous panels examining the issue of "prejudice" under DSU Article 6.2 have also considered, as a highly relevant factor, whether there was any prejudice to the interests of third parties by any alleged deficiencies in the panel request. For example, in *Thailand H-Beams*, the Appellate Body said that "those Members of the WTO who intend to participate as third parties in panel proceedings must be informed of the legal basis of the complaint."[38] Similarly, in *EC – Bed Linen*, the Panel found that the fact that the third parties were able to make substantive submissions on the issues "suggests a lack of prejudice to third parties' interests in this dispute."[39]

62. In the present case, none of the Third Parties raised any concerns about any aspects of Argentina's claims. Indeed, the European Communities, far from expressing any concerns about the alleged lack of clarity of Argentina's request, stated to the contrary that the "Panel should not follow the United States suggestion to consider page 4 . . . in isolation from the rest of the request. Rather, in order to establish whether the conditions of Article 6.2 DSU are met, the Panel should consider the request as a whole."[40] Thus, to paraphrase the Appellate Body in *Thailand H-Beams*, the EC, which is participating as a third party in the panel proceedings, obviously was informed of the legal basis of Argentina's complaint.

63. Argentina also notes that this case is just one of a series of challenges made by various WTO Members to the "sunset review" provisions of US law. Argentina does not assert that these other disputes can be used to determine whether the current panel request complies with Article 6.2. But it does raise a broad and important point: the United States has been engaged in a series of WTO disputes over its sunset review laws, and is intimately familiar with all lines of challenge, and all lines of defense. To accept that the United States was "working in the dark" while waiting for Argentina's submission is simply not credible.

64. In summary, the United States has "assert[ed] that it had sustained prejudice, but [has] offered no supporting particulars . . . ."[41] Consequently, the US request fails to demonstrate any prejudice, let alone prejudice that has violated the due process rights of the United States in these proceedings.

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[38] Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, para. 88 ("*Thailand – H-Beams*").

[39] Panel Report, *EC – Bed Linen*, para. 6.28:

> We therefore turn next to the question whether the European Communities, or any of the third parties, has been prejudiced by this lack of sufficient clarity, "given the actual course of the panel proceedings". . . . [W]hile it is possible that potential third parties were not alerted to the fact that India intended to pursue the issue of consideration of all imports as dumped under Article 3.4 of the AD Agreement, it was clear from the face of the request for establishment that India was pursuing this issue under Article 3.5 of that Agreement. Moreover, all three third parties did address the issue of whether the European Communities acted inconsistently with the AD Agreement in considering all imports as dumped. In our view, this suggests a lack of prejudice to third parties' interests in this dispute. While it is not clear whether potential third parties understood the claim to be asserted under Article 3.4 or Article 3.5, the substance of the issue was clearly apparent to them, and was addressed by those Members that participated as third parties. The specific provision of the AD Agreement alleged to have been violated is, in our view, of less importance than the question whether the particular practice, consideration of all imports as dumped, is permitted by the AD Agreement or not, and that question has clearly been addressed by all parties and third parties in this dispute, and was clearly put before us by the request for establishment.

[40] Third Party Submission of the European Communities, WT/DS268 (14 November 2003), Section 2.

[41] Appellate Body Report, *Korea – Dairy*, para. 131.

65. The inability of the United States to prove actual prejudice during the course of the panel proceedings vitiates the legal basis for all of the claims made by the United States under Article 6.2.

IV. SECTIONS B.1, B.2 AND B.3 OF ARGENTINA'S CLAIMS ARE WITHIN THE PANEL'S TERMS OF REFERENCE

A. US COMPLAINT

66. According to paragraph 104 of the US first submission, the "defect" in Sections B.1, B.2 and B.3 is that "Sections B.1 and B.2 allege an inconsistency with Article 6 of the AD Agreement in its entirety, while Section B.3 alleges an inconsistency with Article 3 of the AD Agreement in its entirety." Articles 3 and 6 each consist of multiple paragraphs and contain multiple obligations. Consequently, the United States argues, Sections B.1, B.2, and B.3 do not comply with the Article 6.2 requirement to "present the problem clearly," because "it is impossible to determine from the panel request the obligation(s) with which US law or the ITC's actions allegedly are inconsistent . . . ."[42]

B. RELEVANT WTO JURISPRUDENCE

67. The relevant WTO case law applicable to this issue has been set out above, in Section III.B. For the purposes of the complaints that have been made by the United States regarding Sections B.1, B.2 and B.3, that jurisprudence may be summarized briefly as follows:

> a request for the establishment of a panel must set out claims, but not the arguments in support of those claims;
>
> the listing of the articles of the agreements claimed to have been violated satisfied the *minimum* requirements of Article 6.2 of the DSU;
>
> in assessing the consistency of the panel request with Article 6.2, the Panel must take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated; and
>
> as a related point, even if the Article cited in the panel request contains multiple obligations, the mere listing of such an Article will still meet the requirements of Article 6.2, absent actual prejudice.

C. ARGENTINA'S POSITION

68. With respect to Article 6, Argentina initially notes that it has challenged the WTO-consistency of a sunset review conducted by the United States. Sunset reviews are governed by Article 11 of the Agreement. As the United States is well aware, Article 11.4 provides in part that: "The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article."

69. The reference in Article 11.4 to "the provisions of Article 6" make clear that the drafters intended Article 6 to apply – to quote the US complaint – "in its entirety" to sunset reviews. By listing Article 11 – and indeed, Article 11.4 – in sections B.1 and B.2, Argentina put the United States on notice that it would be making claims under Article 6. Yet the United States made no objection to

[42] US First Submission, para. 104.

Argentina's references to Article 11, or even to Article 11.4.[43] In addition, to provide even greater precision, Argentina listed Article 6 itself in sections B.1 and B.2. Thus, Argentina has stated its Article 6 claim clearly and unambiguously.

70. With respect to Article 3, Argentina's claim B.3 challenges specific provisions of US sunset law which, by their terms, relate to the temporal period in which the United States makes its likelihood of injury determination. In this regard, the panel request references not only Articles 11.1 and 11.3, but also Article 3. Argentina alleged violations of Article 3 provisions given the general application of Article 3 to reviews conducted under Article 11.3, and the role of these provisions in framing the time period for the injury determination in a sunset review. There is no doubt that these provisions are directly relevant to the issue of the temporal element as to when injury could be considered as "likely" to continue or recur.

71. Argentina also notes that its Article 3 claims on this issue were first raised with the United States over a year ago. Indeed, the wording of Section B.3 of Argentina's consultations request is virtually identical to Section B.3 of its panel request. Section B.3 of Argentina's October 10, 2002, request for consultations states:

> The US statutory requirements that the Commission determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" (19 USC. § 1675a(a)(1)) and that the Commission "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time" (19 USC. § 1675a(a)(5)) are inconsistent with Articles 11.3 and 3 of the Anti-dumping Agreement.[44]

72. Section B.3 of Argentina's Panel Request states:

> The US statutory requirements that the Commission determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" (19 USC. § 1675a(a)(1)) and that the Commission "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time" (19 USC. § 1675a(a)(5)) are inconsistent with Articles 11.1, 11.3 and 3 of the Anti-Dumping Agreement.

73. As set forth above, the United States has been on notice for over a year that Argentina considered this statutory provision to be inconsistent with "Article 3" of the Anti-Dumping Agreement. Indeed, the extensive and detailed questions presented by Argentina to the United States prior to the WTO consultations on 14 November and 17 December 2002, provide additional evidence that the United States was "aware of the claims presented by [Argentina], sufficient to allow it to defend itself."

74. Argentina provided 86 written questions to the United States during the consultations, with about ten questions relating to the Article 3/Article 11.3 relationship and/or the US statutory provisions at issue. The United States did not provide a written response to Argentina's questions and

[43] The only other sentence in Article 11.4 states: "Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review." The Commission's Sunset Determination, which is at issue in Sections B.1 and B.2, was commenced in July 2000 and completed in June 2001, i.e., within twelve months. This renders the second sentence of Article 11.4 obviously inapplicable in this dispute. Consequently, the only provision of Article 11.4 which could possibly be relevant is the first sentence, which, as noted above, incorporates by reference Article 6 "in its entirety."

[44] Request for Consultations by Argentina, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/1 (10 October 2002).

the United States declined to provide substantive responses during consultations. Nor did the United States provide notice to Argentina that it did not understand the nature of the questions posed by Argentina in this regard.

75. Argentina is surprised that the United States has annexed these questions to its submission (US-12), given its previously-expressed concerns about protecting the confidentiality and integrity of consultations. The *US – Lamb Safeguards* Panel noted that: "The United States . . . seriously question[s] the admissibility and the relevance to panel proceedings of information from bilateral, confidential consultations – for which usually no neutral witnesses or written records exist – when ascertaining whether the specificity requirements stipulated by DSU Article 6.2 for *panel requests* are met."[45] Evidently, the United States has set aside its earlier qualms that "reliance in contentious panel proceedings on information from consultations could jeopardise their very purpose."[46]

76. In any event, as Exhibit US-12 indicates, Argentina's 86 detailed written questions to the United States during the consultations period show clearly that the full nature and scope of Argentina's claims were set out in detail for the United States. Regardless of the number of individual questions on Articles 3 or 6, the large number of detailed questions further supports the conclusion that the United States was well aware of the nature of Argentina's claims.

77. Since the United States has put Argentina's written questions before the panel, it is important to emphasize, as Argentina indicated to the DSB on 19 May, that the United States did not express any concern or confusion as to the nature of any of Argentina's claims under Article 3 or 6 at any point during the two rounds of consultations. Once Argentina requested a panel, however, the United States raised hitherto unexpressed concerns that it "could not discern the legal basis of Argentina's complaint . . . ."[47] Argentina questions this sudden and convenient "lack of understanding" by the United States.

78. Moreover, as the United States notes, Argentina's first submission argues that the statutory provisions related to determining injury "within a reasonably foreseeable time" violate US obligations under Articles 3.1, 3.2, 3.4, 3.7 and 3.8.

79. This leaves out only Articles 3.3, 3.5 and 3.6. While violations of these provisions in connection with the statutory provisions at issue in claim B.3 are not developed in Argentina's first submission, there can be little doubt that these provisions too have a bearing on the issue of the temporal element as to when injury could be considered as "likely" to continue or recur. Article 3.3 relates to conducting a cumulative injury analysis, Article 3.5 deals with causation – another clearly relevant provision on the temporal element while Article 3.6 provides rules regarding the determination of injury in relation to the domestic production of the like product.

80. Moreover, in considering whether a reference to Article 3 of the Antidumping Agreement is sufficient for purposes of DSU Article 6.2, paragraph 93 of the Appellate Body report in *Thailand H-Beams* is relevant. This paragraph dealt with Article 5 of the Antidumping Agreement, but raised concepts that are directly relevant to Article 3:

> With respect to Article 5, Poland stated that "Thai authorities initiated and conducted this investigation in violation of the procedural . . . requirements of Article VI of GATT 1994 and Article 5 . . . of the Antidumping Agreement." Article 5 sets out various but closely related procedural steps that investigating authorities must comply with in initiating and conducting an antidumping investigation. In view of the

[45] Panel Report, *US – Lamb Safeguards*, para. 5.39.
[46] *Id*. at para. 5.40.
[47] Dispute Settlement Body: Minutes of Meeting held on 15 April 2003, WT/DSB/M/147, para. 32.

> interlinked nature of the obligations in Article 5, we are of the view that, in the facts and circumstances of this case, Poland's reference to "the procedural . . . requirements" of Article 5 was sufficient to meet the minimum requirements of Article 6.2 of the DSU.[48]

81. As with Article 5, Article 3 also has "interlinked obligations." Article 3.1 provides that a determination of injury must be based on "positive evidence" and involve an "objective examination" of the volume of the dumped imports, the effect of dumped imports on prices, and the consequent impact of the dumped imports on the domestic industry. Article 3.2 provides greater precision regarding the disciplines applicable to Members in determining the volume of the dumped imports, the effect of the dumped imports on prices, and the consequent impact of these dumped imports on the domestic producers. Article 3.4 sets out the factors that must be evaluated when considering the impact of the dumped imports on the domestic industry. Article 3.5 requires that there must be a causal relationship between the dumped imports and the injury. Article 3.7 enumerates when a threat of material injury may be determined. This is not intended as an exhaustive list, but it does illustrate quite clearly that – as with Article 5 – Article 3 sets out the "interlinked obligations" that have been imposed on Members.

82. Therefore, Argentina's reference to "Article 3" in Section B.3 also met the standards set out in DSU Article 6.2.

83. More generally, Argentina's Panel Request was required to, and did, set out its claims under Articles 3 and 6. Argentina was not required to set out its arguments in support of its Articles 3 and 6 claims. The listing of Articles 3 and 6 in Sections B.1, B.2, and B.3 satisfied the "minimum requirements" of Article 6.2 of the DSU.[49]

84. As Argentina's Panel Request meets the "minimum requirements" under Article 6.2, the United States must demonstrate that it sustained actual prejudice during the course of the panel proceedings. In its challenge to the "Page Four" claims, the United States was only able to offer a few brief paragraphs as to why it ostensibly suffered prejudice. For its challenge to Sections B.1, B.2 and B.3, the US first submission has put forward only one sentence: "As in the case of Page 4 of Argentina's panel request, the United States' ability to begin preparing its defense has been impaired because, as a result of Argentina's failure to comply with Article 6.2, the United States did not 'know what case it has to answer.'"[50]

85. This does not constitute "prejudice," rising to the level of a violation of due process rights, for the purpose of DSU Article 6.2. Argentina has shown above, in Section III.C.3, that the United States has not suffered any actual prejudice during the course of the panel proceedings. Argentina will not repeat these arguments, but it incorporates them by reference into the current section.

86. The US claims under Sections B.1, B.2 and B.3 should be dismissed, because Argentina's Panel Request presents the problem clearly, and the United States failed to demonstrate actual prejudice.

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[48] *Id.* at para. 93.
[49] *See* Appellate Body Report, *Korea – Dairy*, para. 123.
[50] US First Submission, para. 110.

V. THE "CERTAIN MATTERS" REFERRED TO BY THE UNITED STATES ARE ALL WITHIN THE PANEL'S TERMS OF REFERENCE

A. US COMPLAINT

87. The United States asserts that the following matters were not included in Argentina's Panel Request and therefore are not within the Panel's terms of reference:

> (i) Argentina's claim that Commerce's sunset review practice, both as such and as applied, is inconsistent with Article 11.3 of the AD Agreement;
>
> (ii) Argentina's claim that 19 USC. §§ 1675(c) and 1675a(c), the SAA, and the *Sunset Policy Bulletin*, taken together, establish an irrefutable presumption that is inconsistent with Article 11.3 of the AD Agreement;
>
> (iii) Argentina's claim that Commerce's sunset review practice is inconsistent with Article X:3(a) of the GATT 1994;
>
> (iv) Argentina's claim that the Commission's application of 19 USC. §§ 1675a(a)(1) and (5) in the sunset review of OCTG from Argentina is inconsistent with Articles 11.3 and 3 of the AD Agreement; and
>
> (v) Argentina's claim that the US Measures it has identified are inconsistent with Article VI of the GATT 1994, Articles 1 and 18 of the AD Agreement, and Article XVI:4 of the WTO Agreement.[51]

B. ARGENTINA'S POSITION

88. At the outset, Argentina notes that the United States has not claimed that it has suffered any prejudice as a result of the five matters that were allegedly "not included" in Sections A and B of Argentina's Panel Request. Although the United States did proffer a tepid assertion of prejudice with respect to its "Page Four" and "Sections B.1, B.2, and B.3" claims, here it has not asserted <u>any</u> prejudice at all.

89. For this reason alone, the Panel can summarily dismiss the US Article 6.2 claims under this section. As noted above, any successful application under Article 6.2 requires the defending party to "substantiate" a claim of prejudice. In the section on the alleged five additional claims, the United States has not even raised, let alone substantiated, a claim of prejudice. Its Article 6.2 claims are therefore defective and must be dismissed.

90. The United States has not made any claim of prejudice because it has not sustained any prejudice. Once again, Argentina incorporates by reference into this section the "no prejudice" arguments discussed in Section III.C.3, above.

91. Even as a matter of textual interpretation, however, the United States is incorrect to assert that these are five "new" claims not included in Argentina's Panel Request. To recall two fundamental principles under Article 6.2:

- a panel request need only set out claims, but not the arguments in support of those claims; and

[51] US First Submission, paras. 112-114.

- a panel request must be read "as a whole," i.e., in its entirety.

92. Turning to the specific US allegations:

(i) Argentina's claim that Commerce's sunset review practice, both as such and as applied, is inconsistent with Article 11.3 of the AD Agreement

93. The United States is apparently alleging here that Argentina's Panel Request does not present a claim challenging the Department's sunset review practice as being inconsistent with Article 11.3, either "as such" or "as applied." Although the United States focuses on Section A.4 of Argentina's Panel Request in making this claim, the US arguments are undermined by the very paragraph they reference.

94. Section A.4 of Argentina's Panel Request states:

> The Department's Sunset Determination is inconsistent with Article 11.3 of the Anti-Dumping Agreement . . . because it was based on a virtually irrefutable presumption under US law as such that termination of the anti-dumping duty measure would be likely to lead to continuation or recurrence of dumping. This unlawful presumption is evidenced by the consistent practice of the Department in sunset reviews (which practice is based on US law and the Department's Sunset Policy Bulletin). (Emphasis added.)

95. The United States reads Section A.4 to raise a claim only with respect to the Department's sunset determination in OCTG from Argentina.[52] Section A.4 clearly states, however, that the Department's sunset determination was inconsistent with Article 11.3 because it was based on an irrefutable presumption, which was established by "US law as such" and evidenced by the Department's "consistent practice." It is axiomatic that in order for the Department's sunset determination to be inconsistent with Article 11.3 as described in Section A.4, that US law establishing the irrefutable presumption "as such" must also be inconsistent with Article 11.3. Consequently, Section A.4 makes clear that Argentina is challenging the irrefutable presumption in US law "as such." Moreover, because Section A.4 states expressly that the Department employed its consistent practice in the sunset determination of OCTG from Argentina, the panel request thus also makes clear that Argentina is challenging the Department's consistent practice "as applied" generally in sunset reviews. Therefore, even looking at Section A.4 in isolation, the panel request presents the problem with regard to the Department's consistent practice clearly.

96. As noted above, however, the panel request must be read as a whole. Reading the panel request as a whole provides further support for the conclusion that Argentina presented the problem with respect the Department's consistent practice clearly.

97. Regarding Argentina's challenge of the Department's consistent practice "as such," the paragraph immediately preceding Section A states that "certain aspects of . . . policies and procedures related to the administration of sunset reviews are inconsistent with US WTO obligations." In addition, the first sentence of Section A.1 alleges that "US . . . procedures regarding 'expedited' sunset reviews are inconsistent" with, inter alia, Article 11. Finally, Page Four similarly refers to "policies[] and procedures related to the determinations of the Department" as being inconsistent with US WTO obligations, including Article 11.3.

98. While Section A.4 of the panel request clearly identifies the "as such" challenge to the unlawful presumption and the "as applied" challenged to the Department's consistent sunset practice,

[52] US First Submission, para. 116.

portions other than Section A.4 of the panel request also refer to Argentina's "as applied" challenge to US sunset review practice under Article 11.3. For example, the first sentence of Section A.2 refers to "[t]he Department's application of the expedited sunset review procedures in the sunset review of OCTG from Argentina" as being inconsistent with, inter alia, Article 11. (Emphasis added.) Additionally, the first sentence of Section A.5 states, "The Department's application of the standard for determining whether termination of anti-dumping measure would be 'likely to lead to continuation or recurrence of dumping' is inconsistent" with, inter alia, Article 11.3. (Emphasis added.)

99. The United States thus cannot credibly assert that from the terms of the panel request it had no notice that Argentina was challenging the Department's practice.

100. Moreover, as explained above, during the consultations Argentina presented written questions to the United States on a broad set of issues being raised by Argentina, including issues related to the Department's general sunset practice and the irrefutable presumption established by US law.[53] For example, in question 13, Argentina asked, "Is there a presumption under US law or practice that revocation of an antidumping order would likely lead to a continuation or recurrence of dumping?"[54] It is clear that even before Argentina submitted its panel request, the United States had notice that Argentina was challenging the Department's consistent practice. Consequently, the United States cannot credibly assert that it suffered actual prejudice during the course of the panel proceedings.

(ii) Argentina's claim that 19 USC. §§ 1675(c) and 1675a(c), the SAA, and the Sunset Policy Bulletin, taken together, establish an irrefutable presumption that is inconsistent with Article 11.3 of the AD Agreement

101. The United States argues that Argentina's Panel Request does not present the problem clearly with respect to the irrefutable presumption established by 19 USC. §§ 1675(c) and 1675a(c), the SAA, and the Sunset Policy Bulletin, taken together. In making this argument, the United States again limits its focus to Section A.4, rather than considering the panel request as a whole.

102. Read as a whole, Argentina's Panel Request presents the problem clearly. First, as noted above, Section A.4 states that the "Department's Sunset Determination is inconsistent with Article 11.3 of the Anti-Dumping Agreement . . . because it was based on a virtually irrefutable presumption under US law as such that termination of the anti-dumping duty measure would be likely to lead to continuation or recurrence of dumping." (Emphasis added.) Accordingly, Argentina's claim that the Department's Sunset Determination was inconsistent with Article 11.3 relies on the premise that US law as such establishes an irrefutable presumption of likely dumping. Consequently, Section A.4 makes clear that Argentina is alleging that US law establishes an irrefutable presumption of likely dumping that is inconsistent with Article 11.3. Meanwhile, Page Four of the panel request (on which Argentina has already provided argumentation) indicates that "US law" in this context comprises 19 USC. §§ 1675(c), 1675a, the SAA, and the *Sunset Policy Bulletin*, and that these measures violate, inter alia, Article 11.

103. Argentina has thus adequately set out its claims and presented the problem clearly. Indeed, Argentina's Panel Request exceeded the minimum requirements of Article 6.2 of the DSU, because it did much more than simply cite Article 11 of the Antidumping Agreement.

104. In addition, during consultations Argentina submitted detailed questions that clearly set forth its claim that the statute, SAA, and Sunset Policy Bulletin establish a presumption that is inconsistent

[53] *See* Written Questions Presented by Argentina for the Consultations on 14 November 2002 (Exhibit US-12), questions 13, 26, 28-31.

[54] *Id.* at question 13 (emphasis added).

with Article 11.3.[55] For example, question 28 states, "Does the United States consider that the US antidumping statute, the Statement of Administrative Action, and the Department's Sunset Review Policy Bulletin, establish a presumption in favor of maintaining an antidumping duty order?"[56] Therefore, the United States cannot credibly assert that it had no notice that Argentina was alleging that these measures – taken together – establish a presumption that is inconsistent with Article 11.3, and that it was prejudiced as a result.

(iii) Argentina's claim that Commerce's sunset review practice is inconsistent with Article X:3(a) of the GATT 1994

105. The United States alleges that Argentina's Panel Request does not clearly challenge Commerce's sunset review "practice," either "as such" or "as applied," as being inconsistent with GATT Article X:3(a). To the contrary, Argentina's Panel Request clearly presented the nature of its claim with respect to Article X:3(a).

106. Section A.4 of the panel request states that "[t]he Department's Sunset Determination is inconsistent with . . . Article X:3(a) of the GATT 1994 because it was based on a virtually irrefutable presumption under US law as such" that "is evidenced by the consistent practice of the Department in sunset reviews . . . ." (Emphasis added.)

107. Article X:3(a) of the GATT 1994 states, "Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this article." Paragraph 1 of Article X, in turn, refers to the "[l]aws, regulations, judicial decisions and administrative rulings of general application, made effective by any [Member], pertaining to . . . rates of duty, taxes, or other charges, or to requirements, restrictions or prohibitions on imports . . . ."

108. Argentina's Panel Request is thus clear. Section A.4 cites Article X:3(a), and the text of Article X:3(a) unambiguously expresses each importing Member's obligation to administer its laws, regulations, decisions and rulings impartially and fairly. Further, Section A.4 provides that the Department's violation of Article X:3(a) is evidenced by the Department's consistent practice in sunset reviews. The United States therefore has no credible basis to assert that it did not understand that Argentina was alleging that the Department's consistent practice in sunset reviews violates Article X:3(a).

109. In addition to Section A.4, Page Four of the panel request states that US "policies and procedures" are inconsistent with Article X of the GATT 1994.

(iv) Argentina's claim that the ITC's application of 19 USC. §§ 1675a(a)(1) and (5) in the sunset review of OCTG from Argentina is inconsistent with Articles 11.3 and 3 of the AD Agreement"

110. The United States alleges that Argentina's Panel Request only challenges 19 USC. §§ 1675a(a)(1) and (5) as such, rather than as applied in the sunset determination of OCTG from Argentina.

111. The United States again fails to consider the panel request "as a whole." The United States reads Section B.3 of the panel request in isolation from the rest of the text. The heading to Section B states that "[t]he Commission's Sunset Determination was inconsistent with the Anti-Dumping

[55] *See* Written Questions Presented by Argentina for the Consultations on 14 November 2002, and 17 December 2002 (Exhibit US-12), questions 13, 26, 28-31.

[56] *Id.* at question 28.

Agreement and the GATT 1994." The heading to Section B applies to each of the subheadings listed below it, including Section B.3. Thus, the panel request unambiguously indicates that Argentina is challenging 19 USC. §§ 1675a(a)(1) and (5) both as such and as applied in the Commission's sunset determination of OCTG from Argentina.

112. In addition, Argentina's Panel Request contains the factual background to this dispute, indicating that the Commission determined in its sunset review of Argentine OCTG that injury would be likely to continue or recur "within a reasonably foreseeable time," as required by 19 USC. § 1675a(a)(1). This statement provides further indication of Argentina's intent to challenge the application of 19 USC. §§ 1675a(a)(1) and (5) in the Commission's sunset determination of OCTG from Argentina.

> *(v) Argentina's claim that the US Measures it has identified are inconsistent with Article VI of the GATT 1994, Articles 1 and 18 of the AD Agreement, and Article XVI:4 of the WTO Agreement*

113. Page Four of the panel request specifically references Article VI of the GATT 1994, Articles 1 and 18 of the Antidumping Agreement, and Article XVI:4 of the WTO Agreement. In the context of this dispute, these articles could not have operated in any way other than as consequential violations. Argentina's claims under Article VI of the GATT 1994, Articles 1, 18.1, and 18.4 of the Antidumping Agreement depend upon a breach of substantive provisions of the Antidumping Agreement. Similarly, Argentina's claim of a violation of Article XVI:4 of the WTO Agreement depends upon a breach of a provision of a covered agreement. Therefore, the mere listing of these provisions in the panel request – which already satisfied the minimum requirements of Article 6.2 – was sufficient to set forth the problem clearly. Indeed, the US argument on this point indicates that it understands quite well the purpose – indeed, the only purpose – of these dependent provisions.[57]

114. Before concluding its submission, Argentina is compelled to comment upon the unwarranted allegations of bad faith in the US first submission with respect to Argentina's Panel Request:

> paragraph 98 of the US first submission states the failure of Argentina to draft Page Four with "similar precision" to the drafting used in Sections A and B "leaves one with the unavoidable impression that the shift from precision to extreme ambiguity was not inadverent";
>
> paragraph 106 suggests that Argentina "knew what claims it intended to make" with respect to Sections B.1, B.2 and B.3, but that it "wished to conceal that information for the time being"; and
>
> footnote 103 accuses Argentina of employing a "bait-and-switch gambit."

115. With such allegations, the United States has essentially accused Argentina, when drafting its panel request, of deliberately attempting to conceal the nature of its claim from the United States, the third parties, the panel, and DSB. Moreover, such an allegation would imply that Argentina has violated its obligation under DSU to "engage in [dispute settlement] procedures in good faith in an effort to resolve the dispute."

116. To the contrary, Argentina has at all times conducted itself consistent with the letter and spirit of the rules governing WTO dispute settlement. Indeed, throughout the course of consultations, and in drafting its panel request, Argentina has clearly identified its claims. Moreover, Argentina had

[57] US First Submission, para. 126 ("These claims are consequential claims in the sense that they depend upon a finding that some other provision of the AD Agreement or GATT 1994 has been breached.").

hoped to resolve this dispute without the need to resort to the panel process. As noted above, Argentina provided 86 written questions to the United States (to which it received no written responses), participated in two rounds of consultations, and has always acted in good faith in these proceedings. For the United States to assert otherwise is perplexing and completely inconsistent with the record of this proceeding. Argentina rejects these accusations by the United States.

VI. CONCLUSION

117. The US request for preliminary rulings fails both prongs of the two-part test set out by the Appellate Body for determining whether a panel request meets the requirements of Article 6.2 of the DSU. First, an examination of Argentina's Panel Request, read as a whole, indicates that it is detailed, clear and specific, fully setting out Argentina's claims. Second, the United States has utterly failed to substantiate its claim that it was allegedly prejudiced during the course of the Panel proceedings. In any event, as indicated above, the United States has been well aware of the full nature and extent of Argentina's claims for over a year.

118. In light of the attendant circumstances in this case, the United States cannot credibly assert that it was not aware of Argentina's claims, "sufficient to allow it to defend itself."

119. Accordingly, Argentina respectfully requests the Panel to dismiss the US request for preliminary rulings in their entirety.

Geneva, 4 December 2003

ANNEX B

THIRD PARTIES' SUBMISSIONS

ANNEX B-1

THIRD PARTY SUBMISSION OF THE EUROPEAN COMMUNITIES

14 November 2003

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EC-Bed Linen	Panel Report, *European Communities – Anti-Dumping Duties on imports of Cotton-Type Bed Linen from India*, final report circulated 30 October 2000 Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001
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EC-Tube and Pipe	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, final report circulated 7 March 2003 Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
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Short Title	Full Case Title and Citation of Case
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1. INTRODUCTION

1. The European Communities makes this third participant submission because of its systemic interest in the correct interpretation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "AD Agreement").

2. In this written submission the European Communities will concentrate on the following issues, other matters being dealt with, to the extent necessary, in an oral statement:

- the United States preliminary objection as to whether the Panel request meets the requirements of Article 6.2 DSU, and in particular whether this can be established for certain parts of the Panel request in isolation;
- the determination in this case by the investigating authority that the response from Siderca was inadequate, on the basis that it accounted for less than 50 per cent of total exports of the product from Argentina to the United States from 1995 to 1999, Siderca itself having made no exports during that period, and the consequences of that determination;
- the "likely" standard for sunset review investigations provided for in Article 11.3 AD Agreement;
- as regards the historical occurrence of dumping, the reliance by the investigating authority only on the dumping margin (1.36 per cent) calculated in respect of the original investigation (the 6 months from 1 January to 30 June 1994), for the purposes of determining (effective from 7 November 2000) that the duty should be applied for a further 5 years (that is, until 11 August 2005 – **11 years, 1 month and 11 days** after the end of the original investigation period);
- as regards prospective likely dumping, the fact that the investigating authority relied on no additional fact or reason, or relied only on statements insufficient to give effective meaning to Article 11.3 AD Agreement;
- the consistency of the *Sunset Policy Bulletin* "as such" with the AD Agreement;
- the reliance by the investigating authority on a dumping determination, made under the Tokyo Round Anti-Dumping Agreement, that involved simple zeroing (comparison of weighted-average normal value with individual export transactions), in a manner inconsistent with the present AD Agreement; and
- the investigating authority's determination of likely injury.

2. PRELIMINARY OBJECTION

In its first written submission, the United States has requested a number of preliminary rulings. In particular, the United States has argued that certain parts of Argentina's request for the establishment of a Panel, and in particular page 4 thereof, do not comply with the requirements of Article 6.2 DSU.[1]

In this respect, the European Communities would like to observe that whether a Panel request is in compliance with the requirements of Article 6.2 DSU, and in particular whether it identifies the measure clearly and whether it provides a brief summary of the legal basis of the complaint, cannot be established by merely considering parts of a Panel request. This has been clearly stated by the Appellate Body in *US – Carbon Steel from Germany*.[2]

[1] First written submission of the United States, para. 84 and following.
[2] Para. 127.

> "Moreover, compliance with the requirements of Article 6.2 must be determined on the merits of each case, *having considered the panel request as a whole*, and in the light of attendant circumstances." (emphasis added)

In the view of the European Communities, the Panel should not follow the United States suggestion to consider page 4 of Argentina's Panel request, i.e. the concluding section thereof, in isolation from the rest of the request. Rather, in order to establish whether the conditions of Article 6.2 DSU are met, the Panel should consider the Panel request as a whole.

3. THE INADEQUACY DETERMINATION

3. An internal DOC memorandum dated 22 August 2000[3] explains that because Siderca had no exports to the United States during 1995 to 1999, and because there were imports of the product from Argentina during that period, Siderca accounts for less than 50 per cent of United States imports of the product from Argentina during the relevant period.[4]

4. The memorandum accordingly recommended that Siderca's response be determined to be inadequate and that DOC should conduct an expedited (120 day) sunset review. According to section 351.218(e)(1)(ii)(C) of DOC's regulations, in an expedited review, the review will be conducted on the basis of facts available as defined in Section 351.308(f). Section 351.308(f) of DOC's regulation provides in relevant part:[5]

> "(f) Use of facts available in a sunset review. Where the Secretary determines to issue final results of sunset review on the basis of facts available, the Secretary normally will rely on:
>
> (1) Calculated countervailing duty rates or dumping margins, as applicable, from prior department determinations; and
>
> (2) Information contained in parties' substantive responses to the Notice of Initiation filed under 351.218(d)(3), consistent with section 752(b) or 752(c) of the Act, as applicable."

5. Argentina argues[6], and the European Communities agrees, that this determination is inconsistent with Article 11.3 AD Agreement. The finding in the present case produced a result that is inconsistent with the AD Agreement. It should be recalled that Siderca had, according to DOC, filed a complete substantive response. This response was found inadequate only on the basis that Siderca had not exported to the United States, so that its share of imports into the United States was less than 50 per cent.

6. This circumstance is not a sufficient justification given the far-reaching consequences of the decision to expedite the review. On the basis of Section 351.308(f), this decision led to the exclusion of relevant evidence from the contested sunset review investigation and determination, in a manner inconsistent with Article 6.1 and 6.2 AD Agreement. It had the additional effect of largely relieving the investigating authority of the obligation to investigate imposed on it by Article 11.3 AD Agreement. The European Communities therefore considers that the decision to expedite the review was incompatible with Articles 11.3 and 6 AD Agreement.

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[3] Exhibit ARG-50, pages 1 and 2.
[4] *See* the rules in Section 351.218(e)(1)(ii)(A) of DOCs regulations, exhibit ARG-3.
[5] Exhibit US-3, page 13524.
[6] First written submission of Argentina, paras. 166 to 171.

4. LIKELY CONTINUATION OF DUMPING

4.1 Required Standard of Determination: Likely

7. Article 11.3 AD Agreement provides:

> "Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review." (footnote 22 omitted)

8. Argentina argues that Article 11.3 AD Agreement requires an anti-dumping duty to be terminated five years after imposition, unless the investigating authority determines that expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. According to the Panel in *US – DRAMs*, likely means "probable".[7] It does not mean "possible" or something less than "probable". Argentina further argues that in the contested sunset investigation and determination, the investigating authority failed to determine that dumping and injury were likely, if the duty expired. For this reason, according to Argentina, the contested sunset investigation and determination are inconsistent with the obligations of the United States under Article 11.3 AD Agreement.[8] As set out in the following sections, the European Communities agrees with Argentina that the DOC likelihood determination is not in accordance with the standard of Article 11.3 AD Agreement.

4.2 The Use of the Dumping Determination from the Original Investigation as the Sole Basis for the Determination of Historical Dumping

9. The only dumping determination used by the investigating authority in the contested sunset review investigation and determination (effective 7 November 2000) was that made in respect of the original investigation (the 6 months from 1 January 1994 to 30 June 1994).

10. The contested sunset review determination was based on the following statement in the issues and decisions memorandum[9], that being a document expressly incorporated by reference into the contested determination:

> "… we find that dumping has *continued* over the life of the Argentine order and is likely to *continue* if the order were revoked." (emphasis added)

11. Article 11.3 AD Agreement refers to likely "continuation or recurrence". If "continuation" and "recurrence" would be interpreted as having the same meaning, one of the two words would be redundant. If that is to be avoided, the words must have different meanings.

12. Both words indicate a determination with a temporal aspect, being one that is partially *historical* and partially *prospective*. If dumping *continues*, it is present, *uninterrupted*, both before and (it is expected) after a point of reference in time. If dumping *recurs*, it is also present both before and

[7] Panel Report, para. 6.45.
[8] First written submission of Argentina, paras. 89 to 93 and 211 to 233.
[9] Exhibit ARG-51, page 5, para. 2, final sentence.

(it is expected) after a point of reference in time, but it is *interrupted* by a time when there was no dumping.[10] These are the common and ordinary meanings of the words "continue" and "recur".

13. The European Communities does not therefore consider that the unqualified statement in the United States Statement of Administrative Action:[11] "The determination called for in these types of reviews is inherently predictive and speculative." is consistent with the AD Agreement. The facts and analysis in the historical part of the determination are neither predictive nor speculative. The prospective part must consist of positive evidence, that is, historical facts (that are neither predictive or speculative) plus analysis or reasoning. Of the four elements in the determination, it is only this final element of prospective analysis or reasoning that might be termed predictive or speculative. For similar reasons, the European Communities would not agree with the United States submissions in the present case, insofar as they suggest that a sunset review investigation and determination is concerned uniquely with a prospective analysis.[12]

14. Since time is continuous and sales punctual, whether dumping is continuous or recurrent can only be determined by reference to a defined *period*. Otherwise every dumped import would be a recurrence; continuous dumping could not by definition exist; and the word continuation would be redundant. Thus, an Article 11.3 AD Agreement review must be conducted by reference to a specific time period. As a matter of logic and common sense, it is not possible to conduct the analysis required by Article 11.3 AD Agreement without some temporal parameters.

15. For example, referring to the 5 year period provided for in Article 11.3 AD Agreement, a sunset review initiated before the end of year 5, that relied on a dumping determination in respect the period from the end of the original investigation up to the most recent available data would be an example of a review that relied on a likely *continuation* determination. On the other hand, an Article 11.3 AD Agreement review which sought to rely on a dumping determination limited to, for example, year 1, in circumstances where there was no subsequent dumping, would be an example of a review that relied on a likely *recurrence* determination.

16. Are there any requirements concerning the time parameters that an investigating authority may select for a sunset review ? As regards the historical element of the determination, the relevant time period may end with the end of the period in which the most recent data is available. There must also be a date on which the time period starts. It cannot stretch back indefinitely.

17. If the investigation period in an Article 11.3 review investigation is defined by the investigating authority as starting on the date of the original investigation period (in this case, 1 January 1994) and ending with the end of the period in which the most recent data is available, then there is no distinction between the concept of continuation and the concept of recurrence. This is the method that was used by the investigating authority in the present case. It is a method that renders the word "recurrence" redundant. Every case becomes a case of continuation. That is why in the issues and decisions memorandum[13] the investigating authority considered itself able to state:

> "… we find that dumping has *continued* over the life of the Argentine order and is likely to *continue* if the order were revoked." (emphasis added).

[10] Panel Report, *US – Carbon Steel from Japan*, para. 7.179 : "We derive this from the reference to "recurrence", which we understand to refer to the recommencement of a phenomenon that has ceased."

[11] United States Statement of Administrative Action (SAA), accompanying the adoption of the Uruguay Round Agreements Act (URAA), implementing the WTO Agreement for the United States, with effect, for the purposes of the present case, from 1 January 1995. Exhibit ARG-5 at page 4208.

[12] First written submission of United States, paras. 250 and 255.

[13] Exhibit ARG-51, page 5, para. 2, final sentence.

18. The investigating authority made that finding of *continuity* notwithstanding the fact that there was a gap of six years, four months and seven days between the end of the original investigation period (30 June 1994), and the date of the contested sunset determination (effective 7 November 2000).

19. The specific question before the Panel is: by relying in the contested sunset review investigation and determination, for the purposes of the historical part of a likely continuation determination, ***only*** on the dumping calculation in relation to the original investigation period (in this case, the six months from 1 January 1994 to 30 June 1994), did the United States act in a manner inconsistent with its WTO obligations ? The Panel does not need to decide whether or not a Member could rely on dumping during any specific later period (such as, for example, years 1, 2 or 3).

20. The European Communities agrees with Argentina that on this point the United States acted inconsistently with its WTO obligations.[14] On the basis of the method used by the United States, a dumping measure could be perpetuated for 10 years, indeed indefinitely, on the basis of the calculation made in relation to the original investigation period, together with the prospective part of the likely continuation determination. That would not be consistent with Article 11.1 or 11.3 AD Agreement.

21. Article 11.1 AD Agreement states a general and overarching principle in the light of which Article 11.3 must be interpreted.[15]

22. Article 11.1 AD Agreement is particularly concerned with the *temporal* scope of an anti-dumping measure. This appears from the title of Article 11, which contains the word "duration". It is confirmed by the use of the word "remain" in Article 11.1. The provision is not concerned with whether or not a measure should be imposed, but whether or not it should remain.

23. The words "only as long as" in Article 11.1 AD Agreement are significant. The text of the provision does not read "An anti-dumping duty shall remain in force *if* necessary to counteract dumping …". Rather, the agreed words "only as long as" indicate a *temporal* requirement that is more than the mere conditional "if". They indicate that there must be a minimum temporal relationship between the existence of dumping and the existence of the duty. *Only as long a*s there is dumping can there be an anti-dumping duty. In other words, a dumping determination in relation to the original investigation period has a limited "shelf-life". It is not forever. It cannot be the *sole* basis for imposing anti-dumping duties for an *unlimited* period of time.

24. This analysis is further confirmed by the use of the words "*is causing*" (the present tense) in Article 11.1 AD Agreement. The dumping in question cannot be dumping that "caused" or "was causing" or "had caused" – it must be dumping that "is causing". The present is now. Whilst it may be true that the requirement to use positive evidence may logically justify using historical data, in relation to a period that is closed (for example, year 4), that does not permit the investigating authority to evade entirely the Member's obligation to determine that dumping *is present*. If a Member relies again only on the results of the original investigation, that would contradict the use of the present tense in Article 11.1 AD Agreement.

25. Further guidance may be derived from the word "immediately" in Article 11.2 AD Agreement, emphasizing that the dumping duty must be terminated immediately when the authorities determine that it is no longer warranted.[16]

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[14] First written submission of Argentina, paras. 156 to 165 and 184.

[15] Appellate Body Report, *US – Carbon Steel from Germany*, para. 70; Panel Report, *EC – Tube and Pipe*, para. 7.113.

[16] Appellate Body Report, *US – Carbon Steel from Germany*, para. 71.

26. The proposition that a Member can rely only on the prospective part of a likely continuation determination (together with the results of the original investigation), if that prospective determination does not involve a present dumping determination, is equally inconsistent with the text of the AD Agreement. Even a prospective determination must be based on positive evidence, that is, evidence capable of assessment, evidence that exists, historical evidence. If such evidence includes a dumping determination, then the preceding observations apply. If it does not include a dumping determination (but involves, for example, imports during the relevant period), then there will, by definition, be no sufficiently recent dumping determination. The language of Article 11.1, as analysed above, expressly and specifically requires a present determination of *dumping*, not a present determination concerning *imports*.

27. Once it is accepted that the results of a dumping calculation made in relation to an original investigation period cannot alone forever be the basis for imposing duties, the only question that remains is what is the maximum "sell-by date" ? Is it 11 years, 7 months and 11 days, and, based on current United States methods and practice, almost certainly longer – indeed indefinite ? In the opinion of the European Communities it results incontestably from Article 11.3 AD Agreement that the maximum period is five years. ***The minimum meaning of Article 11.3*** **AD Agreement** ***is that, to continue the measure beyond five years, an historical dumping determination more recent than that made in the original investigation is necessary.***

4.3 Prospective Continuation of Dumping

4.3.1 Prospective determination

28. Article 11.3 AD Agreement requires a determination that is in part prospective. Article 11.3 AD Agreement does not merely require a finding that dumping occurred or recurred or continued (past tense). It requires a finding that dumping is likely to continue or recur (future tense). Thus, having made the required historical determination of dumping, an investigating authority must go on, in addition, to make the required prospective determination, based on positive evidence existing at least at the time of the determination.[17]

4.3.2 Additional factual requirement

29. The question that arises is whether the prospective determination can consist only of analysis, no new facts being added to those used for the historical determination, or whether new facts must be added, before the prospective analysis is made. ***In the opinion of the European Communities, this may depend on how recent the historical dumping determination is.***

30. If the historical dumping determination relates, for example, to years 1 to 4 (during which the order is in force) and margins are constant or increasing over time, then the same facts might possibly carry weight both for the historical determination and the prospective determination. For the prospective determination what would be particularly necessary would be to add some *reasoning*. If dumping has recently occurred even with an order in place, then it might be relevant for the determination, especially if the trend in the margin is upwards.

[17] Panel Report, *US – Carbon Steel from Japan*, para. 7.45 : "… the authorities are required to establish, on the basis of positive evidence, that there is likelihood of continuation or recurrence of dumping or injury …", and paras. 7.177 and 7.279 ("Future "facts" do not exist."); Panel Report, *US-DRAMS*, para. 6.42 : "… such continued imposition must, in our view, be essentially dependent on, and therefore assignable to, a foundation of positive evidence that circumstances demand it. In other words, the need for the continued imposition of the duty must be demonstrable on the basis of the evidence adduced."; Appellate Body Report, *US – Carbon Steel from Germany*, para. 88 : "… a fresh determination, based on credible evidence, will be necessary to establish that the continuation of the countervailing duty is warranted …"; Appellate Body Report, *US – Lamb*, para. 136.

31. One point, however, is clear. If the historical dumping determination relates only to the original investigation period (as in the present case), in the opinion of the European Communities, some new facts must at least be added for the purposes of the prospective dumping determination. ***Otherwise the continuation of the measure would be based only on out-of-date data and speculation about the future*.** In that way, Article 11.3 AD Agreement would be rendered effectively meaningless, which would not be an acceptable interpretation of the AD Agreement, in conformity with customary rules of international law.

32. What kind of additional factual information is required ? If the requirements would be high (many detailed facts on a range of matters directly linked to the issue of likely future dumping), the balance would lie towards the first part of the first sentence of Article 11.3 AD Agreement : "… any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition …". If the requirements would be low (few general facts on limited matters not directly linked to the issue of likely future dumping), the balance would lie towards the second part of the first sentence of Article 11.3 AD Agreement : "… unless the authorities determine … that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury."

33. In the opinion of the European Communities, the threshold for additional factual information ***must be sufficiently high to give effective meaning*** to the rule in Article 11.3 AD Agreement.[18]

34. Accordingly, since Article 11.3 AD Agreement contains the presumption that duties will be terminated after 5 years, there must be positive factual findings capable of supporting a determination of likely continuation of dumping. Even if there is evidence as to dumping in the original investigation period, that does not mean that the prospective requirement is satisfied.

4.3.3 Additional factual assertions in this case

35. In the issues and decisions memorandum[19] the investigating authority first rejects the no-likelihood argument advanced by Siderca. This rejection is based on *a contrario* reasoning derived from the truncated quotation from the SAA at the beginning of para. II.4 of the *Sunset Policy Bulletin*[20], that being an example of a situation, it is said, in which dumping may be "less likely" to continue.

36. In the same paragraph of the issues and decisions memorandum, the final sentence is concerned with the affirmation of the likelihood determination (the reference to 1.27 per cent instead of 1.36 per cent appears to be a typographical error). It reads:

> "Because 1.27 per cent is above the 0.5 per cent *de minimis* standard applied in sunset reviews, we find that dumping has continued over the life of the Argentine order and is likely to continue if the order were revoked."

37. This is a reference to point II.3(a) of the *Sunset Policy Bulletin*, which states in relevant part:

> "… the Department normally will determine that revocation of an anti-dumping order … is likely to lead to continuation or recurrence of dumping where – (a) dumping continued at any level above *de minimis* after the issuance of the order …"

[18] Appellate Body Report, *US – Carbon Steel from Germany*, para. 71 : "As we explained in our Report *US – Lead and Bismuth II*, the determination made in a review under Article 21.2 [of the SCM Agreement] must be a **meaningful** one." – otherwise "… the review mechanism under Article 21.2 [of the SCM Agreement] **would have no purpose**." (Appellate Body Report, *US – Lead and Bismuth II*, para. 61). (emphasis added)

[19] Exhibit ARG-51, page 5, para. 2, first 3 sentences.

[20] Exhibit ARG-35.

38. The only factual statement in the first phrase above, from the memorandum, relates to the dumping margin calculated in the original investigation. We therefore conclude that for the purposes of the prospective part of the likely continuation determination, the contested determination contains ***no additional statement of fact***, other than the dumping margin calculated in relation to the original investigation period (1 January to 30 June 1994). For this reason, the European Communities considers the contested sunset review investigation and determination to be inconsistent with Article 11.3 AD Agreement.

39. It is correct that, in rejecting Siderca's comments on no-likelihood, DOC made an *incidental* factual assertion : "In the Argentine case, there has been no decline in dumping margins coupled with an increase in imports."

40. Whether or not such an *incidental* factual statement could be sufficient for the purposes of Article 11.3 AD Agreement, the European Communities has the following comments. We first consider the statement : "there has been no decline in dumping margins". In order to determine that something *has declined* it would be necessary to make at least 2 discrete measurements, at different times. The investigating authority did not do that. Instead, it stretched the period under consideration, extending it from the original investigation period (the 6 months from 1 January 1994 to 30 June 1994) to the time at which the assessment was made, and concluded that during this period there had been *no decline*, because there had been no change. If no additional measurement is made, that result is a foregone conclusion, following inevitably and automatically from the method used by the United States.[21] The conclusion must be that this part of the statement adds no new *factual* element to the historical dumping determination, for the purposes of the prospective part of the determination.

41. Thus, the single additional factual element relied on by the investigating authority is the statement:

> "… there has been no … increase in imports … ."

42. The specific question before the Panel is: was this factual assertion alone, leaving aside for the time being the question of whether or not it is accurate, relevant to and sufficient for the purposes of the prospective part of the likely continuation of dumping determination ? ***Is it a feast of fact, or a meagre crumb?*** In the respectful opinion of the European Communities, the Panel should conclude that it is insufficient for the purposes of the AD Agreement.

43. That conclusion is confirmed when one considers the possible additional factual determinations that are *omitted*. The Panel need not enter into a general discussion of what they might or must be, it being sufficient for the purposes of the present case to refer to (without endorsing) United States legislation. The SAA provides:[22]

> "… Commerce also will consider other information regarding price, cost, market or economic factors it deems relevant. Such factors might include the market share of foreign producers subject to the anti-dumping proceeding; changes in exchange rates, inventory levels, production capacity, and capacity utilization; any history of sales

[21] Appellate Body Report, *EC – Bed Linen (21.5)*, para. 132 : "The approach taken by the European Communities in determining the volume of dumped imports was not based on an "objective examination". The examination was not "objective" because its result is predetermined by the methodology itself."; Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.

[22] Exhibit ARG-5 at page 4214.

> below cost of production; changes in manufacturing technology of the industry; and prevailing prices in relevant markets. …"[23]

44. In commercial terms, five years is a long time. There are very many reasons why imports from one Member to another might have been at a particular level prior to the order, and not increased after the order, other than the existence of the order itself. A sufficient and fair consideration of those possible reasons cannot be made if the factual basis for the prospective part of the determination is as narrow as that used by the investigating authority in the present case.

45. That conclusion is also confirmed when one considers the *ambiguity and lack of precision* in the factual statement – the absence of precise detail means one cannot conclude that an objective determination was made.

46. That conclusion is further confirmed when it is recalled what facts DOC *did not use* : throughout the period Siderca neither imported nor dumped the product in the United States.

4.3.4 Additional reasoning

47. Similar comments apply with regard to the need for additional reasoning. Given the requirement that the determination be based on positive evidence, and given that identifying facts relevant to a prospective determination may be problematic, the reasoning justifying the determination assumes a particular importance. A sufficiently detailed and persuasive set of reasons, such as to give effective meaning to Article 11.3 AD Agreement, is therefore necessary. In the present case, as indicated above, there was ***no additional reasoning***, DOC relying only the dumping margin calculated in respect of the original investigation period (1 January to 30 June 1994). For this reason, the European Communities considers the contested sunset review investigation and determination to be inconsistent with Article 11.3 AD Agreement.

48. It is correct that, in rejecting Siderca's no-likelihood comment, DOC *incidentally* mentioned the following:

> "… declining or no dumping margins accompanied by steady or increasing imports may indicate that a company does not have to dump in order to maintain market share."

49. As the issues and decisions memorandum indicates, that statement is also to be found in the SAA[24] and also appears as a truncated quotation from the SAA in the *Sunset Policy Bulletin.*[25]

50. Whether or not such an *incidental* statement of reason could be sufficient for the purposes of Article 11.3 AD Agreement, the European Communities has the following comments. We note first that the phrase does not appear in the issues memorandum in exactly the same context as in the SAA. In the SAA, the preceding sentence contains an example of circumstances in which the measure subject to the sunset review investigation would *not be* terminated. It states:

> "For example, declining import volumes accompanied by the continued existence of dumping margins *after the issuance of an order* may provide a strong indication that, absent an order, dumping would be likely to continue, because the evidence would indicate that the exporter needs to dump to sell at pre-order volumes." (emphasis added)

[23] *See also* : 19 USC. 1675 (Exhibit ARG-1), at page 1157 : "If good cause is shown, the administering authority shall also consider such other price, cost, market or economic factors as it deems relevant.".

[24] Exhibit ARG-5, page 4213.

[25] Exhibit ARG-35, page 18872.

51. DOC does not rely on this statement. Instead, DOC relied on an example of circumstances in which the measure might be terminated, drawing from this example, using *a contrario* reasoning, a different statement.

52. As already indicated above, the European Communities considers that there may be many reasons why import volumes decline, apart from an anti-dumping order, none of which were considered in the contested sunset review investigation and determination.

53. Again, it is appropriate to consider whether or not such a statement can be considered relevant, sufficient, persuasive, credible, even-handed. ***Is it a fair and persuasive justification for the contested determination, not to mention the 217 other determinations presented by Argentina, or is it a brush-off?*** In the respectful opinion of the European Communities, the Panel should conclude that it is insufficient for the purposes of the AD Agreement.

54. It results from the preceding observations that the European Communities agrees with Argentina[26] that the United States acted inconsistently with Article 11.3 AD Agreement, insofar as the additional statement of fact, if any, and the additional statement of reason, if any, relied on by the investigating authority for the purposes of the prospective part of its likely continuation of dumping determination were insufficient to give effective meaning to Article 11.3 AD Agreement.

4.4 Conclusion on Likely Continuation of Dumping

55. For each of the above reasons considered independently (reliance on the dumping determination from the original investigation, and no or insufficient statement of fact and reason for the purposes of the prospective determination) the European Communities considers that the United States did not act in accordance with its obligations under the AD Agreement. In any event, the European Communities invites the Panel to reach that conclusion when both arguments are considered together : continuation of the duty was based on out-of-date data and, essentially, speculation about the future, thus depriving Article 11.3 AD Agreement of effective meaning.

56. Articles VI (1) and (2) GATT 1994 are drafted in the present tense, as is most of the AD Agreement. There must therefore be a minimum temporal relationship between the dumping, and the duty. The object and purpose of Article 11.3 AD Agreement is to define, as a general rule or principle, what that minimum temporal relationship should be, subject to an exception. For Article 11.3 AD Agreement to have effective meaning, the exception cannot be interpreted in such a way as to make it the rule. ***A meaningful balance must be struck***. There was no such meaningful balance struck in the present case. And the statistics submitted by Argentina in respect of United States sunset review investigations reveal that no such meaningful balance is being struck by the United States over time, nor will be struck in the future, unless the Panel reaches an appropriate conclusion and makes appropriate recommendations.

57. According to the SAA[27] which provides authoritative interpretation of United States law : "The [Anti-Dumping] Agreement does require a number of changes in US law, such as … new five-year "sunset" review provisions. These changes ***do not diminish in any meaningful way the level of protection afforded US industries*** from dumped imports." (emphasis added).

58. It is clear from the SAA[28] that administrative burden is an issue in the United States : "… there will likely be more than 400 of these transition orders …"; "… thereby creating an extraordinary burden on the agencies' resources …"; "To promote administrative efficiency …". Certainly these pressures exist and are intense, not least because the United States did not previously have a sunset

[26] First written submission of Argentina, paras. 181 and 184.
[27] At page 137.
[28] Exhibit ARG-5 at page 4208.

review investigation provision, and it is perfectly understandable that a Member should wish to take them into account. As a matter of WTO law, however, such resource allocation issues could never justify such a paucity of fact, reason and procedure as is reflected in the contested sunset review investigation and determination, such as to deprive Article 11.3 AD Agreement of effective meaning.

59. If the United States could conclude in the present case that dumping is likely up to a date more than 11 years after the ***single*** determination in the original investigation, surely this Panel can conclude on the basis of the ***217*** determinations submitted and analysed by Argentina, that no meaningful Article 11.3 AD Agreement balance is being struck or is likely to be struck by the United States, and act accordingly? To do otherwise would be to empty Article 11.3 AD Agreement of meaning, and thus to "upset the delicate balance of rights and obligations attained by the parties to the negotiations."[29]

60. As the Appellate Body has observed:

> "… we wish to underline the thrust of Article 21.3 of the SCM Agreement. An automatic time-bound termination of countervailing duties that have been in place for five years from the original investigation or a subsequent comprehensive review is **at the heart of this provision**. Termination of a countervailing duty is the **rule** and its continuation is the **exception**. The continuation of a countervailing duty must therefore be based on a properly conducted review and a positive determination that the revocation of the countervailing duty would "be likely to lead to continuation or recurrence of subsidization and injury". Where the level of subsidization **at the time of the review** is very low, there must be **persuasive evidence** that revocation of the duty would nevertheless lead to injury to the domestic industry. **Mere reliance by the authorities on the injury determination made in the original investigation will not be sufficient**. Rather, a fresh determination, based on **credible evidence**, will be necessary to establish that the continuation of the countervailing duty is warranted to remove the injury to the domestic industry."[30] (emphasis added)

5. THE *SUNSET POLICY BULLETIN* AND UNITED STATES METHODOLOGY "AS SUCH"

61. Argentina argues that the *Sunset Policy Bulletin* and United States methodology "as such" are inconsistent with Article 11.3 AD Agreement because they establish and evidence that there is an irrefutable presumption that dumping is likely to continue or recur if dumping margins continue or imports cease or decline[31]. The United States argues that no such irrefutable presumption exists, and that, in any event, neither the *Sunset Policy Bulletin* nor United States methodology, not being mandatory, can be found "as such" inconsistent with the AD Agreement.[32]

62. The European Communities considers that the *Sunset Policy Bulletin*, or at least the specific provision of the *Sunset Policy Bulletin* in question, is a measure that may properly be referred to a Panel for the purposes of determining whether or not it is consistent with the AD Agreement.

5.1 The So-Called Mandatory/Discretionary Doctrine

63. The European Communities considers that the distinction between mandatory and discretionary measures is not based on any provision in the WTO Agreements. Moreover, that

[29] Appellate Body Report, *US – Carbon Steel from Germany*, para. 91.
[30] Appellate Body Report, *US – Carbon Steel from Germany*, para. 88.
[31] First written submission of Argentina, paras. 124 to 137.
[32] First written submission of the United States, paras. 171 to 208.

approach does not reflect a general approach by WTO Panels, and has never been confirmed by the Appellate Body.

64. Some Panels have applied a mandatory/discretionary doctrine. Other Panels, and notably the Panel in *US – Section 301*, have taken a contrary, or at least more qualified view. The Appellate Body for its part has so far abstained from pronouncing itself clearly on the issue, although it may be called upon to do so soon in a case presently pending before it.[33] The European Communities considers that, even if relevant, the distinction could not be determinative, nor the end of the analysis.[34]

65. The European Communities further agrees with the Panel in *US – Section 301* that whether or not so-called "discretionary" legislation may be subject to challenge may depend on the specific obligations imposed by each provision of the WTO Agreement. It therefore considers that it is necessary to examine the specific provisions of the AD Agreement in order to establish whether the *Sunset Policy Bulletin* as such may constitute a violation of the disciplines of this agreement.

5.2 The *Sunset Policy Bulletin* Is an Administrative Procedure

66. In the view of the European Communities, the decisive provision for determining whether the *Sunset Policy Bulletin* may give rise to a violation of the AD Agreement is Article 18.4 of the AD Agreement.

67. The European Communities considers that there are two aspects in the wording of this provision which are noteworthy in the present context. First of all, Article 18.4 AD Agreement requires that WTO Members take "all necessary measures, of a general or of a particular character". Laws and regulations being by definition of a general character, this indicates that the obligations of WTO Members are not exhausted by merely enacting laws and regulations which are not incompatible with the AD Agreement, but must ensure that the AD Agreement is respected also in particular cases.

68. Second, Article 18.4 AD Agreement refers, as well as to "laws" and "regulations", also to "administrative procedures". In the view of the European Communities, this separate notion must have a distinct meaning compared to "laws and regulations". However, by examining whether the *Sunset Policy Bulletin* is "binding under US law", the United States is essentially asking the question whether the *Sunset Policy Bulletin* is a law or a regulation. It thereby fails to correctly interpret Article 18.4 AD Agreement.

69. The European Communities considers that the term "administrative procedures" cannot be limited to "rules" or "procedures" the compliance with which is "mandated" by municipal law. If this were the interpretation, the term would be deprived of all independent meaning. Rather, the European Communities considers that the term applies to all rules and procedures which guide proceedings falling under the AD Agreement, including those which have lesser legal force or effects in municipal law than laws and regulations.

70. The European Communities considers that this interpretation is also necessary in order to protect the efficiency of the multilateral system of dispute resolution. Anti-Dumping is characterized by a large number of proceedings affecting individual producers, which follow identical procedures and in which certain issues are bound to recur. It would be regrettable from the point of view of the efficiency of the DSU if a WTO Member could establish certain procedures which effectively result in WTO-incompatible behaviour in a large number of cases, without such procedures being challengeable as such.

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[33] *US – Carbon Steel from Japan* (DS 244/AB-2003-5).
[34] Panel Report, *US – Section 301*, para. 260.

71. Additional guidance may be drawn from a number of further provisions of the AD Agreement, all of which indicate that administrative actions and procedures are subject to the disciplines of the Agreement: Article 18.1 ("action"); Article 18.3 and 18.3.2 ("measures"); Article 18.5 ("changes … in the administration of such laws and regulations."); Article 1 ("actions"); and Article 13 ("administrative actions").

72. For these reasons, the European Communities considers that the *Sunset Policy Bulletin* must be considered an administrative procedure within the meaning of Article 18.4 AD Agreement, and therefore challengeable as such.

5.3 The *Sunset Policy Bulletin* Is Mandatory in Character

73. Furthermore, and on a subsidiary note, even if the distinction between mandatory and discretionary measures were held to be relevant in the present case, the European Communities considers that the *Sunset Policy Bulletin* should be considered as being a mandatory measure.

74. In this context, the question should not be whether the *Sunset Policy Bulletin* is "binding under US law" on DOC. Rather, the question is whether the *Sunset Policy Bulletin* has binding effect by determining the actions of those who conduct sunset reviews. In this respect, the EC would submit that the *Sunset Policy Bulletin* is a formal instruction issued by DOC, and is as such binding on the staff of DOC.

75. Moreover, the European Communities notes that DOC may depart from the *Sunset Policy Bulletin* only *so long as it explains the reasons for doing it.*[35] This duty to provide reasons for any departure from the *Sunset Policy Bulletin* means that it is by no means without legal effect for DOC. This legal effect is reinforced by the fact that the *Sunset Policy Bulletin* is officially published, which means that any departure from it might be challenged by the participants in an anti-dumping proceeding. Thus, even if theoretically DOC might have the power to depart from its *Sunset Policy Bulletin* if it so decided, it is in practice highly unlikely that it would do so in the context of a concrete review investigation. This is confirmed by the fact that in hundreds of review investigations conducted so far, DOC has in fact never departed from the *Sunset Policy Bulletin*.

76. The European Communities observes that the *Sunset Policy Bulletin* is a formal policy statement signed by the Assistant Secretary for Import Administration, on behalf of and on the authority of the administration itself. It was published in the Federal Register. There was a formal consultation procedure (recorded in the *Sunset Policy Bulletin* itself) for its adoption. It is listed on the relevant web site[36], in the same list, shortly after "laws and regulations", that is, dealt with and presented to the public in the same way and given the same ranking. There are currently 23 such policy bulletins (not just in relation to anti-dumping) on the relevant web site, dating from 1991. They are thus relatively few in number, and durable. A "policy" that lasts for 13 years, for example, can, in the opinion of the European Communities, correctly be described as something of which the WTO should be notified pursuant to Article 18.5 AD Agreement, and in respect of which dispute settlement ought to be possible.

77. The European Communities would also invite the Panel to consider the preamble to DOCs final anti-dumping regulation. That repeatedly uses the word "policy" to describe the content of the *regulations*, confirming that in substantive terms the two documents contain the same type of material. It further refers several times to policy bulletins, stating, for example, that DOC "… ***will***

[35] Panel Report, *US – Carbon Steel from Japan*, para. 7.121 (quoting a response of the United States to a question from the Panel).

[36] http://ia.ita.doc.gov

describe" a certain methodology in a policy bulletin[37], confirming that the *Sunset Policy Bulletin* can be described as "action taken under … regulations" within the meaning of Article 1 AD Agreement.

78. Finally, the European Communities notes that the Appellate Body has already held that trade defence methodologies can violate the WTO Agreement.[38] Although that case concerned the *SCM Agreement*, there is no reason to suppose that the same does not hold for the AD Agreement.

6. ZEROING

6.1 Preliminary Observations

79. The European Communities notes that Argentina has raised an argument about zeroing, to which the United States has responded by referring to the Tokyo Round anti-dumping agreement. The European Communities considers the zeroing issue of systemic importance, and has requested consultations with the United States in relation to it.[39] In view of the fact that the European Communities, as third participant in these proceedings, will not be able to respond to the arguments presented by the parties later in this procedure, the European Communities considers that it may be of assistance to the Panel to set out its views in some detail now.

80. The original applications having been made prior to 1 January 1995, it appears that the AD Agreement would not apply to the original final determination and order in this case. The question that arises, however, is whether the results of the original dumping determination could be used in the contested sunset review investigation and determination, given that they involve zeroing inconsistent with Article 2.4 of the AD Agreement[40]. The European Communities agrees with Argentina[41] that on this point the United States acted inconsistently with the AD Agreement.

6.2 Model Zeroing and Simple Zeroing

81. The European Communities recalls two methods of zeroing. What we may call "model zeroing" was the subject of the *EC-Bed Linen* case, and arises when the individual margins calculated for each model are combined. What we may call "simple zeroing" arises at an earlier stage in the calculation, when a weighted-average normal value is compared with individual export transactions.

82. Exhibit ARG-52 contains the detail of the original dumping calculation. On page 2, if the total of the column "TOTPUDD" (125478.93) is divided by the total of the column "TOTVAL" (9240392.64), the result is the 1.36 per cent in the original final determination and order. The column "CONNUMU" refers to the models sold in the United States; and the column "CONNUMT" refers to the models sold in the third country. The zeroing appears from the dots in columns "MRGOBS" to "WTAVPERC" and rows 25 to 58. These are the results for which the final column "USPR" exceeds the penultimate column "FUPDDL", and for which the dumping margin was therefore negative, but set at zero. It thus appears from this table that the zeroing method used was *at least* equivalent to that used in *EC-Bed Linen* (model zeroing). It further appears from the columns TOTOBS and MRGOBS, and the differences between them, that each individual export transaction was in fact compared with a weighted-average normal value (simple zeroing).

83. Whilst it is true that the two methods are different, in the opinion of the European Communities it is possible to say that unjustified simple zeroing is worse than model zeroing. Model zeroing allows for the possibility of some set-off between negative and positive dumping margins.

[37] 62 FR 27355, 27371, 27374, 27376.
[38] Appellate Body Report, *US – CVDs on EC Products*, para. 151.
[39] DS294.
[40] First written submission of Argentina, para. 190, final sentence.
[41] First written submission of Argentina, paras. 181 and 189 to 192.

Simple zeroing does not allow for any set-off at all. The conclusion would be that, in ruling as it did in the *EC Bed Linen* case that model zeroing is inconsistent with the AD Agreement, the Appellate Body effectively ruled that unjustified simple zeroing is also (even more) inconsistent with the AD Agreement, for the same reasons.

84. The European Communities refers the Panel to the text of Articles 2.1, 2.4 and 2.4.2 of the AD Agreement, and to *EC – Bed Linen*, para. 6.115 of the Panel Report and para. 55 of the Appellate Body Report.

85. The United States has not modified its methodology to take account of *EC – Bed-Linen*. For example, the "Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products From The Netherlands" published in FR 66 50408, amended in FR 66 55637, incorporates an issues and decisions memorandum, which states in relevant part (in response to comments from interested parties criticising the zeroing methodology):

> "These statutory requirements [which, according to DOC, mandate zeroing] take precedence over any potentially conflicting obligations under the Uruguay Round Agreements. The Uruguay Round Agreements Act makes clear that if there is a conflict between US law and any provision of the WTO Uruguay Round Agreements, US law prevails. *See* section 102(a)(1) of the URAA ("no provision of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstances, that is inconsistent with any law of the United States shall have effect.") Moreover, the SAA specifically provides that "[r]eports issued by Panels or the Appellate Body under the DSU (i.e., the WTO Dispute Settlement Understanding) have no binding effect under the law of the United States." SAA at 1032, reprinted in 1994 USC.C.A.N. 4040, 4318. Finally, the Bed Linens Panel and Appellate Body decisions concerned a dispute between the European Union and India. We have no WTO obligation to act based on these decisions."

86. It results from the *EC – Bed Linen* case that if a Member elects to use models, it must still respect the requirement to make a fair comparison, and to compare weighted-average normal value with a weighted-average export price, absent justification pursuant to the final sentence of Article 2.4.2 AD Agreement. The rule is essentially sequential: by requiring averaging first, the possibility of zeroing is mathematically eliminated.

87. In the opinion of the European Communities it necessarily follows from the conclusion that model zeroing is inconsistent with the AD Agreement, that simple zeroing is also inconsistent with the AD Agreement, other than in the circumstances described in the final sentence of Article 2.4.2 AD Agreement.

6.3 Zeroing in Context of a Sunset Review Investigation

88. The European Communities anticipates that the United States might eventually seek to argue that the provisions of Article 2 AD Agreement, or at least some of them, notably Article 2.4.2, which contains the phrase "during the investigation phase", are irrelevant in the context of a review (as that term is used by the United States) because they relate only to investigations (as that term is used by the United States).

89. The European Communities would not agree with the proposition that Article 2.4.2 is not relevant in the context of a review. First, simple zeroing in a sunset review investigation is in any event inconsistent with the obligation in Article 2.4 AD Agreement to conduct a *fair comparison*[42], and Article 2.4 does not refer to an "investigation" (as opposed to a "review"). Second, when no

[42] Appellate Body Report, *EC – Bed-Linen*, paras. 59 and 60.

justification is given, simple zeroing is also inconsistent with Article 2.4.2 AD Agreement, second sentence, which also makes no reference either to "investigation" or to "review". Third, in any event, the reference to "investigation" in Article 2.4.2 AD Agreement, first sentence does not have the limited and qualified meaning attributed to it by the United States. Of these three points, the European Communities focuses in this submission on the third. It reserves the possibility to submit further arguments, and to develop the first and second points, in its oral statement or in response to questions from the Panel.

90. According to the United States, it would appear (1) that a distinction must be made between the concept of "investigation" and the concept of "review"; (2) that it is correct to compare or juxtapose these two terms, as if, conceptually, like were being compared with like; and (3) that these concepts are mutually exclusive. The European Communities does not consider these propositions to be correct.

6.3.1 The scheme of the AD Agreement and Article 2.1

91. The European Communities observes that all of the provisions with which the present submission is concerned are in the same part – Part I – of the AD Agreement, which indicates a special degree of connexity between them. The European Communities also considers that there is a certain logical sequence to the articles in Part I of the AD Agreement, which is an integral part of the text. Thus, after the statement of principles (Article 1), Articles 2 (determination of dumping), 3 (determination of injury) and 4 (definition of domestic injury) set out what are clearly the basic building blocks. Articles 5 (initiation and subsequent investigation) and 6 (evidence) are more procedural. Articles 7, 8, 9 and 10 concern the various measures that may be taken. Article 11 concerns reviews. Articles 12 to 15 may fairly be described as miscellaneous.

92. The European Communities invites the Panel to consider Articles 2, 3 and 4, which assume particular significance, given the relative brevity of Article 1. They are definitions. Article 2.1 begins with the text "For the purposes of this Agreement, a product is to be considered as being dumped …".[43] Article 3 begins with the words : "A determination of injury for the purposes of Article VI of GATT 1994 shall be …", and footnote 9 *defines* the term "injury". Article 4 is entitled "*definition* of domestic industry" and begins with the words : "For the purposes of this Agreement, the term "domestic industry" shall be interpreted as …". Both principles and definitions are abstract text destined to be used when interpreting or applying other text.

93. The European Communities invites the Panel to consider the number of times these concepts are used in the text of the AD Agreement. By way of illustration only, a simple automatic computer search of the text of the AD Agreement yields the following results : dumping (110), dumped (37),

[43] Appellate Body Report, *EC – Bed Linen*, para. 51 : "Article 2.4.2 of the Anti-Dumping Agreement explains how domestic investigating authorities must proceed in establishing "the existence of margins of dumping", that is, it explains how they must proceed in establishing that there *is* dumping. Toward this end, Article 2.1 states : …"; Panel Report, *US – Hot-Rolled Steel*, para. 7.115; Panel Report, *EC – Bed Linen*, para. 6.114. The introductory phrase of Article 2.1 is identical to the phrase used in Article 1 of the SCM Agreement : "For the purposes of this Agreement, a subsidy shall be deemed to exist …". *See* Appellate Body Report, *US – Carbon Steel from Germany*, para. 80 : "… Article 1 of the SCM Agreement sets out a ***definition*** of "subsidy" that applies to *the whole of that Agreement* …". *See also* Panel Report *EC – Bed Linen (21.5)*, para. 6.124 and Appellate Body Report *EC – Bed Linen (21.5)* paras. 65 and 141 (the United States submits that Article 2.1 AD Agreement "***defines***" dumping …). According to the SAA, (page 138) which provides authoritative interpretation of United States law : "Article 2 [ADA] … adopts the standard ***definition*** of dumping …". Accordingly, the SAA sets out at page 150 the legislative steps necessary with respect to "***Definition*** of dumping". *See also* first written submission of the United States, paras. 253 and 256 : " … Article 2.1 provides the ***general definition*** that a product is considered to be "dumped" where the export price of that product is less than the comparable price in the comparison market." and this applies "… *throughout the* AD Agreement …".

injury (50), domestic industry (27), total (224). Clearly, these basic concepts permeate the entire agreement.

94. The European Communities does not consider that an express cross-reference from Article 11 to some other provision is necessary, before that other provision must be considered for the purposes of interpreting Article 11. It is instructive, however, to trace the web of express cross-references : Article 11 refers to Articles 9 (twice), 6 and 8; Article 9 to Articles 2 (twice) and 6 (thrice); Article 6 to Article 5; Article 5 to Article 3 (and *vice versa*). Article 1 refers to Article 5; Article 4 to Articles 8 and 3; Article 7 to Articles 5 and 9; Article 10 Articles 7 and 9. This list incorporates, more than once, all the Articles from 1 to 11, and they are all connected to each other by these cross-references. The text of all these articles is thus meshed together as part of a single web or matrix. What was agreed to by all the Members of the WTO was the whole text, not Article 11 in isolation.

95. The European Communities would draw the Panel's very particular attention to the words "unless otherwise specified" in footnote 9 of the AD Agreement. These words indicate that, as regards the definition of injury, there may be derogations or special rules elsewhere in the AD Agreement. No such words are used in Article 2.1 AD Agreement as regards the definition of dumping. Thus, unlike in the case of injury, the AD Agreement does not foresee any possibility at all for departing from the definition of dumping set out in Article 2.1 AD Agreement.

96. Accordingly, the European Communities would invite the Panel not to follow, in any event, the reasoning of the Panel in *US – Carbon Steel from Japan*, paras. 7.99 to 7.101, which relies entirely on the words "unless otherwise specified" – words not present in this case. In fact, the Panel's reasoning in para. 7.99 of its report was that the presence of a definition "… would seem to support the view that the provisions of Article 3 concerning injury may be generally applicable throughout the Anti-Dumping Agreement …" and that "Article 11 does not seem to explicitly specify otherwise in the case of sunset reviews." Transposing that reasoning to the definition of dumping, absent the words "unless otherwise specified", would confirm that Article 2 AD Agreement applies in the context of a sunset review investigation. As has been observed a number of times in the jurisprudence: "the fact that a particular treaty provision is silent on a specific issue must have some meaning."[44]

6.3.2 Anti-Dumping Proceeding

97. Neither of the words "investigation" or "review" is to be found in Article VI GATT 1994, which the AD Agreement implements.

98. In the opinion of the European Communities, ***as a matter of WTO law*** (which is what is determinative for the purposes of the present discussion) the unqualified word "investigation" does not describe the whole anti-dumping procedure. Convenience and the need for a common vocabulary in order to conduct meaningful discussions makes a label appropriate. The precise term is of little importance, but might reasonably be the "**proceeding**". That word is used as an abstract noun at least 4 times in the AD Agreement.[45] Furthermore, it corresponds to the common and ordinary meaning of the text : both court and administrative or quasi-judicial proceedings are commonly said to begin with the filing of the first document with the relevant authority, and the term is customary in WTO anti-dumping law.[46]

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[44] Appellate Body Report, *US – Carbon Steel from Germany*, para. 65; Appellate Body Report, *Japan – Alcoholic Beverages II*, para. 111; Appellate Body Report, *Canada – Patent Term*, para. 78.

[45] AD Agreement, Article 5.9, Article 8.1, Article 9.5 and footnote 19.

[46] For example : Panel Report, *US – Carbon Steel from Japan*, para. 7.32 : "This clause in Article 12.1 appears to us to serve a timing purpose : it explains when during an anti-dumping **proceeding** the public notice of initiation should be given."; Panel Report, *EC – Bed Linen*, footnote 45 (twice) and paras. 6.185 and 6.238; Panel Report, *EC – Tube and Pipe*, para. 7.208; Panel Report, *Egypt-Steel Rebar*, para. 7.139; Panel Report, *Guatemala-Cement II*, paras. 8.247, 8.249 and 8.250 (twice); Panel Report, *US – Lead and Bismuth II*,

6.3.3 Review

99. The word "review" is used 6 times in Article 9.5 AD Agreement (newcomer review), 3 times in Article 11.2 AD Agreement (changed circumstances review), 4 times in Article 11.3 AD Agreement (sunset review) and 5 other times in Article 11 and footnote 21 AD Agreement (changed circumstances and sunset reviews). It is also used once in Article 12.3 AD Agreement (changed circumstances and sunset reviews) and twice in Article 18.3 AD Agreement (all reviews).

100. The word "review" is also used four times in Article 13 AD Agreement. The first two times it refers to *judicial review* of administrative action (as in footnote 20 of the AD Agreement). The third and fourth times the word is used, apparently, in the sense indicated in the preceding paragraph.

101. The word "review" is also used twice in Article 18.6 AD Agreement, which refers to the review of the implementation and operation of the AD Agreement.

102. The conclusion must therefore be that the word or concept "review" is referred to in the AD Agreement with at least 5 different meanings : newcomer review, changed circumstances review, sunset review, judicial review, operational review. Sometimes it is used in two senses at the same time (for example, Article 11.4 AD Agreement). Sometimes it is used in three senses at the same time (for example, Article 18.3 AD Agreement). Which is the correct meaning in any given instance must necessarily be determined by looking beyond the text of the word itself, interpreting it in its context and having regard to the object and purpose of the provision in question.

6.3.4 Investigation

103. Similar remarks apply with respect to the word "investigation".

104. That word appears 15 times in Article 5 AD Agreement (initiation and subsequent investigation). Each time it is expressly associated with the qualifying word "initiate" or "initiation". The sense of the word in Article 5 may therefore be described as an Article 5 investigation or an "**initial investigation**" or an "**original investigation**" – also customary in WTO anti-dumping law.[47]

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para. 6.8; Panel Report, *US – Hot Rolled Steel from Japan*, para. 7.128; Appellate Body Report, *US – Offset Act*, para. 7.144. As regards the SCM Agreement, see : Panel Report, *US – Lead and Bismuth II*, paras. 6.8 (twice) and 6.40 (twice); Panel Report, *US – Lumber*, para. 7.116. **In the present case**, the notice of initiation of the contested sunset review determination (ARG-44) states : "Please consult the Department's regulations at 19 CFR Part 351 (2000) for definitions of terms and for other general information concerning anti-dumping duty order **proceedings** at the Department.". The explanatory memorandum to those regulations (62 FR 27296) states that DOC "… hereby revises its regulations on anti-dumping and countervailing duty **proceedings** …". Section 351.101 of those regulations states : "This part contains procedures and rules applicable to anti-dumping and countervailing duty **proceedings** …". The *Sunset Policy Bulletin* (ARG-35) also refers to "Sunset reviews in Anti-Dumping **Proceedings**", at page 18872 and again at page 18874 in relation to countervailing duties. The issues memorandum in this case (ARG-51) also states 4 times that DOC has not conducted any duty-absorption investigations "in this **proceeding**." *See also* first written submission of United States, for example at paras. 35, 39 and 40. (emphasis added)

[47] For example : Panel Report, *US – Carbon Steel from Japan*, para. 7.37, in which the Panel, in analysing the use of the word "investigation" in Article 5 AD Agreement, also recorded 9 times the use of the word "**initiate**" or one of its derivatives. The Panel then went on, in para. 7.38, to refer 3 times to the term "**original** investigations". It also used the term **original** investigation in para. 7.8 (3 times), footnote 64, para. 7.162 and para. 7.186 of the Report. The term is also used in Appellate Body Report, *US – Carbon Stee1 from Germany* 23 times – see for example, para. 66, para. 83, para. 85, para. 86 and para. 87 (3 times). Para. 60 quotes from the SAA, which uses the term "**initial**" investigation. *See also* Panel Report, *US-DRAMS*, section II.A. (titled "The **original** anti-dumping duty investigation"); Appellate Body Report *US – CVDs on EC Products* (15 times) and Panel Report (13 times); Panel Report, *EC – Bed Linen (21.5)* (12 times); Panel Report, *US – Lumber* (5 times); etc. **In the present case**, the adequacy determination (ARG-50) itself used the

Similarly, the word is used in the same sense 4 times in Article 7 AD Agreement (provisional measures), being there also associated with Article 5 AD Agreement or with the word "initiation". It is also used twice in Article 10 AD Agreement, again each time associated with the word "initiating" or "initiation". In both cases this is perfectly logical, since both provisional measures and retroactivity are relevant in the context of initial or original investigations, but not, by definition, in the context of reviews.

105. The contrast with Article 6 AD Agreement is very striking.

106. Article 11.4 AD Agreement provides that the provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under Article 11 AD Agreement. The word "investigation" is used 21 times in Article 6 AD Agreement. Thus, the relevant provisions of Article 6 must be applied in the context of an Article 11.3 review, and when they so apply, they must apply in respect of "an investigation", as that word is used in Article 6. For example, Article 6.6 AD Agreement requires authorities during the course of "*an investigation*" to satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based. This rule also applies to sunset review investigations. Thus, the type of investigation with which Article 6 read in conjunction with Article 11.4 AD Agreement is concerned must be described as a "**review investigation**" – again, customary in WTO anti-dumping law.[48] The United States does not argue that the provisions concerning "investigations" in Article 6 do not apply to sunset reviews, only that they were complied with in this case.[49]

107. It is not possible to apply the relevant provisions of Article 6 and to assert that there is no investigation, when those provisions expressly refer repeatedly to an investigation. Unlike certain other AD Agreement cross-references, Article 11.4 AD Agreement does not use the term "mutatis mutandis", indicating that the drafters intended that all of the provisions of Article 6 AD Agreement (excluding those not relating to evidence and procedure) would apply in an identical manner to sunset review investigations, as they apply to initial or original investigations.[50] As we have already

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phrase "… in the **original** investigation …"; as does the ITC initiation (ARG-45 at page 41088); the final sunset determination (ARG-46), at page 66702; the issues memorandum (ARG-51) 5 times at pages 6, 7 and 8; and the ITC final determination (ARG-54) at least 15 times at pages 3, 4, 5, 8, 11, 13, 15 and 17 [the limit of the European Communities' verification on this point for the time being]. The *Sunset Policy Bulletin* (ARG-35) also uses the term "**original** investigation" twice (page 18873). *See also* first written submission from United States, for example, paras. 40, 51, 54, 55, etc. (emphasis added)

[48] For example : in the context of Article 11.2 AD, Panel Report, *US – DRAMS*, para. 2.3 : "The DOC initiated the first annual *review* of DRAMs from Korea on 15 June 1994 and **investigated** whether the Korean companies made sales of DRAMs less than normal value, (i.e. dumped) during the period of review.". The same statement is made in para. 2.4 of the same Panel Report; Panel Report, *EC-Bed Linen (21.5)* (3 times); Panel Report, *US – CVDs on EC Products*, footnote 295 and para. 7.114 : "We consider that in a **sunset review investigation** the importing Member is obliged …". **In the present case**, the ITC notice of initiation (ARG-45) bears the title : "[**Investigations** Nos. 701-TA-364 (Review) and 731-TA-711 and 713-716 (Review)]". This is highly significant. The description "investigation" is used in the general title, thus applying to all that follows; the word "investigation" is used for the purposes of assigning a case number; both the word "investigation" and the word "review" are used in the same description, thus to describe the same thing, showing that they are not mutually exclusive; and the word "investigation", if anything, clearly takes precedence over the word "review". The same page also includes a reference to the "Office of Investigations". The reference to the investigation numbers are also included, twice, in the final ITC determination (ARG-54) on the title page and following page, and on page 6 the ITC refers expressly to "**review investigations**". *See also* first written submission of United States, para. 154, in which dictionary definitions of "review" and "determine" are said to include "… conclude from reasoning or ***investigation***, deduce …". (emphasis added)

[49] First written submission of United States, para. 163 and following.

[50] Panel Report, *US – Carbon Steel from Japan*, para. 7.33 : "… the use of term *"mutatis mutandis"* demonstrates that the drafters foresaw that certain provisions of Article 12 could not be applied, at all, or at the very least not in an identical manner, in the case of sunset reviews."

recalled, the fact that a particular treaty provision is silent on a specific issue must have some meaning.

108. Naturally, Article 6 AD Agreement also applies to initial or original investigations, as well as review investigations. This results particularly clearly from the fact that, unlike Article 5 AD Agreement, which refers always to initial investigations, Article 6 refers to an investigation in neutral terms. Thus, the word "investigation" in Article 6 AD Agreement has a more general meaning, that encompasses both initial or original investigations and review investigations. Once again, the fact that a particular treaty provision is silent on a specific issue must have some meaning.

109. The reason why an express cross-reference in Article 11.4 AD Agreement is necessary is not because the concept of "investigation" and the concept of "review" are mutually exclusive, as the United States would have it. It is simply because not every review necessarily involves an investigation, in exactly the same way as not every proceeding necessarily involves an investigation. Thus, Article 11.4 AD Agreement has a purpose : it ensures that the relevant Article 6 AD Agreement rules apply in all reviews, not just those reviews that involve an investigation.

110. This reading of the AD Agreement corresponds to the common and ordinary meaning of the word "investigation", which is what the Panel is bound to use.

111. Further guidance is provided by the term "investigating authorities", which is used several times in the AD Agreement. Given the common and ordinary meaning of this term, what an investigating authority does is to investigate, or in other words, to conduct an investigation. In *the* present case, having regard to the relevant provisions of Article 6 AD Agreement, which applied in this case, both DOC and the ITC can only be correctly described in terms of the AD Agreement as "investigating authorities".[51] Thus, in the present case they were engaged in the conduct of an investigation – a sunset review investigation.

6.3.5 "During the Investigation Phase"

112. In the light of the preceding observations, the European Communities does not agree with the interpretation advanced by the United States of the words "during the investigation phase" in Article 2.4.2 AD Agreement. It is incorrect to assert that the words "investigation" and "review" in the AD Agreement each have a single, mutually exclusive, meaning. They have different meanings, depending on the context and the object and purpose of the relevant provision. Under the AD Agreement, there may be both initial or original investigations, and review investigations. The text of Article 2.4.2 AD Agreement does not read : "during the *initial* investigation phase" or "during the *original* investigation phase" or "during the *Article 5* investigation phase", as would be to be expected if the United States were correct. If that would be the intended or agreed meaning, it would have been a simple matter for the negotiating Members to insert one of those formulations in the text. But **they chose not to do that**. Instead, **the more general term "investigation" is used**, just as in Article 6 AD Agreement, encompassing both initial or original investigations as well as sunset review investigations conducted pursuant to Article 11.3 and Article 6 AD Agreement. To read into the text of Article 2.4.2 AD Agreement words that are not there, and that fly in the face of the context, object and purpose of the provisions, would be to diminish the rights accruing to the Members of the WTO under the AD Agreement, in a manner inconsistent with Articles 3(2) and 19(2) DSU.

[51] Panel Report, *US – Carbon Steel from Japan*, para. 7.166; Panel Report, *US – DRAMs*, para. 6.58; Panel Report, *EC – Pipe and Tube*, para. 7.112. *See also* first written submission from United States, paras. 131, 132, 141, 239, 280 : "In a sunset review, the ***investigating*** authority …", etc.

6.3.6 Other phases : Pre-Investigation Phase

113. The European Communities considers that, following this reasoning, there is no particular difficulty in identifying the object and purpose of the words "during the investigation phase" in Article 2.4.2 AD Agreement. An anti-dumping proceeding may contains other phases, such as, for example, the pre-investigation phase (there may also be others).

114. Thus, the first step in an anti-dumping proceeding is not the initiation of an Article 5 investigation. The first step is normally the written application by the domestic industry, pursuant to Article 5.1 AD Agreement. There are several provisions of the AD Agreement regulating the period prior to the initiation of an Article 5 investigation. These provisions impose obligations on Members. For example, Article 5.2 sets out the minimum content of an application. If an application does not meet these requirements, a Member cannot initiate an Article 5 investigation without acting inconsistently with the AD Agreement. According to Article 5.3 AD Agreement, the authorities must examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation. Article 5.4 AD Agreement requires the authorities to determine that the application is supported by a sufficient proportion of the domestic industry – otherwise "An investigation shall not be initiated …". Article 5.5 AD Agreement prohibits the authorities from publicising the application prior to initiation of an investigation, and requires pre-notification to the government of the exporting Member. Article 5.7 AD Agreement contains rules regarding the consideration of dumping and injury, both in the pre-investigation phase, and "thereafter". Article 5.8 AD Agreement sets out circumstances in which an application must be rejected, and *de minimis* rules. Even if an Article 5 investigation is initiated pursuant to Article 5.6, there must necessarily first be a period during which the authorities gather the necessary evidence, and during which they will be bound by the rules set out in Article 5 AD Agreement. Finally, the European Communities notes that the transitional rule in Article 18.3 AD Agreement is formulated by reference to the date of *application*.

115. There is therefore, incontestably, a period of time before an Article 5 investigation is initiated during which (1) facts material to a possible final determination arise or are placed on the record (2) procedural steps are taken both by "interested parties" (the domestic industry) and by the authorities and (3) AD Agreement rules apply and impose obligations on Members. For the sake of convenience, this period of time or phase prior to the initiation of an Article 5 investigation, which incontestably exists, may be given a label. The precise term chosen is of little importance, but might reasonably be "**pre-investigation phase**".

116. Thus, the rule in Article 2.4.2 AD Agreement would not apply, for example, during the pre-investigation phase. That is common sense and consistent with the other provisions of the AD Agreement. Article 5.2 AD Agreement requires the applicant to provide "such information as is reasonably available to the applicant". Article 5.2 (iii) AD Agreement refers to "information on prices" in the domestic market and "information on export prices". That might, for example, include published price lists. In the opinion of the European Communities, the threshold established by Article 5.2(iii) can be met by information that falls short, very far short, of the information necessary to make a full anti-dumping determination. In fact, this will normally be the case. That is because the very detailed and *complete* information concerning like product, model types, costs of production, domestic export transactions and export transactions, and all information necessary to make a fair comparison pursuant to Article 2.4 AD Agreement, will simply not be available, or reasonably available, to the applicant. Complaints are not required to contain precise and accurate dumping margin calculations. So it would make no sense to apply rules about zeroing. So the AD Agreement expressly provides that the zeroing rules do not apply in the pre-investigation phase.

6.3.7 Object and Purpose of Article 11.3 AD Agreement

117. In the opinion of the European Communities, the object and purpose of Article 11.3 AD Agreement is simple and very clear. We must have a rule other than : duties are forever. That is what Article 11.3 achieves. It takes the period of time from now stretching forward into the future, and divides it up into 5 year segments. In respect of each 5 year segment, Members are required to ensure that any anti-dumping duties they impose are consistent with the AD Agreement. If a duty depends on dumping, and dumping on a comparison, why should it be the case that, with the passage of time, the necessary comparison should move from being "fair" to "unfair" ? If anything, surely the contrary observation would be more consistent with the WTO Agreement. Thus, to permit an unfair comparison in sunset review investigations would not be consistent with the object and purpose of Article 11.3, the AD Agreement as a whole, or Article VI GATT 1994.

6.4 Dumping Margin Calculated Under Previous Agreement

118. The European Communities agrees with the United States that the purpose of the present proceedings is not to consider whether or not, in adopting the original determination, the United States acted in a manner consistent with the Tokyo Round anti-dumping agreement or the present AD Agreement. However, the point is that for the purposes of the present sunset review investigation and determination, the use by the United States of the original dumping determination was inconsistent with the present AD Agreement.

119. The European Communities considers that the Panel should conclude that, given that the original determination involved an unjustified simple zeroing method inconsistent with Article 2.4 and 2.4.2 AD Agreement, it could not be relied on for the purposes of the contested sunset review determination, and the fact that it was made under the Tokyo Round anti-dumping agreement is not a valid defence for the United States.[52]

120. In this respect, the European Communities recalls that according to Article 18.3.2 AD Agreement the present AD Agreement applies also to reviews of measures existing at the date of entry into force of the WTO Agreement. This implies the continuation of such measure is made subject to the disciplines of the AD Agreement, including to the principle contained in Article 11.1 that anti-dumping duties should be maintained only as long as necessary to counteract dumping which is causing injury. This objective of Article 18.3.2 would be undermined if a party were allowed to continue a pre-WTO measure solely on the basis of findings which are not in accordance with the provisions of the AD Agreement.

121. Furthermore, the European Communities notes that the investigating authority made a determination of *continued* dumping, not by making a fresh assessment of fresh information, but by the fiction of stretching the sunset review investigation period back to the beginning of the original investigation period (1 January 1994). It was not possible for the investigating authority to rely on the concept of *continued* dumping during the period 1 January 1994 to the date of the sunset determination (effective 7 November 2000), given that during that period, on 1 January 1995, the basic definition of dumping, indeed the entire agreement, changed. The conclusion that there is dumping is a legal determination resulting from applying certain legal rules to certain facts. Even if the facts have remained the same, if the legal rules have changed, to conclude that dumping **continues** *also during the period after the rules have changed* it must *at the very least* be necessary to apply the new legal rules to the facts. Especially when, as in the present case, doing so would result in no dumping margin at all. In failing to do that in the present case, the investigating authority acted inconsistently with the AD Agreement. One simply cannot speak of a continuous legal determination, when during the period the applicable legal rules changed.

[52] First written submission of United States, para. 260.

122. These observations apply with equal or greater force insofar as Article 11.3 AD Agreement requires a prospective determination of likely continuation of dumping in the future. That future dumping could only be dumping according to the terms of the present AD Agreement.

7. INJURY

123. The European Communities agrees with Argentina that the provisions of Article 3 AD Agreement apply mutatis mutandis in the context of a sunset review investigation.[53] As for dumping, there must a determination either of likely continuation, or likely recurrence. In both cases there is an historical element and a prospective element.

124. Article 3.1 of the AD Agreement confirms this by referring to "a determination of injury for purposes of Article VI of GATT 1994". This introductory wording of Article 3.1 suggests that the disciplines of Article 3 are in principle relevant for the entire AD Agreement, which concerns the implementation of Article VI GATT. This was also the view of the Panel in *US – Carbon Steel from Japan.*[54]

125. There are other textual indications that the Article 3 injury obligations apply throughout the Agreement. For example, the use of the language "for purposes of Article VI of GATT 1994"[55] in Article 3.1 also suggests that, in general, the obligations in Article 3 pertaining to injury may apply throughout the *Anti-Dumping Agreement*, i.e. they are not limited to initial or original investigations.

126. Given the introductory wording of Article 3.1 AD Agreement, the absence of an explicit cross-reference in Article 11.3 to Article 3, to which the United States has referred,[56] is irrelevant. Moreover, the view of the United States that Article 3 is not applicable in the context of a sunset review would lead to a completely unfettered discretion of the authorities as to how they determine likelihood of continuation or recurrence of injury in a sunset review.

127. The United States has argued that even though Article 3 does not apply in a sunset review, some of its provisions "may provide guidance as to the type of information that may be relevant to the examination in a sunset review".[57] This line of reasoning is unconvincing. The provisions of the AD Agreement, including Article 3 thereof, contain binding legal commitments which must be respected throughout the application of the Agreement. The purpose of the provisions is not to provide mere "guidance" to the Members.

128. Furthermore, The European Communities agrees with Argentina that the required standard is “likely”, not “possible” or “a concept that falls in between ‘probable’ and ‘possible’ on a continuum of relative certainty”.[58] The contested sunset review investigation and determination did not correctly apply the “likely” standard, but a lesser standard, and is therefore inconsistent with the obligations of the United States under Article 11.3 AD Agreement.

129. Finally, The European Communities agrees with Argentina[59] that both the historical and prospective part of the injury determination must be based on positive evidence and involve an

[53] First written submission of Argentina, paras. 234 to 241.
[54] Para. 7.100.
[55] We note that in accordance with the provisions of Article 1 of the *Anti-Dumping Agreement*, the reference to Article VI of GATT 1994 in Article 3 is also a general reference to the *Anti-Dumping Agreement* itself.
[56] First written submission of United States, para. 296.
[57] First written submission of United States, para. 302.
[58] First written submission of Argentina, para. 211.
[59] First written submission of Argentina, para. 243 et seq.

objective examination, as required by Article 3.1 AD Agreement. Mere speculation about facts that might or might not arise in the future is insufficient.

8. CONCLUSION

130. In the light of the preceding observations, the European Communities has the following conclusions:

- Whether the Panel request satisfies the requirements of Article 6.2 DSU should be established on the basis of the request as a whole, and not with respect to certain isolated parts of the request. The United States acted inconsistently with the AD Agreement insofar as it determined that the response from Siderca was inadequate, on the basis that it accounted for less than 50 per cent of total exports of the product from Argentina to the United States from 1995 to 1999, Siderca itself having made no exports during that period.
- The United States acted inconsistently with the AD Agreement in not correctly applying the "likely" standard for sunset review investigations provided for in Article 11.3 AD Agreement.
- The United States acted inconsistently with Article 11.3 AD Agreement, insofar as it relied only on the dumping determination made in respect of the original period of investigation. The minimum meaning of Article 11.3 AD Agreement is that, to continue the measure beyond five years, an historical dumping determination more recent than that made in the original investigation is necessary.
- The United States acted inconsistently with Article 11.3 AD Agreement, insofar as the additional statement of fact, if any, and the additional statement of reason, if any, relied on by the investigating authority for the purposes of the prospective part of its likely continuation of dumping determination were insufficient to give effective meaning to Article 11.3 AD Agreement.
- In any event, considering the two preceding arguments together, the United States acted inconsistently with Article 11.3 AD Agreement insofar as the contested determination was based on out-of-date data and essentially speculation about the future, thus emptying Article 11.3 AD Agreement of effective meaning.
- The *Sunset Policy Bulletin* is, as such, inconsistent with Article 11.3 AD Agreement.
- Model zeroing is inconsistent with the AD Agreement, Article 2, 2.4 and 2.4.2; simple zeroing is inconsistent with the AD Agreement, Article 2, 2.4 and 2.4.2, except as provided for in Article 2.4.2, second sentence (which exceptions are not relevant in the present case); and the investigating authority acted in a manner inconsistent with the AD Agreement insofar as it relied, for the purposes of the contested sunset review investigation and determination, on a dumping margin involving such zeroing, particularly insofar as it found ***continued*** dumping during a period in which the applicable legal rules changed. That conclusion is not contradicted by the phrase "during the investigation phase" in Article 2.4.2, first sentence AD Agreement, since it is a conclusion that results from the unqualified definition of dumping in Article 2.1, from the Article 2.4 obligation to make a "fair comparison" and from the Article 2.4.2, second sentence obligation to justify any use of simple zeroing. Furthermore, the word "investigation" in Article 2.4.2 is not qualified with the word "initial" (or original) or one of its derivatives, as in Article 5, but is used in the same more general sense as in Article 6, which applies to sunset review investigations by virtue of the unqualified cross-reference in Article 11.4 AD Agreement.
- Article 3 of the AD Agreement is applicable in the context of a sunset review.

* * *

The European Communities remain available should the Panel wish to pose any written or oral questions on the matters dealt with in this submission.

ANNEX B-2

THIRD PARTY SUBMISSION OF JAPAN

14 November 2003

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I. INTRODUCTION

1. Japan welcomes this opportunity to present its view in the dispute brought by Argentina over the consistency with Article VI of the General Agreement on Tariffs and Trade 1994("GATT"), the Agreement on Implementation of Article VI of the GATT ("AD Agreement"), and the Marrakech Agreement establishing the World Trade Organization ("WTO Agreement") of the decisions by the United States not to terminate the imposition of the anti-dumping duty on oil country tubular goods ("OCTG") from Argentina and US statutory, regulatory, and administrative measures with regard to sunset reviews.

2. Japan has systemic interests in the interpretation and application of the AD Agreement, GATT and WTO Agreement with regard to sunset reviews. As a third party, Japan would like to address the following issues raised by Argentina:

- Applicability of provisions of Articles 2, 3, 6, and 12 to Article 11.3;
- Inconsistency of margins of dumping based on the zeroing methodology for determining "dumping" with Articles 2.1 and 2.4; and inconsistency of determinations of likelihood of continuation or recurrence of both "dumping" by the US Department of Commerce ("DOC") and "injury" by the US International Trade Commission ("ITC") based on such dumping margins in the sunset review of OCTG from Argentina with Article 11.3;
- Inconsistency of the determination by the ITC of likelihood of continuation or recurrence of injury with Articles 3.1, 3.4, 3.5 and 11.3;
- Inconsistency of the waiver provisions in the US statute and regulations and the three scenarios in the *Sunset Policy Bulletin*[1] as such with Articles 6.2, 11.3 and 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement.

II. ARGUMENTS

A. ARTICLES 2, 3, 6 AND 12 APPLY TO SUNSET REVIEWS UNDER ARTICLE 11.3

3. Japan shares the view of Argentina that Articles 2, 3, 6 and 12 apply to sunset reviews under Article 11.3. Provisions of these Articles are explicitly cross-referenced either to or from Article 11, as discussed below. These cross-references show drafters' unequivocal intent that provisions of these Articles apply to sunset reviews under Article 11.3. The Appellate Body in *US – Carbon Steel*[2] confirmed this interpretation. The Appellate Body in that case has reviewed phrases "for the purpose of this Agreement" and "under this Agreement,"[3] and stated "these cross-references suggest to us that, when the negotiators of the SCM Agreement intended that the disciplines set forth in one provision be applied in another context, they did so expressly."[4]

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[1] *Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Anti-Dumping and Countervailing Duty Orders; Policy Bulletin*, 63 Fed. Reg. 18871 (16 April 1998) ("*Sunset Policy Bulletin*") (Exhibit ARG-35).

[2] Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*US – Carbon Steel*"), WT/DS213/AB/R and Corr.1. (28 November 2002).

[3] *See ibid*., footnote 59 (indicating phrases "For the purpose of this Agreement" regarding definition of "subsidy" in Article 1; "For the purpose of Part V" regarding calculation of the amount of a subsidy under Article 14; and "Under this Agreement" in the definition of "injury" under Article 15 and in footnote 45.).

[4] *Ibid*., para. 69 (emphasis added).

1. The provisions of Article 2 apply to the determination of likelihood of continuation or recurrence of "dumping" under Article 11.3

4. As Argentina argues, the provisions of Articles 2.1 and its subsequent paragraphs in Article 2 define the term "dumping" throughout the AD Agreement, including Article 11.3. The title of Article 2 states "Determination of Dumping." Article 2.1 then states that:

> **For the purpose of this Agreement**, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.[5]

5. The first phrase "[f]or the purpose of this Agreement" demonstrates drafters' clear intent to apply the obligations of Article 2 throughout the AD Agreement, wherever the word "dumping" appears. The basic concept of "dumping" under Article 2 thus applies to all "dumping" determinations throughout the AD Agreement, including sunset reviews under Article 11.3. To find otherwise would render the opening phrase of Article 2.1 devoid of any meaning.

6. Article 2.1 is further defined by the other provisions of Article 2, including Article 2.4. Article 2.4 provides "a fair comparison shall be made between the export price and the normal value." As the Appellate Body in *EC – Bed Linen* has stated,[6] this general obligation inform Article 2.1 of how the margin of dumping, *i.e.*, the difference between the export price and the normal value, must be established.

7. The phrase "likely to lead to continuation or recurrence" in Article 11.3 does not change the core concept of "dumping," nor does it affect the applicability of Article 2 to Article 11.3. To find "continuation of dumping," the authorities must find the existence of dumping at the time of the sunset review before ascertaining whether it will "continue". To find "recurrence of dumping," the authorities must first find that dumping has ceased by the time of the sunset review before determining whether it will "recur." The threshold question, therefore, is how the authorities must find the existence of currently occurring dumping. Sunset reviews therefore focus on both the current existence of dumping and the continued existence, or occurrence in the future, of dumping. The underlying concept of "dumping" is the same in either case; the only difference is the period of time for which this assessment is being made.

8. A determination of whether future dumping is likely to continue or recur under Article 11.3, therefore, must reflect the definition and obligations enumerated in Articles 2.1, 2.4 and the other provisions of Article 2.

2. Provisions of Article 3 apply to Article 11.3

9. Argentina also correctly stated that provisions of Article 3 apply to Article 11.3. The title of this Article states "Determination of Injury." Footnote 9 then defines the term "injury" that:

> **Under this Agreement** the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article. (emphasis added.)

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[5] Article 2.1 of the AD Agreement (emphasis added).

[6] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* ("*EC – Bed Linen*"), WT/DS141/AB/R (1 March 2001), para. 59 (a fair comparison in Article 2.4 "is a general obligation that, in our view, informs all of Article 2.")

The phrase "[u]nder this Agreement" in Footnote 9 ensures that, whenever the AD Agreement uses the term "injury," the provisions of Article 3 define the term. To find "injury," therefore, the provisions in Article 3 setting forth requirements for finding "injury" must be satisfied.

10. The texts of the individual provisions of Articles 3 further clarify that the requirements in these provisions apply to a determination of "injury." Article 3.1 sets forth general requirements for a determination of "injury." The phrase "a determination of injury for purposes of Article VI of GATT 1994" clarifies its cross-reference that the provisions of Article 3 apply to an "injury" determination throughout the AD Agreement to determine circumstances in which anti-dumping measure can be applied.[7] The Appellate Body has confirmed "Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation in this respect. Article 3.1 informs the more detailed obligations in succeeding paragraphs."[8]

11. Article 3.1 requires the authorities to base their injury determination on positive evidence and objective examination of "the volume of the dumped imports" and "the effect of the dumped imports on prices." Article 3.2 then sets forth further rules on how the authorities shall consider these two elements. In this way, Article 3.2 informs Article 3.1 and all other provisions of the AD Agreement of the analytical methods that the authorities must follow for making an injury determination.

12. Article 3.1 also provides that the authorities must base their injury determinations on positive evidence and objective examination of "the consequent impact of these imports on domestic producers of such products." Article 3.4 then sets forth how "the impact of dumped imports on the domestic industry" must be examined. Article 3.4 thus provides the detailed requirements for the examination of the impact of dumped imports under Article 3.1, and therefore, for a determination of injury. As such, the authorities must satisfy the requirements in Article 3.4 to determine "injury" in any proceedings under AD Agreement.

13. Article 3.5 provides that injury "within the meaning of this Agreement" must be caused by dumped imports through the effects of dumping as set forth in paragraphs 2 and 4. The phrase "injury within the meaning of this Agreement" ensures that the provisions of Article 3.5 further define the term "injury" whenever the term "injury" appears in this Agreement. The causation and non-attribution requirements under Article 3.5, therefore, must be satisfied to make a determination of "injury."

14. The phrase "likely to lead to continuation or recurrence" in Article 11.3 does not change the core concept of "injury," as is the case of "dumping" discussed above. The terms "continuation or recurrence" demonstrate the drafters' intent that the authorities must first find the current state of injury to the domestic industry, and then how the current state is likely to change. The modifying phrase therefore does not affect the applicability of Article 3 to Article 11.3.

15. The provisions of Article 3, therefore, apply to "injury" determinations in sunset reviews under Article 11.3.

3. Article 6 applies to determinations under Article 11.3

16. Provisions of Article 6 also apply to Article 11.3. Article 11.4 provides the clear cross-reference that "the provisions of Article 6 regarding evidence and procedures shall apply to any review carried out under this Article."

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[7] *See* Article 1 of the AD Agreement, which defines that "[a]n anti-dumping measure shall be applied under the circumstances provided for in Article VI of GATT 1994."

[8] Appellate Report, *Thailand – Anti-Dumping Duties on Angles, Shape and Extensions of Iron or Non-Alloy Steel and H-Beams* ("*Thailand – H-Beams*"), WT/DS122/AB/R (12 March 2001), para. 106.

17. The language "regarding evidence and procedures" in Article 11.4 does not limit the applicability of provisions of Article 6 to Article 11.3. As the Appellate Body in *Thailand – H-Beams* stated, Article 6 "establishes a framework of procedural and due process obligations."[9] The Appellate Body in *EC – Bed Linen (Article 21.5 – India)* has further stated:

> Article 6 is entitled "Evidence", and there is no indication in Article 6 – or elsewhere in the Anti-Dumping Agreement – that Article 6 does not apply generally to matters relating to "evidence" throughout that Agreement. Therefore, it seems to us that *the subparagraphs of Article 6 set out evidentiary rules* that apply throughout the course of an anti-dumping investigation, and *provide also for due process rights that are enjoyed by "interested parties"* throughout such an investigation.[10]

18. As the Appellate Body clarified, provisions of Article 6 set forth evidentiary and procedural rules. All provisions of Article 6, therefore, apply to Article 11.3 through Article 11.4.

4. Article 12 applies to Article 11.3

19. All provisions of Article 12 also apply to sunset reviews under Article 11.3. Article 12.3 specifically states "[t]he provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11."

20. The plain and ordinary meaning of "*mutatis mutandis"* is "all necessary changes have been made."[11] In other words, one must replace those terms in the original Article, which do not fit the situations in the other Article, with the appropriate terms. Because Article 12.3 expressly indicates that the requirements of Article 12 apply to Article 11, which deals with "reviews," the most reasonable approach is to replace the term "investigation" in Article 12 with the word "review." No other words need to be changed, and all remaining words would apply equally.

21. As such, all provisions of Article 12 apply to sunset reviews under Article 11.3 through Article 12.3.

B. THE UNITED STATES WOULD HAVE ACTED INCONSISTENTLY WITH ARTICLES 2 AND 11.3, IF ITS DETERMINATION WERE BASED ON DUMPING MARGIN WITH ZEROING METHODOLOGY

1. Dumping margins using zeroing methodology cannot be a proper evidentiary basis for determining "dumping" in sunset reviews

22. Japan agrees with Argentina that the margin of dumping calculated using the zeroing methodology cannot provide a WTO-consistent basis for determining likelihood of continuation of dumping in a sunset review. The practice of "zeroing" selectively calculates margins only for those sales of a product with positive margins, setting negative margins produced from sales of the product to zero. This methodology thus creates an artificial dumping margin. As discussed below, a "dumping" determination based on margins with the zeroing practice is inconsistent with Articles 2.1 and 2.4. Articles 2.1 and 2.4 apply to the determination of likelihood of continuation or recurrence of dumping under Article 11.3, as demonstrated above. Therefore, a determination of likelihood of continuation or recurrence of dumping based on the margins with the zeroing methodology is inconsistent with Article 11.3.

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[9] Appellate Body Report, *Thailand – H-Beams*, para. 109; see also Appellate Body Report, *EC – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings form Brazil* ("*EC – Pipe Fittings*"), WT/DS219/AB/R, (22 July 2003), para. 138.

[10] Para. 136 (emphasis added).

[11] *See Black's Law Dictionary*, 1039 (7th ed. West Group 1999).

23. The term "a product" under Article 2.1 clarifies that the margin of dumping, *i.e.*, the basis of the determination of "dumping," must incorporate all types of the product that are subject to a particular anti-dumping proceeding. The Appellate Body in *EC - Bed Linen* has stated, "from the wording of this provision, it is clear to us that the Anti-Dumping Agreement concerns the dumping of a *product.*"[12] The Appellate Body in *EC-Bed Linen* further clarified this point:

> all references to the establishment of "the existence of margins of dumping" are references to the *product* that is subject of the investigation. … Whatever the method used to calculate the margins of dumping, in our view, these margins must be, and can only be, established for the *product* under investigation as a whole.[13]

The Appellate Body in *EC – Bed Linen (Article 21.5 – India)* also confirmed "dumping is a determination made with reference to a product from a particular producer [or] exporter, and not with reference to individual transactions." (emphasis added)[14] Article 2.1 thus provides that dumping must be determined on the basis of all types of a product under consideration as a whole, not some types of the product.

24. The Appellate Body in *EC - Bed Linen* proceeded to clarify that the "fair comparison" and "price comparability" requirements mean that the establishment of dumping margins under Article 2.4 must be made by evaluating the product under consideration as a whole, not just a portion of the product. The Appellate Body stated "[a]ll types or models falling within the scope of a "like" product must necessarily be 'comparable'."[15] It then further stated that:

> The European Communities argues on the basis of the "due allowance" required by Article 2.4 for "differences in physical characteristics" that distinctions can be made among different types or models of cotton-type bed linen when determining "comparability". But here again we fail to see how the European Communities can be permitted to see the physical characteristics of cotton-type bed linen in one way for one purpose and in another way for another.[16]

25. The practice of zeroing in establishing dumping margins of a product under consideration, therefore, is inconsistent with Articles 2.1 and 2.4 of the AD Agreement. Any "dumping" determination based on the margin calculated by the zeroing methodology therefore lacks the proper evidentiary basis, and thus also inconsistent with these Articles.

2. DOC's evidentiary basis for determining likelihood of continuation of dumping, if based on zeroing, would render the determination inconsistent with Articles 2 and 11.3

26. It appeared to us that the dumping margin calculated in the original determination was the basis for DOC to make its affirmative determination in the sunset review of OCTG from Argentina. In its *Decision Memorandum*,[17] DOC has stated:

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[12] Appellate Body Report, *EC – Bed Linen*, para. 51.

[13] Appellate Body Report, *EC – Bed Linen*, para. 53 (emphasis added).

[14] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, Recourse to Article 21.5 of the DSU India ("*EC – Bed Linen (Article 21.5 – India)*"), WT/DS141/AB/RW (8 April 2003), para. 143, quoting the original panel report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R (30 October 2000), para. 6.136.

[15] Appellate Body Report, *EC – Bed Linen*, para. 58.

[16] *Ibid*. para. 60.

[17] Issues and Decision Memorandum for the Expedited Sunset Reviews of the Anti-Dumping Duty Orders on Seamless Pipe from Argentina, Brazil, Germany, and Italy; Final Results ("Decision Memorandum") (7 November 2000) (Exhibit ARG-51).

> In this case, there has been no decline in dumping margins nor an increase in imports. Rather, absent an administrative review, the dumping margin from the original investigation is the only indicator available to the Department with respect to the level of dumping. Because 1.27 per cent is above the 0.5 per cent *de minimis* standard applied in sunset reviews, we find that dumping has continued over the life of the order and is likely to continue if the order were revoked.[18]

27. In the original investigation, DOC calculated the dumping margin of 1.36 per cent for Siderca only, and applied this margin to all others rate.[19] Argentina presented an exhibit showing how DOC calculated the margin of dumping for Siderca in the original investigation.[20] While Japan does not take any position with respect to the factual aspect of this dispute, it appears to us that Siderca's dumping margin might have been negative if the zeroing had not been applied in the original investigation. If it were the case, then DOC would lose its proper evidentiary basis for its affirmative determination in the OCTG sunset review under Articles 2.1 and 2.4.[21]

28. Japan therefore respectfully requests that the Panel carefully review the evidence to confirm if DOC used the zeroing methodology to find the 1.36 per cent margin of dumping, and if the margin would have been negative without the zeroing methodology. If the Panel finds that DOC applied the zeroing methodology to find the positive margin, then Japan respectfully requests that the Panel find that the DOC's determination in the sunset review in question was inconsistent with Articles 2.1 and 2.4, and thus, inconsistent with Articles 11.3.

3. ITC's evidentiary basis would not be proper for determining likelihood of continuation of injury, and would render its injury determination inconsistent with Article 11.3

29. If the margin of dumping in the original investigation were calculated using the zeroing methodology, then it also would render the "injury" determination in the sunset review of OCTG inconsistent with Article 11.3.

30. In the sunset review of OCTG from Argentina, DOC reported to the ITC the dumping margin calculated in the original investigation as the dumping margin that is likely to prevail if the order were revoked.[22] As discussed above, the provisions of Articles 3.1, 3.4 and 3.5 apply to the determination of likelihood of continuation or recurrence of injury under Article 11.3. The ITC therefore must have based its determination of "dumped" imports under Article 3.1 and consideration of "the magnitude of margin of dumping" under Article 3.4, and the effects of dumping on the domestic industry under Article 3.5 on the reported margin to reach Article 11.3 injury determination.

31. As discussed above, if the reported margins were calculated using the zeroing methodology, these margins were inconsistent with Articles 2.1 and 2.4 for determining "dumping." In other words, the reported margin would not be a proper evidentiary basis to measure "dumping." The reported margin, therefore, could not be a proper evidentiary basis to determine dumped imports or to consider the magnitude of margin of dumping and the effects of dumping, and thus to determine "injury" under Article 11.3.

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[18] *Ibid*., p. 5.
[19] *Ibid*., p. 8.
[20] *See* Exhibit ARG-52.
[21] Japan notes that any determination must be based on proper evidence as required under Article 17.6(i) of the AD Agreement. *See US – Hot-Rolled Steel*, para. 56 ("Article 17.6(i) sets forth the appropriate standard to be applied by *panels* in examining the WTO-consistency of the *investigating authorities'* establishment and evaluation of the facts under other provisions of the *Anti-Dumping Agreement*.")
[22] *See* Decision Memorandum (Exhibit ARG-51).

32. In sum, as the ITC based these determination and consideration on the reported rates, the ITC's injury determination would also be inconsistent with Article 11.3 if the DOC's reported rate were calculated using the zeroing methodology.

C. ITC'S INJURY DETERMINATION IS INCONSISTENT WITH ARTICLES 3.4, 3.5 AND 11.3

33. Japan supports Argentina's claims that the ITC's injury determination was inconsistent with Articles 3.4 and 3.5 of the AD Agreement. As discussed above, Articles 3.4 and 3.5 apply to sunset reviews under Article 11.3. The ITC's failure to comply with the provisions of these Articles, therefore, renders its injury determination in the sunset review of OCTG from Argentina inconsistent with these Articles and Article 11.3.

1. ITC acted inconsistently with Articles 3.4 and 11.3

34. Argentina submitted convincing evidence[23] that the ITC did not evaluate certain factors mandated by Article 3.4 for determining injury. As Argentina pointed out, Article 3.4 requires that the authorities evaluate all relevant economic factors indices as set forth in the Article. The Appellate Body in *Thailand – H-Beams* confirmed the obligation of the authorities, stating, "Article 3.4 requires a mandatory evaluation of all of the factors listed in that provision."[24]

35. For example, the ITC stated in its report[25] the rates of likely margins of dumping reported from DOC. The ITC, however, did not provide any words stating its evaluation of these rates. Mere statement of facts is insufficient for the purpose of Article 3.4. As the Appellate Body confirmed, the ITC must evaluate each factor.

36. By failing to evaluate certain factors in Article 3.4, therefore, the ITC acted inconsistently with Article 3.4 and accordingly with Article 11.3 in the sunset review of OCTG from Argentina.

2. ITC would have acted inconsistently with Articles 3.5 and 11.3

37. Japan also requests the Panel to carefully review the facts in this dispute to decide whether the ITC acted inconsistently with Article 3.5 and therefore Article 11.3.

38. The first sentence of Article 3.5 expressly states that the authorities must demonstrate that the effects of "dumping" actually caused the injury. As discussed above, the term "dumping" is defined in Article 2.1 and detailed in subsequent provisions.[26] In these connections, the Appellate Body in *US – Carbon Steel* has stated:

> Where the level of subsidization at the time of the review is very low, there must be persuasive evidence that revocation of the duty would nevertheless lead to injury to the domestic industry. Mere reliance by the authorities on the injury determination made in the original investigation will not be sufficient.[27]

39. In this case, DOC found that the magnitude of dumping that would be likely to prevail with respect to OCTG from Argentina was 1.36 per cent, the rate found in the original investigation. This

[23] *See* first submission of Argentina, para. 259 and related exhibits.
[24] Appellate Body Report, *Thailand – H-Beams*, para. 128 (emphasis added).
[25] *See* Commission's Sunset Determination, p. V-1. (Exhibit ARG-54)
[26] *See* Appellate Body Report, *EC – Bed Linen (Article 21.5 – India*), para. 142. *See also United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217, 234/AB/R (13 January 2003), para. 240 ("We recall that, in *US – 1916 Act*, we said the constituent elements of dumping are found in the definition of dumping in Article VI:1 of the GATT 1994, as elaborated in Article 2 of the *Anti-Dumping Agreement*.").
[27] Appellate Body Report, *US – Carbon Steel*, para. 88.

margin of dumping is below *de minimis* under the AD Agreement, and even could be negative without zeroing, if the original investigation were subject to the AD Agreement. In order for the injury determination to be consistent with Article 3.5 and 11.3, therefore, the ITC must have persuasive evidence demonstrating that the injury would be nonetheless likely to continue or recur if the duty were terminated.

40. Further, the "non-attribution" requirement[28] in the second and third sentences of Article 3.5 requires that the authorities explicitly separate and distinguish the injurious effects of other injury factors from the injurious effects of the dumping. In this case, the ITC acknowledged that the market share of the domestic industry has fallen from 90.0 per cent in 1995 to 74.9 per cent in 2000, "due largely to an increase in non-subject imports."[29] The ITC also noted that "[o]il and natural gas prices, the ultimate drivers of OCTG demand"[30] and "a slowdown in the US and/or world economy"[31] would be factors contributing to likely injury to the domestic industry. It, however, appears that the ITC made no attempt to separate and distinguish effects of these known factors from the effects of dumping to the domestic industry. If the ITC had failed to separate and distinguish these known factors, then the ITC acted inconsistently with the non-attribution requirement under Article 3.5.

41. Japan, therefore, respectfully requests that the Panel carefully review whether the ITC demonstrated that the likely injury to the domestic industry would be caused by the effects of dumping, although the magnitude of its margin of dumping was very low. Japan also respectfully requests that the Panel carefully review whether the ITC separated and distinguished effects of all known factors to the likely injury to the domestic industry from the effects of dumping. If the ITC failed to do so, then the Panel should find that the ITC has acted inconsistently with Articles 3.4, 3.5, and 11.3.

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[28] *See* Appellate Body Report, *US – Hot-Rolled Steel*. In that report, the Appellate Body interpreted the second and third sentences of Article 3.5 as follows:

> 222. This provision [Article 3.5] requires investigating authorities, as part of their causation analysis, first, to examine *all* "known factors", "other than dumped imports", which are causing injury to the domestic industry "at the same time" as dumped imports. Second, investigating authorities must ensure that injuries which are caused to the domestic industry by known factors, other than dumped imports, are not "*attributed* to the dumped imports."
>
> 223. . . . In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, <u>such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports</u>. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, <u>in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury</u> which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties.
>
> *US – Hot-Rolled Steel*, paras. 222-23 (emphasis added).

[29] Commission's Sunset Determination at 22 (Exhibit ARG-54).

[30] *Ibid*., p. II-13.

[31] Ibid.

D. WAIVER PROVISIONS IN US STATUTE AND THREE SCENARIOS IN *SUNSET POLICY BULLETIN* ARE INCONSISTENT WITH ARTICLES 6, 11.3 AND 18.4 OF THE AD AGREEMENT AND ARTICLE XVI:4 OF THE WTO AGREEMENT AS SUCH

42. Japan agrees with Argentina that the waiver provisions in the US statute and regulations and the three scenarios[32] in the *Sunset Policy Bulletin* are inconsistent with Articles 6, 11.3 and 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement. Articles 18.4 and XVI:4 require that each Member must "ensure" the "conformity of its laws, regulations and administrative procedures" with the AD Agreement. By establishing and applying the waiver provisions and the three scenarios, which are inconsistent with Articles 6 and 11.3, the United States acted inconsistently with Articles 18.4 and XVI:4.

1. Both the Waiver Provisions and the three scenarios are actionable under Article 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement as such

(a) Inconsistency of a Measure As Such Must Be Examined in Accordance with Article 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement

43. A Member's laws, regulations, and administrative procedures are inconsistent with Article 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement as such, where a complaining Member established that a responding Member failed to "ensure" the "conformity" of them with the AD Agreement. Article 18.4 provides:

> Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

44. The phrase "administrative procedures" confirms that the rules subject to Article 18.4 and Article XVI:4 go well beyond just "laws" and "regulations." The use of the word "administrative" confirms that the scope includes the conduct of authorities in administering their anti-dumping laws. Adding the word "procedures" provides a broader sweep. One of the basic meanings of "procedure" is "a particular mode or course of action."[33] The term "administrative procedures" thus underscores the broad reach of Article 18.4 and Article XVI:4 that encompass from a legislative rule to a particular method of action adopted by the authorities. In addition, by requiring Members to take "all necessary steps, of a general or particular character," Article 18.4 of the AD Agreement contemplates broad and comprehensive action to ensure compliance with WTO obligations.

45. By requiring Members to "ensure … conformity," Article 18.4 and Article XVI:4 further confirm this broad sweep. The plain or ordinary meaning of "ensure" is to "make certain the occurrence of (an event, situation, outcome, etc.)."[34] In the context of these Articles, "ensure" acts to create an affirmative obligation on the part of a Member. The Appellate Body has commented on the meaning of "conform to" in *EC-Hormones*, stating that "conform to" has a stricter meaning than the term "based on." The Appellate Body explained "conform to," means "'comply with,' 'yield or show compliance'" with something, or "'correspondence in form or manner,'" or "'following in form or nature.'"[35] From this definition it is apparent that "conformity" goes beyond mere narrow formalities; "conformity" requires compliance, in manner and nature, as well as in form.

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[32] *See* the first submission of Argentina, para. 145; *see also* section II.A.3 of the *Sunset Policy Bulletin* (Exhibit ARG-35).

[33] New Shorter Oxford English Dictionary, Vol. II at 2363.

[34] New Shorter Oxford English Dictionary, Vol. I at 827.

[35] Appellate Body Report, *EC Measures Concerning Meat and Meat Products ("EC – Hormones")*, WT/DS26/AB/R, WT/DS48/AB/R (16 January 1998), para. 163.

46. The term "administrative procedures" must be understood in this context. Coming after "laws" and "regulations," Articles 18.4 and Article XVI:4 provide the broader term "administrative procedures" to catch administrative rules that may appear discretionary, but that in fact operate as substantively and effectively mandatory rules. Moreover, the term "administrative procedures" must also be understood in the context of a Member needing to take "all" the steps necessary to "ensure" ... "conformity" with WTO obligations. Thus, this language calls for affirmative steps to comply with WTO obligations. To act consistently with Article 18.4, therefore, Members must adopt administrative procedures that are fully consistent with WTO obligations, not those that specifically ignore these WTO obligations.

47. WTO jurisprudence clarifies that the mere language of a measure might not be sufficient to determine whether the measure is inconsistent with Article 18.4 and Article XVI:4 as such. Rather, the nature of a measure -- and whether that measure meets the requirements to "ensure … conformity of its … administrative procedures with"[36] the provisions of the AD Agreement -- must be decided on a case-by-case basis. The Appellate Body in *US – 1916 Act* noted the need to address the "nature" and "breadth" of the discretion at issue.[37] The panel in *US – Countervailing Measures* stated "we are of the view that the existence of some form of executive discretion alone is not enough for a law to be *prima facie* WTO-consistent; what is important is whether the government has an effective discretion to interpret and apply its legislation in a WTO-consistent manner."[38] The panel in *US – Section 301 Trade Act* echoed the same view when it stated that "[i]t simply does not follow from this test, as sometimes has been argued, that legislation with discretion could never violate the WTO."[39]

48. WTO jurisprudence further explains that the Member's failure to ensure the conformity of a law, regulation, or administrative procedure with the relevant WTO agreement can be shown by evidence of the case-by-case application of these measures. In this connection, the Appellate Body explained in *US – Carbon Steel*:

> The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case.[40]

[36] Article 18.4 of the AD Agreement, and Article XVI.4 of the WTO Agreement.

[37] Appellate Body Report, *US – 1916 Act*, para. 91.

[38] *See* Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities* ("*US – Countervailing Measures*"), WT/DS212/R (31 July 2002), para. 7.123 (emphasis added). The Appellate Body appears not to reverse this part of Panel decision, stating "We are not, by implication, precluding the possibility that a Member could violate its WTO obligations by enacting legislation granting discretion to its authorities to act in violation of its WTO obligation. We make no finding in this respect." Appellate Body Report, *US – Countervailing Measures*, WT/DS212/AB/R (9 December 2002), n. 334.

[39] Panel Report, *United States – Sections 301-310 of the Trade Act of 1974* ("*US- Section 301 Trade Act*"), WT/DS152/R (22 December 1999), para. 7.54.

[40] Appellate Body Report, *US – Carbon Steel*, para. 157 (footnote omitted).

(b) Both the Waiver Provisions and the Three Scenarios Are Actionable under Article 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement As Such

49. Applying the above jurisprudence to the instant case, both the waiver provisions and the three scenarios in the *Sunset Policy Bulletin* are actionable under Article 18.4 and XVI:4 as such. For the waiver provisions, the US statute provides:

> In a review in which an interested party waives its participation pursuant to this paragraph, the administering authorities shall conclude that revocation of the order or termination of the investigation would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) with respect to that interested party.[41]

The US regulations then provide:

> The Secretary will consider the failure by a respondent interested party to file a complete substantive response to a notice of initiation … as a waiver of participation in a sunset review before the Department.[42]

50. These two provisions explicitly use the mandatory languages "shall" and "will." No modifying languages, which may give certain discretion to the authorities, are provided. These provisions therefore mandate that DOC make an affirmative determination automatically in the sunset review where no responding parties submitted substantive responses to DOC. No exceptions are provided in such case. These mandatory provisions are sufficient evidence to make them actionable under Article 18.4 and XVI:4.

51. The three scenarios in the *Sunset Policy Bulletin* are also actionable under Article 18.4 and XVI:4. Argentina established that DOC has consistently applied, and has never deviated from, these three scenarios to all sunset reviews in which domestic interested parties have participated.[43] Such consistent application of the three scenarios is sufficient evidence to prove the mandatory nature of the three scenarios and, thus, to make the three scenarios actionable under Articles 18.4 and XVI:4.

2. The Waiver Provisions are inconsistent with Articles 6.2 and 11.3

52. As Argentina claims, the waiver provisions of the US statute and regulations are inconsistent with Articles 6.2 and 11.3. As discussed above, the waiver provisions in the US statute and regulations mandate DOC to make affirmative determination automatically where responding parties did not submit substantive responses to DOC. This determination method is inconsistent with Articles 6.2 and 11.3 as discussed below.

(a) Requirements for Sunset Review "Dumping" Determinations in Article 11.3

53. A determination in a sunset review under Article 11.3 requires that dumping be examined on a prospective basis and that the administering authority must base its determination on probable, not possible, outcomes, and on positive evidence. The term "likely" in Article 11.3 requires that the

[41] 19 USC. § 1675(c)(4)(B) (Exhibit ARG-1).
[42] 19 C.F.R. §351.218(d)(1)(iii) Exhibit ARG-3).
[43] *See* first submission of Argentina, para. 133 and Exhibit ARG-63.

authorities make an affirmative determination on a prospective basis[44] that there is a probability, not a mere possibility, that the dumping will continue or recur in the future.[45]

54. For the positive evidence requirement, the Panel in *US – DRAMs* has stated:

> [S]uch continued imposition must, in our view, be essentially dependent on, and therefore assignable to, a foundation of *positive evidence* that circumstances demand it. In other words, *the need for the continued imposition of the duty must be demonstrable on the basis of the evidence adduced.*"[46]

55. The Appellate Body in *US – Carbon Steel* has also stated, "a *fresh determination, based on credible evidence,* will be necessary to establish that the continuation of the countervailing duty is warranted…"[47] The Appellate Body further explained, "[m]ere reliance by the authorities on the injury determination made in the original investigation will not be sufficient."[48]

56. This WTO jurisprudence must also be understood in conjunction with the "necessity" requirement under Article 11.1. Article 11.1 is an umbrella provision that informs the interpretation of all other provisions of Article 11, including the basic principle that imposition of anti-dumping duties "shall remain in force only as long as and *to the extent necessary*."[49] When read in context with the concept of "necessary," the obligation to "determine" under Article 11.3 reflects a serious burden. The panel in *US – DRAMs* explained:

> We recognize that the certainty inherent to such a prospective analysis could be conceivably somewhat less than that attached to purely retrospective analysis, reflecting the simple fact that analysis involving prediction can scarcely aspire to a standard of inevitability. This is, in our view, a discernable distinction in the degree of certainty, but not one which would be sufficient to preclude that the standard of necessity could be met. In our view, this reflects the fact that the necessity involved in Article 11.2 is not to be construed in some absolute and abstract sense, but as that appropriate to circumstances of practical reasoning intrinsic to a review process. Mathematical certainty is not required, but the *conclusions should be demonstrable on the basis of the evidence adduced*."[50]

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[44] *See* Panel Report, *US – Carbon Steel*, para. 8.96 ("This is, obviously, an inherently prospective analysis").

[45] *See* Panel Report, *US – DRAMs*, para. 6.45 ("a failure to find that an event is not likely is not equivalent to a finding that the event is likely.").

[46] Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea* ("*US – DRAMs*") WT/DS99/R (19 March 1999), para. 6.42. This panel report considers the standard under Article 11.2, but is relevant to sunset reviews because the prospective analysis considered in an Article 11.2 context is the same as in an Article 11.3 context.

[47] The Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*US – Carbon Steel*"), WT/DS213/AB/R and Corr.1 (28 November 2002), para. 88.

[48] Id.

[49] *See US – DRAMs*, para. 6.41. ("We agree with the parties that, by virtue of Article 11.1 of the AD Agreement, an anti-dumping duty may only continue to be imposed if it remains 'necessary' to offset injurious dumping. We are of the view that Article 11.1 contains a general necessity requirement, whereby anti-dumping duties 'shall remain in force only as long as and to the extent necessary' to counteract injurious dumping. That anti-dumping duties 'shall remain in force only as long as and to the extent necessary' to counteract injurious dumping is therefore an unambiguous requirement of Article 11.1.")

[50] *Id*., para. 6.43. (emphasis added.)

(b) Inconsistency of the Waiver Provisions with Article 11.3

57. The US statute and regulations completely ignored the heavy burden placed on the authorities, and the need for the authorities to make their determination of the necessity of continued imposition of dumping duties, based on a "fresh" analysis of "credible evidence," and to reach the conclusion as "demonstrable [from] the evidence adduced". Instead, the waiver provisions require the authorities to make an affirmative determination without reviewing any positive evidence. The mandatory affirmative finding, with no evidence substantiating its affirmative finding, falls short of the requirements under Article 11.3.

(c) Inconsistency of the Waiver Provisions with Article 6.2

58. Furthermore, the waiver provisions are inconsistent with Article 6.2 because these provisions mandate the authorities to make an affirmative determination without any further procedures. The waiver provisions fail to provide any opportunity with responding parties for defending their interests, and thus, deny responding party's due process right under Article 6.2.

59. The due process right under Article 6.2 must be understood in conjunction with Article 6.9 because Articles 6.2 and 6.9 operate together to ensure (along with other provisions) that authorities provide interested parties a full and fair opportunity to defend their interests. Article 6.2 sets out the general procedural and due process obligations. Article 6.9 then requires an authority to inform the parties of the "essential facts under consideration which form the basis for the decision." The provision further requires that the disclosure take place "in sufficient time" for the parties to defend their interests. A "full opportunity" under Article 6.2 thus exists only where the authority discloses all of the relevant facts in sufficient time for their defence.

60. The waiver provisions mandate DOC to make an affirmative determination without further procedures, including the disclosure of essential facts to responding parties. These provisions give responding parties no opportunity to present their views on the essential facts. The waiver provisions thus fail to give any regard to the responding parties' due process right under Article 6.2. These provisions, therefore, are inconsistent with Article 6.2.

3. The three scenarios are inconsistent with Article 11.3

61. Japan agrees with Argentina that the three scenarios, which DOC sets forth in the *Sunset Policy Bulletin* to instruct or "guide" individual sunset review determinations, are inconsistent with 11.3. None of these scenarios meets requirements for sunset review determinations under Article 11.3.

62. As discussed above, the authorities must make prospective analysis based on positive evidence to determine the probability, not a mere possibility, of continuation or recurrence of dumping. None of these scenarios, however, requires the authorities to make any prospective analysis. Nor do any of these three scenarios require any positive evidence to establish that continuation or recurrence of dumping is probable. They simply require the authorities to check the current import volume to compare the volume during the period of original investigation, and the current state of dumping. These three scenarios then instruct that DOC make an affirmative determination either where dumping exits at the rate of 0.5 per cent or above, where imports were ceased, or where the import volume at the time of the sunset review was significantly lower than the volume during the period of original investigations. These three scenarios are far short of satisfying the requirements under Article 11.3, and therefore are inconsistent with Article 11.3.

63. Moreover, these scenarios predetermine the results in an uneven-handed, unfair, biased, and un-objective manner in favour of continuation of imposition of anti-dumping duties. Such

predetermined method is beyond the permissive exercise of the authorities' discretion under Article 11.3 in conjunction with Article 17.6 and *the Vienna Convention* Article 26. [51]

64. Japan recognizes that Article 11.3 provides the authorities with certain discretion to consider relevant evidence. This discretion, however, is not unlimited. The AD Agreement does not confer unfettered discretion on the authorities to pick and choose whatever methodology they see fit for determining the likelihood of continuation or recurrence of dumping. Article 26 of the *Vienna Convention* dictates that any discretion under treaty provisions must be exercised in good faith. In *US – Shrimp*,[52] the Appellate Body explained that this general principle "prohibits the abusive exercise of a state's rights,"[53] and that the exercise of a state's right should be "*fair and equitable as between the parties* and not one which is calculated to procure for one of them an unfair advantage in the light of the obligation assumed."[54] As clarified by the Appellate Body, the basic principle of good faith requires the authorities to act in an even-handed manner that respects fundamental fairness.[55]

65. The explanation by the Appellate Body in *US – Hot-Rolled Steel* with respect to DOC's treatment of a respondent's affiliated parties in connection with normal value is also instructive. The Appellate Body stated:

> Although we believe that the Anti-Dumping Agreement affords WTO Members discretion to determine how to ensure that normal value is not distorted through the inclusion of sales that are not "in the ordinary course of trade," that discretion is not without limits. In particular, the discretion must be exercised in an *even-handed* way that is fair to all parties affected by an anti-dumping investigation.[56]

66. Recently, the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* also stated in a slightly different context:

> the examination was not "objective" because its result is predetermined by the methodology itself. … This approach makes it "more likely [that investigating authorities] will determine that the domestic industry is injured" and, therefore, it cannot be "objective."[57]

67. In Japan's view, the three scenarios, set forth in the *Sunset Policy Bulletin* and applied in all sunset reviews in which domestic interested parties have participated, did not abide by this important principle, and thus were inconsistent with the obligations set forth in the AD Agreement. One of three scenarios instructs that DOC find dumping is likely to continue where DOC finds that the dumping exists at the time of a sunset review. In order to find that dumping is likely to "continue," however, the dumping must exist as the prerequisite. According to this scenario, therefore, all cases, in which DOC must consider whether dumping is likely to "continue," result in its affirmative findings. In this way, this scenario predetermines the result. Indeed, no actual "determination" is involved to find the dumping is likely to "continue."

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[51] Parties are obliged to perform their treaty obligations in good faith. *See Vienna Convention on the Law of Treaties,* Article 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

[52] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12 October 1998) ("US – Shrimp").

[53] Appellate Body Report, *US – Shrimp*, para. 158.

[54] *Id*. at n.156 quoting B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), Chapt. 4, page 125, (emphasis added by Appellate Body).

[55] *See* Appellate Body Report, *US – Hot-Rolled Steel*, para. 148 and n.142. *See also EC Measures Concerning Meat and Meat Products* ("*EC – Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R (16 January 1998), para. 133.

[56] Appellate Body Report, *US – Hot-Rolled Steel*, para. 148 (emphasis in original).

[57] Appellate Body Report, *EC – Bed Linen* (Article 21.5 – India), para. 132. (a footnote omitted).

68. Other two scenarios also rest on mechanical presumptions, not facts. Both scenarios reflect the presumption that all responding parties will export their products at volumes not less than the pre-order level, if the anti-dumping duty is lifted. These methods also stand on the further presumption that all responding parties will cut their export price to less than their normal value to sell their product at the volume of the pre-order level. These presumptions were in fact suggested in the legislative history, including the SAA and the House Report.[58] The two scenarios do not require DOC any information to substantiate that these presumptions are applicable to an individual case "on the basis of the evidence adduced."[59] This use of presumptions rather than facts, thus, predetermines the results to continue imposition of anti-dumping duties in favour of the domestic industry.

69. In sum, the three scenarios cannot satisfy the requirements under Article 11.3, and predetermine the results in favour of the domestic industry beyond the permissive exercise of the authorities' discretion under Article 11.3. These three scenarios are, therefore, inconsistent with Article 11.3.

4. Conclusions

70. As discussed above, both waiver provisions and the three scenarios are actionable under Article 18.4 and XVI:4 as shown by their language or repeated applications to sunset reviews and are inconsistent with Article 6.2 and 11.3. The United States thus failed to ensure the conformity of its statute, regulations, and administrative procedures regarding the waiver provisions and the three scenarios with Articles 6.2 and 11.3 of the AD Agreement. Japan thus respectfully requests that the Panel find that waiver provisions in the US statute and regulations and the three scenarios in the *Sunset Policy Bulletin* are inconsistent with Article 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement as such.

III. CONCLUSION

71. For the foregoing reasons, Japan respectfully requests the Panel to clarify that the United States acted inconsistently with Articles 2.1, 2.4, 3.1, 3.4, 3.5, 6.2, 11.3, and 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement.

[58] Section II.A.3 of the *Sunset Policy Bulletin* specifically stated "the SAA at 890, and the House Report, at 63-64, state that, [E]xistence of dumping margins after the order, or the cessation of imports after the order, is highly probative of the likelihood of continuation or recurrence of dumping." (Exhibit ARG-35).

[59] Panel Report, *US – DRAMs*, para. 6.42.

ANNEX B-3

THIRD PARTY SUBMISSION OF KOREA

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I. INTRODUCTION

1. This third party submission is presented by the Government of Korea ("Korea") with respect to certain aspects of the first Panel submission by Argentina in *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268. The issues raised by Argentina are detailed in its first submission, dated 15 October 2003.[1] Korea also responds herein to certain points made by the United States in its own first submission, dated 7 November 2003.[2]

2. Korea has systemic interests in the interpretation and application of the provisions of Article 11 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("the AD Agreement") governing five-year or "sunset" reviews of anti-dumping measures. Therefore, Korea reserved its third party rights pursuant to Article 4.11 of Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). Korea appreciates this opportunity to present its views to the Panel.

3. Korea is concerned with several aspects of the US law and practice governing how the US Department of Commerce (the "DOC") and the US International Trade Commission ("USITC") make their respective determinations regarding the likelihood of continuation or recurrence of dumping and injury, as required by Article 11.3 of the AD Agreement. In Korea's view, US law and practice on sunset reviews fails to respect fully the disciplines of the AD Agreement and to give effect to the presumption inherent in the AD Agreement in favour of termination of anti-dumping measures after five years. Korea therefore generally supports the arguments raised by Argentina in its first submission. Rather than repeating all of those arguments, however, Korea will address in this submission only certain critical issues on which Korea has additional views.

II. EXECUTIVE SUMMARY

4. Korea addresses the following issues in this submission:

5. All relevant substantive and procedural provisions of the AD Agreement, especially Articles 2, 3, 6 and 12, are applicable *mutatis mutandis* to Article 11.3, to the extent that they are relevant to sunset reviews. Article 11.3 of the AD Agreement does not set out detailed substantive or procedural rules. Accordingly, the standards governing sunset reviews must be found in the other relevant provisions of the AD Agreement. Bearing in mind the object and purpose of the AD Agreement, which is to establish clear and uniform multilateral disciplines governing the imposition and duration of anti-dumping measures, Article 11.3 cannot properly be interpreted as standing alone independent of the other disciplines of the Agreement.

6. US law and practice assume that dumping is likely to continue or recur where the respondents are deemed to have waived their rights to participate in the sunset review or where their responses are deemed inadequate. The United States' practice in this regard fails to ensure that Members' rights under Articles 6 and 12 of the AD Agreement are respected, in that parties are not afforded an opportunity to present all the evidence necessary to defend their interests. The Panel in *US – Sunset Review of Steel from Japan*[3] stated that a determination of the likelihood of continuation or recurrence of dumping and injury must be based on a "sufficient factual basis." Under US practice in expedited cases, however, the DOC may assume that dumping is likely to continue or recur without any meaningful factual evidence or analysis. This failure to protect Members' rights under Article 6 is

[1] Hereinafter "Argentina's first submission."
[2] Hereinafter "US first submission."
[3] Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Restraint Carbon Steel Flat Products from Japan*, WT/DS244/R (circulated 14 August 2003), para. 7.271.

particularly egregious where, as here, the respondent, Siderca, in fact responded to the DOC's notices, but its responses were deemed inadequate because the DOC alleged that it did not account for 50 per cent of exports of subject merchandise during the relevant period. It does not appear that Siderca had any effective means to challenge this determination.

7. The DOC's method of determining likely margins in the event of revocation of an order is biased in favour of finding continued dumping and is based on such limited evidence that it is not reasonably or objectively founded on "positive evidence." The DOC uses a mechanical analysis of previous dumping margins and import volumes to reach pre-ordained conclusions regarding the likely margin of dumping in the event of revocation. Argentina has shown that this approach has led to affirmative determinations in 100 per cent of the DOC's sunset determinations. The United States' practice is therefore inconsistent with the requirements of Articles 11.3 and 2, and undermines the presumption of Article 11 in favour of the termination of dumping measures after five years.

8. The USITC's interpretation of the term "likely" in Article 11.3 as requiring only a finding that injury may possibly continue or recur in the event of termination is inconsistent with Article 11.3 of the AD Agreement, as interpreted in the applicable WTO jurisprudence. WTO panels – in the *US – DRAMs from Korea*[4] and *US – Sunset Review of Steel from Japan*[5] cases – have found that "a 'likely' determination requires that the administering authority must base its determination on 'probable', not 'possible', outcomes."

III. LEGAL ARGUMENTS

A. SUNSET REVIEWS UNDER ARTICLE 11.3 MUST BE CONDUCTED IN ACCORDANCE WITH THE SUBSTANTIVE AND PROCEDURAL RULES OF ARTICLES 2, 3, 6 AND 12 OF AD AGREEMENT

9. In Korea's view, the purpose of the AD Agreement is to establish multilateral control of and clear and consistent disciplines governing the imposition of anti-dumping measures. To achieve this purpose, the disciplines laid out in the AD Agreement must be applied consistently to all aspects of the imposition of an anti-dumping measure, including any determination whether to continue or terminate a measure. This purpose would be thwarted, however, if investigating authorities were permitted to use different substantive definitions and standards to determine whether initially to impose a measure (in an anti-dumping investigation) and whether to terminate or continue that measure (in a sunset review).

10. It is not disputed that an anti-dumping measure may only be imposed following findings of dumping and injury, and a causal link between the two. Article 11.3 of the AD Agreement provides that such a measure shall be terminated after five years unless the authorities determine that termination of the measure would be likely to lead to continuation or recurrence of dumping and injury. Thus, Article 11.3 refers to the same two prerequisites for continuation of a measure – dumping and injury – as were required to impose the measure in the first place. There is no rational reason why the terms "dumping" and "injury" as used in Article 11.3 should be defined or interpreted differently in deciding whether to terminate a measure than in deciding whether to impose the measure in the first place. To the contrary, to permit different definitions of dumping and injury in sunset reviews would undermine the disciplines and purpose of the AD Agreement.

11. Korea recalls that provisions of the AD Agreement are to be interpreted according to Article 31 of the Vienna Convention, which provides:

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[4] Panel Report, *US – Anti-Dumping Duties on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R (adopted 19 March 1999), footnote 494.

[5] Panel Report, *US – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Production from Japan*, WT/DS244/R (circulated 14 August 2003), para. 7.178.

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

12. Thus, the provisions of Article 11.3 of AD Agreement governing sunset reviews must be interpreted according to their ordinary meaning, within the context of Article 11 and the overall object and purpose of the AD Agreement as a whole. This means that the concepts of dumping and injury referred to in Article 11.3 must be interpreted in the same manner as those terms are used in other provisions of the AD Agreement, including, in particular, Articles 2 and 3. Similarly, the procedural protections of Article 6 and 12 of the AD Agreement must also apply to Article 11.3 reviews.

13. The United States argues that it is permissible to interpret Article 11.3 in isolation from the other provisions of the AD Agreement because Article 11.3 contains no explicit reference to the other provisions of the AD Agreement.[6] The absence of such cross-references cannot, however, be understood to permit the interpretation of the terms dumping and injury differently than elsewhere in the AD Agreement. To do so would be inconsistent with the principles of Article 31 of the Vienna Convention, quoted above, which provides that all the provisions must be read in the context of their object and purpose. This interpretive guide removes the need for explicit cross references in every case where terms such as dumping and injury recur.

14. Article 11.3 of the AD Agreement contains no detailed substantive definitions or procedural rules for the conduct of sunset reviews. These definitions and rules must be found elsewhere in the AD Agreement. Korea submits that all other provisions of the AD Agreement, especially Articles 2, 3, 6 and 12, are applicable *mutatis mutandis* to Article 11.3, to the extent that they are relevant to sunset reviews. To hold otherwise would render the terms dumping and injury, as used in Article 11.3, *inutile* and would mean that there were in effect no multilateral disciplines governing the conduct of sunset reviews. Korea finds no basis or support for this position, either evidenced in the intent of the drafters of the AD Agreement, in the general object and purpose of the AD Agreement, or in WTO jurisprudence generally.

15. Korea believes that the introductory words of Article 2.1 of the AD Agreement ("for purposes of the Agreement") mean that the definition of dumping and the rules for the determination of dumping contained in Article 2 apply *mutatis mutandis* to determinations under Article 11.3. Korea also notes that the literal meaning of the text of Article 11.3 itself supports the view that the term "dumping" in Article 11.3 should be interpreted as referring to dumping determined under the rules laid down in Article 2. Article 11.3 refers to a determination of the likelihood of "continuation or recurrence of dumping and injury." The dictionary definition of "continuation" is "the action of continuing in something; continuity in space or of substance; the action or fact of remaining in a state; continuous or prolonged existence of operation."[7] Similarly, "recurrence" refers to "the fact or instance of recurring" or "return or reversion to a state."[8] Both terms refer to a pre-determined or pre-established state. The "state" referred to by Article 11.3 is, of course, dumping. Thus, "a continuation or recurrence of dumping" means that the original state of dumping either remains in effect or is returned to. The logical meaning of this is that the state of dumping referred to in Article 11.3 is the same state of dumping established under the rules of Article 2 in the original investigation. To hold otherwise would permit the possibility that an Article 11.3 review could lead to an anti-dumping measure remaining in effect on the basis of a different "state" than was originally found.

16. The text of Article 11.1 provides additional contextual support for Korea's reading. Article 11.1 states that measures should remain in force only as long as necessary to "counteract"

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[6] *See* US first submission, paras. 140-142.
[7] *The New Shorter Oxford English Dictionary* (Fourth Ed. 1993), pgs. 494-495.
[8] *Id.*, pg. 2510.

dumping. The use of the word "counteract" suggests that the measure is a response to the original finding of dumping, and must retain a nexus to that original finding of dumping. That nexus is lost if the determination of the likelihood of continuation of dumping is made using a different definition of dumping than is used for the original finding.

17. Korea notes that it is not arguing that investigating authorities must make precisely the same determination of dumping following a complete investigation in sunset reviews as is made in an original investigation. Korea recognizes that a sunset review involves a prospective analysis of the likelihood of dumping on sales that have yet to be made. As a practical matter, these future sales cannot be the subject of the same price comparison as sales that have been previously made, as in an investigation. Rather, Korea's position is that in determining whether "dumping" will continue or recur, the investigating authorities must be governed by the definitions established in Article 2 in determining what kind of "dumping" is likely to recur.

18. In its first submission, the United States argues that Article 11.3 does not set forth any methodology to be used in determining the likelihood of continued dumping.[9] The United States goes on to say that it is not required, and indeed could not, quantify the margin of dumping because of the inherently prospective nature of the determination. However, the United States fails to fully recognize that the reference in Article 11.3 to "dumping" is to the same practice of "dumping" defined in Article 2. There is no need for Article 11.3 to provide an additional definition of that term when it has already been defined in Article 2. Korea does not understand Argentina to argue that the United States must achieve some impossible feat of prognostication. The point, simply, is that the United States must ensure that any practice of dumping that it determines would continue or recur in the event of termination of the measure must be defined in accordance with the rules of Article 2. A finding of some sort of dumping other than that defined in Article 2 cannot justify continuation of a measure.

19. For the same reasons, Korea believes that the term "injury" in Article 11.3 must be interpreted as referring to injury as defined in Article 3 of the AD Agreement. Article 11.3 contains nothing to suggest that the term "injury" should be interpreted in any way other than fully consistent with Article 3. Again, it would undermine the disciplines of the entire AD Agreement to permit anti-dumping orders to be continued on the basis of a different standard than that required to impose the measure.

20. Korea finds the United States' attempts to avoid this interpretation to be unpersuasive. The United States attempts to draw a distinction between the texts of Articles 3 and 11.3, saying that Article 3 refers to a "determination of injury" whereas Article 11.3 refers to a determination of "recurrence of injury."[10] But that is not the point. Of course, there is a temporal difference between present injury in an original investigation and recurrence of injury in a sunset review. However, both Articles 3 and 11.3 refer to the same concept of injury – whether one looks forward or back in time – and the sole definition of the concept of injury is contained in Article 3.

21. Moreover, footnote 9 of the AD Agreement provides specific textual support for Korea's view that Article 3 applies to Article 11.3. Footnote 9 of the AD Agreement explicitly states that "under this Agreement the term 'injury' shall, *unless otherwise specified*, be taken to mean material injury to a domestic industry, threat of material injury or material retardation of the establishment of such industry and shall be interpreted in accordance with the provisions of this Article [3]" (emphasis added). Nothing in Article 11 specifies any other meaning for the term "injury." Accordingly, the reference to "injury" in Article 11.3 must be interpreted to mean the same "injury" referred to in Article 3 and footnote 9.

[9] US first submission, paras. 250 *et seq.*
[10] US first submission, para. 289.

22. The United States attempts to avoid this conclusion by saying that to define injury in the same manner in sunset reviews as original investigations would lead to absurd results.[11] The United States says that is impossible to base an Article 11.3 determination on a finding of threat of injury. Again, this is not the point (although in many respects the prospective nature of the sunset review is very analogous to a threat determination in an investigation). Instead, the point is that the injury that may be found likely to *continue* in a sunset review must be the same character of injury that was originally found to exist in the underlying investigation, using the definitions of Article 3.

23. Korea finds further textual support for this reading of Article 11.3 in Article 3.1 of the AD Agreement, which states the conditions upon which a determination of injury shall be made "for purposes of Article VI of GATT 1994," without exception or qualification for different injury determinations that may be required over the life of a measure.

24. While Korea has not addressed here every aspect of the claims raised by Argentina, Korea submits that for the reasons summarized above, it is critically important to the integrity of the AD Agreement that a single definition of each of the fundamental concepts of dumping and injury be applied consistently throughout the Agreement. Korea submits that this interpretation is fully consistent with the text, as well as with the context and the object and purpose, of the AD Agreement.

B. THE UNITED STATES' PRACTICE OF MAKING AN AUTOMATIC FINDING OF CONTINUED DUMPING IN THE EVENT OF A FAILURE TO PARTICIPATE OR WAIVER IS INCONSISTENT WITH ARTICLES 6, 11.3 AND 11.4 OF THE AD AGREEMENT

25. Article 6 of the AD Agreement applies to Article 11.3 by virtue of the cross-reference in Article 11.4, which provides that "the provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article."

26. Article 6.1 stipulates that "[a]ll interested parties in an anti-dumping investigation shall be given … *ample opportunity* to present in writing all evidence which they consider relevant in respect of the investigation in question" (emphasis added). Further, Article 6.2 provides that "[t]hroughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests."

27. Thus, all interested parties are guaranteed the opportunity to present all evidence, in order to be afforded an opportunity to defend their interests. Under US law, however, in the event that a party is deemed to waive its right to participate in a DOC sunset review,[12] or to have submitted an inadequate response,[13] the DOC automatically reaches an expedited determination that dumping would continue or recur in the event of termination of the measure. In Korea's view, these expedited, automatic determinations – whether on the basis of waiver or inadequacy – fail to protect the rights of interested parties under Articles 6.1 and 6.2.

28. The Panel in *US – Sunset Review of Steel from Japan* held that Article 11.3 precludes an investigating authority from simply assuming that likelihood of continued or recurring dumping exists. The Panel stated that "in order to continue imposing the measure, the investigating authority has to determine, on the basis of positive evidence, that its termination of duty is likely to lead to continuation or recurrence of dumping and injury and it must have a *sufficient factual basis* to allow it

[11] US first submission, para. 293.

[12] 19 USC. § 1675(c)(4)(B) (This section stipulates that "In a review in which an interested party waives its participation pursuant to his paragraph, the administering authority shall conclude that revocation of the order…would be likely to lead to continuation or recurrence of dumping…").

[13] 19 USC. § 1675(c)(3)(B) (This section provides that "If interested parties provide inadequate responses to a notice of initiation, the administering authority…. may issue, without further investigation, a final determination on facts available...").

to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence."[14]

29. Thus, the investigating authorities must have a sufficient factual basis for their finding that dumping is likely to continue or recur. By assuming that a waiver of participation means that dumping is likely to continue or recur, however, the US authorities are making determinations without having done any meaningful analysis or without *any* factual basis to suggest there is a likelihood of continuation or recurrence of the dumping and injury. This cannot be said to comply with the requirements of Articles 11.4 and 6.

30. Korea is also concerned that the US law and regulations and the DOC's practice do not comply with the rules of Article 6.8 and Annex II governing the use of facts available. First, it is not clear that the DOC's practice complies with paragraph 6 of Annex II regarding notification of and an opportunity to correct "inadequacies" in a response. Second, and perhaps more importantly, the DOC's practice of assuming a certain outcome where it deems responses to be "inadequate" fails to fulfil the DOC's obligation to make a determination, on the basis of the facts available, as to whether dumping would continue or recur in the event of termination of the measure.

31. This case presents a particularly troublesome example of how the United States' practice works to the detriment of foreign exporters (and Argentina has cited other examples in its first submission). The Argentine respondent, Siderca, had indicated that it had not exported to the United States during the five years the order was in existence and argued that the dumping margin from the original investigation was not large enough to support a finding that dumping would recur in the event of revocation. However, the DOC decided to conduct an expedited review on the grounds that Siderca did not account for 50 per cent of Argentine exports during the period of review. While the United States claims that Siderca had an opportunity to comment on this determination,[15] Korea does not understand the United States to claim that it sought additional information from Siderca regarding its exports or those of other exporters, that it specifically notified Siderca of the consequences of its likely determination, or that it otherwise attempted to ascertain which, if any, other Argentine exporters may account for the balance of exports that would make up the DOC's 50 per cent threshold. (Korea notes that this threshold has no basis in the AD Agreement).

32. The consequences of these omissions were grave for Siderca. These omissions ensured that the DOC expedited its review and, using the mechanical process described in further detail below, reached an automatic finding that dumping would be likely to continue or recur in the event of termination of the measure. While the United States goes to great lengths to defend its actions in its first submission, it fails to explain exactly what Siderca could have done to avoid having its response deemed inadequate, and to avoid the inevitable consequences of an expedited review in this case. Nothing in the United States' first submission suggests that Siderca could reasonably have done anything that would have resulted in the DOC conducting a "full" review and, in turn, perhaps determining that dumping would not continue in the event of revocation. In these circumstances, it is difficult to see how the rights guaranteed by Articles 6 and 11 were protected.

33. The United States argues that the provisions of US law relating to waivers and inadequate responses should be accepted as a practical means of achieving administrative efficiency in the conduct of administrative reviews. Although Korea understands the United States' concerns regarding the efficient use of administrative resources, these concerns cannot be allowed to supersede the substantive and procedural requirements of the AD Agreement, especially with regard to such an important issue as whether an anti-dumping measure should remain in effect.

[14] Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Restraint Carbon Steel Flat Products from Japan*, WT/DS244/R (circulated 14 August 2003), para. 7.271 (emphasis added).

[15] US first submission, paras. 51-55.

34. Moreover, by making assumptions that favour continuation rather than termination of anti-dumping measures, the US laws and practice fail to give effect to the object and purpose of Articles 11.1 and 11.3. Article 11.1 expressly states that "an anti-dumping duty shall remain in force *as long as* and *to the extent necessary* to counteract dumping which is causing injury" (emphasis added). Further, Article 11.3 stipulates that a "definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition," unless it is determined that termination would lead to continued or recurring dumping and injury. These provisions establish a presumption in favour of termination of measures after five years, absent clear and explicit determinations that the termination would lead to continued or recurring dumping and injury. In Korea's view, the assumptions made under US law and practice are wholly inconsistent with this presumption, and therefore with the object and purpose of Article 11.

C. THE UNITED STATES' METHOD OF DETERMINING LIKELY DUMPING MARGINS IN THE EVENT OF REVOCATION OF AN ORDER IS IMPERMISSIBLY BIASED IN FAVOUR OF A FINDING OF CONTINUED DUMPING

35. As discussed above, Korea submits that the determination of the likelihood of continued or recurring dumping under Article 11.3 must be based on the definition of dumping contained in Article 2 of the AD Agreement. Korea has explained that the text of Article 2 makes clear that its rules regarding determination of dumping are established "for the purpose of AD Agreement," which includes Article 11.3. This reading is consistent with Article 31 of the Vienna Convention.

36. Thus, Article 11.3 imposes a positive obligation on the domestic authorities to determine that dumping, as defined in Article 2, is likely to continue or recur. Article 11.3 requires a determination based on a prospective analysis of "positive evidence" that there is a probability that dumping will continue or recur in the future.

37. In its sunset determinations, however, the DOC determines whether dumping is likely to continue in the future based only on two data points relating to past experience. These are the historical dumping margins and the historical import volumes. By limiting its inquiry in this manner, the DOC's practice is flawed in two respects.

38. First, the DOC looks backwards rather than forward. The DOC makes no effort to extrapolate likely future data from the historical data, other than to assume that as matters were in the past, so shall they remain in the future. Thus, rather than making the kind of prospective determination contemplated by Article 11.3, the DOC simply relies on its retrospective data.

39. Second, the DOC does not consider the impact of any other events or external forces – even data regarding price changes, exchange rate changes, etc. that might affect its conclusion. The very limited nature of the DOC's analysis cannot possibly provide a sufficient factual basis on which to make a determination regarding likely future dumping. Argentina has documented how this approach has led to an affirmative finding of likely continued dumping in 100 per cent of the DOC's sunset determinations, without exception. The United States does not appear to dispute these statistics. In these circumstances, the DOC's method of determining whether dumping is likely to continue – both in this case and in every other instance in which it has applied the same mechanical rules – lacks sufficient factual basis to satisfy the requirements of the AD Agreement.

D. THE USITC'S INTERPRETATION OF THE REQUIREMENT THAT INJURY BE "LIKELY" TO CONTINUE OR RECUR IS INCONSISTENT WITH ARTICLE 11.3 OF THE AD AGREEMENT

40. Argentina argues that the use of the term "likely" in Article 11.3 means that investigating authorities must find that continued or recurring dumping or injury would be "probable" and not merely "possible" in the event of termination of the measure. Argentina argues that the USITC's

interpretation of the term "likely" as requiring only a finding that recurring injury would be "possible" is therefore inconsistent with Article 11.3. Korea agrees, for the following reasons.

41. Argentina correctly relies on dictionary definitions to interpret the term "likely" to mean " probable."[16] The ordinary meaning of the term "likely" is, in effect, that there is a greater chance than not that the event will occur. WTO jurisprudence on this point supports Argentina's interpretation. The term "likely" as used in Article 11.3 (and Article 11.2) has been construed as meaning "probable" by the panel in *US – DRAMs from Korea*, which stated that "likelihood or likely carries with it the ordinary meaning of probable."[17] Similarly, the *US – Sunset Review of Steel from Japan* panel found that "a 'likely' determination requires that the administering authority must base its determination on 'probable', not 'possible', outcomes."[18] This interpretation is also consistent with the presumption in favour of termination of anti-dumping measures contained in the AD Agreement.

42. The United States ignores the proper interpretation of the term "likely." Argentina cites to USITC statements to the effect that the term "likely" "captures a concept that falls in between 'probable' and 'possible' on a continuum of relative certainty."[19] Neither the US statute nor the *Statement of Administrative Action* regarding the implementation of the law requires the USITC to adhere to a standard of probability.

43. Korea therefore submits that the USITC improperly interprets the term "likely" as meaning "possible" for the purposes of its determination of the likelihood of continued injury under Article 11.3. The US interpretation should be found to be inconsistent with the text of Article 11.3, and rejected by the Panel.

IV. CONCLUSION

44. Korea respectfully submits that in reaching its decision on Argentina's various claims, the Panel should ensure that the provisions of Articles 2, 3, 6, and 12 are applied consistently and rationally to sunset reviews under Article 11. This will add clarity, consistency and fairness to the conduct of sunset reviews, and give effect both to the ordinary meaning of, and the context, object and purpose of Article 11 and the AD Agreement as a whole.

45. Korea appreciates the opportunity to participate in this proceeding and to present its views to the Panel.

[16] Argentina's first submission, para. 212.

[17] Panel Report, *US – Anti-Dumping Duties on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R (adopted 19 March 1999), footnote 494.

[18] Panel Report, *US – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Production from Japan*, WT/DS244/R (circulated 14 August 2003), para. 7.178.

[19] Argentina's first submission, para. 217 (citations omitted).

ANNEX B-4

THIRD PARTY SUBMISSION OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

14 November 2003

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1. As this dispute gives rise to certain important issues in respect of sunset review, which are of high significance to Members, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu has a systemic interest in the proper interpretation and operation of relevant provisions involving the procedures and would like to submit its views on the following aspects:

(a) Expedited review and the "waiver" determination by the US Department of Commerce;

(b) The issue of "irrefutable presumption" alleged by Argentina; and

(c) The question of applicability of Articles 2 and 3 of the AD Agreement to Sunset Reviews.

A. EXPEDITED REVIEW AND THE "WAIVER" DETERMINATION BY THE US DEPARTMENT OF COMMERCE

2. We are of the view that a Member may conduct an expedited sunset review if it deems appropriate in so far as its conduct is consistent with the relevant provisions of the AD Agreement. Article 11.4 of the AD Agreement explicitly provides that a review under Article 11 "shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review." However, the admission of an expedited review does not exempt a Member from its obligations under the AD Agreement.

3. We consider that the mandatory wording imposed by 19 USC. §1675(c)(4)(B) to the effect that "[i]n a review in which an interested party waives its participation pursuant to this paragraph, the administering authority *shall conclude* that revocation of the order or termination of the investigation would be likely to lead to continuation or recurrence of dumping or countervailable subsidy (as the case may be) with respect to that interested party" (emphasis added)[1], on the face of it, leaves the Department of Commerce with no discretion as to the mandated result of its finding of "likelihood" once the participation of a foreign interested party is deemed waived, irrespective of whether, based on the "information available" or fresh evidence submitted during the sunset review, the continuation or recurrence of dumping is likely or not.

4. Article 11.3 of the AD Agreement provides in part that the authorities must "*determine*…that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury" in order not to terminate the imposition of a definitive anti-dumping duty. (emphasis added). In our view, a review with the finding of the Commerce Department pre-determined and mandated by statute could hardly be considered as determination being "properly conducted", which is a standard set for sunset review by the Appellate Body in *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*[2]*("Steel from Germany")* that "[t]ermination of countervailing duty is the rule and its continuation is the exception. The continuation of a countervailing duty must therefore be based on a ***properly conducted review*** and a ***positive determination*** that the revocation of the countervailing duty would be likely to lead to a continuation or recurrence of subsidization and injury"[3] (emphasis added). It follows, therefore, that this Panel

[1] Argentina's first submission, para. 51.

[2] WT/DS213/AB/R cited in Argentina's first submission, para. 83.

[3] WT/DS213/AB/R, para.88. Article 21.3 of the SCM Agreement has similar provision with Article 11.3 of the AD Agreement in that Article 21.3 also requires the authorities to determine whether the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury. Thus the Appellate Body report in *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* in relation to the requirement of "determination" should be applicable to AD case with regard to the determination of the continuation or recurrence of dumping and injury.

should find that the deemed "waiver" provision referred to in the preceding paragraph is inconsistent with Article 11.3 of the AD Agreement.

B. THE ISSUE OF "IRREFUTABLE PRESUMPTION" ALLEGED BY ARGENTINA

5. In relation to the Statement of Administrative Action ("SAA") and the *Sunset Policy Bulletin* ("Bulletin"), we note that these documents only contain guidelines for the Department of Commerce to follow in a normal situation. We do not find any provision in these documents that mandates compulsory compliance by the Department of Commerce. As such, we thus failed to see an irrefutable presumption that is inconsistent with Article 11.3 of the AD Agreement. However, the indication of SAA being an authoritative expression of US anti-dumping laws and the fact the Bulletin reflecting the Department of Commerce's own practice show that these documents could serve as strong evidence to support that the Commerce Department did act in accordance with the SAA and the Bulletin in the present case, in relation to its decision on the continuous imposition of anti-dumping duties. This helps Argentina in discharging its onus of proving violation of the AD Agreement by the Commerce Department's measures. In this respect, the panel report of *United States – Measures Treating Export Restraints as Subsidies* also recognized the authoritative status of the SAA.[4] It follows, therefore, that when this Panel considers whether there is evidence to show that the Department has acted inconsistently against the AD Agreement, the existence of the SAA and the Bulletin shall be taken into important account.

6. As regards the practice of the Department of Commerce, we do not consider that it is proper to draw a conclusive inference from the analysis conducted by Argentina.[5] However, the fact that in 100 per cent of the cases in which domestic interested parties have participated, the Department has found the likelihood of continuation or recurrence of dumping, still suggests that the Department of Commerce has the apparent tendency of not properly conducting these reviews and making its positive determination as required by the Agreement. This should serve as giving complementary support to establishing Argentina's *prima facie* evidence that is required of the Complainant in this regard, to show that the Department of Commerce has not conducted these reviews properly and that its determination is not based on positive evidence.

C. THE QUESTION OF APPLICABILITY OF ARTICLES 2 & 3 TO SUNSET REVIEWS

7. We do not share the view of the United States that Article 3 of the AD Agreement is inapplicable in total to a sunset review. We consider that the correct interpretation of the law on this issue should be the view expressed by the panel in *United States – Sunset Review of the Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan ("Sunset Review-Japan Steel")*[6] that, save Article 3.3, "the obligations in Article 3 pertaining to injury may apply throughout the Anti-Dumping Agreement, i.e. they are not limited to investigations"[7], although we do have some reservations on excepting the application of Article 3.3 on Sunset Review.[8]

8. We also share the view of the panel in the same matter that in clarifying the requirements of a determination of dumping in an Article 11.3 review, "Article 2 also provides guidance as to the type of information that may be relevant to a sunset review examination of the presence or absence of

[4] WT/DS194/R, adopted 23 August 2001, paras. 8.97-8.98.
[5] Argentina's first submission, paras. 129-134.
[6] WT/DS244/R, circulated 14 August 2003.
[7] Ibid., para. 7.98-100.
[8] We consider that if *de minimis* dumping cannot be cumulatively assessed and thus is not subject to any duty in the original investigation, it is only logical to conclude that it should not be cumulatively assessed and subject to any duty in the sunset review either. In order for a coherent reading of the AD Agreement, Article 3.3 should be interpreted as applicable to sunset review.

dumping since the imposition of the order."[9] The Panel seems to rely on the first paragraph of Article 2.1 "[f]or the purpose of this Agreement", to come to its conclusion that this provision "describes a concept which is generally relevant throughout the Anti-Dumping Agreement".[10]

9. Our proposition in support of the *Sunset Review – Japan Steel* Panel mentioned in the preceding paragraphs is based principally on the plain language of Article 11.3 of the AD Agreement, which purports to set out the conditions for continuing with an anti-dumping order. These conditions, which must be established simultaneously, may be summarized as follows: an authority must (i) conduct a review and (ii) make a positive determination that the expiry of the order would likely lead to continuation or recurrence of dumping and injury. We are of the view that it is the second condition which renders the application of Articles 2 and 3 of the AD Agreement relevant.

10. We consider that in each Article 11.3 review, the question of dumping and injury must also be examined when the question of likelihood of continuation or recurrence is determined. The provision in Article 11.3 already suggests such interpretation. The statement made by the Panel in the *Sunset Review – Japan Steel*[11], cited in paragraph 9 above, further supports our contention that in a sunset review the question of whether dumping is present must be determined. We are of the view that the determination of the likelihood of continuation or recurrence must first rest on some positive determination that sales by exporters after lifting of the anti-dumping order do constitute dumping as defined by Article 2.1, as apparently not all sales by exporters in that case (albeit by those exporters that are subject to the original dumping order) are dumping *per se*. Equally, the incentive to sell immediately into such market after the lifting of the order does not necessarily equate to such exporter selling at a dumped price.

11. Although the standard of determination of dumping in an Article 11.3 review may not be the same as that in relation to investigation, it does not necessarily mean that the determination of the presence of dumping and that such dumping is causing injury, can be dispensed with. In a determination of dumping, Article 2 will be relevant and should be followed in this regard. By the same token, the question of injury must also be established, as dumping based on the margin determined in the original investigation that was causing injury may not necessarily then be causing injury at later stage. In this context Article 3 would also be relevant.

12. Article 11.1 of the AD Agreement, which is stated by the panel in *EC – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*[12] to be "a general and overarching principle, the modalities of which are set forth in paragraphs 2 & 3"[13], provides a mandatory requirement that anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury. The wording of Article 11.1, which informs the whole Article 11, is unambiguous. The present tense used in this Article, i.e. "which is causing injury" demonstrates that anti-dumping duty can only remain in force if there is dumping as defined by Article 2.1, and that such dumping is causing injury. If there is no act of dumping or if such dumping is not causing injury, the anti-dumping duty must be revoked.

13. If the above propositions are accepted, which we consider should be the case, any effective interpretation of Article 11.3 in the context of Article 11 and the AD Agreement, and in light of the object and purpose of the AD Agreement i.e. to discipline and counteract injurious dumping, requires a reading that both Article 2 for the purpose of determining the question of dumping, and Article 3 for the purpose of determining the question of injury, should be made applicable in an Article 11.3 review.

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[9] *Sunset Review – Japan Steel*, para. 7.174.
[10] Ibid., footnote 144.
[11] Supra footnote 8.
[12] WT/DS219/R, adopted 18 August 2003.
[13] Ibid., para. 7.113.

D. CONCLUSION

14. Although Article 11.3 is silent as to the standard and methodologies which Members must follow in their sunset review, we do not consider that it is the intention of WTO Members to leave this question deliberately open and unchecked. We are of the view that a coherent reading of the AD Agreement calls for the application of sunset reviews to the provisions in Articles 2 and 3 of the AD Agreement.

15. We like to mention that the above-mentioned views that US laws and practices are in violation of AD Agreement are not exhaustive. For instance, we also agree with the view submitted by Argentina, in that the Commerce Department's "deemed waiver" of the right of a respondent party to participate in a Sunset Review violates Article 6.1 of the AD Agreement, which requires "all interested parties in an anti-dumping investigation shall be given . . . ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question" and Article 6.2, which provides that interested parties shall be given a full opportunity for the defence of their interests.

16. Furthermore, for instance, the "deemed waiver" rule applying only to respondent interested parties of the sunset review procedures and US parties being not similarly exposed to the same detrimental effect of a deemed waiver should be in violation of Article X:3(a) of the GATT 1994 with respect to the requirements of transparency and procedural fairness, which was emphasized in the *US – Shrimp* case dealing with an alleged violation of Article X relating to the failure of the United States to respect the due process in developing and applying its law prescribing the shrimp import ban. The Appellate Body observed that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations. It further noted that "insomuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure…"[14]

17. The essence of the argument is that if US laws and practices with regard to the waiver and determination of recurrence or continuation of dumping and injury are admitted under the WTO, the result would be that all Members will be able to manoeuvre the continuation of imposing anti-dumping duties without being subject to any time limit. This is not the purpose of the AD Agreement in setting five years as the maximum period in principle.

[14] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R.

ANNEX C

SECOND WRITTEN SUBMISSIONS BY THE PARTIES

ANNEX C-1

SECOND WRITTEN SUBMISSION OF ARGENTINA

8 January 2004

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I. INTRODUCTION

1. On 15 December 2003, the Appellate Body confirmed in *Sunset Review of Steel from Japan* that Article 11.3 of the Anti-Dumping Agreement mandates termination of anti-dumping duties five years after their imposition. Continuation of an anti-dumping measure is an exception, and is only justified where the authority "determine[s]" in a "review" that termination of the measure would be likely to lead to continuation or recurrence of "dumping" and "injury."[1]

2. The consequence for failing to satisfy the conditions are clear: termination of the measure. To invoke the exception and continue an anti-dumping measure beyond five years requires a "rigorous examination" of whether the continuation or recurrence of dumping and injury would be "probable."[2] Further, the likelihood determination must be based on positive evidence[3] and is subject to the substantive standards established in the Anti-Dumping Agreement.[4]

3. The United States takes a very different view in its first submission and its oral statement. According to the United States, Article 11.3 is practically devoid of obligations and constitutes a single bare-bones commitment.[5] Under this view, anti-dumping measures can be continued indefinitely, on almost any basis. Indeed, the United States indicated during the Panel's First Substantive Meeting with the Parties that, if a company dumped in the past, it is reasonable to assume that that company would dump in the future.

4. With respect to the likelihood of dumping determination, although the United States has a complicated scheme of procedural rules, a routine inspection reveals that the US Department of Commerce (the "Department") never makes the meaningful "determination" required by Article 11.3. This is true whether the Department applies the waiver provisions or simply resorts to the three "checklist" criteria established by the statute, the Statement of Administrative Action ("SAA"), and the *Sunset Policy Bulletin*. There is only one factor that matters for the likelihood of dumping determination: whether the US industry participated in the sunset review. The evidence speaks for itself: In the 223 cases (as of December 2003) in which the US industry has expressed an interest in continuing the anti-dumping measure, the Department has found a likelihood of continuation or recurrence of dumping in each case. The US industry has 223 wins and 0 losses on the issue of likely dumping.[6]

5. In this particular case, after concluding that respondent interested parties had "waived" their participation (which results in a statutorily mandated finding of likelihood of dumping), and after invoking the "expedited review" procedures, the Department identified only two facts in its determination that dumping was "likely" to continue: (1) a five-year old margin, calculated on the basis of "zeroing;" and (2) a decline in import volume. The Appellate Body in *Sunset Review of Steel from Japan* spoke to both issues, and found that neither (independently or together) could support a

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[1] *See* Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, circulated 15 December 2003, para. 104 ("*Sunset Review of Steel from Japan*").

[2] *Id.* at paras. 111, 113.

[3] *See* Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, circulated 14 August 2003, para. 7.177 ("*Sunset Review of Steel from Japan*").

[4] *See* Appellate Body Report, *Sunset Review of Steel from Japan*, para. 128.

[5] According to the United States, Article 11.3 is "very limited" and sets virtually no restraints or limitations on a Member's ability to maintain anti-dumping measures. *See* US First Submission, para. 3. The United States stated during the Panel's First Substantive Meeting with the Parties that "Article 11.3 does not prescribe how a Member should go about making a likelihood determination in a sunset review." Opening Statement of the United States at the First Meeting of the Panel with the Parties, WT/DS268, 9 December 2003, para. 6 ("US First Oral Statement").

[6] *See* US Department of Commerce Sunset Reviews (ARG-63 and ARG-64).

determination under Article 11.3 that dumping is likely to continue.[7] And when the dumping margin is extremely low – such as the 1.36 per cent margin in this case – the reliability of such margin is diminished further.

6. With respect to the likelihood of injury determination, the analysis by the US International Trade Commission (the "Commission") is equally problematic. The Commission has insisted "likely" does not mean probable, and is now faced with the Appellate Body statement that likely does mean probable.[8] The Commission's analysis of the volume, price, and impact factors in this case vividly demonstrates that the Commission certainly was not determining what was probable, as it often simply asserted that the conditions that existed at the time of the original injury investigation supported the view that injury was "likely" to continue or recur. Also, the cumulated analysis of the likelihood of injury diminishes the rights of individual WTO Members who have the misfortune of being included in the aggregate determination, and the US statutory provisions fail to satisfy the "likely" standard by extending the period of time outward (with no limitations) within which the Commission must consider whether domestic producers might be injured.

7. The plain wording of the US sunset determinations challenged by Argentina often contradict the arguments advanced by the United States in its First Submission.[9] In addition, the US First Submission suffers from a number of irreconcilable internal contradictions. These contradictions cast serious doubts regarding the US arguments in defence of the sunset determinations. The Panel must examine Argentina's claims based on the words used in the US sunset determinations and not on the subsequent *post hoc* rationalizations of those decisions in the US written submissions.

8. The principal obligation and corresponding right created by Article 11.3 – termination of anti-dumping measures after five years – must not be diminished. Otherwise, the limited exception for maintaining an anti-dumping measure will supersede the principal obligation of Article 11.3. Therefore, Argentina respectfully requests that the Panel, in addition to making specific findings of WTO violations, suggest pursuant to DSU Article 19.1 that the United States terminate the anti-dumping duties on oil country tubular goods ("OCTG") from Argentina and repeal or amend WTO-inconsistent laws, regulations, procedures, and administrative provisions.

II. THE SUBSTANTIVE WTO OBLIGATIONS AT ISSUE IN THIS DISPUTE

A. THE PRIMARY OBLIGATION OF ARTICLE 11.3 OF THE ANTI-DUMPING AGREEMENT IS TERMINATION OF THE ANTI-DUMPING MEASURE

9. The primary obligation of Article 11.3 of the Anti-Dumping Agreement is termination of anti-dumping duties after five years. The Appellate Body in *Sunset Review of Steel from Japan* reaffirmed the principle it first articulated in *Steel from Germany*. Continuation of the measure is the exception, and is only permissible if the authorities conduct a "review," undertake a "rigorous examination" of the facts, and "determine" that termination of the anti-dumping measure would be likely to lead to continuation or recurrence of injurious dumping.[10] The Appellate Body also reaffirmed that, "[i]f any one of these conditions is not satisfied, the duty must be terminated."[11]

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[7] *See* Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 127-128, 130, 177.

[8] *See id.* at paras. 110-111.

[9] *See* Argentina's Oral Statement in the Panel's First Substantive Meeting with the Parties, DS268, 9 December 2003, para.7 ("Argentina's First Oral Statement").

[10] Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 104, 113.

[11] *Id.* at para. 104; s*ee also* Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion – Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, adopted 19 December 2002, para. 88 (*"Steel from Germany")* (interpreting Article 21.3 of the SCM Agreement). The Appellate Body in *Sunset Review of Steel from Japan* concluded that, "[g]iven the parallel wording of these two articles, we believe that the explanation, in our Report in [*Steel from Germany*], of the nature of the sunset

10. In interpreting the meaning of the words "review" and "determine" in Article 11.3, the Appellate Body noted the "investigatory and adjudicatory aspects" of Article 11.3 reviews:

> This language in Article 11.3 makes clear that it envisages a process combining *both* investigatory and adjudicatory aspects. In other words, Article 11.3 assigns an active rather than a passive decision-making role to the authorities. The words "review" and "determine" in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination.[12]

11. With respect to the evidentiary basis for the likelihood determination, the Appellate Body affirmed the Panel's statement that the authority must ground its determination on a "sufficient factual basis" to allow it to "draw reasoned and adequate conclusions concerning the likelihood" of continuation or recurrence.[13] Moreover, the Appellate Body stated that its discussion in *Steel from Germany* of the sunset review provision in the SCM Agreement, Article 21.3, was an "apt description" of the Article 11.3 sunset review.[14] In *Steel from Germany*, the Appellate Body held that the authority must make a "fresh determination" in a sunset review that is forward-looking and "based on credible evidence."[15] The Appellate Body in *Steel from Germany* thus affirmed the Panel's statement in that dispute that the authority's likelihood determination cannot be based solely on outdated information, but rather "should rest on the evaluation of the evidence that it has gathered during the original investigation, the intervening reviews *and finally the sunset review*."[16]

12. Ultimately, the Appellate Body in *Sunset Review of Steel from Japan* made clear that the conduct of a review and the determination of the likelihood of dumping and injury in order to invoke the exception requires a "rigorous examination" that comports with the "exacting nature" of obligations imposed by Article 11.3:

> Article 11.3 states that, notwithstanding the provisions of Articles 11.1 and 11.2, Members "shall" terminate an anti-dumping duty "unless" the authorities make an affirmative likelihood determination in a sunset review. This confirms that the mandatory rule in Article 11.3 applies in addition to, and irrespective of, the obligations set out in the first two paragraphs of Article 11. This also suggests to us that authorities must conduct a *rigorous examination* in a sunset review before the exception (namely, the continuation of the duty) can apply. In addition, our view of the *exacting nature of the obligations* imposed on authorities under Article 11.3 is supported by a consideration of the implications of initiating a sunset review. The last sentence of Article 11.3 allows the relevant duty to continue while the review is underway, and Article 11.4 contemplates that the review process may take up to one year. These provisions create an additional exception to the requirement that anti-dumping duties will be terminated after five years, permitting a Member to maintain the duty for the period during which the review is ongoing, regardless of the outcome of that review. This, too, suggests that the drafters of the Anti-Dumping Agreement saw the sunset review as a *rigorous* process that can take up to one year,

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review provision in the *SCM Agreement* [(Article 2.3)] also serves, *mutatis mutandis*, as an apt description of Article 11.3 of the Anti-Dumping Agreement." Appellate Body Report, *Sunset Review of Steel from Japan*, n.114 (citing Appellate Body Report, *Steel from Germany*, paras. 63 and 88.).

[12] Appellate Body Report, *Sunset Review of Steel from Japan*, para. 111.

[13] *Id.* at paras. 114-115 (citing Panel Report, *Sunset Review of Steel from Japan*, para. 7.271).

[14] *See id*. at n.114.

[15] Appellate Body Report, *Steel from Germany*, para. 88.

[16] Panel Report, *United States – Countervailing Duties on Certain Corrosion–Resistant Carbon Steel Flat Products from Germany*, WT/DS213/R, adopted 19 December 2002, para. 8.95 ("*Steel from Germany*") (emphasis added).

> involving a number of procedural steps, and requiring an *appropriate degree of diligence* on the part of the national authorities.[17]

13. Finally, the Appellate Body in *Sunset Review of Steel from Japan* plainly stated the consequences where a WTO Member fails to conduct a sunset review or fails to make the required likelihood determination under Article 11.3: "If any one of these conditions is not satisfied, the duty must be terminated."[18]

14. There is a WTO-inconsistent presumption built into the system established by the United States to implement its Article 11.3 obligation. The US waiver provisions mandate a finding of likely dumping without a review,[19] without any analysis, and without the requisite determination required by Article 11.3. The basis for the waiver mechanism itself presumably stems from the presumption that non-participation in sunset reviews (whether voluntarily or non-voluntarily) means that in the event of termination dumping would be likely to continue. Then, even if the Department does conduct a "review" (whether "expedited" or "full"), the irrefutable presumption prescribed by the statute, the SAA, and the *Sunset Policy Bulletin* operates to preclude the Department from conducting the type of "review" and from making the kind of "determination" required by Article 11.3.[20] In defending the US waiver provisions and denying the existence of the irrefutable presumption in its first submission, the United States attempts to diminish the import of Article 11.3's use of the terms "review" and "determination." According to the United States, as used in Article 11.3, "the words 'review' and 'determine' do not contain the broad substantive rules suggested by Argentina."[21]

15. The US position is not tenable. The use of defined terms such as "dumping" and "injury" in Article 11.3 makes clear that the substantive provisions of other articles of the Anti-Dumping Agreement apply to the likelihood determination. Further, an authority's likelihood determination must be grounded on a "sufficient factual basis"[22] that rests "on the evaluation of evidence that it has gathered during the original investigation, the intervening reviews *and finally the sunset review*."[23]

16. The United States argues that "'current information' is not the issue in a sunset review conducted pursuant to Article 11.3."[24] "Rather," the United States submits, "the issue under Article 11.3 is whether dumping and injury are likely to continue or recur in the event of the expiry of the duty, an inherently forward-looking inquiry."[25] Thus, the United States suggests that current information is not relevant to the prospective analysis of the likelihood of dumping and injury required by Article 11.3.

17. Consequently, under the US approach, the authorities do not conduct the kind of "rigorous examination" required by Article 11.3 in order to invoke the exception and to justify the continuation of an anti-dumping measure beyond five years.[26] As the Panel stated in *Sunset Review of Steel from Japan*:

> We recall that one of the fundamental goals of the Anti-Dumping Agreement as a whole is to ensure that objective determinations are made based, to the extent possible, on facts. Thus, to the extent that it will rest upon a factual foundation, the prospective likelihood determination will inevitably rest on a factual foundation

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[17] Appellate Body Report, *Sunset Review of Steel from Japan*, para. 113 (emphasis added).
[18] *Id.* at para. 104.
[19] *See* Argentina's First Submission, Section VII.A.1
[20] *See id.* at Section VII.B.2.
[21] US First Submission, para. 154.
[22] Panel Report, *Sunset Review of Steel from Japan*, para. 7.177.
[23] Panel Report, *Steel from Germany*, para. 8.95 (emphasis added).
[24] US First Submission, para. 265.
[25] *Id.*
[26] Appellate Body Report, *Sunset Review of Steel from Japan*, para. 113.

> relating to the past and present. The investigating authority must evaluate this factual foundation and come to a reasoned conclusion about likely future developments.[27]

18. Accordingly, contrary to the US position, the authority must examine current information in order to support the prospective likelihood determination with a sufficient factual basis. A body of evidence consisting solely of past information for an affirmative likelihood determination is deficient and inconsistent with Article 11.3 and cannot constitute positive evidence that dumping would be likely to continue.

B. THE OBLIGATIONS IN ARTICLES 2, 3, 6, AND 12 OF THE ANTI-DUMPING AGREEMENT ARE APPLICABLE TO REVIEWS CONDUCTED UNDER ARTICLE 11.3

19. As Argentina set out in its first submission,[28] the Article 11.3 obligation requires compliance with other provisions of the Anti-Dumping Agreement, including Article 2 (Determination of Dumping), Article 3 (Determination of Injury), Article 6 (Evidence), Article 12 (Notice), and Article 18 (Final Provisions). The United States argues that the substantive obligations contained in other provisions of the Anti-Dumping Agreement do not apply to Article 11.3, particularly Articles 2 and 3.[29]

20. The WTO jurisprudence soundly refutes the US view on this point.[30]

1. Article 2 of the Anti-Dumping Agreement applies to sunset reviews conducted under Article 11.3

21. As confirmed by the Appellate Body in *Sunset Review of Steel from Japan*, Article 2 of the Anti-Dumping Agreement defines "dumping" "for the purposes of the Anti-Dumping Agreement," including sunset reviews under Article 11.3.[31] The Appellate Body explained,

> [T]he words "[f]or the purpose of this Agreement" in Article 2.1 indicate that this provision describes the circumstances in which a product is to be considered as being dumped for purposes of the entire Anti-Dumping Agreement, including Article 11.3. This interpretation is supported by the fact that Article 11.3 does not indicate, either expressly or by implication, that "dumping" has a different meaning in the context of sunset reviews than in the rest of the Anti-Dumping Agreement. Therefore, Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 suggest that the question for investigating authorities, in making a likelihood determination in a sunset review pursuant to Article 11.3, is whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping of the product subject to the duty (that is, to the introduction of that product into the commerce of the importing country at less than its normal value). The Panel also appeared to reach a similar conclusion.[32]

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[27] Panel Report, *Sunset Review of Steel from Japan*, para. 7.279 (emphasis added).

[28] Argentina's First Submission, Section VI.C.3.

[29] US First Submission, paras. 141-142.

[30] *See* Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 109, 127, 128, 130; Appellate Body Report, *Steel from Germany*, paras. 69 n.59, 79-81; Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Kore*a, WT/DS99/R, adopted 19 March 1999, para. 6.59 n.501 ("*DRAMS from Korea*"); Panel Report, *Sunset Review of Steel from Japan*, paras. 7.99-7.100, 7.176.

[31] *See* Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 126-128.

[32] *Id.* at para. 109.

22. The United States argues that only Article 2.1 applies to Article 11.3 insofar as it provides the general meaning for the term "dumping."[33] The United States further contends that the remaining provisions of Article 2 do not apply to Article 11.3, because "Article 11.3 does not require a determination that a particular *amount of dumping* is likely to continue or recur in the future . . . ."[34] According to the United States, such a determination of likely dumping would be impossible as there is no way to measure likely future values for prices, costs, and profits in order to calculate the dumping margin pursuant to Article 2.[35] Therefore, the United States argues, the requirements of Article 2 do not apply to sunset reviews.

23. The Appellate Body expressly ruled that all the provisions of Article 2 – and not just Article 2.1 – apply to sunset reviews under Article 11.3.[36] In doing so, the Appellate Body reversed the Panel's finding that "the substantive disciplines in Article 2 governing the calculation of dumping margins in making a *determination of* dumping [do not] apply in making a *determination of likelihood of continuation or recurrence of* dumping under Article 11.3."[37] The Appellate Body stated,

> Article 2 sets out the agreed disciplines in the Anti-Dumping Agreement for calculating dumping margins. As observed earlier, we see no obligation under Article 11.3 for investigating authorities to calculate or rely on dumping margins in determining the likelihood of continuation or recurrence of dumping. However, should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4. We see no other provisions in the Anti-Dumping Agreement according to which Members may calculate dumping margins.
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> . . .
>
> It follows that we disagree with the Panel's view that the disciplines in Article 2 regarding the calculation of dumping margins do not apply to the likelihood determination to be made in a sunset review under Article 11.3.[38]

24. Therefore, under Article 11.3, where the authority relies on dumping margins calculated in previous determinations in making the likelihood determination, it must ensure that those dumping margins are consistent with the requirements of Article 2.

25. Further, if the authority calculates a new dumping margin for the Article 11.3 review, then such a margin must satisfy the requirements of Article 2. In order to make the prospective analysis required by Article 11.3, the authority must base its likelihood determination on both past and current information.[39] To know whether dumping would likely "continue" or "recur" under Article 11.3, an authority must have current information about dumping.[40] In other words, it becomes necessary to determine if dumping exists in order to assess its probable continuation. Alternatively, it becomes necessary to determine the absence of dumping in order to assess prospectively the probability of recurrence. Therefore, to the extent the authority calculates a dumping margin in order to evaluate whether dumping is currently present or absent in order to make the likelihood determination under Article 11.3, that dumping margin must comport with the disciplines of Article 2.

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[33] US First Submission, para. 254.
[34] *Id.*
[35] *Id.* at para. 255.
[36] *See* Appellate Body Report, *Sunset Review of Steel from Japan*, para. 128.
[37] Panel Report, *Sunset Review of Steel from Japan*, para. 7.168.
[38] Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 127-128.
[39] *See* Panel Report, *Sunset Review of Steel from Japan*, para. 7.279 ("[T]he prospective likelihood determination will inevitably rest on a factual foundation relating to the past and present.").
[40] *See also* Third Party Submission of the European Communities, para. 12.

26. Contrary to the US assertion, the substantive requirements of Article 2 apply to sunset reviews under Article 11.3.

2. Article 3 of the Anti-Dumping Agreement applies to sunset reviews conducted under Article 11.3

27. Article 3 defines "injury" as that term is used throughout the Anti-Dumping Agreement. Thus, an authority's determination under Article 11.3 of whether "injury" would be likely to continue or recur must satisfy the requirements of Article 3. For the United States, injury in Article 11.3 is undefined.

28. The logic behind the Appellate Body's ruling in *Sunset Review of Steel from Japan* that "dumping" for purposes of Article 11.3 is subject to the disciplines of Article 2 requires the parallel finding that "injury" for purposes of Article 11.3 is subject to the disciplines of Article 3.[41]

29. Footnote 9 states: "Under this Agreement the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article." (Emphasis added.) The Appellate Body used the SCM Agreement's equivalent of this very footnote as an illustration of how the injury concept applies throughout the Agreement, including in sunset reviews.[42]

30. The US contention that Footnote 9 is a mere "drafting device" designed to avoid the need to recite each of the three distinct forms of injury throughout the agreement is unpersuasive.[43] The Panel in *DRAMS from Korea* noted "that, by virtue of note 9 of the [Anti-Dumping] Agreement, the term 'injury' in Article 11.2 'shall be interpreted in accordance with the provisions' of Article 3."[44] There is no reason why injury in Article 11.2 should be treated differently than injury for purposes of Article 11.3.

31. Nor does the United States attempt to explain how injury in Article 11.1 could possibly be different from injury in Article 3. Article 11.1 states that "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." There is no suggestion that the drafters of the Agreement intended in Article 11.1 anything other than injury as defined in Article 3 and specified in Footnote 9. And there can be no question that the overarching principles of Article 11.1 provide the immediate context of Article 11.3.

32. The Panel in *Sunset Review of Steel from Japan* interpreted Footnote 9 as follows:

> [T]he term 'injury' as it appears throughout the Anti-Dumping Agreement – including Article 11 – is to be construed in accordance with this footnote, unless otherwise specified. This would seem to support the view that the provisions of Article 3 concerning injury may be generally applicable throughout the Anti-Dumping Agreement and are not limited in application to investigations. Article 11 does not seem to explicitly specify otherwise in the case of sunset reviews.[45]

33. The US also raises the distinction between the "determination of injury" in an original investigation and a "determination of the likely continuation or recurrence of injury" in a sunset

[41] *See* Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 126-128.
[42] *See* Appellate Body Report, *Steel from Germany*, para. 69 n.59.
[43] US First Submission, para. 291.
[44] Panel Report, *DRAMS from Korea*, para. 6.59 n.501; *see also* Panel Report, *Sunset Review of Steel from Japan*, para. 7.99.
[45] Panel Report, *Sunset Review of Steel from Japan*, para. 7.99.

review.[46] But this distinction does not alter the paramount legal requirement under the Anti-Dumping Agreement that the core focus of each determination – "injury" – must be interpreted in accordance with the provisions of Article 3.

34. Moreover, that Articles 3 and 11.3 do not reference each other does not indicate, as the United States argues,[47] that the provisions of Article 3 do not apply to Article 11.3 sunset reviews. Rather, explicit cross-referencing is not necessary, because the terms of Article 3 (through Footnote 9 and Article 3.1) apply throughout the Anti-Dumping Agreement, including in Article 11.3.[48]

35. In sum, Argentina views the issue as one of the fundamental disagreements between the United States and other WTO Members involved in this proceeding. Does "injury" as used in Article 11.3 differ from the meaning of "injury" as defined under the Agreement in Footnote 9, and do the substantive and procedural standards for evaluating injury contained in Article 3 apply to determinations made under Article 11.3? Under the Agreement, the clear answer to both of these questions is "yes." Moreover, this is not merely Argentina's view – all of the Third Parties similarly agree that this interpretation is mandated by the Agreement.[49]

3. Articles 6, 12, and 18 of the Anti-Dumping Agreement apply to sunset reviews conducted under Article 11.3

36. Article 6 of the Anti-Dumping Agreement applies to reviews conducted under Article 11 by virtue of the cross-reference contained in Article 11.4: "The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article." In particular, Article 6.1 requires that "[a]ll interested parties in an anti-dumping investigation shall be given . . . ample opportunity to present . . . evidence . . . ." And Article 6.2 requires that the authority provide all interested parties "a full opportunity for the defence of their interests."

37. The Appellate Body in *Sunset Review of Steel from Japan* recognized that the cross-reference in Article 12.3 to Article 11 reviews indicates that the drafters of the Anti-Dumping Agreement intended for interested parties in Article 11.3 sunset reviews to have "the right to receive notice of the process and reasons for the determination."[50] The United States does not dispute that the provisions of Article 12 apply *mutatis mutandis* to sunset reviews under Article 11.3.[51]

38. Article 18.3 of the Anti-Dumping Agreement expressly provides that "the provisions of this Agreement shall apply to investigations, *and reviews of existing measures*, initiated pursuant to applications which have been made on or after the date of entry into force of the WTO Agreement." (Emphasis added.) Thus, the Anti-Dumping Agreement applies to sunset reviews of anti-dumping measures imposed prior to the entry into force for a Member of the WTO Agreement. The United States does not dispute this.

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[46] US First Submission, paras. 289, 297-301.

[47] *See id.* at para. 296.

[48] Article 3.1 states that "[a] determination of injury <u>for purposes of Article VI of GATT 1994</u> shall be based on positive evidence and involve an objective examination . . . ." (Emphasis added.) The Anti-Dumping Agreement clarifies Article VI of GATT 1994. Therefore, the text of Article 3.1 unambiguously provides that <u>all</u> determinations of injury under the Anti-Dumping Agreement – whether a determination of injury in an original investigation or a determination of the likelihood of injury in a sunset review – are subject to the requirements of that article.

[49] *See* Third Party Submissions of European Communities, paras. 123-127; Japan, paras. 9-15; Korea, paras. 19-24, and Chinese Taipei, para. 7.

[50] Appellate Body Report, *Sunset Review of Steel from Japan*, para. 112.

[51] *See* US First Submission, para. 239.

III. THE DEPARTMENT'S SUNSET DETERMINATION

A. THE US SUNSET REVIEW WAIVER PROVISIONS, 19 USC. § 1675(C)(4) AND 19 C.F.R. § 351.218(D)(2)(III), ARE INCONSISTENT AS SUCH WITH THE ANTI-DUMPING AGREEMENT

1. US arguments that waiver is applied on a company-specific basis are unavailing and do not alter the conclusion that the Waiver Provisions violate Articles 11.3, 11.4, 6.1, and 6.2

39. The US waiver provisions, 19 USC. § 1675(c)(4)(B) and 19 C.F.R. § 351.218(d)(2)(iii), violate Article 11.3 because they mandate a finding of likely dumping.[52] Under Article 11.3, if the WTO Member wishes to invoke the exception and continue the measure, it must meet specified requirements. The Panel in *Sunset Review of Steel from Japan* confirmed that Article 11.3 "precludes an investigating authority from simply assuming" that dumping and injury would likely continue or recur.[53] The Panel further recognized that "one of the fundamental goals of the Anti-Dumping Agreement as a whole is to ensure that objective determinations are made based, to the extent possible, on facts."[54] Article 11.3 requires that the authority take action and ground its determination on a "sufficient factual basis" to allow it to "draw reasoned and adequate conclusions concerning the likelihood" of continuation or recurrence. [55] The Appellate Body confirmed that the authority "must conduct a rigorous examination in a sunset review before the exception (namely, the continuation of the duty) can apply."[56] The authority must make a "fresh determination" that is forward-looking and "based on credible evidence."[57]

40. The United States does not dispute that the application of the waiver provisions mandates a finding of likely dumping. The United States argues, however, that the waiver provisions do not preclude the Department from conducting a sunset review as required by Article 11.3, because the mandatory likelihood determination under section 1675(c)(4)(B) "is limited to the party that failed to respond."[58] According to the United States, "regardless of whether a respondent interested party affirmatively waives participation or Commerce finds that the failure of the respondent interested party to file a substantive response or a complete substantive response constitutes a waiver, Commerce is still required by US law and its own regulations to initiate and conduct the required sunset review."[59]

41. First, as explained in detail below, this is not how the waiver provisions were applied in this case. Siderca submitted a complete substantive response, but the Department nevertheless determined that it "did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation."[60]

42. The US argument fails because it relies on an overly narrow interpretation of "review." As is clear from the Appellate Body, Article 11.3 requires a "rigorous examination" of evidence that results

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[52] *See* Argentina's First Submission, Sec. VII.A.1.
[53] *See* Panel Report, *Sunset Review of Steel from Japan*, para. 7.177.
[54] *Id.* at para. 7.279.
[55] *Id.* at para. 7.177.
[56] Appellate Body Report, *Sunset Review of Steel from Japan*, para. 113.
[57] Appellate Body Report, *Steel from Germany*, para. 88.
[58] US First Submission, para. 146.
[59] *Id.* at para. 148.
[60] *Issues and Decision Memorandum for the Sunset Reviews of the AD Orders on Oil Country Tubular Goods from Argentina, Italy, Japan, and Korea (*Dep't Comm., 31 Oct. 2000) (final results) at 5 ("*Issues and Decision Memorandum*") (ARG-51); *see also Oil Country Tubular Goods from Argentina: Adequacy of Respondent Interested Party Response to the Notice of Initiation*, A – 357-810 *(*Dep't Comm., 22 August 2000) at 1 (Siderca filed a "complete substantive response") and at 2 (the Department determined Siderca's response to be "inadequate") ("*Determination to Expedite*") (ARG-50).

in a meaningful review. The authority must actively evaluate a sufficient body of positive evidence and ultimately render a determination that is based on that evidence. The review required by Article 11.3 cannot be a mere formality and lack substance. By mandating a determination of likely dumping without an evaluation of evidence where a respondent interested party waives – or is deemed by the Department to have waived – participation in the sunset proceeding, the US waiver provisions violate Article 11.3. Indeed, even where only one out of multiple respondents subject to the order waives participation in a sunset review, the US waiver provisions violate Article 11.3. As the Appellate Body confirmed, Article 11.3's requirement to determine in a review whether the continuation or recurrence of dumping would be likely does not permit the Department to automatically conclude – without an evaluation of facts – that dumping would be likely. The problem is even more pronounced when multiple respondent interested parties are deemed to have waived their participation.

43. For example, in this case, the ultimate effect is the same whether waiver is applied on a company-specific or order-wide basis. In this case, the Department deemed the Argentine exporters to have waived, and thus issued a determination that dumping was likely to continue or recur pursuant to the waiver provisions. Therefore, waiver on the company level was equivalent to waiver on an order-wide basis because the Department deemed the companies accounting for 100 per cent of the alleged exports to have waived participation.

2. The US arguments that the Waiver Provisions merely serve as an efficiency mechanism are without merit

44. The United States also attempts to cast the waiver provisions as an efficiency mechanism that enables the Department to save resources where respondent interested parties choose not to participate in the Department's sunset review.[61] According to the United States, "[n]othing in Article 11.3 specifically or the AD Agreement generally requires authorities to engage in such a waste of their own resources and the resources of private parties."[62]

45. Casting the function of the waiver provisions as a vehicle for saving resources is not persuasive. Purported efforts to save administrative resources cannot be used to diminish a Member's substantive rights or to re-define obligations.[63]

46. The point is that Article 11.3 imposes an obligation to the Member maintaining an anti-dumping measure to conduct a "rigorous" review and make a determination of both likely dumping and likely injury in order for it to maintain that measure. If the national authorities are not willing to expend the resources necessary to satisfy their obligation to make a WTO-consistent "determination," then they must terminate the measure. Also, Article 6.8 and Annex II of the Anti-Dumping Agreement provide the only mechanism for the treatment of respondents who do not participate or who are not cooperative: a decision based on facts available for such parties. Article 11.3 (as well as the Anti-Dumping Agreement as a whole) does not permit an additional, so-called efficiency mechanism, that statutorily mandates a finding of a likelihood of a continuation or recurrence of dumping.

47. The United States has applied the waiver provision in 173 of its 297 sunset reviews of anti-dumping duty orders – and in 78 per cent of the sunset reviews in which the domestic industry participated.[64] In all of these cases, the Department issued a finding that dumping would likely continue or recur pursuant to the statutory mandate.[65] In Argentina's view, this is something other

[61] US First Submission, paras. 148-49.
[62] *Id.* at para. 149.
[63] *See* Argentina's First Oral Statement, paras. 49-51.
[64] US Department of Commerce Sunset Reviews (ARG-63 and ARG-64).
[65] *Id.*

than efficiency. The sunset review of antifriction bearings from Sweden illustrates the "efficient" use of the waiver provisions and highlights the direct conflict with Article 11.3 – where there is no review, no analysis, and no determination by the Department. In that case the Department stated, "given that . . . respondent interested parties have waived their right to participate in this review before the Department, we determine that dumping is likely to continue if the orders were revoked."[66]

48. Finally, in its first submission, the United States does not even address the issue of "deemed waivers," where respondents attempted to participate, but the Department rejected their responses and deemed their inadequate responses to constitute a "waiver of participation." The United States did concede, however, during questioning from the Panel at the First Substantive Meeting With the Parties on 9 December that, pursuant to the waiver regulation, 19 USC. § 351.218(d)(2(iii), the Department will apply a deemed waiver for both incomplete substantive responses and for non-responses. However, according to the US First Submission, a party which submits a response to a notice of initiation is never considered to have "waived" its participation in a sunset review.[67] Sunset cases included in Exhibit ARG-63, however, contradict the US explanation and cast doubt on the US response to Argentina's argument.[68]

49. The United States also argues that the waiver provisions do not violate Article 6.1, because US sunset laws and regulations afford interested parties "ample opportunity to present evidence in writing all evidence which they consider relevant."[69] According to the United States, the US waiver provisions only "operate when a respondent interested party has chosen not to avail itself of the Article 6.1 rights that other provisions of the regulations guarantee."[70]

50. Under the Department's sunset regulations, the Department "will consider the failure by a respondent interested party to file a complete substantive response . . . as a waiver of participation in a sunset review before the Department."[71] Applying this provision, the Department has deemed a respondent to have waived its participation where the Department considered the respondent's response to the notice of initiation to be "inadequate" under 19 USC. § 351.218(e)(1)(ii)(A) – both

[66] *Antifriction Bearings from Sweden*, 64 Fed. Reg. 60,282, 60,284 (Dep't Comm. 1999)(final results sunset review) (ARG-63, Tab 6).

[67] *See* US First Submission, para. 166, ("[The US waiver provisions] are relevant only when a respondent interested party has not responded to the notice of initiation of the sunset review by making the required first submission, the substantive response.").

[68] *See, e.g., Cut-to-Length Carbon Steel Plate from Belgium*, 65 Fed. Reg. 18,292 (Dep't Comm. 2000)(final results sunset review)(ARG-63, Tab 82). The Department received incomplete responses from two respondents, and therefore considered their responses to be "inadequate" under 19 C.F.R. § 351.218(e)(1)(ii)(A). *See Issues and Decision Memo for the Expedited Sunset Review of the AD Order on Cut-to-Length Carbon Steel Plate from Belgium* at 2-3 (ARG-63, Tab 82). In addition, the domestic interested parties urged the Department to deem the respondents' failure to file complete responses as waivers of participation in the review. *See id.* at 2. In concluding that dumping was likely to continue or recur, the Department stated: "In the instant review, the Department did not receive an adequate response from any respondent interested party. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation." *See id.* at 5. *See also Seamless Pipe from Argentina, Brazil, Germany, and Italy*, 65 Fed. Reg. 66,708 (Dep't Comm. 2000)(final results sunset review)(ARG-63, Tab 212). For the sunset review of the order against Italian seamless pipe, the Department received a complete substantive response from a respondent interested party, but considered the response to be "inadequate" by virtue of the 50 per cent rule under 19 C.F.R. § 351.218(e)(1)(ii)(A). *See Issues and Decision Memo for the Expedited Sunset Reviews of the AD Orders on Seamless Pipe from Argentina, Brazil, Germany, and Italy* at 3 (ARG-63, Tab 212). In concluding that dumping was likely to continue or recur, the Department stated: "In the instant reviews, the Department did not receive adequate response from any respondent interested party for the Argentinean, Brazilian, and Italian cases. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation." *See id.* at 5 (emphasis added).

[69] *See* US First Submission, para. 164.

[70] *See id.* at para. 166.

[71] 19 C.F.R. § 351.218(d)(2)(iii) (emphasis added).

because the response was incomplete and because the respondent failed to satisfy the 50 per cent threshold test.[72] Indeed, the Department deemed Siderca's complete substantive response to constitute a waiver of participation.[73]

51. The Department's regulations regarding the "deemed waiver" thus deny respondent interested parties the opportunity to present evidence in violation of Article 6.1. Although the Department's regulations afford respondents the opportunity to submit evidence, these provisions are meaningless in the context of a deemed waiver where the Department issues a mandatory determination of likely dumping pursuant to the statute, despite a respondent's attempts to participate in the sunset proceeding.

52. Similarly, the US waiver provisions violate Article 6.2. In response to this argument, the United States again fails to address the consequences of a deemed waiver. By deeming a respondent interested party's inadequate response to constitute a waiver under 19 C.F.R. § 351.218(d)(2)(iii), the Department denies the respondent "a full opportunity for the defence of [its] interests." Indeed, a respondent hardly can be said to have a full opportunity to defend its interests where the Department issues a mandatory determination of likelihood without considering information and argument submitted by that respondent.

B. 19 USC. § 1675A(C)(1), THE STATEMENT OF ADMINISTRATIVE ACTION, AND SECTION II.A.3 OF THE *SUNSET POLICY BULLETIN* ESTABLISH AN IRREFUTABLE PRESUMPTION OF LIKELY DUMPING IN DEPARTMENT OF COMMERCE SUNSET REVIEWS THAT VIOLATES AS SUCH ARTICLE 11.3

53. In *Sunset Review of Steel from Japan*, the Appellate Body confirmed that the likelihood determination required under Article 11.3 could not be based on a presumption that dumping would be likely to continue or recur.[74]

54. In its first submission, Argentina presented three independent claims that demonstrate that the United States has established and/or employs an irrefutable presumption of likely dumping in violation of its WTO obligations.[75] First, the SAA and *Sunset Policy Bulletin* cannot be separated from the US statute and, taken together, the statute, SAA, and *Sunset Policy Bulletin* establish an irrefutable presumption of likely dumping in violation of Article 11.3 of the Anti-Dumping Agreement as such. Second, the consistent practice of the United States demonstrates that it always applies an irrefutable presumption of likely dumping in violation of Article 11.3 as such. Third, in the alternative (*i.e.*, in the event that the Panel were to find that the SAA and the *Sunset Policy Bulletin* could not be challenged as "measures," or that, individually or taken together with the statute, they were not inconsistent with Article 11.3), Argentina's first submission demonstrates that the United States has not administered its law with respect to the likelihood of dumping determination in an impartial and reasonable manner as required by Article X:3(a) of the GATT 1994.

55. The implications of not finding a violation pursuant to at least one of these claims would be significant for the WTO as a rules-based system. If countries can avoid treaty obligations by copying the text of treaty commitments into domestic legislation, and then publishing "administrative guidance" that either undermines the substantive obligations or results in consistent practice that is inconsistent with WTO obligations, then WTO obligations would become meaningless.

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[72] *See, e.g., Seamless Pipe from Argentina, Brazil, Germany, and Italy*, 65 Fed. Reg. 66,708 (Dep't Comm. 2000)(final results sunset review)(ARG-63, Tab 212); *Cut-to-Length Carbon Steel Plate from Belgium*, 65 Fed. Reg. 18,292 (Dep't Comm. 2000) (final results sunset review) (ARG-63, Tab 82).

[73] *See Issues and Decision Memorandum* at 5 (ARG-51) ("In the instant reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation.").

[74] *See* Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 178, 191.

[75] *See* Argentina's First Submission, Sections VII.B. and VII.E.

1. 19 USC. § 1675a(c)(1), the Statement of Administrative Action, and the *Sunset Policy Bulletin* are measures that can be challenged as such

56. In its first submission, Argentina set forth its argument that the statute, the SAA, and the *Sunset Policy Bulletin* – taken together – are inconsistent with Article 11.3 as such, because they establish an irrefutable presumption of likely dumping.[76]

57. The likelihood of dumping standard under US law is "multi-layered" in the sense that the US Congress has delegated the likelihood determination to the Department, which has, in turn, issued rules – codified in the *Sunset Policy Bulletin* – governing the likelihood determination according to criteria prescribed by Congress in the statute and SAA. Therefore, in discerning the likelihood of dumping standard under US law, the statute, SAA, and *Sunset Policy Bulletin* are "inseparable and should not be read independently from each other when evaluating the overall conformity of the law with WTO obligations."[77]

58. The statutory provision, 19 USC. § 1675a(c)(1), provides the starting point for the Department's likelihood determination. Section 1675a(c)(1) instructs that, in determining whether revocation of an anti-dumping order would be likely to lead to continuation or recurrence of dumping, the Department "shall consider—(A) the weighted average dumping margins determined in the investigation and subsequent reviews, and (B) the volume of imports of the subject merchandise for the period before and the period after the issuance of the anti-dumping duty order . . . ."

59. As with the relevant statutory provision in *US – Export Restraints*, however, the statute cannot be read isolation.[78] While the statute prescribes the two factors (i.e., previously calculated dumping margins and import volumes) that the Department must consider in making the likelihood determination, the statute does not articulate how the Department must interpret these in deciding whether dumping would be likely to continue or recur. In other words, the statutory provisions alone do not articulate the likelihood of dumping standard under US law.

60. In order to discern the likelihood of dumping standard under US law, the statute cannot be read independently from the SAA and the *Sunset Policy Bulletin*. As a matter of US law, the SAA has a unique status as the authoritative interpretive tool for the statute.[79] The SAA outlines the three criteria that Congress believes are "highly probative" of likely dumping: (1) continued dumping margins, (2) the cessation of imports, and/or (3) declining import volumes accompanied by the continued existence of dumping margins.[80]

61. The *Sunset Policy Bulletin* is an administrative instrument that, as with the issuance of regulations, the Department published in the *Federal Register*, and was subject to public comment prior to the initiation of the first US sunset review. The policies concerning sunset reviews set forth in the *Sunset Policy Bulletin* "are intended to complement the applicable statutory and regulatory provisions by providing guidance on methodological or analytical issues not explicitly addressed by the statute and regulations."[81] With respect to the likelihood of dumping determination, Section II.A.3 of the *Sunset Policy Bulletin* further instructs that the Department "normally will" determine that the

[76] *See id.* at Section VII.B.2.

[77] Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, para. 7.27 ("*US – Sections 301-310*").

[78] *See* Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R, adopted 23 August 2001, paras. 8.92, 8.100 – 8.101, 8.130 ("*US – Export Restraints*").

[79] *See id.* at paras. 8.97-8.98.

[80] SAA at 889-890 (ARG-5).

[81] *Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Anti-Dumping and Countervailing Duty Orders*, 63 Fed. Reg. 18,871, 18,871 (Dep't Comm. 1998)("*Sunset Policy Bulletin*") (ARG-35)(emphasis added); *see also* Appellate Body Report, *Sunset Review of Steel from Japan*, para. 95.

continuation or recurrence of dumping would be likely where at least one of the three criteria set forth in the SAA is satisfied, with no further analysis.[82]

62. Thus, in the end, the US likelihood standard is expressed in Section II.A.3 of the *Sunset Policy Bulletin*. Part of an overall framework with the statute and the SAA, the *Sunset Policy Bulletin* sets forth the presumption of likelihood of dumping that no respondent has ever been able to overcome. Argentina submits that the irrefutable presumption of likely dumping prescribed by Section II.A.3 of the *Sunset Policy Bulletin* is inconsistent with Article 11.3 as such.

63. In rebuttal, the United States argues that the *Sunset Policy Bulletin* has "no independent legal status," and for that reason cannot be challenged as a WTO-inconsistent measure.[83] In doing so, the United States cites the Panel's ruling in *Sunset Review of Steel from Japan* that the *Sunset Policy Bulletin* does not constitute a measure for purposes of a WTO challenge.[84]

64. The Appellate Body, however, has overruled the Panel's finding that the *Sunset Policy Bulletin* is not a measure that is challengeable, as such, with the WTO Agreement.[85] The Appellate Body held that "measure" for purposes of WTO challenge is cast broadly, and includes administrative instruments such as the *Sunset Policy Bulletin*.[86] Accordingly, the Panel has the authority to decide whether Section II.A.3 of the *Sunset Policy Bulletin*, which is a distillation of 19 USC. § 1675a(c)(1) and the SAA, is inconsistent with Article 11.3 as such.

2. 19 USC. § 1675a(c)(1), the Statement of Administrative Action, and Section II.A.3 of the *Sunset Policy Bulletin* require decisive reliance by the Department on historical dumping margins and declines in import volume and thus establish an irrefutable presumption of likely dumping in Department of Commerce sunset reviews in violation of Article 11.3 as such

65. In *Sunset Review of Steel from Japan*, the Appellate Body evaluated whether Section II.A.3 of the *Sunset Policy Bulletin* is inconsistent with Article 11.3 as such. In addressing this issue, the Appellate Body stated,

> We believe that a *firm evidentiary foundation* is required in each case for a proper determination under Article 11.3 of the likelihood of continuation or recurrence of dumping. Such a determination cannot be based solely on the *mechanistic application of presumptions*. We therefore consider that the consistency of Sections II.A.3 and 4 of the *Sunset Policy Bulletin* with Article 11.3 of the Anti-Dumping Agreement hinges upon whether those provisions instruct [the Department] to treat dumping margins and/or import volumes as *determinative or conclusive*, on the one hand, or merely indicative or probative, on the other hand, of the likelihood of future dumping.[87]

66. Thus, the Appellate Body determined that, if the *Sunset Policy Bulletin* is interpreted by the Department as directing it to consider continued dumping margins and declining volumes (*i.e.*, satisfaction of any of the three criteria prescribed by Section II.A.3) as conclusive of likely dumping, then the *Sunset Policy Bulletin* would be inconsistent with Article 11.3 as such. The likelihood

[82] *Sunset Policy Bulletin* at 18,872 (ARG-35).
[83] US First Submission, para. 195.
[84] *See id.* at para. 196 (citing Panel Report, *Sunset Review of Steel from Japan*, paras. 7.125-7.126).
[85] *See* Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 94-100.
[86] *See id.* at paras. 84-88.
[87] *Id.* at para. 178 (emphasis added).

determination required by Article 11.3 must be based on "all relevant evidence," not on "the mechanistic application of presumptions."[88]

67. Ultimately, however, the Appellate Body did not decide whether the *Sunset Policy Bulletin* is inconsistent with Article 11.3 as such. The Appellate Body concluded that, because the Panel had not made any factual findings as to the "consistent application" of Section II.A.3, it could not fully discern that provision's "meaning."[89] Consequently, it could not determine whether Section II.A.3 directs the Department to consider the three criteria to be conclusive of likely dumping.

68. Here, however, Argentina has submitted extensive evidence of the Department's "consistent application" of Section II.A.3. Thus, under the guidance provided by the Appellate Body in *Sunset Review of Steel from Japan*, the Panel has the evidence before it to discern the meaning of Section II.A.3 and to make the proper ruling that the three criteria are inconsistent with Article 11.3 as such.[90] Argentina's Exhibits ARG-63 and ARG-64[91] demonstrate that the Department follows the instruction of Section II.A.3 in every sunset review, and every time it finds that at least one of the three criteria is satisfied, the Department makes an affirmative finding of likely dumping without considering additional factors. The Department's consistent application of Section II.A.3 thus demonstrates its meaning: Section II.A.3 directs the Department to attach decisive weight to historical dumping margins and declining import volumes (or the cessation of imports altogether) in every case. Therefore, because Section II.A.3 of the *Sunset Policy Bulletin* instructs the Department to treat satisfaction of any one of the three criteria as conclusive of likely dumping, the measure is inconsistent with the Article 11.3 obligation to determine on the basis of all relevant evidence whether termination of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping.[92]

69. The Department's 10 December 2003 final determination in the sunset review of the anti-dumping order on stainless steel wire rod from Spain provides a telling illustration of how the Department mechanistically treats the Section II.A.3 criteria as decisive without considering other relevant evidence.[93] As in all sunset reviews, the Department followed the instruction of Section II.A.3 and considered only historical dumping margins and import volumes. The dumping margin for the only identified respondent interested party had declined since the imposition of the order, from 4.73 per cent in the original investigation to 0.80 per cent in the only completed administrative review.[94] Meanwhile, the volume of the subject imports declined significantly the year the order was imposed, but thereafter import volume to the United States resumed to pre-order levels.[95] This evidence should have required a finding that continuation or recurrence of dumping would not be likely, as even the SAA recognizes that "declining (or no) dumping margins accompanied by steady

[88] *Id.* at paras. 178, 191 ("As we have found in other situations, the use of presumptions may be inconsistent with an obligation to make a particular determination in each case using positive evidence. Provisions that create 'irrebuttable' presumptions, or 'predetermine' a particular result, run the risk of being found inconsistent with this type of obligation.").

[89] *See id.* at paras. 184, 190; *see also* Appellate Body Report, *Steel from Germany*, paras. 148, 157.

[90] Indeed, Argentina submits that the Panel must make factual findings as to the meaning of Section II.A.3, as evidenced by the Department's consistent application of the measure, if only to preserve Argentina's rights for appeal.

[91] Argentina introduces Exhibit ARG-64 in this second submission. ARG-64 consists of Argentina's review of the Department's sunset proceedings conducted since September 2003, and thus supplements ARG-63.

[92] *See* Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 178, 191.

[93] *See Issues and Decision Memorandum for the Expedited Sunset Review of the Anti-Dumping Order on Stainless Steel Wire Rod from Spain*, (10 December 2003)(ARG-64, Tab 4). The final results of this review were published on December 10, 2003, during the Panel's First Substantive Meeting with the Parties in the instant dispute.

[94] *See id.* at 4.

[95] *See id.* at 6.

or increasing imports may indicate that foreign companies do not have to dump to maintain market share in the United States and that dumping is *less likely* to continue or recur if the order were revoked."[96] Nevertheless, the Department rigidly applied the Section II.A.3 criteria and concluded, "We find that revocation of the order on SSWR from Spain is likely to continue or recur if the order were revoked, because of the existence of dumping margins above de minimis level and the decrease of import levels following the imposition of the order."[97]

70. The United States cannot dispute that, in following Section II.A.3, the Department always treats satisfaction of any one of the three criteria as conclusive.

71. Further, by requiring the Department to treat satisfaction of any one of the three criteria as conclusive of likely dumping, Section II.A.3 establishes an irrefutable presumption of likely dumping. Here, again, Argentina's extensive evidence of the Department's consistent application of Section II.A.3 demonstrates the invariable consequence – and thus the meaning – of that provision. In 100 per cent of the sunset reviews in which the domestic industry participated, the Department followed the instructions of Section II.A.3, and in each case, the Department rendered an affirmative likelihood determination.[98] Therefore, because Section II.A.3 requires the Department to apply a mechanistic presumption of likely dumping, Section II.A.3 is inconsistent with the Article 11.3 obligation to determine on the basis of all relevant evidence whether termination of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping.[99]

72. The United States takes the position that there is no irrefutable presumption of likely dumping under US law.[100] First, the United States asserts that permissive language in the SAA ("[f]or example," "may provide strong indication," and "highly probative") and Section II.A.3 of the *Sunset Policy Bulletin* ("normally") indicates that these provisions do not establish an irrefutable presumption.[101]

73. In *Sunset Review of Steel from Japan*, however, the Appellate Body examined this very language in evaluating whether Section II.A.3 is inconsistent with Article 11.3 and found that it did not resolve the issue.[102] Indeed, the Appellate Body found that other language in Section II.A.3 contradicted the notion that the intent behind use of the word "normally" was permissive.[103] Specifically, the Appellate Body noted that the following statement in Section II.A.3 suggested "by negative implication, that data relevant to the two factors mentioned in Section II.A.3(a)-(c) (namely, import volumes and historical dumping margins) *will* be regarded as conclusive in sunset reviews of final anti-dumping duties (as opposed to reviews of suspended investigations . . .)[:]"

> The Department recognizes that, in the context of a sunset review of a suspended investigation, the data relevant to the criteria under paragraphs (a) through (c), above, [dumping margins and import volumes] *may not be conclusive* with respect to likelihood. [104]

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[96] SAA at 889-90 (ARG-5) (emphasis added.).

[97] *Issues and Decision Memorandum for the Expedited Sunset Review of the Anti-Dumping Order on Stainless Steel Wire Rod from Spain* at 6 (10 December 2003)(ARG-64, Tab 4).

[98] *See* US Department of Commerce Sunset Reviews, ARG-63 (showing that, in the 217 sunset reviews in which the domestic industry participated as of September 2003, the Department found that dumping would be likely in each case); ARG-64 (showing that, in the six sunset reviews conducted by the Department since September 2003, the Department followed Section II.A.3 and found that dumping would be likely in each case).

[99] Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 178, 191.

[100] *See* US First Submission, para. 173.

[101] *See id.* at paras. 176, 178.

[102] *See* Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 179-181.

[103] *Id.* at para. 179.

[104] *Id.* (citing *Sunset Policy Bulletin* at 18,872 (ARG-35)).

Therefore, the Appellate Body determined that evidence of the consistent application of Section II.A.3 was necessary to discern its meaning.[105]

74. As discussed above, Argentina has produced extensive evidence demonstrating the Department's consistent application of Section II.A.3, and thereby, its meaning. The facts of the Department's sunset reviews speak for themselves: In 100 per cent of the sunset reviews in which a domestic interested party participated in the proceeding, the Department determined that dumping was likely to continue or recur; and in 100 per cent of the sunset reviews for which the Department determined that dumping was likely to continue or recur, the Department cited the authority of Section II.A.3 of the *Sunset Policy Bulletin*.[106] The Department thus treats Section II.A.3 as binding in all sunset reviews.

75. In addition, the United States asserts that the following statement in the *Sunset Policy Bulletin* disproves the existence of an irrefutable presumption:

> [T]he Department normally will determine that revocation of an anti-dumping order or termination of a suspended dumping investigation is not likely to lead to continuation or recurrence of dumping where dumping was eliminated after issuance of the order or the suspension agreement, as applicable, and import volumes remained steady or decreased.[107]

76. The United States claims that this passage "completely undermines Argentina's case and rather spoils Argentina's story."[108] Argentina disagrees. Rather, this passage further supports Argentina's compelling story of US WTO violations in sunset reviews. Out of the 223 sunset reviews in which the domestic industry participated as of December 2003 (the 217 cases in ARG-63 plus the six cases in ARG-64), the Department cited this provision only four times.[109] More importantly, in each of those four cases, the Department found "good cause" to consider other factors[110] and found alternative grounds for its determination that dumping would be likely to continue or recur.[111] So this passage, which the United States considers its "silver bullet," is in fact a dead letter that has only been used against respondents to justify resorting to the "good cause" provision" in order to otherwise find that dumping would be likely to continue, as reflected in the four cases in which neither the waiver provisions nor the three checklists items were used for the likelihood determination.

77. How are respondents ever going to be able to refute or disprove the presumption of likely dumping prescribed by US law if the Department will always find likely dumping, even in the one rare circumstance in which it is supposedly permitted to determine that dumping would not be likely to continue or recur? Moreover, the Department's use of the "good cause" provision demonstrates its true application – as a tool to justify an affirmative likelihood determination in the rare instance where the Section II.A.3 criteria are not met.

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[105] *See id.* at para. 184.

[106] *See* US Department of Commerce Sunset Reviews (ARG-63 and ARG-64).

[107] *Sunset Policy Bulletin* at 18,872 (ARG-35).

[108] US First Submission, para. 181.

[109] US Department of Commerce Sunset Reviews (ARG-63 and ARG-64).

[110] Pursuant to 19 USC. § 1675a(c)(2) (ARG-1), 19 C.F.R. § 351.218(e)(2)(iii) (ARG-3), and Section II.C of the *Sunset Policy Bulletin* (ARG-35).

[111] *See Sugar and Syrups from Canada*, 64 Fed. Reg. 48,362, 48,363-64 (Dep't Comm. 1999)(final results sunset reviews)(ARG-40); *Issues and Decision Memorandum for the Sunset Review of Gray Portland Cement and Cement Clinker from Venezuela* (Dep't Comm., 18 Feb. 2000)(prelim. results) at 3-5 (ARG-47); *Issues and Decision Memorandum for the Sunset Review of Uranium from Russia* (Dep't Comm., 27 June 2000)(final results) at 15-17 (ARG-48); *Issues and Decision Memorandum for the Sunset Review of Uranium from Uzbekistan* (Dep't Comm., 27 June 2000)(final results) at 9-11 (ARG-49).

78. Of these four cases, the full sunset review of the anti-dumping order on sugar and syrups from Canada is particularly illustrative of the great lengths the Department will go in order to render a determination of likely dumping, even where the evidence clearly commands a negative determination. In that case, the Department applied the Section II.A.3 criteria and preliminarily determined that dumping was not likely to continue or recur, finding that "the continued absence of a dumping margin for [the foreign respondent] and the continued existence of imports from [the respondent] in substantial quantities demonstrate[d] that [the respondent was] capable of selling the subject merchandise in the United States without dumping."[112] The Department, however, reversed its preliminary results and issued an affirmative likelihood determination in its final results. The Department based its final determination on an "abbreviated cost test with the limited data on the record."[113] The Department acknowledged that it was not its normal practice to examine costs and pricing during a sunset review, but it nevertheless found that the information on record amounted to "good cause" sufficient to "warrant consideration of such [other] factors."[114]

79. The Department first compared the foreign respondent's cost of production with sales prices in the Canadian home market. The Department did not, however, compare costs and sales prices for the same year; rather, it "compared a weighted-average home market price, based on 1997 price data supplied by [the respondent], with a COP based on 1998 costs derived from [the respondent's] data."[115] Based on this comparison, the Department concluded that the respondent had sold sugar in the Canadian home market at below its cost of production and that it thus "made below cost sales within an extended period of time in substantial quantities at prices which did not permit recovery of all costs within a reasonable period of time."[116] Because the respondent's home market sales failed the Department's cost test, the Department determined that it would not be appropriate to compare home market sales prices to US export prices to assess dumping. Consequently, the Department compared the respondent's constructed value with its verified average US export selling price. Based on this comparison, the Department "conclude[d] that at least some of [the respondent's] sales to the United States [were] at prices below CV."[117] The Department concluded that this information provided a sufficient basis for determining that dumping was likely to continue or recur if the order were revoked, despite the non-existence of dumping margins and a significant volume of imports.[118]

80. Based on all of the foregoing, Argentina submits that Section II.A.3 of the *Sunset Policy Bulletin* is inconsistent with the Anti-Dumping Agreement as such because it (1) instructs the Department to treat historical dumping margins and import volumes as decisive and conclusive of likely dumping, and (2) establishes a presumption of likely dumping that no respondent has been able to overcome.

81. Argentina respectfully urges the Panel to analyze Argentina's claim. The Appellate Body's report in *Sunset Review of Steel from Japan* shows the importance of the Panel deciding the issues that are properly placed before the Panel. In that case, despite the fact that the Government of Japan had presented evidence that the *Sunset Policy Bulletin* violated Article 11.3, the Panel stopped short of ruling on the claim because it erroneously considered that the *Sunset Policy Bulletin* could not be challenged. Because the Panel stopped short of a substantive analysis, the Appellate Body could not "complete the analysis" even though it recognized that the claim could have merit and that Japan had presented evidence. Argentina respectfully asks that the Panel not repeat this here, and that it

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[112] *Sugar and Syrups from Canada*, 64 Fed. Reg. 20,253, 20,257 (Dep't Comm. 1999)(prelim. results sunset review)(ARG-63, Tab 261).

[113] *Sugar and Syrups from Canada*, 64 Fed. Reg. 48,362, 48,363 (Dep't Comm. 1999)(final results sunset review)(ARG-63, Tab 261).

[114] *Id.*

[115] *Id.* at 48,364 (emphasis added).

[116] *Id.*

[117] *Id.*

[118] *See id.*

consider the claims put before it by Argentina, and the supporting evidence of Exhibits ARG-63 and ARG-64.

3. Argentina established a *prima facie* case as set forth in ARG-63 and ARG-64 and the United States has not rebutted the existence of the irrefutable presumption

82. Through Exhibits ARG-63 and ARG-64, Argentina has demonstrated that the presumption of likely dumping established by the *Sunset Policy Bulletin* has never been overcome. The facts are unequivocal: in 100 per cent of the sunset reviews in which the domestic industry participated (223/223), the Department has followed the directive of Section II.A.3, and in every case the Department rendered an affirmative determination of likely dumping. Argentina has thus satisfied its burden of establishing a *prima facie* case demonstrating the irrefutable presumption employed by the Department in sunset reviews.

83. The United States attempts to diminish the clear importance of the data by contending that there were only 35 cases in which the likelihood of dumping issue was "contested."[119] The United States again fails to appreciate the nature of the obligation to determine the likelihood of dumping under Article 11.3. Lack of respondent party participation does not release the United States from its obligation under Article 11.3 to conduct a review and to make a determination that termination of the duty would be likely to lead to continuation or recurrence of injury. While respondent interested parties can be a "primary source of information" in anti-dumping proceedings, the United States still has "a duty to seek out relevant information"[120] and to ensure that its likelihood of dumping determination is supported by a "sufficient factual basis."[121] Otherwise, it cannot invoke the exception of Article 11.3 (continuation of the measure).

84. In any event, even using the US figures, 35 out of 35 still proves Argentina's claim. The United States simply cannot point to a single sunset review in which the presumption that dumping would likely continue was overcome. Therefore, the United States has failed to rebut Argentina's *prima facie* case.

85. Further, ARG-63 and ARG-64 demonstrate that the Department <u>always</u> treats the satisfaction of any one of the three criteria prescribed by Section II.A.3 of the *Sunset Policy Bulletin* as conclusive of likely dumping. This evidence is indisputable.

4. The Department's consistent practice in sunset reviews both demonstrates the irrefutable presumption of likely dumping in US law and itself violates as such Article 11.3 of the Anti-Dumping Agreement

86. Independent from its challenge of Section II.A.3 of the *Sunset Policy Bulletin*, Argentina challenges the Department's consistent practice as such.

87. After the Appellate Body's decision in *Sunset Review of Steel from Japan*, there can be no doubt that agency practice is challengeable as such in WTO dispute settlement proceedings. In that case, the Appellate Body evaluated whether "the type of instrument itself – be it a law, regulation, *procedure*, *practice*, or something else – govern[s] whether it may be subject to WTO dispute

[119] *See* US First Submission, para. 185. In any event, there were actually 43 cases in which the likelihood of dumping determination was – using the US term – "contested." Argentina's Exhibit ARG-63 shows that the response from foreign interested parties was deemed adequate in 28 cases and inadequate (based on a foreign party's attempt to participate) in 17 cases. Thus, foreign interested parties attempted to participate in 45 Department sunset reviews. In 2 of these cases, however, the domestic industry withdrew from the proceeding. Thus, the foreign and domestic parties "contested" the likelihood determination in 43 sunset reviews.

[120] Appellate Body Report, *Sunset Review of Steel from Japan*, para. 199.

[121] Panel Report, *Sunset Review of Steel from Japan*, paras. 7.177, 7.279.

settlement[.]"[122] After reviewing the relevant WTO jurisprudence and agreement provisions,[123] the Appellate Body concluded "that there is no basis, either in the practice of the GATT and the WTO generally or in the provisions of the Anti-Dumping Agreement, for finding that only certain types of measure can, as such, be challenged in dispute settlement proceedings under the Anti-Dumping Agreement."[124] The Appellate Body's reasoning thus requires the conclusion that agency practice may be challenged as such.

88. As set forth above, Argentina submits that the consistent practice of the United States demonstrates that it always treats satisfaction of at least one of the three criteria ((1) continued dumping margins; (2) cessation of imports; and (3) declining volumes) as conclusive of likely dumping, and thus applies an irrefutable presumption of likely dumping in violation of Article 11.3.[125] There are no exceptions; the Department applies this likelihood standard in every sunset review in which the domestic industry participates.

89. Citing several panel decisions, the United States argues that, because the Department may depart from its practice as long as it explains its reasons for doing so, the Department's consistent practice of employing the US likelihood standard in sunset reviews may not be challenged as such.[126] In light of the Appellate Body's decision in *Sunset Review of Steel from Japan*, however, it is clear that US agency practice can be challenged as such in WTO disputes.[127]

90. The United States further argues that, even if the Department's practice could be challenged as such, it could not be considered WTO-inconsistent, because the Department's practice neither mandates action that is WTO-inconsistent, nor precludes action that is WTO-consistent.[128] According to the United States, the Department's likelihood of dumping practice is not mandatory, because the Department may depart from it as long as it explains its reasons for doing so. In this regard, the United States asserts that, "[i]n accordance with the normal WTO rules on the allocation of the burden of proof, it is up to the complaining party to demonstrate that any challenged measure mandates WTO-inconsistent action or precludes WTO-consistent action."[129]

91. Argentina submits that it has satisfied its burden. Again, Argentina has demonstrated that the Department employs the US likelihood standard in <u>every</u> sunset review in which the domestic industry participates.[130] Thus, Argentina has made its *prima facie* case establishing that the US likelihood standard is mandatory under the Department's practice. Accordingly, the burden shifts to the United States to show that the Department can depart from its likelihood practice. Because the United States cannot point to a single sunset review in which the Department has done so, the United States has failed to rebut Argentina's claim.

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[122] Appellate Body Report, *Sunset Review of Steel from Japan*, para. 78 (emphasis added). *See also* Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities* ("*US – CVDs on EC Products*") WT/DS212/AB/R, adopted 8 January 2003, paras. 50, 151, 162; *United States – CVDs on EC Products: Status Report by the United States*, WT/DS212/13 (28 Oct. 2003)(stating that the United States/Department changed a methodology to comply with its WTO obligations).

[123] *See* Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 85-87.

[124] *Id.* at para. 88.

[125] *See* US Department of Commerce Sunset Reviews (ARG-63 and ARG-64).

[126] *See* US First Submission, para. 198 (citing Panel Report, *Sunset Review of Steel from Japan*, para. 7.131; Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS260/R, adopted 29 July 2002, para. 7.22 ("*India Steel Plate*")).

[127] *See* Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 85-88.

[128] *See* US First Submission, para. 199.

[129] *Id.*

[130] *See* US Department of Commerce Sunset Reviews (ARG-63 and ARG-64). *See also* Appellate Body Report, *Steel from Germany*, para. 148.

5. Assuming a*rguendo* that US law and practice establishing the irrefutable presumption are not inconsistent as such with Article 11.3, then the United States has not administered its law with respect to the Article 11.3 Likelihood of Dumping Determination in an impartial and reasonable manner in violation of Article X:3(a) of the GATT 1994

92. The GATT Article X:3(a) argument raised in Argentina's First Submission is an alternative claim.[131] This claim applies only if the Panel finds that US law is consistent with Article 11.3, or that the offending provisions are not "measures" that can violate US WTO obligations. In this event, the Department's sunset practice demonstrates that the United States has not administered its law with respect to the likelihood of dumping determination in an impartial and reasonable manner as required by Article X:3(a) of the GATT 1994.

93. Through its comprehensive analysis of the Department's sunset reviews, Argentina has established a clear and undeniable pattern of biased and unreasonable decision making by the Department in its administration of the laws, regulations, decisions, and rulings pertaining to sunset review.[132] It is simply not credible to believe that a review based on positive evidence could lead to an affirmative finding of likely dumping in each of the 223 cases in which the US industry requests continuation of the anti-dumping measure. A record of 223 wins and 0 losses (or even 35 wins and 0 losses to use the US figures of so-called "contested" cases) for the US industry demonstrates a lack of impartiality, and the unreasonable administration of national laws, regulations, decisions, and rulings.

94. On this issue the United States is unable to even muster a true rebuttal. The United States first argues that Argentina failed to demonstrate that the Department violated the Article X:3(a) requirement to administer the sunset review laws, regulations, decisions, and rulings in a "uniform" manner.[133] In fact, Argentina never challenged the uniformity of the Department's administration of sunset reviews in the first place. To the contrary, Argentina submits that the Department's uniform administration of sunset reviews demonstrates a clear pattern of biased and unreasonable decision making, because the only determinative factor in the Department's sunset review is US industry participation.

95. Second, the United States again attempts to deconstruct the clear import of Argentina's Exhibit ARG-63 by arguing that only the so-called "contested" cases are relevant for the purposes of Article X:3(a).[134] Under Article 11.3, however, the lack of respondents' participation does not relieve the authority from the obligation to make a determination based on positive evidence that dumping would likely continue or recur in order to invoke the exception and continue the anti-dumping measure. In any event, even using the erroneous US figures, 35 out of 35 still proves Argentina's claim. At a minimum, Argentina has satisfied its burden of establishing a prima facie violation of Article X:3(a), and the United States has failed to rebut that claim.

[131] *See* Argentina's First Submission, Sec. VII.E.

[132] *See* US Department of Commerce Sunset Reviews (ARG-63 and ARG-64).

[133] *See* US First Submission, para. 274.

[134] *See id.* at para. 275. On this point, Argentina again notes that there were actually 43 cases in which the likelihood of dumping determination was – using the US term – "contested."

C. THE DEPARTMENT'S SUNSET REVIEW OF OCTG FROM ARGENTINA WAS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

1. The Department's determinations indicate that it applied the Waiver Provisions to Siderca; Application of the Waiver Provisions in the Sunset Review of OCTG from Argentina was inconsistent with Articles 11.3 and 6 of the Anti-Dumping Agreement

96. The Department determined that because Siderca's response was "inadequate" the company had "waived" its right to participate in the sunset review. This is clear from the Department's *Issues and Decision Memorandum*: "In the instant reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation."[135]

97. As explained above, the US waiver provisions violate Article 11.3 because they mandate a finding of likely dumping. Article 11.3's requirements to conduct a "review" (which necessarily entails a "rigorous examination" of the facts) and to make a "determination" precludes the authority from mandating statutorily an affirmative finding of likely dumping. If the WTO Member wishes to invoke the exception and continue the measure, it simply does not have the choice of doing nothing, or of passively assuming that dumping and injury would likely continue or recur.[136] The authority must take action and ground its determination on a "sufficient factual basis" to allow it to "draw reasoned and adequate conclusions concerning the likelihood" of continuation or recurrence.[137] The authority must make a "fresh determination" that is forward-looking and "based on credible evidence."[138]

98. The application of the waiver provisions in the Argentine case violated Article 6.1 because it prevented the only known Argentine exporter, Siderca, from presenting evidence for meaningful consideration. Siderca had notified the Department of its desire to participate in the sunset review and its willingness to cooperate fully by filing a complete substantive response to the Department's notice of initiation. Nevertheless, the Department deemed Siderca to have waived its participation and thus issued a determination that dumping was likely pursuant to the statutory mandate of 19 USC. § 1675(c)(4)(B). Accordingly, application of the waiver provisions resulted in a mandatory determination of likely dumping without any analysis in violation of Article 6.1.

(a) The US Position in Its First Submission Is Inconsistent with Both the Department's Sunset Determination and the Factual Record Before the Department

99. The United States argues that the Department did not deem Siderca to have waived its participation in the sunset review of OCTG from Argentina.[139] Buried in footnote 216 of its first submission, however, the United States does concede ambiguity, stating that "[a]lthough based on this language it may appear that Commerce deemed all respondent interested parties to have waived their participation in the OCTG sunset review . . . ." The United States says instead that there were <u>other</u> Argentine exporters who did not respond at all to the notice of initiation. Also, at the Panel's First Substantive Meeting With the Parties, the United States conceded that with respect to this point the Department's sunset determination may have been "inartfully drafted."

100. Thus, under the theory expressed in the US First Submission, the exporters considered to account for all exports of Argentine OCTG to the United States waived their participation by failing

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[135] *Issues and Decision Memorandum* at 5 (ARG-51).

[136] *See* Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 113-115; Panel Report, *Sunset Review of Steel from Japan*, paras. 7.177, 7.271.

[137] *See* Panel Report, *Sunset Review of Steel from Japan*, para. 7.177.

[138] Appellate Body Report, *Steel from Germany*, para. 88.

[139] *See* US First Submission, paras. 211- 213.

to respond to the notice of initiation, and the Department therefore had no choice but to follow the statutory mandate to make an affirmative finding of likely dumping in this case. If this is true, how can the United States now contend that the waiver provision did not affect Siderca, or that it did not diminish Argentina's rights under Article 11.3?

101. Initially, of course, there is the unambiguous language of the Department. The Department determined that Siderca's response was inadequate,[140] and that the Department did not receive "an adequate response from respondent interested parties" and that "this constitutes a waiver of participation."[141] Based on the statements in the Department's determinations there can be no serious dispute that the Department: (1) determined Siderca's response to be inadequate; and (2) applied the waiver provisions to Argentina.

102. With respect to the facts, there was no reasonable basis for the Department to have considered that there were other Argentine producers/exporters who failed to respond to the notice of initiation and who were thus the true subjects of the application of the waiver provisions. Nor has the Department ever explained these decisions in any of the documents related to its sunset review determination.

103. First, Siderca was the only Argentine producer/exporter investigated in the original investigation, and it was the only producer/exporter named in the subsequent reviews requested by the US industry. During the five-year period after imposition of the order, the domestic industry requested four administrative reviews, naming Siderca as the only exporter each time.[142] In at least one case, the representatives of the US industry identified Siderca as "the only know[n] producer" of the subject merchandise.[143] The Department initiated an administrative review in each year, but ultimately rescinded the reviews because there were no shipments to evaluate.[144] In all of these instances, however, Siderca's "no shipment certifications" led to additional questions from the Department and additional comments from the US industry. In all cases, Siderca explained that it was shipping to the United States, but that all of its shipments were either non-subject merchandise, or were not entering the United States for consumption in the United States. In all cases, the Department ultimately agreed with Siderca's certification that it made no shipments for consumption in the United States of subject merchandise, and therefore rescinded the annual reviews.

104. Further, the record developed in the Department's sunset review indicated that Siderca was the only producer/exporter of the subject merchandise. In its substantive response, Siderca indicated that it was the only producer of seamless OCTG, and, to its knowledge, it was the only producer/exporter of Argentine OCTG.[145] The Department acknowledged these statements (while

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[140] *See Issues and Decision Memorandum* at 3 ("the Department determined Siderca's substantive response to be inadequate") and 7 (" the Department determined to conduct an expedited review because of its finding that Siderca did not provide adequate substantive responses") (ARG-51).

[141] *Id.* at 5.

[142] *Initiation of Anti-Dumping and Countervailing Duty Administrative Reviews*, 61 Fed. Reg. 48,882, 48,883 (Dep't Comm. 1996) (ARG-28); *Initiation of Anti-Dumping and Countervailing Duty Reviews*, 62 Fed. Reg. 50,292, 50,292 (Dep't Comm. 1997) (ARG-32); *Initiation of Anti-Dumping and Countervailing Duty Reviews*, 63 Fed. Reg. 51,893, 51,894 (Dep't Comm. 1998) (ARG-37); *Initiation of Anti-Dumping and Countervailing Duty Reviews*, 64 Fed. Reg. 53,318, 53,318 (Dep't Comm. 1999) (ARG-41).

[143] Letter from Schagrin Associates to the Honourable William M. Daley of 29 Aug. 1997 ("Oil Country Tubular Goods from Argentina: Request for Administrative Review") at 2 (ARG-58).

[144] *Oil Country Tubular Goods from Argentina*, 62 Fed. Reg. 18,747, 18,748 (Dep't Comm. 1997) (rescinded admin. review) (ARG-29); *Oil Country Tubular Goods from Argentina*, 63 Fed. Reg. 49,089, 49,090 (Dep't Comm 1998) (rescinded admin. review) (ARG-36); *Oil Country Tubular Goods from Argentina*, 64 Fed. Reg. 4,069, 4,070 (Dep't Comm. 1999) (rescinded admin. review) (ARG-37); *Oil Country Tubular Goods from Argentina*, 65 Fed. Reg. 8,948, 8,949 (Dep't Comm. 2000) (rescinded admin. review) (ARG-43).

[145] Substantive Response of Siderca to the Department's Initiation of Sunset Review of the AD Order on OCTG from Argentina (2 August 2000), para. 6 ("Siderca's Substantive Response") (ARG-57).

misstating them slightly) by stating that "Siderca asserts that it is the only producer of OCTG in Argentina, and to its knowledge, there is no other producer of OCTG in Argentina."[146] Thus, at the very least, the record developed by the Department casts doubt on the statistics relied upon by the Department for the adequacy determination. It is not clear why the Department chose to believe the statistics, instead of its understanding of Siderca's position.

105. Finally, the Department had reason to doubt its data. On previous occasions, the Department concluded that the official statistics contained errors, in one case incorrectly classifying non-consumption entries as consumption entries,[147] and in another case misclassifying mechanical pipe as OCTG.[148]

106. From this record, it is not reasonable for the Department to have assumed that there were other Argentine producers/exporters who should have responded to the initiation notice, and whose failure would have such consequences for Argentina's rights under Article 11.3. This unfounded assumption had dire consequences for Argentina as it resulted in the deemed waiver of Siderca and a statutorily mandated finding of likely dumping.

(b) Even Accepting the US Explanation in Its First Submission, the Effect of the Application of the Waiver Provisions in the Sunset Review of OCTG from Argentina Is the Same Under Either Scenario

107. In the sunset review of OCTG from Argentina, according to the US First Submission, it was the producers accounting for 100 per cent of the Argentine exports who were deemed to have waived their participation.[149] Therefore the statute mandated a determination that termination would be likely to lead to a continuation of dumping for the Argentine producers representing all exports to the United States.

108. Thus, whether waiver was applied to all "respondent interested parties" (as indicated in the Department's Issues and Decision Memorandum) or whether waiver was applied only to the non-responding respondents, the result is equivalent to waiver on an order-wide level because the Department assumed that companies accounting for 100 per cent of the exports had waived participation. In this case there can be no doubt that the waiver provisions precluded the Department from conducting a "review" and making the "determination" required by Article 11.3. Siderca was viewed as irrelevant to the sunset determination, despite the fact that the record established that it was, at that time, the only known producer and exporter from Argentina. Under the statutory and regulatory rules applied in this case, Siderca, with no exports, had no chance to influence the Department because the Department considered that the exporters accounting for 100 per cent of the exports "waived" their participation. As the Appellate Body stated, "The words 'review' and 'determine' in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination."[150]

[146] *Determination to Expedite* at 2 (ARG-50)

[147] *Oil Country Tubular Goods from Argentina*, 63 Fed. Reg. 49,089, 49,090 (Dep't Comm. 1998) (rescinded admin. review) (ARG-36).

[148] *Oil Country Tubular Goods from Argentina*, 65 Fed. Reg. 8,948, 8,949 (Dep't Comm. 2000) (rescinded admin. review) (ARG-43).

[149] US First Submission, para. 216.

[150] Appellate Body Report, *Sunset Review of Steel from Japan*, para. 111.

2. Assuming *arguendo* that waiver was only applied to the non-responding respondents, the Department's conduct of an expedited review on the basis of the facts available was inconsistent with Articles 11.3, 6.8, and Annex II of the Anti-Dumping Agreement

(a) Under This Scenario, Argentina Was Limited To an Expedited Review and a Decision Based on Facts Available

109. In the sunset review of OCTG from Argentina, the Department cites both the "waiver" provision, 19 USC. § 1675(c)(4)(B) and the "facts available" provision, 19 USC. § 1675(c)(3)(B), and therefore purports to rely on both provisions.[151] However, there is no basis under US law for the simultaneous application of these provisions to a single respondent. Indeed, these provisions are mutually exclusive with respect to a single respondent.[152]

110. The Department stated unambiguously that Siderca's response was "inadequate" and that "the Department did not receive an adequate response from respondent interested parties" and that "this constitutes a waiver of participation."[153] There is also reference in the Department's determinations regarding the decision to conduct an expedited review, with citations to the Department's regulation related to determinations based on facts available.[154] Notwithstanding these statements, the United States asserts in its first submission that the Department did not apply facts available to Siderca.[155] Again, the answer that the United States provides in its first submission relates to the so-called "non-responding respondent interested parties" that is, Argentine companies other than Siderca who never responded to the invitation to file a substantive response.[156]

111. Here, the United States enters into a series of contradictions. In the Department's determination to conduct an expedited review, it noted that "[d]uring the five-year period from 1995 to 1999, the combined-average annual percentage of Siderca's exports of OCTG to the United States with respect to the total of exports of the subject merchandise to the United States was significantly below 50 per cent."[157] Based on this finding, the Department determined Siderca's substantive response to be "inadequate" under 19 C.F.R. § 351.218(e)(1)(ii)(A) and thus conducted an expedited review pursuant to 19 C.F.R. § 351.218(e)(1)(ii)(C).[158]

112. According to the Department's sunset regulations, if respondent interested parties have provided an inadequate response, the Department will normally conduct an expedited review and issue its final results "based on the facts available[.]" (19 C.F.R. § 351.218(e)(1)(ii)(C); *see also* 19 USC. § 1675(c)(3)(B).) Section 351.208(f)(2) provides that the "facts available" consist of dumping margins from prior determinations and information contained in parties' substantive responses. Assuming *arguendo* that the waiver provisions were not the basis of the Department's sunset determination,[159] then the Department's citation to 19 USC. § 351.218(e)(1)(ii)(C) in the

[151] See, e.g., Issues and Decisions Memorandum at 4 (ARG-51) (citing section 1675(c)(4)(B)), and Determination to Expedite at 2 (ARG-50) (citing section 1675(c)(3)(B)).

[152] *See* Argentina's First Submission, paras. 100-101.

[153] *Issues and Decision Memorandum* at 5 (ARG-51).

[154] *Determination to Expedite* at 2 (ARG-50); *Issues and Decision Memorandum* at 3 (ARG-51).

[155] *See* US First Submission, paras. 214, 221, 234-36.

[156] *See id.* at para. 214.

[157] *Determination to Expedite* at 2 (ARG-50).

[158] *Issues and Decision Memorandum* at 3 (ARG-51); *Adequacy Determination* at 2 (ARG-50)("we recommend that you determine Siderca's response to be inadequate").

[159] Despite the statement in the Department's *Issues and Decision Memorandum* (ARG-51) at 4-5 that "respondent interested parties" waived their participation in the sunset review, the United States contends that it did not apply the waiver provisions to Siderca. *See* US First Submission, para. 211. The United States is also ambivalent as to whether it applied waiver to the non-responding respondents. In its First Submission, the United States indicates that the Department deemed the non-responding respondents to have waived their participation in the sunset review (*see* paras. 216, 155, and n.216) and, elsewhere, that it did not apply the

Department's *Determination to Expedite* and in its *Issues and Decisions Memorandum* demonstrates that the Department's sunset determination was based, at best, on "facts available."[160]

(b) The Department Violated Articles 6.1 and 6.2 of the Anti-Dumping Agreement

113. The conduct of the expedited review and the application of the waiver provisions in the sunset review of OCTG from Argentina violated Article 6.1 because they effectively prevented Siderca from presenting evidence for meaningful consideration by the Department regarding the likelihood of continuation or recurrence of dumping in order to inform its determination under Article 11.3. The Department acknowledged that Siderca both filed a complete substantive response to the notice to initiate a sunset review, and notified its willingness to participate fully in the instant sunset review.[161] Nevertheless, the Department's application of the waiver provisions to the so-called non-responding respondents dictated the result for Argentina as a whole. Thus, Siderca did not have an "ample opportunity to present . . . evidence which [it] consider[ed] relevant" when the Department deemed the respondents accounting for 100 per cent of the imports to have waived participation, which determination resulted in an automatic likelihood determination in violation of Article 6.1.

114. The conduct of the expedited review and the application of the waiver provisions to Siderca in the sunset review of OCTG from Argentina also violated Article 6.2, because Siderca did not have a full opportunity to defend its interests. Siderca could not defend its interests because the result was effectively foreclosed, given that the Department deemed the non-responding respondents accounting for 100 per cent of the imports to have waived participation, which determination resulted in an automatic likelihood determination.

115. The United States argues that, by limiting its substantive response to a "mere" four pages in length and not taking advantage of other opportunities to submit comments, Siderca failed to fully avail itself of the opportunities granted by the sunset regulations for the presentation of evidence.[162] In addition to the substantive response to the notice of initiation, the United States explains, Siderca could have submitted comments on the Department's adequacy determination (19 C.F.R. § 351.309(e)) and rebuttal comments to any other party's substantive response (19 C.F.R. § 351.218(d)(4)). Therefore, the United States concludes, the Department's sunset review of Argentine OCTG was not inconsistent with Articles 6.1 and 6.2.

116. The US argument fails for several reasons. First, contrary to the US assertion, Siderca did not fail to take the opportunity to present evidence. As the United States repeatedly recognizes in its First Submission, Siderca's response to the notice of initiation was a "complete substantive response" that met all of the Department's regulatory requirements.[163] Nevertheless, despite its submission of a complete substantive response, the Department deemed Siderca's response to be inadequate. This determination resulted in Siderca being deemed to have waived its participation in the sunset review, which in turn resulted in a mandatory likelihood determination. Consequently, with the determination that Siderca's response was inadequate, the case effectively ended, with the outcome preordained.

117. At the same time, under Article 6.1 and Annex II, it was the Department's obligation to "specify in detail the information required" from Siderca in order for the Department to undertake a review and make the required determination under Article 11.3. Siderca provided information that the United States characterizes as a "complete substantive response," and Siderca also offered to

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waiver provisions to the non-responding respondents because the Department applied facts available to them (*see* para. 214).

[160] *See Determination to Expedite* at 2 (ARG-50) and *Issues and Decision Memorandum* at 3 (ARG-51).

[161] *See Determination to Expedite* at 1-2 (ARG-50).

[162] *See* US First Submission, paras. 228-29, 237.

[163] *See id.* at paras. 211, 213, 214, and 216.

cooperate fully in the review. The US statements now that the information was insufficient because it was limited to a "mere" four pages contradicts its statements that Siderca's submission was a complete substantive response. The only way to reconcile the contradiction in the Department's statements is for it to admit that, despite being a "complete substantive response," Siderca's response was either irrelevant to the Department's determination, or Siderca's response did not include the information that the Department was hoping to receive. Neither explanation, however, is acceptable under Articles 11.3, 6.1, 6.8, and Annex II.

118. Second, regarding the Department's adequacy determination, the regulation provides that submitted "comments may not include any new factual information or evidence (such as supplementation of a substantive response to the notice of initiation) and are limited to five pages."[164] Thus, the regulation precluded Siderca from submitting any new evidence with respect to the Department's determination that Siderca's response was inadequate.

119. Finally, by the time that the Argentine sunset review began, the Department had completed approximately 160 sunset reviews of anti-dumping measures, and it was well-known that the Department had designed and implemented a system which avoided any type of substantive determination. Hence, respondent participation was widely considered to be futile, and would in no way change the substantive outcome of the proceeding.

120. Commentators writing at the time of the Argentine sunset determination described the institutional bias of the Department in the conduct of its sunset reviews:

> The relative treatment by Commerce of domestic and respondent interested parties, although in part consistent with the Statute and the legislative history, may provide some basis for the criticism often heard among outside observers that Commerce's procedures are sometimes biased in favour of the domestic industry. It is not clear that respondent interested parties gain very much by participation in Commerce reviews and avoiding automatic judgments. The statute, the legislative history, and Commerce rules make it highly likely that Commerce will find a likelihood of dumping and will simply rely on the results of the original investigation. Commerce will probably arrive at the same conclusions regardless of foreign participation. In light of this and the high information burden on respondent interested parties, there is a clear incentive for respondent interested parties to forego participation at Commerce. In fact, most respondent interested parties have simply not responded in the majority of reviews initiated to date. As can be seen in Table 1, only nine responses from respondent interested parties have been received to date.[165]

121. The author of this article also interviewed several practitioners. Based on these conversations, he noted that: "[o]ne practitioner stated there is a very clear perception among respondents of an institutional bias at Commerce against respondents, and therefore there is a great reluctance to expend resources toward presenting their [sunset] case at Commerce."[166]

122. The analysis done by Argentina for the purposes of this panel proceeding confirms the widely-held perceptions at the time: in every sunset review in which the domestic industry participated and in which the waiver provisions were not applied, the Department limited its

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[164] 19 C.F.R. § 351.309(e) (emphasis added).

[165] *See* Peter A. Dohlman, *Determinations of Adequacy in Sunset Reviews of Anti-Dumping Orders in the United States,* 14 AM. U. INT'L L. REV. 1281, 1331-32 (footnotes omitted) (1998-1999) (ARG-65) (at the time of writing this article, the author (who stated that the views expressed in the article were his personal views and not representative of the Commission) served as the Senior Economist to Commissioner Carol T. Crawford of the International Trade Commission).

[166] *See id.* at 1300 n.64 (ARG-65).

"analysis" to the SAA and *Sunset Policy Bulletin* criteria and found a likelihood of dumping.[167] By relying exclusively on the checklist criteria from the SAA and *Sunset Policy Bulletin*, the Department denies foreign interested parties an ample opportunity to present evidence and fully defend their interests, contrary to the obligations established by Articles 6.1, 6.2, and 11.3. Despite US protestations to the contrary, the United States is well aware of the fact that even if Siderca availed itself of other opportunities to submit comments, the outcome would have been the same. The United States cannot credibly argue that a more active intervention by Siderca would suddenly have tilted the record from 223/0 to 222/1.

(c) The Department Violated Article 6.8, 6.9, and Annex II Because the "Facts Available" Analysis Was Necessarily Limited To the Dumping Margin in the Original Investigation and the Information in the Substantive Response

123. Again Argentina contends that the Department's determination was based on the application of the waiver provisions in this case, which violates Articles 11.3, 6.1, 6.2, 6.8, 6.9, and Annex II of the Anti-Dumping Agreement. Even if the Panel accepts the United States' argument that the determination was instead based on facts available, the substantive analysis of the WTO obligations does not change. A decision based on facts available also violates Articles 11.3, 6.1, 6.2, 6.8, 6.9, and Annex II.

124. "Facts available" can be used only as a last resort when investigating authorities are faced with recalcitrant and uncooperative parties. Accordingly, Article 6.8 and Annex II permit an investigating authority to make determinations based on "facts available" only when an interested party "refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation . . . ." In this case, however, Siderca provided all information required by the Department's sunset regulations in its substantive response to the notice of initiation, and it agreed to cooperate fully in the investigation. Thus, Siderca was not an uncooperative party. Nevertheless, the Department considered Siderca's complete substantive response to be inadequate based on the 50 per cent threshold test and thus determined to conduct an expedited review. Even worse, there was no determination that Siderca failed to cooperate. The Department thus violated Articles 6.8, 6.9, and Annex II.

125. As for the argument in the US First Submission that the Department used facts available only for the non-responding Argentine respondents, there is no support for this statement in the sunset determination. The concept of non-responding Argentine respondents is never even mentioned directly in the sunset determination. Even if it had been mentioned, as explained in detail above, it was not a reasonable and objective assessment of the facts to consider that such parties existed, and to condition Argentina's rights in this way without further investigation. Limiting the analysis in this way violates Articles 11.3, 6.1, 6.2, 6.8, 6.9, and Annex II.

3. The Department's Determination that termination of the duty would be likely to lead to continuation of dumping was inconsistent with Articles 11.3 and 2 of the Anti-Dumping Agreement

(a) There Was No Evidence Before the Department That Dumping Continued During the Sunset Review Period

126. Assuming *arguendo* that the likelihood determination was not based on the application of the waiver provisions, then the record before the Department reflects that the sole bases for the Department's likelihood determination were: (1) the 1.36 per cent margin from the original investigation that was calculated using the practice of zeroing negative margins; and (2) the decline in

[167] *See* US Department of Commerce Sunset Reviews (ARG-63 and ARG-64).

volume of Argentine OCTG imports. These pieces of information – with nothing more – are insufficient to continue an anti-dumping measure under Article 11.3.

127. Following the imposition of the US anti-dumping measure on Argentine OCTG, Siderca chose to stop exporting to the US market. As the Appellate Body has explained, declines in import volumes following the imposition of anti-dumping duties can result from many factors apart from the duties.[168] The lack of shipments from Siderca was demonstrated through a series of annual reviews initiated by the Department. Each August from 1996-1999 (covering the five-year period relevant to the sunset review that forms the basis of this dispute), representatives of the US industry requested an annual review of shipments by Siderca. Under US law and practice, the petitioners are required to identify the exporter for which it requests a review, and each time during this period, the US industry requested a review only of Siderca. For example, the US industry's letter requesting the second review states: "Review is requested of Siderca because it is the only known producer of oil country tubular goods in Argentina . . . ."[169] As a result of such requests, the Department initiated a review in each of the four years following the issuance of the anti-dumping order on OCTG from Argentina, publishing an "initiation notice" naming Siderca as the exporter to be reviewed. In certain of the reviews, the Department also issued an anti-dumping questionnaire.[170]

128. In each of the four reviews requested of Siderca, Siderca replied by stating that it did not export OCTG to the United States for consumption in the United States during the review period, and as a result asked that the review be rescinded. In all cases, this "no shipment certification" led to additional questions from the Department and additional comments from the US industry. In all cases, the Department ultimately agreed with Siderca's certification that it made no shipments and therefore rescinded the annual reviews because there were no shipments to review.

129. Hence, given that Siderca did not ship to the United States following the imposition of the order, the only evidence before the Department was that Siderca had not continued to dump during the sunset review period. In addition, the alleged Argentine OCTG imports from the so-called non-responding respondents were of a very small quantity, and were not subject to administrative reviews to determine whether they were dumped. The Department could not simply presume that they were dumped, and use this as "evidence" that dumping was likely to continue in the future.

130. The Department did not gather or evaluate additional facts at the time of the sunset review, but instead based its decision that dumping would likely continue or recur only on the dumping margin of 1.36 per cent from the original investigation, and the fact that Siderca had stopped exporting OCTG to the United States.[171] This is the sum total of what the European Community aptly characterized as the "meagre crumb" of evidence supporting this likely dumping determination.[172]

131. The Department's reliance on the 1.36 per cent dumping margin established in the original investigation in 1995 cannot serve as a basis for the Department's determination that dumping would be likely to continue or recur.

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[168] Appellate Body Report, *Sunset Review of Steel from Japan*, para. 177.

[169] Letter from Schagrin Associates to the Honourable William M. Daley of 29 Aug. 1997 ("Oil Country Tubular Goods from Argentina: Request for Administrative Review") at 2 (ARG-58).

[170] *Initiation of Anti-Dumping and Countervailing Duty Reviews*, 61 Fed. Reg. 48,882 (Dep't Comm. 1996)(initiating review for the period 11 Aug. 1995, through 31 July 1996)(ARG-28); *Initiation of Anti-Dumping and Countervailing Duty Reviews*, 62 Fed. Reg. 50,292 (Dep't Comm. 1997)(initiating review for the period 1 Aug. 1996, through 31 July 1997)(ARG-32); *Initiation of Anti-Dumping and Countervailing Duty Reviews*, 63 Fed. Reg. 51,893 (Dep't Comm. 1998)(initiating review for the period 1 Aug. 1997, through 31 July 1998)(ARG-37); *Initiation of Anti-Dumping and Countervailing Duty Reviews*, 64 Fed. Reg. 53,318 (Dep't Comm. 1999)(initiating review for the period 1 Aug. 1998, through 31 July 1999)(ARG-41).

[171] *See Issues and Decision Memorandum* at 5 (ARG-51).

[172] Third Party Submission of European Communities, para. 42.

- First, the rate is historic, with no relationship whatsoever to the forward-looking determination required to invoke the exception of Article 11.3 and continue the measure. The United States still has never offered a logical explanation of what this rate says about future dumping, let alone the likelihood of future dumping.
- Second, as explained in detail below in subsection b, in the original investigation the Department calculated the 1.36 per cent margin based on the practice of zeroing negative margins. In fact without the zeroing practice, there would have been no dumping margin at all, and there would have been no measure to review.[173]

132. To know whether dumping would likely "continue" or "recur" under Article 11.3, an authority must have current information about dumping.[174] In other words, it becomes necessary to determine if dumping exists in order to assess its probable continuation. Alternatively, it becomes necessary to determine the absence of dumping in order to assess prospectively the probability of recurrence.

133. As the Appellate Body explained, satisfying these obligations does not necessarily require the same type of calculation as may be performed in an Article 5 investigation, but the authorities have an obligation to act diligently and to collect evidence that can form the basis for the requisite determination.[175] The Department's reliance on the 1.36 margin from the original investigation cannot satisfy either possibility. The United States argues that the Department determined that "dumping continued to exist throughout the history of the order . . . ."[176] The Department, however, had rescinded each of the four administrative reviews of Siderca following the order, and thus did not have evidence of dumping margins throughout the history of the order. The Department's reliance on such flawed and dated information necessarily resulted in speculation as to whether or not dumping would be likely to continue or recur were the order to be terminated, rather than a determination based on sufficient positive evidence.

134. Indeed, particularly in the facts of this case where the Department relied on Siderca's small dumping margin of only 1.36 per cent, the Department had an obligation to gather and evaluate "persuasive evidence" in order to justify its determination of likelihood of dumping. As the Appellate Body has ruled, "mere reliance" on the determination made in the original investigation is not enough.[177] This reinforces Argentina's view of the extreme and unfair situation presented in this case.

135. With respect to import volumes, the Appellate Body in *Sunset Review of Steel from Japan*, stated that:

> [T]he second and third scenarios in Section II.A.3 relate to the situation where there is *no dumping* (either because imports ceased or because dumping was eliminated after the duty was imposed). The cessation of imports in the second scenario and the decline in import volumes in the third scenario could well have been caused or reinforced by changes in the competitive conditions of the market-place or strategies of exporters, rather than by the imposition of the duty alone. Therefore, a case-specific analysis of the factors behind a cessation of imports or a decline in import volumes (when dumping is eliminated) will be necessary to determine that dumping will recur if the duty is terminated.[178]

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[173] *See*, on that issue, the Third Party Submissions of European Communities, paras. 79-89, and Japan paras. 22-28.

[174] *See also* Third Party Submission of European Communities, para. 12.

[175] *See* Appellate Body Report, *Sunset Review of Steel from Japan*, para. 111.

[176] US First Submission, para. 218.

[177] *See* Appellate Body Report, *Steel from Germany*, para. 88.

[178] Appellate Body Report, *Sunset Review of Steel from Japan*, para. 177.

136. The Department engaged in no such analysis in this case. Nor did it request additional information from Siderca who had pledged to cooperate fully. Instead, the Department relied solely on the 1.36 per cent dumping margin and the low import volumes. This does not constitute the "sufficient factual basis" for the substantive and meaningful determination required by Article 11.3.

(b) Decisive Reliance by the Department on a WTO-Inconsistent Margin (Because It Was Calculated Using the Practice of Zeroing) as the Basis for the Likelihood Determination Is Inconsistent with Article 11.3

137. There can be no doubt that the 1.36 per cent margin is based on a calculation method that is inconsistent with Article 2.4. To calculate the 1.36 per cent margin, the Department applied "zeroing" by setting all negative margins to zero, and summed the remaining positive margins. The effect is to disregard the existence and magnitude of the negative margins in determining the amount of "dumping" arising from the sales under review.

138. This can be seen clearly in Exhibit ARG-52 to Argentina's First Submission. The comparison beginning on line 25 indicates "." in the column "MRGOBS," meaning that none of the transactions involving this particular product generated positive dumping margins, and the "Total Potential Uncollected Dumping Duties" ("TOTPUDD") column for those same transactions similarly is blank. After setting all the "negative margins" to zero in this manner, the Department summed all of the positive margins (represented by the products listed in lines 1-24 of ARG-52), and divided the resulting figure by the total net US value to calculate the overall dumping margin for Siderca. As shown on the second page of ARG-52, dividing the "TOTPUDD" total ($125,478.93, which, because of zeroing, does not reflect the "negative margins" generated on many sales) by the "TOTVAL" total ($9,240,392.64) yields the 1.36 per cent margin relied on by the Department in the sunset review.

139. This method overestimated the overall dumping margin by ignoring the US sales that were not "dumped;" that is, in the words of Article 2.1 of the Anti-Dumping Agreement, were not "introduced into the commerce of another country at less than its normal value . . . ." This can be seen in greater detail in Exhibit ARG-66A, Results of the Department's Margin Calculation for Siderca's Sales (Without "Zeroing"), which reproduces the results of the Department's analysis on a transaction-specific basis. As shown in Exhibit ARG-66A, the Department analyzed 385 individual sales transactions of Siderca in the original investigation.[179] Unlike the Department's calculation, the output in Exhibit ARG-66A does <u>not</u> set the negative margins to zero in fields UMARGIN or PUDD; that is it does not zero. Instead, if the US price of the sale exceeds the weighted-average normal value for the comparison product (that is, if there was no dumping as defined in Article 2.1), the UMARGIN column reports a negative dumping margin on a per unit basis, the PUDD column shows the extended value of the negative dumping by multiplying the negative unit margin by the QTY, and the PCTEMARG column shows the percentage negative margin for each US transaction.

140. The results are clear and dramatic. Of the 385 US sales transactions examined by the Department, only 97 were "dumped" within the meaning of Article 2.1, while more than three times

[179] Exhibit ARG-66A, Results of the Department's Margin Calculation for Siderca's Sales (Without "Zeroing"), reports the output from the Department's computer program, showing for each transaction, in order from left to right, the sequential line, or "observation" number on the output report ("OBS"), the invoice number ("INVOICU"), the sale date ("SALEDTU"), the quantity sold ("TOTQTY"), the "control number" or products involved in the US sales transaction ("CONNUMU"), the "control number" or products involved in the comparison market sale ("CONNUMT"), the "foreign unit price in dollars" ("FUPDOL," which is the weighted-average normal value for the comparison market product), the United States price ("USPR," which is the net US sales price for each transaction), the unit margin ("UMARGIN," which results from subtracting the USPR from the FUPDOL), the extended margin or "potentially uncollected dumping margin" ("PUDD," which results from multiplying the UMARGIN by the QTY), the value of the US sale ("TOTVAL," which results from multiplying the USPR by the QTY), and the percentage dumping margin for each transaction ("PCTEMARG," which results from dividing the EMARGIN by the VALUE).

as many sales (288) were not dumped. Further, the total value of dumping on the dumped sales was $125,478.93 (as indicated in ARG-52, second page), while the total value of negative dumping on the non-dumped sales was more than 4 times higher, or $527,638.38. When the PUDD field is summed without the practice of zeroing, and the total dumping considered by the Department ($125,478.93) is offset by the total negative dumping ($527,638.38), the result is a total negative dumping of $402,159.45, which, divided by the total value of US sales of $9,240,342.64, converts the 1.36 margin used by the Department to a negative 4.35 per cent margin. Clearly, this is not evidence of dumping as defined by Article 2.1.

141. This effect can also be seen on a product-specific basis, with results that are equally clear and dramatic. During the period of investigation, Siderca made four US sales of CONNUMU 1 (which can be verified by the "TOTOBS" column on ARG-52 for line 13, and which can be seen individually on lines 25, 42, 234, and 369 of Exhibit ARG-66A). The net US price, US quantity, average normal value, unit margin, extended margin, and net US value for each of the US sales of CONNUMU 1 are shown below.

OBS Number ARG-66A	Net US Price	US Quantity	Normal Value	Unit Margin	Extended Margin	US Value
	US$ per Ton	Ton	US$ per Ton	US$ per Ton	("PUDD") US$	US$
	(A)	(B)	(C)	(D = C – A)	(E = B * D)	(F = A * B)
25	$489.015	100.95	$504.234	$15.219	$1,536.40	$49,366.06
42	$491.312	41.35	$504.234	$12.923	$534.36	$20,315.73
369	$583.961	67.09	$504.234	($79.727)	($5,348.85)	$39,177.94
234	$590.391	13.36	$504.234	($86.157)	($1,151.05)	$7,887.62

142. The total net US value for CONNUMU 1 was $116,747.35. The corresponding total extended margin or "PUDD" was $2,070.76 with zeroing and was negative $4,429.14 without zeroing. The overall margin for CONNUMU 1 was 1.77 per cent with zeroing. Without zeroing, the overall dumping margin for CONNUMU 1 was negative 3.79 per cent. Ignoring the fact, and the extent to which, the third and fourth US sales were not dumped converted the negative margin to a positive margin for this product, just as it did on an overall basis, as demonstrated above.

143. Exhibit ARG-66B, Excerpt from the Department's Margin Calculation Program Demonstrating "Zeroing," shows the portion of the program that the Department used to calculate the overall dumping with zeroing for Siderca in the investigation. Lines 1 thru 4 of the program calculated the total quantity and value for all of US products sold by Siderca. This step is the same as the sum of F of the example above. Lines 12 thru 16 calculated the amount of dumping, total quantity and value of all US products that contributed to dumping. This is where zeroing is applied. Specifically line 13 of the program ("WHERE EMARGIN GT 0") instructed the computer to calculate the total amount of dumping, quantity and value only for those transactions generating positive extended margins. This step is the same as the sum of only the positive values in column E in the example above. Line 22 of the program calculates the overall margin by dividing the sum of all positive extended margins by the total net US value.

144. As shown in the example above, zeroing inflates the overall margin significantly, and, in this case, without zeroing there would have been no dumping margin. To avoid the overestimation of dumping margin, the Department simply needs to delete line 13 of the computer program and rerun the program. When this is done, using the same computer program the Department used in the original investigation and the same database that Siderca provided, the margin is a negative 4.35 per cent on an order-wide basis. This is, in fact, what is shown in Exhibit ARG-66A.

145. The Appellate Body recognized in *Sunset Review of Steel from Japan* that zeroing is not consistent with Article 2.4.[180] It does not yield a "fair comparison," and it does not accurately reflect whether the product, as a whole, is being sold at less than normal value.

146. The Appellate Body ruled that when a Member relies on a dumping margin in making a determination in an Article 11.3 review, that margin must be WTO-consistent.[181] The Appellate Body explained that:

> Article 2 sets out the agreed disciplines in the Anti-Dumping Agreement for calculating dumping margins. As observed earlier, we see no obligation under Article 11.3 for investigating authorities to calculate or rely on dumping margins in determining the likelihood of continuation or recurrence of dumping. However, should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4. We see no other provisions in the Anti-Dumping Agreement according to which Members may calculate dumping margins. In the CRS sunset review, USDOC chose to base its affirmative likelihood determination on positive dumping margins that had been previously calculated in two particular administrative reviews. If these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the Anti-Dumping Agreement.[182]

147. Accordingly, the Appellate Body "reverse[d] the Panel's consequential finding, in paragraph 8.1(d)(iii) of the Panel Report, that the United States did not act inconsistently with Article 2.4 of the Anti-Dumping Agreement in the CRS sunset review by relying on dumping margins alleged by Japan to have been calculated in a manner inconsistent with Article 2.4."[183]

148. The Appellate Body reiterated that relying on a WTO-inconsistent margin can "taint the likelihood determination" under Article 11.3, and that such a margin need not have been challenged in the underlying administrative proceeding or in a WTO Challenge:

> As explained above, if a likelihood determination is based on a dumping margin calculated using a methodology inconsistent with Article 2.4, then this defect taints the likelihood determination too. Thus, the consistency with Article 2.4 of the methodology that USDOC used to calculate the dumping margins in the administrative reviews bears on the consistency with Article 11.3 of USDOC's likelihood determination in the CRS sunset review. In the CRS sunset review, USDOC based its determination that "dumping is likely to continue if the [CRS] order were revoked" on the "existence of dumping margins" calculated in the administrative reviews. If these margins were indeed calculated using a methodology that is inconsistent with Article 2.4 – an issue that we examine below – the USDOC's likelihood determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3. Moreover, a legal defect of this kind cannot be cured by NSC's failure to take issue with it in the CRS sunset review or the administrative reviews. It follows that we cannot agree with the United States' suggestion that Japan's appeal on this issue must fail because: (i) NSC did not object, in either the CRS sunset review or the administrative reviews, to the methodology USDOC used to calculate the dumping margins in question; and (ii)

[180] *See* Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 134-135.
[181] *See id.* at paras. 126-132.
[182] *Id.* at para. 127 (footnotes omitted).
[183] *Id.* at para. 128.

> Japan did not initiate dispute settlement proceedings in the WTO regarding USDOC's calculation of those margins in the context of the administrative reviews.[184]

149. The Appellate Body explained that zeroing (whether in the original investigation or otherwise) not only distorts the magnitude of the dumping margin, but may also result in a positive margin that otherwise would not exist:

> When investigating authorities use a zeroing methodology such as that examined in *EC – Bed Linen* to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognized in the present dispute, "zeroing . . . . may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing." Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping.[185]

150. That is precisely the case with Siderca. There would have been no margin in the original investigation in the absence of zeroing. Consequently, the 1.36 per cent margin (calculated on the basis of zeroing negative margins) cannot constitute evidence that termination of the measure would be likely to lead to a continuation or recurrence of dumping. To be clear, Argentina is not claiming that the original dumping determination violated US WTO obligations because it was calculated based on the practice of zeroing negative margins. Rather, Argentina challenges the Department's reliance on that margin as the basis for its determination that dumping would be likely to continue under Article 11.3. The Appellate Body has clarified that the Department may not rely on a dumping margin which is inconsistent with the substantive standard of Article 2.4 as the basis for its likelihood determination under Article 11.3.

4. The "likely margin" reported by the Department to the Commission was inconsistent with Articles 2 and 11.3

151. The Department determined that if the order were revoked, the likely dumping margin to prevail would be 1.36 per cent. The Department reported this margin to the Commission for purposes of the Commission's sunset review and its likelihood of injury determination. Because the 1.36 per cent margin was inconsistent with Article 2 (because it was based on the WTO-inconsistent practice of zeroing negative margins), and additionally because it was constructed on the basis of the Department's "circumstance of sale" adjustment,[186] the Department's determination that this margin constituted the likely margin to prevail violated Articles 11.3 and 2.

152. The United States notes that the Department's reporting of the likely margin to the Commission in a sunset review is a construct of US law, rather than a requirement of Article 11.3.[187] Consequently, the United States argues, the Department's reporting of the 1.36 per cent margin to the Commission was not inconsistent with Article 11.3. This argument cannot be accepted. As the Appellate Body makes clear, once a Member undertakes either to calculate a dumping margin or to rely on a dumping margin, however, that margin must be consistent with the requirements of Article 2. In the case at hand, because the United States did not make a WTO-consistent determination that dumping would be likely to continue or recur, it was required to have terminated the measure.

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[184] *Id.* at para. 130.
[185] *Id.* at para. 135 (footnotes omitted).
[186] *See* Argentina's First Submission, n.14.
[187] *See* US First Submission, para. 267.

IV. THE COMMISSION'S SUNSET DETERMINATION

153. Much of what is wrong with the Commission's determination of whether injury is likely to continue or recur in this case involves the question of proper standard. That is, what kind of analysis does Article 11.3 require when it states that the authorities must terminate the measure unless they find that injury is "likely" to continue or recur? In a typical case, such a challenge might be complicated by the fact that, unless the authorities explain precisely what standard they are applying, the standard itself may not be discernible from the agency's decision. Also, in this case, the United States correctly states, and Argentina acknowledges, that both Article 11.3 and the US statute use the same word, that is "likely."

154. The Panel's review of Argentina's claim on this issue, however, is facilitated by two striking facts. First, the Appellate Body recently confirmed Argentina's position that the term "likely" in Article 11.3 means "probable."[188] Second, the US First Submission, and its oral statement at the first substantive meeting, continues to take the position that "likely" does not mean "probable." Not only is this the United States' position before the Panel, but the United States has taken the position repeatedly before the US courts, and before a NAFTA panel reviewing the same Commission determination in this dispute.

155. As a result, the issue, as presented to this Panel, is very clear. The Appellate Body has stated what the standard is, and the United States has stated that it does not apply that standard. These statements regarding the applicable standard are reviewed briefly in Section A below. In addition, the Commission's determination, and the US First Submission, contain several glaring examples that the United States means what it says: it certainly does not apply a "probable" standard. These examples, and the conflict with the positive evidence standard of Article 3.1, are reviewed in Section B below. The rebuttal of the United States' position with respect to cumulation and the proper timeframe for determining whether "likely" injury will recur are reviewed in Sections C and D, respectively.

A. THE COMMISSION DID NOT APPLY THE CORRECT STANDARD FOR DETERMINING WHETHER TERMINATION OF THE ANTI-DUMPING DUTY ORDER WOULD BE LIKELY TO LEAD TO CONTINUATION OR RECURRENCE OF INJURY AND VIOLATED ARTICLES 11.3 AND 3.1 OF THE ANTI-DUMPING AGREEMENT

156. Argentina argued in its First Submission that the term "likely" as used in Article 11.3 has its common and ordinary meaning of "probable." The United States, in its First Submission, argues that "likely" simply means "likely," and that it does not mean "probable." The United States offers several other, secondary definitions of "likely" in support of its view that "likely" has no common and ordinary meaning, and that it does not mean "probable."

157. Any remaining doubt as to the meaning of "likely" was removed by the Appellate Body's decision in *Sunset Review of Steel from Japan*. The Appellate Body confirmed in that case that the ordinary meaning of "likely," as used in Article 11.3, is "probable."[189] The Appellate Body then observed that, "[i]n view of the use of the word 'likely' in Article 11.3, an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be probable if the duty were terminated – and not simply if the evidence suggests that such a result might be possible or plausible."[190]

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[188] *See* Appellate Body Report, *Sunset Review of Steel from Japan*, para. 111.

[189] *See* Appellate Body Report, *Sunset Review of Steel from Japan*, para. 111; *see also* Panel Report, *DRAMS from Korea*, para. 6.48 n.494 (stating in the context of interpreting Article 11.2 "that 'likelihood' or 'likely' carries with it the ordinary meaning of 'probable'"); *Nippon Steel Corp. v. United States*, No. 01-00103, slip op. 02-153 at 7-8 (Ct. Int'l Trade Dec. 24, 2002)(ARG-17); *Usinor Industeel, S.A. v. United States*, No. 01-00006, slip op. 02-152 at 2 (Ct. Int'l Trade Dec. 20, 2002)(ARG-16).

[190] Appellate Body Report, *Sunset Review of Steel from Japan*, para. 111.

158. As explained in Argentina's First Submission, and not rebutted by the United States, the Commission has argued repeatedly before US courts that "likely" does not carry its ordinary meaning of "probable," but instead means something else. In its more recent declarations, the Commission stated that "likely" "captures a concept that falls in between 'probable' and 'possible' on a continuum of relative certainty."[191] The US First Submission tells the Panel not to worry about these changing standards and the litigation in the US courts because, ultimately, the reviewing court upheld the Commission's re-determination on remand, and that determination was the same as its initial determination, which the parties had disputed as being inconsistent with the "likely" standard.[192]

159. Argentina respectfully submits that the Panel should pay attention to the US litigation and the Commission's changing views as to the meaning of the term "likely." They are directly relevant to the standard that the agency applied during numerous sunset determinations, including the sunset determination in this case. In fact, the Commission has expressly taken the position before a NAFTA panel reviewing this very same OCTG sunset determination that "likely" does not, and cannot, mean "probable."[193] Before the NAFTA Panel, the Mexican company, TAMSA, argued that the Commission applied the improper standard, and that the Commission should have given the term "likely" its common and ordinary meaning, which is "probable" or "more probable than not." In responding to this argument, the United States included the following point heading in its brief:

> **The Statement of Administrative Action's Explanation of the Likelihood Standard Excludes TAMSA's Theory That "Likely" Means "Probable"**[194]

160. In this section of its brief, the Commission relies on the SAA and claims:

> The SAA explains, unambiguously, that after the revocation "[t]here may be *more than one* likely outcome." SAA at 883. The possibility of "more than one likely outcome" shows that Congress did not intend "likely" to mean "probable" or "more probable than not."[195]

161. The statements could not be clearer that the Commission in the underlying investigation did not consider "likely" to mean "probable." In fact, it considered the SAA to control the interpretation of the term "likely" and to preclude any notion that "likely" could mean "probable." As will be seen in Section B below, there is ample evidence from the review to demonstrate that the Commission did not apply a "probable" standard.

162. As for the United States' argument in its First Submission that the court upheld the Commission's decision in the underlying Usinor Remand, the argument misses the point. The point is that the court found that the Commission did not apply the correct standard initially, and it directed the Commission to apply the ordinary and common meaning of "likely," which is "probable." It is only after the Commission adjusted its analysis and applied a different standard that the court affirmed the Commission's remand determination. Thus, the Usinor litigation is yet another proof that the Commission initially applied the wrong standard.

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[191] Int'l Trade Comm'n Remand Determ. Pursuant to *Usinor Industeel S.A., el al v. United States*, No. 01-00006 (July 2002) at 6 (non-proprietary version) (ARG-56 bis).

[192] US First Submission, para. 283.

[193] The NAFTA appeal in question was filed by the Mexican company, TAMSA. While this obviously was not a review requested by Argentina, it is, without question, a review of the same ITC determination that is before this Panel. As the United States reminded the Panel and Argentina in its First Submission and during the oral statement, it conducted this determination on a cumulated basis. Therefore, the arguments that it made regarding the likely standard before the NAFTA panel are directly relevant to this Panel's consideration of whether the Commission applied the correct standard.

[194] ITC Brief, *Oil Country Tubular Goods from Mexico, Results of Five-Year Review*, USA-MEX-201-1904-06 (8 Feb. 2002) (non-proprietary version) at 43 (excerpts included as Exhibit ARG-67).

[195] *Id.*

B. THE COMMISSION'S SUNSET DETERMINATION WAS INCONSISTENT WITH ARTICLE 11.3 AND 3 OF THE ANTI-DUMPING AGREEMENT

1. The Commission's Sunset Determination was inconsistent with Article 3.1 of the Anti-Dumping Agreement

163. Article 3.1 provides that, "[a] determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products." (Emphasis added.)

164. The United States argues that Article 3.1 does not apply to sunset reviews. According to the United States, the requirements of Article 3.1 are "potentially incompatible" with Article 11.3 reviews, because "[i]mports may not even be present in the market at the time of the sunset review, and they may not be sold at dumped prices."[196] The US argument fails for several reasons. First, as previously established,[197] the provisions of Article 3 – including paragraph 1 thereof – apply to Article 11.3. Moreover, the United States ignores the language "for purposes of Article VI of GATT 1994[.]" The Anti-Dumping Agreement as a whole clarifies Article VI of GATT 1994. Thus, Article 3.1 makes clear that all determinations of injury – whether a determination of injury in an original investigation or a determination of the likelihood of injury in a sunset review – are subject to the requirements of Article 3. Finally, the United States ignores the fundamental requirement of Article 3.1: that a determination of injury shall be based on positive evidence and an objective examination of the facts. Article 3.1 makes clear that these fundamental principles apply to a likelihood of injury determination under Article 11.3.

165. Therefore, in evaluating whether the Commission's likelihood of injury determination in the sunset review of OCTG from Argentina was consistent with Article 11.3, the panel must consider whether the Commission based its determination on positive evidence and examined the facts objectively.

166. In its oral statement at the first panel meeting of 9 December 2003, the United States argued that the Commission's sunset determination was based on positive evidence and an objective evaluation of the facts.[198] Pointing to the Commission's determination, the United States asserted that "the [Commission] carefully reviewed an extensive array of factors and evidence relative to the likely volume, price effect and impact of imports on the domestic industry."[199]

167. Mere citation to a voluminous record of information does not satisfy the requirement to examine the record objectively and to base conclusions on positive evidence. In evaluating whether the Commission's establishment of the facts was proper and its assessment objective, it is important to keep in mind that the Commission failed to apply the correct "likely" standard under Article 11.3 and conducted a cumulative injury analysis. As a result, the Commission simply did not support its determination that injury would likely continue or recur upon termination of the order on Argentine OCTG with a sufficient factual basis.

168. That the Commission failed to base its conclusions on positive evidence and objectively evaluate the facts is evident from its findings with respect to volume, price, and impact. Argentina has already discussed the Commission's findings in detail in the first written submission and oral

[196] US First Submission, para. 305.

[197] As established above in Section II.C.2, an authority's determination under Article 11.3 of whether "injury" would be likely to continue or recur must satisfy the requirements of Article 3.

[198] *See* US First Oral Statement, para. 23.

[199] *Id.* at para. 24.

statement at the first panel meeting, and will not recount all of the evidence here.[200] Argentina will, however, comment briefly on the Commission's approach with respect to each factor, as it illustrates the fundamental problem with the Commission's analysis: The Commission speculated that certain outcomes were possible, instead of relying on positive evidence that certain events were probable.

169. With respect to the volume of imports, the United States claims that "the [Commission] found that producers in the five countries involved had both the capacity and the incentive to increase their exports to the United States."[201] This assertion is somewhat misleading. With respect to the subject producers in Argentina, Italy, and Mexico (as well as the only Japanese producer to participate in the sunset review), the Commission actually found that "[t]he recent . . . capacity utilization rates represent[ed] a potentially important constraint on the ability of [the] subject producers to increase shipments of casing and tubing to the United States."[202] Thus, the Commission recognized positive evidence indicating that the volume of imports was not likely to increase significantly in the event of revocation of the orders.

170. Despite this positive evidence of capacity constraints, however, the Commission determined that the subject producers had "incentives" to shift "their productive capacity to producing and shipping more casing and tubing to the US market."[203] The Commission based its conclusion that the subject producers had "incentives" to ship more OCTG to the United States on five findings.[204] As demonstrated by Argentina in its first submission and at the first panel meeting, however, each one of these findings was based on speculation, rather than on positive evidence.[205] Further, in making these findings, the Commission frequently disregarded positive evidence supporting the opposite conclusion.[206] As a result, the Commission failed to determine, based on positive evidence, that the recurrence of injury upon revocation of the orders on OCTG was probable.

171. In sum, in the face of positive evidence indicating that the recurrence of injury was not likely based on the volume analysis,[207] the Commission invented "incentives" – based on conjecture and speculation – in order to render an affirmative likelihood determination. The Commission's approach to the volume factor demonstrates that it failed to support its determination with positive evidence and to objectively examine the record. The Commission's sunset determination was therefore inconsistent with Articles 3.1 and 11.3. Further, the Commission's evaluation of the volume factor demonstrates its failure to apply the "likely" standard of Article 11.3.

172. The US First Submission also reveals similar reliance on conjecture with respect to the price effects of the "likely" imports. In response to Argentina's claim that the Commission cited paltry evidence of likely underselling by imports and potential price effects of the imports, the United States makes the following statement in its brief:

> As for underselling by imports, Argentina's complaints relate solely to the ITC's discussion of underselling during the current review period. But the ITC itself placed little weight on this point, as it recognized that the orders had significantly reduced the volume of subject imports. What was much more significant to the ITC – and

[200] *See* Argentina's First Submission, Sec. VIII.B.2; Argentina's First Oral Statement, paras. 115-126.

[201] US First Oral Statement, para. 26.

[202] *Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico*, USITC Pub. 3434, Inv. Nos. 701-TA-364, 731-TA-711, and 713-716 (June 2001) at 19 ("*Commission's Sunset Determination*") (ARG-54).

[203] *Id.*

[204] *See id.* at 19-20.

[205] *See* Argentina's First Submission, paras. 244-246; Argentina's First Oral Statement, paras. 119-123.

[206] *See id.*

[207] The evidence included the testimony of German Cura, President of Siderca, at the Commission's sunset hearing. *See* ITC Hearing Tr., *Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico* (8 May 2001) (Mr. German Cura) at 200-208 (ARG-68).

> what Argentina completely ignores in its submission – is the fact that underselling by subject imports during the original investigations drove down US prices.[208]

173. This statement regarding price effects speaks volumes. In other words, the Commission admits that it had very little evidence of likely underselling by the likely imports. In fact, it says that it placed "little weight" on any such evidence. Instead, it gave greater weight to the information developed five years earlier in the original investigation. This admission runs completely contrary to the requirements of Article 11.3 and the rigorous examination required by the Appellate Body in *Sunset Review of Steel from Japan*. It is simply not acceptable for the reviewing authorities to rely on information from the original investigation that led to the measure as the same basis for continuing the measure for an additional five years. If the authorities cannot develop a sufficient factual basis to support the notion that imports are likely to have detrimental price effects on the domestic industry, then they cannot presume that those price effects will occur.

174. A similar admission appears in the very next paragraph of the US First Submission, where the United States attempts to refute Argentina's arguments that it gave undue weight to the fact that domestic prices were increasing at the end of the period examined. The United States claims:

> Second, evidence from the original investigation strongly supports a finding that imports can drive down domestic prices even during a period of strong demand. Thus, it was completely logical for the ITC to conclude that whatever current prices may be, imports would drive down or suppress the price of the domestic like product if the orders were revoked.[209]

175. These two sentences accurately portray the reality of the Commission's analysis. From a finding in the original investigation that imports "can" drive down domestic prices, the Commission concludes that imports "would" drive down or suppress the price of domestic like products if the order were revoked. In other words, because it is possible (as demonstrated five years earlier), then it must be "likely" to occur if the orders are revoked. Again, this type of reasoning is unacceptable under Article 11.3, and it demonstrates that the Commission is not applying a "likely" standard and that the decision in this case is not based on positive evidence of likely price effects.

176. The United States' defence of the Commission's "impact" analysis suffers from the same problem. Despite the fact that the Commission found that the domestic industry's condition had improved and that its current condition was "positive," the Commission nonetheless found that "revocation of the orders likely would lead to a significant increase in the volume of subject imports, which likely would undersell the domestic like product and significantly depress or suppress the domestic industry's prices, leading to a significant adverse impact on the domestic industry."[210] In its only defence against Argentina's argument with respect to the impact analysis, the United States offers the following sentence:

> The ITC noted that in the original investigation, a significant increase in demand had not precluded subject imports from gaining market share and having adverse price effects.[211]

177. Once again, the conclusion of what is likely to occur in the future depends wholly on the fact that it occurred in the original investigation, five years in the past. In this particular instance, the problem is compounded because the Commission is reduced to saying that increased demand in the past had not precluded subject imports from gaining market share and having adverse price effects,

[208] US First Submission, para. 338 (footnotes omitted).
[209] *Id.* at para. 339 (emphasis added, footnotes omitted).
[210] *Id.* at para. 342.
[211] *Id.*

and drawing the inference from this observation that likely imports were likely to have the same impact. One is left to imagine how an exporter could ever meet this standard given that, by definition, most anti-dumping measures in place in the United States had some evidence of adverse impact supporting the initial decision.

178. Article 11.3 demands a rigorous analysis of the likely consequences of revocation. With respect to injury, Article 3.1 and Article 11.3 require positive evidence that injury is likely to continue or recur in order for the measure to be continued. The Commission's conclusions with respect to volume, price, and impact in this case fall short of meeting the substantive and evidentiary standard.

2. The Commission's Determination was inconsistent with Article 3.4 of the Anti-Dumping Agreement

179. Article 3.4 of the Anti-Dumping Agreement requires the authority to evaluate the following "relevant economic factors and indices having a bearing" on the domestic industry: actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity, factors affecting domestic prices, the magnitude of the margin of dumping, actual and potential negative effects on cash flow, inventories, employment, wages, growth, and ability to raise capital or investments.[212] In its sunset determination of OCTG from Argentina, however, the Commission failed to address several of the mandatory factors, and provided a mere mechanical recitation of several others. The Commission's determination was therefore inconsistent with Article 3.4.

180. The United States argues that, because there may not be an impact from dumped imports to evaluate at the time of the sunset review, "the obligations described in Article 3.4 cannot practicably be applied to all sunset reviews."[213] Even if a particular factor turns out not to be germane to the authority's analysis, however, the authority still has an obligation under Article 3.4 to address each factor. As stated by the Panel in *H-Beams from Poland*, the authority must provide "a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury."[214]

181. The United States also argues in its First Submission that the Commission in fact considered all of the elements identified in Article 3.4.[215] The United states includes on page 109 a table indicating the "location in ITC Report" of statistics related to the relevant factors. The US rebuttal is not effective and reflects a misunderstanding of the kind of analysis required by Article 3.4. In *Egypt – Steel Rebar*, the panel held that the mere presentation of tables of data concerning the economic factors and indices listed in Article 3.4, without more, does not constitute an "evaluation" in the sense of Article 3.4.[216] Accordingly, the panel ruled, in order to "rebut a *prima facie* case that its 'evaluation' under Article 3.4 was inadequate or did not take place at all[,]" a Member must produce a "written record – whether in the disclosure documents, in the published determination, or in other internal documents – of how [the] factors [had] been interpreted or appreciated by [the] investigating authority during the course of the investigation . . . ."[217] The Commission did not do this in its determination, and the United States has failed to demonstrate otherwise in its First Submission.

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[212] Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, para. 7.236 ("*H-Beams from Poland*"). The Appellate Body agreed with the panel report in entirety. *See* Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*,WT/DS122/AB/R, adopted April 5, 2001, para. 125 (*"H-Beams from Poland"*).

[213] US First Submission, para. 346.

[214] Panel Report, *H-Beams from Poland*, para. 7.236.

[215] US First Submission, para. 347.

[216] Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002, para. 7.42 (*"Egypt – Steel Rebar"*).

[217] *Id.* at para. 7.49.

3. The Commission's Determination was inconsistent with Article 3.5 of the Anti-Dumping Agreement

182. With regard to the required causation analysis, Article 3.5 directs the authority to "examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports." In the sunset review of OCTG from Argentina, however, the Commission failed to separate and distinguish the potential injurious effects of other causal factors from the potential effects of the dumped imports. Thus, the Commission's determination was inconsistent with Article 3.5.

183. The United States argues that "textual indications in Article 3.5" show that "it specifically is not applicable to sunset reviews."[218] The United States attempts to demonstrate that each and every word of Article 3.5 cannot practicably apply to sunset reviews. For example, the United States points out that Article 3.5 refers to existing "injury," but "in a sunset review, with an anti-dumping order in place, there may be no current injury or causal link . . . ."[219] In addition, the United States refers to the Article 3.5 requirement not to attribute the injurious effects from other known sources of injury to the dumped imports. With respect to this provision, the United States argues, "In a sunset review, where the focus is on evaluating the likely effect of imports upon expiry of the duty (*i.e.*, at some point in the future), other factors 'which at the same time are injuring the domestic industry' will not be 'known' to the investigating authority."[220]

184. As demonstrated previously, however, according to Footnote 9 of the Anti-Dumping Agreement, "injury" for purposes of Article 11.3 "shall be interpreted in accordance with the provisions of [Article 3]." The fundamental requirement of Article 3.5 that the authority establish a causal link between the dumped imports and injury to the domestic industry is relevant to sunset reviews under Article 11.3. In the context of a sunset review, in order to render an affirmative likelihood of injury determination, Article 3.5 requires the authority to demonstrate that, upon termination of the anti-dumping measure, the subject imports – through either the continuation or recurrence of dumping – would be likely to cause injury to the domestic industry. In addition, Article 3.5 requires the authority not to ascribe the effects from other known potential sources of injury to the subject imports.

185. In the sunset review of OCTG from Argentina, the Commission failed to separate and distinguish the potential injurious effects of other causal factors from the potential effects of the dumped imports. The United States has been unable to demonstrate that the Commission satisfied the non-attribution requirement of Article 3.5.

C. THE COMMISSION'S APPLICATION OF A CUMULATIVE INJURY ANALYSIS IN THE SUNSET REVIEW OF OCTG FROM ARGENTINA WAS INCONSISTENT WITH ARTICLES 11.3 AND 3.3 OF THE ANTI-DUMPING AGREEMENT

186. As set out in the first submission and oral statement, Argentina submits that the Commission's application of a cumulative injury analysis in the sunset review of OCTG from Argentina was inconsistent with Articles 11.3 and 3.3 of the Anti-Dumping Agreement.[221] Argentina raised three independent arguments as to why the conduct of a cumulative analysis was WTO-inconsistent:

[218] US First Submission, para. 350.
[219] *Id.* at para. 352.
[220] *Id.* at para. 353.
[221] *See* Argentina's First Submission, VIII.D-F; Argentina's First Oral Statement, paras. 104-112.

- The text of Article 11.3 (and use of the singular "duty") prohibits cumulation. This is further confirmed by the text of Article 3.3 of the Anti-Dumping Agreement, which limits cumulation to "investigations" and even then only where certain conditions are met;
- Assuming *arguendo* that Articles 11.3 and 3.3 do not preclude cumulation in sunset reviews, then the terms of Article 3.3 must be applied to any cumulative analysis in a sunset review. Application of either the *de minimis* or negligibility requirements (both of which must be satisfied) would have prevented cumulation in the sunset review of OCTG from Argentina; and
- The Commission's use of a cumulative injury analysis in the sunset review of OCTG from Argentina was also inconsistent with Article 11.3, because it prevented the Commission from applying the correct "likely" standard.

187. Rather than recast these arguments in full, for purposes of this second submission, Argentina will focus this discussion on the US counterarguments. It is important to recognize at the outset that the Panel's decision with respect to cumulation in *Sunset Review of Steel from Japan* rested on very narrow grounds, and that the issue of whether cumulation is permitted in Article 11.3 sunset reviews is still a matter of first impression under the Anti-Dumping Agreement.[222]

1. The text of Article 11.3 prohibits cumulation. Under Article 3.3 of the Anti-Dumping Agreement, the use of cumulation is only permitted in "investigations," and even then only where certain conditions are met

188. According to the United States, "Argentina argues that because cumulation is not expressly permitted in Article 11.3, the ITC is prohibited from engaging in a cumulative analysis in a sunset review."[223] The United States misconstrues Argentina's argument. Argentina does not argue that Article 11.3 is silent with respect to cumulation. Argentina asserts that Article 11.3 – both pursuant to its terms and as interpreted in its context – expressly prohibits cumulation.

189. Pursuant to its terms, Article 11.3 applies to "any definitive anti-dumping duty" and requires the "expiry of the duty." In each reference, the drafters chose the singular and avoided the plural. In addition, the context of Article 11.3 reinforces the clear text that Article 11.3 prohibits cumulation. Article 11.3 is an implementing provision of Article 11. Article 11.1, the umbrella provision of Article 11.3, directs that "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." (Emphasis added.) Again, the drafters have used the singular. Thus, on its face and interpreted within its context, Article 11.3 does not permit a cumulative analysis of the likely injurious effects of multiple anti-dumping orders.

190. The United States contends that Article 11.3's reference to the "duty" is not conclusive.[224] Yet, in *Sunset Review of Steel from Japan*, "[t]he United States argue[d] that the meaning of the word

[222] The Panel addressed the narrow issue of "whether the obligation relating to the negligibility standard under Article 5.8 for the purposes of a cumulative injury assessment under Article 3.3 in investigations also applies to sunset reviews under Article 11.3." Panel Report, Sunset Review of Steel from Japan, para. 7.93. The Panel explicitly stated that it was not addressing the issue of whether Article 11.3 permits cumulation in the likelihood of injury determination: "For this reason, we do not address the more general issue of whether or not cumulation is permitted in sunset reviews." Id. at 7.104 (emphasis added). In summarizing the Panel's findings in Sunset Review of Steel from Japan, the Appellate Body stated, "The Panel also found (and Japan does not appeal these findings) no inconsistency with the United States' WTO obligations in respect of . . . cumulation in sunset reviews . . . ." Appellate Body Report, Sunset Review of Steel from Japan, para. 6. Hence, the Appellate Body's statement regarding what Japan had not appealed necessarily is limited to the narrow issue addressed by the Panel, and does not speak to the broader and still unresolved question of whether cumulation is permitted in sunset reviews.

[223] US First Submission, para. 363.

[224] *See id.* at para. 366.

'duty' in Article 11.3 is explained in Article 9.2 of the Anti-Dumping Agreement, which 'makes clear that the definitive duty is imposed on a product-specific (*i.e.*, order-wide) basis, not a company-specific basis."[225] The Appellate Body agreed with the United States "that this reference in Article 9.2 informs the interpretation of Article 11.3."[226] Thus, the Appellate Body's decision in *Sunset Review of Steel from Japan* confirms that the use of "duty" in the singular means that the authority must determine whether the termination of a single anti-dumping order – and not multiple anti-dumping orders – would be likely to lead to injury.

191. The Appellate Body's decision in *Steel from Germany* suggests that it understands that the injury analysis in a sunset review is not conducted on a cumulated basis: "Thus, in our view, the terms 'subsidization' and 'injury' each have an independent meaning in the *SCM Agreement* which is not derived by reference to the other. It is *unlikely* that very low levels of subsidization could be demonstrated to *cause* 'material' injury."[227] The Appellate Body's statement would be true only where the injury analysis in a sunset review is not conducted on a cumulated basis.

192. Finally, the United States asserts that "cumulation in anti-dumping investigations was a widespread practice among GATT contracting parties prior to the adoption of Article 3.3 in the Uruguay Round, even though the Tokyo Round Anti-Dumping Code was silent on the subject."[228] The fact that cumulation was not regulated by the Tokyo Round, however, weakens, rather than helps, the US argument. Prior to the Uruguay Round, the use of cumulation in injury determinations generated several conflicts. Consequently, the drafters of the Uruguay Round anti-dumping code – through Article 3.3. – limited the use of cumulation to "investigations," and even then only where certain conditions are met.

193. Accordingly, by conducting a cumulative injury analysis in the sunset review of OCTG from Argentina, the Commission violated Articles 11.3 and 3.3.

2. Assuming *arguendo* that Articles 11.3 and 3.3 do not preclude cumulation, then the terms of Article 3.3 must be applied to any cumulative analysis in a sunset review

194. In the alternative, Argentina argues that, even assuming that Articles 3.3 and 11.3 do not preclude cumulation in Article 11.3 reviews, then the terms of Article 3.3 must be applied to any such cumulative analysis in a sunset review.[229] The application of either the *de minimis* or negligibility requirements under Article 3.3 (by virtue of the cross-reference to Article 5.8) would have prevented cumulation in the Commission's sunset determination of Argentine OCTG.

195. The US rebuttal to Argentina's alternative argument relies on the premise that Article 3 does not apply to sunset reviews under Article 11.3.[230] As Argentina has demonstrated, however, the disciplines of Article 3 apply to Article 11.3.

196. In addition, the US relies on the Panel's decision in *Sunset Review of Steel from Japan.*[231] In that decision, the Panel held that, because Article 3.3 is limited by its own terms to "investigations," "the cross-reference in Article 3.3 to the negligibility standard in Article 5.8 does not apply to sunset reviews."[232] Japan did not appeal this ruling.

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[225] Appellate Body Report, *Sunset Review of Steel from Japan*, para. 150 (emphasis added).
[226] *Id.*
[227] Appellate Body Report, *Steel from Germany*, para. 81.
[228] US First Submission, para. 370.
[229] *See* Argentina's First Submission, Sec. VIII.E; Argentina's First Oral Statement, para.108.
[230] *See* US First Submission, para. 373.
[231] *See id.* at paras. 374-378.
[232] Panel Report, *Sunset Review of Steel from Japan*, para. 7.102.

197. In response, Argentina first notes that the Panel's ruling in *Sunset Review of Steel from Japan* is not inconsistent with Argentina's assertion above that, because Article 3.3 restricts the use of cumulation to "investigations," Article 3.3 precludes the use of cumulation in sunset reviews. However, in the event that the Panel finds that cumulation is not prohibited by Articles 11.3 and 3.3, then the authorities must respect the substantive standards for cumulation in Article 3.3. The authorities may not cumulate in a manner that diminishes the rights of individual countries under Article 11.3. In this case, with negligible import volumes and a *de minimis* dumping margin, Argentina had a right to expect that its export performance would be taken into account in the likelihood of injury analysis, and not rendered irrelevant by an analysis that focused on the export practices of producers from other countries.

198. The United States also argues that "the application of Article 5.8's negligibility thresholds would be unworkable in the context of sunset reviews."[233] The United States suggests that it would not be practicable for the authority to assess whether the likely – as opposed to the current – volume of imports would be negligible. Article 5.8, however, explicitly directs the authority to consider whether the "actual or potential" volume of imports is negligible. Consequently, it is clear that Article 5.8 contemplates that in certain injury determinations the authority will need to estimate future import volumes.

199. Finally, as set out in Argentina's First Submission and oral statement,[234] the Commission's use of a cumulated injury analysis in the sunset review of OCTG from Argentina was also inconsistent with Article 11.3, because it prevented the Commission from applying the correct "likely" standard. In reaching its decision to cumulate in this case, the Commission considered whether imports from each subject source had any possible discernible adverse impact on the domestic industry.[235] As part of its analysis, the Commission did not find that the Argentine imports would have no discernible adverse impact on the domestic industry. In other words, the Commission reasoned that the Argentine imports could have a possible adverse impact on the domestic industry. This low standard, cast in a double-negative, runs directly counter to the "likely" standard established by Article 11.3. The United States does not respond to this argument in its First Submission.

200. This use of a double negative formulation is contrary to the panel's decision in *DRAMS from Korea*.[236] A "not unlikely" standard does not set the same standard as "likely." Worse still, the "no" discernible adverse impact test used by the Commission establishes a standard that is directly contrary to a "likely" standard. Under this formulation, finding any discernible impact leads to cumulation, which as in this case can lead to a finding of "likely" injury without regard to any "positive evidence" relating to probable imports from individual countries.

[233] US First Submission, para. 379.

[234] *See* Argentina's First Submission, Sec. VIII.F; Argentina's First Oral Statement, paras. 109-111.

[235] *Commission's Sunset Determination* at 6, 10-16. Pursuant to 19 USC. § 1675a(a)(7) "[t]he Commission shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry."

[236] Panel Report, *DRAMS from Korea*, para. 6.45 ("We consider that a failure to find that an event is 'not likely' is not equivalent to a finding that the event is 'likely.'")

D. THE TIME FRAME WITHIN WHICH INJURY WOULD BE LIKELY TO CONTINUE OR RECUR UNDER ARTICLE 11.3 OF THE ANTI-DUMPING AGREEMENT

1. The US Statutory Provisions as to the time frame within which injury would be likely to continue or recur are as such inconsistent with Articles 11.3 and 3 of the Anti-Dumping Agreement

201. In its first written submission, Argentina demonstrated that 19 USC. §§ 1675a(a)(1) and (5) are inconsistent as such with Articles 11.3 and 3 of the Anti-Dumping Agreement.[237] Section 1675(a)(1) directs the Commission to determine whether injury would be likely to continue or recur "within a reasonably foreseeable time." The SAA explains that "'reasonably foreseeable time' ... normally will exceed the 'imminent' timeframe applicable in a threat of injury analysis."[238] Moreover, section 1675(a)(5) mandates that the Commission "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time."

202. Article 11.3, however, requires the authority to determine whether termination of an anti-dumping measure would be likely to lead to the continuation or recurrence of injury *upon termination of the measure*. Thus, the authority's likelihood of injury determination must not be based on speculation about possible market conditions several years into the future, but rather must be based upon the likelihood of injury upon "expiry" of the measure. By defining a "reasonably foreseeable time" as longer than an "imminent" time, the US statutory provisions are inconsistent with Article 11.3, which requires the determination to be based upon injury upon "expiry" of the duty.

203. The United States argues that Article 11.3 is silent on the question of the relevant time frame in which injury would be likely to continue or recur, and thus WTO Members "remain free to determine under their own laws and procedures the time frame relevant in sunset inquiries."[239] There are two problems with this argument. First, the United States ignores the immediate context of Article 11.3. WTO Members adopted Article 11.3 to enforce the underlying principle of Article 11: that anti-dumping measures "shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." Accordingly, when read together with its umbrella provision, Article 11.1, it is evident that the time frame in which injury would be likely to continue or recur under Article 11.3 must be as curtailed as possible to ensure that anti-dumping measures are maintained only as long as necessary to counteract injurious dumping. Second, unbridled discretion in defining the relevant time frame is not consistent with the "likely" standard of Article 11.3, and even less so when considered in light of 11.1.

204. Sections 1675(a)(1) and (5) are also inconsistent with Articles 3.7 of the Anti-Dumping Agreement. Article 3.7 requires injury determinations to be "based on facts and not merely on allegation, conjecture or remote possibility," and that the circumstances under which injury would occur be "imminent." The US provisions provide that the likelihood of injury determination need not be based on "imminent" injury, thereby fostering speculation.

205. The United States narrowly reads Articles 3.7 and 3.8 to be limited to threat determinations. Pursuant to Footnote 9 of the Anti-Dumping Agreement, however, "injury" under Article 11.3 must "be interpreted in accordance with the provisions of [Article 3,]" which includes Articles 3.7 and 3.8. Although Articles 3.7 and 3.8 only reference threat determinations specifically, both threat determinations and likely injury determinations require an assessment of future injury. Accordingly, the requirements of Articles 3.7 and 3.8 are relevant to sunset reviews under Article 11.3. Article 3.7

[237] *See* Argentina's First Submission, Sec. VIII.C.1.
[238] SAA at 887 (ARG-5).
[239] US First Oral Statement, para. 33.

requires that the circumstances under which injury will occur be "imminent" (such as upon expiry of the duty) and Article 3.8 requires that authorities decide future injury cases with "special care."

2. The Commission's application of the Statutory Provisions as to the time frame within which injury would be likely to continue or recur was inconsistent with Articles 11.3 and 3 of the Anti-Dumping Agreement

206. The Commission applied 19 USC. §§ 1675a(a)(1) and (5) in the sunset review of OCTG from Argentina; therefore, its sunset determination was inconsistent with Articles 11.3 and 3. The Commission provides no indication at all as to the time period it considered to be a "reasonably foreseeable time" in the sunset review of OCTG from Argentina. The only known information was that the US industry was doing well at the time of the review. So Argentina is left to wonder when it was that the Commission believed that things would go bad. Not upon expiry of the duty says the United States.[240] Is the time period one year? Three years? Five years? In the end, are these periods the same? Are they all equally consistent with Article 11.3? In this case, there is no way to determine because the Commission did not indicate the time frame. Hence, these provisions were applied in a manner inconsistent with Article 11.3.

V. CONSEQUENTIAL VIOLATIONS UNDER ARTICLE VI OF THE GATT 1994, ARTICLES 1 AND 18 OF THE ANTI-DUMPING AGREEMENT, AND ARTICLE XVI:4 OF THE WTO AGREEMENT

207. In Section IX of Argentina's First Submission, Argentina argued that the measures identified in the panel request, including the Department's determination to conduct an expedited review, the Department's Sunset Determination, the Commission's Sunset Determination, and the Department's determination to continue the order, and the relevant US laws, regulations, policies, and procedures, are inconsistent with the obligations of the United States under Article VI of the GATT 1994, Articles 1, 18.1, and 18.4 of the Anti-Dumping Agreement, as well as Article XVI:4 of the WTO Agreement.

208. In rebuttal, the United States submits that none of the measures identified by Argentina are inconsistent with provisions of the Anti-Dumping Agreement, and therefore, there can be no consequential violations.[241] For the reasons previously set out, however, Argentina believes that it has persuasively demonstrated that the identified US measures, both as such and as applied, violate the Anti-Dumping Agreement and GATT 1994. Accordingly, Argentina has also proven its consequential claims.

209. In addition, the United States argues that the Department's Determination to Expedite does not constitute a "separately challengeable measure[.]"[242] The United States describes the Department's Determination to Expedite as an "interlocutory decision" and lumps it into a vast category of "[h]undreds, perhaps thousands, of discrete preliminary decisions [that] went into what eventually became an anti-dumping measure."[243] The United States unconvincingly seeks to diminish the significance of the Department's Determination to Expedite. The Department's inadequacy determination was the sole basis for either the deemed waiver or the application of facts available. Either way, the Department's affirmative likelihood determination flowed directly from its

[240] US First Submission at para. 357.

[241] US First Submission, para. 382. The United States also contends that Argentina's panel request did not properly identify its dependent claims. *See id.* at 381. Argentina addresses this argument in Section VI, below.

[242] *Id.* at 384.

[243] *Id.*

inadequacy determination. The Department's Determination to Expedite thus constitutes a measure for purposes of WTO challenge.[244]

210. Even if the Determination to Expedite does not constitute a separate, challengeable measure, however, it is still necessarily before the panel. Because the inadequacy determination was integral to the Department's finding of likely dumping in the sunset determination, the inadequacy determination cannot be divorced from the Department's Sunset Determination. Therefore, whether it is considered a measure or not, the panel must evaluate the WTO-consistency of the Department's Determination to Expedite. Indeed, despite its argument that the Determination to Expedite does not constitute an independent measure, the United States itself recognizes that this determination may still be "challenged in WTO dispute settlement as part of a challenge to a *bona fide* measure[,]" such as the Department's Sunset Determination.[245]

VI. US REQUEST FOR PRELIMINARY RULINGS

A. ARGENTINA'S PANEL REQUEST COMPLIED FULLY WITH DSU ARTICLE 6.2

1. Introduction

211. In its opening statement to the Panel on 9 December 2003, the United States said that "[n]owhere" in the US First Submission is there an allegation that Argentina's Panel Request failed to "identify the specific measures at issue."[246] As Argentina stated in its closing statement to the Panel on 10 December 2003, this is a welcome admission, for two reasons.

212. First, it confirms that the US measures that Argentina is challenging are limited, specific, and have been identified with precision in its Panel request. Second, this concession by the United States means that there now remains only a single Article 6.2 issue before the Panel: did Argentina fail to "present the problem clearly," such that the United States has suffered actual prejudice during the course of the panel proceedings? It is a wonder that the United States tries to advance such a claim given its assertion in its opening statement that:

> [M]ost of the issues in this dispute should sound very familiar. Indeed, Argentina's 'as such' claims largely raise issues that have either been already addressed in other disputes or that are closely related to those addressed in other disputes.[247]

If this is true, how can the United States claim that it has suffered prejudice in this case?[248]

213. Argentina stands fully by all of the arguments it set out in its Submission on the US Request for Preliminary Rulings. While there is no need to repeat all of these arguments here, Argentina

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[244] Further, the Appellate Body's discussion of what constitutes a measure for purposes of a WTO challenge makes clear that this determination can be challenged by Argentina. *See* Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 85-88.

[245] *Id.*

[246] US First Oral Statement, para. 35.

[247] *Id.* at para. 4.

[248] The Appellate Body has repeatedly made clear that "[t]he procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes." Appellate Body Report, *United States – Tax Treatment For "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, para. 166. This was affirmed by the Appellate Body in *H-Beams from Poland* and *High Fructose Corn Syrup*: see Appellate Body Report, *H-Beams from Poland*, para. 97 and Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, n.45.

reiterates that its Panel Request complied fully with all of the requirements of DSU Article 6.2, including the requirement to "present the problem clearly."

214. In considering US allegations that Argentina did not "present the problem clearly," it is important to keep one, overarching principle in mind. The United States seems to believe that Article 6.2 imposes some kind of abstract, overarching requirement of "clarity." The United States never defines what this standard of "clarity" is, or why Argentina's request allegedly falls short. However, the Appellate Body has stated that assessing claims under DSU Article 6.2 is by no means an abstract exercise, or that a Panel Request must satisfy what the responding party considers to be "clear."

215. Instead, the jurisprudence has stressed repeatedly that whether a Panel request can be considered to "present the problem clearly" must be assessed against the due process objective embodied by Article 6.2. This is explained further below.

2. Argentina's "Page Four" claims are within the Panel's Terms of Reference

216. Argentina welcomes the belated US recognition of the well-established principle that a Panel Request must be read as a whole. Unfortunately, however, the positions advanced by the United States in the present proceedings show anything but a holistic approach. The US arguments related to "Page Four" of Argentina's claims focus almost exclusively on a single word – "also." This is exactly the kind of narrow approach the Appellate Body has instructed Panels not to take.

217. The United States is asking this Panel to parse the text of the Panel request. It hopes that the Panel will agree to:

- isolate and focus narrowly on the word "also"; and
- isolate and focus narrowly on Page Four.

218. Yet the jurisprudence demonstrates, quite unambiguously, that Panels considering their terms of reference cannot sever and isolate text in this way. Instead, the Appellate Body has enjoined Panels to take a broader approach.

219. Contrary to the assertions of the United States at the First Meeting of the Panel, Argentina's arguments have not "switched." Indeed, Argentina has explained the structure of the Request repeatedly to the United States, both at the DSB meeting of May 19, and in Argentina's Submission on the US Request for Preliminary Rulings. To reiterate: Argentina used the word "also" on Page Four to indicate that it was elaborating on the previous pages. When the Panel Request is read as a whole, this is quite obvious.

220. Even assuming *arguendo* that the word "also" has to be segregated and interpreted separately from the rest of the text, the dictionary treats the word "also" as synonymous with the term "moreover."

221. It is also important to emphasize the context in which the word "also" appeared. As Argentina stated in Argentina's Submission on the US Request for Preliminary Rulings, the request said "Argentina also considers" that certain US laws are WTO-inconsistent, and not that Argentina considers that "certain US laws are also WTO-inconsistent." The United States made no response to this point during the First Meeting of the Panel.

222. Another important contextual point ignored by the United States is that Argentina's reference to US measures in that sentence was immediately qualified by the term "related to the determinations of the Department and the Commission." The "determinations of the Department and the Commission" were described in detail earlier in the Panel request. For this reason, it is simply not

credible for the United States to argue that it is "impossible to discern the nature of Argentina's problems."[249]

223. The United States argued at the First Meeting of the Panel that "Argentina claims to have provided a narrative description in the first part of the panel request that remedies the deficiencies that otherwise exist with respect to Page 4."[250] It also stated that "this narrative is little more than a chronology of events."[251] Argentina would make two points in response to this US assertion.

224. First, Argentina did not claim that its "narrative description . . . remedies the deficiencies" of Page Four. Indeed, there are no "deficiencies" to "remedy." Rather, Argentina argued that although a narrative description is not required, panels have in some cases "considered [a narrative] description to be relevant in determining whether a complaining party has met the obligations covered by Article 6.2."[252] Argentina recalled that the *High Fructose Corn Syrup* Panel noted that the request in that case set forth "facts and circumstances describing the substance of the dispute," which led the Panel conclude that it was "sufficiently detailed to set forth the legal basis of the complaint so as to inform the defending Member . . . and potential third parties of the claims made by the United States."[253] Argentina then argued, and continues to maintain, that its Panel Request similarly "set forth facts and circumstances describing the substance of the dispute."[254] It provided considerable detail about the US measures being challenged, including the WTO-inconsistent determinations of the Department and the Commission.

225. Second, with respect to the US assertion that the detailed factual information set out in Argentina's Panel Request was "little more than a chronology of events," Argentina would note that a "chronology of events" is synonymous with, and serves the purpose of, "setting forth the facts and circumstances" describing the substance of the dispute. In any event, Argentina's Panel Request was not, in fact, limited to a "chronology," but rather provided full details of the entire factual and legal background giving rise to the current dispute.

226. In any event, the United States has in no way suffered prejudice during the course of the Panel proceedings as a result of Argentina's drafting of Page Four. This issue is discussed below, in section VI.C.

3. Sections B.1, B.2 And B.3 of Argentina's claims are within the Panel's Terms of Reference

227. Argentina similarly provided extensive argumentation on this issue in Argentina's Submission on the US Request for Preliminary Rulings, and it stands by those arguments.

228. At the First Meeting of the Panel, the United States claimed that "Argentina does not take issue with the findings of prior panels that citations to entire articles of the AD Agreement – including Article 6 – can fail to satisfy the requirements of Article 6.2."[255] Argentina fully recognizes that some prior panels have made such rulings. However, it is of no particular relevance that prior panels have decided that citations to entire articles "can" fail to satisfy Article 6.2. Indeed, this US statement, read in isolation, does not convey an accurate picture of the state of WTO jurisprudence.

229. An accurate presentation of the state of the law was set out in Argentina's Submission on the US Request for Preliminary Rulings, particularly paragraph 67, which noted that:

[249] US First Submission, para. 87.
[250] US First Oral Statement, para. 40.
[251] *Id.*
[252] Argentina's Submission on the US Request for Preliminary Rulings, para. 30.
[253] *Id.* at para. 31.
[254] *Id.* at para. 45.
[255] US First Oral Statement, para. 41.

- a request for the establishment of a panel must set out claims, but not the arguments in support of those claims;
- the listing of the articles of the agreements claimed to have been violated satisfied the minimum requirements of Article 6.2 of the DSU;
- in assessing the consistency of the panel request with Article 6.2, the Panel must take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated; and
- as a related point, even if the Article cited in the panel request contains multiple obligations, the mere listing of such an Article will still meet the requirements of Article 6.2, absent actual prejudice.

230. Argentina also demonstrated in its Submission on the US Request for Preliminary Rulings that:

- its request for the establishment of a panel set out its claims with respect to Article 3 and 6 of the Anti-Dumping Agreement, but not the arguments in support of those claims;
- the listing by Argentina of Articles 3 and 6 satisfied the minimum requirements of Article 6.2 of the DSU, in that both Articles were listed;
- in assessing the consistency of the Argentina's Panel Request with Article 6.2, the Panel must take into account whether the ability of the United States to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the Panel Request "simply listed" Articles 3 and 6; and
- again, as a related point, even though Articles 3 and 6 of the Anti-Dumping Agreement contain multiple obligations, the mere listing of these Articles still meets the requirements of Article 6.2, absent actual prejudice suffered by the United States during the course of the panel proceedings.

The latter point was demonstrated clearly by the Appellate Body decision in Korea Dairy. As Argentina noted in its Submission on the US Request for Preliminary Rulings, in that case the Appellate Body recognized that "Article XIX of the GATT 1994 has three sections and a total of five paragraphs, each of which has at least one distinct obligation. Articles 2, 4, 5 and 12 of the Agreement on Safeguards also have multiple paragraphs, most of which have at least one distinct obligation."[256] However, the Article 6.2 request was nevertheless dismissed because "Korea failed to demonstrate to us that the mere listing of the articles asserted to have been violated has prejudiced its ability to defend itself in the course of the Panel proceedings."[257]

231. Therefore, the US assertion that "entire articles of the AD Agreement . . . can fail to satisfy the requirements of Article 6.2" simply misses the point. The fact that "entire articles" have been cited in a panel request is by no means determinative. What is determinative is whether actual prejudice has been suffered by the responding party.

232. Argentina would also note that in *H-Beams from Poland*, references to "entire articles" of the Anti-Dumping Agreement – in that case, Articles 2, 3 and 5 – were nevertheless found to be consistent with DSU Article 6.2. Thailand argued that "the Panel should have dismissed Poland's claims relating to Articles 2, 3 and 5 because each of these articles of the Anti-Dumping Agreement contains numerous, distinct obligations, and the request for the establishment of a panel submitted by

[256] Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, para. 129 ("*Korea Dairy*").
[257] *Id.* at para. 131.

Poland did not meet the standard of clarity demanded by Article 6.2 of the DSU with respect to the precise claims of Poland under these Articles."[258]

233. In other words, Thailand advanced virtually the same argument in that case that the United States is advancing in the present case with respect to Argentina's references to Articles 3 and 6 in the present case. It is important to note that the Appellate Body dismissed Thailand's request, further demonstrating the irrelevancy of the US argument that citations to "entire claims" somehow fail the Article 6.2 standard. Decisions such as Korea Dairy and H-Beams from Poland provide a definitive refutation of this argument.

234. During the First Meeting of the Panel, the United States also asserted that "Argentina's main argument" is that "the United States somehow knew from the consultations what Argentina's problems were."[259]

235. First, this is not "Argentina's main argument." As indicated above, Argentina has advanced a range of arguments to demonstrate that its references to Articles 3 and 6 meet the minimum requirements of DSU Article 6.2. These were set out in section IV of Argentina's Submission on the US Request for Preliminary Rulings.

236. Second, the characterization of Argentina's position by the United States (i.e., that "the United States somehow knew from the consultations what Argentina's problems were") is equally misleading. Argentina's Submission on the US Request for Preliminary Rulings raised a number of more comprehensive points, which may be summarized briefly as follows:

- Argentina's claims were first raised formally with the United States in the WTO context in October 2002, when Argentina issued its consultations request;
- the United States expressed no concerns about the nature or scope of the Argentina's claims prior to, during, or after the consultations, even though all issues were canvassed thoroughly during two sets of consultations;
- Argentina's Panel Request used very similar – and, in some cases, virtually identical language to that used in the consultations request;
- the United States, when faced with a Panel request, suddenly professed not to understand Argentina's claims; and
- this case is only one of a series of WTO "sunset" cases which raise the same or similar issues, in which the United States has put considerable resources into defending – claim by claim, argument by argument, and which, as the United States has already observed, "should sound very familiar."[260]

237. All of these factors go to a broader issue: the credibility – or lack thereof - of US assertions that it did not "understand" Argentina's claims under Articles 3 and 6.

B. THE SO-CALLED "CERTAIN MATTERS" REFERRED TO BY THE UNITED STATES ARE ALL WITHIN THE PANEL'S TERMS OF REFERENCE

238. Argentina's Submission on the US Request for Preliminary Rulings provided a full rebuttal of all of the US allegations regarding what the United States considers to be "new claims." As Argentina demonstrated in that submission, none of these claims are "new." All are found in the Panel request.

[258] Appellate Body Report, *H-Beams from Poland*, para. 82.
[259] US First Oral Statement, para. 42.
[260] US First Oral Statement, para. 35.

239. At the First Meeting of the Panel, the United States left unchallenged all but one of Argentina's arguments – ostensibly "in the interests of time." The US delegation stated its hope that limiting itself to "one example," that would "suffice to demonstrate the fatal flaws in Argentina's arguments."[261] However, in an Article 6.2 claim, arguing by "example" will not "suffice." The United States must prove all of its claims, including each of the five putative "new" claims. The United States was simply silent in response to four of the full refutations provided by Argentina in its Submission on the US Request for Preliminary Rulings. The Panel can now conclude that for the first, second, third, and fifth of the supposedly "new" claims, the United States has simply failed to discharge the burden to prove such claims.

240. As for the fourth "new" claim, the United States did manage to muster a couple of paragraphs in its statement in an attempt to support its position that the "as applied" claim regarding the time period considered by the Commission was not in Argentina's panel request. But these arguments are simply unconvincing.

241. As stressed repeatedly in Argentina's Submission on the US Request for Preliminary Rulings, the Panel Request must be read as a whole. In this specific context, this means recognizing that the language used by Argentina in Section B.3 of its Panel Request is part of the broader context of panel request, particularly the heading under which it appears.

242. The specific language in Section B.3 referred to certain statutory requirements related to the time period within which the Commission will assess whether injury would be likely to continue or recur. The heading to section B is "The Commission's Sunset Determination was inconsistent with the Anti-Dumping Agreement and the GATT 1994." Read together – the specific language of Section B.3 together with the more general heading of Section B – the United States was clearly put on notice that Argentina would be raising both an "as such" and "as applied" claim.

C. THE UNITED STATES HAS IN NO WAY BEEN PREJUDICED DURING THE COURSE OF THE PANEL PROCEEDINGS

243. The issue of prejudice is critical to the Panel's determinations on the Article 6.2 issues. The law of the WTO is clear: any defending party advancing a claim under Article 6.2 must prove actual prejudice during the course of the Panel proceedings.

244. If the United States fails to demonstrate actual prejudice during the course of the Panel proceedings, then its Article 6.2 claims must fail. It is as simple as that.

245. Moreover, the United States cannot argue prejudice in a global, abstract way. Instead, it must demonstrate to the Panel the prejudice it has allegedly suffered during the course of the Panel proceedings for each of its Article 6.2 claims. This is the approach taken by other Panels such as that in *Egypt – Steel Rebar*:

> [W]e requested Egypt to provide us, in respect of each claim that it requests us to dismiss, the two-part analysis referred to in *Korea – Dairy* and *EC – Bed Linen*, that is, the asserted lack of clarity in the Request for Establishment of a Panel, and evidence of any resulting prejudice to Egypt's ability to defend its interest in this dispute due to such lack of clarity.[262]

246. Evidently, the United States wishes that it did not have to prove prejudice. Indeed, during the US closing statement on 10 December, the US delegation stated that it did "not agree that a prejudice

[261] *Id.* at para. 45.
[262] Panel Report, *Egypt – Steel Rebar*, para. 7.25 (emphasis added, footnotes omitted).

requirement applies." Nevertheless, the Panel must apply the law as it currently exists, not as the US delegation would prefer it to be.

247. The relevant cases on prejudice have been discussed in Argentina's Submission on the US Request for Preliminary Rulings, but perhaps the state of the jurisprudence was put most succinctly by the *EC-Bed Linen* panel: "an allegation that the requirements of Article 6.2 of the DSU are not met will not prevail where no prejudice is established."[263]

248. Indeed, the United States itself argued this position before the *Canada Wheat Board* panel. As cited earlier by Argentina, the United States argued before the *Wheat Board* panel that:

> [*E*]*ven if* a panel request is insufficiently detailed "to present the problem clearly," the panel is not automatically deprived of jurisdiction over the matter. Rather, the panel must examine, based on the "particular circumstances of the case," whether the defect has prejudiced the ability of the responding party to defend itself.[264]

249. How has the United States "demonstrated" prejudice in this case? The answer: it has not. It has asserted, but has not proven, prejudice.

250. US arguments of "prejudice" essentially boil down to complaints about having to wait until receipt of Argentina's submission. This demonstrably does not rise to the level of a violation of the due process rights of the United States. Indeed, in previous cases, similar assertions by defending parties were rejected by panels as insufficient for the purposes of demonstrating prejudice under Article 6.2. This is illustrated below.

251. A recent demonstration of this was provided by the panel in *EC – Pipe Fittings*:

> [T]he European Communities has failed in any event to demonstrate to us any prejudice to its interests throughout the course of these Panel proceedings by the way these "claims" appeared in the Panel request. We asked the European Communities to indicate any prejudice that it had sustained. The European Communities responded as follows:
>
> > *The EC takes the view that in all the cases in which it has raised this objection its interests have been prejudiced by the lack of adequate notice of the issues.* The scope of the claims that are explicitly made in Brazil's panel request is already exceptionally broad. *The EC is entitled to the period that elapses between the establishment of the panel and the presentation of the complainant's first written Submission to prepare its defence.* Such preparation is only possible if the complainant adequately specifies its claims in its panel request for incorporation into the terms of reference.
>
> However, it was evident to us from the participation of the European Communities in asserting its views in various phases of these Panel proceedings, including in its first written submission and in the first Panel meeting and in the exchanges between the parties preceding the first Panel meeting on preliminary issues, that *the EC's ability to defend its*elf had not been prejudiced over the course of these Panel proceedings.

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[263] Panel Report, *European Communities - Anti-Dumping Duties on Imports Of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, para. 6.25 (emphasis added).

[264] Oral Statement of the United States at the First Panel Meeting, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276 (6 June 2003), paras. 6-8.

> *We therefore consider that the text of the Panel request adequately indicates the nature of the problem addressed by Brazil's claims and deny the EC request to dismiss these allegations made by Brazil*.[265]

252. Similar complaints about "having to wait" were equally unavailing in *High Fructose Corn Syrup*:

> *Mexico asserts that it had to wait until the first written submission of the United States, more than four months after the request for establishment, to have a clear idea of what the United States' arguments in support of its assertions were.* Mexico argues that as a result of the failure of the United States to present the problem clearly and specify the factual and legal basis for the request, *it was obliged to spend that time working "in the dark".* In its comments on interim review, Mexico asserts that this resulted in the expenditure or squandering of resources that could otherwise have been devoted to preparing a timely defence.[266]

253. At the First Meeting of the Panel, the Panel similarly found that this assertion did not rise to the level of prejudice required under DSU Article 6.2: "We find that Mexico has not demonstrated to us that it was prejudiced in its ability to defend its interests in the course of the proceedings in this dispute."[267]

254. The US assertions of "prejudice" in this case are strikingly similar to those found to be insufficient in cases such as *EC – Pipe Fittings* and *High Fructose Corn Syrup*. As noted in Argentina's Submission on the US Request for Preliminary Rulings, for the "Page Four" claims, the United States argued only that its "ability . . . to begin preparing its defence was delayed because, due to Argentina's failure to comply with Article 6.2, the United States did not 'know what case it has to answer.'"[268] For its challenge to Sections B.1, B.2 and B.3, the US First Submission stated that: "As in the case of Page 4 of Argentina's panel request, the United States' ability to begin preparing its defence has been impaired because, as a result of Argentina's failure to comply with Article 6.2, the United States did not 'know what case it has to answer.'"[269]

255. This is an exceedingly thin argument. It by no means constitutes a proven violation of "due process rights." The Panels in *EC - Pipe Fittings* and *High Fructose Corn Syrup* did not take seriously such unsubstantiated assertions of "prejudice," and dismissed the Article 6.2 requests. This Panel should follow the prudent course set by these earlier panels and similarly reject the US request.

256. It is also highly relevant to note that earlier Panels, in determining whether the wording of the Panel Request caused "prejudice," have assessed whether there was any prejudice to the interests of Third Parties. This was set out in paragraphs 61 and 62 of Argentina's Submission on the US Request for Preliminary Rulings.

257. In the present case, none of the Third Parties expressed any concerns about the alleged "lack of clarity" of Argentina's Panel Request – not in the DSB, and not before the Panel.

258. To the contrary, many of the Third Parties specifically disavowed any difficulties with Argentina's Panel Request:

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[265] Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, paras. 7.22-7.24 ("*EC - Pipe Fittings*"). The EC did not appeal this issue.

[266] Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000, para 7.16 (*"High Fructose Corn Syrup"*).

[267] *Id.* (emphasis added).

[268] US First Submission, paras. 97 and 110 (emphasis added).

[269] *Id.* at para. 110 (emphasis added).

- the EC stated that the "Panel should not follow the United States suggestion to consider page 4 . . . in isolation from the rest of the request. Rather, in order to establish whether the conditions of Article 6.2 DSU are met, the Panel should consider the request as a whole."[270] At the Third Party session, the EC reaffirmed that "the Panel should assess Argentina's Panel Request as a whole, and not one specific part of it in isolation from the rest."[271]
- Japan informed the Panel that it "had no particular problem with the panel request of Argentina when drafting our third party submission."[272]
- The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu stated that "we did not encounter any difficulties related to DSU Article 6.2 in preparing our third party submission and oral statement."[273]
- Mexico used even stronger language, advising the Panel that "el gobierno de Mexico considera que dicha solicitud cumple cabalmente con el artículo 6.2 de ESD y que se trata de una táctica dilatoria del gobierno de Estados Unidos para retrasar el análisis de este Grupo Especial del fondo del asunto. En caso de que el Grupo Especial determine llevar a cabo un procedimiento adicional para atender a dichas objeciones, México solicita respetuosamente que se respeten sus derechos como tercera parte en esta controversia."[274]

259. This leaves the United States alone among WTO Members which ostensibly could not "understand" the nature of Argentina's complaints because of the alleged "lack of clarity." With no support among the Third Parties, the United States was reduced to arguing at the First Meeting of the Panel that the wording of Argentina's Panel Request prejudiced "potential" third parties. The Panel need not detain itself on this line of argumentation. No other Panel in the history of the WTO has ever considered anything as remote as prejudice to "potential" third parties.

260. Moreover, the US assertions of "prejudice" have been amply contradicted by the conduct of the United States to date in these proceedings. The United States submitted a full, substantive (albeit unconvincing) submission responding to Argentina's claims and it participated actively in the hearing. It will, no doubt, file a similarly detailed second submission, along with responses to the Panel's questions. Indeed, this kind of active participation at all stages of the panel process was the basis for the rejection of similar Article 6.2 requests in Panels such as *EC – Bed Linens* (quoted above) and *US – Lamb Safeguards*.[275]

261. Finally, to reiterate a point Argentina has made earlier, and as the *Canada Aircraft* Panel made clear, it is not possible to assess the supposed prejudice to the United States "during the panel process" until the end of the panel process.[276]

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[270] Third Party Submission of the European Communities, Section 2.

[271] Third Participant's Oral Statement by the European Communities, WT/DS268, 10 December 2003, para. 3.

[272] First Third Party Oral Statement by Japan, WT/DS268, 10 December 2003, para. 2.

[273] First Third Party Oral Statement by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, WT/DS268, 10 December 2003, page 3.

[274] First Third Party Oral Statement by Mexico, WT/DS268, 10 December 2003, at 2. The English translation of this quotation is as follows: "The Government of Mexico considers that the referenced panel request complies completely with DSU Article 6.2, and that [the Preliminary Objections] represent a delaying tactic by the Government of the United States to delay the substantive analysis by this Panel. In the event that the Panel decides to carry out an additional proceeding to consider the referenced objections, Mexico respectfully requests that its rights as a Third Party in this case be respected."

[275] Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177, 178/R, adopted 16 May 2001, paras. 5.51-5.53.

[276] Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, para. 9.33 (emphasis added).

D. CONCLUSIONS

262. Successful applications under DSU Article 6.2 are very rare in WTO dispute settlement. There is good reason for this: the Appellate Body has set the standard very high for a request under DSU Article 6.2 to be granted.

263. As noted above, there is no abstract standard of "clarity" under DSU Article 6.2. A Panel cannot strike claims from a Panel Request because the language used somehow displeases the responding party, or the responding party would have preferred different wording. A Panel can strike claims from a Panel Request only where it concludes that the due process rights of the respondent have been violated.

264. The respondent party must prove that it has suffered actual prejudice during the course of the Panel proceedings as a result of the wording of the panel requests. Vague assertions by the responding party that it had to wait for the complainant's first submission clearly will not suffice, and have been emphatically rejected by prior panels.

265. This is particularly the case where, as here, the United States has filed a full reply to all of Argentina's claims. Assertions of "prejudice" by the United States are simply not credible.

266. However, Argentina would emphasize that its defence to the Article 6.2 claims of the United States by no means rests on the "no prejudice" point alone. To the contrary, Argentina has demonstrated, both in its Submission on the US Request for Preliminary Rulings and in this Submission, that the wording of its claims were entirely clear – a point on which the Third Parties agree.

267. To apply what the Appellate Body said in *Korea Dairy*, it is unquestionable that the United States "had not been misled as to what claims were in fact being asserted against it as respondent."[277]

268. Argentina therefore respectfully requests the Panel to dismiss the US preliminary requests and to adjudicate Argentina's substantive claims entirely on the merits.

VII. CONCLUSION

269. Argentina refers the Panel to the specific requests it made of the Panel as set forth in paragraphs 314-323 of Argentina's First Submission. Argentina incorporates those requests in full. In sum, Argentina respectfully requests the Panel:

- to find that in this case the US measures identified by Argentina, as such and as applied, violate US WTO obligations;
- to recommend that the United States brings its measures found to be inconsistent with the covered agreements into conformity with its WTO obligations; and
- to suggest, pursuant to DSU Article 19.1, that the only way for the United States to comply with these recommendations is through the immediate termination of the anti-dumping measure on OCTG from Argentina.

270. As Argentina's First and Second Submissions demonstrate, the Department's and the Commission's sunset determinations violate US obligations under Article 11.3.

271. In December, the Appellate Body reaffirmed that termination of an anti-dumping duty is the primary obligation of Article 11.3, that it is a "mandatory rule," that continuation of the duty is the exception to this rule, and that this exception may be invoked only when the specified conditions for

[277] Appellate Body Report, *Korea Dairy*, para. 123 ("*Korea Dairy*").

continuing the duty are satisfied, and that "[i]f any one of these conditions is not satisfied, the duty must be terminated."[278]

272. With respect to the likelihood of dumping determination, the United States has developed three different procedures to implement its Article 11.3 obligation, each depending on the perceived level of participation in the process. In the end, it does not matter which procedure the United States uses. Regardless of the procedural route, the Department applies mandatory criteria which prevent precisely the type of factual and legal review that Article 11.3 requires in order to invoke the exception to termination. The Appellate Body leaves no doubt that "authorities must conduct a rigorous examination in a sunset review before the exception (namely, the continuation of the duty) can apply." [279] The Appellate Body emphasized "the exacting nature of the obligations imposed on authorities under Article 11.3 . . . ." [280]

273. Rather than satisfy the "exacting" obligations of Article 11.3, the Department gives decisive and preponderant weight to the existence of dumping margins and to declines in import volume. Indeed, in discussing these very factors from the *Sunset Policy Bulletin*, the Appellate Body stated that the issue was "whether Section II.A.3 goes further and instructs USDOC to attach decisive or preponderant weight to these two factors in every case." [281] Argentina's Exhibits ARG-63 and ARG-64 demonstrate that, in fact, the Department gives "decisive and preponderant" weight to these two factors in every single case in which the domestic industry participated. Indeed, the US authorities' failure to satisfy Article 11.3 obligations can be seen plainly in this case, and in all the other cases in which the US industry has expressed an interest. There is no substantive analysis with respect to the likelihood of dumping determination – let alone a "rigorous examination." There is no positive evidence from which to infer likely behaviour. In the end, there is neither the "review" nor "determination" required by Article 11.3. As the Appellate Body explained, "[p]rovisions that create 'irrebuttable' presumptions, or 'predetermine' a particular result, run the risk of being found inconsistent with this type of obligation."[282]

274. The 1.36 per cent margin from the original investigation – calculated on the basis of zeroing – and the decline in import volumes are an insufficient basis for the Department's determination that dumping would be likely to continue. The Appellate Body spoke directly to reliance on zeroing and explained that such reliance would "taint" the likelihood determination under Article 11.3, and could not constitute the proper foundation for the likelihood determination.[283]

275. With respect to the likelihood of injury determination, the Commission fails to apply the correct legal standard – a "likely" standard. The Commission's determination in this case rests on the notion that, because there was a finding of injury in the original investigation, so it must be that injury is "likely" to continue or recur in the event of termination. This case is a clear example of the varied uses of "possible" scenarios to support a finding of "likely" injury.

276. In its closing statement at the First Substantive Meeting, the United States warned of the dangers of creating additional obligations through dispute settlement. Such an approach, the United States admonished, would violate the rule in DSU Article 3.2 that panel rulings cannot add to the Members' obligations. Argentina does not disagree, but notes that the United States focuses on only half of the story. The very same sentence referred to by the United States also stands for the proposition that "rulings of the DSB cannot . . . diminish the rights . . . provided in the covered

[278] Appellate Body Report, *Sunset Review of Steel from Japan*, para. 104.
[279] *Id.* at para. 113.
[280] *Id.*
[281] *Id.* at para. 176.
[282] *Id.* at para. 191.
[283] *Id.* at para. 130.

agreements."[284] The Appellate Body has contributed importantly to clarifying the meaning of the rights and obligations comprised in Article 11.3. Argentina submits that it had a right to termination of this measure and that the United States could continue the measure only by making findings consistent with Articles 11.3, 2, 3, 6, and 12 of the Anti-Dumping Agreement. This, the United States did not do, and as a result, the DSB must restore the right conferred to Argentina under Article 11.3, which is termination of the measure.

[284] *See* Argentina's First Submission, para. 8.

ANNEX C-2

SECOND WRITTEN SUBMISSION OF THE UNITED STATES

8 January 2004

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I. INTRODUCTION

1. Given the comprehensive nature of the Panel's questions regarding the Department of Commerce's ("Commerce") sunset review procedures, the United States will use this submission to place Argentina's claims regarding those procedures (1) within the perspective of the WTO agreements regarding sunset reviews; (2) in the context in which sunset reviews are conducted in the United States; (3) in terms of the actual sunset review procedures, in particular, the decision whether to expedite; and (4) in terms of this particular sunset review. In so doing, the United States will reconfirm that, no matter how they are analyzed, Argentina's as such and as applied claims regarding those procedures are baseless.

2. Because these claims are baseless, Argentina has sought to colour the proceedings by alleging a series of "irrefutable presumptions" in US sunset review law. As this submission will make clear, Commerce provides ample opportunity for parties to "refute" evidence on the record and findings made in the course of the sunset review. A party's failure to attempt to refute a finding does not make that finding irrefutable; it simply means the party has not availed itself of the opportunity to present facts and arguments. Article 11.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement") does not prescribe specific methodologies with respect to sunset reviews; instead, it requires Members to afford interested parties the full opportunity for a defence of their interests.[1] US sunset review law complies with this requirement.

3. The general tenor of Argentina's position with respect to Commerce's determination in this particular sunset review is that the review was conducted unfairly because Siderca was the "only exporter" of OCTG during the original investigation, yet Commerce found that Siderca did not meet the 50 per cent threshold normally used to assess whether to conduct an expedited or full sunset review.[2] Notwithstanding the significant fact that Siderca ignored more than one opportunity to suggest a different outcome, the United States notes that there is a second Argentine exporter of OCTG to the United States; this exporter did not respond to the notice of initiation.[3]

4. The United States is concerned that if the Panel adopts Argentina's arguments, it will create an incentive for respondent interested parties to participate minimally, if at all, in sunset review proceedings. According to Argentina's arguments, respondent interested parties should be permitted to refuse to participate fully in a sunset review, and then later have a WTO panel find that the results of that review are not consistent with WTO obligations. The United States does not believe that the Anti-Dumping Agreement permits respondent interested parties to bootstrap investigating authorities into revoking orders by participating minimally, if at all, in the proceedings. Indeed, the Appellate Body in *Japan Sunset* has made specific reference to the "prominent role" of interested parties in sunset reviews because they often have the "best evidence" of their likely future pricing behaviour.[4]

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[1] *See e.g., United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, Report of the Appellate Body, circulated 15 December 2003 ("*Japan Sunset"),* para. 123.

[2] First Written Submission of Argentina, para. 151.

[3] The United States notes the care with which Siderca described itself in its substantive response to the initiation of the sunset proceedings: "Siderca is the only producer of seamless OCTG in Argentina. To Siderca's knowledge, there is no other producer of OCTG in Argentina." Substantive Response of Siderca to the Department's Initiation of Sunset Review of the AD Order on OCTG from Argentina (2 August 2000) at 3 (emphasis added). (Exhibit ARG-57.) Siderca carefully qualified the latter statement, and only the latter statement. The United States understands Acindar, the other Argentine producer, to manufacture welded OCTG, rather than seamless OCTG.

[4] *Japan Sunset*, para. 199.

5. The United States believes that the facts and argument presented in this proceeding confirm that Commerce makes appropriate procedures available to respondent interested parties so that they may defend their interests in sunset review proceedings. This submission will provide the following in support thereof: A review of the Appellate Body's pertinent findings in *Japan Sunset*; an overview of US law governing Commerce's conduct of sunset reviews; a demonstration that the law is consistent with the Anti-Dumping Agreement; and a discussion of respondent interested parties' participation in the part of the review relating to the determination of likelihood of dumping.

6. This submission also addresses the determination by the US International Trade Commission ("ITC") that revocation of the duties would be likely to lead to continuation or recurrence of injury. Specifically, the submission responds to arguments made by Argentina in its oral statement at the Panel's first meeting and to certain points raised by third parties in their written submission and oral statements regarding the ITC's injury determination.

II. REVIEW OF KEY APPELLATE BODY FINDINGS IN *JAPAN SUNSET*

7. In *Japan Sunset*, various aspects of the US sunset review regime were challenged, requiring the Appellate Body to examine the nature of the obligations arising from Article 11.3 of the Anti-Dumping Agreement. By closely reviewing the language of Article 11.3 and comparing it with language in other provisions of the Agreement, including Article 11.2, the Appellate Body concluded that "Article 11.3 does not prescribe any particular methodology to be used by investigating authorities in making a likelihood determination in a sunset review;"[5] "WTO Members are free to structure their anti-dumping systems as they chose, provided that those systems do not conflict with the provisions of the Anti-Dumping Agreement."[6] Furthermore:

> Article 11.3 does not expressly state that investigating authorities must determine that the expiry of the duty would be likely to lead to dumping *by each known exporter or producer concerned.* In fact, Article 11.3 contains no express reference to individual exporters, producers, or interested parties . . . . We also note that Article 11.3 does not contain the word 'margins' . . . .[7]

The Appellate Body thus confirmed that a sunset review is fundamentally different from both an original investigation and an administrative review.

8. Based on this assessment, the Appellate Body also concluded that in a sunset review there is no "obligation for investigating authorities to make their likelihood determination on a company-specific basis."[8] The Appellate Body therefore upheld the right of the United States to conduct sunset reviews on an order-wide basis.

9. The Appellate Body further confirmed the significant role that respondent interested parties play in sunset review proceedings, an issue that is at the heart of this particular dispute. Indeed,

> the Anti-Dumping Agreement assigns a prominent role to interested parties as well and contemplates that they will be a primary source of information in all proceedings conducted under the Agreement. Company-specific data relevant to a likelihood determination under Article 11.3 can often only be provided only by the companies themselves. For example, as the United States points out, it is the exporters or

[5] *Japan Sunset*, para. 149.
[6] *Japan Sunset*, para. 158.
[7] *Japan Sunset*, para. 149.
[8] *Japan Sunset*, para. 155.

> producers themselves who often possess the best evidence of their likely future pricing behaviour – a key element in the likelihood of future dumping.[9]

10. Similarly, the Appellate Body recognized the importance of the administrative review process, which provides parties with the opportunity to request revocation of an anti-dumping duty order with respect to a particular exporter or producer.[10]

11. Because of a direct reference in Article 11.4, the Appellate Body concluded that the provisions of Article 6 regarding evidence and procedure apply to sunset review proceedings, a position with which the United States has agreed. Accordingly, "Article 6 requires all interested parties to have a full opportunity to defend their interests."[11] Bearing in mind that it is Argentina's burden to prove that the US sunset review proceedings do not comply with Article 6, the United States will nevertheless demonstrate that its sunset review proceedings provide a full opportunity for interested parties to defend their interests.

III. OVERVIEW OF COMMERCE'S EXPEDITED SUNSET PROCEDURES

12. Prior to delving into the specific sunset review procedures of the United States, it bears repeating that a sunset review occurs only after affirmative determinations of dumping and injury have been made. Moreover, individual companies are provided the opportunity to have orders revoked in part, i.e., with respect to that individual company, prior to the initiation of a sunset proceeding.

A. THE AVAILABILITY OF REVOCATION PROCEDURES PRIOR TO INITIATION OF A SUNSET REVIEW

13. Specifically, revocation for a particular company from an anti-dumping duty order is possible by two methods under US law (revocations of anti-dumping duty orders, in part, are generally termed "company-specific" revocations in US parlance). The first and most common method is for a producer or exporter to seek revocation pursuant to section 351.222(b)(2) of Commerce's Regulations, i.e., after three annual administrative reviews wherein Commerce has calculated, in each review, a dumping margin of zero or *de minimis* for the producer or exporter seeking revocation.

14. The second method for a producer or exporter seeking revocation is the "changed circumstances" review.[12] Under this method, a producer or exporter may request a review at any time after providing information that changed circumstances warrant a review for the purposes of revocation of an anti-dumping duty order.

15. Thus, a producer or exporter may seek revocation for itself from an anti-dumping duty order prior to the initiation of a sunset review. The Appellate Body in *Japan Sunset* recognized the importance of the availability of these procedures in ensuring that an anti-dumping duty remain in force only so long as and to the extent necessary to counteract dumping which is causing injury.[13] In this context, the United States conducts its sunset reviews on an order-wide, rather than company-specific, basis.

B. THE DECISION TO EXPEDITE

16. With regard to sunset reviews themselves, Commerce will conduct either an expedited or a full review. The decision whether to conduct an expedited or full sunset review is based on a two-part

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[9] *Japan Sunset*, para. 199.
[10] *Japan Sunset*, para. 158.
[11] *Japan Sunset*, para. 152.
[12] Section 751(b) of the Tariff Act of 1930 (Exhibit ARG-1), codified at 19 C.F.R. § 351.216.
[13] *Japan Sunset*, para. 199.

procedure: (1) Solicitation and evaluation of individual substantive responses (including waivers); and (2) Assessment of the adequacy of the aggregate response.

1. Solicitation and evaluation of substantive responses

17. In its notice of initiation, Commerce solicits substantive responses from respondent interested parties. These responses are due not later than 30 days after publication of the notice of initiation.[14]

18. Commerce examines each substantive response submitted by a domestic or respondent interested party to assess whether it is complete, i.e., whether it contains the information specified in the regulations.[15] A "complete" substantive response normally must contain the limited information required by section 351(d)(3)(ii) of the *Sunset Regulations*.

19. In terms of responses, section 751(c)(4)(A) of the Tariff Act of 1930 ("the Act") specifically provides a respondent interested party with an opportunity to affirmatively "waive" participation in the Commerce proceeding thereby affording the respondent interested party the opportunity to concentrate its resources on addressing the ITC's determination of likelihood of the continuation or recurrence of injury.[16] In addition, section 351.218(d)(2)(iii) of the *Sunset Regulations* provides that Commerce will consider a failure by a respondent interested party to submit a complete substantive response, whether based on no submission or submission of an incomplete response, as a waiver of that party's participation in Commerce's sunset review.[17]

20. Consequently, each Commerce determination concerning the completeness of the substantive response filed by the respondent interested party would be based on one of three sets of circumstances: (1) no submission of a substantive response based on an affirmative "waiver" statement by the respondent interested party that it did not wish to participate in Commerce's sunset proceeding; (2) a finding that the respondent interested party is "deemed" to have waived its right to participate based on the submission of an incomplete substantive response or the failure of the party to submit any substantive response; and (3) a finding that the respondent interested party submitted a complete substantive response.

21. In the first two circumstances, Commerce would make a finding that the failure to submit any substantive response or to submit an incomplete substantive response constitutes an incomplete substantive response from the particular respondent interested party who failed to submit a substantive response or who submitted an incomplete substantive response. When Commerce determines that a respondent interested party has waived its right to participate, Commerce is directed by section 751(c)(4)(B) of the Act to make an affirmative finding of likelihood of continuation or recurrence of dumping for that respondent interested party.[18] This is <u>not</u> a determination of likelihood for the entire order.

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[14] 19 C.F.R. 351.218(d)(3)(i) (Exhibit ARG-3).

[15] *See* 19 C.F.R. 351.218(e) (Exhibit ARG-3) and Preamble, 63 Fed. Reg. at 13518 (Exhibit US-3).

[16] *See* 19 U.S.C. 1677(c)(4)(A) & (B); SAA at 880 (Exhibit US-11); and 19 C.F.R. 351.218(d)(2)(i) & (ii) (requirements for notice of waiver) (Exhibit ARG-3).

[17] 19 C.F.R. 351.218(d)(2)(iii) ("deemed waiver") (Exhibit ARG-3).

[18] See section 751(c)(4)(B) of the Act, providing that the affirmative likelihood determination resulting from the waiver described in section 751(c)(4)(A) only applies "with respect to that party." 19 U.S.C. § 1675(c)(4)(B) (Exhibit ARG-1); see also, SAA at 881 ("If Commerce receives such a waiver, Commerce will conclude that revocation or termination would be likely to lead to continuation or recurrence of dumping or countervailable subsidies with respect to that submitter.") (emphasis added) (Exhibit US-11).

2. Assessment of adequacy

22. Once Commerce has determined which respondent interested parties have filed complete substantive responses, Commerce will then normally evaluate whether the aggregate response to the notice of initiation, by the respondent interested parties who filed complete substantive responses, is "adequate."[19] The so-called 50 per cent threshold, provided in section 351.218(e)(1)(ii)(A) of the *Sunset Regulations*, is normally used to make this aggregate adequacy determination.[20]

23. In order to determine the adequacy of the aggregate response to the notice of initiation, Commerce sums, for the five years preceding the sunset review, the export volumes of the subject merchandise of all the respondent interested parties who filed complete substantive responses to the notice of initiation. If the export volumes represented by the respondent interested parties, in the aggregate, are more than 50 per cent of the total exports of the subject merchandise during the five year period, Commerce will normally find that the aggregate response to the notice of initiation is "adequate" and will conduct a full sunset review. If the export volumes represented by the respondent interested parties, in the aggregate, are not more than 50 per cent of the total exports of the subject merchandise during the five year period, Commerce will normally find that the aggregate response to the notice of initiation is "inadequate" and will conduct an expedited sunset review (although Commerce has made exceptions, as discussed in the US response to question 1 of the Panel).

C. RECORD EVIDENCE IN AN EXPEDITED SUNSET REVIEW

24. Section 751(c)(3)(B) of the Act states that where interested parties collectively provide an inadequate response to a notice of initiation, Commerce may issue, without further investigation, a final determination based on the facts available.[21] It should be noted that in this context, the facts available include information provided in complete and incomplete substantive responses, as well as prior determinations.[22] Contrary to Argentina's assertion, facts available in this context is <u>not</u> a "euphemism for adverse inferences"[23] under section 351.308(f), applicable to sunset reviews. Interested parties who submitted complete substantive responses are afforded an opportunity to submit comments on Commerce's adequacy determination pursuant to section 351.309(e) of the *Sunset Regulations*. After consideration of these interested party comments on the adequacy determination, if Commerce still finds that the aggregate response to the notice of initiation is not more than 50 per cent of the total imports, then Commerce normally will conduct an expedited sunset

[19] *See Sunset Policy Bulletin*, 63 Fed. Reg. at 18872 (Exhibit ARG-35). An "adequate" number of substantive responses normally is required, because Commerce makes its likelihood determination on an order-wide basis.

[20] Section 751(c)(3) of the Act leaves to Commerce's discretion the choice of methodology for determining when the response from interested parties to the notice of initiation is "adequate" for the purposes of conducting a full sunset review. See SAA at 880 (in many cases, some but not all parties will respond; nevertheless, where parties demonstrate a "sufficient willingness to participate," the agency will conduct a full sunset review) (Exhibit US-11). Consequently, Commerce promulgated section 351.218(e)(1)(ii) of the *Sunset Regulations* to codify the 50 per cent threshold test and to give effect to section 751(c)(3) of the Act. *See* Preamble, 63 Fed. Reg. at 13518. (Exhibit US-3).

[21] The SAA in discussing section 751(c)(3) states that this provision "is intended to eliminate needless reviews. This section will promote administrative efficiency and ease the burden on agencies by eliminating needless reviews while meeting the requirements of the [Anti-Dumping and SCM] Agreements. If parties provide no or inadequate information in response to a notice of initiation, it is reasonable to conclude that they would not provide adequate information if the agencies conducted a full-fledged review. However, where there is sufficient willingness to participate and adequate indication that parties will submit information requested throughout the proceeding, the agencies will conduct a full review." SAA, at 880 (Exhibit US-11).

[22] Section 351.308(f)(2)(Exhibit US-27).

[23] Argentina's Oral Statement, para. 7.

review and base the final sunset determination on the facts available in accordance with section 751(c)(3)(B) of the Act.[24]

25. In making the order-wide final sunset determination in an expedited sunset review, Commerce will rely on all information on the administrative record of the sunset proceeding, including information in the substantive responses and rebuttal responses of the domestic interested parties, prior agency determinations, as well as the information submitted by respondent interested parties in their substantive and rebuttal responses.[25] Commerce normally will not accept additional submissions from any interested party, whether domestic or respondent, after that interested party's substantive submission is found to be incomplete. Nevertheless, any information submitted by an interested party in its substantive response is considered by Commerce when Commerce makes the final determination in an expedited sunset review, even in a case where the particular substantive response was found to be incomplete.[26]

26. At the conclusion of the sunset review, Commerce publishes the *Final Sunset Determination*, announcing the final likelihood determination, and issues a *Decision Memorandum* explaining the issues decided in the sunset review (including the likelihood determination), the methodologies employed, and factual bases supporting the final determination.

IV. ARGENTINA HAS NOT MET ITS BURDEN OF DEMONSTRATING THAT COMMERCE'S SUNSET REVIEW PROCEDURES ARE INCONSISTENT WITH ARTICLE 11.3 AND ARTICLE 6

27. WTO Members are free to structure their sunset reviews as they choose, provided the reviews do not conflict with the Anti-Dumping Agreement.[27] Argentina bears the burden of proving that Commerce's sunset review procedures conflict with the Anti-Dumping Agreement.

28. In this dispute, Argentina claims that Commerce's expedited "waiver" procedures violate Article 11.3 because a "waiver" mandates a finding of dumping through the application of "facts available."[28] Not only does Article 11.3 state nothing about findings and facts available, but Argentina's claim is essentially a simple mischaracterization of the procedures themselves. In addition, Argentina has not demonstrated that Commerce's expedited procedures mandate a finding of likely dumping simply because section 751(c)(3)(B) of the Act and section 351.308 of the *Sunset Regulations* provide that Commerce normally may rely on the "facts available" when making the final sunset determination in cases where the respondent interested parties do not demonstrate sufficient interest in participating in the sunset review. Section 351.308(f) clearly defines "the facts available" as prior agency determinations, the information submitted by the interested parties (notwithstanding whether their submissions were "complete"), and any other information on the administrative record. As demonstrated above, there is no negative inference to be associated with the use of the term "facts available" in this context. It simply defines all the information on the record and provides that the

[24] Section 351.218(e)(1)(ii)(C)(2) of the *Sunset Regulations* provides that Commerce may base its final sunset determination on "the facts available" without further investigation in a case where the aggregate respondent interested parties is inadequate or Commerce may exercise its discretion and conduct further investigation. The decision whether to conduct further investigation in an expedited sunset review is left to Commerce's discretion. *See* SAA at 879-880 (Exhibit US-11).

[25] *See* section 351.308(f)(1) of the *Sunset Regulations* (definition of "the facts available") (Exhibit US-27). If a respondent interested party submitted a statement of waiver or was deemed to have waived due to its failure to submit any substantive response to the notice of initiation, then, obviously, there would be no information from that respondent interested party for Commerce to consider in making the final sunset determination.

[26] *See* section 351.308(f)(2) of the *Sunset Regulations* (Exhibit US-27).

[27] *Japan Sunset*, para. 158.

[28] Argentina's Oral Statement, para. 47.

final sunset determination in an expedited review will be made on the basis of all the information on the administrative record of that review. Section 751(c)(3)(B) of the Act and section 351.218 of the *Sunset Regulations* require that the sunset determination be made using all the information on the administrative record.

29. Argentina has also claimed that the expedited sunset procedures violate the obligations in Articles 6.1 and 6.2 of the Anti-Dumping Agreement. In this regard, Argentina has made no demonstration that the expedited procedures, as such, preclude interested parties from submitting evidence or having a full opportunity to defend their interests.[29] Instead, as illustrated above, the expedited sunset procedures provide interested parties with the opportunity to submit a substantive response containing any information the party wishes Commerce to consider, to submit a rebuttal substantive response, to submit comments on Commerce's adequacy determination, and to request extension of deadlines for the submission of factual information. Consequently, Argentina has not shown how the expedited sunset procedures preclude any interested party from having a full opportunity to defend its interests. The United States notes that Members are merely required to offer respondent interested parties the opportunity to defend their interests; the United States is not required to ensure that respondent interested parties take advantage of that opportunity.

30. Simply put, Argentina has not met its burden of demonstrating how the expedited sunset procedures, as such, preclude WTO-consistent action or mandate WTO-inconsistent action.

V. ARGENTINE RESPONDENT INTERESTED PARTIES DID NOT TAKE ADVANTAGE OF THE FULL OPPORTUNITY TO DEFEND THEIR INTERESTS

31. Because Article 11.3 does not prescribe detailed criteria for conducting sunset reviews, but rather sets forth minimal obligations with respect to evidence and procedure, the question in this dispute essentially is whether Argentina has demonstrated that Commerce did not provide respondent interested parties the opportunity to participate in the review and present evidence. A review of the proceedings will reveal that the respondent interested parties simply failed to take advantage of the opportunities available to them.

A. REVIEW OF RESPONDENT INTERESTED PARTIES' OPPORTUNITIES TO SUBMIT FACT AND ARGUMENT IN THESE PROCEEDINGS

32. On 3 July 2000, Commerce published its notice of initiation of the sunset review of the anti-dumping duty order on certain OCTG from Argentina.[30] In the notice, Commerce, as is its normal practice, highlighted the deadline for filing a substantive response in the sunset review and the information that was required to be contained in the response.[31] Commerce also explicitly referred parties to the applicable regulation concerning requests for an extension of filing deadlines.[32] On 2 August 2000, a domestic interested party filed a response to the notice of initiation providing, *inter alia*, statistics indicating imports of Argentine OCTG during the period of review. That same day, Siderca filed a substantive response in which it stated that it had "no share of total exports of subject

[29] *See, e.g.*, Argentina's Oral Statement, para. 48.

[30] *Initiation of Five-Year ("Sunset") Reviews of Anti-Dumping and Countervailing Duty Orders or Investigations of Oil Country Tubular Goods* ("*Sunset Initiation*"), 65 FR 41053, 41054 (3 July 2000) (Exhibit ARG-44).

[31] *Sunset Initiation*. The information requirements concerning substantive responses to notices of initiation of sunset reviews are set forth at 19 C.F.R. 351.218(d)(3) (Exhibit ARG-3).

[32] *Sunset Initiation*. 19 C.F.R. 351.302(c) provides that a party may request an extension of a specific time limit. 19 C.F.R. 351.302(b) provides that unless expressly precluded by statute, Commerce may, for good cause, extend any time limit established by its regulations. The US anti-dumping duty statute does not contain deadlines for submission of information in a sunset review (Exhibit US-3).

merchandise" during the period of review.[33] Siderca did not file a rebuttal submission, as it was entitled to do.[34] Therefore, Siderca permitted the record to indicate that there were imports of subject merchandise, for which cash deposits were paid pursuant to the anti-dumping order, and that Siderca, the lone respondent interested party that filed a submission, did not account for 50 per cent of those imports. Siderca did so even though the regulations clearly provide that under such circumstances, Commerce will "normally" expedite the review.

33. Siderca's failure to seize its opportunities continued. On 22 August 2000, Commerce issued an Adequacy Memorandum, in which it recited the facts received thus far in the proceeding (i.e., imports of subject merchandise together with an admission by the sole respondent interested party to file a submission that it was not responsible for any of the imports) and concluded that Siderca did not account for 50 per cent of imports of the subject merchandise. Siderca did not file a response to the Adequacy Memorandum, as it was entitled to do pursuant to section 351.309(e). Not having received a response to its Adequacy Memorandum, Commerce then proceeded with an expedited review, as contemplated by the regulations to which Siderca was privy.

34. The facts on the record – as Siderca allowed them to stand – therefore supported a finding of dumping during the life of the order. Commerce found that dumping duties were levied and collected, at the dumping margins assigned in the original investigation, against Argentine OCTG imported into the United States during the five-year period preceding the sunset review. Commerce also examined import data from several sources, including the Census Bureau Statistics and the ITC Trade Database, and found that US imports of Argentine OCTG had declined substantially immediately after the order was imposed and remained at depressed levels for the entire five-year period prior to the sunset review. Based on these findings and absent any evidence or argument from Siderca to the contrary, Commerce concluded that dumping by Argentine exporters was likely to continue or recur in the event of revocation of the order.[35]

35. In this regard, Argentina's allegation that its "treatment in the sunset review depended entirely on the assumption that the US statistics were correct, that there were other exports from Argentina, and that these alleged other exports were relevant enough to trigger a waiver and/or expedited review"[36] is wrong. Argentina's "treatment in the sunset review" is the direct result of the meagre participation of its foreign exporters. Moreover, the United States notes that as the government of the country in which subject merchandise was produced, Argentina was an interested party and could have participated in the proceedings, had it chosen to do so.[37]

B. ARGENTINA'S CLAIMS REGARDING THE ANTI-DUMPING AGREEMENT

36. Argentina claims that Commerce's sunset determination in OCTG from Argentina is not consistent with Article 11.3 because a sufficient factual basis does not exist to support the final affirmative determination.[38] As noted above, Commerce created a factual record, including substantive responses from interested parties and prior proceedings.

37. Argentina relies heavily on the argument that the 1.36 per cent margin from the original investigation is flawed because it was calculated in 1995 (it is "old") and the margin was calculated using an allegedly WTO-inconsistent methodology. However, the Appellate Body in *Japan Sunset* has concluded that Members are not obligated to calculate "new" dumping margins.[39] They are

[33] Page 4, (Exhibit ARG-57).
[34] 19 C.F.R. 351.218(d)(4) (Exhibit ARG-3).
[35] *Decision Memorandum* at 4-5 (Exhibit ARG-51).
[36] Argentina's Oral Statement, para. 43.
[37] Section 771(9) of the Tariff Act of 1930.
[38] Argentina's Oral Statement, paras. 69-70.
[39] *Japan Sunset*, para. 149.

merely obligated to provide respondent interested parties opportunities to offer evidence in support of negative likelihood determination. Therefore, the magnitude of dumping is not pertinent to making a determination with regard to likelihood of dumping.[40]

38. Argentina also maintains that Commerce violated Article 6 because the expedited review procedures deprived Siderca of the opportunities for evidence submission and the defence of its rights under Article 6.1 and Article 6.2 of the Anti-Dumping Agreement. Argentina alleges, in particular, that the nature of Commerce's expedited sunset review in OCTG from Argentina denied Siderca a meaningful opportunity to submit evidence and impermissibly limited its ability to submit additional argument or factual information in defence of its interests.[41] As discussed above, Siderca had more than one meaningful opportunity to defend its interests. In its substantive submission, Siderca could have included any information to indicate to Commerce that there were no aggregate consumption imports of OCTG during the period of review, or that Commerce should not use the 50 per cent threshold in this particular case. Instead, Siderca simply focused on the magnitude of the dumping margin. Similarly, Siderca could have filed a rebuttal response to dispute or explain the statistics provided by the domestic interested party, which showed imports of subject merchandise; at that point, Siderca knew that, based on the record evidence, it would not satisfy the 50 per cent threshold normally used, based on Siderca's own lack of shipments. Further, Siderca failed to response to the Adequacy Memorandum, which it was entitled to do. Again, the fact that respondent interested parties (again recalling that there are two Argentine exporters of OCTG) failed to take advantage of their opportunities does not mean that the United States failed to provide them.

39. In sum, there is no basis for Argentina's claim that Commerce's expedited sunset review procedures impermissibly limited an interested party's ability to present its case or defend its interests, and Argentina has not demonstrated that Siderca's ability to present its case or submit evidence was impaired in any way in the instant sunset review.

VI. ARGENTINA HAS NOT DEMONSTRATED THAT THE ITC'S SUNSET REVIEW PROCEDURES ARE INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

40. Argentina bears the burden of proving that the ITC's sunset review determination is inconsistent with the Anti-Dumping Agreement. Argentina has not met this burden.

41. Indeed, Argentina advanced arguments at the Panel meeting that are simply not accurate. These concern in particular the "likely" standard of Article 11.3, cumulation**,** and whether the ITC properly established the relevant facts and assessed those facts objectively. Each argument will be addressed in turn.

A. THE "LIKELY" STANDARD OF ARTICLE 11.3

42. Argentina erroneously argues that decisions by US courts in other cases are relevant to this dispute. They are not. But even if they were, these US court decisions are not ultimately helpful to Argentina's argument that "likely" entails a high degree of probability. In the one case that has completed the first stage of judicial review, the court ultimately explained that it did not interpret "'likely' to imply any degree of 'certainty'."[42]

[40] It should be noted that Argentina's challenge in this dispute is to Commerce's *reporting* of the 1.36 per cent margin to the ITC for its use in making the determination of the likelihood of continuation or recurrence of injury. *See* Argentina First Written Submission, paras. 189 & 193.

[41] Argentina's First Written Submission, paras. 121-122.

[42] *Usinor Industeel v. United States*, Slip Op. 02-152 at 6 (CIT 20 December 2002) (Exhibit US-18).

B. ARTICLE 3 OF THE ANTI-DUMPING AGREEMENT DOES NOT APPLY TO SUNSET REVIEWS

43. Argentina argues that because the term "injury" has the same meaning in Article 11.1 as in Article 3, and because "the overarching principles of Article 11.1 provide the immediate context of Article 11.3," the term "injury" must have the same meaning in Article 11.3 as it does in Article 3.[43] The United States is not of the view that "injury" has the same meaning in Articles 3 and 11.1, on the one hand, and in Article 11.3, on the other. The analysis required by Articles 3 and 11.1, and by Article 11.3 is fundamentally different. Articles 3 and 11.1 speak of existing "injury." Article 11.3 on the other hand speaks of the likelihood of the "continuation or recurrence of . . . injury." These provisions have a different focus and involve entirely different determinations, as the Appellate Body has recognized on more than one occasion.[44]

44. Argentina questions whether the injury referred to in Article 11.3 can be any different than that referred to in Article 11.1.[45] The United States is of the view that Article 11.1 is best viewed as a statement of general principle as to the duration of anti-dumping duty measures, but not as providing specific content to Members' obligations under Article 11.3 with respect to sunset reviews.[46] This becomes clear if one considers the consequences of a literal interpretation of the two provisions. Article 11.1 would appear to require the revocation of an anti-dumping duty order as soon as it is no longer causing injury ("[a]n anti-dumping duty shall remain in force *only as long as* . . . necessary to counteract dumping which is causing injury"). Article 11.3 (and Article 11.2 for that matter), however, contemplates that an anti-dumping measure may be continued even if there is no current injury, if it is likely that injury will recur. Put another way, if Article 11.1 is read as providing specific content to Members' obligations under Article 11.3, it would make a nullity of that part of Article 11.3 that permits the continuation of a duty when injury is likely to recur. Such an interpretation flies in the face of the fundamental principle of treaty interpretation that treaties should not be interpreted in such a way as to make any of their provisions inutile.[47]

45. It is significant that neither Argentina nor any of the third parties have responded to the United States' observation that applying the definition of "injury" in footnote 9 to the determination of "recurrence of injury" in Article 11.3 would lead to absurd results. It would mean that the inquiry in a sunset review would become whether expiry of the duty would be likely to lead to continuation or recurrence of material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry. Continuation or recurrence of a threat of material injury would involve a very attenuated notion of future injury and would set an extremely low threshold in sunset reviews for continuing anti-dumping duty measures. The United States is of the view that this is not what was intended by Members when Article 11.3 was negotiated. Moreover, it is hard to see how many of the obligations of Article 3 would be relevant to an inquiry of whether expiry of the duty would be likely to lead to continuation or recurrence of material retardation of the establishment of an industry. The United States can see no basis for selectively applying parts of the definition of "injury" in footnote 9 to sunset reviews, but not applying others. Either the definition applies to Article 11.3 in its entirety or it does not apply at all.

46. The fallacy of Argentina's position that Article 3 applies to sunset determinations is apparent by considering an analogy (albeit an imperfect one). Suppose that there are two distinct inquiries: (1) whether at least one meter of snow is lying on the ground; and (2) whether it is likely that at least one meter of snow will fall within a month. Although both of these inquiries refer to "at least one

[43] Argentina's Oral Statement, paras. 98 and 101.

[44] *US – German Steel*, AB Report, para. 87, *US - Japan Sunset*, AB Report, para. 106

[45] Argentina's Oral Statement, para. 98.

[46] The text of Article 11.1 existed in its present form in the Tokyo Round Anti-Dumping Code (as Article 9.1 in that code), prior to the adoption of the provision for sunset reviews.

[47] *See United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Report of the Appellate Body adopted 20 May 1996, page 23 (footnote omitted).

meter of snow" (in the same way that footnote 9 and Article 11.3 both use the word "injury"), the steps that would be appropriate to pursue each inquiry are quite different. The first inquiry might be pursued by measuring the depth of the snow at certain spots; the second inquiry might be pursued by certain meteorological analysis. However, it would be inappropriate to pursue the second inquiry using methods appropriate for the first (*i.e.*, by measuring the amount of snow currently on the ground).

47. Argentina misconstrues the Appellate Body's report in *Steel from Germany*, when it asserts that "[t]he Appellate Body used the SCM equivalent of [footnote 9] as an illustration of how the injury concept applies throughout the Agreement, including in sunset reviews."[48] In the section of the *Steel from Germany* report referred to by Argentina, the Appellate Body was merely listing "provisions of the SCM Agreement that apply independently of cross-references in that they contain explicit statements of their scope of application." Contrary to Argentina's suggestion, the Appellate Body made no finding that Article 15, note 45 of the SCM Agreement applies in sunset reviews. Argentina's reliance on the panel report in *DRAMs from Korea* also is unpersuasive.[49] The panel in that dispute was not considering the applicability of Article 3 to reviews under Article 11.2.

48. We next address arguments contained in the submissions and oral statements of third parties. The EC maintains that the reference in Article 3.1 to "a determination of injury for purposes of Article VI of GATT 1994" lends support to the conclusion that Article 3 obligations apply to sunset reviews.[50] This argument is unpersuasive. Article VI of GATT 1994 does not mention sunset reviews, and a sunset review does not entail a "determination of injury."

49. The EC also argues that Article 3 must be applicable to sunset reviews because otherwise members would have "completely unfettered discretion" in determining the likelihood of continuation or recurrence or injury.[51] The EC's concerns are unfounded. First, sunset reviews are subject to the provisions regarding evidence and procedure in Article 6 (by virtue of the explicit provision to this effect in Article 11.4). Furthermore, sunset reviews, if subject to dispute settlement, must satisfy the provisions of Article 17.6(i) of the Anti-Dumping Agreement, *i.e.*, the establishment of the facts must be found to have been "proper" and the evaluation of those facts to have been "unbiased and objective." Finally, as the Appellate Body has explained, "[t]he words 'review' and 'determine' in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of the process of reconsideration and examination."[52]

50. Japan's discussion of how selected provisions of Article 3 supposedly apply to sunset reviews in fact demonstrates just the opposite. Japan notes that Article 3.1 requires that authorities base their injury determination on an objective examination of "the volume of the dumped imports" and "the effect of dumped imports on prices."[53] But in a sunset review there may be no current imports, or they may not currently be dumped. Japan then explains that Article 3.2 sets forth further rules on how authorities shall consider the volume of dumped imports and price effects.[54] Again, these rules are inapplicable in sunset reviews because of the possible absence of dumped imports. Japan goes on to characterize Article 3.4 as providing the "detailed requirements for the examination of the impact of dumped imports under Article 3.1, and, therefore, for a determination of injury."[55] But, as explained

[48] Argentina's Oral Statement, para.96.
[49] Argentina's Oral Statement, para. 97.
[50] Third Participant's Submission by the European Communities, paras. 124-125.
[51] Third Participant's Submission by the European Communities, para. 126.
[52] *Japan Sunset*, para. 111.
[53] Third Party Submission of Japan, para. 11.
[54] Third Party Submission of Japan, para. 11.
[55] Third Party Submission of Japan, para. 12.

in the United States' first submission, there are also numerous textual indications in Article 3.4 that it is not applicable to sunset reviews.[56]

51. Next, Japan asserts that the causation and non-attribution requirements of Article 3.5 apply to sunset reviews because of the use of the phrase "within the meaning of this Agreement" in that article.[57] The simple answer to this is that a determination of the likelihood of continuation or recurrence of injury in a sunset review is not a determination of injury. As explained in the United States' first written submission, the obligations under Article 3.5 are incompatible with the nature of sunset reviews.[58]

52. In connection with its argument regarding the applicability of Article 3.5 to sunset reviews, Japan points to the likely margin of dumping for OCTG from Argentina, 1.36 per cent.[59] The United States notes that this is not the only margin that is relevant to these sunset reviews. The likely dumping margins applicable to the other four countries considered cumulatively with Argentina in these reviews were: Italy – 49.78 per cent, Japan – 44.20 per cent, Korea – 12.17 per cent, and Mexico – 21.70 per cent.[60]

53. Japan argues that the ITC failed to observe the non-attribution requirement of Article 3.5 to the extent that it did not separate and distinguish the effects of dumping on the domestic industry from the effects of several other specific factors.[61] As explained in the United States' first submission (paras. 348-354), the non-attribution analysis of Article 3.5 cannot be conducted in the context of sunset reviews. Japan also misrepresents the ITC Report when it states that: "[t]he ITC also noted that '[o]il and natural gas prices, the ultimate drivers of OCTG demand' and 'a slowdown in the US and/or world economy' would be factors contributing to likely injury to the domestic industry." The ITC Report (p. II-13) identified these as factors relevant to demand trends, but not as factors contributing to likely injury to the domestic industry.

54. Japan and Korea suggest that in a sunset review the ITC must first establish whether there is current injury, before considering likelihood of continuation or recurrence.[62] However, there is simply no textual basis in Article 11.3 for imposing a requirement that authorities first make a "present injury" determination before considering whether expiry of the duty is likely to lead to continuation or recurrence of injury.

55. Korea argues that investigating authorities should not be permitted to use "different substantive definitions and standards to determine whether initially to impose a measure (in an anti-dumping investigation) and whether to terminate or continue that measure (in a sunset review)."[63] Korea's position, like that advanced by the EC and Japan, fails to account for the fundamentally "different nature and purpose of original investigations, on the one hand, and sunset reviews, on the other hand."[64] A determination of injury and a determination of the likelihood of continuation or recurrence of injury involve fundamentally different inquiries.

C. CUMULATION IN SUNSET REVIEWS

56. The only textual basis that Argentina offers for its argument that cumulation is not permitted in sunset reviews is that Article 11.3 refers to "any definitive anti-dumping duty" and to "the duty,"

[56] US First Submission, para. 346.
[57] Third Party Submission of Japan, para. 13.
[58] US First Submission, para. 350-353.
[61] Third Party Submission of Japan, para. 40.
[62] Third Party Submission of Japan, para. 14; Third Party Submission of the Republic of Korea, para. 11.
[63] Third Party Submission of the Republic of Korea, para. 9.
[64] *Japan Sunset*, para. 124

and that Article 11.1 refers to "an anti-dumping duty." Argentina's position that the drafters of the Anti-Dumping Agreement deliberately "have chosen the singular and have avoided the plural"[65] is unconvincing. The reference to "any definitive anti-dumping duty" is not necessarily to the singular.[66] Moreover, the reference in Article 11.3 to "the duty" is merely descriptive and is hardly evidence that the drafters intended to prohibit cumulation. (As noted in the United States' first submission,[67] cumulation in anti-dumping investigations was a widespread practice among GATT contracting parties prior to the adoption of Articles 3.3 and 11.3 in the Uruguay Round.)

57. Argentina seeks to bolster its argument by referring to "the object and purpose" of Article 11.3. As the United States pointed out in its first submission (para. 367), the relevant principle of treaty interpretation speaks of the object and purpose of *the treaty*, and not particular treaty provisions.[68] The United States does not agree with Argentina's suggestion that Article 11.3 merely rescinds anti-dumping duties. Article 11.3 is clear that expiry of such duties is only appropriate where it is not likely that this would lead to the continuation or recurrence of dumping and injury.

58. Argentina's claim that the United States has violated Article 11.3 by cumulating because "Argentina, and each WTO Member, negotiated for the right to have an anti-dumping measure affecting its exports removed after five years"[69] is similarly unpersuasive. The negotiating objective of the United States and certain other Members was to retain anti-dumping duties where warranted. The negotiating objectives of Argentina and perhaps other Members cannot be used to read into the Anti-Dumping Agreement obligations that do not exist in the treaty as reflected by its text. Indeed, it is the text reflects "the delicate balance of rights and obligations attained by the parties to the [Uruguay Round] negotiations."[70]

59. Argentina's suggestion that, if cumulation is permitted in sunset reviews, the limitations on cumulation in Article 3.3 must also apply is directly at odds with the Appellate Body's finding in *US – German Steel* [71] and therefore Argentina's argument should be rejected.

60. Argentina argues that the standards that the ITC applies in deciding whether to cumulate run "directly counter to the ' likely' standard established by Article 11.3."[72] Argentina is confusing the standards for (i) deciding whether cumulation in a sunset review is appropriate with (ii) the standard for determining whether expiry of the duty would be likely to lead to continuation or recurrence of injury. The Anti-Dumping Agreement is silent on the former question, and thus the standards that the ITC applied in deciding whether to cumulate cannot violate Article 11.3.

D. CONTRARY TO ARGENTINA'S ASSERTIONS, THE ITC PROPERLY ESTABLISHED THE RELEVANT FACTS AND ITS ASSESSMENT OF THOSE FACTS WAS OBJECTIVE

61. Article 17.6 provides that "in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective." Notwithstanding Argentina's misstatements and selective analysis about the factual record, the ITC did in fact properly establish facts and evaluate them in an unbiased and objective manner.

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[65] Argentina's Oral Statement, para. 105.

[66] *The New Shorter Oxford English Dictionary* (p. 91) defines "any" as having singular or plural meanings. (Exhibit US-28).

[67] US First Submission, para. 370.

[68] *Vienna Convention on the Law of Treaties*, Art. 31(1).

[69] Argentina's Oral Statement, para. 107.

[70] *US – German Steel*, AB Report, para. 91.

[71] *US – German Steel*, AB Report, paras. 58-97.

[72] Argentina's Oral Statement, para. 109.

62. In its oral statement, Argentina seeks to cast doubt on the ITC's finding that the likely volume of subject imports would be significant if the anti-dumping duty orders were revoked. Argentina incorrectly states that the ITC found that "subject producers' capacity utilization rates represent a potentially important constraint on the ability of these subject producers to increase shipments of casing and tubing to the United States."[73] The ITC was not referring to all of the subject producers (i.e., the casing and tubing producers in the five countries subject to the sunset reviews) when it stated producers were "operating at capacity utilization rates that represent a potentially important constraint on [their] ability . . . to increase shipments of casing and tubing to the United States." This is clear from a review of pages 18-19 of the ITC Report.

63. On page 18 the ITC first reviewed the capacity of subject producers in Japan. It stated: "[i]n addition to the reported capacity of NKK [the only Japanese producer to have provided data to the ITC], we find that there is significant available capacity among the other Japanese producers."[74] Then, at the top of page 19 of the ITC Report the ITC reviewed the capacity of subject producers in Korea, and referred to "Korea's unused capacity for all pipe and tube products."[75]

64. Only after having considered available capacity in Japan and Korea did the ITC discuss the capacity utilization rates of "[p]roducers in *the other subject countries* (and NKK in Japan)" (emphasis added), and it was in connection with *these producers* that the ITC made the observation about capacity utilization rates representing a potentially important constraint on their ability to increase exports to the United States.[76] In short, the ITC's finding of potential capacity constraints on exports applies only to producers in Argentina, Italy and Mexico – and not to producers in Japan (except for NKK) and Korea.

65. This is especially significant because of the size of the casing and tubing industry in Japan. The ITC noted that "[i]n the original investigations, the import volume, market share, and production capacity of casing and tubing from Japan were the largest of the subject countries."[77] Because all but one of the Japanese producers declined to participate in this sunset review, the precise size of the Japanese industry was not known. However, according to the ITC Report, US producers stated that non-responding Japanese producers had the potential to supply 3.5 million tons of OCTG[78] – an amount that exceeded the total capacity of the US casing and tubing industry in 2000.[79] (Data on the capacity of those Korean producers that responded to the ITC's questionnaire is confidential.) In light of the foregoing, Argentina's argument that the ITC's volume finding was contradicted by the fact of capacity restraints is simply erroneous.

66. In addition to its conclusions about excess capacity in Japan and Korea, the ITC found that producers in Argentina, Italy, and Mexico, and NKK in Japan, would have incentives to devote more of their productive capacity to producing and shipping casing and tubing to the US market, despite their apparently high capacity utilization rates. The ITC gave a number of reasons for reaching this conclusion. Argentina's attempts in its oral statement to discredit the ITC's reasoning are unpersuasive.

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[73] Argentina's Oral Statement, para. 117.

[74] *Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico*, USITC Pub. 3434, Inv. Nos. 701-TA-364, 731-TA-711, and 713-716 (June 2001) ("ITC Report") (Exhibit ARG-54) at 18.

[75] ITC Report at 19. The ITC's more specific findings as to unused capacity among Korean producers are redacted from the ITC Report because they reflect business proprietary information.

[76] ITC Report at 19.

[77] ITC Report at 18.

[78] ITC Report at II-8.

[79] The US casing and tubing industry's capacity in 2000 was 3.3 million tons. ITC Report at III-1, table III-1.

67. First, with respect to the ITC's finding that Tenaris would have a strong incentive to expand its presence in the US market, Argentina maintains that "the Commission only examines 'half' the story" and that "some of the companies forming the so-called Tenaris Alliance were outside the anti-dumping duty orders under review."[80] This assertion is incorrect. In fact, only one of the five Tenaris companies, Algoma in Canada, was not subject to the anti-dumping duty orders involved in these sunset reviews.[81]

68. Argentina argues that if Tenaris had really been interested in shipping to the United States, it could have done so through Algoma in Canada.[82] Argentina neglects to mention, however, that in 2000 – only one year before the reviews at issue here - counsel for Siderca assured the ITC, during a five-year review involving OCTG from Canada, that DST (the predecessor organization to Tenaris) had no intention of using the Algoma facility to ship OCTG to the United States.[83] Based at least in part on this assurance, the ITC lifted a longstanding anti-dumping order on OCTG from Canada. Tenaris' commitment not to ship OCTG from Canada completely undermines Argentina's argument that Tenaris could use Algoma to serve this market.

69. Also, in connection with the incentive for Tenaris to ship to the United States, Argentina suggests that this was not likely to occur because of long-term contractual commitments by Siderca and other affiliated producers to sell elsewhere.[84] The suggestion by Argentina that all of Tenaris' production was devoted to long-term contracts is at odds with Tenaris' own testimony in the sunset reviews. Siderca 's President (who testified that he was responsible for exports of OCTG from all of the Tenaris companies) testified that its long-term agreements account for only about 55 per cent of its sales of OCTG.[85] In other words, Tenaris' commitments under long-term contracts would not present a significant impediment to expanding shipments to the United States.

70. The United States pointed out (in para. 328 of its first written submission) that Argentina's claim that Siderca's ability to ship to the United States was limited by long-term contractual commitments was also undermined by the fact that many of these contracts were with global oil and gas companies that would be eager to buy from Siderca in the United States. Argentina now asserts that the United States ignored evidence that the global companies with which Tenaris had contracts represented only 12-14 per cent of US oil and gas rigs.[86] In fact, the ITC did not ignore this evidence. As the ITC explained in its report (p. 19, n. 124), the evidence on the US market share of these companies was mixed: Tenaris claimed it was only 12-14 percent; the domestic industry claimed it was significantly greater. The ITC found that the US presence of these global companies to be significant under either estimate.[87]

71. Argentina contends that the evidence that global oil and gas companies already buying from Tenaris would also want to do so in the United States if the anti-dumping orders were revoked is

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[80] Argentina's Oral Statement, para. 119.

[81] ITC Report at 16.

[82] Argentina's Oral Statement, para. 119, first subparagraph.

[83] *See, Certain Pipe and Tube from Argentina, Brazil, Canada, India, Korea, Mexico, Singapore, Taiwan, Thailand, Turkey, and Venezuela*, Inv. Nos. 701-TA-253 (Review) and 731-TA-132, 252, 271, 273, 276, 277, 296, 409, 410, 532-534, 536, and 537 (Review), USITC Pub. 3316 (July 2000) at 51 n. 310, and OCTG-IV-5 (Exhibit US-29).

[84] Argentina's Oral Statement, para. 119.

[85] *Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico*, Inv. Nos. 701-TA-364, 731-TA-711, and 713-716, ITC Hearing Transcript, ("ITC Hearing Tr."), pp. 200 and 205 (German Cura, Siderca) (Exhibit US-30). Argentina cites to this very testimony in its oral statement (para. 119, third subparagraph).

[86] Argentina's Oral Statement, para. 119, fourth and fifth subparagraphs.

[87] ITC Report, p. 19 n.124.

supported only by "a second-hand statement that one customer had expressed such a desire."[88] This is incorrect. This was not only the testimony of the president and chief executive officer of one of the largest distributors of OCTG in the United States;[89] the director of another large OCTG distributor told the ITC:

> Most of the major end users already purchase from these subject producers internationally and the end users are unwavering in their desire to see the extremely low priced OCTG that they get internationally extended to the US market. They have said as much to me quite openly and I think you would hear the same thing from most of my colleagues up here today.[90]

72. The second reason that the ITC found that the subject producers would have an incentive to devote more of their capacity to shipping casing and tubing to the US market is that casing and tubing were among the highest valued pipe and tube products, generating among the highest profit margins.[91] Argentina characterizes this factor as "a general assumption rather than positive evidence."[92] Argentina is mistaken. The relatively high value (and profit margins) of casing and tubing was established during the ITC's sunset reviews,[93] and Argentina does not dispute this fact. It stands to reason that pipe and tube producers – as profit-maximizing entities – would seek to maximize their production of products with higher profit margins. Argentina's attempts to dismiss this factor as "conjecture and speculation"[94] is unpersuasive.

73. The third factor that the ITC relied on in determining that producers in Argentina, Italy, and Mexico, and NKK in Japan, would have incentives to increase their shipments of casing and tubing to the United States, is that prices for casing and tubing on the world market were significantly lower than prices in the United States.[95] Argentina's characterization of this evidence as "anecdotal" is misleading. As its report makes clear, the ITC relied on the testimony of three executives from firms that produce or distribute OCTG, who each testified that prices for casing and tubing in the United States were significantly higher than international prices.[96] Argentina also attempts to downplay this factor by noting that the ITC recognized that there was contradictory evidence as to the magnitude of the price differential.[97] The fact that Argentina does not dispute the existence of a price differential, but rather questions its magnitude, speaks for itself.

74. The fourth factor that the ITC relied on is that foreign casing and tubing producers also faced import barriers in other countries or on related products that were produced in the same facilities as OCTG. Import barriers in other countries existed in the form of a 67 per cent anti-dumping duty in Canada on casing from Korea. The import barriers on related products that the ITC identified were: (i) US anti-dumping duties on seamless standard pipe from Argentina, Japan, and Mexico; (ii) US import quotas on welded line pipe shipped from Korea; and (iii) US anti-dumping duties on circular, welded, non-alloy steel pipes from Korea.

75. Argentina seeks to downplay the Canadian anti-dumping duty on casing from Korea of 67 per cent.[98] However, it was reasonable for the ITC to take this factor into account, especially since

[88] Argentina's Oral Statement, para. 119, fifth subparagraph.
[89] ITC Hearing Tr. at 59 (Mr. Ketchum, Red Man Pipe and Supply) (Exhibit US-20).
[90] ITC Hearing Tr. at 55 (Mr. Stewart, Hunting Vinson) (Exhibit US-20).
[91] ITC Report, p. 19.
[92] Argentina's Oral Statement, para. 120, first subparagraph.
[93] ITC Report, p.16.
[94] Argentina's Oral Statement, para. 120, fourth subparagraph.
[95] ITC Report at 19-20.
[96] ITC Report at 19 n.128.
[97] Argentina's Oral Statement, para. 121, second subparagraph.
[98] Argentina's Oral Statement, para. 122, first subparagraph.

the Korean industry is heavily export-dependent, Canada is the second largest regional market for OCTG in the world,[99] and the Canadian duty was relatively high.

76. In connection with anti-dumping measures on related products, Argentina claims that there was no evidence that pipe and tube producers would ever shift production from other products to OCTG. This is simply false. In sworn testimony before the ITC, domestic producers specifically testified that there is a hierarchy of pipe and tube products, and that OCTG is at the top of that hierarchy.[100] These same producers also testified that their companies did switch production to higher-value products like OCTG as market conditions warranted.[101] This evidence directly supports the ITC's finding that if the orders on OCTG were revoked, Tenaris would have a strong incentive to shift products in order to increase its output of OCTG.

77. Finally, the ITC explained that industries in at least some of the subject countries were heavily export-dependent. The ITC noted that Japan and Korea in particular had very small home markets and depended nearly exclusively on exports.[102] Argentina seeks to minimize the significance of this factor by arguing that the ITC inferred that just because "certain companies have been successful in exporting," they would increase their exports to the United States by certain amounts.[103] Argentina misconstrues the ITC's finding in two respects. First, the ITC did not conclude merely that certain companies "have been successful in exporting;" rather, it found that the industries in at least some of the countries involved (and particularly in Japan and Korea) were *dependent* on exports because of very small home markets for their products. Second, the ITC did not infer from this export-orientation that these industries would increase their exports to the United States in specific amounts (as Argentina argues). Instead, this export-orientation was just one of a number of factors that led the ITC to conclude that the likely volume of subject imports would be significant if the anti-dumping duty orders were revoked.

78. Argentina's approach to the ITC's analysis of the likely volume of imports is to examine in isolation each factor that the ITC considered and to assert that each factor does not amount to positive evidence. However, the Panel is directed in Article 17.6 to assess whether the establishment of the facts was proper and whether the evaluation of those facts was unbiased and objective. The ITC properly developed an extensive record in the sunset reviews at issue and conducted an unbiased and objective analysis of that record. Although Argentina may have drawn a different conclusion based on those facts, that alone does not render the ITC's determination inconsistent with the Anti-Dumping Agreement.

VII. CONCLUSION

79. Based on the foregoing, the United States renews its request that the Panel reject Argentina's claims in their entirety.

[99] The United States directs the Panel's attention to Figure II-1 on page II-5 of the ITC Report, which shows that the percentage of worldwide rig counts in 2000 was as follows: United States – 47.91 per cent, Canada – 17.99 per cent, Latin America – 11.87 per cent, Middle East – 8.16 per cent, Far East – 7.32 per cent, and Europe and Africa – 6.75 per cent.

[100] IT Hearing Tr. at 158-159 (Mr. Dunn, Lone Star Steel) (Exhibit US-30).

[101] ITC Hearing Tr. at 159 (Mr. Dunn, Lone Star Steel) and 161 (Mr. Barnes, IPSCO Tubulars) (Exhibit US-30)].

[102] ITC Report at 20.

[103] Argentina's Oral Statement, para. 123.

ANNEX D

ORAL STATEMENTS, FIRST AND SECOND MEETINGS

ANNEX D-1

OPENING AND CLOSING ORAL STATEMENTS OF ARGENTINA – FIRST MEETING

Opening Statement – 9 December 2003

I. INTRODUCTION

1. At the heart of this dispute is a fundamental disagreement between the United States and the rest of the WTO constituency regarding the sunset obligation of Article 11.3 of the Anti-Dumping Agreement. For the United States, Article 11.3 is practically devoid of obligations.[1] For the United States, anti-dumping measures can be continued indefinitely and on almost any basis. For the rest of the WTO constituency,[2] including Argentina, Article 11.3 establishes a fundamental obligation to terminate an anti-dumping measure five years after its imposition. Reliance on the limited exception to this obligation requires a Member to make specific findings that are based on evidence and that comply with the substantive standards established in the Anti-Dumping Agreement.

2. In this case, the United States did not terminate the measure applicable to Argentine OCTG, but rather invoked the exception and continued the order for an additional 5 years, at least. However, the United States did not make the findings required by Article 11.3, as Argentina explains in its First Submission and elaborates today.

3. The United States accuses Argentina of having a weak case and of distorting facts. Argentina does not believe such accusations are helpful. Instead, Argentina will present its arguments with a focus on the Anti-Dumping Agreement obligations, on the record of the underlying sunset proceedings, and on the practice of the United States. In doing so, Argentina will leave it for the Panel to evaluate the merits of the case.

4. The underlying facts are not complicated. The only Argentine exporter ever investigated in this case, Siderca, was found to have been dumping in 1994, based on the practice of zeroing negative margins, at a level of 1.36 per cent. Thereafter, the exporter stopped shipping to the United States, and the US Government conducted several reviews to confirm that it had stopped shipping. In the so-called sunset review proceedings five years later, the Department determined that dumping was likely to continue and the Commission determined that injury was likely to continue or recur. These are the essential facts.

5. This simple fact pattern may seem more complicated by the various types of procedures set up by the United States to implement its Article 11.3 obligations, the various levels of participation that are possible in these proceedings, and the consequences that the US system attaches to each level of participation. This is especially true with respect to the likely dumping determination by the Department of Commerce, whose sunset determinations have little to do with a substantive analysis of whether dumping is likely, and instead focus on the application of presumptions that lead to the inevitable conclusion that dumping is likely to continue or recur.

6. In its First Submission, the United States denies that there are any presumptions at work, and it defends its sunset laws, its sunset practice, and its sunset determinations in this case. As part of its

[1] According to the United States, Article 11.3 is "very limited" and sets virtually no restraints or limitations on a Member's ability to maintain anti-dumping measures. (*See* US First Submission, para. 3.).

[2] *See* Third Parties submissions of Japan, European Communities, Chinese Taipei, and Korea.

presentation today, Argentina will demonstrate certain contradictions that arise from a comparison of the US sunset determinations challenged by Argentina and the arguments advanced by the United States in its First Submission. Indeed, Argentina will highlight several instances where the words of the sunset determination contradict the position asserted by the United States in its First Submission. The US First Submission also has a number of irreconcilable internal contradictions. Let me just review some of these examples, which we have placed on Chart 1 for ease of reference.

7. Chart 1 lists four issues related to the likely dumping determination which were key to the US decision not to terminate the measure. They go to the very heart of the issue of whether the United States made the type of determination required in order to invoke the exception provided for in Article 11.3. Yet on these key issues, the United States takes a very different position in its First Submission than it did in its sunset determination.

- With respect to waiver, the Department unambiguously stated in its sunset determination that the respondents waived their right to participate in the review. In its First Submission, the United States says that the Department did not deem Siderca to have waived its participation.

- With respect to Siderca's response, the Department clearly stated in its sunset determination that Siderca's response was inadequate.[3] In its First Submission (para. 213), the United States says the exact opposite – "Siderca did not fail to file an adequate response but, rather, filed a complete substantive response." Moreover, elsewhere in the First Submission (para. 233), the United States asserts that: "An inadequate response is one that lacks required information or is simply not submitted."

- Notwithstanding the application of the waiver provisions to Siderca, the Department also cites in its final determination the provision for the conduct of an expedited review and application of "facts available," which is the euphemism for adverse inferences. In its First Submission (para. 214), the United States denies that it applied facts available to Siderca and explains that it applied facts available to the "non-responding respondents" from Argentina. This explanation not only contradicts the references in the sunset determination, but also contradicts the United States' explanation that any such "non-responding respondents" waived their right to participate, which mandates a finding of likely dumping.

- Finally, with respect to these "non-responding respondents," the Department never mentioned such a term in the sunset determination or in the WTO consultations prior to this panel proceeding. Yet Argentina learns through the First Submission filed by the United States that these "non-responding respondents" triggered the application of the waiver provisions, the inadequacy determination, and the decision to conduct an expedited review.

8. In addition to these contradictions relating to the purported basis for the Department's likelihood of dumping determination, the contrast between the treatment of Siderca's lack of shipments for the dumping and injury determinations is striking. For the likelihood of dumping, the lack of shipments was the key factor leading to waiver. For the likelihood of injury determination, Argentina's shipments were irrelevant because the Commission relied on speculation regarding non-Argentine imports, all of which were considered on a cumulated basis.

[3] *See* ARG-46 (Department's Sunset Determination at 66,701) ("On the basis of … inadequate responses… from respondent interested parties, the Department determined to conduct expedited reviews); ARG-50 (Department's Determination to Expedite at 2) ("…we recommend that you determine Siderca's response to be inadequate and that we should conduct an expedited (120 day) sunset review…); ARG-51 (*Issues and Decision Memorandum* at 3, 7) ("the Department determined Siderca's substantive response to be inadequate;" and "Siderca did not provide adequate substantive responses.").

9. This case will challenge the Panel in several ways, especially because of the procedures established in US law to implement the Article 11.3 obligation, and the contradictions between the sunset determination and the US First Submission. Yet, underneath all the discussion of the procedures in the First Submission, there is only one factor that matters for the likelihood of dumping determination: has the US industry participated in the sunset review? In the 217 cases in which the US industry has expressed an interest in continuing the anti-dumping measure, the Department has found a likelihood of a continuation or recurrence of dumping in each case. The US industry has 217 wins and 0 losses on the issue of likely dumping.

10. For the Commission's sunset determination, the picture is equally troubling. An analysis of the Commission's determination in this case shows that the Commission is not engaged in an analysis of whether injury is "likely" to continue or recur, but rather makes its determination based on isolated factors that cannot satisfy the common meaning of the term "likely." Further, the Commission makes its determination on a cumulated basis of all countries subject to the measure, which has the effect of negating the rights of individual Members who have the misfortune of being caught in the cumulated analysis.

11. Argentina will not repeat all of the arguments set forth in its First Submission and notes that this oral statement should not be viewed as exhaustive of Argentina's arguments. Argentina proposes to present its case in the following manner. First, Argentina will review the nature of the Article 11.3 obligation, which is fundamental to this case. Second, Argentina will explain the WTO-inconsistencies of the "likely" dumping determination by the Department. Third, Argentina will demonstrate the violations of the Agreement by the "likely" injury determination by the Commission. Fourth, Argentina will address briefly the preliminary objections that the United States has raised, and which Argentina rebutted in full in its submission of 4 December. Finally, Argentina will draw conclusions that place this case in the proper and necessary context.

II. THE ARTICLE 11.3 OBLIGATION

A. INTERPRETING ARTICLE 11.3 AND DEFINING THE SUNSET OBLIGATION IN PROPER CONTEXT

12. The only way to interpret the terms of Article 11.3 is to give the words their ordinary meaning and to interpret the words in their context – both the immediate context (i.e., the other paragraphs of Article 11) and the broader context (i.e., the other provisions of the Anti-Dumping Agreement, and the WTO Agreements as a whole), in accordance with their object and purpose.

13. Article 11.3 must be read in the context of the overarching obligation set out in Article 11.1. Article 11.1 fundamentally limits the use of anti-dumping duties in three significant respects: duration ("only as long as necessary"); magnitude ("only to the extent necessary"); and purpose ("to counteract dumping which is causing injury").

14. The panel in *EC – Pipe Fittings* recently reaffirmed the clear mandate of Article 11.1, noting that it "contains a general, unambiguous and mandatory requirement that anti-dumping duties 'shall remain in force only as long as and to the extent necessary' to counteract injurious dumping." The Panel added that Article 11.1 states "a general and overarching principle." (DS219, para. 7.113) This general principle is expressed substantively throughout the Anti-Dumping Agreement, including in the "sunset review" provisions of Article 11.3. To put it simply, and to paraphrase the Appellate Body's statement in *Steel from Germany*, if there is no determination of likely continuation or recurrence of injurious dumping, the measure must be terminated.

15. The United States would prefer to have this Panel focus its attention exclusively on Article 11.3, and ignore both the immediate context of Article 11, and the broader context of the Anti-Dumping Agreement. The *Vienna Convention* does not permit such an approach. The United States cannot assert that the Panel should base an interpretation of Article 11.3 of the Anti-Dumping

Agreement (as the United States does), entirely on the words used in that *one* provision; especially when the words used in that provision are defined elsewhere in the Agreement. Rather, it is necessary to interpret Article 11.3 by examining the ordinary meaning of *all* the provisions that together prescribe the relevant obligations of Article 11. Then the proper interpretation of the provisions must be applied to the facts of the case.

16. To summarize, the United States asserts that Article 11.3 is an "empty shell." Argentina and the Third Parties participating in this case disagree, and contend that Article 11.3 incorporates the substantive standards of Articles 2, 3, 6, and 12. As we will see later, this fundamental difference regarding the meaning of Article 11.3 is the basis of this dispute.

B. THE PRIMARY OBLIGATION OF ARTICLE 11.3 IS TERMINATION OF THE MEASURE

17. The Appellate Body in *Steel from Germany* explained that the primary obligation of Article 21.3 – which parallels Article 11.3 of the Anti-Dumping Agreement – is **termination** of the measure after five years. Continuation of the measure is the exception, and only if the there is strict adherence to the requirements of the Agreement. The Appellate Body has stated:

> [W]e wish to underline the thrust of Article 21.3 of the SCM Agreement. An automatic *time-bound* termination of countervailing duties that have been in place for five years from the original investigation or a subsequent comprehensive review is *at the heart of this provision*. Termination of a countervailing duty is the rule and its continuation is the exception. The continuation of a countervailing duty must therefore be based on a *properly conducted review and a positive determination* that the revocation of the countervailing duty would "be likely to lead to continuation or recurrence of subsidization and injury." (para. 88, emphasis added).

18. Article 11.3's requirement to conduct a "review" and make a "determination" precludes the authority from assuming that dumping and injury would likely continue or recur. (*See* Panel Report, *Sunset Reviews of Steel from Japan*, DS244, para. 7.177.) The authority must take action and ground its determination on a "sufficient factual basis" to allow it to "draw reasoned and adequate conclusions concerning the likelihood" of continuation or recurrence. (*Id.*) In this regard, the authority's determination cannot be based solely on outdated information, but rather "should rest on the evaluation of the evidence that it has gathered during the original investigation, the intervening reviews *and finally the sunset review*." (*Id.*) The authority must make a "fresh determination" that is forward-looking and "based on credible evidence." (Appellate Body Report, *Steel from Germany*, para. 88.)

19. The Appellate Body plainly stated the consequences where a WTO Member fails to conduct a sunset review or fails to make the required determination under Article 11.3: "If [a WTO Member] does not conduct a sunset review, or, having conducted such a review, it does not make such a positive determination, the duties must be terminated." (*Steel from Germany*, para. 63).

C. OTHER PROVISIONS OF THE ANTI-DUMPING AGREEMENT APPLY TO ARTICLE 11.3 REVIEWS

20. The terms of Article 11 mandate compliance with other provisions of the Anti-Dumping Agreement, including Article 2 (which defines "dumping" "for the purposes of the Anti-Dumping Agreement," including sunset reviews), Article 3 (which defines the meaning of "injury" under the Anti-Dumping Agreement, including its use in the Article 11.3), and Article 6 (which applies to reviews conducted under Article 11 by virtue of the cross-reference contained in Article 11.4), and Article 12. The textual analysis of the Appellate Body in *Steel from Germany* and the Panel Report in

DRAMS from Korea confirms that key substantive provisions of the Anti-Dumping Agreement apply to Article 11.3 reviews.[4]

21. The Third Parties agree that key substantive provisions of the Anti-Dumping Agreement (including Articles 2, 3, and 6) apply to reviews conducted under Article 11.3.[5]

D. THE US AUTHORITIES APPLIED THE WRONG STANDARD: THE ORDINARY MEANING OF "LIKELY" IN ARTICLE 11.3 IS "PROBABLE" AND NOT "POSSIBLE"

22. Article 11.3 requires the authorities to determine whether the expiry of the measures would be likely to lead to continuation or recurrence of dumping and injury. The US authorities failed to give the term "likely" its ordinary meaning.

23. Both WTO and US jurisprudence make clear that "likely" does not have the same meaning as "possible."

24. Both the ordinary meaning of the term "likely" and the context of Article 11.3 require the application of a "probable" standard to the question of whether dumping and injury will continue or recur. In other words, the continuation or recurrence of dumping and injury must be more likely than not. Indeed, the United States itself has asserted before the WTO that the term "likely" means "probable." In *Steel from Germany*, the United States expressly stated that "[t]he word 'likely' carries with it the ordinary meaning of 'probable.'" (US Oral Statement at the First Meeting of the Panel, WT/DS213, 29-30 January 2002, para. 6).

25. Hence, in order to make a determination that is consistent with Article 11.3, the Department and the Commission must find that it is "likely" (*i.e.*, more probable than not) that termination of the anti-dumping measure will lead to the continuance or recurrence of dumping and injury, respectively.

E. SUMMING UP THE ARTICLE 11.3 OBLIGATIONS IN THIS CASE

26. The United States submits that it can invoke the exception of Article 11.3 by initiating a review and making a determination. The rest – the very substance of the determination – is not subject to any disciplines, according to the United States. Argentina and the Third Parties see it differently. Reading Article 11.3 within its context reveals that it is full of substantive obligations. If a Member wishes to invoke the exception and continue a measure beyond the 5 year limit established in Article 11.3, it is subject to specific disciplines that are common in the Anti-Dumping Agreement:

- It must conduct a review and make determinations within a specified time if it wishes to maintain the measure (required by Article 11.3);
- The conduct of the review and the determinations must satisfy the requirements of Article 6 and must be based on positive evidence;
- The authorities must find that dumping (within the meaning of Article 2) is "likely" to continue or recur (dumping must be more probable than not); and
- The authorities must find that injury (within the meaning of Article 3) is "likely" to continue or recur (injury must be more probable than not).

[4] Appellate Body Report, *Steel from Germany*, paras. 69 n.59, 79-81; Panel Report *DRAMs from Korea*, para. 6.59 n.501.

[5] Third Party Submissions of European Communities (paras. 89-96, 123-127), Japan (paras. 3-21), Korea (paras. 9-24), and Chinese Taipei (paras. 7-13).

The United States failed to satisfy its obligations in this case in every respect.

III. THE DEPARTMENT'S SUNSET REVIEW OF OCTG FROM ARGENTINA

27. Let us turn now to the Department's determination of whether dumping is likely to continue or recur. Throughout this oral presentation, Argentina will focus on the application of the US obligations in this specific case. However, such an exercise leads directly to laws and regulations developed by the United States, the instruments that inform those laws and regulations, and the Department's consistent practice in sunset reviews. Let us look briefly at the system that the United States established to implement its 11.3 obligation (section A), then let us look at the application of this system to Argentina in this case (section B), and finally we will look at the Argentine case in the context of the other cases the United States has decided (Section C).

A. US SUNSET PROCEEDINGS

28. **There is only one variable that matters in the whole of the US sunset regime governing Department sunset reviews: whether the domestic industry participates in the sunset review.** In all 217 sunset reviews (including Argentina's review) in which at least one domestic interested party participated, the Department determined that termination of the measure would be likely to lead to continuation or recurrence of dumping.

29. **The basis for the Department's determination of likely dumping in each of these 217 sunset reviews was either: (1) application of the waiver provisions; or (2) resort to the three "checklist" criteria established by the Statement of Administrative Action and the *Sunset Policy Bulletin*.**

30. **The Department applied the waiver provisions in 167 sunset reviews, 77 per cent of the sunset reviews in which the domestic industry participated.** In all of these cases, the Department issued a finding that dumping would likely continue or recur pursuant to the statutory mandate. Illustrative of the swift – and to use the US description – "efficient" operation of the waiver mechanism is the sunset review of antifriction bearings from Sweden, where the Department stated, "[G]iven that . . . respondent interested parties have waived their right to participate in this review before the Department, we determine that dumping is likely to continue if the orders were revoked." (*Antifriction Bearings from Sweden* (found in Tab 6 of ARG-63)). The Department made a similar statement in the case being reviewed by the panel in this case: The *Issues and Decision Memorandum* at 4-5 (ARG-51)("In the instant reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation.").

31. The US waiver provisions violate Article 11.3 because they mandate a finding of likely dumping. Article 11.3's requirement to conduct a "review" and make a "determination" precludes a WTO Member from statutorily mandating an affirmative finding of likely dumping. To do otherwise would be to reduce Article 11.3 to a nullity, something a treaty interpreter may not do. If a WTO Member wishes to invoke the exception and continue an anti-dumping measure, it simply does not have the option of doing nothing, or of passively assuming that dumping and injury would be likely to continue or recur.

32. **Resort to the checklist criteria of the SAA/*Sunset Policy Bulletin*.** In those cases in which the Department does not apply the waiver provisions, the Department instead uses its other tool: the checklist criteria in the SAA and the *Sunset Policy Bulletin*. These US instruments limit the Department's so-called likelihood "analysis" solely to a consideration of: (1) the existence of dumping margins from the original investigation and subsequent administrative reviews; (2) whether imports of the subject merchandise ceased after issuance of the order; and (3) whether dumping was eliminated after imposition of the order and import volumes declined significantly.

33. The United States has not, and cannot, point to a single case in which the domestic industry participated in a DOC sunset review and the Department determined that dumping would not be likely. The facts of the DOC sunset reviews speak for themselves: In 100 per cent of the sunset reviews in which a domestic interested party participated in the proceeding, the Department determined that dumping was likely to continue or recur; and in 100 per cent of the sunset reviews for which the Department determined that dumping was likely to continue or recur, the Department relied on the directives of the SAA and the Department's *Sunset Policy Bulletin*.

34. For ease of reference Argentina has prepared Chart 2, which depicts the DOC sunset review system.

35. The first page demonstrates that there is only one dispositive factor in DOC sunset reviews. That is, whether the domestic industry participates. As the chart shows, in 100 per cent (all 217) cases in which the domestic industry participated, the Department determined that dumping would be likely. In those cases in which the US industry did not participate (74), the Department terminated the order.

36. Page 2 of the Chart shows the two tools used by the Department that give rise to the remarkable winning percentage of the US industry. The Department reaches the likely dumping determination either through the application of the mandatory waiver provisions or reliance on the SAA/*Sunset Policy Bulletin* checklist criteria. Together these two tools enable the Department to find likely dumping in any case in which the domestic industry is interested. At the end of the day, the waiver provisions and presumption under US law created by the SAA and *Sunset Policy Bulletin* simply preclude the Department from conducting a review and making the determination required by Article 11.3.

37. Page 3 of the Chart depicts the "deemed waiver" mechanism in US law, where a respondent interested party that attempts to participate in a DOC sunset review is "deemed" by the Department to have waived its right to participate by virtue of either an "incomplete" or "inadequate" substantive response. A party's response can be deemed inadequate solely on the basis that its imports are less than 50 per cent of the total exports to the United States from that party's country. This is precisely what happened to Siderca in this case.

38. Finally, as Page 4 of the Chart shows, no matter what type of review, and irrespective of the Department's adequacy determination, at the end of the day all roads lead to a likely dumping determination, whether through application of the mandatory waiver provisions or the presumption established by checklist criteria of the SAA and *Sunset Policy Bulletin*.

39. **The evidence speaks for itself.** The United States has implemented a complicated sunset review scheme. Yet, from a results standpoint, it does not really matter whether the Department issues a likelihood determination pursuant to application of the waiver provisions, or through the application of the checklist criteria (whether in an expedited or full sunset review). It does not matter that under the regulations a substantive response may contain "any other relevant information or argument that the party would like the [Department] to consider." And it does not matter that respondent parties are afforded opportunities to submit comments. Despite the US assertions to the contrary, there simply is no meaningful opportunity for respondents to participate in sunset reviews.

40. In addition to the inflexible application of the waiver provisions, Argentina's review of the Department's sunset determinations leads to the conclusion that the Department applies a presumption in favour of finding likely dumping that no party has ever overcome. The Appellate Body in *Steel from Germany* explained that while it would be difficult for a single case to serve as conclusive evidence of the Department's practice as such violating US WTO obligations, a comprehensive examination of all US sunset reviews and an analysis of the methodology used by the Department in those reviews might provide such an evidentiary basis. (Appellate Body Report, *Steel from Germany*,

para. 148.) The Appellate Body further explained that a violation might be established by "evidence of the consistent application of such laws" and that "the nature and the evidence required to satisfy the burden of proof will vary from case to case." (para. 157).

41. ARG-63 embodies the results of Argentina's review of all of the Department's sunset reviews that were undertaken in order to provide empirical evidence in support of its claims. As of September 2003, the Department of Commerce had conducted 291 sunset reviews of anti-dumping duty orders. Argentina has analyzed all 291 of these sunset reviews and has recorded the Department's findings for each in ARG-63. A perfect record of likely dumping in all cases in which the US industry has shown the slightest interest can in no way be considered to constitute a meaningful – or WTO-consistent – "determination" for the purposes of Article 11.3.

B. THE DEPARTMENT'S SUNSET REVIEW OF OCTG FROM ARGENTINA

42. **Key facts.** The only Argentine exporter ever investigated in the case was the company, Siderca. Siderca was the only exporter investigated in the original 1994 investigation (as it was the only investigated party also in 1984 and 1985 anti-dumping investigations, and in several administrative reviews under US countervailing duty law). Siderca had not shipped any OCTG to the United States for consumption during the relevant period for purposes of the sunset review. Siderca stated this to the Department in its substantive response in the Department's sunset procedure. Siderca made similar "no-shipment" representations during each of the relevant administrative review periods. The Department conducted "no-shipment" reviews and in each instance verified Siderca's claims that the company had not exported OCTG to the United States. Curiously, the US First Submission states that "No administrative reviews of the anti-dumping duty order on certain OCTG from Argentina were requested or conducted prior to the sunset review" (para. 48). However, four reviews were requested, even though they were rescinded when the Department verified the lack of consumption imports from Siderca.[6]

43. However, in the sunset review, the Department's import data showed the existence of some Argentine OCTG imports to the United States. Because Siderca's total exports of OCTG to the United States (zero exports) were less than 50 per cent of what was presumed to be OCTG exports from Argentina to the United States, the Department determined Siderca's response to be "inadequate." (ARG-50). In this sense, Argentina's treatment in the sunset review depended entirely on the assumption that the US statistics were correct, that there were other exports from Argentina, and that these alleged other exports were relevant enough to trigger a waiver and/or expedited review under the US law and regulations. In fact, the US industry never alleged the existence of other Argentine exporters, the Department never reviewed or investigated other Argentine exporters, and the Department discovered through its own review that the statistics in fact had incorrectly recorded non-consumption entries as consumption entries.

44. **Application of Waiver Provision to Siderca.** The Department then determined that because Siderca's response was deemed to be "inadequate," the company was similarly deemed to have "waived" its right to participate in the sunset review. I quote from the *Issues and Decision Memorandum* at 4-5 (ARG-51)("In the instant reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation."). (*See* Chart 1)

45. Now let's look at what the United States has said in its First Submission to this panel. The United States argues that the Department did not deem Siderca to have waived its participation in the sunset review of OCTG from Argentina (US First Submission, paras. 211- 213). Buried in footnote 216, the United States does concede ambiguity: it states that "although based on this

[6] *See* Exhibits ARG-28, ARG-32, ARG-37, and ARG-41 for the reviews. *See also* ARG-29, ARG-36, ARG-38, and ARG-43 for the outcomes.

language it may appear that Commerce deemed all respondents interested parties to have waived their participation in the OCTG sunset review…" The United States says instead that there were other Argentine exporters who did not respond at all to the notice of initiation. In paragraph 146, the United States tells us that such a failure to respond has the consequence of a waiver, which, under the statute mandates an affirmative determination of continuation or recurrence of dumping. Let us return to Chart 2, where we see that a failure to respond leads directly to waiver of participation, for which the statute then mandates an affirmative likelihood determination, without any substantive review.

46. Thus, under the theory expressed in this part of the US First Submission (which is different than what the United States says in another part), the exporters considered to account for all exports of Argentine OCTG to the United States waived their participation by failing to respond to the notice of initiation, and the Department therefore had no choice but to follow the statutory mandate to make an affirmative finding of likely dumping in this case. If this is true, how can the United States now contend that the waiver provision did not affect Siderca, or that it did not diminish Argentina's rights under Article 11.3?

47. **Why waiver violates Article 11.3.** The US waiver provisions violate Article 11.3 because they mandate a finding of likely dumping. Article 11.3's requirement to conduct a "review" and make a "determination" precludes the authority from mandating statutorily an affirmative finding of likely dumping. If the WTO Member wishes to invoke the exception and continue the measure, it simply does not have the choice of doing nothing, or of passively assuming that dumping and injury would likely continue or recur. (*See* Panel Report, *Sunset Reviews of Steel from Japan*, DS244, para. 7.177.) The authority must take action and ground its determination on a "sufficient factual basis" to allow it to "draw reasoned and adequate conclusions concerning the likelihood" of continuation or recurrence. (Id.) The authority must make a "fresh determination" that is forward-looking and "based on credible evidence." (Appellate Body Report, *Steel from Germany*, para. 88.)

48. **Additionally, waiver violates Articles 6.1 and 6.2.** The application of the waiver provisions in the Argentine case violated Article 6.1 because it prevented the only known Argentine exporter, Siderca, from presenting evidence for meaningful consideration. Siderca had notified the Department of its desire to participate in the sunset review and its willingness to cooperate fully by filing a complete substantive response to the Department's notice of initiation. Nevertheless, the Department deemed Siderca to have waived its participation and thus issued a determination that dumping was likely pursuant to the statutory mandate of 19 USC. § 1675(c)(4)(B). Accordingly, by issuing a determination of likelihood without any analysis and without meaningful consideration of the information submitted by Siderca, the Department denied Siderca an "ample opportunity to present . . . evidence which [it] considered relevant . . . ."

49. The United States attempts to cast the waiver provisions as an "efficiency" mechanism that enables the Department to save resources where respondent interested parties choose not to participate in the Department's sunset review. (US First Submission, paras. 148-49) Casting the function of the waiver provisions as a vehicle for saving resources is not persuasive. Purported efforts to save administrative resources can in no way negate a Member's obligations under the Agreement.

50. The point is that Article 11.3 imposes an obligation on the Member maintaining an anti-dumping measure to conduct a review and make a determination of both likely dumping and likely injury in order for it to maintain that measure. If the national authorities are not willing to expend the resources necessary to satisfy their obligation to make a WTO-consistent "determination," then they must terminate the measure. Also, it must be noted that the Anti-Dumping Agreement provides only one mechanism for the treatment of respondents who do not participate or who are not cooperative: Article 6.8 and Annex II provide the limited circumstances in which a Member may make a decision based on facts available for such parties. Thus, an additional so-called efficiency mechanism, that statutorily mandates a finding of a likelihood of a continuation or recurrence of dumping, is not permitted.

51. Finally, it must be stated that, in the name of "efficiency," the United States has applied the waiver provision in 167 of its 291 sunset reviews. In Argentina's view, this is something other than efficiency.

1. The Department's decision to conduct an expedited review

52. The Department's determination cites both the "waiver" provisions (19 USC. § 1675(c)(4)(B) and 19 C.F.R. 351.218(d)(2)(iii)) and the "facts available" provision (19 C.F.R. § 351.218(e)(1)(ii)(C)). The Department's determination purports to rely on both provisions. However, there is no basis under US law for the simultaneous application of these provisions to a single respondent. Indeed, these provisions are mutually exclusive. (*See* discussion in Argentina's First Submission, para. 100).

53. Putting aside the unambiguous language that the Department deemed Siderca's inadequate response to constitute "waiver" of participation (*Issues and Decision Memorandum*, ARG-51 at 5), and despite language in its determinations regarding the application of facts available (ARG-51 at 3), the United States asserts that the Department did not apply facts available against Siderca. (US First Submission, paras. 214, 221, 234-36.) Again, the answer that the United States provides in its First Submission lies in the so-called "non-responding Argentine respondents;" that is, companies other than Siderca who never responded to the invitation to file a substantive response.

54. Here, the United States enters into a series of contradictions. First, the US assertion runs counter to the language in the Department's determination. In the Department's determination to conduct an expedited review, it noted that "[d]uring the five-year period from 1995 to 1999, the combined-average annual percentage of Siderca's exports of OCTG to the United States with respect to the total of exports of the subject merchandise to the United States was significantly below 50 per cent." (ARG-50) Based on this finding, the Department determined Siderca's substantive response to be "inadequate" under 19 C.F.R. § 351.218(e)(1)(A)(i) and thus conducted an expedited review pursuant to 19 C.F.R. § 351.218(e)(1)(C)(2). (ARG-51) (*Issues and Decision Memorandum* at 3, 7) ("the Department determined Siderca's substantive response to be inadequate;" and "Siderca did not provide adequate substantive responses."); *Determination to Expedite* at 2 (ARG-50)("we recommend that you determine Siderca's response to be inadequate"). Based on such statements in the key documents explaining the Department's actions, it is hard to understand how the United States can say in its First Written Submission that Siderca's response was not inadequate (para. 225, 237), and that it did not apply facts available to Siderca.

55. Second, according to the Department's sunset regulations, if the respondent interested parties have provided an inadequate response, the Department will normally conduct an expedited review and issue its final results "based on the facts available[.]" (19 C.F.R. § 351.218(e)(1)(ii)(C); *see also* 19 USC. § 1675(c)(3)(B).) Section 351.208(f)(2) provides that the "facts available" consist of dumping margins from prior determinations and information contained in parties' substantive responses. Again, this is precisely what the Department's Issues and Decision Memorandum says that it did, but which the United States now says that it did not do.

56. Third, the US explanation in its First Written Submission at paragraphs 214, 216, and 233 that facts available was applied to the "non-responding respondents" is flatly inconsistent with its explanation in paragraph 146 that the waiver provisions applied to the "non-responding respondents." If the waiver provisions applied, then there was no need to apply facts available.

57. The Panel and Argentina deserve a straight answer from the United States to two critical questions: (1) was Siderca's response adequate (in the proceeding, the United States expressly said no, and now it says yes); and (2) what happens when non-responding respondents do not respond to the notice of initiation (the United States says in paragraph 146 that the waiver provisions apply,

resulting in a mandatory affirmative finding, and the United States asserts in paragraphs 214, 216, 233 that they apply facts available to these companies).

58. Argentina submits that the Panel must review the decisions taken by the authorities, as explained by the authorities at the time they took the decision, and not as they later attempt to justify these decisions. Based on the statements in the Department's determinations, there can be no serious dispute that the Department: (1) determined Siderca's response to be inadequate; (2) applied the waiver provisions to Argentina; and (3) made the likely dumping determination, at least in part, based on the conduct of a expedited review and application of facts available. These actions by the United States were unjustified by the facts and objectively unreasonable, and in substance they violated Articles 11.3, 2, 6.8, 6.1 and 6.2, and Annex II.

59. With respect to the facts, there was no reasonable basis for the Department to have considered that there were other Argentine producers/exporters, and that the failure of these other producers/exporters to respond justified the decision to expedite the review and resort to "facts available."

(a) Siderca was the only Argentine producer/exporter investigated in the original investigation, and it was the only producer/exporter named in the subsequent reviews requested by the US industry. During the five-year period after imposition of the order, the domestic industry requested four administrative reviews, naming Siderca as the only exporter each time. (ARG-28; ARG-32; ARG-37; ARG-41.) In at least one case, the representatives of the US industry identified Siderca as "the only know[n] producer" of the subject merchandise. (ARG-58). The Department initiated an administrative review in each year, but ultimately rescinded the reviews because there were no shipments to evaluate. (ARG-29; ARG-36; ARG-38; ARG-43.) In all of these instances, however, Siderca's "no shipment certifications" led to additional questions from the Department and additional comments from the US industry. In all cases, Siderca explained that it was shipping to the United States, but that all of its shipments were either non-subject merchandise, or were not entering the United States for consumption in the United States. In all cases, the Department ultimately agreed with Siderca's certification that it made no shipments for consumption in the United States of subject merchandise, and therefore rescinded the annual reviews.

(b) Further, the record developed in the Department's sunset review indicated that Siderca was the only producer/exporter of the subject merchandise. In its substantive response, Siderca indicated that it was the only producer of seamless OCTG, and, to its knowledge, it was the only producer/exporter of Argentine OCTG. The Department acknowledged these statements (while misstating them slightly) by stating that "Siderca asserts that it is the only producer of OCTG in Argentina, and to its knowledge, there is no other producer of OCTG in Argentina." (ARG-50 at 2). Thus, at the very least, the record developed by the Department casts doubt on the statistics relied upon by the Department for the adequacy determination. It is not clear why the Department chose to believe the statistics, instead of its understanding of Siderca's position.

(c) The Department had reason to doubt its data. On previous occasions, the Department concluded that the official statistics contained errors, in one case incorrectly classifying non-consumption entries as consumption entries (ARG-36 at 40,090), and in another case misclassifying mechanical pipe as OCTG (ARG-43 at 8949).

60. From this record, it is not reasonable for the Department to have assumed that there were other Argentine producers/exporters who should have responded to the initiation notice, and whose failure would have such consequences for Argentina's rights under Article 11.3. This unfounded

assumption had dire consequences for Argentina as it resulted in the deemed waiver of Siderca. In any event, whether the determination is based on waiver, or is made on the basis of the checklist criteria (whether in an expedited or full review), the outcome is the same – a determination of likely dumping.

61. **The Department's conduct of an expedited review, its application of the checklist criteria, and its reliance on facts available violated Article 6.8 and Annex II.** "Facts available" can be used only as a last resort when investigating authorities are faced with recalcitrant and uncooperative parties. Accordingly, Article 6.8 and Annex II permit an investigating authority to make determinations based on "facts available" only when an interested party "refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation." In this case, however, Siderca provided all information required by the Department's sunset regulations in its substantive response to the notice of initiation. Thus, Siderca was not an uncooperative party. Nevertheless, the Department considered Siderca's complete substantive response to be inadequate based on the 50 per cent test and thus determined to conduct an expedited review on the basis of the facts available pursuant to the statute and regulation. In doing so, the Department violated Article 6.8 and Annex II, because these provisions do not permit the application of facts available to a cooperative respondent. Even worse, there was no determination that Siderca failed to cooperate. Moreover, the Department failed to notify the parties of "essential facts" forming the basis of its decision, as required by Article 6.9.

62. As for the US argument in its First Submission that it used facts available only for the non-responding Argentine respondents, there is no support for this statement in the sunset determination. The concept of non-responding Argentine respondents is never even mentioned directly in the sunset determination. Even if they had been mentioned, it was not a reasonable and objective assessment of the facts to consider that such parties existed and to condition Argentina's rights in this way without further investigation.

63. **The Department's conduct of an expedited review and reliance on facts available violated Articles 6.1 and 6.2.** Argentina was surprised by the Department's adequacy determination, and the resulting determination to conduct an expedited review based on facts available. The only investigated Argentine exporter had filed a complete substantive response, and had indicated that it would cooperate fully in the Department's review. Further, the Department had direct knowledge that official statistics had been demonstrated to be incorrect in the past. Again, the Department's failure to provide notice of the "essential facts" forming the basis of its decision to conduct an expedite review based on facts available was inconsistent with Article 6.9.

64. The United States argues that, by limiting its substantive response to a "mere" four pages in length and not taking advantage of other opportunities to submit comments, Siderca failed to fully avail itself of the opportunities granted by the sunset regulations for the presentation of evidence. (US First Submission, paras. 228-29, 237). In addition to the substantive response to the notice of initiation, the United States explains, Siderca could have submitted comments on the Department's adequacy determination (19 C.F.R. § 351.309(e)) and rebuttal comments to any other party's substantive response (19 C.F.R. § 351.218(d)(4)). Therefore, the United States concludes, the Department's sunset review of Argentine OCTG was not inconsistent with Articles 6.1 and 6.2.

65. The US argument fails for several reasons. First, contrary to the US assertion, Siderca did not fail to take the opportunity to present evidence. As the United States repeatedly recognizes, Siderca's response to the notice of initiation was a "complete substantive response" that met all of the Department's regulatory requirements. (US First Submission, paras. 211, 213, 214, and 216). The Department thus received what it considered to be the requisite information to make the likelihood determination. Having submitted a "complete substantive response" and having offered to cooperate fully, Siderca could not have been expected to know that something more was necessary in order to have the Department undertake a substantive evaluation of whether dumping would be likely to

continue or recur. Under Annex II, it was the Department's obligation to "specify in detail the information required" from Siderca.

66. Second, regarding the Department's adequacy determination, the regulation provides that submitted "comments may not include any new factual information or evidence (such as supplementation of a substantive response to the notice of initiation) and are limited to five pages." (19 C.F.R. § 351.309(e) (emphasis added). Thus, the regulation precluded Siderca from submitting any new evidence with respect to the Department's determination that Siderca's response was inadequate.

67. Third, by the time that the Argentine sunset review began, it was well-known that the Department had designed and implemented a system which avoided any type of substantive determination. Hence, respondent participation was widely considered to be futile. The analysis done by Argentina for the purposes of this panel proceeding confirms the widely-held perceptions at the time: in every sunset review in which the domestic industry participated, the Department limited its "analysis" to the SAA and *Sunset Policy Bulletin* checklist criteria and found a likelihood of dumping. Consequently, it would not have mattered whether Siderca had submitted comments to the Department's adequacy determination, rebuttal comments, or had been granted a full review. By not truly considering all evidence submitted, the Department denies foreign interested parties an ample opportunity to present evidence and fully defend their interests, contrary to the obligations established by Articles 6.1 and 6.2. Despite US protestations to the contrary, the United States is well aware of the fact that even if Siderca availed itself of other opportunities to submit comments, the outcome would have been the same. The United States cannot credibly argue that a more active intervention by Siderca would suddenly have tilted the record from 217/0 to 216/1.

2. The substantive basis for the Department's Likelihood of Dumping Determination violated Article 11.3

68. Let us now turn to the stated substantive basis of the Department's likelihood of dumping determination. As noted above, the Department did not gather or evaluate additional facts at the time of the sunset review, but instead based its decision that dumping would likely continue or recur only on the following facts available: (1) the 1.36 per cent dumping margin calculated for Siderca in the original investigation, and (2) the fact that Siderca had ceased to ship OCTG to the United States. (*See Issues and Decision Memorandum* at 5 (ARG-51). This is the sum total of what the European Community aptly characterized in their Third Party Submission as the "meagre crumb" of evidence supporting this likely dumping determination.

69. This does not constitute the "sufficient factual basis" for the substantive and meaningful determination required by Article 11.3. For several reasons, the Department's reliance on the 1.36 per cent dumping margin established in the original investigation in 1995 cannot serve as a basis for the Department's determination that dumping would be likely to continue or recur.

- First, the rate is historic, with no relationship whatsoever to the forward-looking determination required to invoke the exception of Article 11.3 and continue the measure. The United States has still never offered a logical explanation of what this rate says about future dumping, let alone the likelihood of future dumping.

- Second, in the original investigation, the Department calculated the 1.36 per cent margin based on the practice of zeroing negative margins. In fact, without the zeroing practice, there would have been no dumping margin at all, and there would have been no measure to review.[7] The Appellate Body has held that zeroing negative margins is inconsistent with Article 2.4.2 of the

[7] *See* on that issue, the Third Party Submissions of European Communities (paras. 79-89) and Japan (paras. 22-28).

Anti-Dumping Agreement. (*See* Appellate Body Report, *Bed Linen from India*, para. 55.) Accordingly, the Department cannot rely on a WTO-inconsistent margin as a basis for a determination of likelihood of dumping under Article 11.3.

70. In order to establish in a sunset review whether it is necessary to maintain an anti-dumping measure, the authority will have to make a finding of likely dumping. To know whether dumping would likely "continue" or "recur" under Article 11.3, an authority must have current information about dumping.[8] In other words, it becomes necessary to determine if dumping exists in order to assess its probable continuation. Alternatively, it becomes necessary to determine the absence of dumping in order to asses prospectively the probability of recurrence. The Department's reliance on the 1.36 margin from the original investigation cannot satisfy either possibility. The United States argues that the Department determined that "dumping continued to exist throughout the history of the order . . . ." (US First Submission, para. 218.) The Department, however, had rescinded each of the four administrative reviews of Siderca following the order, and thus did not have evidence of dumping margins throughout the history of the order. All it had was the five year-old margin from the original investigation – with a razor thin dumping margin, calculated on the basis of a WTO-inconsistent zeroing practice. There was no evidence that dumping continued after the issuance of the order and, consequently, the five-year old dumping margin could not provide the basis for a determination that dumping would be likely to "continue."

71. Indeed, particularly in the facts of this case, where the Department relied on Siderca's small dumping margin of only 1.36 percent, the Department had an obligation to gather and evaluate "persuasive evidence" in order to justify its determination of likelihood of dumping. As the Appellate Body has ruled, "mere reliance" on the determination made in the original investigation is not enough. (*See* Appellate Body Report, *Steel from Germany*, para. 88.). This reinforces Argentina's view of the extreme and unfair situation presented in this case.

72. **The likely margin of dumping of 1.36 per cent determined by the Department and reported to the Commission violated Articles 2 and 11.3.** The Department determined that if the order were revoked, the likely dumping margin to prevail would be 1.36 per cent. The Department reported this margin to the Commission for purposes of the Commission's sunset review and its likelihood of injury determination. Because the 1.36 per cent was inconsistent with Article 2 (because it was based on the WTO-inconsistent practice of zeroing negative margins), and additionally constructed on the basis of the Department's "circumstance of sale" adjustment[9], the Department's determination that this margin constituted the likely margin to prevail violated Articles 11.3 and 2.

73. The United States notes that the Department's reporting of the likely margin to the Commission in a sunset review is a construct of US law, rather than a requirement of Article 11.3. (*See* First Submission by the United States at para. 267.) Consequently, the United States argues, the Department's reporting of the 1.36 per cent margin to the Commission was not inconsistent with Article 11.3. This argument cannot be accepted. Once a Member undertakes either to calculate a dumping margin or to rely on a dumping margin, that margin must be consistent with the requirements of Article 2. In the case at hand, since the United States did not make a WTO-consistent determination that dumping would be likely to continue or recur, it was required to have terminated the measure.

[8] *See* also Third Party Submission of the European Communities (para. 12).
[9] *See* Argentina's First Submission, footnote 14.

C. SIDERCA'S CASE CONSIDERED IN THE OVERALL CONTEXT OF THE IMPLEMENTATION OF ARTICLE 11.3 BY THE UNITED STATES AND THE DEPARTMENT'S CONSISTENT SUNSET PRACTICE

74. As is evident from the foregoing, the Department's sunset determination did not come close to satisfying the requirements of Article 11.3 and the substantive standards incorporated therein. The sunset review of OCTG from Argentina is not unique in this respect. Viewed in the context of consistent US practice in sunset reviews by the Department, the Argentine experience is, unfortunately, all too predictable and consistent.

75. First, as noted previously, the Department applied the waiver provisions in 167 sunset reviews, 77 per cent of the sunset reviews in which the domestic industry participated. In all of these cases, the Department issued a finding that dumping would likely continue or recur pursuant to the statutory mandate (*See* ARG-63).[10]

76. In all 217 sunset reviews in which at least one domestic interested party participated, the Department rendered an affirmative likelihood determination. Domestic industry participation is the only determinative factor in a Department sunset review. No matter what type of sunset proceeding is undertaken by the Department, the Department does not conduct the "review" and "determination" required by Article 11.3. The results are pre-ordained when the US industry participates. Indeed, the Department found that termination of the order would be likely to lead to continuation of dumping even where the producer could no longer export to the United States because its sole production facility was destroyed as a result of military action and, in any event, trade sanctions prevented imports into the United States.[11]

77. The Department's rigid adherence to the mandate of the SAA and the *Sunset Policy Bulletin* limits its likelihood "analysis" solely to a mechanical review of: (1) the existence of dumping margins from the original investigation or subsequent administrative reviews; (2) whether imports of the subject merchandise ceased after issuance of the order; and (3) whether dumping was eliminated after imposition of the order and import volumes declined significantly.

78. The Department's "consistent application of" these checklist criteria in the SAA and the *Sunset Policy Bulletin* in its reviews demonstrates the mandatory nature of these instruments. Nevertheless, the United States takes the position that there is no irrefutable presumption of likely dumping in the Department's practice. (Para. 172.)

79. As noted previously, the United States has not cited a single case in which the domestic industry participated in a DOC sunset review and the Department determined that dumping would not be likely.

80. The United States argues that there were only 35 "contested cases." (Para.151.) The US argument again misses the point.

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[10] *See, e.g., Antifriction Bearings from Sweden*, 64 Fed. Reg. 60,282, 60,284 (1999)(ARG-63, Tab 6); *Ball Bearings from Singapore*, 64 Fed. Reg. 60,287, 60,289 (1999)(ARG-63, Tab 11); *Aspirin from Turkey*, 64 Fed. Reg. 36,328, 36,330 (1999)(ARG-63, Tab 14)). For example, in the final results of the sunset review of antifriction bearings from Sweden, the Department stated, "[G]iven that . . . respondent interested parties have waived their right to participate in this review before the Department, we determine that dumping is likely to continue if the orders were revoked." (*Antifriction Bearings from Sweden*, 64 Fed. Reg. 60,282, 60,284 (1999)(ARG-63, Tab 6).

[11] *Industrial Nitrocellulose from Yugoslavia*, 64 Fed. Reg. 57,852 (Dep't Comm. 1999)(final results sunset review) (ARG-42).

81. First, the premise of the US argument is fundamentally flawed because participation by respondents is an irrelevant factor given the SAA/SPB checklist criteria and the presumption that has never been refuted in the Department's sunset reviews when the domestic industry was interested.

82. Moreover, the substantive rights of WTO Members under Article 11.3 cannot be conditioned upon the actions of private sector exporters. Article 11.3 places an affirmative obligation upon a Member to terminate anti-dumping measures in five years unless that Member makes specific findings based on positive evidence. In the event that a company fails to cooperate, then Members would be subject to the disciplines of Article 6.8 and Annex II.

83. More importantly, however, even using the US erroneous figures,[12] 35 out of 35 still proves Argentina's claim. These are still "unbeatable odds." Moreover, of these, the Department has conducted 28 full sunset reviews. In each case, the Department found that dumping would likely continue or recur upon expiry of the order. Argentina has satisfied its burden of establishing a *prima facie* case demonstrating the presumption employed by the Department in sunset reviews has never been refuted in cases in which the domestic industry participates.

84. **Underneath the clutter.** It is easy to get lost in the procedural rules the United States has created in its law. Yet, from a results standpoint, the framework does not matter. Through the waiver provisions or application of the checklist criteria (whether in an expedited or full sunset review), the Department issues a determination that dumping would be likely to continue or recur. **At the end of the day, there is only one variable that matters in the whole of the US sunset regime governing Department sunset reviews: whether the domestic industry participates in the sunset review.** In all 217 sunset reviews (including Argentina's review) in which at least one domestic interested party participated, the Department rendered an affirmative likelihood determination.

85. That domestic industry participation is the only determinative factor in a Department sunset review demonstrates that – despite the statute, regulations, and the Department's purported consideration of parties' arguments – the Department does not truly engage in a meaningful analysis based on adequate evidence of whether dumping would likely continue or recur upon termination of the order. No matter what type of sunset proceeding conducted by the Department, the Department does not conduct the "review" and make the "determination" required by Article 11.3 and the substantive provisions of the Anti-Dumping Agreement.

IV. THE COMMISSION'S SUNSET REVIEW

86. We now turn, Mr. Chairman, to the aspect of the case involving injury. Let us recall that injury is a common term in the implementation of GATT Article VI. Injury retains this essential meaning in Article 11 of the Anti-Dumping Agreement. In Article 11.3, injury is a fundamental precondition to the continuation of the order. That is, a Member must find a likelihood that injury will continue or recur before it can continue a measure beyond 5 years.

87. Article 11.3 requires a finding of likely injury based on an objective examination of positive evidence, and the obligation in Article 11.3 cannot be satisfied by a finding that recurrence of injury is

[12] In any event, there were actually 43 cases in which the likelihood of dumping determination was – using the US term – "contested." Argentina's Exhibit ARG-63 shows that the response from foreign interested parties was deemed adequate in 28 cases and inadequate (based on a foreign party's attempt to participate) in 17 cases. Thus, foreign interested parties attempted to participate in 45 Department sunset reviews. In 2 of these cases, however, the domestic industry withdrew from the proceeding. Thus, the foreign and domestic parties "contested" the likelihood determination in 43 sunset reviews.

one of several possibilities, without reaching the point of being "likely". That is precisely what happened in this case.

A. THE COMMISSION GENERALLY DOES NOT APPLY THE "LIKELY" STANDARD REQUIRED BY ARTICLE 11.3

88. Let us first turn to the likely standard.

89. At the outset, Argentina submits that the United States should not be surprised that its trading partners are challenging the Commission's interpretation of the word "likely," or the Commission's implementation of this aspect of the Article 11.3 obligation. The Commission has been subject to criticism and has been challenged in US courts for its incorrect interpretation of the term "likely." There have been several challenges to the Commission's "likely" standard in the US courts, and the decisions have been consistent: in none of these cases was the Commission's original sunset decision upheld as correctly applying a "likely" standard.

90. The United States takes the position before this panel that the Commission applied a correct standard in the sunset determination of Argentine OCTG. The United States contends that the Commission is applying the correct standard, noting that US law uses the same term – "likely" – that appears in Article 11.3 (para. 282). The United States contends that "[i]t is incorrect to conclude that 'likely' can only mean 'probable' and cites secondary definitions of "likely" that appear to convey a degree of certainty that is less than "probable" but more than "possible." (US First Submission, para. 282 n.300) Moreover, the Commission has argued before US courts that "likely" does not carry its ordinary meaning of probable and that "the term 'likely' captures a concept that falls in between 'probable' and 'possible' on a continuum of relative certainty."[13]

91. Argentina recognizes that US law uses the same term "likely" as in the Anti-Dumping Agreement. However, the similarities stop there. The application of the likely standard to the facts of this case demonstrates the violation of Articles 3 and 11.3. Argentina will review the application of the standard to the facts of this case later in our presentation.

92. However, with respect the standard, we have to recognize that the US position as to the meaning of the term "likely" has changed again. In *Steel from Germany* and *DRAMS from Korea* the United States accepted that "likely" means "probable." The distinctions that the United States now tries to draw between the meaning of the terms likely and probable is inconsistent with the position the United States has taken in the WTO and is not tenable.

93. The United States tries to diminish the importance of these shifting positions in the sunset reviews, the US courts, and the WTO. This is so especially regarding the US litigation of the one case which has completed the first stage of judicial review, where the United States contends that the court ultimately approved the Commission's sunset determination, and that the result did not change from the original determination. But this argument misses the point. This acceptance of the Commission's finding was possible only after the court insisted that the term likely means probable, and that the Commission had to change its analysis to apply a likely, or probable, standard. Far from helping the US position, the affirmance of the remand determination only serves to emphasize the point that the Commission applied the wrong standard and that the result could only be sustained after the Commission fixed its decision.

[13] *See Usinor Industeel, S.A. v. United States*, No. 01-00006, slip op. 02-152 at 4-6 (CIT 20 Dec. 2002)(ARG-16); *Nippon Steel Corp. v. United States*, No. 01-00103, slip op. 02-153 at 6-7 (CIT 24 Dec. 2002).

B. ARTICLE 3 OF THE ANTI-DUMPING AGREEMENT APPLIES TO ARTICLE 11.3 REVIEWS

94. With this background, we turn to the question of what must be "likely." For Argentina and the other trading partners involved in this proceeding, the answer is clear: the answer is "injury," which can only be injury as defined under the terms of the Anti-Dumping Agreement. For the United States, the issue is not so clear, and injury in Article 11.3 has a unique meaning, which is something different than injury as defined in Article 3.

95. Article 3 defines "injury" as that term is used throughout the Anti-Dumping Agreement. Thus, an authority's determination under Article 11.3 of whether "injury" would be likely to continue or recur must satisfy the requirements of Article 3.

96. Footnote 9 states: "Under this Agreement the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or a material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article." The Appellate Body used the SCM equivalent of this very footnote as an illustration of how the injury concept applies throughout the Agreement, including in sunset reviews. (*See* Appellate Body Report, *Steel from Germany*, para. 69, n.59.)

97. The US contention that Footnote 9 is a mere "drafting device" designed to avoid the need to recite each of the three distinct forms of injury throughout the agreement is unpersuasive. The Panel in *DRAMs from Korea* noted "that, by virtue of note 9 of the [Anti-Dumping] Agreement, the term 'injury' in Article 11.2 'shall be interpreted in accordance with the provisions of Article 3." (Panel Report, *DRAMs from Korea*, Para. 6.59 n.501; *see also* Panel Report, *Sunset Review of Steel from Japan*, para. 7.99). The United States has not offered any reasons for why injury for purposes of Article 11.2 should be treated differently than injury for purposes of Article 11.3.

98. Nor does the United States attempt to explain how injury in Article 11.1 could possibly be different from injury in Article 3. Article 11.1 states that "An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping that is causing injury." There is no suggestion that the drafters of the Agreement intended in Article 11.1 anything other than injury as defined in Article 3 and specified in footnote 9. And there can be no question that the overarching principles of Article 11.1 provide the immediate context of Article 11.3. Is the United States saying that injury for the purposes of Article 11.3 is different than injury as referenced in Article 11.1?

99. The Panel in DS244 (another case involving Article 11.3) stated that:

> The term 'injury' as it appears throughout the Anti-Dumping Agreement – including Article 11 – is to be construed in accordance with this footnote, unless otherwise specified. This would seem to support the view that the provisions of Article 3 concerning injury may be generally applicable throughout the Anti-Dumping Agreement and are not limited in application to investigations. Article 11 does not seem to explicitly specify otherwise in the case of sunset reviews."

100. It is difficult to understand, and runs counter to logic, that negotiators who demonstrated care in choosing their words throughout the Agreement would define a term with such precision in footnote 9, specify that it applies throughout the Agreement, and then change the meaning of the term in Article 11.3 without being clear that the negotiators were doing so.

101. The US also raises the distinction between the "determination of injury" in an original investigation and a "determination of the likely continuation or recurrence of injury" in a sunset review. To the United States, the drafters intended a different kind of injury in Article 11.3. Again, missing from the United States argument is any reference to Article 11.1, which establishes the overarching general principle limiting the duration of an anti-dumping duty, and linking the duration

to the same injury that was required in order to impose the duty. Article 11.3 does nothing more than implement the principle of Article 11.1 in the specific context of a five-year review, and there is no indication that a different concept of injury was intended by the drafters or accepted by the Members.

102. Thus, an authority's determination of whether "injury" would be likely to continue or recur under Article 11.3 must meet the requirements of Article 3. Article 3.1 mandates that the authority's "determination of injury" be based on "positive evidence" and "an objective examination" of the likely volume of dumped imports and the effect of such imports on prices in the domestic market for like products, and the likely impact of these imports on domestic producers of such products. Articles 3.4, 3.5, 3.7, and 3.8 impose further obligations related to consideration of specific economic factors and indices having a bearing on the state of the domestic industry, causation, and special rules related to any future injury determinations.

103. In sum, Argentina views the issue as one of the fundamental disagreements between the United States and other WTO Members involved in this proceeding. Does "injury" as used in Article 11.3 differ from the meaning of "injury" as defined under the Agreement in footnote 9, and do the substantive and procedural standards for evaluating injury contained in Article 3 apply to determinations made under Article 11.3? Under the Agreement, the clear answer to both of these questions is "yes." Moreover, this is not merely Argentina's view – the Third Parties similarly agree that this interpretation is mandated by the Agreement.

C. THE COMMISSION'S APPLICATION OF A "CUMULATIVE" INJURY ANALYSIS IN THE SUNSET REVIEW OF THE ANTI-DUMPING DUTY MEASURE ON ARGENTINE OCTG WAS INCONSISTENT WITH ARTICLES 11.3 AND 3.3

104. Article 11.3 does not permit cumulation. A cumulative injury analysis under Article 11.3 would require an assessment of the combined likely effects of terminating multiple anti-dumping measures. Article 11.3, however, pertains only to individual anti-dumping measures. This is clear from the textual analysis of the provision and the object and purpose of the provision.

105. Pursuant to its terms, Article 11.3 applies to "any definitive anti-dumping duty" and requires the "expiry of the duty." In each reference, the drafters have chosen the singular and have avoided the plural. In addition, the context of Article 11.3 reinforces the clear text that Article 11.3 prohibits cumulation. Article 11.3 is an implementing provision of Article 11. Article 11.1, the umbrella provision of Article 11.3, directs that "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." Again, the drafters have used the singular. Thus, on its face and interpreted within its context, Article 11.3 does not permit a cumulative analysis of the likely injurious effects of multiple anti-dumping orders.

106. Through Article 3.3, the Anti-Dumping Agreement limits the use of a cumulative injury analysis to "investigations," and even then only where certain conditions are met. The fact that Article 3.3 provides for the conditioned use of cumulation in "investigations" but not in "reviews" indicates that a cumulative injury analysis is not permitted in the likelihood of injury determination made in an Article 11.3 review. It is difficult to understand why a textual limitation permitting cumulation only in investigation should be interpreted differently that the concept of *de minimis* which, according to the Appellate Body's interpretation, applies only to investigations.[14] Indeed, the United States embraced the Appellate Body's rationale on this point.

107. The US violation of Article 11.3 is even more evident when one considers the extent to which cumulation undermined Argentina's rights under Article 11.3 in this case. Argentina, and each WTO Member, negotiated for the right to have an anti-dumping measure affecting its exports removed after five years, unless doing so would be likely to lead to continuation or recurrence of injury. Yet, the

[14] *See* Appellate Body Report, *Steel from Germany*, paras. 68-69, 91-92.

United States never made such a finding in this case. The Commission never analyzed the effect of removing the anti-dumping measure on Argentine OCTG. Rather, the Commission performed a cumulative assessment, which essentially conditioned Argentina's right under Article 11.3 upon the actions of exporters from other WTO Members, and the Commission's interpretation of those actions. There is no basis in the text of Article 11.3 or of the object and purpose of the provision to suggest that Argentina's right to have the anti-dumping measure expire was intended to be conditioned in this way. Instead, Argentina has a right to expect termination, unless there is a finding based on positive evidence that termination of the anti-dumping measure on Argentine OCTG (not all anti-dumping measures on OCTG from other countries) would be likely to lead to a continuation or recurrence of injury.

108. Finally, assuming *arguendo* that Articles 3.3 and 11.3 do not preclude cumulation in Article 11.3 reviews, then the terms of Article 3.3 must be applied to any such cumulative analysis in a sunset review. Indeed, the application of either the *de minimis* or negligibility requirements (both of which must be satisfied) would have prevented cumulation in the Commission's sunset determination of Argentine OCTG. The US rebuttal to Argentina's alternative argument relies on the premise that Article 3 does not apply to sunset reviews under Article 11.3. As Argentina has noted, footnote 9 provides that "injury" under the Anti-Dumping Agreement "shall be interpreted in accordance with the provisions of … Article [3]."

109. The Commission's use of a cumulated injury analysis in the sunset review of OCTG from Argentina was also inconsistent with Article 11.3, because it prevented the Commission from applying the correct "likely" standard. In reaching its decision to cumulate in this case, the Commission considered whether imports from each subject source had <u>any possible</u> discernible adverse impact on the domestic industry. (*Commission's Sunset Determination* at 6, 10-16.) The Commission included the imports from Argentina in the cumulated injury analysis because it did <u>not</u> find that the Argentine imports would have <u>no</u> discernible adverse impact on the domestic industry. In other words, the Commission cumulated imports from Argentina on the basis of a finding that these imports could have any <u>possible</u> adverse impact on the domestic industry. This low standard, cast in a double-negative, runs directly counter to the "likely" standard established by Article 11.3. The United States does not respond to this argument.

110. This use of a double negative formulation is contrary to the panel's decision in *DRAMS from Korea*. "Not unlikely" does not set the same standard as "likely." Worse still, "no" discernible adverse impact establishes a standard that is directly contrary to a "likely" standard. Under this formulation, finding any discernible impact leads to cumulation, which as we see in this case can lead to a finding of "likely" injury without regard to any "positive evidence" relating to probable imports from individual countries.

111. The Commission's use of a "possibility" standard for cumulation also conflicts with the reasoning of the Appellate Body in *Steel from Germany*, and the evidentiary requirements of Article 3.1 of the Anti-Dumping Agreement. (*See* Appellate Body Report, *Steel from Germany*, para. 81 (stating that "[i]t is *unlikely* that very low levels of subsidization could be demonstrated to *cause* 'material' injury," and that "[w]here the level of subsidization at the time of the review is very low, there must be persuasive evidence that revocation of the duty would nevertheless lead to injury to the domestic industry.") Such a statement only makes sense if one presumes that cumulation is not possible under Article 11.3.

112. As with the Commission's failure to apply the correct "likely" standard under Article 11.3, the Commission's decision to conduct a cumulative injury analysis demonstrates that the Commission did not support its determination that injury would likely continue or recur upon termination of the order on Argentine OCTG with a sufficient factual basis. It cannot seriously be argued that an affirmative likelihood of injury determination could have been made with respect to Argentina without a decision to cumulate the imports from several countries.

D. THE COMMISSION'S KEY FINDINGS DEMONSTRATE ITS FAILURE TO APPLY THE LIKELY STANDARD

113. In order to determine whether the Commission satisfied the standards of Article 11.3, the panel must consider whether the facts were properly established and whether the assessment of the facts was objective.

114. In the recent compliance panel appeal in the *Bed Linens* case, the Appellate Body provided additional guidance on the applicable standard under Article 17.6(i):

> In *US – Hot-Rolled Steel*, we stated that "[a]lthough the text of Article 17.6(i) is couched in terms of an obligation on *panels* . . . the provision, at the same time, in effect defines when *investigating authorities* can be considered to have acted inconsistently with the Anti-Dumping Agreement." We further explained that the text of Article 17.6(i) of the Anti-Dumping Agreement, as well as that of Article 11 of the DSU, "requires panels to 'assess' the facts and this . . . clearly necessitates an active review or examination of the pertinent facts."[15]

115. To do this, the panel will have to review the written submissions of the parties in detail. We will not recount all of that evidence here.

116. Instead, we will focus on the volume findings in the Commission's determination because these findings appear to drive the Commission's overall conclusion, and because the Commission's analysis with respect to "likely volume" best illustrates what Argentina considers to be the problem with the Commission's analysis – that is, it relies on isolated factors that indicated that certain outcomes were possible, rather than relying on positive evidence that certain events were likely to continue or recur.

117. The Commission concluded "that the volume of subject imports [was] likely to increase significantly in the event of revocation." (*See Commission's Sunset Determination* at 19-20 (ARG-54). The Commission made this conclusion despite its recognition that the subject producers' "capacity utilization rates represent a potentially important constraint on the ability of these subject producers to increase shipments of casing and tubing to the United States." (*Id.*) Despite the existence of capacity constraints, the Commission determined that the subject producers had "incentives to devote more of their productive capacity to producing and shipping more casing and tubing to the US market." (*Id.*) The Commission based its conclusion that the subject producers had "incentives" to ship more OCTG to the United States in the absence of the dumping measures on five findings. Let's review each of them.

118. Again, Argentina has prepared a summary chart (Chart 3) for ease of reference. Chart 3 summarizes each of the five so-called incentives that the Commission cited, and explains why these "incentives" cannot defeat the positive evidence of capacity restraints, and cannot support a finding that injury is likely to continue or recur.

119. First, the Commission found that, "[g]iven Tenaris' global focus, it likely would have a strong incentive to have a significant presence in the US market, including the supply of its global customers' OCTG requirements in the US market." (*Id.* at 19.)

- With respect to Tenaris, the Commission only examines "half" the story. Indeed, some of the companies forming the so-called Tenaris alliance were

[15] Appellate Body Report, Recourse to Article 21.5, *Bed Linen from India*, para. 163.

outside of the anti-dumping duty orders under review. Thus, there was no incentive for the companies subject to the order to ship, given the existence of members of the alliance outside of the order. Moreover, other companies in the Tenaris alliance, such as Algoma, were not subject to an order and did not ship to the United States.

- The Commission characterized Tenaris as the "dominant supplier of OCTG products and related services to all of the world's major oil and gas drilling regions except the United States." (*Id.*)

- Siderca, put forth positive evidence indicating that the subject producers' output was committed in long-term contracts, and that it and its affiliates sold primarily to end users. (Hearing Tr. At 5 (Testimony of German Cura))

- Yet the Commission concluded that the companies referred to as Tenaris would act according to this incentive and ship OCTG to the United States, apparently regardless of the long-term commitments maintained by Siderca and the other affiliated producers. The United States adds in its written submission that "many of those contracts were with the very end users most eager to see subject imports enter the US market." (US First Submission, para. 328.)

- In making this assertion, the United States ignores the record evidence indicating that Tenaris, the dominant global supplier, had global contracts with companies that represented "only 12-14 per cent of US oil and gas rigs." (*Commission Sunset Determination* at 19 n.124.) Moreover, the United States asserts that "testimony at the hearing indicated that customers already buying OCTG from the subject producers would immediately import the subject product if these orders were revoked." (*Id.*) Yet in support of this assertion, the United States could only point to a second-hand statement that one customer had expressed such a desire. (*Id.* (citing Hearing Tr. At 58 (Mr. Ketchum, Red Man Pipe and Supply)(Exhibit US-20).)

- In concluding that Tenaris had a strong incentive to ship OCTG to the United States, the Commission failed to cite positive evidence that this so-called "incentive" would justify breaking long-term contracts and turning away long-term customers, for which positive evidence existed. It is a matter of common-sense that one does not become a "dominant" (Argentina prefers "leading") supplier by breaking long-term contracts.

- The Commission's finding that Tenaris had a strong incentive to ship OCTG to the US market was thus based on a mere possibility, rather than on positive evidence indicating that such shipments would be likely.

120. Second, the Commission found that, because "casing and tubing are among the highest valued pipe and tube products, . . . producers generally have an incentive, where possible, to shift production in favour of these products from other pipe and tube products that are manufactured on the same production lines." (*Id.*)

- On its face, this statement is a general assumption rather than positive evidence. The statement that "producers generally have an incentive" is not enough support for establishing that something is likely to occur.

- In addition, this again contradicts the notion – based on positive evidence developed during the review – that a company would disregard long-term contracts to shift production.

- The Commission's statement also fails to recognize that Siderca (and even Tenaris) had established its position as the dominant world supplier without the US market. This suggests that the company had developed a strategy that did not rely on the US market and was not, in fact, motivated by these purported "general incentives."

- In sum, it is clear that the so-called incentive to shift production is not based in any way on positive evidence, but rather only on conjecture and speculation.

121. Third, the Commission found that "prices for casing and tubing on the world market are significantly lower than prices in the United States," and that this price differential created "an incentive for subject producers to seek to increase their sales of casing and tubing to the United States." (*Id.* at 19-20.)

- The Commission relied on anecdotal evidence with respect to its efforts to discern the so-called international prices.

- There is, as the Commission recognizes, contradictory evidence as to the magnitude of the price differential.

- Moreover, this anecdotal and contested evidence related to the supposed price differential, and did not relate to the ultimate proposition relied on by the Commission – that the Argentine producer would react to this incentive despite its long-term contracts and it was selling to end users.

- Notwithstanding the above points, the Commission embraces the evidence submitted by the US industry and once again accepted what can be described as a general assumption that exporters will ship to the US market in quantities sufficient to cause injury.

- Even accepting *arguendo* the possibility of competing record evidence on this point, the evidence ultimately relied on by the Commission does not establish a likelihood that any exporters would act in accordance with this general incentive.

122. Fourth, the Commission found that "subject country producers also face[d] import barriers in other countries, or on related products." (*Id.* at 20.)

- With regard to trade barriers in third-country markets, the Commission could point to only one outstanding order on the subject merchandise: an anti-dumping order in Canada against imports from Korea. (Id. at 20.) This is hardly the "positive evidence" required to support a conclusion that increased exports would be likely to enter the US market.

- Moreover, the underlying premise supporting the Commission's reliance on the existence of other anti-dumping orders one is the so-called incentive to shift production. As noted above, there was no evidence of product-shifting, it ignored evidence that product shifting would not occur, and in the end amounted to conjecture and speculation.

123. Finally, the Commission concluded that the industries in the subject countries were "dependent on exports for the majority of their sales." From this, the Commission classified these producers as "export-oriented." In turn, from this, it then stated that "the export orientation of the industries in the subject countries indicates that they would seek to re-enter the US market in significant quantities, as they did in the original investigation." This statement deserves some analysis. In essence, from the observation that certain companies have been successful in exporting, the Commission reaches the conclusion that these companies will: 1) increase exports to the US market; 2) in significant quantities; and 3) in similar proportion as in 1994-95. This is the basis of the Commission's so-called incentive. Argentina submits that this is pure conjecture, built upon several layers of speculation that does not even approach the standard required by Article 11.3.

124. Moreover, it must be noted that in connection with the Commission's analysis of the so-called "incentives," the Commission never considered how these incentives would operate with regard to producers and exporters in Argentina. Argentina finds it hard to accept that its right to termination under Article 11.3 can be completely disregarded without an examination of that focuses on Argentine producers and Argentine OCTG exports.

125. Argentina further recalls that these five factors were central to the Commission's determination with respect to its finding that the likely volume would increase. In the end, what did the Commission do? The Commission determined that "the ability to achieve high levels of overall capacity utilization depends on maintaining high levels of casing and tubing production . . . capacity utilization rates represent a potentially important constraint on the ability of these subject producers to increase shipments of casing and tubing to the United States." The natural conclusion flowing from this positive evidence is that there would not be an increase in volume. However, instead, the Commission invented "incentives," based on conjecture and speculation, and then the Commission substituted these incentives to overcome the positive evidence of capacity constraints.

126. Similar short-comings exist with respect to the Commission's price analysis and its impact analysis. Argentina invites the panel to keep this in mind as it reviews the Commission's determination in evaluating whether the Commission satisfied the likely standard of Article 11.3.

V. COMMENT ON US REQUEST FOR PRELIMINARY RULINGS

127. Before concluding, Mr. Chairman, Argentina would like to turn briefly to the US request for preliminary rulings.

128. Argentina's 4 December submission responds fully to the allegations made by the United States in its Request for Preliminary Rulings. However, Argentina here briefly highlights some of the WTO case law that should guide the Panel in assessing its interpretation of DSU Article 6.2. Argentina's submission responds specifically to the three categories of allegations made by the United States: (i) the so-called "Page Four" claims; (ii) the claims under Sections B.1, B.2 and B.3; and (iii) the "certain matters" that the United States asserts were not included in Argentina's Panel request.

129. Argentina first recalls the general principles enunciated by the Appellate Body:

- the terms of reference serve the due process objective of providing notice to the defending party and the third parties of the nature of the complainant's case. Any finding that Article 6.2 has been violated is tantamount to a finding that due process rights have been violated;[16]

[16] Appellate Body Report, *Steel from Germany*, para. 126.

- compliance with the requirements of Article 6.2 must be determined by considering the panel request as a whole, and not simply on the basis of isolated portions;[17] and

- compliance must be assessed in the light of "attendant circumstances," including actual prejudice to the defendant during the course of the panel proceedings.[18]

130. First, Argentina's panel request must be read as a whole. In crafting its preliminary objection, the United States turns the principle of DSU Article 6.2 on its head. Indeed, rather than read Argentina's panel request as a whole, the United States artificially severs the request, parses isolated language, and then contends that in this context the United States cannot discern the particular claims of Argentina. The US position is untenable. Considering the panel request as a whole, it is quite clear which violations are being alleged by Argentina. Indeed, Argentina has set out the WTO-inconsistencies with precision.

131. Second, the United States has not satisfied its burden of demonstrating it suffered actual prejudice during the course of the panel proceedings (which have only just begun). This is a critical flaw in the US complaint. A review of the US First Submission confirms that in no way have the "due process rights" of the United States been violated. The United States has provided detailed (albeit unconvincing) argumentation on the full range of claims, demonstrating clearly that the United States is fully aware of Argentina's claims, and has responded substantively to them. It should also be noted that previous panels examining the issue of "prejudice" under DSU Article 6.2 have also considered, as a highly relevant factor, whether there was any prejudice to the interests of third parties by any alleged deficiencies in the panel request. In *Bed Linens*, for example, the Panel found that the fact that the third parties were able to make substantive submission on the issues "suggests a lack of prejudice to third parties' interests in this dispute." [19]

132. In the present case, none of the Third Parties have raised any concerns about any aspects of Argentina's claims. Indeed, the European Communities, far from expressing any concerns about the alleged lack of clarity of Argentina's request, stated to the contrary that the "Panel should not follow the United States suggestion … Rather, in order to establish whether the conditions of Article 6.2 DSU are met, the Panel should consider the request as a whole."[20]

133. In summary, the US request for preliminary rulings fails both prongs of the two-part test set out by the Appellate Body for determining whether a panel request meets the requirements of Article 6.2 of the DSU. First, an examination of Argentina's panel request, read as a whole, indicates that it is detailed, clear and specific, fully setting out Argentina's claims. Second, the United States has utterly failed to substantiate its claim that it was allegedly prejudiced during the course of the Panel proceedings. In any event, as indicated above, the United States has been well aware of the full nature and extent of Argentina's claims for over a year. In light of the attendant circumstances in this case, the United States cannot credibly claim that it was not aware of Argentina's claims, "sufficient to allow it to defend itself."

134. Accordingly, Argentina respectfully requests the panel to dismiss the US request for preliminary rulings in their entirety.

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[17] *Id.* at para. 127.

[18] Appellate Body Report, *Korea Dairy*, para. 127.

[19] Panel Report, *European Communities - Anti-Dumping Duties on Imports Of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, paragraph 6.28.

[20] Third Party Submission of the European Communities, 14 November 2003, Section 2.

VI. CONCLUSION

135. Let us conclude, Mr. Chairman. Argentina is confident that the Panel appreciates the extreme nature of this case, and the extreme nature of the conflict of the Department's and the Commission's determinations with the obligations of Article 11.3. Here we are, nearly a decade after a 1.36 per cent margin was calculated for Argentina's only investigated exporter. This margin, everyone concedes, was calculated on the basis of zeroing, and is below what is today a *de minimis* margin. Injury was determined originally on the basis of cumulated imports, as it was once again in the US sunset proceeding.

136. Despite these defects, this measure continues, and it is very likely to continue to exist well into the future if nothing is done. How is this possible in light of the fact that WTO Members included in the Uruguay Round a specific provision that requires termination of an anti-dumping measure unless specific conditions are met?

137. Argentina has presented to this Panel and to the WTO Members its view of how this troubling result has occurred.

138. With respect to likely dumping, the United States has arranged three different procedures to implement its Article 11.3 obligation, each depending on the perceived level of participation in the process. In the end, it does not matter which procedure the United States uses. All roads lead to the application of mandatory criteria which prevent precisely the type of factual and legal review that Article 11.3 requires in order to invoke the exception to termination. This can be seen plainly in this case, and in all the other cases in which the US industry has expressed an interest. There is no analysis, no positive evidence from which to infer likely behavior; in the end, no review.

139. With respect to likely injury, although the Commission does develop evidence, in the end it fails to apply the correct legal standard – a "likely" standard. It explains how there are several possibilities supporting injury. This case is a clear example of the varied uses of "possible" scenarios to support a finding of "likely" injury.

140. Argentina cannot conclude without noting the stark contradiction in the approach of the Department and the Commission in their respective sunset reviews. For its part, the Department considered Argentina's only investigated exporter to be irrelevant and therefore concluded that the Argentine exporter had "waived" its participation in the review. For its part, the Commission based its determination on speculation about the Tenaris alliance and on a cumulative assessment of exports from other countries, both subject to, and not subject to, the measure. In other words, the Commission's analysis is anything but an order-wide analysis, but rather conditions each Member's rights upon the actions of other companies from other Members. In the end, neither the approach of the Department or of the Commission is consistent with Article 11.3. There is one principal obligation under Article 11.3. Argentina had the right under Article 11.3 to have the anti-dumping measure on OCTG terminated unless the specified requirements of Article 11.3 have been satisfied to invoke the exception to maintain the measure. Argentina's rights have been violated by the exceedingly limited approach of the Department and by the overly expansive approach of the Commission.

141. Argentina respectfully requests the Panel:

- to find that in this case the US measures identified by Argentina, as such and as applied, violate US WTO obligations;

- to recommend that the United States brings its measures found to be inconsistent with the covered agreements into conformity with its WTO obligations; and

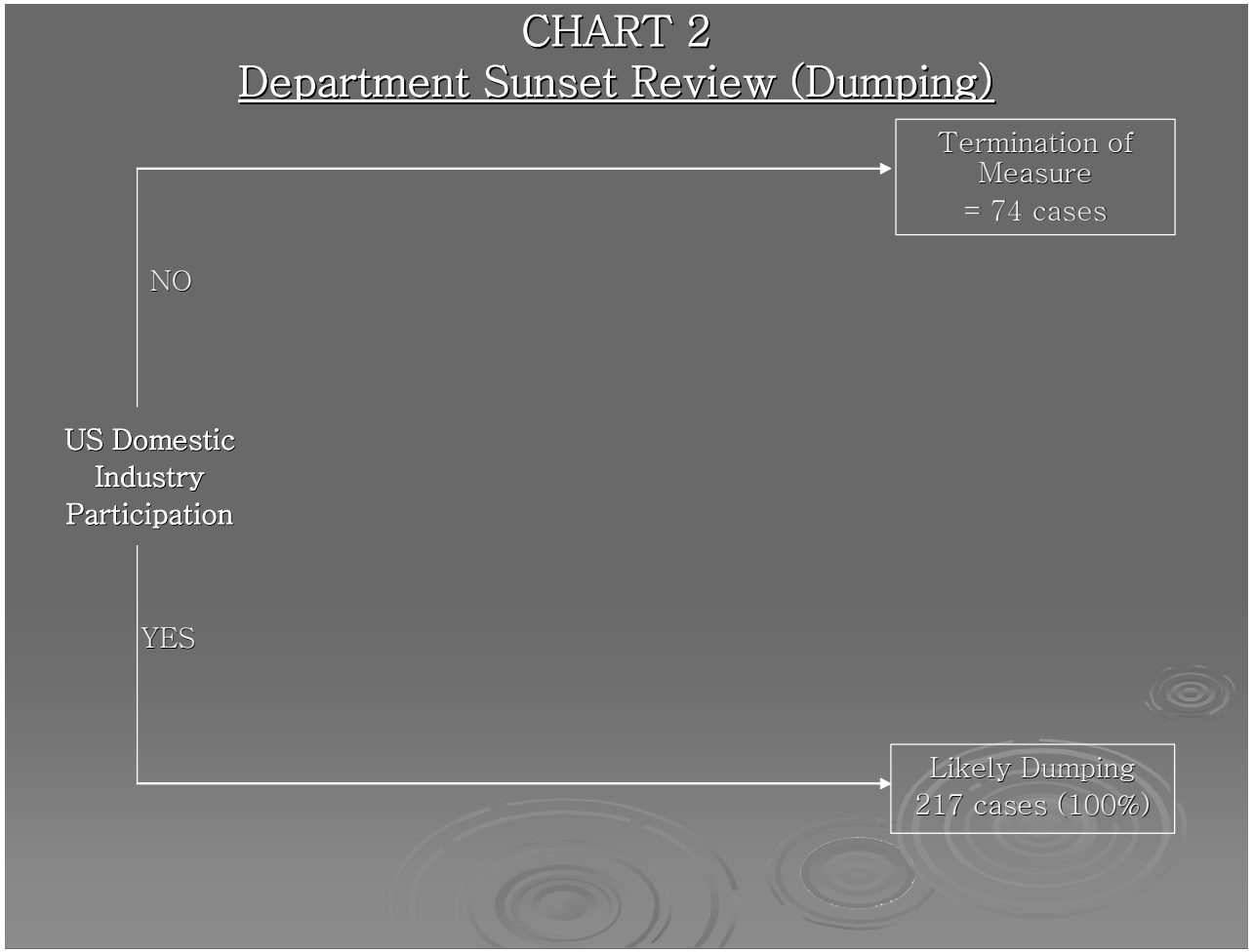
- to suggest, pursuant to DSU Article 19.1, that the only way for the United States to comply with these recommendations is through the immediate termination of the measure.

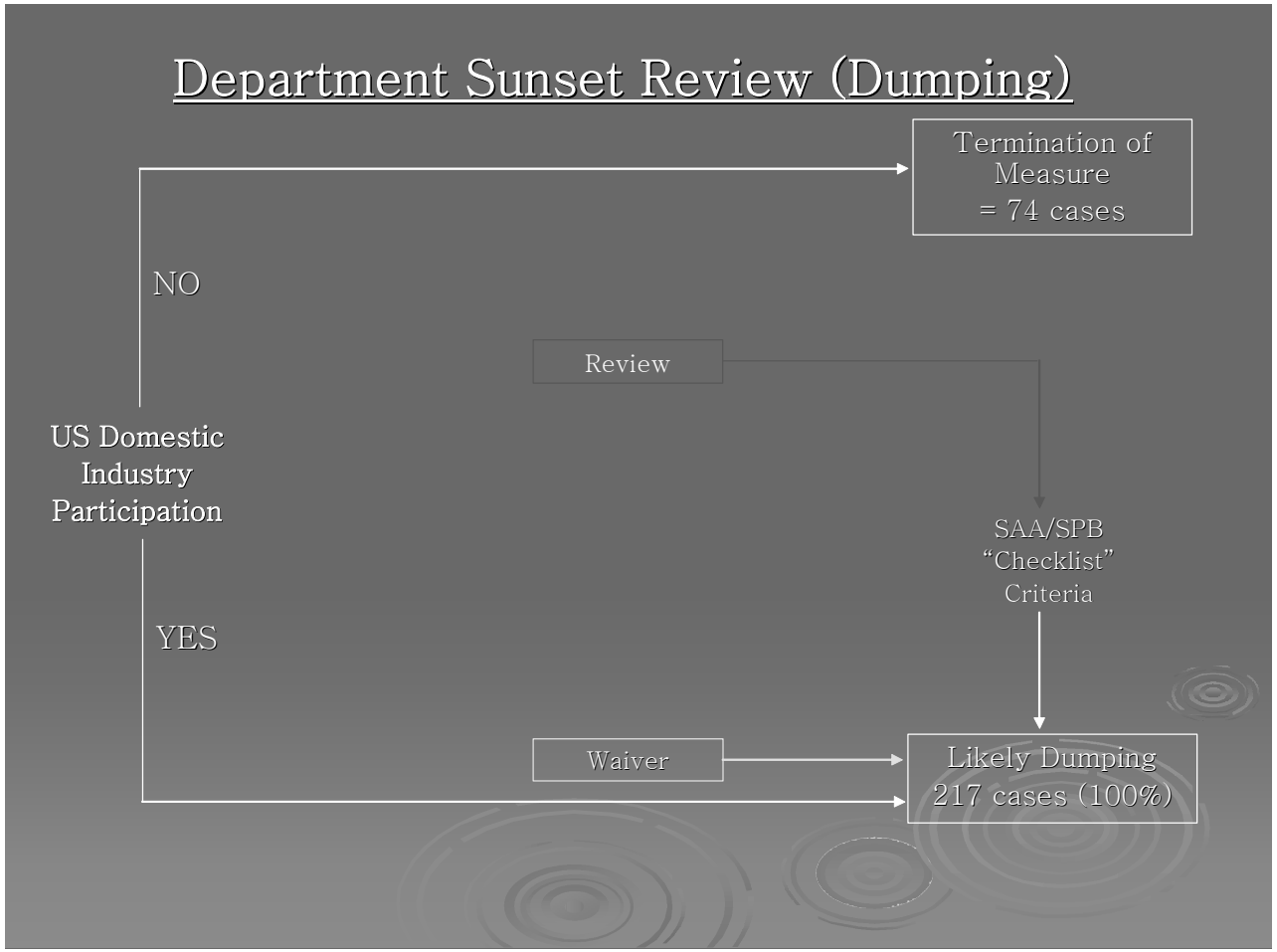
142. Argentina recalls that DSU Article 3.7 provides that the "first objective" of the dispute settlement mechanism is usually to "secure the withdrawal" of the WTO-inconsistent measure. This is particularly appropriate in the present case. Indeed, immediate termination of the anti-dumping duty is the only possible remedy, given the pervasive violations committed by the United States in this case. Article 11.3 requires termination after five years unless certain findings have been made within the specified time on the basis of evidence. Here, the United States did not make these findings and cannot now "cure" the multiple defects through another review or any action other than the immediate termination of the anti-dumping duty.

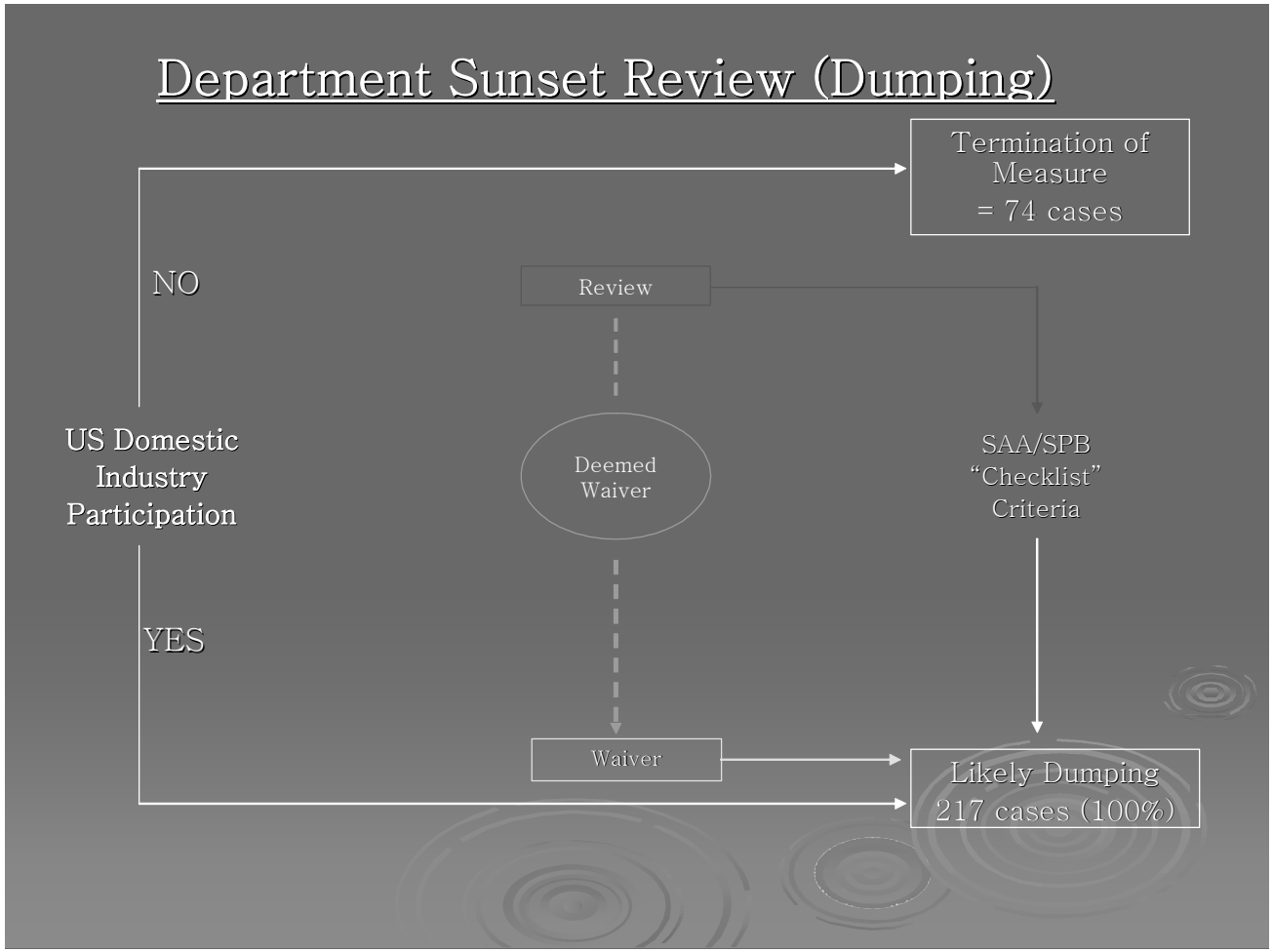
143. Unless the panel recommends termination in this case, this story will repeat into the future, not only for Argentina but for all the trading partners affected by US anti-dumping measures.

CHART 1: Contradictions in US Position

Issue	**In Sunset Determination**	**In First Submission**
Waiver	The Department deemed respondent interested parties to have waived participation ARG 51 (Issues & Decisions Memorandum at 5)	Siderca was not deemed to have waived participation (paras. 211-213)
Siderca's Response	Inadequate ARG 51 (Issues & Decision Memorandum at 3, 7) ARG 50 (Adequacy Determination at 2) ARG 46 (DOC Sunset Determination at 66,701)	Adequate (para. 213, 216, 233, 234)
Facts Available	Applied to Siderca ARG 51 (Issues & Decision Memorandum at 3)	Not applied to Siderca (paras. 214, 221)
Significance of "Non-responding Respondents"	Never mentioned	The reason for waiver, inadequacy, expedited review and "facts available" (paras. 214, 216)







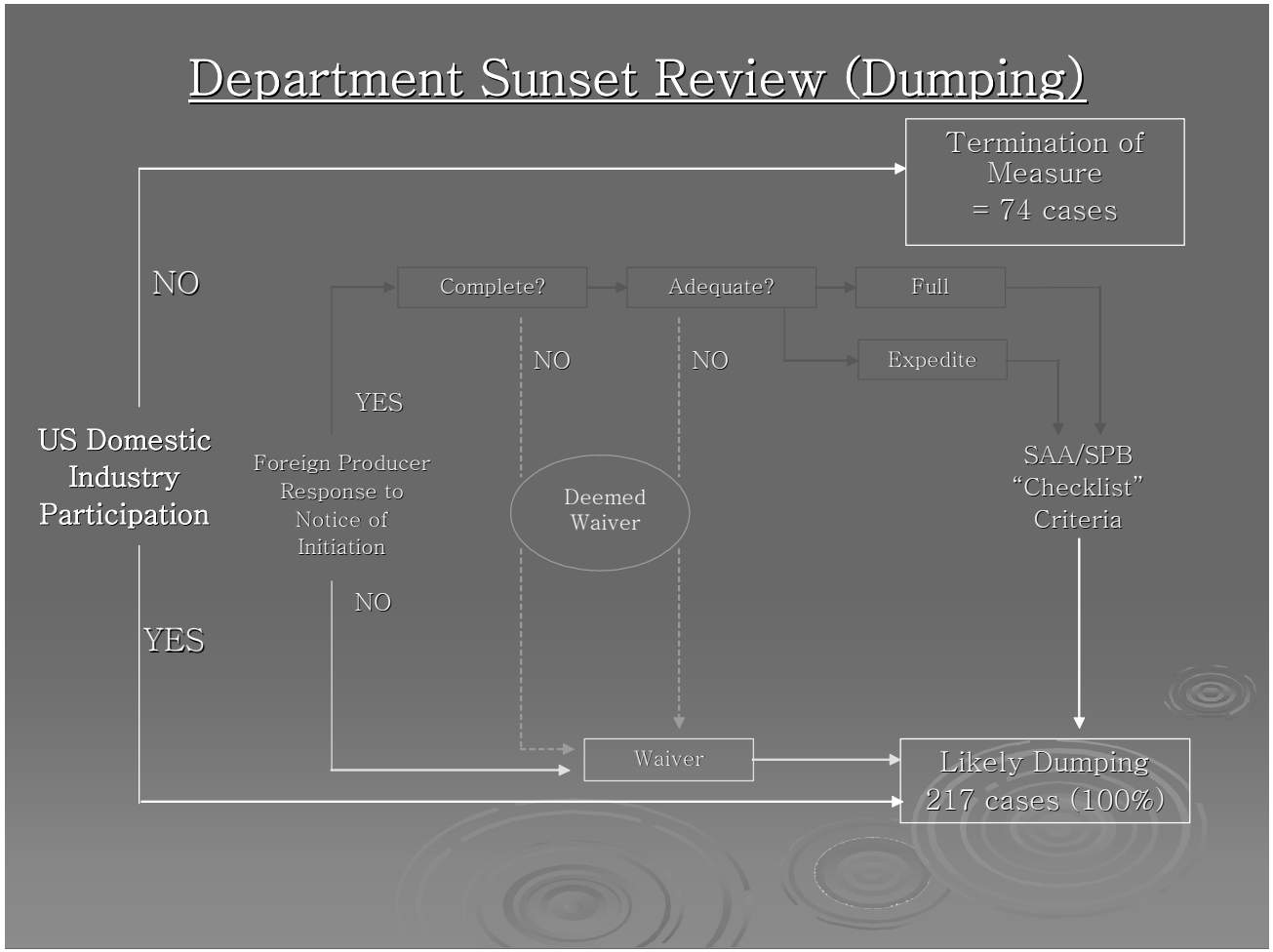


CHART 3: The Commission's "5-Incentive" Analysis

Factors relied on as	**"incentives" by the Commission**	**. . . are not "likely" because:**
1) Global Focus Tenaris has a Global Focus	Tenaris has a strong incentive to have a significant presence in the U.S.	• Evidence on the record does not support the "strong incentive" argument. • Tenaris mills from non-subject countries could have, but did not, access the U.S. market. • Tenaris developed its leading position without relying on the U.S. market
2) OCTG Pricing Casing and tubing are among the highest valued pipe and tube products generating among the highest profit margin	There is an incentive to shift production to OCTG and to ship more OCTG to the U.S.	There was positive evidence regarding products other than casing & tubing products that were part of Tenaris' overall strategy, associated with service to the oil and gas industry. Therefore, the ITC's "product shifting" is not possible for a leading, full range supplier.
3) U.S. OCTG Pricing Casing and tubing prices in the U.S. are higher than prices on the world market	There is an incentive to focus on the U.S. market for OCTG products	• Evidence regarding price differentials was disputed • Several producers had commitments to supply other markets
4) Trade Remedies There was one antidumping order in Canada against Korean OCTG	Exporters faced barriers in other countries or in related products, which would lead the exporters to ship more OCTG to the U.S.	There are no barriers against Argentine OCTG or related products
5) Export Orientation Producers are dependent on exports for the majority of their sales	Producers are export-oriented, and therefore shipments to the U.S. would be increased	There's a strong commitment to long-term contracts with overseas multinational companies. It is not logical to risk those contracts for spot sales in the US market

Closing Statement – 10 December 2003

1. Mr. Chairman, Members of the Panel: on one level, this case may seem very complex. There are many US laws, regulations and practices, including some of which even the US delegation characterized as "inartfully" drafted.

2. Yet underneath all the complexity of the US legal system lies a very simple truth: if the US industry wants a dumping order to be continued, the Department will find that dumping is likely to continue or recur. It's as simple as that. Even a quick review of Argentina's Exhibit 63 will indicate how clear and straightforward this case really is.

3. Argentina is confident that the Panel realizes full well the mechanical, pre-ordained nature of US sunset "determinations." This approach is at odds with the requirements of the Agreement.

4. Mr. Chairman, let us consider briefly what we heard yesterday from the United States on "likely" dumping. With respect to waiver – and this is directly the Chairman's questions to the United States and the US response to that question – the United States asserts on the one hand that waiver is applied on a company-specific basis. On the other hand, the United States indicated several times that the sunset determination is conducted on an order-wide basis, and that it never makes a likelihood of dumping determination on a company-specific basis. Yet the mandatory provisions of the statute unambiguously state that, in the event of "waiver," the Department shall conclude that dumping is likely to continue or recur. What precisely does the statute mean? And, furthermore, what precisely did the Department mean when it said in its *Issues and Decision Memorandum* that, and I quote, "[S]ection 751(c)(4)(B) of the Act provides that the Department shall determine that revocation of an order is likely to lead to continuation or recurrence of dumping where a respondent interested party waives its participation in the sunset review. In the instant reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes waiver of participation."

5. In response to a panel question yesterday, the United States spoke of "inartful" drafting with regard to the Department's waiver regulation. The United States also declared "inartful" the drafting of certain aspects of the Department's decisions. Argentina agrees with these characterizations of "inartful" drafting, but this explanation cannot excuse the US failure to comply with its obligations under Article 11.3.

6. But, as I stressed before, in the end, it does not matter which procedure the United States uses, and Argentina has demonstrated this through its empirical analysis provided in ARG-63. In the end, the US will apply its mandatory criteria, which prevent the type of factual and legal review that Article 11.3 requires in order to maintain the order. This can be seen plainly in this case, and in all the other cases in which the US industry has expressed an interest. There is no analysis, no positive evidence from which to infer likely behaviour; in the end, no review.

7. After some of the US statements yesterday, this result is not surprising to Argentina. The United States recited criteria from the *Sunset Policy Bulletin.* To paraphrase the US assertions, if a company dumped in the past it is reasonable to assume that it will dump in the future. If a company stopped shipping after the imposition of an anti-dumping duty order, it is reasonable to assume that the company cannot export without dumping. If a company's volume has declined, it is reasonable to assume that the company will dump again if the order is lifted. These statements are the criteria established by the statute, SAA and the *Sunset Policy Bulletin.* These statements speak for themselves. These are in fact the sole criteria relied upon to make the likely dumping finding. Assumptions based on speculation cannot, however, satisfy the Article 11.3 standard.

8. With respect to the Commission's likely injury determination, the Commission confirmed that it did not consider the impact of likely Argentine OCTG imports on the United States industry; rather, it considered the impact of cumulated imports from 5 countries. Argentina cannot accept that such an approach is consistent with Article 11.3. If it were, Argentina's right to have measures terminated after 5 years is severely limited, and is something very different from what the text of Article 11.3 says that it is.

9. We also heard yesterday that the cumulated approach was essential in this case because of the "Tenaris" alliance. Yet, we also heard yesterday that the Commission did not consider the fact that the Tenaris Alliance had members outside of the order, free to export to the United States without any restrictions, but in fact did not do so. If Tenaris were motivated to act as the Commission presumes, why was it not shipping to the United States through its Tenaris Alliance member in Canada? Is this not positive evidence supporting the notion that these producers would not significantly increase their volume to the United States? It is, and it is essentially ignored by the Commission.

10. On the procedural issues, Mr. Chairman, I can be brief. As I said yesterday, we welcome the admission by the United States that Argentina's panel request has identified the specific measures at issue. This confirms what Argentina has said all along – that the US measures that Argentina are challenging are limited, specific, and have been identified with precision in our Panel request.

11. This concession by the United States also means that there now only remains one single Article 6.2 issue before the Panel: did Argentina fail to "present the problem clearly," such that the United States has suffered actual prejudice during the course of the panel proceedings?

12. Mr. Chairman, I will not repeat what is set out in our 4 December submission, which demonstrated the Argentina has complied fully with the Article 6.2 requirement to "present the problem clearly."

13. With respect to the alleged prejudice to the United States: as the *Canada Aircraft* decision stated, a Panel cannot assess prejudice during the panel process until the <u>end</u> of the panel process. In this regard, we recall what the statement with which the United States opened this proceeding yesterday, and I quote: "for anyone who follows WTO dispute settlement, most of the issues in this dispute should sound very familiar." Since the United States is "very familiar" with the issues, it seems highly unlikely that it, or any of the "potential" third parties, suffered any prejudice from the alleged lack of clarity in the claims set out in Argentina's Panel Request. I have to add that Argentina was quite surprised yesterday to hear the US delegation argue that actual prejudice may not be a fundamental prerequisite under Article 6.2. This is a complete contradiction of what the United States argued before the *Canada Wheat Board*, where it asserted, and I quote:

> *even if* a panel request is insufficiently detailed "to present the problem clearly," the panel is not automatically deprived of jurisdiction over the matter. Rather, the panel must examine, based on the "particular circumstances of the case," whether the defect has prejudiced the ability of the responding party to defend itself [original emphasis].

14. There is much more I could say on these issues, particularly in light of the US oral statement of yesterday. We will respond fully to the US 9 December oral statement regarding Article 6.2 objections in our Second Written Submission.

15. Mr. Chairman, we would respectfully request that the Panel continue to bear in mind one fundamental point. At the end of the Uruguay Round, the drafters of the Anti-Dumping Agreement agreed that dumping orders would not, and could not, exist in perpetuity. Argentina and other WTO members negotiated – and paid for – the right to have orders terminated after five years, unless very stringent conditions were met. These conditions patently have not been met in this case.

16. Argentina respectfully requests the Panel:

- to find that in this case the US measures identified by Argentina, as such and as applied, violate US WTO obligations;

- to recommend that the United States brings its measures found to be inconsistent with the covered agreements into conformity with its WTO obligations; and

- to suggest, pursuant to DSU Article 19.1, that the only way for the United States to comply with these recommendations is through the immediate termination of the measure. This is the only remedy that can restore the right Argentina obtained in Article 11.3 to have measures applicable to its exports terminated after 5 years.

17. Argentina thanks the Panel for the opportunity to present its case.

ANNEX D-2

ORAL STATEMENT OF THE UNITED STATES – FIRST MEETING

9 December 2003

Mr. Chairman, members of the Panel:

1. On behalf of the United States delegation, I would like to thank you for agreeing to serve on this Panel.

2. Today, it is our pleasure to present the views of the United States concerning the issues in this dispute. Organizationally, we will first talk about some of the substantive issues, and then turn to the procedural issues.

3. With respect to the substantive issues, in our First Written Submission, we fully addressed the Argentine arguments made to date. Today, we will focus on what we consider to be the central issues. We will begin with a discussion of some of the issues concerning "dumping," and then turn to some of the issues relating to "injury."

Issues concerning the likelihood of continuation or recurrence of dumping

4. Mr. Chairman, for anyone who follows WTO dispute settlement, most of the issues in this dispute should sound very familiar. Indeed, Argentina's "as such" claims largely raise issues that either have been directly addressed in other disputes or that are closely related to those addressed in other disputes. In either case, the Panel faces a straightforward task. It should apply the WTO obligations in question based on the approaches taken in recent panel and Appellate Body reports.

5. For example, Argentina claims that an "irrefutable presumption" exists simply because Commerce has found likelihood in a particular number of sunset reviews. However, as a series of panels have found – including those in *US – Export Restraints*, *US – India Plate*, and *US – Japan Sunset* – the frequency of a particular outcome does not transform that outcome into a "measure" that may be challenged independently for its alleged WTO inconsistency.

6. With respect to Commerce's expedited sunset review regulations, Argentina has not demonstrated how these regulations breach Article 11.3 or any other obligation of the AD Agreement. This is not surprising given that, as the *US – Japan Sunset* panel observed, Article 11.3 does not prescribe how a Member should go about making a likelihood determination in a sunset review.

7. Argentina's claim that Commerce's reported "margin likely to prevail" is WTO-inconsistent rings hollow because Argentina has not demonstrated that any obligation exists to quantify dumping in a sunset review. In *US – German Steel*, the Appellate Body addressed Article 21.3 of the SCM Agreement – the counterpart to Article 11.3 – and found that there is no obligation to apply any *de minimis* threshold in a sunset review because Article 21.3 does not explicitly or implicitly contain such an obligation. The same holds true for Article 11.3 and the obligation to calculate a margin of dumping to determine likelihood. Indeed, given that almost identical language is found in both Article 21.3 of the SCM Agreement and Article 11.3 of the AD Agreement, the analysis applied by the Appellate Body for Article 21.3 is equally persuasive with respect to Article 11.3.

8. In this regard, there is also no basis in the AD Agreement for Argentina's claim that a determination of likelihood of continuation or recurrence of dumping under Article 11.3 of the AD Agreement must be made by determining a current level of dumping in a sunset review. To the

contrary, footnote 22 of the AD Agreement makes clear that a current level of dumping determined immediately prior to a sunset review is not determinative of the issue of likelihood in a sunset review.

9. Finally, Commerce's *Sunset Policy Bulletin* is not a legal instrument with independent status under US law – it is not a "measure." Nor is it "mandatory" within the meaning of the well-established mandatory/discretionary distinction.

10. Turning to Argentina's "as applied" claims, Argentina has based these claims either on an inaccurate understanding of the facts on the record or upon facts that Argentina failed to put in the record.

11. For example, Argentina claims that Siderca was found to have provided an inadequate submission in the sunset review proceeding and that this alleged finding resulted in an expedited review. This statement is disproved by a simple review of the record, and Argentina has not cited one instance in the administrative record of the OCTG review where Commerce made this alleged finding. In fact, in each of the three separate documents – the Final Sunset Determination, the Decision Memorandum, and the Adequacy Memorandum – Commerce clearly stated that Siderca had fully cooperated in the sunset review and had filed a complete substantive response. Notwithstanding Argentina's claims to the contrary, Commerce also clearly articulated in the Decision Memorandum and the Adequacy Memorandum that it had determined to expedite the review because none of the firms that had actually exported Argentine OCTG to the United States were participating in the sunset review proceeding.

12. Similarly, Argentina's claims that the expedited review process denied Siderca a full opportunity for submission of evidence and defence of its interests are belied by a simple examination of the facts. Notwithstanding the expedited nature of the review, Siderca had the right to file a complete substantive response, but chose to comment on only two issues and its treatment of those issues amounted to two pages of text. Siderca also chose not to exercise its right to file a rebuttal response. Siderca did not submit "any additional information" on its own behalf or on the behalf of the Argentine exporters, as permitted by section 351.218(d)(3)(iv) of Commerce's Sunset Regulations. In addition, no other Argentine interested party submitted any information or requested to participate in the proceeding. Given that Siderca and the Argentine exporters did not avail themselves of the existing opportunities for participation and defence of their interests, it is disingenuous for Argentina to now claim that the expedited nature of the proceeding resulted in a denial of opportunities to participate in contravention of Article 6. Moreover, the opportunities for defence and participation in an expedited review provide all that is required by Article 6.

13. Finally, Argentina claims that Commerce's report of the "margin likely to prevail" in the absence of the anti-dumping duty order breaches Articles 2 and 11.3, as applied in this case, because it objects to the calculation methodology used in the original investigation to derive the margin. First, as previously noted, there is no WTO obligation to quantify any margin for the dumping that is likely to continue or recur for purposes of a sunset review under Article 11.3 of the AD Agreement. Nor is there any WTO obligation to consider particular margins in a sunset injury analysis. Second, the measure at issue in this dispute is the sunset review, not the original investigation. If Argentina intended to make claims concerning that distinct measure, it has failed to properly do so. Finally, we note that Argentina has made no claim that, if the allegedly problematic methodology were modified, the margin likely to prevail would be affected or that there would be any change in the margin that would be meaningful for the US International Trade Commission's ("ITC") analysis.

Issues concerning the likelihood of continuation or recurrence of injury

14. Argentina has raised a number of issues regarding the ITC' s determination of likelihood of continuation or recurrence of injury in the OCTG sunset review. We will focus today on four of those issues: first, whether the ITC applied the correct standard for determining whether termination of the

anti-dumping duty orders would be *likely* to lead to continuation or recurrence of injury; second, whether the obligations of Article 3 of the AD Agreement apply to sunset reviews; third, whether the ITC's determination was consistent with the evidentiary standards of Article 3.1; and fourth, whether the time frame provided for under US law for the likely recurrence of injury is consistent with Article 11.3 of the AD Agreement.

The ITC applied the correct standard for determining whether termination of the anti-dumping duty orders would be likely to lead to continuation or recurrence of injury

15. Argentina argues that the ITC misinterpreted the term "likely" in Article 11.3. Essentially, Argentina maintains that "likely" can only mean "probable," and that the ITC disregarded this meaning and interpreted "likely" to mean "possible." Both of these arguments are incorrect.

16. Trying to pin down the meaning of "likely" by seeking a synonym for that word – such as "probable" – is not helpful. The drafters did not use a synonym; they used "likely." Moreover, dictionaries define "likely" in various ways. And even if only one synonym were applicable, this would merely beg the question of how that synonym should be interpreted.

17. To properly define "likely," one must bear in mind the context in which it is used. In particular, one must consider the fundamental nature of the inquiry called for by sunset reviews. Sunset reviews inherently involve less certainty and precision than original investigations.

18. Contrary to Argentina's assertion, the ITC did *not* find that the recurrence of injury was merely possible. It examined the likely volume, price effects, and impact of imports if the orders were revoked. It examined each of these factors closely. For example, with respect to likely volume, the ITC found that the significant increases in import volume during the original investigation, substantial excess capacity in several of the subject countries, and a strong incentive on the part of foreign producers to establish a presence in the large, relatively higher-priced US market, supported the conclusion that the likely volume of imports would be significant if the orders were revoked.

Article 3 does not apply to sunset reviews

19. Argentina claims that Article 3 of the AD Agreement applies in its entirety to sunset reviews. But, there are numerous textual indications that this is not the case. For example, there are no cross-references in Article 3 to Article 11, or in Article 11 to Article 3.

20. Moreover, a determination of injury under Article 3 and a determination of likely recurrence of injury under Article 11.3 are entirely different animals. This is underscored by the fact that many of the obligations described in Article 3 simply cannot be applied in sunset reviews. For example, Article 3.1 specifies that a determination of injury shall involve an examination of the "volume of the dumped imports and the effect of the dumped imports on prices." Yet, in a sunset review imports may not even be present in the market at the time of that review, and they may not be sold at dumped prices.

21. Another example of the incompatibility between the provisions of Article 3 and the inquiry involved in a sunset review can be found in Article 3.5. Article 3.5 refers to the "dumped imports" and speaks of such imports in the present tense as "causing injury." However, in a sunset review there may be no dumped imports. Article 3.5 refers also to existing "injury" and describes an existing causal link between dumped imports and that injury. Again, in a sunset review, with an anti-dumping order in place, there may be no current injury or causal link. Indeed, it would be surprising if there were given the remedial effect of an anti-dumping measure.

22. In sum, it is clear from these textual provisions, and others described in our First Submission, that the obligations of Article 3 do not extend to sunset reviews.

The ITC's Sunset Determination was consistent with Article 3.1

23. Even though Article 3.1 does not apply to sunset reviews, the ITC's sunset determination effectively satisfies the Article 3.1 requirements. The ITC's determination was based on a proper establishment of the relevant facts and an unbiased and objective evaluation of those facts – as required by Article 17.6(i) of the AD Agreement – and was based on positive evidence.

24. As is clear from its report, the ITC carefully reviewed an extensive array of factors and evidence relative to the likely volume, price effect and impact of imports on the domestic industry. We will focus in this statement only on the ITC's findings with regard to the likely volume of imports, as it is representative of the ITC's approach.

25. The ITC first reviewed the volume of imports in its original injury investigation, to see how imports developed in the absence of dumping measures. The original investigation showed that the rate of increase in imports was far greater than the increase in demand at that time, and that the market share of subject imports rose significantly, at the expense of that of the domestic industry. After the anti-dumping duty orders went into effect, imports fell but remained a factor in the US market.

26. Turning to the likely volume of imports if the dumping orders were revoked, the ITC found that producers in the five countries involved had both the capacity and the incentive to increase their exports to the United States. The ITC gave five reasons for this.

27. First, the ITC found that the Tenaris alliance of OCTG producers (which has members in four of the five countries at issue here) with its global focus would have a strong incentive to gain a significant presence in the US market. Second, the ITC found that the subject producers would have an incentive to devote more of their capacity to shipping casing and tubing to the US market in that casing and tubing were among the highest valued pipe and tube products. Third, the ITC found that prices for casing and tubing on the world market were significantly lower than prices in the United States. Fourth, the ITC found that the subject producers faced import barriers on casing and tubing in other countries or on related products in the United States. Finally, the ITC found that the OCTG industries in at least some of the subject countries, especially Japan and Korea, were heavily export-dependent.

28. Argentina takes issue with only three of the ITC's reasons. First, it questions whether the Tenaris producers could re-orient to the United States production that was committed under existing contracts. But the evidence before the ITC plainly supports its finding. Tenaris is the dominant supplier of OCTG products and related services to all of the world's major oil and gas drilling regions except the United States. The United States represented the best growth opportunity for the Tenaris producers. The chief executive officer of one of the world's largest distributors of OCTG, in sworn testimony, told the ITC that: "It is simply not imaginable that [Tenaris] or the other subject companies would stay out of the United States which buys as much OCTG as the rest of the world combined and has the highest prices."[1]

29. Argentina's second reason for challenging the ITC's volume finding is that there is only one trade barrier in third country markets facing casing and tubing. Argentina quite clearly overlooks the fact that the ITC examined not only import barriers on casing and tubing in third country markets but also barriers on related products in the United States – that is, lower-priced products that were produced in the same facilities as casing and tubing.

[1] *See* Exhibit US-20.

30. Finally, Argentina takes issue with the ITC's finding that foreign producers had an incentive to export casing and tubing to the United States because prices in the United States were higher than in other markets. As explained more fully in our First Submission, Argentina inaccurately characterizes both the evidence on which the ITC relied and the ITC's analysis of this issue. The evidence shows that the ITC did conduct an independent investigation of this issue by considering the relevant evidence submitted by both parties – and that this evidence demonstrated the existence of a substantial price gap between the United States and the rest of the world.

31. In sum, the ITC had ample evidence to support its finding that subject producers had strong incentives to shift into the US market and that the subject imports were likely to increase in volume.

The time frame in which injury would be likely to recur

32. Argentina claims that the provisions of US law regarding the time frame within which injury would be likely to recur are inconsistent with Articles 3 and 11.3 of the AD Agreement. These provisions instruct the ITC to determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" and to "consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time."

33. Argentina misconstrues Article 11.3, which does not specify the time frame relevant to a sunset inquiry. In the absence of any specific provision in Article 11.3, Members remain free to determine under their own laws and procedures the time frame relevant in sunset inquiries. It is inherently reasonable for the United States to consider the likelihood of continuation or recurrence "within a reasonably foreseeable time" and that the "effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time."

Procedural issues

34. Turning to the procedural issues, in its submission of 4 December,[2] Argentina fails to rebut the US case that portions of Argentina's panel request fail to comply with the requirements of Article 6.2 of the DSU and that certain claims asserted by Argentina in its First Submission are not within the Panel's terms of reference. To a large extent, Argentina's submission of 4 December fails to respond to US arguments at all, responding instead to arguments that the United States never made.

35. For example, Argentina asserts that the United States has alleged an inconsistency with the third requirement of Article 6.2 of the DSU – the requirement to "identify the specific measures at issue." This assertion is simply wrong. Nowhere in the US First Submission is there an allegation that Argentina's panel request is inconsistent with that requirement. Instead, the United States has complained about Argentina's failure to comply with the fourth requirement of Article 6.2 – the requirement to "present the problem clearly." Thus, paragraphs 25-28 and 33-38 of the 4 December submission contain responses to arguments the United States never made.

36. Similarly, notwithstanding Argentina's assertions to the contrary, the United States has *not* argued that a panel request must include arguments or that it must include narrative descriptions of claims. Thus, the Panel can ignore Argentina's argumentation on these points, as well.

37. What the United States *has* argued is that Article 6.2 requires that a panel request contain a "brief summary of the legal basis of the complaint sufficient to present the problem clearly." Where, as here, a "measure" is described ambiguously (such as by the phrase "certain aspects"), where the treaty provision in question is described ambiguously (such as by a reference to an entire article with

[2] *Submission from Argentina on the Request by the United States for Preliminary Rulings Under Article 6.2 of the DSU*, 4 December 2003 [hereinafter "4 December Submission"].

multiple paragraphs and obligations), and where there is no accompanying narrative description or argument, the problem will not be presented clearly.[3]

Page 4

38. Turning to the specific defects in the panel request, let us begin with what we have called "Page 4." Regarding Page 4, Argentina's assertion that the United States did not consider the panel request as a whole is simply wrong. In paragraphs 88-89 of the US First Submission, the United States explained how it looked at Sections A and B of the panel request to try and figure out the nature of the problems set forth on Page 4, and how it concluded – as would any reasonable and objective person – that the problems complained about on Page 4 were different from the problems complained about in Sections A and B. For example, when Argentina makes "as such" claims in Sections A and B regarding section 751(c)(4) and sections 752(a)(1) and (5) of the US Tariff Act of 1930, and then on Page 4 says that it "also" considers certain aspects of sections 751(c) and 752 to be WTO-inconsistent, a reasonable and objective person would conclude that Argentina was asserting new claims and not merely repeating the claims in Sections A and B.

39. Argentina's arguments appear now to have switched. Argentina told the DSB that Sections A and B of the panel request contain Argentina's "particular claims." Now, Argentina says "the essence of Argentina's claims" – whatever "essence" means – are contained in Sections A and B.[4] This is just inaccurate. For example, Page 4 identifies the ITC's sunset regulations as a source of some (unidentified) problem, but where in Sections A or B is the "essence" of Argentina's "claim" set forth? The answer is: nowhere.

40. Finally, Argentina claims to have provided a narrative description in the first part of the panel request that remedies the deficiencies that otherwise exist with respect to Page 4.[5] However, this narrative is little more than a chronology of events, which concludes, on page 2 of the panel request, with the same ambiguous assertion that appears on Page 4; namely, that "certain aspects of US laws, regulations, policies and procedures related to the administration of sunset reviews are inconsistent with US WTO obligations."

Sections B.1, B.2 and B.3

41. Turning to the defects in Sections B.1, B. 2 and B.3 of the panel request, we recall that these defects involve instances in which Argentina alleges inconsistencies with Articles 3 and 6 of the AD Agreement in their entirety. What is most interesting about Argentina's justification for these defects is what Argentina does not argue. Argentina does not take issue with the findings of prior panels that citations to entire articles of the AD Agreement – including Article 6 – can fail to satisfy the requirements of Article 6.2 of the DSU.[6] Argentina also never explains why, in other portions of its panel request, it was able to identify with precision the particular paragraphs of Articles 3 and 6 of concern to it.[7] Given Argentina's insistence that the entire panel request be considered, this omission on its part is especially curious.

42. With respect to the arguments that Argentina does make, they are unavailing. Argentina's main argument is that the United States somehow knew from the consultations what Argentina's problems were.[8] However, as the panel in the *Canada Wheat* dispute found, this type of argument is

[3] *See* First Submission by the United States of America, 7 November 2003, para. 87 [hereinafter "US First Submission"].

[4] 4 December submission, note 26.

[5] *Id.*, para. 45.

[6] US First Submission, para. 105, note 119.

[7] *Id.*, para. 106.

[8] 4 December submission, paras. 71-77.

legally irrelevant for purposes of determining whether a panel request complies with Article 6.2 of the DSU.[9] Moreover, as a factual matter, Argentina's argument fails, because the United States already has demonstrated how the consultations failed to shed light on the nature of Argentina's problems.[10]

43. Interestingly, Argentina seems to object to the US discussion of Argentina's questions at consultations.[11] This is a curious objection, given that it was Argentina that first cited these questions, arguing to the DSB that they somehow made up for any deficiencies in Argentina's panel request.

"Certain matters"

44. Finally, there are the "certain matters" that are not within the Panel's terms of reference, discussed in Section IV.D of the US First Submission. Because these matters are not within the Panel's terms of reference, the United States does not need to demonstrate prejudice as part of its analysis in this case. However, to be clear, the United States was, in fact, prejudiced by the inclusion in Argentina's First Submission of matters that were not included in Argentina's panel request.

45. In the interests of time, the United States will not comment on Argentina's defence of each one of these "matters," but instead will limit itself to one example that should suffice to demonstrate the fatal flaws in Argentina's arguments.

46. The United States has asserted that the claims set forth in Section VIII.C.2 of the Argentina First Submission are not within the Panel's terms of reference.[12] This section contains an "as applied" claim regarding the time period considered by the ITC. However, the only portion of the panel request dealing with the time period considered by the ITC is Section B.3, which clearly is limited to an "as such" claim regarding the relevant statutory provisions.

47. Argentina argues that an "as applied" claim should be read into Section B.3 because the heading of Section B refers to the "Commission's Sunset Determination."[13] The problem, though, is that Section A of the panel request also has a heading that refers to Commerce's determinations, but the individual paragraphs of Section A clearly distinguish between "as such" and "as applied" claims. Section A.1 makes an "as such" claim with respect to Commerce's expedited review regime, while Sections A.2 and A.3 clearly make "as applied" claims regarding certain aspects of the expedited review regime as applied in the sunset review of OCTG from Argentina.

48. Thus, anyone reading the panel request as a whole – as Argentina says one must – would conclude that Argentina deliberately limited its claims regarding the time period considered by the ITC to an "as such" claim regarding the relevant statutory provisions. If Argentina had intended otherwise, it would have distinguished between the "as such" and the "as applied" claims as it did in Section A with respect to Commerce 's expedited review system.

[9] *See* US First Submission, para. 109, quoting *Canada – Wheat*, para. 25.
[10] *Id*., paras. 107-108.
[11] 4 December submission, para. 75.
[12] US First Submission, paras. 123-125.
[13] 4 December submission, para. 111.

The United States has been prejudiced

49. Argentina's attempts to demonstrate compliance with Articles 6.2 and 7 of the DSU simply highlight the deficiencies in its panel request and its First Submission. The forced interpretive efforts in which Argentina engages to try to demonstrate the "clarity" of its panel request speak for themselves.

50. Thus, Argentina is really left with nothing other than the baseless assertions that: (1) the United States is afraid to engage on the substantive issues;[14] and (2) the United States has not been prejudiced.

51. Concerning the first argument, the United States simply notes that we could have been spared this debate if Argentina simply had withdrawn its panel request and submitted a proper one after the United States expressed its concerns. Argentina waited over a year before even requesting consultations, so it is difficult to understand why Argentina refused to take approximately one more month for panel establishment in order to comply with the requirements of the DSU.

52. On the topic of prejudice, although this should not be relevant where – as here – there is a clear failure by Argentina to comply with the DSU, nonetheless the United States and potential third parties were prejudiced by Argentina's failure to comply with the requirements of the DSU. Members were unable to know the matter being referred to the Panel until well after panel establishment, and the United States was prejudiced in its ability to prepare its defence.

53. Moreover, it is appropriate to take into account not only the disadvantage experienced by the United States, but the utter lack of any justification by Argentina for the deficiencies in its panel request. For example, Sections A and B of the panel request show that Argentina is capable of drafting claims with precision, but yet Argentina offers no plausible explanation for the ambiguity on Page 4.

54. In summary, this Panel should follow the precedent set by the panel in the *Canada Wheat* dispute. Although in that case the panel found a failure to comply with the third requirement of Article 6.2 of the DSU – the requirement to identify the specific measures at issue – the panel's reasoning applies with equal force to Argentina's failure to "present the problem clearly." As that panel made clear, the due process objective of Article 6.2 requires that a panel request provide the respondent with the information necessary to begin preparing its case. The panel found that the US failure to comply with Article 6.2 "creates significant uncertainty regarding the identity of the precise measures at issue and thus impairs Canada's ability to 'begin preparing its defence' in a meaningful way."[15]

55. In this case, Argentina's failure to comply with Article 6.2 created significant uncertainty regarding the matters at issue, thereby impairing – i.e., prejudicing – the United States' ability to begin preparing its defence in a meaningful way.

56. Mr. Chairman, that concludes the opening statement of the United States. The US delegation looks forward to your questions and engaging in a constructive dialogue with the Panel.

[14] 4 December submission, para. 2.
[15] *Canada – Wheat*, para. 28.

ANNEX D-3

THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

10 December 2003

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Table of cases referred to in this statement

Short Title	Full Case Title and Citation of Case
Argentina – Floor Tiles	Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS211/R, adopted 5 November 2001
EC – Tube and Pipe	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, final report circulated 7 March 2003 Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
Egypt – Steel Rebar	Panel Report, Egypt – *Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS/211/R, adopted 1 October 2002
Guatemala – Cement II	Panel Report, *Guatemala-Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000
US – Carbon Steel from Germany	Panel Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/R, final report circulated 3 July 2002 Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, adopted 28 November 2002
US – DRAMs	Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of one Megabit or above from Korea*, WT/DS99/R, adopted 19 March 1999

Thank you Chairman and Members of the Panel.

1. Introduction

1. The European Communities intervenes as a third party in this case because of its systemic interest in the correct interpretation of the AD Agreement.

2. Summary of written submission

2. Our written submission contained observations on six points.

3. First, with respect to the preliminary objection raised by the United States, we consider that the Panel should assess Argentina's Panel Request as a whole, and not one specific part of it in isolation from the rest.

4. Second, with respect to the inadequacy determination, we consider that the cumulative effect of the relevant provisions in this case led to a situation in which the investigating authority was essentially relieved from any obligation to investigate, in a manner that is inconsistent with the AD Agreement.

5. Third, with respect to the likelihood determination, we consider that it was inconsistent with Article 11.3 AD Agreement, being based on out-of-date data together with a prospective determination.

6. Fourth, with respect to the *Sunset Policy Bulletin*, we consider it to be a measure subject to challenge under the WTO Agreement and "as such" inconsistent with Article 11 of the AD Agreement.

7. Fifth, with respect to zeroing, we agree that the United States was not entitled to use, for the purposes of a sunset review investigation under Article 11.3 AD Agreement, a dumping determination made using a zeroing methodology inconsistent with Article 2 AD Agreement.

8. Sixth, with respect to injury, we consider that the provisions of Article 3 of the AD Agreement also apply in the context of a sunset review investigation and determination.

9. To these observations we would like to add the following, concerning : the inadequacy determination; the United States proposition that Article 11.3 AD Agreement must be interpreted in isolation from all other substantive provisions of the Agreement; the likelihood determination; and zeroing.

3. Inadequacy Determination and Waiver of Participation

10. Under DOC's regulations,[1] DOC will consider a response to be 'adequate' only if respondent interested parties account for more than 50 per cent of total exports to the United States. If the response is considered inadequate, DOC will decide to expedite the review, and decide on the basis of "facts available".[2] Since Siderca had not exported to the United States during the period under review, and even though DOC found that it had filed a complete substantive response, DOC considered that its response was inadequate, and therefore decided to expedite the review.

[1] Section 351.218(e)(1)(ii)(A).
[2] Section 351.218(e)(1)(ii)(C).

11. As Korea has rightly stated, the 50 per cent threshold for determining the adequacy of responses of respondent interested parties has no basis in the AD Agreement.[3] Panels have consistently held that an investigating authority may decide on the basis of "facts available" only under the specific conditions of Article 6.8 AD Agreement.[4]

12. Article 6.8 AD Agreement permits the authority to decide on the basis of facts available only in cases "in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation". Article 6.8 does not permit an authority to resort to facts available merely because a respondent interested party, which has filed a complete substantive response, does not meet certain quantitative requirements regarding its import share.

13. The decision to expedite the review may lead to the exclusion of relevant evidence from the sunset review investigation, in a manner inconsistent with Article 6.1 and 6.2 AD Agreement. Moreover, it has the additional effect of largely relieving the investigating authority of the obligation to investigate imposed on it by Article 11.3 AD Agreement. The European Communities therefore considers that DOC's regulations, as well as the decision to expedite the review in the present case, are incompatible with Articles 11.3 and 6.1, 6.2, and 6.8 AD Agreement.

14. Argentina has also challenged the provisions of United States law which provide that in certain cases, a respondent interested party is deemed to have waived participation in the proceedings.[5] The European Communities notes that the United States has responded that DOC did not apply the waiver provision in the proceedings concerning Siderca.[6]

15. This notwithstanding, the European Communities considers that the provisions of United States law as such are incompatible with the AD Agreement. DOC's regulations provide that failure by a respondent interested party to file a complete substantive response will be considered as a waiver of participation in the sunset review.[7] Under United States law, the waiver has the effect that the administering authority shall conclude that revocation of the order or termination of the investigation would be likely to lead to continuation or recurrence of dumping with respect to that interested party.[8]

16. If a respondent interested party fails to provide necessary information, Article 6.8 AD Agreement provides that the investigating authority may decide on the basis of the facts available. However, no provision of the AD Agreement allows the investigating authority to simply assume that dumping is likely to continue or recur. By providing that, in the absence of a complete substantive response, the investigating authority will conclude, without further investigation, that dumping is likely to continue or recur, United States law is establishing a presumption which has no basis in the AD Agreement. The waiver provisions as such are therefore incompatible with Articles 11.3 and 6.8 AD Agreement.

4. United States interpretation of Article 11.3 of the AD Agreement in isolation from the rest of the AD Agreement

17. The foundation of the United States' defence is its assertion[9] that:

[3] Korea's Written Submission, para. 31.
[4] Panel Report, *Argentina – Floor Tiles* para. 6.20; Panel Report, *Egypt – Steel Rebar*, para. 7.147.
[5] Argentina's First Written Submission, para. 109 and following.
[6] US First Written Submission, para. 211.
[7] Section 351.218(d)(2)(iii).
[8] 19 USC § 1675(c)(4)(B).
[9] US First Written Submission, para. 3.

> "Article 11.3 is the **only provision** of the AD Agreement that sets forth the substantive requirements for determining whether an order should be revoked five years after its imposition." (emphasis added)

18. Thus, according to the United States, procedural provisions aside, an investigating authority is free to ignore all other provisions of the AD Agreement when applying and interpreting Article 11.3. As the United States puts it[10]:

> "In sum, aside from the obligations contained in Article 11.3 and those provisions of Articles 6 and 12 discussed above, the AD Agreement leaves the conduct of sunset reviews to the **discretion of the Member** concerned." (emphasis added)

19. The European Communities does not agree with that assertion. We identify (non-exhaustively) at least six provisions of the AD Agreement that include requirements that are more than merely procedural, and which an investigating authority may not ignore in a sunset review investigation and determination. They are: Article 1; Article 2; Article 3; Article 4; Article 9; and Article 11.1.

20. The European Communities considers that it cannot be said that Article 1 of the AD Agreement is wholly irrelevant to the application and interpretation of Article 11.3. Article 1 is entitled "Principles". It refers to the rules set out in Article VI GATT 1994. It twice refers to the "provisions" of the AD Agreement, without qualification or restriction – that is, to all of them, including Article 11.3. An investigating authority cannot therefore ignore the principles set out in Article 1 of the AD Agreement when applying and interpreting Article 11.3, any more than it can ignore Article VI GATT 1994.

21. Similarly, the European Communities does not agree with the United States when it asserts, in the above quotation, that an investigating authority is free to ignore Article 2 of the AD Agreement when applying and interpreting Article 11.3. Indeed, this bare assertion is not one that, ultimately, the United States is able to sustain, itself admitting that :

> "Article 2, therefore, provides the **general meaning** of the term "dumping" as it is used throughout the AD Agreement, including in Article 11.3."[11] (emphasis added)

22. The same comments apply with respect to Article 3 of the AD Agreement, concerning the determination of injury. Article 11.3 does not "otherwise specify" – so, in accordance with the terms of footnote 9 of the AD Agreement, the term "injury" in Article 11.3 must be taken to mean what is set out in the definition. The defined term in footnote 9 is "injury" not, as the United States would have it, "determination of injury", which is simply the title of Article 3.[12] It may be that the United States wishes that the title of Article 3 would have been used in the definition in footnote 9, instead of the term "injury". That is not, however, what the text of the AD Agreement provides for.

23. The European Communities further notes that Article 11.3 of the Agreement contains the words "domestic industry". Article 4 of the Agreement contains the "definition of domestic industry". The European Communities does not therefore agree that an investigating authority can ignore Article 4 of the AD Agreement when applying and interpreting Article 11.3.

24. Similar comments may be made with regard to Article 9 of the AD Agreement, which concerns not only the collection of anti-dumping duties, but also their "imposition". Article 11.3 of the AD Agreement expressly refers to five years from the "imposition" of the duty; it also refers to

[10] US First Written Submission, para. 142.
[11] US First Written Submission, para. 256.
[12] US First Written Submission, paras. 289 to 292.

"the expiry of the duty", meaning the expiry of the imposition of the duty; and to the rule that "[t]he duty may remain in force" meaning the imposition of the duty may remain in force. Thus, a decision under Article 11.3 not to terminate the duty is a decision to impose the duty for a further period of up to five years. The European Communities does not therefore agree that an investigating authority is entitled to proceed without any regard whatsoever to Article 9 of the AD Agreement when applying and interpreting Article 11.3.

25. As outlined in our written submission, Article 11.1 of the AD Agreement also applies to sunset review investigations and determinations, as the Appellate Body has confirmed.[13] The European Communities does not therefore agree with the United States when it asserts that an investigating authority is free to ignore Article 11.1 of the AD Agreement when applying and interpreting Article 11.3.

26. We conclude that the foundation of the United States' defence in this case is manifestly erroneous.

5. Likely continuation of dumping

27. We would now like to make some comments in relation to the determination of likely continuation of dumping.

28. First, responding to certain assertions made by the United States,[14] we would like to comment on the precise nature of the determination in this case. It is in the issues and decisions memorandum,[15] Section 1, the sub-section entitled "Department's Position", final paragraph, final sentence, which states that DOC finds that dumping has continued over the life of the Argentine order. The only reason given for that finding is the dumping margin calculated in relation to the original period of investigation (1 January to 30 June 1994).

29. We conclude that the finding is one of continuation of dumping and that the sole basis for that finding was the original dumping margin calculated by reference to the period 1 January to 30 June 1994. Thus the determination was based on out-of-date data together with the prospective determination.

30. Second, we would like to re-iterate the importance of Article 11.1 of the AD Agreement, which the Appellate Body has correctly confirmed is relevant to the interpretation of Article 11.3.[16] The text of Article 11.1 AD Agreement, and particularly its use of the present tense, clearly confirms, in the opinion of the European Communities, that there must be a minimum temporal relationship between a finding of dumping and the imposition of a duty. A dumping determination has a shelf-life. It is not forever. Thus, once the relevance of Article 11.1 of the AD Agreement is acknowledged – a relevance erroneously denied by the United States – the inevitable outcome of the analysis becomes clear.

31. Third, the European Communities does not agree with the unqualified assertion made by the United States that in a sunset review investigation "an authority is considering what will happen in the future".[17] The investigating authority must also consider what happened in the past. The United

[13] Appellate Body Report, *US – Carbon Steel from Germany*, para. 70; Panel Report, *EC-Tube and Pipe*, para. 7.113.
[14] US First Written Submission, para. 54.
[15] Exhibit ARG-51.
[16] Appellate Body Report, *US – Carbon Steel from Germany*, para. 70; Panel Report, *EC – Tube and Pipe*, para. 7.113.
[17] US First Written Submission, para. 255.

States admits this in paragraph 151 of its First Written Submission, when it admits that the authority will consider information about "prior and current dumping margins".

32. Fourth, the European Communities does not agree with the distinction drawn by the United States between "the existence of a dumping margin" and "the magnitude of a dumping margin",[18] at least for the purposes of the present case, which concerns the continuation of an alleged margin of just 1.36 per cent. Given such a small alleged margin, it is impossible to be certain whether or not it exists "in general terms", without calculating its magnitude (and sign) in a meaningful and mathematical way by reference to the rules in Article 2 AD Agreement. Furthermore, if the only known previous measurement was made (years earlier) using rules now known to have influenced the outcome decisively one way rather than the other, it is impossible to rely on that earlier measurement in order to assert that, in general terms, the margin still exists, without in fact investigating and determining its current magnitude and sign. And it is doubly problematic to proceed in that way when what is asserted is the existence of a *continued* margin, and when the means of measuring that margin have, in the intervening period, changed as a matter of law.

33. Fifth, the United States makes much of its assertions that Siderca had ample opportunity to submit information to the investigating authority; and insists that the relevant factual information is that "… contained in the administrative records of Commerce and the ITC …".[19] So be it. The factual information on the basis of which Siderca's dumping margin, if any, during the period from 1 January to 30 June 1994, was calculated and could again be calculated ***is*** in DOC's administrative records. All DOC would have needed to have done would have been to run the data through a standard computer programme - ***little more than the push of a button***. Unnecessary, says the United States, because in general terms there is dumping as defined by Article 2 AD Agreement (***I know a dumping margin when I see one***) and it is certain that if I make a specific measurement the presence of dumping will be confirmed. But in circumstances where it is in fact certain that specific measurement will reveal no dumping at all, and all the data is already in the hands of the investigating authority, in the opinion of the European Communities, such an approach is not consistent with the requirement that an authority conduct ***an unbiased and objective*** investigation.

34. Sixth, in *US-DRAMs*, the Panel concluded :

> "… the scope of application of the AD Agreement is determined by the scope of the post-WTO review. Any aspects of a pre-WTO measure that are not covered by the scope of the post WTO-review do not become subject to the AD Agreement by virtue of Article 18.3 of the AD Agreement. By way of example, a pre-WTO injury determination does not become subject to the AD Agreement merely because a post-WTO review is concluded relating to the pre-WTO determination of the margin of dumping."[20]

35. Assuming, for the sake of argument, that this is correct, it follows that any aspect of a pre-WTO measure that *is* covered by the scope of the post WTO-review *does* become subject to the AD Agreement. The critical question then becomes whether or not, if there would be a post-WTO review covering the aspect of dumping, in which reliance would be made on a post-WTO dumping determination inconsistent with the Agreement, the review determination could be attacked on the grounds that the original determination is flawed. If the answer to this question is in the affirmative, then it follows from the above quotation, cited with approval by the United States,[21] that, by virtue of Article 18.3 of the AD Agreement, the same would apply when, as in the present case, the original dumping determination was made under the Tokyo Round Agreement. The Panel must answer this

[18] US First Written Submission, para. 254.
[19] US First Written Submission, para. 131.
[20] Panel Report, *US – DRAMs*, para. 6.14.
[21] US First Written Submission, para. 260.

critical question in the affirmative, because the United States itself affirms that if, in the original determination, there is some breach of Article 2 of the AD Agreement "in general terms", the review determination will also be vitiated.[22] *US – DRAMs* therefore confirms that the fact that the original determination was made under the Tokyo Round Agreement offers no valid defence for the United States. The United States cannot escape this conclusion in this case particularly because it made a single determination of *continuation* of dumping, spanning the original investigation period, the life of the order, and stretching into the future.

6. Zeroing

36. With respect to zeroing, we would like to take this opportunity to re-iterate our agreement with the arguments presented not only by Argentina, but also by Korea, at pages 2 to 7, 12 and 14 of its written submission; by Japan, at pages 1 to 3, 5 to 8 and 19 of its written submission ; and by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, at pages 2 to 4 of its written submission. The relationship between Articles 2 and 11 of the AD Agreement is such that the United States was not entitled to use, in the contested sunset determination, the original dumping determination made in respect of the period 1 January to 30 June 1994 – a determination that involved zeroing inconsistent with Article 2 of the Agreement – as the *sole* basis for its determination of continuation of dumping.

* * *

Thank you for your attention.

[22] US First Written Submission, para. 256.

ANNEX D-4

THIRD PARTY ORAL STATEMENT OF JAPAN

10 December 2003

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I. INTRODUCTION

1. Mr. Chairman and distinguished Members of the panel, on behalf of the Government of Japan, I thank you for your attention to this important matter. This morning, we will not repeat our arguments in our written submission. Rather, we would like to focus on certain arguments presented by parties that we did not address in detail in our written submission. Before discussing specific issues, Japan would like to note that the panel report in *US – Carbon Steel from Japan*[1] is currently pending before the Appellate Body. It is regrettable that the schedule of this panel meeting does not allow us to offer an argument based on the Appellate Body report. Japan believes that the Appellate Body will accept our arguments and respectfully requests this Panel to carefully review its analysis.

2. First of all, we would like to briefly touch upon the request by the US for preliminary ruling under Article 6.2 of the DSU. We don't intend to make a detailed argument on this matter. We confine ourselves to saying that we have had no particular problem with the panel request of Argentina, when drafting our third party submission.

II. ARGUMENT

A. DUMPING DETERMINATIONS IN SUNSET REVIEWS

1. The US arguments on requirements for "dumping" determination in sunset reviews are incorrect

3. The United States confuses the determination of "dumping" with the precise calculation of future dumping margins, and then attempts to reject the application of Article 2 to Article 11.3.[2] These arguments must be rejected.

4. The US argument does not recognize the significance of the terms "continuation or recurrence" in Article 11.3. The words "determine" and "continuation or recurrence" in Article 11.3 require the authorities to determine whether the dumping currently exists at the time of a sunset review and how the current state is likely to continue or change at a point in the future. Focusing only on the future event, the US fails to give any meaning to these explicit terms in Article 11.3.

5. Contrary to the US argument, Article 2 does not require the US authority to calculate precisely future dumping margins. The authorities' discretion, however, is not unlimited. As discussed in our third party submission, the authorities must base its determination on credible evidence in accordance with Articles 2 and 11.3. To determinate the current state of dumping, the authorities must have the credible evidence showing a positive margin of dumping, which may be calculated in the sunset review, or in some cases, in the most recent administrative review. To determinate that the dumping is likely to continue or recur, the authorities must have the credible evidence showing the projection of the export price and the normal value of the product at a point in the future. In both determinations, precise calculation of dumping margin is not the requisite. Thus, US argument should be rejected.

[1] Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, ("*US – Carbon Steel from Japan*"), WT/DS244/R (14 August 2003).

[2] *See* US First Submission, para. 254.

2. Dumping determination based on margins calculated in a pre-WTO proceeding using the zeroing methodology is WTO-inconsistent

6. The United States argues that Article 18.3 prevents Argentina from challenging the validity of the dumping margin calculated in the pre-WTO proceeding.[3] We disagree.

7. Contrary to the US argument, Article 18.3 explicitly sets forth that the provisions of the AD Agreement shall apply to "reviews of existing measures." This clarifies that the entire process of the sunset review of this OCTG case is subject to the current AD Agreement, including the establishment and evaluation of evidence. The panel report in *US – DRAMs* further clarified that the dumping margins in the original investigation, when it is used as the evidence in a sunset review, must be consistent with the provisions of the AD Agreement. The panel has specifically stated "the AD Agreement applies to those parts of a pre-WTO measures that are included in the scope of a post-WTO review."[4] The scope of a post-WTO review, a sunset review in this case, is not limited to the determination itself, but extends to evidence, on which the determination of the sunset review is based. The authorities cannot make a WTO-consistent determination, if its evidentiary basis is WTO-inconsistent. Therefore, the determination based on the margin of dumping calculated in a pre-WTO proceeding using the zeroing methodology, which is inconsistent with Article 2, is inconsistent with Articles 2 and 11.3 of the AD Agreement.

B. INJURY DETERMINATIONS IN SUNSET REVIEWS

8. The US argument on footnote 9[5] of the AD Agreement is not based on the interpretation of its ordinary meaning, and thus must be rejected. As discussed in our third party submission, the first phrase of footnote 9 "{u}nder this Agreement" clarifies that the term "injury" throughout the whole AD Agreement, including the term in Article 11.3 shall be understood in accordance with footnote 9.

9. The phrase in the said footnote "shall be interpreted in accordance with the provisions of this Article"[6] further clarifies application of substantive rules in Article 3 to Article 11.3. The phrase "likely to lead to continuation or recurrence" in Article 11.3 does not change the core concept of "injury". To find a "recurrence" of injury, for example, the authorities must first find that injury through the effects of dumping ceased, and then must find that the injury will recur at a point in the future. These analyses do not affect the substantive requirement that the authorities must find injury based on positive evidence and on objective examination of the effect of dumped imports on prices and the volume of dumped imports. In the same vein, the requirement for evaluating economic factors listed in Article 3.4 as well as the causation and non-attribution requirements under Article 3.5 must be satisfied under the sunset review proceeding.

10. The United States argues that likelihood of injury as defined in Article 11.3 requires "decidedly different analysis"[7] from that for the injury analysis in the original investigation. Contrary to the US argument, Article 3 expects prospective analysis even in the original investigation. Footnote 9 and the provisions of Article 3 clarify that all the provisions of Article 3 apply to the determination of the threat of material injury. Article 3.7 then sets forth that the authorities must examine a situation at a point in the future, at which the effects of dumping will cause material injury to the domestic industry. In a threat case, therefore, the examination of economic factors and causations under Articles 3.4 and 3.5 also must be made at the point in the future. The analysis of

[3] *See* US First Submission, paras. 258-260.

[4] Panel Report, *United States – Anti-Dumping Duties on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabits or Above from Korea ("US – DRAMs")*, WT/DS99/R (29 January 1999), para. 6.14.

[5] *See* US First Submission, paras. 290-296.

[6] *Ibid*.

[7] US First Submission, para. 301.

"injury" in sunset reviews is quite analogous to the analysis required in Article 3 for the threat of material injury. As such, Article 3 contemplates the prospective injury analysis, as Article 11.3 requires. The US argument thus has no merits.

11. In this OCTG case, the ITC failed to evaluate individual factors as listed in Article 3.4. The ITC also failed to separate and distinguish the effects of known factors, which the ITC knew at the time of the sunset review, from effects of dumping. The ITC's injury determination in the sunset review, therefore, was inconsistent with Articles 3.4 and 3.5.

C. WTO-INCONSISTENCY OF WAIVER PROVISIONS AS SUCH

1. Inconsistency of Waiver Provisions with Article 11.3 as such

12. As discussed in our third party submission, the Waiver Provisions are inconsistent with Article 11.3 because they require DOC to make an affirmative dumping determination in a sunset review without reviewing any evidence on the record or considering likelihood of continuation or recurrence of dumping, where a responding party fails to submit its substantive response.

13. Japan would like to note that the US argument that "the affirmative likelihood determination described in section 751(c)(4)(B) is limited to the party that failed to respond"[8] appears to contradict with its own argument that a "dumping" determination in a sunset review must be made on an "order-wide" basis.[9] If an affirmative finding for a non-responding party pursuant to the Waiver Provisions would be a basis of the overall order-wide determination, then the affirmative finding would necessarily affect adversely other parties. The United States should clarify this apparent discrepancy.

2. Failure of US arguments based on Article 6

14. The United States also attempted to justify its Waiver Provisions upon assumption that an exporter is obliged to submit information within 30 days after the initiation of a sunset review.[10] Lack of a response from a responding party, however, does not provide justification for the authorities to make an affirmative dumping determination without any positive evidence. As discussed in our third party submission, the authorities have the serious primary burden to demonstrate the likelihood of continuation or recurrence of dumping. The burden cannot be shifted until the authorities establish the *prima facie* case based on positive evidence.

15. In addition, it appears that the United States considers that a public notice of the initiation in the *Federal Register* constitutes the questionnaire, and thus serves as notice to responding parties under Article 6.1.[11] We disagree.

16. This requirement under Article 6.1 must be understood in the context of Article 6.1.1 and Annex II. Article 6.1.1 requires that the responding parties shall be given at least 30 days for reply after "receiving questionnaires." Thus, the requirements of Article 6.1 is based on the action of the authorities' delivering questionnaires. In this case, DOC did not even issue questionnaires to respondents. DOC stated in the *Federal Resister* only that interested parties may "respond to the notice of initiation." DOC cannot passively sit by and hope that all the relevant information will simply appear, nor can DOC fault an interested party for not providing information that was not specifically requested.

[8] US First Submission, para. 146.

[9] US First Submission, para. 214 ("the sunset determination is made on an order-wide basis, not a company-specific basis.")

[10] *See* US First Submission, para. 144-145.

[11] *See* US First Submission, paras. 222-223.

17. Further, paragraph 1 of Annex II provides that the authorities shall "ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available." A public notice in the territory of a Member cannot be a sufficient method to "ensure" that the party, which may be on the other side of the earth, is aware that DOC will be free to determine on the basis of the facts available, if the party fails to submit its response. DOC's public notice, therefore, does not satisfy the notice requirements under Article 6.1.

3. Expedite review procedures are also inconsistent with Article 6.2

18. Japan notes that the rationale on the inconsistency with Articles 6.2 and 6.9 of the Waiver Provisions discussed in our third party submission also may apply to DOC's expedited review procedures. DOC regulations on the expedite reviews provide that DOC does not make a preliminary determination,[12] and accordingly does not disclose to responding parties essential facts under Article 6.9, nor does DOC provide interested parties any opportunity to comment on these essential facts under Article 6.2. Thus, DOC's expedited review procedures are also inconsistent with Articles 6.2 and 6.9.

D. WTO-INCONSISTENCY OF THREE SCENARIOS IN *SUNSET POLICY BULLETIN* AS SUCH

19. The United States argues that the *Sunset Policy Bulletin* must have "functional life of its own" and must be "mandatory" under its domestic jurisprudence to be WTO-inconsistent as such.[13] The alleged criteria, however, are not provided in any provision of WTO Agreements nor have been confirmed by the Appellate Body.

20. Even assuming that the criteria of "functional life of its own" and "mandatory" nature of the instruments are relevant, the manner to establish that an instrument meets the criteria should not be limited to the mere language of the instrument. The Appellate Body in *US – Carbon Steel* has explained that a legal instrument is reviewable "as such" upon showing "consistent application" of the instrument, among other evidence.[14]

21. In this dispute, Argentina demonstrated that DOC applied the three scenarios in the *Sunset Policy Bulletin* consistently to all sunset reviews. The United States argues that DOC "may" depart from the *Sunset Policy Bulletin*, and that "Sometimes Commerce 'normally' will determine likelihood, and at other time it 'normally' will not".[15] The evidence, however, points to the contrary. DOC has strictly followed the three scenarios in all sunset reviews, and has never departed. Moreover, the mere language of "normally," inserted immediately preceding the mandatory term "will," does not relieve a Member from WTO-inconsistency inquiry as such. The three scenarios are therefore reviewable administrative procedures under Article 18.4.

[12] *See Appendix VIII-B-Schedule for Expedited Sunset reviews in DOC sunset regulations*, 63 Fed. Reg. 13516, 13525 (20 March 1998) (Exhibit US-3)

[13] *See* US First Submission, paras. 194 and 200.

[14] *See* Appellate Body Report, *US – Carbon Steel*, para 154.

[15] US First Submission, para. 181.

III. CONCLUSION

22. For the foregoing reasons, Japan respectfully requests this Panel to clarify that the United States acted inconsistently with Articles 2.1, 2.4, 3.1, 3.4, 3.5, 6.1, 6.2, 11.3, and 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement.

ANNEX D-5

THIRD PARTY ORAL STATEMENT OF MEXICO

10 December 2003

Distinguished Members of the Panel

1. The main point of this dispute is compliance by the United States with its obligations under Article 11.3 of the Anti-Dumping Agreement. The obligation consists in terminating definitive anti-dumping duties after they have been in force for five years, unless it can be established that the requirements in the same article for maintaining them in force are met. Those requirements are that, in a review conducted under the terms of Article 11.3 of the Agreement, and other articles that are also applicable, it is determined that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.

2. The main point of this submission is to emphasize that, regardless of the procedural method used by the United States Department of Commerce, whenever any interested party of the industry in that country has requested the continuation of anti-dumping measures, the Department of Commerce has unfailingly found a justification to arrive at a positive determination of continuation or recurrence of dumping and injury.

3. Argentina has demonstrated in its submission the existence of a presumption, which operates without exception and without analysis in every case. The case of oil country tubular goods from Mexico, another case appearing in the same group of measures imposed in 1995 and included as Tab 179 in Exhibit 63 of Argentina's submission, is another very clear example. In this case the Department of Commerce decided to conduct a five-year review or sunset review. The background to that review was four annual reviews in which TAMSA, the main Mexican export firm, which participated in all of them, had had a dumping margin of ZERO in the last three reviews. YES, I repeat, the Mexican firm had a dumping margin of zero in three consecutive reviews.

4. Despite this, and on the basis of the pattern of irrefutable presumption established by the SAA and the SPB, the Department of Commerce arrived at a positive determination of continuation or recurrence of dumping without making any positive analysis or conducting a review based on actual evidence to substantiate its decision. This clearly shows that, over and above the arguments to try and "dress up" each case, the slightest participation by United States industry automatically leads to a positive determination by the Department of Commerce, something that has occurred in 100 per cent of the cases of five-year reviews or sunset reviews conducted to date.

5. Lastly, allow me to refer to the preliminary objections to Argentina's request to establish a Panel. In this connection, the Government of Mexico considers that the request fully complies with DSU Article 6.2 and that it is a delaying tactic by the United States Government to hold back an analysis by this Panel of the merits of the case. Should the Panel decide to adopt an additional procedure to meet those objections, Mexico respectfully requests that its rights as a third party to the dispute be respected.

ANNEX D-6

THIRD PARTY ORAL STATEMENT OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

10 December 2003

Thank you, Mr. Chairman and members of the Panel. We would also like to thank the delegations of Argentina and the United States for allowing us the time to express our views in this dispute as a third party.

Pursuant to our strong systemic interest in the proper interpretation of relevant WTO provisions dealing with sunset reviews, we presented in our third party submission what we consider to be the correct reading of Article 11.3 of the Anti-Dumping Agreement. We made three main points:

First, we believe that Articles 2 and 3 of the Anti-Dumping Agreement should be taken into account during sunset reviews. The text of Article 11.3 is unambiguous with regard to the requirements that authorities must meet in order to apply an anti-dumping order beyond five years: the authorities are obliged to "**determine**, in a review…that the expiry of the duty would be likely to lead to continuation or recurrence of **dumping** and **injury** [emphasis added]." While we recognize that the nature of a sunset review may differ from an original investigation because of the prospective element indicated by the words "likely to lead to continuation and recurrence", the underlying determination to be made by the authorities, nevertheless, relates directly to dumping and injury.

Article 2 and Article 3 of the Anti-Dumping Agreement govern the "Determination of Dumping" and the "Determination of Injury." These two articles inform Members as to the principles to be applied in determining what constitutes dumping, and what constitutes injury. Be it current or prospective, original or sunset review, the authorities, in making any determination on dumping and injury, cannot avoid referencing Article 2 and 3 because the two articles are the only articles in the Anti-Dumping Agreement that deals with the question of what constitute dumping and injury. Therefore, Article 11.3, by instructing the authorities to make a determination on the likelihood of continuation or recurrence of dumping and injury, must necessarily be also instructing the authorities to apply, wherever appropriate, Article 2 and 3.

Moreover, we believe that the text of Article 11.3 includes an obligation to make a **positive** determination that takes into account information relevant to the determination at hand, namely the likelihood of continuation or recurrence of dumping and injury. This determination should be separate from the original investigation. Past determination of dumping does not inform as to the likelihood of future dumping. Similarly, past injury based on past dumping margin does nothing to show the likelihood of future injury caused by dumping. Therefore, data and information from the original investigation must be updated and made relevant to the specific determination for sunset review.

In making that positive sunset determination, authorities cannot completely discard the disciplines outlined by Articles 2 and 3. Article 11.1 provides that "an anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract **dumping** which is causing injury [emphasis added]." The Panel in *EC – Pipe Fittings from Brazil* explained that Article 11.1 contains "a general and overarching principle, the modalities of which are set forth in paragraphs 2 (and 3) of that Article." Article 11.1 thus informs Members of the purpose behind Article 11.3, which is the termination of the anti-dumping order within five years, except under limited circumstances. In

order for Article 11.3 to achieve that purpose, the sunset determination must follow the disciplines of Articles 2 and 3. Otherwise, Members would be able to conduct a cursory sunset review and extend the anti-dumping duty indefinitely, rendering Article 11.1 and 11.3 meaningless.

Second, we stated in our third party submission that in our view, the expedited review procedure resulting from a waiver determination, pursuant to 19 USC §1675(c)(4)(B), is inconsistent with Article 11.3. As we have already stated above, we consider the text of Article 11.3 to require the authorities to make a positive determination on the likelihood of continuation or recurrence of dumping and injury. On its face, 19 USC §1675(c)(4)(B) does not allow such a determination by the authorities once a foreign interested party is deemed to have waived its participation. Instead, the Department of Commerce is directed automatically to conclude, once participation is deemed waived, that the termination of the order would likely lead to continuation or recurrence of dumping. In our view, a review with the finding already mandated by statute can hardly be considered a "determination" within the meaning of Article 11.3. Therefore, 19 USC §1675(c)(4)(B) is inconsistent with Article 11.3.

Third, with regard to the issue of irrefutable presumption, we disagree with Argentina that an irrefutable presumption of likely dumping based on the Statement of Administrative Action and the *Sunset Policy Bulletin* can be inferred from the statistics on US sunset review determinations compiled by Argentina. We do believe, however, that the statistics raise a serious doubt as to the objectivity of the authorities in conducting sunset reviews. Therefore, we see the fact that dumping was found likely to continue or recur in 100 per cent of the sunset reviews in which a domestic interested party participated in the proceedings as strong evidence in establishing Argentina's *prima facie* case of a violation of Article 3.1 of the Anti-Dumping Agreement. Furthermore, in failing to make an objective examination with regard to injury, the authorities did not properly conduct its sunset review, thus violating Article 11.3.

Finally, with regard to the preliminary issue, we consider it unnecessary in this case for us, as a third party, to make substantial comments on a purely procedural question. However, we would just like to state that we did not encounter any difficulties related to DSU Article 6.2 in preparing our third party submission and oral statement.

Members of the Panel, in sum, we believe that Articles 2 and 3 apply to sunset reviews and that the United States has acted inconsistently with Article 11.3 of the Anti-Dumping Agreement. The Panel should make its finding accordingly.

Thank you.

ANNEX D-7

OPENING AND CLOSING ORAL STATEMENTS OF ARGENTINA – SECOND MEETING

Opening Statement – 3 February 2004

I. INTRODUCTION

1. Mr. Chairman, members of the Panel, on 9 January 2004, the DSB adopted the report of the Appellate Body in *Sunset Review of Steel from Japan*. This decision expressly confirms the positions that Argentina has taken throughout this dispute about the obligations imposed on investigating authorities during sunset reviews.

2. The Appellate Body made clear that Article 11.3 imposes significant and substantive obligations on any WTO Member seeking to maintain an anti-dumping order beyond its scheduled expiration date. Indeed, the Appellate Body emphasized the "exacting nature" of the commitments under Article 11.3 (para. 113), and stated that authorities conducting a sunset review "must act with an appropriate degree of diligence" before arriving at a "reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination." (para. 111) Nowhere in the Appellate Body decision is there an endorsement of "passivity" and "presumptions." To the contrary, the Appellate Body stressed that "Article 11.3 assigns an active rather than a passive decision-making role to the authorities."

3. Even prior to the Appellate Body decision, the US position in the current dispute lacked credibility. Now, however, the US position has become completely untenable.

4. The US Second Submission provides scant reference to the Appellate Body decision. Moreover, when the decision was adopted by the DSB on 9 January, the US statement – incredibly – made *no mention at all* of Article 11.3. Unfortunately for the United States, the Appellate Body's decision in *Sunset Review of Steel from Japan* is dispositive on many of the issues currently before this Panel. Argentina highlighted the importance of the decision in its Second Submission, and will do so again this morning.

5. In the First Meeting of the Parties, Argentina explained the simple facts giving rise to this dispute. These facts led to several claims that US law, both as such and as applied, violates the substantive obligations of the United States. Argentina stands firmly behind all of its claims, which find significant support from the Appellate Body's most recent articulation of the sunset obligation in *Sunset Review of Steel from Japan*.

6. In Argentina's view, there is no basis to assert that the US Department of Commerce's (the "Department") sunset review of Argentine OCTG was decided by an analysis of the facts. Rather, the Department's determinations make clear that the outcome of the case was the result of the application of the waiver provisions. Argentina respectfully asks that the Panel look to the Department's written determination as the only valid explanation of what happened to Siderca/Argentina in the sunset review of Argentine OCTG. Indeed, the Department's application of the waiver provisions to Siderca (or, at a minimum, to Argentina) is plainly indicated in the Department's *Issues and Decision Memorandum*. (ARG-51 at 5) It is telling that the United States resorts to: (1) *ex post facto* rationalizations in efforts to explain that its sunset determinations do not mean what the words in those determinations indicate; and (2) argumentation that any confusion resulting from the language of the Department's determinations is simply the result of "inartful" drafting.

7. Nevertheless, even when giving the United States the benefit of the doubt that the Department actually engaged in an analysis of facts, the US position on the core issue is unsustainable. Put simply, the legal and factual basis for the United States' decision to invoke the exception in Article 11.3 is in direct conflict with the "exacting" obligations of Article 11.3. Indeed, a 1.36 per cent dumping margin from the original investigation (calculated using the WTO-inconsistent practice of zeroing negative margins) and a decline in import volume – and nothing more – whether taken together or considered alone are an insufficient basis for the Department's determination of likely dumping under Article 11.3. This is clear after the Appellate Body's decisions in *Steel from Germany*, and *Sunset Review of Steel from Japan*.

8. It is also clear that when the domestic industry is interested in maintaining the measure, no respondent interested party has ever overcome the WTO-inconsistent presumption of likely dumping embodied in the US statute, the Statement of Administrative Action ("SAA"), and the *Sunset Policy Bulletin*, and as evidenced by the Department's consistent practice. The US industry has 223 wins and 0 losses on the issue of likely dumping. (*See* ARG-63 and ARG-64).

9. As for the likelihood of injury determination, analysis of the US International Trade Commission's (the "Commission") sunset determination in this case shows that the Commission, consistent with its practice, did not engage in any meaningful analysis of whether injury is "likely" to continue or recur, but rather based its determination on isolated factors grounded in speculation that cannot satisfy the meaning of the term "likely" – which, as the Appellate Body stated in December, means "probable." Further, the Commission made its determination on a cumulated basis of all countries subject to the measure, which has the effect of negating the rights of individual Members who are subject to a cumulated analysis.

10. Argentina will not repeat all of the arguments set forth in its First and Second submissions, and in its first oral statement. Today, Argentina will first review the nature of the Article 11.3 obligation in light of the *Sunset Review of Steel from Japan* case. Second, Argentina will demonstrate that the purported factual basis for the Department's determination of likely dumping is patently inconsistent with the requirements of Article 11.3. Third, Argentina will highlight the contradictions that continue in the US position, noting several instances where the US asks the Panel not to read literally the words used in the sunset determination. Fourth, Argentina will demonstrate that none of the US arguments is credible in light of the WTO-inconsistent presumption that is applied in all Department sunset reviews in which the domestic industry is interested. Fifth, Argentina will demonstrate the Commission's violations of the Anti-Dumping Agreement. Sixth, Argentina will briefly comment on the preliminary objections that the United States has raised, that Argentina has rebutted, and that now seem to be abandoned. Finally, Argentina will offer its conclusions.

II. TERMINATION OF THE MEASURE IS THE RULE; THE EXCEPTION CAN BE INVOKED ONLY THROUGH A "REVIEW" INVOLVING A "RIGOROUS EXAMINATION" LEADING TO THE REQUISITE "DETERMINATION" UNDER ARTICLE 11.3

11. The United States attempts to recast the Article 11.3 obligation as merely an obligation to afford parties the opportunity to participate in sunset reviews. In paragraph 31 of its Second Submission, the United States says: "the question in this dispute essentially is whether Argentina has demonstrated that Commerce did not provide respondent interested parties the opportunity to participate in the review and present evidence." Argentina could not disagree more; this case is about substantive obligations also. The United States cannot evade the "exacting" obligations under Article 11.3 by shifting the burden from the administering authority to respondent interested parties.

12. The United States completely ignores the unambiguous statements of the Appellate Body in *Sunset Review of Steel from Japan* about the significant and substantive obligations imposed by

Article 11.3, including the following: termination is the rule; continuation is the exception (para. 104); the nature of the obligations to conduct a "review" and make a "determination" (para. 111); the likelihood determination requires a "forward-looking analysis" (para. 105); Article 11.3 contains "exacting" obligations and requires a "rigorous examination" (para. 113); "dumping" as used in Article 11.3 means "dumping" in Article 2 (para. 109); the term "likely" in Article 11.3 means "probable" (paras. 110-111); that the *Sunset Policy Bulletin* is a measure that is subject to WTO-challenge (paras. 99, 101); that the *Sunset Policy Bulletin* might be shown – with evidence of the Department's consistent application – to establish WTO-inconsistent presumptions (paras. 177-178). The rights and obligations flowing from Article 11.3 can hardly be characterized as simply "procedural."

13. As Argentina has repeatedly stressed – and as the Appellate Body has made clear – the primary obligation of Article 11.3 is termination of anti-dumping duties after five years. The Appellate Body in *Sunset Review of Steel from Japan* reaffirmed the principle it first articulated in *Steel from Germany*. Continuation of the measure is the exception, and is only permissible if the authorities conduct a "review," undertake a "rigorous examination" of the facts, and "determine" that termination of the anti-dumping measure would be "likely" to lead to continuation or recurrence of injurious dumping. (Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 104, 114) The Appellate Body also reaffirmed that, "[i]f any one of these conditions is not satisfied, the duty must be terminated." (*Id.* at para. 104)

14. As noted above, in interpreting the meaning of the words "review" and "determine" in Article 11.3, the Appellate Body noted the "investigatory and adjudicatory aspects" of Article 11.3 reviews and that "authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination." (*Id.* at para. 111)

15. With respect to the evidentiary basis for the likelihood determination, the Appellate Body affirmed the Panel's statement that the authority must ground its determination on a "sufficient factual basis." (*Id.*, paras. 114-115 (citing Panel Report, para. 7.271)) In addition, the Appellate Body has held that the authority must make a "fresh determination" in a sunset review that is forward-looking and "based on credible evidence." (Appellate Body Report, *Steel from Germany*, para. 88)

16. Despite the clear findings of the Appellate Body, the United States continues to argue that Article 11.3 imposes only "limited requirements" on Members. (US Response to Panel Questions, para. 22) By focusing on procedure over substance, the United States seeks to shift the burden of the obligation under Article 11.3 completely to respondent interested parties. In so doing, the United States essentially ignores the "exacting nature" of the obligation Article 11.3 imposes on the importing Member in order to invoke the exception and justify the maintenance of an anti-dumping measure beyond five years: that is, the obligation to "determine" in a "review" that termination of the measure would likely lead to continuation or recurrence of dumping and injury.

III. THE LIKELIHOOD OF DUMPING

A. THE ALLEGED SUBSTANTIVE BASIS FOR THE DEPARTMENT'S LIKELIHOOD DETERMINATION VIOLATES US WTO OBLIGATIONS

1. The Department's reliance on the decline in import volume, and on the 1.36 per cent margin from the original investigation and the related deposit rate is legally insufficient under Article 11.3

17. The US Second Submission argues that the Department's likelihood determination was based solely on two factors: "Commerce found that dumping duties were levied and collected, at the dumping margins assigned in the original investigation, against Argentine OCTG imported into the

United States during the five-year period preceding the sunset review. Commerce also . . . found that US imports of Argentine OCTG had declined substantially immediately after the order was imposed and remained at depressed levels for the entire five-year period prior to the sunset review." (US Second Submission, para. 34)

18. **A decline in import volume alone is a legally insufficient basis for a Likelihood Determination under Article 11.3.** Following the imposition of the US anti-dumping measure on Argentine OCTG, Siderca chose to stop exporting to the US market. The Appellate Body has explained that declines in import volumes following the imposition of anti-dumping duties can result from many factors apart from the duties: "The cessation of imports . . . and the decline in import volumes . . . could well have been caused or reinforced by changes in the competitive conditions of the market-place or strategies of exporters, rather than by the imposition of the duty alone. Therefore, a case-specific analysis of the factors behind a cessation of imports or a decline in import volumes (when dumping is eliminated) will be necessary to determine that dumping will recur if the duty is terminated." (Appellate Body Report, *Sunset Review of Steel from Japan*, para. 177 (emphasis added)) Despite the fact that Siderca had developed a successful business strategy without relying on the US market, the Department presumed that declining import volumes indicated that dumping would be likely to continue or recur upon termination of the order. In doing so, it was following the direction of the SAA and SPB.

19. The Department did not analyze the factors behind the decline in imports of Argentine OCTG. Nor did it request additional information from Siderca, which had pledged to cooperate fully.

20. **The 1.36 per cent margin from the original investigation and the existence of a deposit rate are not evidence of continued dumping and cannot serve as the basis for the Department's Likelihood of Dumping Determination.** The United States explains a new theory in its Second Submission regarding the continuation of dumping. It goes like this: a minimal quantity of OCTG was imported into the United States in the 5 years following the imposition of the measure, the US importer must have paid the 1.36 per cent deposit on the imports, and, because the importer did not request a review, the deposits were converted into definitive anti-dumping duties, thereby proving that dumping "continued." The argument has major flaws.

• First, there is no mention of any of this on the record of the sunset review. The Department simply stated that "there have been above *de minimis* margins for the investigated companies throughout the history of the orders," and therefore "dumping continued after the issuance of the orders[.]" (*Issues and Decision Memorandum* at 5 (ARG-51)). There is no reference to the payment of anti-dumping deposits constituting evidence of continued dumping.

• Second, the explanation given in the *Issues and Decision Memorandum* actually contradicts the new explanation by the United States. Who are the "investigated companies" from Argentina to which the Department refers? Everyone concedes that the only company ever investigated was Siderca (a seamless pipe producer), and the Department determined several times that Siderca did not ship OCTG to the US for consumption in the US If Siderca, the only "investigated company," did not ship, how can there be "above *de minimis* margins for the investigated companies throughout the life of the history of the orders." Clearly, the statements are simply wrong with respect to Argentina, and just as clearly they contradict the new explanation that the importation of OCTG from other, non-investigated, non-reviewed exporters constitutes the evidence of continued dumping.

• Third, the Department keeps talking about the "entries," as if it had evidence on the record of many entries of Argentine OCTG during the relevant period. In fact, the Department had made several findings in annual reviews that any entries, if they existed, were extremely isolated, and were not explained on the record. To clarify this issue, Argentina refers the Panel to **Chart 4** (Exhibit ARG-69), which summarizes the Department's findings with respect to import volume in the four annual reviews that it had completed by the time of its sunset review determination. In the end, the

record show possibly two entries, both welded, one of which was 154 tons and the other of an undetermined amount. We also know that the statistics used as the basis of the alleged volume of imports in each review contained several errors ranging from the misclassification of products to the inclusion of non-consumption entries. Chart 4 also contains references to the Exhibit number so that the Panel can review this evidence.

• Fourth, the new explanation offered by the United States makes no sense. The fact that an importer is required to pay a small anti-dumping duty deposit upon importation, and that the Department does not conduct a review of the imports made by the importer, says absolutely nothing about whether the imports are dumped or whether dumping has continued. Article 2 of the WTO Anti-Dumping Agreement defines dumping in terms of a substantive analysis of export price and normal value. Nothing in Article 2 provides that payment of a required deposit can subsequently be "deemed" to be an admission of dumping either for Article 2 and certainly not for Article 11.3. The United States cannot credibly argue that it has ever conducted such an analysis since the imposition of the measure in August 1995. It is surprising that the United States even offers this justification. The United States often explains to its trading partners that the deposits required as part of its retrospective assessment system are not evidence of dumping, and that it cannot determine whether dumping has occurred until it performs a substantive review of the actual imports during the relevant period. (*See* Panel Report, *US – Section 129(c)(1)*, DS221, paras. 2.6-2.8), emphasizing the need for a substantive analysis in an anti-dumping review in order to determine whether dumping exists in a retrospective system). The explanation in the Second Submission that these deposits prove the continuation of dumping is simply wrong. Any duties that might have been collected resulted from the lack of an administrative review, so that entries were liquidated without any substantive analysis of dumping.

21. For these reasons, the Panel must conclude that the United States had no evidence of continued dumping at the time of the sunset determination, and that the new theory offered now by the United States is nothing more than an *ex post facto* justification that the Panel must not consider. Such justifications cannot be accepted. (*See* Panel Report, *Poultry from Brazil*, DS241, para. 7.49 ("[W]e do not believe that, as a panel reviewing the evaluation of an investigating authority, we are to take into consideration any arguments and reasons that are not demonstrated to have formed part of the evaluation process of the investigating authority); Panel Report, *Argentina – Ceramic Tiles*, DS189, para. 6.27; Panel Report, *Guatemala Cement*, DS156, para. 8.245))

22. Also, the United States still has never offered a logical explanation of what the 1.36 per cent rate says about future dumping, let alone the likelihood of future dumping. The rate is historic, with no relationship whatsoever to the forward-looking determination required to invoke the exception of Article 11.3 and continue the measure. As the Appellate Body made clear, "the likelihood determination is a prospective determination. In other words, the authorities must undertake a forward-looking analysis and seek to resolve the issue of what would be likely to occur if the duty were terminated." (Appellate Body Report, *Sunset Review of Steel from Japan*, para. 105). The Appellate Body ruled that "mere reliance" on the determination made in the original investigation is not enough. (*See* Appellate Body Report, *Steel from Germany*, para. 88.) The Appellate Body rulings reinforce Argentina's view of the extreme and unfair situation presented in this case.

23. The Department's reliance on the 1.36 margin from the original investigation and the decline in imports cannot satisfy the obligation under Article 11.3.

2. Decisive reliance by the Department on a WTO-inconsistent margin as the basis for the Likelihood Determination is inconsistent with Article 11.3

24. The United States claims that during sunset reviews "Members are not obligated to calculate 'new' dumping margins. They are merely obligated to provide respondent interested parties opportunities to offer evidence in support of negative likelihood determination. Therefore, the magnitude of dumping is not pertinent to making a determination with regard to likelihood of

dumping." (US Second Submission, para. 37, footnotes omitted). This answer demonstrates how the United States is attempting to recast the obligations under Article 11.3 and erroneously shift responsibility from the administering authority (which holds the substantive obligations under Article 11.3) to the exporters of the Member holding the right of termination under Article 11.3.

25. Argentina has not argued, and is not arguing, that Members are obligated to calculate a new dumping margin in connection with a review conducted under Article 11.3. However, the Appellate Body has made clear that reliance on a WTO-inconsistent margin – such as a margin calculated using the practice of zeroing – "taints" the likelihood determination under Article 11.3. Specifically, the Appellate Body found that "if a likelihood determination is based on a dumping margin calculated using a methodology inconsistent with Article 2.4, then this defect taints the likelihood determination too." (Appellate Body Report, *Sunset Review of Steel from Japan*, para. 130)

26. In this case, there can be no doubt that the 1.36 per cent margin that the Department relied on as the basis for its likelihood of dumping determination was based on a calculation method that is inconsistent with Article 2.4. To calculate the 1.36 per cent margin, the Department applied "zeroing" by setting all negative margins to zero, and summed the remaining positive margins. The effect was to disregard the existence and magnitude of the negative margins in determining the amount of "dumping" arising from the sales under review. This can be seen clearly in Exhibit ARG-52 to Argentina's First Submission and in Exhibit ARG-66 to Argentina's Second Submission. (*See* Argentina's Second Submission, paras. 43- 48). These Exhibits demonstrate that there would have been no dumping margin in this case without zeroing. In fact, without zeroing the margin would have been <u>negative 4.35 per cent</u>.

27. The Appellate Body recognized in *Sunset Review of Steel from Japan* that zeroing is not consistent with Article 2.4. (*See* paras. 134-135.) It does not yield a "fair comparison," and it does not accurately reflect whether the product, as a whole, is being sold at less than normal value. The Appellate Body ruled that when a Member relies on a dumping margin in making a determination in an Article 11.3 review, that margin must be WTO-consistent. (*See* Appellate Body Report, *Sunset Review of Steel from Japan*, para. 127) The Appellate Body explained that zeroing (whether in the original investigation or otherwise) not only distorts the magnitude of the dumping margin, but may also result in a positive margin that otherwise would not exist:

> When investigating authorities use a zeroing methodology such as that examined in *EC – Bed Linen* to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognized in the present dispute, "zeroing . . . may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing." Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping. This conclusion led the Appellate Body to "reverse the Panel's consequential finding . . . that the United States did not act inconsistently with Article 2.4 of the *Anti-Dumping Agreement* in the CRS sunset review by relying on dumping margins alleged by Japan to have been calculated in a manner inconsistent with Article 2.4." (*See* Appellate Body Report, *Sunset Review of Steel from Japan*, para. 128)

28. To be clear, Argentina is not claiming that the original dumping determination violated US WTO obligations because it was calculated based on the practice of zeroing negative margins. Rather, <u>Argentina challenges the Department's reliance on that margin as the basis for its determination that dumping would be likely to continue under Article 11.3.</u> The Appellate Body has

clarified that the Department may not rely on a dumping margin which is inconsistent with the substantive standard of Article 2.4 as the basis for its likelihood determination under Article 11.3.

29. In *Sunset Review of Steel from Japan*, the Appellate Body clarified the application of these principles in an Article 11.3 review, but ultimately did not find a violation by the United States. The only reason that it did not do so was the fact that the Panel had not considered the evidence and had not made a finding primarily because it decided that the disciplines of Article 2.1 did not apply to Article 11 reviews. That view has been discredited by the Appellate Body, and there can be no question that reliance on margins calculated in a manner inconsistent with the substantive standards of Article 2 may not serve as the basis for a likelihood determination under Article 11.3. The evidence of zeroing in this case is squarely before this Panel. Argentina respectfully submits that the Panel must consider this evidence and make the finding that was lacking in the panel decision before the Appellate Body in *Sunset Review of Steel from Japan*.

3. The Department's alleged application of facts available was inconsistent with Articles 11.3, 6.1, 6.2, 6.8, 6.9, and Annex II

30. Assuming *arguendo* that the waiver provisions were not the basis for the Department's sunset determination in OCTG from Argentina, then the Department's resort to the limited set of facts available – the 1.36 per cent margin and the decline in import volumes – was inconsistent with Articles 11.3, 6.1, 6.2, 6.8, 6.9, and Annex II. (*See* Argentina's Second Submission, Section III.C.2)

31. The Panel need not search further than the Department's own regulations to observe the severe consequences of the decision to conduct an expedited review in a case such as Argentina. It is not, as the United States says, an issue of only time frame. For example, section 351.218(e)(2)(i) virtually ensures that the only basis for the Department's likelihood determination will be the margin from the prior determinations, which in this case is limited to the original investigation. The regulation states that the Department will "rely" on the that margin except "under the most extraordinary circumstances" in a full review. Therefore, respondents in an expedited review such as this have no chance of escaping the Department's "reliance" on the margin from the original investigation, which by definition always will be a positive margin.

32. Articles 6.8 and Annex II permit an investigating authority to make determinations based on "facts available" only where an interested party "does not provide[] necessary information within a reasonable period or significantly impedes the investigation . . . ." Siderca, however, submitted a complete substantive response to the Department's notice of initiation and agreed to cooperate fully in the investigation, and the Department never found that Siderca failed to cooperate. Thus, the application of facts available against Siderca was inconsistent with Articles 6.8 and Annex II, and the failure to disclose the essential facts infringed the substantive requirements in Article 6.9.

33. The United States apparently recognizes that the application of facts available to Siderca would have been inconsistent with the Anti-Dumping Agreement, and for this reason argues that the Department did not apply facts available to Siderca. (*See* US First Submission, paras. 214, 221, 234-236) According to the United States, the Department applied facts available to the "non-responding respondents," rather than to Siderca. (*See id.* para. 214) Again, the US assertion is flatly contradicted by the Department's *Issues and Decision Memorandum* (ARG-51 at 3) which does not mention any non-responding respondents. The US assertion is yet another *ex post facto* rationalization. Moreover, the US assertion is inconsistent with its previous explanation that the Department applied waiver to the non-responding respondents. (US First Submission, para. 216)

34. Even if the Department had applied facts available, whether to Siderca or to the so-called non-responding respondents, the outcome is the same. Under the relevant provision, expedited sunset reviews are conducted "without further investigation" on the basis of "the facts available." (19 C.F.R. § 351.218(e)(1)(ii)(C)) Consequently, the Department's conduct of an expedited review in this case

precluded the Department from making the substantive and fresh "determination" required by Article 11.3, and denied Siderca the full opportunity to present evidence and defend its interest, in violation of Articles 6.1 and 6.2.

B. THE US ATTEMPT TO EXPLAIN THE DEPARTMENT'S SUNSET DETERMINATION AND ITS SUNSET PROCEDURES CANNOT CURE US VIOLATIONS OF ARTICLE 11.3

1. The Waiver Provisions as applied in the Department's Sunset Review of Argentine OCTG violates US obligations

35. As explained above, the Department's affirmative likelihood determination was not grounded on a sufficient factual basis. In fact, Argentina submits that the Department's description of its decision demonstrates that it deemed Siderca to have waived participation in the sunset review and thus never engaged in any analysis in this case.

36. The Panel can disregard this set of US contradictory statements and *ex post facto* justifications and simply look at the words used by the Department itself in its *Issues and Decision Memorandum* states: "In the instant reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation." (at 5 (ARG-51)(emphasis added)) As with the aggregate responses from Italy, Japan, and Korea, the Department found that Siderca's complete substantive response was "inadequate." (*See Determination to Expedite* at 2 (ARG-50); *Issues and Decision Memorandum* at 3, 7 (ARG-51)) Therefore, the statement in the *Issues and Decision Memorandum* that "the Department did not receive an adequate response from respondent interested parties" and that "this constitutes a waiver of participation" leads to one incontrovertible conclusion: The Department applied waiver to all respondent interested parties, including Siderca.

37. The Department's application of waiver to Siderca precluded the Department from conducting the "review" and making the "determination" required by Article 11.3, and denied Siderca the opportunity to present evidence and defend its interest. The Department's sunset review of Argentine OCTG was thus inconsistent with Articles 11.3, 6.1, and 6.2.

38. The United States has argued that the Department did not deem Siderca to have waived participation in the sunset proceeding. (*See* US First Submission, paras. 211-213, 216; US Answers to First Set of Panel Questions, para. 51) The US argument is not persuasive for two reasons. First, as Argentina has just shown, the express wording of the *Issues and Decision Memorandum* flatly contradicts the US assertion. Indeed, the United States itself has recognized in these proceedings that the language of the *Issues and Decision Memorandum* appears to indicate that the Department deemed Siderca to have waived participation. (*See* US First Submission, n.216) For this reason, in its answer to Panel Question 11, the United States essentially asks the Panel to not read words that are actually written and instead to replace the phrase "did not receive an adequate response" that is unambiguously set forth in the *Issues and Decision Memorandum* with the phrase "did not receive a complete substantive response" that the United States now asserts is what it meant to say. Similarly, the United States asks the Panel to read "respondents from Japan, Korea, and Italy" when it wrote "respondent interested parties." (*See* US Answers to First Set of Panel Questions, paras. 51-52) Thus, the US argument is not simply an *ex post facto* rationalization, but rather a blatant attempt to change the unambiguous language in the *Issues and Decision Memorandum* to other words that comport with the explanation of the sunset system now offered by the United States in these proceedings.

39. Second, even accepting the US explanation that it applied "waiver" to the "non-responding" respondents, and that waiver is only applied at the "company-specific" level, no one can dispute that the application of the waiver provisions in this case led directly to an "order-wide" likelihood

determination. The "waived" companies were assumed to account for 100 per cent of the exports. Siderca, with no exports, had no chance to influence the Department's final determination.

40. Finally, if true, the US assertion that the Department deemed so-called "non-responding respondents" to have waived participation in this case further demonstrates the utterly passive nature with which the Department conducts sunset reviews. This also highlights the illogical nature of the Department's approach to determining "adequacy" – even accepting the US description of how it makes the adequacy determination. The Department is never in a position to know (and did not know in sunset proceeding involving Argentine OCTG) how many exporters have not responded – i.e., it could be none, one, ten, or more. Given the severe consequences flowing from the adequacy determination, the Department should have attempted to understand this basic fact.

41. **The US reliance on the minimal level of alleged OCTG exports during the period of review had severe consequences for Argentina.** The United States responds to a question from the panel by noting that the amount of exports averaged less than 900 tons in each year during the five-year period following imposition of the measure, declining from a level of 45,000 net tons prior to the initiation of the original investigation. According to the United States, the domestic interested parties provided the import statistics, and the Department verified the data by consulting the ITC Trade Database and the Department's Census Bureau IM-145 import data.

42. The US response highlights the flaws with the Department's reliance on these import statistics. Siderca participated in four "no shipment reviews" which revealed serious flaws with the statistics. The US attempts to down play those flaws, but Argentina insists that they are important. For this reason, we have prepared in **Chart 4** a chart summarizing the findings in the "no shipment reviews." It is no wonder that the United States did not precisely answer question 13a from the panel. To this day, the Department has no idea of the volume of imports entering during the relevant period. This is a significant problem because those statistics led directly to: (1) the determination that Siderca's complete substantive response was "inadequate"; (2) the application of waiver to Siderca or to Argentina; (3) the finding that dumping continued over the life of the order; and (4) the ultimate determination that dumping would be likely to continue or recur. Yet, despite the importance of the import statistics, the Department never disclosed to the parties the exact export figures, and the United States failed to respond to the Panel's specific question on this point. For these reasons, the Department violated Articles 11.3, 6.1, 6.8, 6.9, and Annex II.

43. The United States now contends that, "through administrative review procedures, the United States has identified Acindar as another Argentine producer of OCTG, and one that may have shipped OCTG to the United States during the period of review . . . ." (US Response to Panel Questions, para. 64) In carefully phrasing this response, the United States fails to note that the administrative review to which it refers occurred years after the sunset review. Nor does the United States contend that the Department identified Acindar as another Argentine OCTG exporter in the instant sunset review. This is because there was no evidence in the record before the Department in either the sunset review or the four "no shipment reviews" that Acindar was a producer and exporter of OCTG during the relevant period.

44. If the Department had Acindar in mind, then the Department never disclosed these "essential facts" as required by Article 6.9. On the contrary, the only evidence that existed was Siderca's statement that, to its knowledge, it was the only Argentine producer and exporter of the subject products. (*See Siderca's Substantive Response*, para. 6 (ARG-57)) The Department cited this statement, but gave no explanation of why it, as the investigating authority, did not at least attempt to clarify this issue. This was consistent with statements by the US industry to the Department in the annual reviews, where the US industry only requested reviews of Siderca, and for the second requested review (for the period 8.1.96 – 7.31.97) stated: "Review is requested of Siderca because it is the only known producer of oil country tubular goods in Argentina . . . ." (ARG-58 at 2). In addition, the petitioners also stated during the course of these "no shipment" reviews that Siderca was

the "sole producer of OCTG in Argentina." (ARG-36, at 49090) Therefore, the record evidence indicates that there was no reasonable basis for the Department to have considered that there were other Argentine producers/exporters that failed to respond to the notice of initiation and who were thus the true subjects of the application of the waiver provisions.

45. Consequently, the casual reference to Acindar as an Argentine OCTG exporter in its answers to the Panel's questions is another *ex post facto* justification by the United States to support its determination. Argentina respectfully requests the Panel to consider only issues and facts reflected in the record. Nevertheless, this reference further highlights the decisive weight the authorities assigned to the non-investigated, "non-respondent respondents" accounting for 100 per cent of Argentine OCTG imports that were deemed to have waived participation in the sunset review, thus leading to the statutorily mandated determination of "likely" dumping. The United States also suggests in its Second Submission that the Argentine Government's failure to participate in the sunset review contributed to "Argentina's 'treatment in the sunset review.'" (para.39) Argentina is surprised by this statement, as the United States never made this point in any of its written sunset determinations, or indicated that this consideration supported the Department's likelihood of dumping determination. This is the first time that Argentina has heard the Department put forth this rationale, as it was not raised in the underlying sunset proceeding, or at any stage of this dispute – not in the consultations, in the US First Submission, or in the US Opening Statement.

2. The US Waiver Provisions are inconsistent as such with Articles 11.3, 6.1, and 6.2

46. Throughout these Panel proceedings, Argentina has consistently argued that the US waiver provisions are inconsistent as such with Article 11.3 of the Anti-Dumping Agreement, because they preclude the Department from undertaking the rigorous "review" and making the substantive "determination" required by this Article. The automatic judgments mandated by the US waiver provisions are patently inconsistent with the "exacting nature of the obligations imposed on authorities under Article 11.3." (Appellate Body Report, *Sunset Review of Steel from Japan*, para. 113)

47. In its Second Submission and responses to the Panel's first set of questions, the United States asserts that the waiver provisions are not inconsistent with Article 11.3 as such because they do not mandate that the Department render an affirmative likelihood determination for the order as a whole. (*See* US Second Submission, paras. 19-21; US Answers to First Set of Panel Questions, paras. 3, 19, 20, 23, 24, 28, 29, 30) Instead, the United States emphasizes, these provisions mandate a likelihood of dumping determination only with respect to the specific company that waived – or was deemed to have waived – participation in the sunset review. (*See id.*)

48. In making this argument, however, the United States never explains precisely how a company-specific waiver determination is made in the context of its so-called order-wide analysis. Nor does the United States explain why the statutory mandate of the waiver provisions – that the Department "shall" determine that the waiving company would be likely to dump – does not affect the order-wide determination. The simple reason for this is because the United States cannot do so; otherwise, the words of the US statute would be meaningless.

49. The United States thus refuses to acknowledge the impact of the waiver provisions on the Department's final likelihood determination. Even where applied to only one of multiple respondents, the waiver provision necessarily taints the final likelihood determination. Article 11.3 simply does not permit the authority to make automatic judgments regarding the likelihood of dumping, even if limited to a particular respondent. Rather, the authority's review must be "rigorous" and its ultimate determination must be based on positive evidence. (*See* Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 113-115) Article 11.3 does not permit the administering authority to conclude – without any basis in fact – that any particular respondent would be likely to dump upon termination of the measure. The Appellate Body confirmed that there is no place for the use of

"presumptions" in sunset reviews in place of the obligations set out in Article 11.3. (*See id.*, para. 191)

50. The US defence of the waiver provisions also fails to account for the numerous sunset reviews in which the Department did not receive a substantive response from any respondent interested party. (*See* US Department of Commerce Sunset Reviews (ARG-63 and ARG-64)) In such instance, the waiver provisions necessarily mandate an affirmative likelihood determination at the order-wide level. Such an automatic judgment is patently inconsistent with the Article 11.3 obligation.

51. The United States suggests that the waiver provisions are not inconsistent as such with the Anti-Dumping Agreement, because, "[i]n making the order-wide final sunset determination in an expedited sunset review, Commerce will rely on all information on the administrative record of the sunset proceeding, including information in the substantive responses and rebuttal responses of the domestic interested parties, prior agency determinations, as well as the information submitted by respondent interested parties in their substantive and rebuttal responses." (US Second Submission, para. 25; *see also* US Answers to First Set of Panel Questions, paras. 10, 16, 17, 22, 25, 32, 39, 42, 61) As we have just shown, however, this argument does not alter the fact that the waiver provisions require the Department to make automatic judgments without any basis in fact. In addition, the US assertion is wrong on two levels.

52. First, the waiver provisions preclude the Department from considering company-specific information submitted by a respondent to which waiver has been applied. The United States acknowledges that a respondent that submits an incomplete substantive response will be "deemed" to have waived participation. (*See* US Answers to First Set of Panel Questions, para. 42) The statute thus mandates that the Department conclude that this respondent would be likely to dump upon termination of the anti-dumping measure, and, as a result, the Department must disregard any company-specific information contained in that respondent's substantive response. Any other interpretation would render the plain language of the statute meaningless. The consequences of the "deemed" waiver – the denial of the opportunity to present evidence and defend one's interest – also demonstrate that the US waiver provisions are inconsistent with Articles 6.1 and 6.2.

53. Second, the US sunset provisions as a whole restrict the Department's "analysis" to the three scenarios prescribed in the SAA and the *Sunset Policy Bulletin*. (*See* 19 USC. § 1675a(c)(2); 19 C.F.R. §§ 351.218(d)(3)(iv)(A) and (e)(2)(iii); 19 C.F.R. § 351.308(f)(2); *Sunset Policy Bulletin*, Sections II.A.3 and II.C). Therefore, it is irrelevant that the Department's regulations provide that respondent interested parties may include in their substantive responses "any other relevant information or argument that the party would like the [Department] to consider[,]" (19 C.F.R. § 351.218(d)(3)(iv)(B)). Also, the US regulations unreasonably restrict consideration of other information to "full reviews." (*See* 19 C.F.R. § 351.218(e)(2)(iii))

54. As the preceding discussion has shown, in attempting to defend the Department's likelihood determination in the sunset review of Argentine OCTG, the United States has made assertions that not only contradict the Department's published determinations, but also contradict the United States' own arguments. And then after the Panel pursued certain contradictions further, the United States was forced to concede that it made mistakes not only in the written sunset determination, but also in its First Submission. (*See* US Response to Question 9(a) from the Panel)

55. In its First Oral Statement, Argentina presented in **Chart 1** a list of significant contradictions between the Department's sunset determination and its First Submission. The United States has tried to cure several contradictions with new arguments, which were never stated at the time of the sunset decision, and therefore are *ex post facto* rationalizations which cannot be considered by the Panel. For the Panel's convenience and further review, we have organized the contradictions into two charts: **Chart 5** (Exhibit ARG-70) contains the *ex post facto* rationalizations, and **Chart 6** (Exhibit ARG-71)

contains the unresolved contradictions. If the Panel decides that some of the propositions advanced by the United States can be considered despite the fact that they are *ex post facto* rationalizations, then the Panel will confront a new problem: it will have to pick and choose between contradictory positions (i.e. adequate or inadequate response from Siderca, waiver, and application of facts available to Siderca, Argentina, and/or the "non-responding respondents," etc.).

56. That the United States has been unable to articulate a consistent and coherent story over the course of these proceedings and to link that explanation with its discussion in the *Issues and Decision Memorandum* manifests its failure to reconcile the Department's likelihood determination with Article 11.3. No matter the argument put forth by the United States, only one conclusion can be drawn: The Department failed to conduct the sunset review of OCTG from Argentina in a manner that is consistent with Article 11.3. Indeed, as Argentina has demonstrated previously, even when viewed in the light most favourable to the United States, the Department's likelihood determination simply was not grounded on a sufficient factual basis to invoke the exception of Article 11.3 and continue the anti-dumping measure.

C. NONE OF THE US ARGUMENTS ARE CREDIBLE IN LIGHT OF THE WTO-INCONSISTENT PRESUMPTION IN ALL SUNSET CASES

57. In *Sunset Review of Steel from Japan*, the Appellate Body declared that "[p]rovisions that create 'irrebuttable' presumptions, or 'predetermine' a particular result, run the risk of being found inconsistent" with the "obligation of investigating authorities, in a sunset review, to determine, on the basis of all relevant evidence, whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping." (Appellate Body Report, *Sunset Review of Steel from Japan*, para. 191)(emphasis added)

58. Operating together, the statute, the SAA, and the *Sunset Policy Bulletin* establish a WTO-inconsistent presumption of likely dumping in Department of Commerce sunset reviews. The statute provides the starting point for the Department's likelihood determination by enumerating the two elements that the Department must consider in every sunset review: (1) historical dumping margins and (2) past import volumes. The SAA further clarifies the likelihood of dumping standard under US law by instructing how these two factors should be interpreted. The SAA provides that any of the following three scenarios are "highly probative" of likely dumping: (1) continued dumping margins, (2) the cessation of imports, and (3) declining import volumes accompanied by the continued existence of dumping margins. (*See* SAA at 889-890 (ARG-5)) Finally, Section II.A.3 of the *Sunset Policy Bulletin* directs the Department to determine that continuation or recurrence of dumping would be likely whenever at least one of the three criteria set forth in the SAA is satisfied. (*See Sunset Policy Bulletin* at 18,872 (ARG-35))

59. Ultimately, then, the US likelihood standard is expressed in Section II.A.3 of the *Sunset Policy Bulletin*. As the Appellate Body ruled in *Sunset Review of Steel from Japan*, the *Sunset Policy Bulletin* is a measure that may be challenged in WTO dispute settlement. (*See* paras. 99-100)

60. The Appellate Body also addressed the very issue raised in this dispute: whether Section II.A.3 of the *Sunset Policy Bulletin* is inconsistent as such with Article 11.3. In examining this issue, the Appellate Body determined that, if Section II.A.3 directs the Department to consider continued dumping margins and declining import volumes (i.e., satisfaction of any of the three prescribed criteria) as "determinative or conclusive" of the likelihood of future dumping, then the measure would be inconsistent with Article 11.3 as such. (Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, para. 178) The Appellate Body thus confirmed that the likelihood determination required by Article 11.3 must be based on "all relevant evidence," not on "the mechanistic application of presumptions." (*Id.* at paras. 178, 191)

61. In the end, the Appellate Body did not decide whether Section II.A.3 of the *Sunset Policy Bulletin* is inconsistent as such with Article 11.3, because it lacked the factual basis to do so (the Panel had failed to make factual findings as to the "consistent application" of Section II.A.3).

62. This Panel is not similarly constrained in the instant case. Argentina has submitted extensive evidence of the Department's "consistent application" of Section II.A.3 of the *Sunset Policy Bulletin* in all sunset reviews in which the domestic industry participates. Argentina's Exhibits ARG-63 and ARG-64 show that the Department follows the instruction of Section II.A.3 in every sunset review in which the domestic industry is interested, and every time it finds that at least one of the three criteria is satisfied, the Department makes an affirmative finding of likely dumping without considering additional factors. These facts are beyond dispute and the United States has not attempted to rebut these facts. The Department's consistent application of Section II.A.3 thus demonstrates its meaning: Section II.A.3 of the *Sunset Policy Bulletin* directs the Department to attach decisive weight to historical dumping margins and declining import volumes (or the cessation of imports altogether) in every case. Therefore, Section II.A.3 is inconsistent with the Article 11.3 obligation to determine "on the basis of all relevant evidence" whether termination of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping. (*See* Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 178, 191)

63. By directing the Department to give decisive weight to the three prescribed criteria as conclusive of likely dumping, Section II.A.3 establishes a WTO-inconsistent presumption of likely dumping and predetermines the outcome of the Article 11.3 review. Argentina's extensive evidence of the Department's consistent application of the *Sunset Policy Bulletin* again speaks for itself: In 100 per cent of the sunset reviews in which the domestic industry participated, the Department followed the mandate of Section II.A.3, and in each case, the Department rendered an affirmative likelihood determination. (*See* US Department of Commerce Sunset Reviews, ARG-63 and ARG-64) The United States cannot dispute these facts. Therefore, because Section II.A.3 of the *Sunset Policy Bulletin* directs the Department to apply a WTO-inconsistent presumption of likely dumping, the measure is inconsistent with Article 11.3. (*See* Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 178, 191)

64. The role that the sunset regulations play in this overall framework reinforces the mechanics of the WTO-inconsistent presumption. Consistent with the WTO-inconsistent presumption of likelihood established by US law, the sunset regulations limit the substantive information that the Department is required to solicit to historical dumping margins and past import volumes. (*See* 19 C.F.R. § 351.218(d)(3)(iii)) Although – as the United States repeatedly highlights – the Department's regulations provide that respondent interested parties may include in their substantive responses "any other relevant information or argument that the party would like the [Department] to consider[,]" (19 C.F.R. § 351.218(d)(3)(iv)(B)), the provision is hollow because the US sunset provisions as a whole restrict the Department's "analysis" to the three criteria forming the presumption of likely dumping. (*See* 19 USC. § 1675a(c)(2); 19 C.F.R. §§ 351.218(d)(3)(iv)(A) and (e)(2)(iii), § 351.308(f)(2); *Sunset Policy Bulletin*, Section II.C)

65. In this regard, the US reliance on 19 C.F.R. § 351.308(f)(2) for the proposition that the Department considers all information provided in the substantive responses in expedited reviews is unavailing. By virtue of the cross reference contained in this regulation to section 1675a(c) of the statute, the true meaning of section 351.308(f) is that the Department will consider information other than historical dumping margins and past import volumes only where "good cause" is shown. (*See also* 19 C.F.R. §§ 351.218(d)(3)(iv) and (e)(2)(iii); Section II.C of the *Sunset Policy Bulletin*) As demonstrated by Exhibits ARG-63 and ARG-64, the Department has never considered "good cause" information in determining that dumping would not be likely to continue or recur. Subsection 351.218(e)(2)(iii) further restricts such consideration to "full reviews."

66. Instead, the Department has always treated satisfaction of any one of the three criteria prescribed by the *Sunset Policy Bulletin* as decisive in rendering affirmative likelihood determinations. Indeed, even in the context of a full review, the US sunset provisions limit the Department's analysis to a consideration of the three criteria prescribed by the SAA and *Sunset Policy Bulletin*. (*See* 19 USC. § 1675a(c)(2); 19 C.F.R. §§ 351.218(d)(3)(iv)(A) and (e)(2)(iii); *Sunset Policy Bulletin*, Section II.C) As Mexico, a Third Party Participant in this case, explained in its response to a question posed during these proceedings, the US sunset review of OCTG from Mexico was a "full review" and these SAA/*Sunset Policy Bulletin* criteria were applied and served as the basis for the Department's affirmative likelihood of dumping determination in that case.

67. In sum, regardless of whether the Department conducts an expedited or full review, and regardless of the nature of the information provided by respondents, the application of the WTO-inconsistent presumption established by US law leads to the same outcome in every sunset review in which the domestic industry participates: likely dumping. Ultimately, the WTO-inconsistent presumption is best summarized by the United States in its own words in its response to a panel question during the first meeting of the Panel with the Parties: It is reasonable to assume that a company that has dumped in the past is likely to dump in the future. This is not surprising as that is what the SAA and *Sunset Policy Bulletin* direct the Department to do in <u>every</u> case. (*See* US Department of Commerce Sunset Reviews, ARG-63 and ARG-64) Therefore, consistent with the Appellate Body's guidance in *Sunset Review of Steel from Japan*, the Panel must find that the Department's sunset review of Argentine OCTG was inconsistent with Article 11.3.

IV. THE LIKELIHOOD OF INJURY

A. ARTICLE 3 OF THE ANTI-DUMPING AGREEMENT APPLIES TO SUNSET REVIEWS CONDUCTED UNDER ARTICLE 11.3

68. The reasoning of Appellate Body's recent decision in *Sunset Review of Steel from Japan* should silence any lingering debate as to whether Article 3 applies to sunset reviews under Article 11.3.

69. The Appellate Body found that the definition of "dumping" applied for the purpose of the entire Agreement, including for sunset reviews, in light of the specific wording of Article 2.1.

70. Similarly, Footnote 9 of the Anti-Dumping Agreement provides that, "<u>[u]nder this Agreement</u>, the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or the material retardation of the establishment of such an industry and <u>shall be interpreted in accordance with the provisions of [Article 3]</u>." (Emphasis added.) Accordingly, the Appellate Body's reasoning in *Sunset Review of Steel from Japan* requires the parallel finding that "injury" for purposes of Article 11.3 is subject to the disciplines of Article 3.

71. Ignoring the clear implication of *Sunset Review of Steel from Japan*, the United States continues to assert that Article 3 does not apply to Article 11.3 sunset reviews. (*See* US Second Submission, paras. 43-55) First, the United States asserts that "injury" under Articles 3 and 11.1 does not have the same meaning as in Article 11.3. (US Second Submission, para. 43) According to the United States, the analysis required by Articles 3 and 11.1, which speak of existing injury, is "fundamentally different" from that required by Article 11.3, which speaks of the likelihood of continuation or recurrence of injury. (*Id.*)

72. The distinction between the determination of injury in an original investigation and the determination of the likelihood of continuation or recurrence of injury in a sunset review, however, does not alter the Anti-Dumping Agreement's clear instruction that the core focus of each determination – "injury" – "shall be interpreted in accordance with the provisions of [Article 3]."

Further, the premise for the US argument – that Articles 3 and 11.1 speak of "existing injury," rather than the likelihood of future injury – is flawed. Article 3 clearly pertains also to the threat of injury, i.e., to an analysis of future injury, not just to an analysis of existing injury.

73. Second, the United States argues that, "if Article 11.1 is read as providing specific content to Members' obligations under Article 11.3, it would make a nullity of that part of Article 11.3 that permits the continuation of a duty when injury is likely to recur." (US Second Submission, para. 44)

74. Argentina does not argue, however, that Article 11.1 sets out the specific obligation contained in Article 11.3. Rather, Article 11.1 is an umbrella provision that states "a general and overarching principle, the modalities of which are set forth in paragraphs 2 and 3." (Panel Report, *Pipe Fittings from Brazil*, DS219, para. 7.113) In this light, "injury" as used in Article 11.1 cannot be interpreted differently in Article 11.3. In its second submission, the United States appears to agree that "injury" in Article 11.1 is subject to the provisions of Article 3. Yet the United States has failed to demonstrate that Article 3 does not similarly apply to Article 11.3.

75. There is no textual support for the position that the term "injury" as used in Article 11.1 is different than the term "injury" as used in Article 11.3

B. THE COMMISSION APPLIED THE WRONG STANDARD – "LIKELY" MEANS "PROBABLE"

76. The Appellate Body in *Sunset Review of Steel from Japan* also ended the debate over the meaning of likely. "Likely" means "probable." (Para. 111)

77. Throughout these proceedings, the United States has consistently argued that "likely" as used in Article 11.3 does not mean "probable." More significantly, the Commission expressly stated before a NAFTA panel that it did not interpret "likely" to mean "probable" <u>in the very same sunset determination at issue in this dispute</u>. (*See* ITC Brief included in ARG-67). Therefore, there can be no doubt that the Commission failed to apply the correct standard in this case. As we will discuss next, the Commission's evidentiary findings with respect to the likely volume, price effects, and impact in the instant sunset review confirm this conclusion.

C. THE COMMISSION FAILED TO RELY ON POSITIVE EVIDENCE THAT INJURY WOULD BE <u>LIKELY</u> TO CONTINUE TO OR RECUR IN THE EVENT OF TERMINATION

78. Article 3.1 and Article 11.3 require positive evidence that injury is "likely" to continue or recur in order for the measure to be continued. The Commission's conclusions with respect to volume, price, and impact in this case fall short of meeting the substantive and evidentiary standard.

79. First, **with respect to volume**, the Commission concluded that, "in the absence of the orders, the likely volume of cumulated subject imports . . . would be significant." (*Commission's Sunset Determination* at 20 (ARG-54)) In making this conclusion, the Commission recognized that most of the subject producers faced capacity constraints (*Id.* at 19), and thus, positive evidence that these subject producers would not likely increase their shipments of OCTG to the United States. (*Id.* at 19) To overcome this positive evidence, the Commission found that these subject producers had "incentives" to shift "their productive capacity to producing and shipping more [OCTG] to the US market." (*Id.*) As Argentina has demonstrated in previous submissions, however, each one of these findings was based on speculation and conjecture, rather than on positive evidence of likelihood. Therefore, the Commission failed to determine, based on positive evidence, that the volume of subject imports would <u>likely</u> be significant upon termination of the orders.

80. The above discussion regarding capacity and the so-called incentives highlights that cumulation was wholly inappropriate in the sunset review of Argentine OCTG because: (1) it undermined Argentina's individual right to termination of the anti-dumping measure under

Article 11.3; and (2) the basis for the Commission's decision to cumulate was inconsistent with the "likely" standard of Article 11.3 because the Commission simply presumed that since there was competition between imports in the original investigation, it was likely that there would be such competition in the event of termination. Finally, it should be noted that if the positive evidence of capacity constraints were not significant, the Commission would not have devoted so much of its determination to a discussion of the subject producers' "incentives" to shift productive capacity for sale to the United States. Simply put, the Commission's conclusion that the volume of the subject imports would likely be significant relied on its findings of incentives.

81. In its Second Submission, the United States also attempts to bolster the Commission's findings of incentives, either by citing to additional record facts or by simply restating the Commission's finding. (*See id.* at paras. 66-77) Nevertheless, the United States fails to show how the Commission's findings were based on positive evidence of likelihood, as opposed to conjecture and speculation. Further, the United States is unable to account for the Commission's frequent disregard of positive evidence that undermined its incentive findings.

82. For example, the United States points out that, in a previous sunset review of OCTG from Canada, counsel for Siderca assured the Commission that the predecessor organization to Tenaris "had no intention of using the Algoma facility to ship OCTG to the United States." (*Id.*) Based on this evidence, the United States concludes, "Tenaris' commitment not to ship OCTG from Canada completely undermines Argentina's argument that Tenaris could use Algoma to serve this market." (*Id.*)(emphasis added) As evidence that Tenaris had "committed" not to ship OCTG from Canada, the United States cites footnote 310 of the Commission's determination in the review of OCTG from Canada. (*See id.* (citing USITC Pub. 3316 (July 2000) at 51. n.310 (US-29)) This footnote, however, does not indicate that Tenaris had committed not to ship OCTG to the United States from Canada. Rather, it states, "We also note Siderca's sworn testimony that exports to the United States are not part of its **business plan** for the Algoma facility." (USITC Pub. 3316 (July 2000) at 51. n.310 (US-29)(emphasis added)) Algoma gave no "commitment," but rather stated that exports to the United States were not part of its business plan, just as Siderca explained that exports to the United States were not an important part of its business plan in this sunset review. Why the explanation of the Tenaris business plan was considered credible in the Canadian case, and not credible in the Argentine case, remains a mystery. These facts also expose the speculation in which the Commission engaged in this case: rather than consider Tenaris' actions in Canada to be positive evidence that the Tenaris Group was not likely to export significant quantities to the United States if the measures were removed, the Commission ignored the evidence and relied on its "incentive" analysis. The Commission never even acknowledged that a Tenaris company, Algoma, could have shipped to the United States but did not.

83. In sum, despite the extensive record assembled by the Commission in the instant sunset review, the Commission simply failed to determine, based on positive evidence, that the volume of subject imports would likely be significant in the absence of the orders.

84. **With respect to price**, the Commission's finding with respect to the likely price effects of the subject imports was also based on conjecture, rather than positive evidence of likelihood. As Argentina demonstrated in its Second Submission, in making its price findings, the Commission placed great weight on information developed five years earlier in the original investigation. (*See* Argentina's Second Submission, paras. 172-173)

85. The United States makes a similar admission it attempts to refute Argentina's arguments that the United States gave undue weight to the fact that domestic prices were increasing at the end of the period examined. The United States claims that "evidence from the original investigation strongly supports a finding that imports can drive down domestic prices even during a period of strong demand" and that this means therefore that "imports would drive down or suppress the price of the domestic like product if the orders were revoked." (US First Submission, para. 339)

86. It is striking that from a finding in the original investigation that imports "can" drive down domestic prices, the Commission concludes in the sunset review that imports "would" drive down or suppress the price of domestic like products if the order were revoked. In other words, because it is possible (as demonstrated five years earlier), the Commission concludes it must be "likely" to occur if the orders are revoked. This is not the standard set forth by Article 11.3. Further, this type of reasoning demonstrates that the Commission is not applying a "likely" standard, and that the decision in this case is not based on positive evidence of likely price effects.

87. Finally, **with regard to impact**, the Commission stated, "in the original investigations, subject imports captured market share and caused price effects despite a significant increase in apparent consumption in 1993 and 1994 as compared to 1992." (*Commission's Sunset Determination* at 22) (ARG-54) (emphasis added) On this basis, the Commission concluded that, "despite strong demand conditions in the near term[,]" the subject imports would be likely to have a negative impact on the domestic industry in absence of the orders. (*Id.*) Thus, once again, the Commission based its conclusion of what is likely to occur on what occurred in the original investigation, five years in the past. In other words, the Commission determined on the basis of possibility (as demonstrated by events five years earlier) that an outcome is "likely." Again, such reasoning is unacceptable under Article 11.3 and shows that the Commission did not apply the "likely" standard in this case.

88. In its defence against Argentina's argument with respect to the impact analysis, the United States offers the following sentence: "The ITC noted that in the original investigation, a significant increase in demand had not precluded subject imports from gaining market share and having adverse price effects." (US First Submission, para. 342, emphasis added)

89. Once again, we see that the conclusion of what is likely to occur in the future depends wholly on the fact that it occurred in the original investigation, five years in the past. In this particular instance, the problem is compounded because the Commission is reduced to saying that increased demand in the past had not precluded subject imports from gaining market share and having adverse price effects, and drawing the inference from this observation that likely imports were likely to have the same impact. Argentina wonders how an exporter could ever meet this standard given that, by definition, most anti-dumping measures in place in the United States had some evidence of adverse impact supporting the initial decision.

90. For these reasons, the Commission's sunset determination in this case was inconsistent with Articles 3.1 and 11.3. Additionally, the United States has failed to rebut Argentina's claim that the Commission's sunset determination was inconsistent with Articles 3.4 and 11.3, because it cannot show on the record that the Commission properly evaluated the relevant economic factors prescribed by that provision. (*See* Panel Report, *Egypt – Steel Rebar*, DS211, para. 7.42, 7.49) As noted by Argentina, the Commission's consideration of the WTO-inconsistent margin of 1.36 per cent (calculated using the practice of zeroing) that was reported by the Department to the Commission for purposes of the Commission's sunset review was also inconsistent with US WTO obligations. If the Commission relied on this WTO-inconsistent margin in its determination, the determination was "tainted;" if not, then the Commission failed to comply with its obligations under Articles 3.4 and 11.3. (*See* Argentina's First Submission, paras. 189-193; Argentina's Second Submission, paras. 151-152) Finally, the Commission's sunset determination was inconsistent with Article 3.5, because the Commission failed to distinguish the potential injurious effects of other causal factors from the potential effects of the dumped imports.

D. THE COMMISSION'S CUMULATIVE INJURY ANALYSIS IN THE SUNSET REVIEW OF OCTG FROM ARGENTINA VIOLATES THE ANTI-DUMPING AGREEMENT

1. Contrary to US assertions, Argentina has the individual right to termination of the anti-dumping measure on OCTG from Argentina pursuant to Article 11.3 of the Anti-Dumping Agreement

91. As Argentina has maintained throughout the course of these proceedings, every WTO Member has the right to have anti-dumping duties terminated after five years. The United States, however, expressly denies the existence of such a right. The United States takes the position in response to Argentina's third question that: "The United States does not consider that Argentina has the right to termination under Article 11.3 premised on the examination only of whether the revocation of the anti-dumping duty order relating to subject imports from Argentina will lead to a continuation or recurrence of injury."

92. Argentina could not disagree more on this point. Argentina's position that it has a right to termination is based directly on the text of Article 11.3. Nowhere in Article 11.3 is Argentina's right to termination conditioned on the export practices of private companies of other WTO Members. The United States has no textual argument to support its view, but rather relies on its unilateral assertion contradicting the common intention of the WTO Members, as reflected in the text. (*See EC-LAN Equipment* at para. 84) Indeed, no WTO Member can unilaterally deny a right conferred to another Member by the WTO Agreements. Permitting Members to disregard conferred WTO rights would undermine the careful balance of rights and obligations achieved in multilateral negotiations. Argentina respectfully asks the Panel to keep the United States' extraordinary statement in mind when considering whether cumulation is permitted in sunset reviews. In this case, without cumulating the effect of imports, the Commission could not have found that Argentine OCTG imports would likely injure the US market.

2. Articles 11.3 and 3.3 preclude cumulation in the sunset reviews

93. Argentina submits that the Commission's cumulative injury analysis in the sunset review of OCTG was inconsistent with Articles 11.3 and 3.3 of the Anti-Dumping Agreement.

94. First, with respect to the text of Article 11.3, the United States argues that references to "any definitive anti-dumping duty" and "the duty" are not evidence that the drafters intended to prohibit cumulation in sunset reviews. (*See* US Second Submission, para. 56) The US argument, however, is inconsistent with the position it took in *Sunset Review of Steel from Japan*. In that dispute, the United States argued that "duty" as used in Article 11.3 is defined by Article 9.2 of the Anti-Dumping Agreement, "which 'makes clear that the definitive duty is imposed on a product-specific (i.e., order-wide) basis, not a company-specific basis." (Appellate Body Report, *Sunset Review of Steel from Japan*, para. 150) In other words, the United States relied on the significance of the word "duty" and that it applies to one order (rather than to one company) to prove its point. The Appellate Body agreed with the United States that Article 9.2 informs the interpretation of "duty" in Article 11.3. (*Id.*) The Appellate Body therefore confirmed that the use of "duty" in the singular means that the authority must determine whether the termination of a single anti-dumping order – and not multiple orders – would be likely to lead to injury.

95. The United States also contends that it is incorrect for Argentina to refer to the "object and purpose" of Article 11.3. (US Second Submission, para. 57) According to the United States, "Article 11.3 is clear that expiry of such duties is only appropriate where it is <u>not likely</u> that this would lead to the continuation or recurrence of dumping and injury." (*Id.*) The Appellate Body, however, has confirmed Argentina's interpretation of the principal obligation of Article 11.3: termination of the anti-dumping duty after five years is the rule, and maintenance is the exception. (Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, para. 104) The US interpretation

turns the Article 11.3 obligation on its head, making continuation of anti-dumping measures the rule and termination the exception. In addition, the US endorsement of a "not likely" standard is inconsistent with Article 11.3. In *DRAMs from Korea*, the Panel clearly stated "that a failure to find that an event is 'not likely' is not equivalent to a finding that the event is 'likely.'" (DS99, para. 6.45)

96. Second, the United States argues that Argentina's alternative argument – that if cumulation is permitted in sunset reviews, the limitations on cumulation in Article 3.3 would have prevented cumulation in this case – is directly at odds with the Appellate Body's findings in *Steel from Germany*. (*See* US Second Submission, para. 59, citing Appellate Body Report, *Steel from Germany*, paras. 58-97) In *Steel from Germany*, the Appellate Body merely held that the *de minimis* rule of Article 11.9 of the SCM Agreement – the parallel provision to Article 5.8 of the Anti-Dumping Agreement – does not independently apply to Article 21.3 – which is parallel to Article 11.3 of the Anti-Dumping Agreement. The Appellate Body did not address whether the *de minimis* rule of Article 11.9 applies to Article 21.3 in the context of applying a cumulative injury analysis by virtue of the cross-reference contained in Article 15.3, the parallel provision to Article 3.3 of the Anti-Dumping Agreement. (Appellate Body Report, *Steel from Germany*, para. 92) To the contrary, the Appellate Body's decision in *Steel from Germany* suggests that it understands that the injury analysis in a sunset review is not conducted on a cumulated basis. (*Id.* at para. 81)

97. Finally, the United States addressed Argentina's argument that the standards that the Commission applies in deciding whether to cumulate run directly counter to the "likely" standard established by Article 11.3. (*See* US Second Submission, para. 60) According to the United States, Argentina confuses the standard for deciding whether cumulation in a sunset review is appropriate with the standard for determining whether expiry of the duty would be likely to lead to continuation or recurrence of injury. (*See* id.) Because the "Anti-Dumping Agreement is silent on the former question," the United States argues, "the standards that the ITC applied in deciding whether to cumulate cannot violate Article 11.3." (*Id.*)

98. Argentina has not confused the two questions. Rather, Argentina submits that the threshold inquiry for cumulating – i.e., whether imports from each subject source had any possible discernible adverse impact – taints the likelihood determination in a sunset review. (*See* Argentina's First Submission, paras. 292-294; Argentina's Second Submission, paras. 199-200) For example, in the sunset review of Argentine OCTG, it cannot credibly be argued that the Commission could have determined that injury would likely continue or recur without having conducted a cumulated analysis. Consequently, the conduct of a cumulated injury analysis is not consistent with Article 11.3.

E. THE COMMISSION'S OVERALL APPROACH IN THE SUNSET REVIEW OF ARGENTINE OCTG IS FLAWED

99. As explained above, the Commission's likelihood of injury determination is flawed because it rests on several possible outcomes. The flaws with the Commission's likelihood of injury determination are further compounded because of the Commission's use of a cumulative analysis.

100. First, in reaching its decision to cumulate in this case, the Commission initially considered whether imports from each subject source would have any possible discernible adverse impact on the domestic industry. The Commission cumulated the imports because it did not find that the imports would have no discernible adverse impact on the domestic industry. (*See* 19 USC. § 1675a(a)(7)) The language applied by the Commission (written with two negative clauses) meant that the Commission could cumulate imports that, considered individually, have any possible adverse impact on the domestic industry. (*See* 19 USC. § 1675a(a)(7)) This standard is directly counter to the "likely" standard established by Article 11.3. (*See* Appellate Body Report, *Sunset Review of Steel from Japan*, para. 110; Panel Report, *DRAMS from Korea* at paras. 6.48, 6.52-6.58) With respect to the second part of the Commission's analysis as to whether to cumulate, the Commission considered whether the "imports would be likely to compete with each other." (*See* 19 USC. § 1675a(a)(7))

Again, just as the Commission failed to apply the "likely" or "probable" standard throughout its analysis (*see*, e.g., Argentina's Second Submission, para. 159), it failed to apply that standard to the threshold question of whether to cumulate for purposes of the conduct of the Article 11.3 review.

101. Second, as Argentina demonstrated in its written submissions, the Commission's finding of likelihood of injury hinges on supposed future occurrences – which while possible, do not constitute positive evidence of likelihood. Indeed, for many of its findings, the Commission simply presumed such events would occur simply because they were noted in the original investigation (*See*, e.g., Argentina's Second Submission, paras. 172-177). Thus, the flaws with the individual pieces of information relied on by the Commission are evident. Basic logic dictates that one cannot simply take the sum of purported possible scenarios to reach a "likely" outcome. In fact, when more future "variables" are relied upon to support the likelihood of a particular occurrence happening (in this case injury), this actually leads one to the conclusion that such an occurrence is less likely to happen. Yet, this same reasoning underpins the Commission's analysis.

V. THE UNITED STATES HAS FAILED TO DISCHARGE ITS BURDEN UNDER ARTICLE 6.2 OF THE DSU: THE US PRELIMINARY OBJECTIONS MUST FAIL

102. Finally, Argentina will now take a moment to offer some brief observations with respect to the terms of reference. Such observations may not be necessary, as the United States seems to have all but abandoned its DSU Article 6.2 claim. Indeed, the US Second Submission makes no reference whatsoever to DSU Article 6.2.

103. Argentina reiterates that from the text of the panel request, it is clear that the so-called "Page Four" claims and the "B1/B2 and B3" claims all complied fully with DSU Article 6.2 Moreover, the five "certain matters" were all set forth in Argentina's panel request and also complied fully with DSU Article 6.2. The United States has not rebutted any of Argentina's textual arguments on these points. The United States has thus demonstrably failed to discharge its burden to prove that Argentina's Panel request did not comply with Article 6.2.

104. Moreover, the Appellate Body has made clear that prejudice must be demonstrated for an Article 6.2 claim to succeed. The Appellate Body has also made clear (*Wool Shirts*) that "the burden of proof rests upon the party. . . who asserts the affirmative of a particular claim." The United States has asserted prejudice, but has failed to discharge its burden to demonstrate it.

105. The Panel asked the United States to explain how it was "prejudiced with respect to each alleged inconsistency that the United States is raising in its request for preliminary rulings." The United States failed to reply to the Panel's direct question about "each alleged inconsistency," presumably because it could not muster any credible arguments to this effect. The United States contented itself instead with a general complaint that "the United States has not been afforded the full measure of due process required under the DSU, compromising its ability to research the issues at hand, assign personnel, etc."

106. As Argentina has stressed before, vague assertions about having to wait for the complainant's First Submission have been rejected by previous panels as insufficient to rise to the level of violation of due process rights. The Panel should follow this sound precedent in the present case.

107. In summary, the United States has failed to rebut Argentina's textual arguments that all of the disputed claims are properly set forth in Argentina's panel request consistent with the requirements of Article 6.2. In addition, the United States has simply asserted, but has not demonstrated, any prejudice. Its Article 6.2 claims must therefore fail. Although Argentina has an exceptionally strong case on prejudice (or lack thereof), its Article 6.2 defence by no means is limited to the "no prejudice" point alone. Argentina affirms its earlier detailed statements that – on a purely textual analysis – the

US Article 6.2 claims are groundless. Argentina therefore respectfully requests the Panel to dismiss the US Article 6.2 requests in their entirety.

VI. BASED ON THE PERVASIVE AND FUNDAMENTAL US VIOLATIONS, THE PANEL SHOULD SUGGEST THAT THE MEASURE BE TERMINATED

108. In concluding today, Argentina refers the Panel to the specific requests it made of the Panel in paragraphs 314-323 of Argentina's First Submission, and paragraphs 269-276 of Argentina's Second Submission. Argentina incorporates those requests in full. In sum, Argentina respectfully requests the Panel:

- to find that in this case the US measures identified by Argentina, as such and as applied, violate US WTO obligations;

- to recommend that the United States brings its measures found to be inconsistent with the covered agreements into conformity with its WTO obligations; and

- to suggest, pursuant to DSU Article 19.1, that the only way for the United States to comply with these recommendations is through the immediate termination of the anti-dumping measure on OCTG from Argentina.

109. Argentina would like to take this opportunity to revisit the implications of DSU Article 3.2. (*See* Argentina's First Submission, para. 8; Argentina's Second Submission, para. 276) In its closing statement at the First Substantive Meeting, the United States warned of the dangers of creating additional obligations through dispute settlement. Such an approach, the United States admonished, would violate the rule in DSU Article 3.2 that panel rulings cannot add to the Members' obligations.

110. Argentina agrees that Panels should not – indeed cannot – add to the obligations of Members under the WTO Agreements. Yet, Argentina is by no means seeking to "add to" the obligations of the United States under the Anti-Dumping Agreement. To the contrary, Argentina is simply asking that the United States abide by the binding commitments that it accepted at the end of the Uruguay Round – nothing more, nothing less.

111. Moreover, the United States focuses on only half of the story. The very same sentence also states the proposition that "rulings of the DSB cannot . . . diminish the rights . . . provided in the covered agreements." Such "rights provided in the covered agreements" include Argentina's rights under the Anti-Dumping Agreement, including Argentina's rights under Article 11.3. The Appellate Body has contributed importantly to clarifying the meaning of the rights and obligations comprised in Article 11.3. Argentina had a right to termination of the anti-dumping order on OCTG after five years. The United States could continue the measure only by making findings consistent with Articles 11.3, 2, 3, 6, and 12 of the Anti-Dumping Agreement. As Argentina has amply demonstrated, the United States failed to comply with these critical obligations. As a result, the DSB must restore the right conferred to Argentina under Article 11.3, which is termination of the measure.

112. Argentina respectfully urges the Panel to make the necessary suggestion that the measure be terminated in this case. Not to do so would invite the United States to extend the measure beyond the expressly prescribed period in Article 11.3. (*See* Appellate Body Report, *Sunset Review of Steel from Japan*, para. 113) The suggestion in this case is necessary to give meaning to the rights of Argentina in this case.

113. Argentina thanks you for your time and attention today, and would be pleased to respond to any questions the Panel may have.

Closing Statement – 3 February 2004

1. Mr. Chairman, members of the Panel: Argentina will not repeat all of its arguments here. At this point, we will limit ourselves to three broad points.

2. First, it is critically important that all WTO Members, including the United States, respect the careful balance of rights and obligations embodied in the Anti-Dumping Agreement.

3. Participants in the Uruguay Round reached agreement on a package of disciplines applicable to anti-dumping measures. The Agreement recognizes the rights of importing countries to use anti-dumping measures to counteract injurious dumping. However, the right to invoke such measures is predicated upon the strict compliance with the substantive obligations of the Agreement.

4. Among the most important obligations in the Agreement are those applicable to sunset reviews. Article 11.1 makes clear that anti-dumping measures are limited in duration ("only as long as necessary"), magnitude ("only to the extent necessary"), and purpose ("to counteract dumping which is causing injury"). Article 11.3 gives specific content to these overarching principles by requiring termination of anti-dumping orders after five years.

5. These obligations were a critical element of the overall, carefully calibrated equilibrium of rights and obligations accepted by Argentina, the United States, and other Members at the end of the Round. It is essential that this Panel give the full, substantive content to these rights.

6. In accepting the Uruguay Round package, participants thus agreed to meaningful disciplines on the use of anti-dumping measures. We did not agree to the mechanical application of presumptions. We did not agree to immutable practices that stack the deck against importers. We did not agree to rules that lead inflexibly to a pre-ordained result as soon as the US industry shows the slightest interest in maintaining the order. We did not agree to 223 to 0.

7. Argentina notes that the Panel asked the United States questions today regarding the automatic application of the waiver provisions and the resulting automatic judgment. The United States tries to give the impression that these provisions do not result in automatic judgments. Argentina respectfully reminds the panel that Argentina has challenged the waiver provisions as such. The statute requires that the Department "shall" make an affirmative determination of likelihood of dumping with respect to the company that is waived.

8. We therefore ask this Panel to ensure that the United States respects and implements fully the obligations that it accepted when it accepted the Anti-Dumping Agreement – nothing more, nothing less.

9. Second, in a related point, we would ask this Panel to be guided by the authoritative and unambiguous guidance it has received from the Appellate Body, most notably in the *Sunset Review of Steel from Japan* case. As Argentina has emphasized, the rulings of the Appellate Body provide a definitive disposition of many of the issues facing the Panel, including the obligation on investigating authorities to play an active role in the investigation.

10. At the beginning of this proceeding, the United States argued that Article 11.3 was essentially an empty shell. According to the United States, Article 11.3 provided few, if any, restraints on US authorities as they raced to placate the wishes of their domestic industry.

11. The Appellate Body decision has completely undermined the US position, and has confirmed what Argentina has maintained from the beginning – that the US measure against OCTG from

Argentina was without legal basis under the Anti-Dumping Agreement. As the Appellate Body emphasized, Article 11.3 is no empty shell – it is replete with significant and highly substantive obligations. The Appellate Body could not have been any clearer on the key point that "presumptions" and "passivity" have no role in sunset reviews. As the Appellate Body explained, "[p]rovisions that create 'irrebuttable' presumptions, or 'predetermine' a particular result, run the risk of being found inconsistent with this type of obligation."

12. We would also emphasize that although the Appellate Body lacked the certain factual data upon which it could draw the necessary conclusions, the present Panel is not similarly constrained. Argentina has placed before this Panel all the factual basis it requires.

13. Argentina is thus confident that this Panel will render a decision that is consistent with the explicit direction of the Appellate Body. The Appellate Body has told Members that the sunset review is an "exacting" process that requires a "forward-looking analysis" and a "rigorous examination." We also know that "likely dumping" means "probable" dumping, and that "likely injury" means "probable injury."

14. In Argentina's view, it is necessary for this Panel to apply these clear standards to the facts of this case. This will be a straightforward exercise. Argentina is also confident that once the Panel applies the Appellate Body's guidance, there can be no other outcome than a finding of WTO-inconsistency.

15. Third, we would ask the Panel, during its deliberations, to give special attention to the particularly egregious facts of this case. For example, the Department's determination that dumping was likely relied on nothing more than a 1.36 margin from the original investigation, calculated through the use of zeroing, and a decline in import volume. As Argentina has emphasized, the Appellate Body in the *Sunset Review of Steel from Japan* case found that neither factor, either independently or together, could support a determination under Article 11.3 that dumping is likely to continue. If this is the basis on which the Department could uphold a determination that dumping was "probable", then the disciplines of Article 11.3 would be rendered essentially meaningless.

16. Thus, the Panel's task in the present case is significantly simplified by the untenable factual basis upon which the United States seeks to justify its actions.

17. With respect to the preliminary issues raised by the United States, Argentina would make three comments. First, as Argentina has stressed repeatedly, and as the Appellate Body has made clear, a Panel request must be read *as a whole*. The Panel must reject the US attempt to narrowly interpret different portions of the document in isolation. Second, the United States said this morning that "nothing in the WTO agreements explicitly states that a lack of prejudice cures a violation of DSU Article 6.2." However, this is not, and never has been, Argentina's position. Rather, the Appellate Body has stated repeatedly that *a violation of Article 6.2 never arises at all unless prejudice has been established.* Moreover, prejudice must rise to the level of a violation of due process rights. However, even at this very late stage in the proceedings, the United States merely asserts, but has not established, actual prejudice. Third, Argentina would respectfully remind the Panel that the United States has never rebutted the textual arguments advanced by Argentina demonstrating that all of Argentina's claims are in fact set forth in Argentina's panel request and are therefore properly before the panel.

18. Finally, with respect to Argentina's request for a suggestion by the Panel under DSU Article 19.1, Argentina does not agree that GATT and WTO practice has been exclusively for Panels simply to recommend that the measure be brought into conformity, without making any suggestions on how to do so. There are many examples where Panels have made such suggestions. Moreover, given the facts of this dispute, such a suggestion would be particularly appropriate.

19. The Panel has all of the legal and factual elements it needs to draw the inescapable conclusions about the WTO-inconsistency of the US measures. Your decision will be of vital importance not just for Argentina, but for the integrity of the multilateral trading system.

20. We thank you again for the time and attention that you have given to this dispute.

ANNEX D-8

OPENING AND CLOSING ORAL STATEMENTS OF THE UNITED STATES – SECOND MEETING

Opening Statement – 3 February 2004

Mr. Chairman, members of the Panel:

1. The United States appreciates this opportunity to comment on the issues raised in this proceeding.

2. This dispute is not complicated. It involves three overarching questions, some of which the Appellate Body has already explored at length. First, what does the Anti-Dumping Agreement require with regard to sunset reviews? Second, has Argentina demonstrated that US law fails to meet those requirements? Third, has Argentina demonstrated that the US application of its law also fails to meet those requirements?

3. Consistent with principles of treaty interpretation reflected in Article 31 of the *Vienna Convention*, an analysis of rights and obligations must begin with the text of the agreement being interpreted. Article 11.3 of the Anti-Dumping Agreement provides that an anti-dumping duty must be terminated unless a Member makes a finding of likelihood of continuation or recurrence of dumping and injury. Article 11.4 makes clear that the rules of Article 6 regarding evidence and procedure are applicable in these sunset reviews. Therefore, a Member must make a determination of likelihood with regard to dumping and injury and must afford interested parties the opportunity to participate and present evidence. In addition, Article 17.6(i) of the Anti-Dumping Agreement provides that a panel's examination of the facts is limited to whether those facts were properly established before and examined by the domestic investigating authority in a manner that is unbiased and objective, not whether the facts established at the time – or new ones impermissibly introduced here – might have led to a different conclusion.

4. We will first address issues concerning the Department of Commerce's determination regarding the likelihood of dumping, followed by the US International Trade Commission's determination regarding the likelihood of injury. In doing so, the United States will again confirm that US law – as such and as applied – is not inconsistent with the obligations contained in the Anti-Dumping Agreement. We will then conclude with some remarks on the procedural issues in this dispute.

Issues Concerning the Likelihood of Continuation or Recurrence of Dumping

5. Mr. Chairman, Argentina's claims in this dispute fail because they rely on obligations not found in Article 11.3 or anywhere else in the Anti-Dumping Agreement.

6. Consistent with DSU Article 3.2 and previous panel and Appellate Body findings, the United States has argued that the Panel should interpret the text of the Anti-Dumping Agreement, and in particular Articles 11.3 and 6, in accordance with the ordinary meaning of the terms of the Agreement in their context and in light of the Agreement's object and purpose.

7. Simply put, Article 11.3 provides that a definitive anti-dumping duty must be terminated unless the requisite finding – likelihood of continuation or recurrence of dumping and injury – is made. As the Appellate Body in *United States - Corrosion-Resistant Carbon Steel Flat Products*

from Japan recently upheld, the Anti-Dumping Agreement does not prescribe the means a Member must employ in determining whether dumping and injury are likely to continue or recur in a sunset review.[1]

8. There is also no requirement in Article 11.3 or elsewhere in the Anti-Dumping Agreement to calculate or consider the magnitude of current dumping in making the likelihood of continuation or recurrence of *dumping* determination. Nor is there a requirement to calculate or consider past, present, or future dumping margins in making the likelihood of continuation or recurrence of *injury* determination. Furthermore, there is no requirement in Article 11.3 or elsewhere in the Anti-Dumping Agreement to make likelihood of dumping determinations on a company-specific basis. The Appellate Body in *Japan Sunset* has confirmed these points as well, recognizing that (1) "Article 11.3 neither explicitly requires authorities in a sunset review to calculate fresh dumping margins, nor explicitly prohibits them from relying on dumping margins calculated in the past"[2] and (2) that "dumping margins may well be relevant to, but they will not necessarily be conclusive of, whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping".[3]

9. Argentina claims that Commerce's expedited sunset procedures preclude Commerce from making a "determination" or conducting a "review." We have demonstrated, however, that US sunset procedures provide for participation by interested parties, including the submission of factual information and argument, as well as rebuttal to such information and argument. We have also demonstrated that Commerce makes its likelihood determination based on all the evidence on the administrative record, including the evidence submitted by the interested parties during the sunset review. Commerce thus arrives at, in the words of the Appellate Body, a "reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination."[4] Commerce's procedures therefore are not inconsistent with the limited obligations of Article 11.3.

10. Argentina's statistics, which purportedly demonstrate an alleged lack of impartiality on the part of the United States, are irrelevant in light of these procedures. Argentina argues that Commerce relies solely on the participation of the domestic industry to determine whether dumping is likely to continue or recur, but here again Argentina misses the point: Where the domestic industry has, selectively, chosen to participate, it has placed evidence on the record that respondents have failed to rebut persuasively. The fact that the United States does not make affirmative determinations where the domestic industry fails to participate demonstrates that the United States does *not* simply continue every order without regard to the factual circumstances of each case. Thus, Argentina has failed to prove its claim regarding GATT Article X:3(a) and Article 11.3 of the Anti-Dumping Agreement.

11. In addition to these general legal issues, Argentina has made case-specific claims regarding Commerce's sunset determination involving oil country tubular goods from Argentina. Commerce's determination, however – that the expiry of the anti-dumping duty order would be likely to lead to the continuation or recurrence of dumping – is based on evidence regarding the existence of dumping and the depressed import volumes over the life of the order.

12. After providing all interested parties with ample opportunity to submit for the record their views, including any information they deemed relevant, Commerce reasonably concluded that, in the event of revocation, dumping is likely to continue or recur. Notably, respondent interested parties failed to provide evidence, either through the substantive responses to the notice of initiation or in rebuttal to the substantive response of the domestic industry, to persuade Commerce to find otherwise. This, in spite of the fact that, according to the Appellate Body, the Anti-Dumping Agreement assigns a "prominent role to interested parties . . . and contemplates that they will be a primary source of

[1] WT/DS244/AB/R, AB-20003-5, 15 December 2003, para. 123.
[2] *Id*., para. 123.
[3] *Id*., para. 124.
[4] *Id*., para. 111.

information in all proceedings conducted under that agreement," especially with regard to company-specific data.[5]

13. Indeed, the only respondent interested party to file a substantive response, Siderca, filed no rebuttal at all in response to the evidence placed on the record by the domestic industry. Argentina claims that Siderca was simply discouraged from filing responses because of the arguable perception that participation is "futile";[6] if so, why did Siderca file a substantive response at all? Why participate half-way? Contrary to Argentina's complaints, Commerce did conduct a review and made a determination based on record evidence; if Argentina wishes to assign blame for the contents of the record, it need only look as far as its own producers.

14. Argentina also claims that the expedited sunset procedures denied respondent interested parties an opportunity to defend their interests and to submit evidence, in violation of the obligations in Articles 6.1 and 6.2. As we have demonstrated at length in our written submissions, Commerce provides parties with ample opportunity to submit facts and arguments. Argentina has failed to show one instance where Siderca was denied an opportunity to defend its interests in this case. Instead, the record shows that Siderca, Argentina, and any other respondent interested party simply did not take advantage of the opportunities afforded them.

15. Finally, Argentina attempts to make much of the dumping margin calculated for Siderca in the original investigation. Argentina's only claim in this regard is that Commerce *reported* a dumping margin likely to prevail to the ITC that Argentina believes was based on a calculation methodology not in accordance with the Anti-Dumping Agreement. First, neither the ITC nor Commerce relied on the reported dumping margins in making their respective determinations. In addition, the only calculation methodology found not to be in accordance with the Anti-Dumping Agreement is the methodology in *EC – Bed Linens*. The methodology used by Commerce is not the same as the methodology in *EC – Bed Linens*.

Issues Concerning the Likelihood of Continuation or Recurrence of Injury

16. Argentina's grievances with the ITC's likelihood determination generally fall into two categories: Issues concerning the applicability of certain articles of the Anti-Dumping Agreement with respect to sunset reviews and issues concerning the ITC's analysis in this review.

17. The United States would first like to address two of the larger interpretative issues with regard to the Anti-Dumping Agreement and sunset reviews: The relevance of Article 3 and the availability of cumulation.

18. We explained in our submissions that original injury investigations and sunset reviews are fundamentally different inquiries with different purposes. We also pointed to very specific and fundamental obligations in Articles 3.1, 3.4 and 3.5 that just do not make sense in the context of sunset reviews.

19. Argentina's response on these points is telling. Essentially, Argentina sidesteps the issues. For example, we explained that the instruction in Article 3.1 to examine the volume of dumped imports and their effect on prices will often not be appropriate in a sunset review because imports may not be present in significant volumes, and they may not be sold at dumped prices.[7] In response, Argentina does not explain how the volume and price effects analysis mandated by Article 3.1 will be relevant in a sunset review. Instead, Argentina essentially says that Article 3.1 applies to sunset

[5] *Id.*, para. 199.
[6] Second Submission of Argentina, para. 119.
[7] First Submission of the United States, para. 305.

reviews because all of Article 3 applies to these reviews.[8] Argentina is answering the question by merely asserting the answer, without argumentation.

20. Another example of specific obligations in Article 3 that make no sense in sunset reviews can be found in Article 3.5. We explained that the obligation to demonstrate that "dumped imports are . . . causing injury" often cannot be complied with in the context of a sunset review (again, because imports may not be present in significant volumes, may not be sold at dumped prices, and may not be causing present injury).[9] Argentina responds by characterizing this as some sort of an attempt by the United States "to demonstrate that each and every word of Article 3.5 cannot practicably apply to sunset reviews."[10] But, we are not talking about a few stray words here; we are talking about the core of the obligation in Article 3.5 – to demonstrate "that the dumped imports are . . . causing injury."

21. Argentina's discussion of the requirements of Article 3.5 is a good example of how Argentina is attempting to improperly expand the obligations on Members in sunset reviews. Article 3.5 instructs investigating authorities to examine "any *known* factors other than the dumped imports which at the same time are injuring the domestic industry." (The word "known" was added to this provision in the Uruguay Round and can only be construed as having narrowed the obligation under the Tokyo Round Anti-Dumping Agreement, which was not confined to an examination of "known" factors.) Yet, Argentina asserts that Article 3.5 required that the ITC "distinguish the *potential injurious effects* of other causal factors from the effects of the dumped imports," despite Article 3.5's limitation of the obligation to "known factors" causing injury.[11]

22. Argentina argues that the logic behind the Appellate Body's finding in *Japan Sunset* regarding the applicability of Article 2 to sunset reviews "requires the parallel finding that "injury" for purposes of Article 11.3 is subject to the disciplines of Article 3."[12] In fact, the Appellate Body's report stands for just the opposite conclusion.

23. In *Japan Sunset*, the Appellate Body reiterated its earlier finding that "original investigations and sunset reviews are distinct processes with different purposes."[13] The Appellate Body then found that investigating authorities are under no obligation to calculate or rely on dumping margins when they make their likelihood of dumping determination in a sunset review.[14] (The Appellate Body explained that "it is consistent with the different nature and purpose of original investigations, on the one hand, and sunset reviews, on the other hand, to interpret the Anti-Dumping Agreement as requiring investigating authorities to calculate dumping margins in an original investigation, but not in a sunset review.")[15] The Appellate Body then concluded that *if* – and only *if* – investigating authorities choose to rely on dumping margins in making their likelihood determination, they are required to observe the disciplines of Article 2.4. In this case, neither Commerce nor the ITC relied on any particular dumping margins in making their likelihood determinations.

24. So what does *Japan Sunset* teach us? The parallel finding with respect to the likelihood of continuation or recurrence of injury determination is that investigating authorities are under no obligation in a sunset review to make a new "injury" determination, as defined in Article 3, but that if they do, they should observe the disciplines of Article 3. In this case, the ITC did not make a new "injury" determination as part of its sunset review; it assessed whether injury was likely to continue or recur, and the obligations of Article 3 do not apply.

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[8] Second Submission of Argentina, para. 164.
[9] First Submission of the United States, para. 351.
[10] Second Submission of Argentina, para. 183.
[11] Second Submission of Argentina, para. 185.
[12] Second Submission of Argentina, para. 28.
[13] *Japan Sunset*, para. 106 (quoting from *US-Carbon Steel*, AB Report, para. 87).
[14] *Japan Sunset*, para. 123 and 126.
[15] *Japan Sunset*, para. 124.

25. Argentina also argues that the Anti-Dumping Agreement prohibits use of cumulation in sunset reviews. It should be noted first that neither Article 11.3 nor any other provision in the Anti-Dumping Agreement prohibits cumulation. Argentina's argument that Article 11.3 expressly prohibits cumulation because it speaks of "duty" in the singular is unconvincing. One of the two supposed uses of the singular – the reference to "any definitive anti-dumping duty" – could just as well state the plural. And the reference to "the duty" is merely descriptive. If the drafters of Article 11.3 had intended to prohibit cumulation in sunset reviews, they surely would have found a more explicit way of doing so.

26. Argentina also relies on the Appellate Body's finding in *Japan Sunset* that Articles 11.3 and 9.2 do not require authorities to make their likelihood determinations on a company-specific basis.[16] We fail to see how this has any relevance to the question of whether cumulation is permitted. If anything, Article 9.2 suggests that "an anti-dumping duty" is not limited to a single country because that article envisions that "an anti-dumping" duty might be applied to "all the supplying countries involved."

27. With regard to the ITC's analysis in the sunset review of OCTG from Argentina, two of Argentina's arguments merit special attention here: The ITC's pricing analysis and the application of the "likely" standard.

28. At the outset of this discussion, it bears repeating: Article 17.6(i) makes clear that the availability of an alternative interpretation of evidence on the record is not sufficient to find a determination inconsistent with the Anti-Dumping Agreement. Argentina must prove that the ITC's examination of facts was not unbiased and objective. Argentina's arguments, which are based on a misapprehension of the ITC's analysis, do not indicate that the ITC's examination was biased and unobjective.

29. With regard to pricing, Argentina focuses on the evidence of underselling, and asserts that authorities should not be permitted to rely on pricing information from the original investigation to the exclusion of more current data.[17] However, the ITC did *not* rely exclusively on the evidence of underselling from the original investigation. There *was* evidence of more recent underselling, but the scope of this underselling was limited because subject imports had a limited presence in the US market in the period of review.[18] Moreover, current pricing data may be limited in a sunset review if imports have declined as a result of the imposition of the order. Argentina's suggestion that a finding of likely underselling must be based exclusively on current pricing data should be rejected.

30. With regard to the ITC's overall determination, Argentina repeatedly claims that the ITC construed "likely" to mean "possible" in the underlying review. This is untrue, and there is no evidence to support it. Argentina also makes much of the question of whether "likely" means "probable." But Article 11.3 does not use the word "probable." As we have already stated, moreover, a debate about synonyms for "likely" does not advance this inquiry. The word "probable" itself has a variety of meanings and does not connote a specific degree of probability. For example, some would interpret the word to mean "more likely than not."

31. Rather than debating synonyms, the United States believes it is more useful to examine the details of the ITC's analysis, as explained fully in our submissions.[19] It is also worth noting that the

[16] Second Submission of Argentina, para. 190.
[17] Second Submission of Argentina, paras. 172-173.
[18] ITC Report, p. 21.
[19] First Submission of the United States, paras. 313-43; Second Submission of the United States, paras. 61-78.

ITC, using the "likely" standard, has made negative likelihood of injury determinations, leading to the revocation of anti-dumping measures, in over one-third of the first set of sunset reviews it conducted.

32. Argentina attempts to portray the ITC's determination as speculative and not based on record evidence. It generally does this by focusing on selected individual factors that the ITC considered and claiming that the ITC's conclusion was not based on empirical certainty. We urge the Panel to reject this piecemeal analysis and to look at *all* of the evidence that the ITC considered and the *entirety* of its determination.

33. Finally, contrary to Argentina's suggestion,[20] the ITC did not use a double-negative "no discernible adverse impact" standard in lieu of the "likely" standard of Article 11.3. The question of whether imports from each subject country have a discernible adverse impact is part of the ITC's cumulation analysis under US domestic law. It has nothing to do with the application of the "likely" standard in sunset reviews.

Procedural Issues

34. Finally, we turn to the procedural issues briefly. First, with regard to Argentina's requests for specific remedies in section XI of its First Submission, the United States notes that GATT and WTO practice with respect to remedies has been to urge the respondent, where the panel rules against it, to bring the inconsistent measure into conformity with that Member's WTO obligations. Therefore, should this Panel agree with Argentina on the merits, it should nonetheless reject Argentina's requested specific remedy.

35. As for the other issues the United States described in its request for preliminary rulings, it remains perplexing that Argentina has chosen to devote resources to vigorously debate issues that would not exist had Argentina simply withdrawn its original panel request and drafted a proper one. Nevertheless, the United States has proven its claims. Nothing in Argentina's submissions refutes the arguments the United States has advanced. To the contrary, these arguments confirm that Argentina's panel request was inconsistent with Article 6.2 of the DSU.

36. More specifically, confusion persists with regard to the relevance of the "claims" on Page Four of Argentina's Panel Request. Argentina seems to believe that the placement of the word "also" in the first sentence of its Page Four "claims" and that quoting the dictionary meaning of "also" resolve the ambiguity as to whether these claims duplicate those in Sections A and B or are in addition to them.[21] With all due respect, simply defining "also" does not clarify the meaning of the sentence with respect to the rest of the panel request. In addition, Argentina's insistence that the panel request be read "as a whole" provides no clarification on this point. The fact that this issue continues to be debated is itself evidence that the request was not clear.

37. It should also be noted that Page Four – in stark contrast to the other portions of the request – does not provide a "brief summary" of the legal basis of the claim, as required by Article 6.2 of the DSU, regardless of Argentina's assertions to the contrary. In Sections A and B, Argentina provided a description of the measures being challenged. On Page Four, Argentina did not. There is no discussion between the relationship of the articles alleged to have been violated and the legal references on Page Four. There is no summary of the legal basis of the claims – whatever they may be.

38. Argentina's argument that third parties found the claim to be "clear" is, frankly, not relevant; the third parties are not defending their laws, and what may be "clear" enough for purposes of

[20] Second Submission of Argentina, para. 199-200.
[21] Submission of Argentina on US Preliminary Request, para. 42.

determining third-party participation in a dispute is not necessarily clear enough for the party forced to respond with precision to the claims being made.[22]

39. Argentina makes an even more striking argument in connection with the US' concerns that Argentina's First Submission contains claims that are outside the terms of reference of the panel request. According to Argentina, the United States must show that it suffered prejudice in order for the Panel to find these matters outside the terms of reference.[23] There is no such requirement, and, not surprisingly, Argentina cites no support for this argument.

40. Argentina's prejudice argument implies that panel requests need only be drafted clearly if failure to do so would prejudice the respondent, and that these panel requests only form the terms of reference if failure to do so would prejudice the respondent. In other words, panel requests and the due process considerations of the DSU are meaningless unless the respondent loses the case. Needless to say, such a results-oriented approach to due process vitiates the procedural protections of the DSU.

41. Nonetheless, while nothing in the WTO agreements states that lack of prejudice cures a violation of DSU Article 6.2, the United States was in fact prejudiced by Argentina's deficient panel request in this dispute. As we noted at the first substantive meeting of the Panel, Argentina's vague panel request resulted in the United States being unable to prepare its defence from the start. One consequence of this is that we were rushed to complete our First Submission, which caused us to neglect to address until the first Panel meeting Argentina's improper request for a specific remedy from the Panel, as noted above.

42. Finally, Argentina's argument that the United States has not made its case with respect to its preliminary ruling request, and thus the Panel should simply disregard some of the US claims now,[24] is without merit. The United States has in fact made its case; Argentina has not rebutted these claims.

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43. In closing, the United States urges the Panel to be mindful of two things in evaluating Argentina's claims: First, the obligations under Article 11.3 of the Anti-Dumping Agreement extend primarily to due process considerations. Article 11.3 does not establish substantive requirements with regard to the methodology a Member employs in conducting a sunset review. Second, with regard to the analysis underpinning the Commerce and ITC determinations, Article 17.6(i) provides that a panel may not overturn these determinations simply because another conclusion could have been drawn; if the Member establishes facts in a proper manner and examines those facts in a manner that is unbiased and objective, then the Member has met its obligations.

44. In this case, the United States afforded respondent interested parties the opportunity to place facts and arguments on the record. The United States evaluated those facts and arguments in an unbiased and objective manner. Argentina's claims must therefore be rejected.

45. Mr. Chairman, that concludes the opening statement of the United States for this second meeting of the Panel. The US delegation looks forward to your questions.

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[22] Second Submission of Argentina, para. 257.
[23] Submission of Argentina on US Preliminary Request, para. 88.
[24] Second Submission of Argentina, para. 239.

Closing Statement – 3 February 2004

1. Thank you very much. We have a few points to make in closing, touching on a few key issues.

Issues Concerning the Likelihood of Continuation or Recurrence of Dumping

2. The United States is still of the view that the *Sunset Policy Bulletin* is not a mandatory measure that can be challenged in WTO dispute settlement. Although the Appellate Body reversed the panel on this issue in *Japan Sunset* because it believed that the panel had not fully considered the relevant arguments, we are confident that this Panel, in properly considering all the relevant factors, would reach the same conclusion as the *Japan Sunset* panel. Under US law, the *Sunset Policy Bulletin* has no independent legal status; it is not a measure challengeable under WTO dispute settlement. Nor does the Bulletin mandate any behaviour whatsoever. This is true as a matter of fact, and any conclusion to the contrary would simply mischaracterize US law.

3. Also, contrary to Argentina's arguments, the statute, SAA, and the *Sunset Policy Bulletin* – whether considered individually or on their own – do not presume an affirmative likelihood determination in every sunset review. As explained in significant detail in the US First Submission, paras. 173-186, as the party asserting this fact, Argentina bears the burden of proving it; Argentina has failed to do so.

4. With respect to the *Sunset Policy Bulletin* and Section III.A.3, in particular, Argentina has failed to demonstrate that Commerce's consideration of dumping and import volumes is determinative – as opposed to probative – with respect to likelihood. In *Japan Sunset*, the Appellate Body itself recognized that Section III.A.3 does not necessarily instruct Commerce to treat these two factors as conclusive in every case (para. 181). Nor do Argentina's Exhibits 63 or 64 shed any light on the nature of the Policy Bulletin. These charts contain no information concerning WHAT evidence was on the record in the sunset review and how Commerce considered that evidence. In Japan Sunset, the Appellate Body stated that the "probative value of the two factors for a likelihood determination in a sunset review will necessarily vary from case to case." (Para. 176.) Argentina's Exhibits 63 and 64 provide no insights into the facts of those cases with respect to information on dumping and import volumes; nor do they indicate whether interested parties – domestic or respondent – provided any other information for Commerce's consideration. These charts, therefore, are meaningless.

5. In contrast, the facts in this case are enlightening. Siderca knew about the initiation of the sunset review and the required content of the substantive response, but did not take advantage of its opportunities to submit explanatory information on its likely dumping behaviour or its import volumes. As the Appellate Body stated in *Japan Sunset*, "The Anti-Dumping Agreement assigns a prominent role to interested parties ... and contemplates that they will be a primary source of information . . . . Company-specific data relevant to a likelihood determination under Article 11.3 can often be provided only by the companies themselves. . . . [I]t is the exporters or producers themselves who often possess the best evidence of their likely future pricing behaviour – a key element in the likelihood of future dumping." (Para. 199) Neither Siderca, nor any other Argentine exporter or producer, provided such data. The evidence that was provided led to Commerce's affirmative likelihood determination, not any "irrefutable presumption" allegedly contained in the *Sunset Policy Bulletin*.

6. In presenting questions on the dumping methodology, Argentina characterized the Japan Sunset report as interpreting the AD Agreement to require administering authorities to ensure that any margin on which they rely was calculated consistent with Article 2. We note again that Commerce did not rely on the magnitude of the dumping margin, but rather just the existence of continued

dumping throughout the existence of the order. We also note that nothing in the *Japan Sunset* report shifts the burden of proof for making a *prima facie* case of a claim from the complainant to the respondent, as suggested by Argentina.

7. We further note that *Japan Sunset* found that there was no obligation to calculate a dumping margin in a sunset review and, in this case, the United States did not calculate a dumping margin. While *Japan Sunset* did allow that claims under Article 2 could be reached in a sunset review, that finding does not alter the application of Article 17 of the AD Agreement – that a panel examine a matter based upon the facts made available in conformity with appropriate domestic procedures and whether the establishment of the facts was proper and whether the evaluation of the facts was proper, unbiased, and objective.

8. While Argentina is not barred from raising its Article 2 claims before this Panel, the factual basis for that claim must be the Commerce record and here, Argentina has failed to establish that the record facts provide a basis for its claims. As we noted in response to questions, and as Argentina agreed in paragraph 21 of its statement this morning, the Panel must limit its review to the record that was before the administering authority. The Commerce record does not contain any calculation methodology – rather, it contains the final determination of Commerce from the investigation. Argentina's Exhibits 52 and 66A and B were not part of the record before Commerce and are not properly before this Panel. In addition, even if the Panel were to consider Argentina's exhibits, those exhibits, if anything, only confirm that the United States used a calculation methodology distinct from that considered in *EC – Bed Linen*. Argentina has advanced no independent legal theory to support its Article 2 claim. Thus, even if the principles of *EC – Bed Linen* were applicable as *stare decisis*, which they are not, Argentina's claim would fail.

9. Argentina also argues that Commerce does not seek out relevant information in sunset reviews or evaluate information in an objective manner. Even a cursory review of the facts of this case belies Argentina's view. Commerce takes an active role in every sunset review, whether full or expedited. Commerce informs the foreign government of an impending initiation of a sunset review and encourages that government's participation in the sunset review. Commerce publishes a notice of initiation of the sunset review. Commerce has published its *Sunset Regulations* containing the questionnaire. These same regulations invite interested parties to submit any factual information or argument they wish Commerce to consider in the sunset review. Far from being passive, Commerce actively seeks factual information and argument relevant to the likelihood dumping determination.

10. As we noted earlier, Argentina fails to fully acknowledge the prominent role the AD Agreement assigns to interested parties. In this case, neither Siderca nor any other foreign interested party provided any additional factual information in the sunset review of OCTG from Argentina.

11. For those foreign interested parties who failed to respond to the notice of initiation, they were deemed to have waived their rights to participation. Argentina faults Commerce for not identifying the recalcitrant interested parties, rather than these parties themselves, despite the observation in Japan Sunset that company-specific data relevant to a likelihood determination can often be provided only by the companies themselves. Nothing in Article 11.3 or the AD Agreement requires the investigating authority to extract or divine information that an interested party does not wish to submit. Thus, any fault for the absence of information on the administrative record of the sunset review of OCTG from Argentina can only be assigned to Siderca and the non-responding respondents themselves.

Issues Concerning the Likelihood of Continuation or Recurrence of Injury

12. We would also like to respond to just two points that Argentina made this morning concerning the injury part of this case.

13. Our first point relates to Argentina's statement that "when more future 'variables' are relied upon to support the likelihood of a particular occurrence happening . . . this actually leads one to the conclusion that such an occurrence is less likely to happen." (Argentina oral statement, para. 101.) What is Argentina suggesting? That the United States should simplify its sunset review analysis, and consider fewer "future variables"? Surely, this would run counter to the Appellate Body's finding that authorities should conduct a "rigorous examination" in sunset reviews.

14. Second, Argentina questions how an exporter can ever meet the ITC's standard, given that the ITC will consider evidence of adverse impact from the original injury investigation. (Argentina oral statement, para. 89.) The answer to this question lies close at hand – in the same ITC report that we are considering, the ITC made a negative likelihood-of-injury determination for drill pipe from Argentina and Mexico, leading to the revocation of those anti-dumping measures. The answer also lies in the more than one third of the reviews in which the ITC made negative likelihood of injury determinations. We ask the Panel to reject Argentina's suggestion that the ITC imposes a standard that cannot be met.

Procedural Issues

15. With respect to Argentina's request that the Panel suggest "that the only way for the United States to comply with" any adverse "recommendations is through the immediate termination of the anti-dumping measure on OCTG from Argentina," in addition to our statements at the first Panel meeting and in our opening statement this morning, the United States notes that Article 19.1 of the DSU provides first and foremost that, "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement." This facilitates the goal of encouraging parties to reach mutually satisfactory solutions. It also recognizes that a Member generally has many options available to it to bring a measure into compliance. And although Article 19.1 also provides that, "[i]n addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations," most panels appropriately exercise their discretion to not provide such suggestions. We believe that, since the US measures at issue already conform to the WTO agreements, there is no need for either a recommendation or a suggestion. Nonetheless, should the Panel determine otherwise, we believe that the Panel in this dispute should also decline to make any suggestions in this regard.

16. With respect to prejudice, the United States has already responded to this issue in our First Submission (paras. 96-99) and our answers to the Panel's first set of questions (paras. 93-94). While Argentina may not agree with our responses, we nevertheless believe that our showing of prejudice is sufficient and valid. Indeed, previous panels such as the panel in the *Canada Wheat Board* dispute have relied on these very reasons, and we believe that this Panel should also follow suit.

17. Further, the United States has not abandoned its claims concerning the preliminary rulings by failing to address them in its second substantive response. For the record, parties only abandon claims by doing so affirmatively. In this instance, having made its case, and having reviewed Argentina's detailed but unconvincing response to the US' claims, the United States made the decision to devote its resources to answering the panel's questions and rebutting erroneous and misleading assertions in Argentina's oral presentation to the Panel in the first substantive meeting. Had Argentina's claims not been continually evolving and had Argentina presented the problem clearly at the beginning of this process, the United States could have afforded to devote the time and energy to rebutting each line of Argentina's response. If Argentina believes the United States has "abandoned" its due process claims

as a result of this supposed omission, then Argentina has itself provided evidence of the prejudice the United States has suffered in these proceedings.

18. Regardless, Argentina's argument that it may rely on the headings in the panel request to establish the claims in its panel request only confuses the issues further. There are two headings in the panel request. There are apparently three sets of claims (including Page Four, if those are claims). The two headings refer to "*the*" determination. Neither refers to the "as such" claims. Therefore, the headings do not clarify the claims within them.

19. In some cases, Argentina refers to the factual background portion of the request to expand the claims contained therein. Yet the last sentence of that section states that the "*specific claims*" are set forth below.

20. This concludes our closing statement. We would of course be happy to elaborate further on any of the issues raised today, should the Panel wish to ask additional questions. Thank you again for your time and attention.

ANNEX E

QUESTIONS AND ANSWERS

[1] Pursuant to the explanations provided by the United States at the beginning of the second substantive meeting of the Panel with parties, the United States provided a revised version of its written answers to the questions of the Panel in connection with the first substantive meeting of the Panel with parties. In this revised version, the full text of paragraph 14 of the original document dated 8 January 2004, as well as similar sentences found in paragraph 17 (the penultimate sentence), paragraph 41 (the second sentence), and paragraph 44 (the latter part of the third sentence) were deleted.

[2] Pursuant to the explanations provided by the United States at the beginning of the second substantive meeting of the Panel with parties, the United States provided a revised version of its written answers to the questions of Argentina in connection with the first substantive meeting of the Panel with parties. In this revised version, edits were made to paragraph 14 of the original document dated 8 January.

ANNEX E-1

ANSWERS OF ARGENTINA TO QUESTIONS OF THE PANEL – FIRST MEETING

EXPEDITED REVIEWS/WAIVER PROVISIONS

ARGENTINA

1. Is Argentina basing its "as such" claim regarding expedited reviews/waiver provisions of the US law also on the provisions of US law regarding the adequacy of responses to the notice of initiation, i.e. the 50 per cent rule? Please clarify.

Argentina's Response:

First, Argentina clarifies that it is not challenging the expedited review provisions, 19 USC. § 1675(c)(3)(B) and 19 C.F.R. § 351.218(e)(1)(ii), "as such." Rather, Argentina chose to limit its challenge to the expedited review provisions "as applied" in the sunset review of OCTG from Argentina (see Argentina's First Submission, section VII.C).

With respect to Argentina's challenge to the waiver provisions (19 USC. § 1675(c)(4) and 19 C.F.R. § 351.218(d)(2)(iii)), Argentina has challenged these provisions "as such" and "as applied" (see Argentina's First Submission, sections VII.A and C). The "as such" claim is not based on the US adequacy provision, 19 C.F.R. § 351.218(e)(1)(ii)(A), although the adequacy provision is relevant to the waiver claim. Specifically, the adequacy provision is relevant to the mechanics of the "deemed" waiver under 19 C.F.R. § 351.218(d)(2)(iii), because, pursuant to the deemed waiver provision, the Department will deem a respondent to waive its participation where it receives no response or an incomplete response to a notice of initiation. In addition, the Department has treated a response that is "inadequate" by virtue of 19 C.F.R. § 351.218(e)(1)(ii)(A) (which contains the 50 per cent rule) as a waiver of participation in a sunset review, which is what the Department's Issues and Decision Memorandum said that the Department did to Siderca in this case. (ARG-51, at 4-5) (See also, e.g., *Issues and Decision Memorandum for Seamless Pipe from Argentina, Brazil, Germany, and Italy* (31 October 2000) at 3, 5 (deeming the "inadequate" response from an Italian respondent to constitute a waiver)(ARG-63, Tab 212); *Issues and Decision Memorandum for Cut-to-Length Carbon Steel Plate from Belgium* (March 29, 2000) at 2-3, 5 (deeming the "inadequate" responses from two respondent interested parties to constitute waivers of participation)(ARG-63, Tab 82))

The waiver provisions are inconsistent with Articles 11.3, 6.1, and 6.2, because they preclude the Department from conducting a "review" and making a "determination" of the likelihood of dumping, and because they deny respondent interested parties the opportunity to present evidence and defend their interests. The fact that the United States now claims that the waiver provisions are limited to a "company-specific" finding does not (a) reflect what is set forth in the Issues and Decision Memorandum in this case, and (b) excuse the violation of Articles 11.3, 6.1, and 6.2. In certain circumstances, such as those present in this case, company-specific waivers inevitably lead directly to an "order-wide" likelihood determination.

BOTH PARTIES

15.

(a) Does the cross-reference in Article 11.4 of the Agreement incorporate all provisions of Article 6 in Article 11.3? Does the same cross-reference also incorporate Annex II in Article 11.3?

Argentina's Response:

The cross-reference in Article 11.4 expressly incorporates all provisions of Article 6 into Article 11.3. Article 11.4 states that "[t]he provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article[,]" without any limiting language. (Emphasis added.) As the Appellate Body determined in *Sunset Review of Steel from Japan*, however, certain provisions of Article 6 – while incorporated into Article 11.3 by virtue of Article 11.4 – may not be relevant to all sunset reviews conducted under Article 11.3. (See Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, para. 155.) Argentina submits that the provisions of Article 6 for which it has brought claims in the instant dispute – Articles 6.1, 6.2, 6.8, 6.9, and Annex II – are relevant to sunset reviews under Article 11.3, and therefore apply to Article 11.3 reviews.

The cross-reference in Article 11.4 to Article 6 incorporates Annex II. Article 11.4 expressly incorporates all provisions of Article 6 into Article 11.3, including Article 6.8. Article 6.8, in turn, instructs that the "provisions of Annex II shall be observed in the application of this paragraph." Accordingly, by virtue of the cross-reference in Article 11.4, Annex II applies to sunset reviews under Article 11.3.

(b) If you are of the view that the cross-reference in Article 11.4 makes article 6.1 of the Agreement applicable to sunset reviews, does Article 6.1 – together with its subparagraphs- require that the investigating authority <u>send</u> questionnaires to exporters in sunset reviews?

Argentina's Response:

As recognized by the Appellate Body in *Sunset Review of Steel from Japan*, Article 6.1 applies to sunset reviews under Article 11.3 by virtue of the cross-reference contained in Article 11.4. (See Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, para. 152.) Argentina does not argue, however, that Article 6.1 – together with its subparagraphs – requires that the investigating authority send questionnaires to exporters in all sunset reviews under Article 11.3. Under Article 11.3, however, the "[investigating] authorities have a duty to seek out relevant information" in sunset reviews. (*Id.* at para. 199) Sending questionnaires would be one way for the authorities to discharge this obligation, but Argentina does not believe that it is the only way.

In the sunset review before this Panel, Argentina's claim does not depend on the Department's failure to send questionnaires. However, Argentina does contend that the Department failed to satisfy its obligation to conduct a "review," undertake a "rigorous examination" and make a "determination" or, as the Appellate Body recently stated, to "seek out relevant information and to evaluate it in an objective manner." (Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, para. 199).

Part of the obligation in Article 6.1 requires that "[a]ll interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require . . . ." In this case, the Department considered that there could be other Argentine exporters and that the existence and non-response of these exporters could influence the type of sunset proceeding that the Department would conduct. The Department had an obligation to seek out the information it required and to do so consistently with the Anti-Dumping Agreement.

Therefore, while Article 6.1 *may* not *require* that the investigating authority issue questionnaires to exporters in a sunset review, the authority may be obligated to do so in a particular sunset review in order to ensure that it makes the likelihood determination on a "sufficient factual basis," as required by Article 11.3. (Panel Report, *Sunset Review of Steel from Japan*, DS244, para. 7.177). A "sufficient factual basis" is required by the Anti-Dumping Agreement.

In the absence of evidence – whether submitted by the parties or gathered by the authority – of likely dumping, the authorities must terminate an anti-dumping measure.

(c) What significance, if any, should be given to the use of the word "investigation" in paragraphs 1 and 6 of Annex II, and to the use of the word "should" rather than "shall" in all of its paragraphs?

Argentina's Response:

In addressing the applicability of paragraphs 1 and 6 of Annex II to sunset reviews under Article 11.3, the use of the word "investigation" in these paragraphs should not be assigned any particular significance. As explained above, the cross-reference in Article 11.4 expressly incorporates Annex II into Article 11.3. Therefore, paragraphs 1 and 6 of Annex II apply to sunset reviews under Article 11.3. Moreover, the Appellate Body in *Sunset Review of Steel from Japan* stated that Article 11.3 reviews are investigatory in nature. (*See* Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, para. 111 ("This language in Article 11.3 makes clear that it envisages a process combining *both* investigatory and adjudicatory aspects.")) Thus, the use of the word "investigation" in paragraphs 1 and 6 of Annex II should not be interpreted as indication that these provisions do not apply to Article 11.3 reviews. That the Appellate Body in *Sunset Review of Steel from Japan* found that Article 6.1 applies to Article 11.3 reviews despite that provision's use of the term "investigation" provides further support for this conclusion. (*See id.* at para. 152)

The use of "should" rather than "shall" in Annex II is also not significant. In *Steel Plate from India*, the Panel held that, despite the use of the word "should," the provisions of Annex II are mandatory:

> We note that there is disagreement between the parties as to whether the provisions of Annex II, which are largely phrased in the conditional tense ("should") are mandatory. We consider that Article 6.8 itself answers this question. Article 6.8 explicitly provides that "The provisions of Annex II **shall** be observed in the application of this paragraph" (emphasis added). In our view, the use of the word "shall" in this context establishes that the provisions of Annex II are mandatory. Indeed, this would seem a necessary conclusion. The alternative reading would mean that investigating authorities are required ("shall") to apply provisions which are not themselves required, an interpretation that makes no sense. Moreover, the provisions of Annex II, while worded in the conditional, give specific guidance to investigating authorities regarding certain aspects of their determinations which, without more, clearly establish the operational requirements. Thus, we consider that the provisions of Annex II are mandatory, not because of the wording of those provisions themselves, but because of the obligation to observe them set out in Article 6.8.

(Panel Report, *Steel Plate from India*, DS206, para. 7.56; see also Panel Report, *Argentina – Ceramic Tiles*, DS189, paras. 6.74, 6.79-6.80 (treating the provisions of Annex II as mandatory obligations).

Given the mandatory language of Article 6.8, Argentina considers that there can be little question that the obligations of Article 6, and specifically 6.8 and Annex II, apply in sunset reviews, and that they reflect obligations of the Members.

16. In this sunset review, did Siderca attempt to submit additional evidence to the DOC after its substantive response to the notice of initiation? If so, how did the DOC respond to such attempts?

Argentina's Response:

Siderca did not attempt to submit additional evidence to the Department after its substantive response to the notice of initiation. Having submitted a "complete substantive response" that met all of the Department's regulatory requirements and having offered to cooperate fully in the sunset review, under Article 6.1, 6.8 and Annex II, it was the Department's obligation to "specify in detail the information required" from Siderca in order for the Department to undertake a review and make the required determination under Article 11.3. Siderca could not reasonably be expected to know that any additional information was necessary in order to have the Department undertake a meaningful review and make a substantive likelihood determination. The Department determined that Siderca's response was inadequate, however, and never requested any additional information from Siderca.

Once the decision to expedite had been taken, that meant that the Department's likelihood determination was pre-ordained – likely dumping – for the non-responding respondents accounting for 100 per cent of the Argentine exports and for Siderca.

In addition, although the Department's sunset regulations afford respondents the opportunity to comment on the adequacy determination, these comments "may not include any new factual information or evidence . . . ." (19 C.F.R. § 351.309(e)). Consequently, Siderca did not comment on the Department's adequacy determination, because the regulation precluded it from submitting any new evidence with respect to that determination.

17. What is the significance of the word "may" in section 1675(c)(3)(B) of the Tariff Act of 1930?

Argentina's Response:

Through the use of the word "may," section 1675(c)(3)(B) authorizes the Department and the Commission to make their respective likelihood determinations without further investigation on the basis of the facts available (which in the Department's consistent practice is limited to the existence of any one of the three checklist criteria prescribed by the SAA and *Sunset Policy Bulletin*), where interested party responses to the notice of initiation are inadequate. Argentina takes this opportunity to reiterate that it has not challenged this provision of US law "as such" (please refer to Argentina's response to question 1).

OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING

ARGENTINA

18. The Panel notes Argentina's assertion in paragraph 189 of its first written submission that the reporting by the DOC of the original dumping margin to the ITC as the likely margin violated Articles 2 and 11.3 of the Agreement. Please explain whether Argentina submits that the original dumping margins can not be used at all in sunset reviews, or whether they can not establish the sole basis of investigating authorities' sunset determinations.

Argentina's Response:

Argentina's view is that the original dumping margins can be considered as one of the many factors by the authority in making the likelihood of dumping determination. In Argentina's view, original dumping margins cannot establish the sole basis – or event the preponderant basis – for a determination of likelihood of continuation or recurrence of dumping. The original dumping determination alone simply cannot constitute a sufficient basis upon which the authority can make a determination that dumping would be likely to continue or recur upon expiry of the duty. Indeed, the very fact that there is a sunset review means that there was a dumping margin from the original investigation. It follows that if the original dumping margin were to be given decisive weight, then the authorities would always make a determination that dumping would be likely. Nor can the original dumping margin coupled with consideration of import volumes – with no more – be considered sufficient for purposes of the likelihood determination. Yet this is precisely what the Department does when it applies the checklist criteria in the SAA and Section II.A.3 of the *Sunset Policy Bulletin*.

The SAA and the *Sunset Policy Bulletin* limit the Department's so-called likelihood "analysis" solely to a consideration of: (1) the existence of dumping margins from the original investigation and subsequent administrative reviews; (2) whether imports of the subject merchandise ceased after issuance of the order; and (3) whether dumping was eliminated after imposition of the order and import volumes declined significantly. As the Appellate Body recently explained in *Sunset Review of Steel from Japan*, however, the issue is not whether dumping margins and import volumes might be relevant, but "whether Section II.A.3 goes further and instructs USDOC to attach decisive or preponderant weight to these two factors in every case." (DS244, para. 176)(emphasis added).

In Argentina's view, these factors are not merely disproportionately weighted in Department sunset reviews; they are the sole factors relied on by the Department, and hence preordain the result of an affirmative likelihood determination in all Department sunset reviews in which the domestic industry participates. The Appellate Body explained that it did not believe that either factor (dumping margins or import volumes) could always be presumed to constitute sufficient evidence of likely dumping:

> We would have difficulty accepting that dumping margins and import volumes are always "highly probative" in a sunset review by USDOC if this means that either or both of these factors are presumed, by themselves, to constitute sufficient evidence that the expiry of the duty would be likely to lead to continuation or recurrence of dumping. Such a presumption might have some validity when dumping has *continued* since the duty was imposed (as in the first scenario identified in Section II.A.3 of the *Sunset Policy Bulletin*), particularly when such dumping has continued with significant margins and import volumes. However, the second and third scenarios in Section II.A.3 relate to the situation where there is *no dumping* (either because imports ceased or because dumping was eliminated after the duty was imposed). The cessation of imports in the second scenario and the decline in import volumes in the third scenario could well have been caused or reinforced by changes in the competitive conditions of the market-place or strategies of exporters, rather than by the imposition of the duty alone. Therefore, a case-specific analysis of the factors behind a cessation of imports or a decline in import volumes (when dumping is eliminated) will be necessary to determine that dumping will recur if the duty is terminated. (DS244, para. 177)

The Appellate Body's statement applies directly to this case. Imports stopped, or at the very least were significantly less, after the imposition of the anti-dumping measure. And there was no evidence of continued dumping during the life of the anti-dumping measure. Thus, the Department could not simply presume that, because the Department calculated a 1.36 per cent dumping margin in

the original investigation (based on the practice of zeroing), dumping would be likely to continue. As demonstrated in Argentina's First and Second Submissions, without zeroing, there would be no dumping margin. (*See* Argentina's First Submission, para. 189, Exhibit ARG-52; Argentina's Second Submission, paras. 138-145, Exhibits ARG-66A & B)

19. The Panel notes Argentina's arguments in paragraphs 181, 189 and 192 of its first written submission regarding the DOC's alleged use of the zeroed-out dumping margin in the instant sunset review. Is Argentina arguing that the DOC zeroed-out the likely dumping margin in this sunset review, or, is it arguing that the use of the originally zeroed-out margin rendered the DOC's likelihood determinations WTO-inconsistent? If the latter, please explain whether in your view the original dumping margin in question, alone or together with some other facts, constituted the basis of the DOC's likelihood determinations in this sunset review?

Argentina's Response:

Argentina considers that the Department's application of the waiver provisions resulted in a mandatory determination of likely dumping in the sunset review of OCTG from Argentina.

Assuming *arguendo* that waiver was not applied to either Siderca or to Argentina in this case, Argentina's view is that the Department identified only two facts in its likelihood of dumping determination: (1) the dumping margin of 1.36 per cent from the original investigation; and (2) the decline in import volumes (*See* Issues and Decision Memorandum at 5 (ARG-51)).

With respect to the dumping margin from the original investigation, in the words of the Appellate Body in *Sunset Review of Steel from Japan*, this is precisely one of those cases where zeroing affects not only the degree of the dumping margin, but also changes the outcome of no dumping (within the meaning of Article 2) to one of dumping. (DS244, para. 135) It is clear that in calculating the dumping margin during the original investigation, the Department employed the practice of zeroing negative margins. This can be seen clearly by Exhibit ARG-52 to Argentina's First Submission, and the further supporting information submitted with Argentina's Second Submission. This evidence shows that, without the zeroing of negative margins, the results of the Department's calculations in the original investigation would have been a negative 4.35 per cent. Argentina's position is that the Department's reliance on the 1.36 per cent margin from the original investigation (a margin calculated on the basis of zeroing) and the decline in import volume as the sole factors in rendering its determination that dumping would be likely to continue was inconsistent with US WTO obligations.

In addition, Argentina takes the position that the Department's reporting of the 1.36 per cent margin to the Commission violates Articles 11.3 and Article 2. Even though Article 11.3 may not require an authority to calculate a dumping margin or report a margin of dumping in connection with the likelihood determination, once an authority undertakes to either calculate a margin or rely on a margin for purposes of the likelihood of injury determination, or report a "likely" margin of dumping for use in the likelihood of injury analysis, then the authority must act consistently with the requirements of Article 2 (*See* Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, para. 130).

20. The Panel notes Argentina's arguments in paragraphs 124-147 of its first written submission regarding the alleged irrefutable presumption under US law/practice regarding likelihood determinations in sunset reviews. Please respond to the following questions:

(a) Is Argentina basing its claim on the US law or the DOC's practice in sunset reviews, or both?

Argentina's Response:

Both. Argentina is challenging US law as such. To support its as such challenge to US law, Argentina is relying on the text of the instruments, as well as the Department's consistent practice in applying these instruments, in determining the meaning of US law. In addition, Argentina is also challenging as a separate claim the Department's consistent practice as such.

The US statute, the Statement of Administrative Action (SAA), and the *Sunset Policy Bulletin* (SPB), *operating together*, establish a presumption in favour of finding likely dumping. This WTO-inconsistent presumption is demonstrated in the Department's consistent practice in all sunset reviews in which the domestic industry participates. Indeed, the Department relies exclusively on the authority of the statute, the SAA and the SPB in making its likelihood "determinations."

As noted in Section VII.B of Argentina's First Submission, 19 USC. §§ 1675(c) and 1675a(c) establish the statutory standard for determining the likelihood of continuation or recurrence of dumping. The SAA clarifies this standard by outlining the instances in which the Department should determine that dumping is likely to continue or recur. The SPB provides further direction to the Department as to the three factors that it will rely on and the weight that should be given to those factors in deciding whether termination of the order would likely lead to continuation or recurrence of dumping.

To understand how these three instruments function, and the cumulative effect they have in establishing the WTO-inconsistent presumption, they need to be read together. Indeed, it should be emphasized that in drafting these three instruments, the United States intended for them to operate in a complementary manner in sunset reviews.

In the end, the SPB is a distillation of the statute and the SAA, and establishes the criteria forming the presumption that no respondent party has ever been able to refute.

(b) If Argentina is basing its claim on the US law, please identify the legal instruments [e.g. the Statute, the Regulations, the SPB, the Statement of Administrative Action ("SAA") etc.] that constitute the basis of Argentina's as such claim? In particular, please indicate, if any, the provisions in the US statute that contains the alleged irrefutable presumption of likelihood of continuation or recurrence of dumping.

Argentina's Response:

The legal instruments establishing the presumption are those set out in Argentina's Panel Request, and explained in Argentina's First Submission. They are: 19 USC. §§ 1675(c) and 1675a(c), the SAA (particularly pages 888 to 890) and the SPB (particularly Section II.A.3).

19 USC. § 1675a(c)(1) requires the Department to consider "(A) the weighted average dumping margins determined in the investigations and subsequent reviews, and (B) the volume of imports of the subject merchandise for the period before and the period after the issuance of the anti-dumping duty order or the acceptance of the suspension agreement."

The referenced portions of the SAA, in turn, outline the many instances in which, under US law, the Department will determine – based solely on the factors of dumping margins and import volumes – that dumping is likely to continue or recur:

> [The Bill] establishes standards for determining the likelihood of continuation or recurrence of dumping. Under section [1675a(c)(1)], Commerce will examine the relationship between dumping margins, or the absence of margins, and the volume of imports of the subject merchandise, comparing the periods before and after the issuance of an order or the acceptance of a suspension agreement. For example, *declining import volumes* accompanied by the continued existence of dumping margins after the issuance of an order may provide a strong indication that, absent an order, dumping would be likely to continue, because the evidence would indicate that the exporter needs to dump to sell at pre-order volumes. If imports cease after the order is issued, it is reasonable to assume that the exporters could not sell in the United States without dumping and that, to renter the US market, they would have to resume dumping.
>
> . . . .
>
> The Administration believes that existence of *dumping margins after the order*, or the *cessation of imports after the order*, is highly probative of the likelihood of continuation or recurrence of dumping. If companies *continue to dump* with the discipline of an order in place, it is reasonable to assume that dumping would continue if the discipline were removed. . . .
>
> *[T]he existence of zero or de minimis dumping margins at any time while the order was in effect shall not in itself require Commerce to determine that there is no likelihood of continuation or recurrence of dumping.* Exporters may have ceased dumping because of the existence of an order or suspension agreement. Therefore, the present absence of dumping is not necessarily indicative of how exporters would behave in the absence of the order or agreement. (SAA at 889-890)(emphasis added)

Under Section II.A.3 of the SPB, the Department "normally will" determine that dumping is likely to continue or recur where:

(a) dumping continued at any level above *de minimis* [(i.e., above 0.5 per cent)] after the issuance of the order or the suspension agreement, as applicable;

(b) imports of the subject merchandise ceased after the issuance of the order or the suspension agreement, as applicable; or

(c) dumping was eliminated after the issuance of the order or the suspension agreement, as applicable, and import volumes for the subject merchandise declined significantly.

The provisions of the statute, the SAA, and SPB – when read together – establish the presumption of likely dumping. The operation of this presumption can be seen through the consistent practice of the Department. These provisions (as evidenced by the practice) make clear that the sole factors dispositive for the likelihood of dumping determination are (1) the existence of dumping margins from the original investigation and subsequent administrative reviews; (2) whether imports of the subject merchandise ceased after issuance of the order; and (3) whether dumping was eliminated after imposition of the order and import volumes declined significantly. (*See* US Department of Commerce Sunset Reviews, ARG-63 and ARG-64)

BOTH PARTIES

(c) Please explain how you identify "practice" and how you distinguish practice from law? In light of the WTO jurisprudence, please explain your views as to whether practice as such is challengeable under WTO law or not.

Argentina's Response:

For present purposes, Argentina would note that a "law" provides the legislative or regulatory framework within which a Member may implement its WTO obligations, while a "practice" may refer to the actual application of such laws or regulations by the administering authorities. There is no question that laws, regulations, administrative procedures, and practices are all subject to WTO dispute settlement proceedings.

This point was made forcefully by the Appellate Body in *Sunset Review of Steel from Japan* (DS244).

The Appellate Body began its analysis by asking itself this question: "does the type of instrument itself – be it a *law, regulation, procedure, practice, or something else* – govern whether it may be subject to WTO dispute settlement?" (Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, para. 78)(emphasis added) It went on to answer this question by noting that:

> In the practice under the GATT, most of the measures subject, as such, to dispute settlement, were *legislation*. We nevertheless observed in *Guatemala – Cement I* that, in fact, a broad range of measures could be submitted, as such, to dispute settlement:
>
> > In the practice established under the GATT 1947, a "measure" may be *any* act of a Member, whether or not legally binding, and it can include even non-binding administrative guidance by a government (*see Japan – Trade in Semi-Conductors*, adopted 4 May 1988, BISD 35S/116).
>
> The provisions of the Anti-Dumping Agreement setting forth a legal basis for matters to be referred to consultations and thus to dispute settlement, are also cast broadly. . .. There is no threshold requirement, in Article 17.3, that the measure in question be of a certain type. (*Id.* at paras. 85-86)(footnote omitted)

The Appellate Body added that Article 18.4 of the Anti-Dumping Agreement demonstrated that, "[t]aken as a whole, the phrase 'laws, regulations and administrative procedures' seems to us to encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings. If some of these types of measure could not, as such, be subject to dispute settlement under the Anti-Dumping Agreement, it would frustrate the obligation of 'conformity' set forth in Article 18.4." (*Id.* at para. 87)

This analysis led the Appellate Body to conclude that:

> [T]here is no basis, either in the practice of the GATT and the WTO generally or in the provisions of the Anti-Dumping Agreement, for finding that only certain types of measure can, as such, be challenged in dispute settlement proceedings under the Anti-Dumping Agreement. (*Id.* at para. 88)

It therefore found that the Panel erred in law when it found that the SPB, as such, could not be inconsistent with the Anti-Dumping Agreement because it is not a mandatory legal instrument. (*Id.* at para. 100)

The Appellate Body's decision in *Sunset Review of Steel from Japan* is consistent with the Appellate Body decision in *US – Countervailing Measures*. As noted in Argentina's First Submission, in that case the Appellate Body treated practice – specifically, a practice of the US Department of Commerce – as a measure for the purposes of WTO dispute settlement. It noted that "[t]he European Communities challenges the *administrative practice* followed by the USDOC when examining whether a 'benefit' continues to exist following a change in ownership. This *administrative practice* is called the 'same person' method." (Appellate Body Report, *US – Countervailing Measures*, DS212, para. 86)(emphasis added) After finding this practice to be WTO-inconsistent, the Appellate Body recommended to the DSB that it request the United States "to bring its measures *and administrative practice* (the "same person" method) . . . into conformity with its obligations . . . ." (Id. at para. 162)

As a result of these two unambiguous Appellate Body decisions, there is no doubt that practice is "challengeable under WTO law."

(d) What, in your view, is the relationship between "practice" on the one hand and "the SPB" and "the SAA" on the other? Could the SPB and the SAA be considered as legal instruments that embody the US practice with regard to sunset reviews?

Argentina's Response:

As indicated above, the statute, the SAA and the SPB must be read together, not separately, for the purposes of assessing whether the United States has implemented its obligations under Article 11.3 of the Agreement.

The SAA, by its own terms, represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law . . . . Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretations of those agreements included in this Statement carry particular authority." (SAA at 656)

As the Appellate Body noted, the SPB "forms part of the overall framework within which 'sunset' reviews of anti-dumping or countervailing duties are conducted in the United States." (Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, para. 73)

Argentina would not agree, however, that "the SPB and the SAA [could] be considered as legal instruments that embody the US practice with regard to sunset reviews." These instruments pre-date even the first US sunset review. Rather, the statute, the SAA, and the SPB, operating together, provide the basic framework for sunset reviews and establish a presumption in favour of affirmative findings that dumping is likely to continue or recur. The Department applies these instruments in its practice, which practice has been consistent in finding a likelihood of continuation or recurrence of dumping (based on the three SAA/SPB criteria) in every case in which domestic industry participates in the sunset review.

21. Do Articles 2 and 3 of the Agreement apply to sunset reviews? If your response is in the affirmative, do these articles apply to sunset reviews in the same manner in which they apply to original investigations, or in a different manner? Please elaborate on the basis of the provisions of the Agreement and the relevant WTO case law.

Argentina's Response:

Articles 2 and 3 of the Anti-Dumping Agreement apply to sunset reviews.

As noted in Argentina's First Submission, Article 2.1 defines dumping "[f]or the purpose of this Agreement." Any possible doubt about this issue was resolved definitively by the Appellate Body in *Sunset Review of Steel from Japan*:

> We agree with Japan that the words "[f]or the purpose of this Agreement" in Article 2.1 indicate that this provision describes the circumstances in which a product is to be considered as being dumped *for purposes of the entire Anti-Dumping Agreement, including Article 11.3*. This interpretation is supported by the fact that Article 11.3 does not indicate, either expressly or by implication, that "dumping" has a different meaning in the context of sunset reviews than in the rest of the Anti-Dumping Agreement. Therefore, Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 suggest that the question for investigating authorities, in making a likelihood determination in a sunset review pursuant to Article 11.3, is whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping of the product subject to the duty (that is, to the introduction of that product into the commerce of the importing country at less than its normal value). (Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, para. 109)(emphasis added))

Argentina's First Submission also demonstrated that Article 3 applies to reviews conducted under Article 11, essentially for the same textual reasons as those advanced under Article 2.

As indicated above, Article 2.1 defined dumping "for the purpose of this Agreement." Similarly, footnote 9 of the Anti-Dumping Agreement uses a virtually identical formulation, defining injury "under this Agreement." Although the Appellate Body was not called upon to pronounce whether footnote 9 defined injury for all purposes of the Agreement, including Article 11.3, the same principles it enunciated with respect to Article 2 apply equally to Article 3.

Indeed, as noted in Argentina's First Submission, this was the approach taken by the Panel in *Sunset Review of Steel from Japan*, which stated footnote 9:

> [S]eems to demonstrate that the term "injury" as it appears throughout the Anti-Dumping Agreement – including Article 11 – is to be construed in accordance with this footnote, unless otherwise specified. This would seem to support the view that the provisions of Article 3 concerning injury may be generally applicable throughout the Anti-Dumping Agreement and are not limited in application to investigations. Article 11 does not seem to explicitly specify otherwise in the case of sunset reviews. (Panel Report, *Sunset Review of Steel from Japan*, DS244, para. 7.99)

Argentina also recalls the statement of the Appellate Body in *H-Beams from Poland* that "the obligations in Article 3.1 apply to *all* injury determinations undertaken by Members." (Appellate Body Report, *H-Beams from Poland*, DS122, para. 114)

Thus, it is clear that both Article 2 and Article 3 apply to sunset review determinations under Article 11.3.

22. The Panel notes Argentina's statements in paragraphs 132, 184, 190 and 192 of its first written submission. In your view, does Article 11.3 require an investigating authority to calculate the likely dumping margin in a sunset review? If your response is in the negative, does Article 11.3 at least require some kind of comparison between the future export price and the future normal value? Please explain on the basis of the relevant provisions in the Agreement.

Argentina's Response:

In Argentina's view, Article 11.3 does not *require* an investigating authority to calculate the likely dumping margin in a sunset review. If, however, the authority relies on a dumping margin as a basis for its likelihood determination or calculates or reports the likely dumping margin in a sunset review, then that margin must conform to the disciplines of Article 2. (Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, para. 127).

Article 11.3 does not necessarily require a comparison between the future export price and the future normal value, although this information would certainly be relevant to the likelihood of dumping determination.

The essential point is that the authority must terminate the measure unless it develops a sufficient evidentiary basis to support the conclusion that dumping is likely to continue or recur. What the authority may not do is continue the measure without a sufficient factual basis to establish that dumping is likely to continue or recur. If the authority cannot establish such evidence, the order must be terminated.

OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF INJURY

ARGENTINA

25. The Panel notes Argentina's assertion in paragraph 273 of its first written submission that the statutory provisions under US law that require the ITC to inquire whether the revocation of a measure is likely to lead to continuation or recurrence of injury within a reasonably foreseeable time are inconsistent with Articles 3.7 and 3.8 of the Agreement. Is Argentina arguing that Articles 3.7 and 3.8 apply to sunset reviews and therefore add to the substantive obligations of investigating authorities in sunset reviews? If so, please cite the provisions of the Agreement that can support this assertion. Or, is Argentina citing these two articles as a side argument without asserting that they are directly applicable to sunset reviews? Please elaborate.

Argentina's Response:

The likelihood of injury analysis under Article 11.3 necessarily entails elements of Articles 3.7 and 3.8. Article 3 defines "injury" as that term is used throughout the Anti-Dumping Agreement. Thus, an authority's determination under Article 11.3 of whether "injury" would be likely to continue or recur must satisfy the requirements of Article 3. Footnote 9 states: "Under this Agreement the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article." The Appellate Body used the SCM Agreement's equivalent of this very footnote as an illustration of how the injury concept applies throughout the Agreement, including in sunset reviews. (See Appellate Body Report, *Steel from Germany*, DS213, para. 69 n.59.)

Article 11.3 provides that the relevant time frame for the likelihood of injury determination is at the "expiry of the duty." This time period does not equal "reasonably foreseeable time." Moreover, that the Article 11.3 inquiry relates to termination of the duty being "likely to lead to continuation or recurrence" does not mean the time frame has no parameters.

Argentina agrees with the United States that the prospective nature of the injury determination under Article 11.3 creates certain similarities with the threat of injury analysis. Threat of injury determinations are governed by Article 3.7, which provides that such determinations must be "based on facts and not merely on allegation, conjecture or remote possibility." Article 3.7 also requires the circumstances under which injury would occur to be imminent. US law does not define, nor has the Commission articulated, what constitutes "a reasonably foreseeable time." The complete discretion of the Commission in making its determinations as to whether injury is likely to continue or recur conflicts with the requirements of the Anti-Dumping Agreement. Speculation by an investigating authority about market conditions several years into the future is inconsistent with Article 11.3 and Article 3. Similarly, US law imposes an obligation on the Commission inconsistent with the mandate of Article 3.8, which provides that, "[w]ith respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be considered and decided with special care."

The challenged provisions of US law are inconsistent with the temporal requirements of Articles 11.3, 3.7, and 3.8 of the Anti-Dumping Agreement and their treatment of future injury determinations. By extending the period of time outward (with no limitations) within which the Commission must consider whether domestic producers might be injured, the statutory provisions fail to satisfy the "likely" analysis mandated by Articles 11.3, 3.1, 3.2, 3.4, 3.5, 3.7, and 3.8 of the Anti-Dumping Agreement.

CUMULATION

BOTH PARTIES

26. Would cumulation be generally allowed (i.e. both in original investigations and reviews) in the absence of Article 3.3 of the Agreement? What provision, if any, of the Agreement would cumulation violate in the absence of Article 3.3? In other words, in your view, is Article 3.3 an authorization for the use of cumulation, or, is it rather a provision that imposes certain restrictions on the use of cumulation in investigations? Please elaborate on the basis of the relevant provisions of the Agreement.

Argentina's Response:

Cumulation was not previously subject to disciplines under the GATT. The WTO Anti-Dumping Agreement addressed cumulation for the first time, and authorized the use of cumulation only in certain circumstances. Article 3.3 provides a very limited exception for the use of cumulation, and then only under specified conditions. First, cumulation is limited to "anti-dumping investigations." In Steel from Germany, the Appellate Body ruled that the use of "investigation" in Article 11.9 of the SCM Agreement indicated that the *de minimis* rule of that provision did not extend beyond the original investigation to sunset reviews. (*See* Appellate Body Report, *Steel from Germany*, DS213, paras. 68-69, 92). Accordingly, the use of "investigations" in Article 3.3 must similarly limit the conditioned application of cumulation to original investigations, and not to sunset reviews under Article 11.3. Second, its use is further confined to those investigations "where imports of a product from more than one country are simultaneously subject to anti-dumping investigations." Third, only if the first two criteria are satisfied, can the authority in an investigation "cumulatively assess the effects of such imports," and even then "only if" the authority makes additional findings, including: 1) that "the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5;" and 2) that "the volume of imports from each country is not negligible." Finally, the authorities must also determine whether "a cumulative

assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the like domestic product."

Article 11.3 provides a good example of a provision that would be violated if a cumulative injury assessment were undertaken in a sunset review. The specific reference in the text of Article 11.3 to "an anti-dumping duty" is singular and not plural, which on its face refers to one measure, and not multiple anti-dumping measures. Indeed, as the Appellate Body explained in *Sunset Review of Steel from Japan*:

> The United States argues that the meaning of the word "duty" in Article 11.3 is explained in Article 9.2 of the Anti-Dumping Agreement, which "makes clear that the definitive duty is imposed on a product-specific (i.e., order-wide) basis, not a company-specific basis." As the United States points out, Article 9.2 refers to the imposition of "an anti-dumping duty . . . in respect of any product", rather than the imposition of a duty in respect of individual exporters or producers. We agree that this reference in Article 9.2 informs the interpretation of Article 11.3. We also note that Article 9.2 allows investigating authorities, in imposing a duty in respect of a product, to "name the supplier or suppliers of the product concerned" or, in certain circumstances, "the supplying country concerned." This suggests that authorities may use a single order to impose a "duty", even though the amount of the duty imposed on each exporter or producer may vary. Therefore, Article 9.2 confirms our initial view that Article 11.3 does not require investigating authorities to make their likelihood determination on a company-specific basis. (Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, para. 150)(footnotes omitted)

This passage also confirms that the use of duty in the singular means that the duty subject to review in Article 11.3 is a single measure, and not multiple measures.

Moreover, in addition to the text of Article 11.3, the text of Article 3.3 makes clear that cumulation is permitted only in investigations. There is no cross-reference in Article 3.3 to Article 11.3. Nor is there any explicit cross-reference to either cumulation or to Article 3.3 in the immediate context of Article 11 (i.e., Articles 11.1, 11.2, 11.4, or 11.5) or in the broader context of the Anti-Dumping Agreement.

Finally, the reasoning of the Appellate Body in *Steel from Germany* suggests that it understands that the injury analysis in a sunset review is not conducted on a cumulated basis: "Thus, in our view, the terms 'subsidization' and 'injury' each have an independent meaning in the SCM Agreement which is not derived by reference to the other. It is *unlikely* that very low levels of subsidization could be demonstrated to cause 'material' injury." (Appellate Body Report, *Steel from Germany*, DS213, para. 81) Such a statement would be true only where the injury analysis is not conducted on a cumulated basis.

OTHER

ARGENTINA

28. In paragraph 40 of Argentina's oral statement, Argentina referred to the statement of the Appellate Body in *US-Carbon Steel* that "while it would be difficult for a single case to serve as conclusive evidence of the Department's practice as such violating US WTO obligations, a comprehensive examination of all US sunset reviews and an analysis of the methodology used by the Department in those reviews might provide such an evidentiary basis." Is Argentina arguing that the consistent use of a specific methodology could amount to a measure in law which can be challenged in a WTO dispute settlement proceeding?

Argentina's Response:

Yes. Argentina takes the position that the consistent use of a specific methodology (i.e., consistent practice) can be challenged as such. (*See* Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, paras. 85-87; *see also* Appellate Body Report, *US – Countervailing Measures*, DS212, paras. 150, 151, 162)) Argentina believes that the Appellate Body's report in *US – Carbon Steel* further supports the conclusion that consistent practice may be challenged as such. (*See* Appellate Body Report, *US – Carbon Steel*, DS213, para. 148).

* * *

Additional Note referred to the questions posed by the European Communities:

By letter to the Chairman dated 11 December 2003, the European Communities submitted a written version of the questions posed at the 10 December meeting.

The written questions attached to the European Communities' letter to the Chairman indicate that the questions are directed only to the United States. Therefore, at this stage, Argentina limits itself to the following general comment on the question, in line with the explanation provided in Argentina's First and Second Submissions.

At the outset, Argentina understands that the series of questions posed by the European Communities addresses both the specific issue of "zeroing" in sunset reviews, and the broader issue of whether the substantive requirements of "dumping" contained in Article 2 apply to an Article 11.3 determination of whether "dumping" is likely to continue or recur.

Both the specific issue and the broader issue have been addressed by the Appellate Body in *Steel from Japan*.

With respect to the specific issue, the Appellate Body held that, "should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4." (*Id.* at para. 127; *see also id.* at 130) Also, the Appellate Body reaffirmed its holding in *EC – Bed Linen* that use of a zeroing methodology tends to impermissibly inflate the dumping margin, and is thus inconsistent with Article 2.4's requirement to make a "fair comparison" between the export price and normal value. (*See* Appellate Body Report, *Steel from Japan*, paras. 134-135) Therefore, in making a determination of likely dumping, the reliance on – or calculation of – a margin based on the practice of zeroing is inconsistent with Article 11.3.

With respect to the broader issue, the Appellate Body held that the substantive requirements of Article 2 apply to sunset reviews under Article 11.3. (*See* Appellate Body Report, *Steel from Japan*, para. 128 ("It follows that we disagree with the Panel's view that the disciplines in Article 2 regarding the calculation of dumping margins do not apply to the likelihood determination to be made in a sunset review under Article 11.3.")

As a result, Argentina believes that the Appellate Body decision in *Steel from Japan* resolves the "zeroing" issue presented by Argentina in this dispute. By relying on the 1.36 per cent margin calculated in the original investigation as the evidentiary basis for its determination that dumping was likely to continue, the Department had an obligation to ensure that the 1.36 per cent margin was in fact evidence of "dumping" as defined in Article 11.3 and Article 2. If the Panel finds that the 1.36 per cent margin was based on a calculation that is not consistent with Article 2.4, then the Department could not rely upon this margin as evidence that dumping was likely to continue or recur. If the Department did rely upon this margin, then its decision is inconsistent with Article 11.3.

The information submitted in Exhibit ARG-52 demonstrates that the anti-dumping margin relied upon by the United States in this sunset review was calculated in a manner that is not consistent with Article 2.4 of the Anti-Dumping Agreement. The additional details being provided in section II.C.3.b of Argentina's Second Written Submission provide further proof that the 1.36 per cent margin was calculated in a manner inconsistent with Article 2.4, and therefore could not be relied upon in an Article 11.3 review as evidence that dumping was likely to continue or recur.

ANNEX E-2

ANSWERS OF THE UNITED STATES TO QUESTIONS OF THE PANEL – FIRST MEETING

8 January 2004

EXPEDITED REVIEWS/WAIVER PROVISIONS

Q2. Please respond to the following questions regarding "expedited sunset reviews" under the US law?

(a) In what circumstances does the DOC decide to conduct an expedited sunset review? More specifically, does the US law require or allow the DOC to conduct an expedited sunset review in cases where there is an affirmative or deemed waiver as well? Or, are expedited reviews limited only to cases where the respondent interested parties' substantive response to the notice of initiation is found inadequate because their share in the total imports falls below the 50 per cent threshold prescribed under US law?

1. The US Department of Commerce (Commerce) decides whether to conduct a full or expedited sunset review based on a two-part procedure. First, Commerce solicits substantive responses from interested parties after publication of the notice of initiation of the review in the Federal Register.[1] Respondent interested parties, which include foreign exporters and governments,[2] have several options: They may (1) file a substantive response; (2) elect to waive their rights to participate in the review ("affirmative waiver"); or (3) refuse to provide a substantive response.[3] Commerce will determine whether each response received is "complete" per the criteria set forth in the regulations.[4] No response, or an incomplete substantive response, is considered a waiver ("deemed waiver").[5] Parties waiving their rights to participate in the review are considered likely to dump (a company-specific likelihood finding).[6]

2. Second, taking into account all of the responses received as part of the first step, including deemed and affirmative waivers, Commerce normally evaluates whether the exporters submitting complete substantive responses account for 50 per cent of the total imports of subject merchandise to the United States over the five calendar years preceding the initiation of the review ("50 per cent threshold").[7] If the responses do not meet the 50 per cent threshold, Commerce will normally conduct an expedited review to make an order-wide determination of the likelihood of continuing or recurring dumping (an order-wide likelihood determination).[8]

3. The likelihood finding with regard to one company under the first step is not dispositive of the results of the order-wide likelihood determination under the second step. Even if Commerce finds that dumping is likely with regard to one company, Commerce still must decide whether to conduct a full or expedited review to determine order-wide likelihood. The decision whether to expedite depends on the other respondent interested party responses.

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[1] 19 C.F.R. 351.218(d)(3) (Exhibit ARG-3).
[2] 771(9) of the Tariff Act of 1930 (19 USC. 1677(9).
[3] 19 C.F.R. 351.218(d) (Exhibit ARG-3).
[4] 19 C.F.R. 351.218(d)(3)(ii) (Exhibit ARG-3).
[5] 19 C.F.R. 351.218(d)(2)(iii) (Exhibit ARG-3).
[6] Section 751(c)(4) of the Tariff Act (19 USC. 1675(c)(4)) (Exhibit ARG-1).
[7] 19 C.F.R. 351.218(e)(1)(ii)(A) (Exhibit ARG-3).
[8] 19 C.F.R. 351.218(e)(1)(ii)(C) (Exhibit ARG-3).

4. (Please note that the 50 per cent threshold is not dispositive. Commerce may take other factors into account and has conducted several full sunset reviews under the anti-dumping and countervailing duty laws in which the aggregate response did not represent more than 50 per cent of imports. Most of these involved analyses of subsidization where the relevant government's participation is essential given the nature of the sunset review in the countervailing duty context. In at least one case, however, Commerce conducted a full sunset review in an anti-dumping case in which the aggregate response to the notice of initiation did not represent more than 50 per cent of imports for the five year period. In *Pineapple from Thailand*, the only respondent interested party to file a complete substantive response did not represent more than 50 per cent of the imports during the five year period preceding the sunset review.[9] Commerce nonetheless conducted a full sunset review because the respondent interested party was a significant exporter of the subject merchandise, was a respondent in the original investigation, represented nearly 50 per cent of the imports during the five year period (on average), and accounted for more than 50 per cent of the imports for the two years preceding the sunset review.)

(b) The Panel notes that the provisions relating to a deemed waiver, i.e. the presumption that a respondent interested party that submits an incomplete substantive response is deemed to have waived its right to participate, are found in the Regulations only. This matter does not seem to be dealt with under the Tariff Act. Would the United States agree that the only provisions of the US law relating to deemed waivers are contained in the Regulations?

5. Yes.

(c) If the DOC carries out an expedited sunset review in cases of an affirmative or deemed waiver as well, please explain whether there are any differences in the procedural rules that apply to these two sets of expedited sunset reviews, i.e. expedited reviews that result from a waiver and those that result from the submission of an inadequate response.

6. There is only one "type" of expedited review.

7. There is no difference in the treatment of a respondent interested party in an expedited sunset review conducted by Commerce whether that particular party waives its right to participate pursuant to an election (section 751(C)(4)(A)) or is deemed to have waived because it failed to respond or its substantive response to the notice of initiation was found to be inadequate.[10]

(d) Please explain the differences, if any, between expedited and full sunset reviews regarding the procedural rules that are followed by the DOC. Please explain for instance whether interested parties, especially the foreign exporters, in expedited sunset reviews have the right to submit evidence in addition to, and apart from, their response to the notice of initiation; whether they have the right to request a hearing; and whether the DOC issues a final disclosure as stated in Article 6.9 of the Agreement. Please respond in detail by referring to the relevant provisions of the US law in conjunction with Article 6 and Annex II of the Agreement.

[9] *See Preliminary Results of Full Sunset Review; Canned Pineapple Fruit from Thailand*, 65 Fed. Reg. 58509 (29 September 2000).

[10] *See* 19 C.F.R. 351.218(e)(2)(ii) (Exhibit ARG-3).

8. The Appellate Body in *Japan Sunset* has confirmed that Article 11.3 does not prescribe the methodology – or methodologies – that Members may use in conducting sunset reviews.[11] Article 11.4 ensures that the general procedural and evidentiary provisions of Article 6 apply in sunset reviews to give respondent interested parties basic due process. Expedited reviews are consistent with Article 11.3 and Article 6 as incorporated therein.

9. Whether the sunset review is full or expedited, Commerce's *Sunset Regulations* provide the due process and evidentiary requirements found in Article 6. Specifically:

(a) Section 351.218(d)(3) provides that interested parties will have 30 days from the notice of initiation of the review to submit complete substantive responses. In addition to identifying information that is required of interested parties, section 351.218(d)(3)(iv)(B) provides that parties may provide "any other relevant information or argument that the party would like [Commerce] to consider." (Emphasis added.)

(b) Section 351.218(d)(4) affords interested parties the opportunity to rebut evidence and argument submitted in other parties' substantive responses within five days of the submission of those responses.

(c) In cases where Commerce finds that the aggregate response to the notice of initiation from the respondent interested parties is inadequate, section 351.309(e) of Commerce's *Sunset Regulations* affords interested parties the opportunity to comment on whether an expedited review is appropriate.

10. Therefore, Commerce's regulations expressly provide parties – in both full and expedited reviews – with multiple opportunities to provide Commerce with any relevant information, to rebut any relevant information and argument submitted by other parties, and to comment on the appropriateness of conducting an expedited review even when the substantive responses have been inadequate. Section 351.308(f)(2) of Commerce's *Sunset Regulations* provides that Commerce normally will consider the substantive submissions – not just the complete ones – of all interested parties in making the order-wide likelihood determination in an expedited sunset review.

11. The differences between a full and an expedited sunset review are timing (the final sunset determination in an expedited sunset review is issued 120 days after the notice of initiation, rather than the full sunset review's 240 days)[12] and the fact that case briefs are not filed in an expedited case. Because as a rule hearings are tied to the contents of the case briefs,[13] hearings are generally not held in an expedited proceeding. It should be noted that the deadline for the submission of factual information is the same for both an expedited and a full sunset review proceeding and normally is no later than the deadline for the submission of the interested party rebuttal briefs.[14]

12. Article 6.9 requires that interested parties be informed of the essential facts. This requirement does not impose a particular means of disclosure. The United States has established an investigative and review process that allows interested parties to presented with all of the facts as they are presented to the authority, as well as arguments made about these facts.[15]

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[11] *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, Report of the Appellate Body, 15 December 2003 ("*Japan Sunset")*, paras 149 and 158.

[12] 19 C.F.R. 351.218(e)(ii)(2), 19 C.F.R. 351.218(f)(3) (Exhibit ARG-3).

[13] 19 C.F.R. 351.310(c) (Exhibit US-27).

[14] *See* 19 C.F.R. 351.218(d)(4) (Exhibit ARG-3).

[15] *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, Report of the Panel, adopted 28 September 2001 ("*Ceramic Floor Tiles")*, para 6.125.

13. Consistent with paragraph 1 of Annex II, the Commerce regulations set forth in detail the requirements for the submission of a complete substantive response and specify that interested parties may submit other information.[16] The regulations also make clear that respondent interested parties have 30 days to provide a complete substantive response[17] and if the collective responses are considered inadequate, an expedited review will normally be conducted and facts available used.[18] Consistent with paragraphs 5 and 6, Commerce does not require the information provided to be ideal; as noted above, parties are provided the opportunity to explain why they cannot provide particular information. Further, all evidence or information is accepted, even for incomplete substantive responses, pursuant to section 351.308(f) of the *Sunset Regulations.*

(e) Please explain whether exporters who submitted an incomplete response to the notice of initiation of a sunset review, and therefore are deemed to have waived their right to participate under Section 351.218(d)(2) (iii) of the DOC's Sunset Regulations, have the right to submit evidence in addition to, and apart from, their response to the notice of initiation; whether they have the right to request a hearing; and whether the DOC issues a final disclosure as stated in Article 6.9 of the Agreement. Please respond in detail by referring to the relevant provisions of the US law in conjunction with Article 6 and Annex II of the Agreement.

14. Commerce has never found a substantive response to be incomplete.

15. If an exporter in fact submitted an incomplete substantive response – a hypothetical situation – that exporter would be deemed to have waived its right to participate in the sunset review, pursuant to section 351.218(d)(2)(iii). Therefore, the exporter would not have the right to submit additional evidence or request a hearing.

16. The US sunset review procedures meet Article 6 requirements. A notice of initiation is published in the *Federal Register*, respondent interested parties have 30 days to provide a complete substantive response and any other information they wish to provide, they are afforded the opportunity to respond to the adequacy determination (if they provided a complete substantive response),[19] and even if facts available is applied, the information in both incomplete and complete responses is taken into account.[20]

17. The sunset review procedures conform to the norms in Annex II. For example, the information required from respondent interested parties in a substantive response is set forth in the regulations and therefore precedes the notice of initiation, providing greater rights than those suggested under paragraph 1 of Annex II. Similarly, the regulations make clear that facts available may be used if information is not supplied within a reasonable time. Article 5 suggests that all information should be accepted and that authorities should not disregard any properly submitted, verifiable information. As noted above, even when expedited reviews are conducted and facts available are used, Commerce will consider the information provided in complete and incomplete substantive responses. Additionally, as noted above, Commerce has never made a finding that a substantive submission was incomplete. Similarly, even though a respondent interested party's incomplete submission will preclude it from participating further, the evidence and information contained therein will be used at a minimum as part of facts available, if facts available is applied.[21]

[16] 19 C.F.R. 351.218(d)(iv) (Exhibit ARG-3).
[17] 19 C.F.R. 351.218(d)(3) (Exhibit ARG-3).
[18] 19 C.F.R. 351.218(e)(ii)(C)(2) (Exhibit ARG-3).
[19] 19 C.F.R. 351.309(e) (Exhibit US-27).
[20] 19 C.F.R. 351.308(f)(2) (Exhibit US-27).
[21] 19 C.F.R. 351.308(f)(2) (Exhibit US-27).

18. Article 6.9 requires that interested parties be informed of the essential facts. This requirement does not impose a particular means of disclosure. The United States has established an investigative and review process that allows interested parties to be presented with all of the facts as they are presented to the authority, as well as arguments made about these facts.[22]

Q3. The Panel notes that under US law the effect of failure to submit a complete substantive response is a deemed waiver, in which case the DOC is directed to find likelihood of continuation or recurrence of dumping. The effect of submitting an inadequate substantive response, however, seems to be the DOC's resort to facts available. In the latter case, will the DOC also find likelihood without further investigation? In other words, is there a difference between these two effects? Is it correct to state that the DOC is directed to find likelihood as a matter of US law only in the case of an incomplete substantive response, or does that also apply to complete but inadequate substantive responses?

19. As noted above, the assessment of likelihood may occur twice in a sunset review, but with different implications. First, a respondent interested party's waiver of participation, deemed or affirmative, will lead to a finding with regard to that party that the party is likely to continue to dump (or that dumping by that party will recur). Commerce will subsequently determine whether dumping is likely to continue or recur on an order-wide basis, i.e., taking into account the activities of all the companies that export the subject merchandise, including information provided in substantive responses. In other words, one company's failure to submit a complete substantive response results in a finding of likelihood with respect to that company, and not on an order-wide basis; Commerce could still, in light of other submissions and facts on the record, conclude that there is no order-wide likelihood of dumping.

Q4. The Panel notes that Section 1675(c)(4) of the Tariff Act of 1930 reads:

> **"(B) Effect of waiver**
>
> > **In a review in which an interested party waives its participation pursuant to this paragraph, the administering authority shall conclude that revocation of the order or termination of the investigation would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) with respect to that interested party."[23] (emphasis added)**

(a) Does this provision mean that the DOC will make no substantive analysis but will automatically determine that there is a likelihood of continuation or recurrence of dumping? How does the United States explain it in light of the obligation to determine under Article 11.3? In other words, is it the view of the United States that not carrying out any substantive determination in cases of an affirmative or deemed waiver discharges the investigating authority from its obligation to make a likelihood determination under Article 11.3?

20. No. As noted above, the assessment of likelihood may occur twice in a sunset review. The statute requires a finding of company-specific likelihood in the case of an affirmative waiver but does not mandate a determination of order-wide likelihood. Commerce will take the waiver into account for purposes of the 50 per cent threshold.

[22] *Ceramic Floor Tiles*, para 6.125.
[23] 19 USC. § 1675(c)(4) (Exhibit ARG-1 at 1152).

21. Article 11.3 does not mandate a particular methodology for Members conducting sunset reviews. The Appellate Body in *Japan Sunset* concluded that Members are free to structure sunset review proceedings as they wish, provided those proceedings are consistent with the obligations of Article 6.[24] Thus, the "determination" referenced therein need not be made with respect to each company subject to the order; instead, for the United States, the determination is made for the order as a whole.

22. The United States does not believe that its sunset reviews result in "not carrying out any substantive determination in cases of an affirmative or deemed waiver." The application of facts available, which includes information provided by the parties in their substantive responses, even if incomplete, assures that the determination is based on the facts on the administrative record, including prior dumping determinations (such as administrative reviews), as well as any information the parties wish to make available. It bears repeating that parties are entitled to include *any* relevant information in their substantive responses, and not just the information set forth under section 351.218(d)(ii). As a result, Commerce does make a substantive determination, and the sunset review procedures of the United States conform to the limited requirements of Article 11.3.

(b) For instance, in a case of a waiver, does the US law preclude the DOC from evaluating, as part of its likelihood determination, imports statistics and the results of administrative reviews – if any-- or any other piece of information that might be available to the DOC or that might have been submitted by the domestic interested parties?

23. The United States wishes to reiterate that a waiver does not result in an order-wide likelihood determination. Regardless of whether a company has waived its right to participate, with regard to the order-wide likelihood determination, Commerce is authorized to take into account facts available, including the information in the substantive responses (whether complete or incomplete) if an expedited review is conducted. Notably, respondent interested parties are entitled to include *any* relevant information in those responses. Additionally, Commerce may consider information from prior determinations (such as administrative reviews) in assessing order-wide likelihood.

(c) Hypothetically, in a sunset review where all of the interested foreign exporters submitted incomplete responses to the notice of initiation, would the above-quoted section of the Tariff Act require that the DOC find likelihood of continuation without considering the information contained in these incomplete responses? Please elaborate by referring to the relevant provisions of the US law.

24. No. As noted above, there is a difference between a company-specific likelihood finding and an order-wide likelihood determination. The Tariff Act requires a company-specific likelihood finding when that company has elected to waive participation. However, the Tariff Act does not mandate a particular order-wide likelihood determination.

25. If all of the respondent interested parties submitted incomplete responses, the regulations provide that Commerce will normally consider the collective response to be inadequate, and Commerce will normally proceed to an expedited review and use facts available.[25] In using facts available, Commerce will consider all of the information provided in the incomplete responses and information from prior proceedings to reach the order-wide likelihood determination.[26]

[24] *Japan Sunset*, paras. 156-57.
[25] Section 351.218(d)(ii)(C)(2) (Exhibit ARG-3).
[26] 19 C.F.R. 351.308(f)(2) (Exhibit US-27).

Q5. The Panel notes that Section 1675(c)(4)(B) of the Tariff Act of 1930 provides that when an interested party waives its participation in a sunset review, the DOC will find likelihood of continuation or recurrence of dumping with respect to that interested party. The Panel also notes that Section 351.218(d)(2) (iii) of the DOC's Sunset Regulations state that failure to submit a complete substantive response to the notice of initiation of sunset review will be deemed a waiver of that exporter's right to participate in that sunset review. Finally, the Panel notes the United States' statement in paragraph 235 of its first written submission that the DOC carries out its likelihood determinations in sunset reviews on an order-wide basis.

(a) The United States mentions in footnote 250 of its first written submission that the *Sunset Policy Bulletin* ("SPB") requires the DOC to make its likelihood determinations on an order-wide basis. Please specify whether there is any other provision in any other legal instruments under US law (e.g. the Statute or the Regulations) which requires that likelihood of continuation or recurrence of dumping determinations in sunset reviews be carried out on an order-wide basis.

26. Footnote 250 is a citation to the statement in the text that an "adequate" number of responses is normally required.[27] Footnote 250 does not state that the SPB requires Commerce to make its likelihood determinations on an order-wide basis.

27. Section 751(c)(1)(A) of the Act provides the Commerce shall conduct a sunset review of an anti-dumping duty order five years after publication of the anti-dumping duty order. The SAA, as the authoritative interpretive tool for the statute, makes it clear that section 751(c) requires Commerce to make the sunset determination on an order-wide basis.

(b) Given the US statement in paragraph 235 of its first written submission that the DOC is required to carry out its likelihood determinations in sunset reviews on an order-wide basis, what meaning should be given to the language "with respect to that interested party" in Section 1675(c)(4)(B) of the Tariff Act of 1930? If the US law requires that the DOC make its sunset determinations on an order-wide basis, what happens when one of the exporters waives its right to participate or fails to submit a complete response, which seems to lead to a deemed-waiver? Would the statutory provision that mandates a positive finding with regard to the waiving exporter also determine the overall likelihood determination to be made for the country concerned on an order-wide basis?

28. No; neither section 751(c)(4)(B) nor any other provision of US law or regulation mandates an order-wide affirmative likelihood determination in a sunset review based on the waiver of a single exporter.

(c) Suppose that exporter A, one of the exporters involved in a sunset review initiated against country X, submits an incomplete response to the notice of initiation and therefore is deemed to have waived its right to participate pursuant to Section 351.218(d)(2) (iii) of the DOC's Sunset Regulations. Would the DOC have to find likelihood for country X on an order-wide basis because it has to find likelihood as a matter of law for exporter A submitting incomplete response? In other words, would the affirmative finding with regard to exporter A also determine the overall order-wide determination for country X in this case? Please elaborate by referring to the relevant provisions under the US law.

29. No. As noted above, Commerce may make a company-specific likelihood finding and will subsequently make an order-wide likelihood determination. If an expedited review is conducted and

[27] First Written Submission of the United States, para. 235.

facts available are used, then the regulations provide that all of the factual information on the record will be applied in making the order-wide determination, including information from incomplete and complete substantive responses.[28] Thus, US law does not mandate that a likelihood finding with respect to one company result in a likelihood determination for the entire order.

(d) If your response to question (c) is in the negative, please explain whether a negative finding for country X on an order-wide basis would violate Section 1675(c)(4)(B) of the Tariff Act of 1930, which requires that the DOC make a positive determination for exporter A which submitted an incomplete response to the notice of initiation?

30. No violation of 751(c)(4)(B) or any other provision of US law would result. The statute requires only that likelihood be found with respect to the company that waived; it does not mandate that likelihood be found on an order-wide basis. As noted above, Commerce, even if using facts available, will consider information from prior proceedings and from all substantive responses, complete or otherwise.

Q6. The Panel notes that section 351.308(f) of the DOC's Regulations sets out the facts to be used by the DOC when applying facts available in a sunset review.

(a) Does this section define or limit the scope of facts available in sunset reviews? In other words, does this section allow the DOC to consider facts other than those set out therein when using facts available in a sunset review? Please respond in detail by referring to the relevant provisions of the US law in conjunction with Article 6 and Annex II of the Agreement.

31. Section 751(c)(3)(B) provides that Commerce will base its final sunset determination on the facts available if the order-wide response from respondent interested parties, in the aggregate, is found to be inadequate. Section 351.308(f) of the *Sunset Regulations* provides that, when Commerce is making the final sunset determination on the basis of the facts available, Commerce normally will rely upon prior agency determinations and information from the interested party substantive responses. The latter may include *any* information the respondent interested party considers relevant to the proceedings.

32. Article 6.8 of the AD Agreement provides that "[i]n cases which any interested party refuses access to, or otherwise does not provide, necessary information" a Member may make its determination on the basis of "facts available." In an expedited sunset review, respondent interested parties representing more than 50 per cent of the imports of the subject merchandise have affirmatively waived participation, filed an incomplete substantive response, or have failed to respond to the notice of initiation in any respect. In this context, Commerce normally uses the facts available to make its final sunset determination because the respondent interested parties have collectively failed to provide the necessary information. Nevertheless, paragraph 3 of Annex II to the AD Agreement provides that, when applying the facts available pursuant to Article 6.8, all properly submitted, verifiable information should be taken into account when the determination at issue is made. Section 351.308(f)(2) provides for consideration of this information when submitted in an interested party's substantive response, whether that substantive response is complete or incomplete.

(b) What is the significance of the word "normally" in this section?

33. Section 351.308(f) of the *Sunset Regulations* states that Commerce normally will base its final sunset determination on prior agency determinations and the information submitted in the parties' substantive responses. The use of the word "normally" in section 351.308(f) provides

[28] 19 C.F.R. 351.308(f)(2) (Exhibit US-27).

Commerce with the discretion to find that the factual circumstances in a particular case warrant Commerce's reliance on other or additional information when making the final order-wide sunset determination.

(c) What is the legal significance of the cross-reference in Section 351.308(f) of the Regulations to 752(b) and 752(c) of the Act? Given that the Statute does not have any provision about the inadequacy of substantive responses, does this cross-reference suggest that the provisions of Section 351.308(f) of the Regulations apply only in cases of an affirmative or deemed waiver, but not in cases where the substantive response is complete but inadequate because the exporters' share is below 50 per cent? Please respond in conjunction with the statements of the United States in paragraphs 156 and 170 of its first submission.

34. As noted above, there are two steps in assessing whether to conduct a full or expedited sunset review. The first is to evaluate whether the substantive responses (there may well be more than one exporter, for example) to the notice of initiation are complete or whether parties have waived their right to participate in the proceedings. These decisions are then folded into the second step, which is to determine whether the complete substantive responses represent 50 per cent of imports. Then, if Commerce decides to proceed with an expedited review, Commerce normally will apply facts available, as described in Section 351.308(f). Thus, it is entirely possible that there will be waivers and complete substantive responses in one proceeding, both of which are taken into account in determining whether to expedite and, correspondingly, use facts available.

35. The cross-reference to sections 752(b) and 752(c) of the Act is found in section 351.308(f) because these statutory provisions contain the mandatory elements Commerce "shall" consider in making an order-wide likelihood determination a sunset review. Commerce will consider any additional information in the parties' substantive response in light of the statutory requirements contained in sections 752(b) and 752(c) when making the final sunset determination.

(d) Please explain whether in a sunset review where the respondent interested party/parties account for less than 50 per cent of total exports of the subject product into the US market the DOC would take into account the information and evidence submitted by the respondent interested parties in their substantive responses to the notice of initiation of the sunset review? If so, explain why Section 351.218(e)(1)(ii)(C)(2) of the Regulations provides that the DOC would base its determinations on facts available in such cases. In other words, if the DOC is to take into account evidence submitted by the respondent interested parties to the notice of initiation no matter what their share in the total exports of the subject product into the US market is, why is it that the Regulations direct the DOC to resort to facts available if the respondent's share falls below 50 per cent?

36. In a sunset review in which the respondent interested party or parties do not meet the 50 per cent threshold, and Commerce has made a determination that the aggregate response to the notice of initiation was inadequate, Commerce would consider the information and evidence submitted by the respondent interested parties in their substantive responses when making the final sunset determination in accordance with section 351.308(f) of the *Sunset Regulations*.

Q7.

(a) Please explain the significance of the language "without further investigation" in Section 351.218(e)(1)(ii)(C)(2) of the DOC's Regulations. What does it imply? Does it mean that the DOC will not accept any submission of evidence by foreign exporters in expedited sunset reviews in addition to their responses considered to

be inadequate? Or does it imply that the evidence submitted by interested parties will not be evaluated or otherwise tested?

37. Section 351.218(e)(1)(ii)(C)(2) of the *Sunset Regulations* provides that Commerce will normally base its final sunset determination on "the facts available" without further investigation in a case where the aggregate respondent interested parties is inadequate. However, Commerce may exercise its discretion and conduct further investigation.[29] The use of the language "without further investigation" of section 351.218(e)(1)(ii)(C)(2) provides that Commerce is not required to request additional information.

38. Commerce normally will not accept additional submissions from any interested party, whether domestic or respondent, after that interested party's substantive submission is found to be "incomplete." Nevertheless, any information submitted by an interested party in its substantive response is considered by Commerce when Commerce makes the final determination in an expedited sunset review, even in cases where that substantive response was found to be "incomplete."[30]

(b) More generally, would it be correct to state that in terms of procedural rules, the only difference between a statutory finding of likelihood in a case of waiver and an expedited review in cases where the response is found to be inadequate is the fact that in the latter case the DOC will consider the information submitted by the foreign exporter in its complete substantive response to the notice of initiation?

39. Commerce will consider all information on the administrative record of the sunset proceeding, including information in the substantive responses and rebuttal responses of the domestic interested parties, prior agency determinations, and any other information received by Commerce, as well as the information submitted by foreign interested parties in their substantive and rebuttal responses.[31] If a respondent interested party submitted a statement of waiver, then, obviously, there would be no information from that party to consider.

Q8. The Panel notes the following provision in Section 351.218(d)(2) (iii) of the DOC's Sunset Regulations:

> **"(iii) No response from an interested party. The Secretary will consider the failure by a respondent interested party to file a complete substantive response to a notice of initiation under paragraph (d)(3) of this section as a waiver of participation in a sunset review before the Department."[32] (emphasis added)**

(a) Please explain the relationship between the terms "no response" and "a complete substantive response" as used in this section. Does this provision mean that submission of an incomplete response by an interested party is deemed as no response under US law? Does this provision treat an incomplete response as no response at all not withstanding how minimal the lacking portion of this response may be? Or, does it treat these two cases differently? Is there a waiver when the exporter fails to respond at all, or also when the exporter submits its response but the response doesn't contain all required information?

[29] *See* SAA at 879-880 (Exhibit US-11).
[30] 19 C.F.R. 351.308(f)(2) (Exhibit US-27).
[31] *See* section 351.318(f)(1) of the *Sunset Regulations* (Exhibit US-27) (definition of "the facts available").
[32] 19 C.F.R. § 351.218(d)(2) (Exhibit ARG-3).

40. When a respondent interested party submits an incomplete substantive response, Commerce will find that the incomplete response is the equivalent of no response from that respondent interested party for the purposes of determining likelihood on a company-specific basis.

41. Commerce does not reject incomplete submissions *per se.* In fact, Commerce has never rejected a submission as incomplete. The evaluation concerning the completeness of a substantive response depends on the individual circumstances and is done on a case-by-case basis.[33] In addition, Commerce has general authority to waive deadlines for good cause, unless expressly precluded by statute.[34] Therefore, if a response were incomplete, Commerce could extend the 30 day deadline to permit the respondent interested party to complete the submission.

42. There is a deemed waiver when an exporter submits either an incomplete substantive response or no response at all. Nevertheless, the information submitted in an incomplete substantive response will be considered by Commerce when making the final sunset determination.

Q9. The Panel notes the statement of the United States in paragraph 242 of its first written submission that:

> **"A determination that the aggregate response to the notice of initiation is inadequate can be based on the respondent interested parties electing waiver, or failing to respond, or in providing inadequate substantive responses, or on any combination of these scenarios."**

(a) Please explain whether the 50 per cent test is the sole basis for a determination of inadequacy, or whether, as the United States points out in the above-quoted paragraph, the respondents' response can be deemed inadequate in cases where there is an affirmative or deemed waiver, but the share of the cooperating respondents in total imports is above 50 per cent.

43. The term "inadequate" in the quoted part of the submission in fact refers to the completeness of the each substantive response submitted in response to the notice of initiation, rather than the adequacy of the aggregate responses.

44. The 50 per cent threshold is the normal basis for determining whether Commerce will conduct an full sunset review or a expedited sunset review. However, as noted above, Commerce has made an exception where the respondent interested party provided information indicating that complete substantive responses not meeting the 50 per cent threshold were nevertheless adequate. Commerce has not made a finding of inadequacy when the complete substantive responses met the 50 per cent threshold, nor has Commerce ever found a substantive response to be incomplete. Therefore, if a sufficient number of respondent interested parties (or just one, if it meets the 50 per cent threshold) simply adhere to the criteria set forth in the regulations, they can virtually ensure that a full review will be conducted. In other words, in practical terms it is up to the respondent interested parties to decide whether they want a full or expedited review.

(b) Please explain whether there have been cases where an inadequacy decision was based on the interested party's electing waiver, or failing to respond, rather than its share in total imports.

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[33] *See* 19 C.F.R. 351.218(d)(3) (Exhibit ARG-3) and Preamble, 63 Fed. Reg. at 13518 (Exhibit US-3) (Commerce may consider incomplete company-specific substantive response to be complete or adequate where that interested party is unable to report the required information and provides explanation).

[34] 19 C.F.R. 351.302(b) (Exhibit US-3).

45. The election of waiver and the adequacy assessment are two distinct procedures. An affirmative or deemed waiver does not automatically result in a finding that the substantive responses were inadequate. Instead, Commerce will normally assess whether the complete substantive responses to the notice of initiation are sufficient to meet the 50 per cent threshold. Other exporters meeting the 50 per cent threshold may have filed complete substantive responses, or may have submitted information sufficient to allow Commerce to conduct a full sunset review.

46. More specifically, if a respondent interested party submits a substantive response to the notice of initiation that does contain all the information required by section 351.218(d)(3) of the *Sunset Regulations*, then it has submitted a "complete" substantive response. If a respondent interested party submits a substantive response to the notice of initiation that does not contain all the information required by section 351.218(d)(3), then "normally" that party will be considered to have submitted an "incomplete" substantive response. Likewise, if a respondent interested party affirmatively waives its right to participate or fails to respond to the notice of initiation, then its response is also considered "incomplete".

47. Once Commerce has determined which company-specific substantive responses are "complete," Commence then normally applies the 50 per cent threshold to the total import volumes represented by all the respondent interested parties who filed a complete or adequate company-specific substantive response to determine whether the aggregate response to the notice of initiation is "adequate." Commerce then uses the results to determine whether to conduct a full or expedited sunset review.

(c) More generally, please explain whether under US sunset reviews law, "an affirmative or deemed waiver" and "an inadequate response" are two situations that are mutually exclusive. In other words, would it be accurate to state that under US law, certain circumstances lead exclusively to an affirmative or deemed waiver and some others exclusively to an inadequate response?

48. No; the existence of deemed or affirmative waivers is included in the consideration of the 50 per cent threshold to assess the adequacy of the aggregate substantive responses. For example, one exporter may have waived its right to participate, while another will have filed a complete substantive submission. If the latter meets the 50 per cent threshold or provides information as to why the 50 per cent threshold is not appropriate, then Commerce could find that the complete substantive responses were adequate, and therefore a full review would normally be conducted.

Q10. The Panel notes the US statement in paragraph 162 of its first written submission:

> **"[T]hat the United States may afford parties expanded opportunities to submit evidence and argument in a full sunset review is a matter of US policy, not an obligation under the AD Agreement, and is not grounds to find fault with the evidentiary and procedural rules governing expedited sunset reviews."**

(a) In the view of the United States, does Article 6 apply to sunset reviews in its entirety? Or, are there some provisions in this article that may not be applicable in the context of sunset reviews? Please respond in conjunction with the provisions of Article 11.4, especially the language "regarding evidence and procedure" contained therein.

49. Article 11.4 of the AD Agreement stipulates that the Article 6 provisions "regarding evidence and procedure" shall apply to reviews under Article 11. Thus, not all of the provisions of Article 6 are applicable to Article 11 reviews; rather, only the provisions of Article 6 regarding evidence and

procedure are so applicable. The Appellate Body in *Japan Sunset* recently confirmed that Article 11.3 does not prescribe substantive rules for the administration of sunset reviews.[35]

(b) If it is the view of the United States that Article 6 – either entirely or partially- applies to sunset reviews, where in Article 6 or elsewhere in the Agreement does the United States find support for its proposition that giving interested parties expanded procedural rights in full sunset reviews compared with expedited sunset reviews is not WTO-inconsistent?

50. As noted above, the Appellate Body in *Japan Sunset* confirmed that Article 11.3 does not prescribe the methodology Members may use in conducting sunset reviews. Therefore, unless the US sunset review procedures are in conflict with Article 6 or Article 11.3, these procedures are permitted under the Anti-Dumping Agreement. Nothing in the Anti-Dumping Agreement prohibits the United States from giving parties expanded procedural rights in full sunset reviews compared with expedited sunset reviews. The United States notes that the parties themselves effectively decide whether they want "expanded procedural rights."

Q11. The Panel notes the following part of the DOC's Issues and Decision Memorandum in the instant sunset review:

> **"In the instant sunset reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation ."**[36]

Is the Panel to understand that the DOC deemed Siderca to have waived its right to participate in this sunset review? If so, on what basis under US law? If your response is in the negative, please explain what meaning the Panel should give to this sentence.

51. No; Commerce found that Siderca had filed a complete substantive response and, consequently, would not have been found to have waived its right to participate in the sunset review proceeding.[37] The Decision Memorandum for the sunset review of OCTG from Argentina includes the final sunset determinations for the sunset reviews of OCTG from Italy, Japan and Korea also. In each of these other three sunset reviews, respondent interested parties failed to respond to the notice of initiation in any respect. Therefore, the above quoted passage is a reference to the failure of the respondent interested parties in the sunset reviews of OCTG from Italy, Japan, and Korea.

52. The Issues and Decision Memorandum demonstrates that Commerce made two findings – that Siderca had filed a complete substantive response and that no other respondent interested party had filed a substantive response in any of the sunset reviews covered by the Decision Memorandum.[38]

Q12. The Panel notes the argument of the United States, in paragraph 237 of its first written submission, that "Siderca did not avail itself of the opportunities made available by the Sunset Regulations for such defence in an expedited sunset review."

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[35] *Japan Sunset*, para 123.

[36] *Issues and Decision Memorandum for the Sunset Reviews of the AD Orders on Oil Country Tubular Goods from Argentina, Italy, Japan, and Korea* (Dept's Comm., 31 Oct. 2000) (final results) ("*Decision Memorandum")* (Exhibit ARG-51 at 5).

[37] *See Decision Memorandum* at 3 (Exhibit ARG-51) and *Adequacy of Respondent Interested Party Response to the Notice of Initiation,* A-357-810 (Dept's Comm., 22 August 2000) *("Adequacy Memorandum")* at 1-2 (Exhibit ARG-50).

[38] *Decision Memorandum* at 3-4 (Exhibit ARG-51).

(a) Please explain at which point(s) of time during the instant sunset review Siderca was given further opportunities to defend itself under US law but failed to do so.

53. Siderca had a number of opportunities to submit argument and information in support of its rights in the expedited sunset review of OCTG from Argentina. First, when a respondent interested party files a substantive response, one of the requirements of section 351.218(d)(3) is a statement from the submitter regarding the likely effects of revocation which includes any information, argument, and reasons supporting the statement. Siderca's entire claim in this regard was that Commerce should apply the *de minimis* standard found in Article 5.8 of the AD Agreement and, as a consequence, should revoke the order. In addition, section 351.218(d)(3)(iv)(B) provides interested parties the opportunity to submit any other relevant information or argument the interested party would like considered in the sunset review. Siderca made no other arguments or submission of factual information.[39]

54. Second, each interested party is afforded the opportunity to submit a response in rebuttal (a "rebuttal response"), pursuant to section 351.218(d)(3)(vi)(4) of the *Sunset Regulations*, to challenge any argument or information contained in the substantive responses of the other interested parties. Siderca did not file any rebuttal response despite the fact that the domestic interested parties had made allegations, supported by statistics, that there were shipments of Argentine OCTG in four of the five years preceding the sunset review. Siderca did not challenge these statistics or any other information in the domestic interested parties substantive responses, although it was provided the opportunity to do so.

55. Finally, as discussed in the US first written submission and in the US answers above, Commerce determines whether to conduct a full or expedited sunset review based on the adequacy of the aggregate response to the notice of initiation. In making this determination, Commerce determines whether the imports from the respondent interested parties who filed a complete substantive response, on an aggregate basis, represent more than 50 per cent of the imports of the subject merchandise during the five years preceding the sunset review. Commerce then issues an Adequacy Memorandum which announces the decision and the factual bases underlying the decision. This determination is subject to challenge by the interested parties, pursuant to section 351.309(e) of the *Sunset Regulations*.

56. Commerce issued its adequacy determination in the sunset review of OCTG from Argentina and based the determination on the import statistics provided by the domestic interested parties after verifying them using the ITC Trade Database.[40] (Commerce re-verified the import statistics for the final sunset determination using Commerce's Census Bureau IM-145 import statistics; *see Decision Memorandum* at 4-5 (Exhibit ARG-51)). Siderca did not challenge Commerce's adequacy determination, as it had the right to do pursuant to section 351.309(e) of the *Sunset Regulations*.

57. At no time did Siderca provide any statements or assertions that it would not dump in the future if the order were revoked, offer any explanations why it had ceased shipments of the subject merchandise after imposition of the duty, or submit any allegations that information submitted in the sunset review proceeding of OCTG from Argentina was inaccurate or incorrect. In this proceeding, the First Written Submission of Argentina implies that Siderca was the only producer of OCTG in Argentina during the sunset review and that Siderca's lack of shipments contradicts the data indicating that Argentine OCTG was in fact exported to the United States during the period of review. Siderca made similar statements in its complete substantive response to the notice of initiation. However, there is a second Argentine producer of OCTG: Acindar. The United States has conducted administrative reviews of Acindar since 2001, and as recently as 19 March 2003, Commerce found

[39] *See* Siderca's Substantive Response at 2-3 (Exhibit ARG-57).
[40] *See Adequacy Memorandum* at (Exhibit ARG-50).

Acindar to have a dumping margin of 60.73 per cent.[41] Moreover, it is the understanding of the United States that Acindar produces welded OCTG, whereas Siderca produces seamless OCTG (both are covered by the anti-dumping order). It is not beyond the realm of possibility that Siderca did not challenge the import statistics used during the sunset review because it was aware that another Argentine producer had begun to ship OCTG to the United States during the period of review and that Commerce's adequacy finding based on the 50 per cent threshold was in fact accurate.

58. To permit Argentina to raise factual issues now that neither it nor Siderca raised during the underlying sunset review would permit respondent interested parties to manipulate the system. Consistent with the general principles in Article 6, the United States afforded all Argentine exporters – and the Argentine government – the opportunity to present sufficient information to warrant a full sunset review. Siderca and Argentina declined to do so.

59. Therefore, in spite of Argentina's complaint, Commerce's likelihood determination was in fact correct, as evidenced by the dumping margin found with regard to Acindar after the sunset review.

(b) Which provisions of the DOC's Regulations, or other relevant legal instruments under US law, give interested exporters the right to defend their interests? Please respond in conjunction with the language "without further investigation" in section 351.218(e)(1)(ii)(C)(2) of the DOC's Regulations. What meaning should be given to this provision if the Regulations give interested exporters the right to defend their interests?

60. Please see US Answer to Question 7(a) above.

61. Section 751(c)(3)(B) provides that Commerce will base its final sunset determination on the facts available if the aggregate response from respondent interested parties, in the aggregate, is found to be inadequate. Section 351.218(e)(1)(ii)(C)(2) of the *Sunset Regulations* provides that Commerce "normally" will issue a final determination in a sunset review "without further investigation" when insufficient interest in participation is demonstrated by the interested parties. The provision for a final sunset determination "without further investigation" is intended to expedite the sunset review process. Nevertheless, Commerce has the discretion not to expedite and, even in cases where the sunset review is expedited, interested parties who supplied complete substantive responses may still submit rebuttal responses, a challenge to Commerce's adequacy determination, and have the right to supply any argument and information that interested party wishes Commerce to consider in the sunset review.

Q13.

(a) What was the amount of exports of the subject product by Argentine exporters other than Siderca during the five-year period of application of this measure? Who were the exporters that made such exports? What was the source of these statistics?

62. The domestic interested parties submitted import statistics in their substantive responses indicating that there were imports of the subject merchandise into the United States in each year, except 1996, from the imposition of the order until the sunset review.[42] These statistics show that there were approximately 45,000 net tons prior to the initiation of the original investigation, 26,000 net tons entered during the investigation, and an average of less than 900 net tons in each year from the imposition of the anti-dumping duty order on OCTG from Argentina until the sunset review.

[41] *Notice of Final Results and Rescission in Part of Anti-Dumping Duty Administrative Review; Oil Country Tubular Goods, Other Than Drill Pipe, from Argentina*, 68 Fed. Reg. 13262, 13263 (19 March 2003).

[42] *See* Exhibit US-23.

63. The domestic interested parties supplied import statistics concerning imports of OCTG for the five year period prior to the sunset review.[43] These statistics were verified during the sunset review by using two independent sources: (1) ITC Trade Database; and (2) Commerce's Census Bureau IM-145 import data.[44]

64. Also, through administrative review procedures, the United States has identified Acindar as another Argentine producer of OCTG, and one that may have shipped OCTG to the United States during the period of review, as described above.

(b) The Panel notes Argentina's assertion in paragraph 43 of its first oral submission that the DOC's determination that there were exports of the subject product from Argentina into the United States during the period of imposition of the measure at issue was flawed because the DOC incorrectly recorded non-consumption entries as consumption entries. Please explain whether the so called "non-consumption entries" are those products in transit which are not destined for ultimate consumption in the United States?

65. First, the panel should be aware Siderca did not raise this issue during the underlying sunset review. Second, as detailed below, Argentina's assertion concerning the nature of these shipments and their effect on the accuracy of the import statistics used in the sunset review is significantly exaggerated.

66. In order to assist the Panel, however, we provide an accurate reiteration of the facts on this issue. During the five year period, there were four administrative reviews initiated for Siderca at the request of domestic interested parties. Commerce terminated each of these administrative reviews because Commerce determined that there were no consumption entries of OCTG from Argentina exported by Siderca during these periods.

67. In the administrative review initiated for the period 25 June 1995 – 31 July 1996, Commerce found that, although there were entries of Argentine OCTG during the period, there were no consumption entries of OCTG made by Siderca and, consequently, Commerce terminated the administrative review for Siderca.[45] Domestic interested parties claimed that Siderca made seven shipments of OCTG during the period that were not included in the import statistics. Commerce determined that six of the shipments were FTZ or TIB entries destined for re-export. For the seventh entry, "Siderca surmised that this shipment of [Argentine OCTG] involved parties other than itself."[46] The US Customs Service verified that there were no shipments of OCTG made by Siderca during the period under review. There was no assertion made by Siderca nor did Commerce find in this administrative review that the import statistics contained an error or errors.

68. In the administrative review initiated for the period 1 August 1996 – 31 July 1997, Commerce found that the one entry directly attributed to Siderca was destined for re-export and, consequently, Commerce terminated the administrative review for Siderca"[47] There was no finding that there were no consumption entries of OCTG made during the period. The only finding was that there were no entries of OCTG during the period under review exported by Siderca and that the one entry reportedly made by Siderca was in error.

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[43] *See* Exhibit US-23.

[44] *See Adequacy Memorandum* at 2 (Exhibit ARG-50) and *Decision Memorandum* at 3 (Exhibit ARG-51), respectively.

[45] *See Oil Country Tubular Goods from Argentina; Rescission of Anti-Dumping Duty Administrative Review*, 62 Fed. Reg. 18747, 18748 (April 17, 1998) (Exhibit ARG-29).

[46] 62 Fed. Reg. at 18748 (Exhibit ARG-29).

[47] *See Oil Country Tubular Goods from Argentina; Rescission of Anti-Dumping Duty Administrative Review*, 63 Fed. Reg. 49089, 49090 (September 14, 1998) (Exhibit ARG-36).

69. In the administrative review initiated for the period 1 August 1997 – 31 July 1998, Commerce found that the one shipment of Argentine OCTG made during the period was entered for consumption in the United States, but that the shipment was not exported by Siderca.[48] Consequently, Commerce terminated the administrative review for Siderca.

70. Finally, in the administrative review initiated for the period 1 August 1998 – 31 July 1999, Commerce found that there were no entries of OCTG made by Siderca and, consequently, Commerce terminated the administrative review for Siderca.[49] There was no finding that there were no consumption entries of OCTG made during the period. In fact, Commerce determined that there was at least one entry of OCTG for consumption made during the period, but that Siderca was not the exporter.

71. Therefore, in the administrative proceeding covering the 1996-1997 period, Commerce determined that there was a minor error concerning one entry in the statistical reporting of the import statistics and, in the administrative review covering the 1998-1999 period, there was an undetermined amount of mechanical tubing misclassified as OCTG, but at least one entry of OCTG for consumption. Again, the Panel should note that Siderca did not raise this issue in either its substantive response or by filing a challenge to Commerce's adequacy determination in the sunset review where it could have been addressed in the context of the sunset proceeding and not for the first time before this Panel.

(c) Did the United States base its adequacy determination in the instant sunset review on these statistics?

72. Yes, as verified by the statistics compiled in the ITC's Trade Database and Commerce's Census Bureau IM-145 import statistics.[50]

Q14. Is there a legal basis for the 50 per cent threshold that determines the adequacy of the foreign exporter's response to the questionnaire in a sunset review?

73. Section 752(c)(3) of the Act leaves to Commerce's discretion the choice of methodology for determining when the response from interested parties to the notice of initiation is "adequate" for the purposes of conducting a full sunset review.[51] Consequently, Commerce promulgated section 351.218(e)(1)(ii) of the *Sunset Regulations* to codify the 50 per cent threshold to give effect to section 752(c)(3) of the Act.[52]

74. The context of sunset reviews is important in understanding the 50 per cent threshold. While an original investigation requires a factual assessment of dumping, a sunset review requires a counterfactual finding of "likelihood" of future dumping when a finding of dumping has already been made. Article 11.3 does not prescribe the methodology for conducting sunset reviews; instead, it requires that parties be given general procedural and evidentiary rights in accordance with Article 6. The Anti-Dumping Agreement does not require Members to expend resources to unearth information that is being withheld.

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[48] *See Oil Country Tubular Goods from Argentina; Rescission of Anti-Dumping Duty Administrative Review*, 64 Fed. Reg. 4069, 4070 (27 January 1999) (Exhibit ARG-38).

[49] *See Oil Country Tubular Goods from Argentina; Rescission of Anti-Dumping Duty Administrative Review*, 65 Fed. Reg. 8948 (23 February 2000) (Exhibit ARG-43).

[50] *See Adequacy Memorandum* at 2 (Exhibit ARG-50) and *Decision Memorandum* at 3 (Exhibit ARG-51), respectively.

[51] *See* SAA at 880 (Exhibit ARG-5) (in many cases, some but not all parties will respond; nevertheless, where parties demonstrate a "sufficient willingness to participate," the agency will conduct a full sunset review).

[52] *See* Preamble, 63 Fed. Reg. at 13518 (Exhibit US-3).

Q15.

(a) Does the cross-reference in Article 11.4 of the Agreement incorporate all provisions of Article 6 in Article 11.3? Does the same cross-reference also incorporate Annex II in Article 11.3?

75. No, the cross-reference in Article 11.4 specifically incorporates only those provisions of Article 6 regarding "evidence and procedure." Please see the answer to Question 10(a) above.

76. The reference in Article 6 to Annex II incorporates Annex II into Article 11.3. However, Annex II is only applicable to the same extent as Article 6.

(b) If you are of the view that the cross-reference in Article 11.4 makes article 6.1 of the Agreement applicable to sunset reviews, does Article 6.1 – together with its subparagraphs – require that the investigating authority send questionnaires to exporters in sunset reviews?

77. No. Article 6.1 requires that interested parties be given notice of the information the authorities require in respect of the investigation in question. It does not require that a "questionnaire" be sent. Commerce published its "sunset questionnaire" and made the reporting requirements part of its regulations.[53]

(c) What significance, if any, should be given to the use of the word "investigation" in paragraphs 1 and 6 of Annex II, and to the use of the word "should" rather than "shall" in all of its paragraphs?

78. The use of the word "investigation" means that the obligations contained in Annex II are limited to original investigations. The cross-reference in Article 11.4 concerning the application Article 6 to sunset reviews makes the obligations of Article 6 regarding evidence and procedure and, consequently, the obligations in Annex II regarding evidence and procedure applicable in sunset reviews also. The use of the word "should" indicates that the requirement is directory or recommended, rather than mandatory.

Q16. In this sunset review, did Siderca attempt to submit additional evidence to the DOC after its substantive response to the notice of initiation? If so, how did the DOC respond to such attempts?

79. No.

Q17. What is the significance of the word "may" in section 1675(c)(3)(B) of the Tariff Act of 1930?

80. The use of the word "may" means that Commerce has the discretion not to base the final sunset determination on "the facts available" if Commerce determines that other information is more appropriate. In other words, Commerce is not bound by the statute to use "the facts available" in every case where there is an inadequate response to the notice of initiation.

[53] *See* section 351.218(d) (Exhibit US-3).

OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING

Q20. The Panel notes Argentina's arguments in paragraphs 124-147 of its first written submission regarding the alleged irrefutable presumption under US law/practice regarding likelihood determinations in sunset reviews. Please respond to the following questions [. . .]

(c) Please explain how you identify "practice" and how you distinguish practice from law? In light of the WTO jurisprudence, please explain your views as to whether practice as such is challengeable under WTO law or not.

81. A Commerce administrative practice is neither a "measure" within the meaning of the relevant WTO agreements, nor a "mandatory" measure within the meaning of the mandatory/discretionary distinction. A "measure" – which can give rise to an independent violation of WTO obligations – must constitute an instrument with a functional life of its own – i.e., it must *do* something concrete, independently of any other instruments. It is well-established that a "practice" is not a measure.[54] Indeed, a practice under US law consists of nothing more than individual applications of the US AD law in the context of sunset reviews. While Commerce, like many other administrative agencies in the United States, uses the term "practice" to refer collectively to its past precedent, "practice" has neither a "functional life of its own" nor operates "independently of any other instruments" because the term only refers to individual applications of the US statute and regulations.[55] In contrast to the US statute and regulations, which clearly function as "measures", no general, *a priori* conclusions about the conduct of sunset reviews under US law can be drawn from an examination of "practice."

82. Moreover, even if "practice" could be considered a measure (and the United States' position is that it cannot), in order for any measure, as such, to be found WTO-inconsistent, the measure must be "mandatory", i.e., it must require WTO-inconsistent action or preclude WTO-consistent action. The Appellate Body and several Panels have explained the distinction between mandatory and discretionary measures. A Member may challenge, and a WTO panel may find against, a measure as such only if the measure "mandates" action that is inconsistent with WTO obligations, or "precludes" action that is WTO-consistent.[56] In accordance with the normal WTO rules on the allocation of the burden of proof, it is up to the complaining party to demonstrate that the challenged measure mandates WTO-inconsistent action or precludes WTO-consistent action.[57] "Practice" is *not* binding on Commerce, and, under US administrative law, Commerce may depart from its precedent in any particular case, so long as it explains the reasons for doing so. Therefore, this "practice" does not mandate WTO-inconsistent action or preclude WTO-consistent action.

[54] *See, e.g., United States – Measures Treating Export Restraints as Subsidies*, WT/DS194/R, Report of the Panel, adopted 29 June 2001 ("*US Export Restraints*").

[55] Japan's definition of "practice" does not comport with its status in US law. Japan describes practice as "administrative procedures", which it defines as "a detailed guideline that the administrating [sic] authority follows when implementing certain statutes and regulations." Japan's First Submission, para. 8. We define "administrative procedures" and "guidelines" in our answer to Question 82.

[56] Appellate Body Report, *US - Carbon Steel*, para. 162; *United States - Anti-Dumping Act of 1916* ("*1916 Act*"), WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, paras. 88-9; Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 2 February 2002, para. 259; *see also US – Export Restraints*, paras. 8.77-9; Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, adopted 30 August 2002, para. 6.22.

[57] Panel Report, *Brazil – Export Financing Programme for Aircraft – Second Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW/2, adopted 23 August 2001, para. 5.50.

(d) What, in your view, is the relationship between "practice" on the one hand and "the SPB" and "the SAA" on the other? Could the SPB and the SAA be considered as legal instruments that embody the US practice with regard to sunset reviews?

83. Neither the SAA nor the *Sunset Policy Bulletin* can be challenged as independent violations of the AD Agreement because they do not mandate or preclude actions subject to the AD Agreement. The SAA is a type of legislative history which, under US law, provides authoritative interpretative guidance in respect of the statute. Thus, the SAA operates only in conjunction with (and as an interpretive tool for) the US anti-dumping statute, and cannot be independently challenged as WTO-inconsistent.

84. Nor can the *Sunset Policy Bulletin* be challenged independently as a violation of WTO obligations. Under US law, the *Sunset Policy Bulletin* is a non-binding statement, providing Commerce's general understanding of sunset-related issues not explicitly addressed by the statute and regulations.[58] In this regard, the *Sunset Policy Bulletin* has a legal status comparable to that of agency precedent: Commerce may depart from its policy bulletin in any particular case, so long as it explains the reasons for doing so.[59] The *Sunset Policy Bulletin* does nothing more than provide Commerce and the public with a guide as to how Commerce may interpret and apply the statute and its regulations in individual cases. Absent application in a particular case, and in conjunction with US sunset laws and regulations, the *Sunset Policy Bulletin* does not "do something concrete" for which it could be subject to independent legal challenge under the WTO agreements.

Q21. Do Articles 2 and 3 of the Agreement apply to sunset reviews? If your response is in the affirmative, do these articles apply to sunset reviews in the same manner in which they apply to original investigations, or in a different manner? Please elaborate on the basis of the provisions of the Agreement and the relevant WTO case law.

85. No. In a sunset review, Commerce is analyzing whether dumping is likely to continue or recur in the absence of the discipline of the duty. An analysis of the likelihood of dumping under Article 11.3 does not require a determination of the magnitude of the margin of dumping because the amount of dumping is not relevant to the issue of whether dumping will continue or recur if the discipline is removed. In other words, the issue in an Article 11.3 sunset review is not *how much* the exporters may dump in the future, but simply *whether* they will dump in the future if the order were to be revoked. Given that there is no obligation under Article 11.3 to calculate a margin of dumping, the provisions of Article 2 relevant to the calculation of a margin of dumping are not applicable to sunset reviews. Indeed, the Appellate Body in *Japan Steel Sunset* concluded that the investigating authority is not required to calculate dumping margins in making a likelihood determination in a sunset review under Article 11.3.[60]

86. The United States explained its position that Article 3 does not apply to sunset reviews in paragraphs 287-302, 304-307, 344-346, and 348-354 of its first written submission, and in its second written submission in paragraph 44 *et seq*.

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[58] *Sunset Policy Bulletin*, 63 FR at 18871 ("This policy bulletin proposes *guidance* regarding the conduct of sunset reviews. As described below, the proposed policies are intended to complement the applicable statutory and regulatory provisions by providing *guidance* on methodological or analytical issues not explicitly addressed by the statute and regulations.") (emphasis added) (Exhibit ARG-35).

[59] As a matter of US administrative law, Commerce practice cannot be binding because Commerce is not obliged to follow its own precedent so long as it explains departures from such precedent. Thus, as a matter of law, Commerce practice cannot transform a discretionary measure into a mandatory measure.

[60] *See Japan Sunset*, paras. 123-124, 155.

Q22. The Panel notes Argentina's statements in paragraphs 132, 184, 190 and 192 of its first written submission. In your view, does Article 11.3 require an investigating authority to calculate the likely dumping margin in a sunset review? If your response is in the negative, does Article 11.3 at least require some kind of comparison between the future export price and the future normal value? Please explain on the basis of the relevant provisions in the Agreement.

87. No.[61]

Q23. The Panel notes that the DOC's Issues and Decision Memorandum in the instant sunset review mentions that it was determined that dumping continued over the life of the measure in question and that the margin of dumping did not decline in the same period. Please explain the factual basis of that determination, in particular, please indicate whether the DOC calculated a dumping margin for Siderca or any other Argentine exporter after the imposition of the original measure.

88. As noted above, the Appellate Body in *Japan Sunset* confirmed that Article 11.3 does not require the calculation of a dumping margin. Commerce did not calculate a dumping margin in the sunset review for Siderca or any other Argentine exporter of OCTG during the five years preceding the sunset review because Siderca had ceased shipping to the United States during that time. In the sunset review, Commerce found that dumping continued to exist during the five years preceding the sunset review because there were shipments of Argentine OCTG during four of those five years and dumping duties were assessed on those same imports.[62] (In a subsequent administrative review, Commerce found a dumping margin of 60.73 per cent for Acindar, an Argentine producer of OCTG that the United States believes began to ship OCTG to the United States in 1997.)[63]

Q24. What was the factual basis of the DOC's likelihood of continuation or recurrence of dumping determination in this sunset review? What factual information was collected by the DOC and from what sources?

89. Commerce found that dumping was likely to continue or recur based on the existence of dumping and the continued depressed import volumes since the imposition of the OCTG order.[64] Both the domestic interested parties and Siderca supplied complete substantive responses which contained the factual information required by section 351.218(d)(3) of the *Sunset Regulations*. In addition, domestic interested parties each supplied Argentine OCTG import statistics in their substantive responses, which indicated that Siderca was not the only exporter of Argentina OCTG to the United States.[65] Commerce used both the ITC Trade Database and the Commerce's Census Bureau statistics to verify the OCTG import statistics submitted by the domestic interested parties.[66]

CUMULATION

Q26. Would cumulation be generally allowed (i.e. both in original investigations and reviews) in the absence of Article 3.3 of the Agreement? What provision, if any, of the Agreement would cumulation violate in the absence of Article 3.3? In other words, in your view, is Article 3.3 an authorization for the use of cumulation, or, is it rather a provision that imposes certain restrictions on the use of cumulation in investigations? Please elaborate on the basis of the relevant provisions of the Agreement.

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[61] *See* US Answer to Panel Question 21 and *Japan Sunset*, paras. 123-124, 155.

[62] *See Decision Memorandum* at 5 (Exhibit ARG-51).

[63] *Notice of Final Results and Rescission in Part of Anti-Dumping Duty Administrative Review; Oil Country Tubular Goods, Other Than Drill Pipe, from Argentina*, 68 Fed. Reg. 13262, 13263 (19 March 2003).

[64] *See Decision Memorandum* at 4-5 (Exhibit ARG-51).

[65] *See* Exhibit US-23.

[66] *See Adequacy Memorandum* at 2 (ARG-50) and *Decision Memorandum* at 4-5 (Exhibit ARG-51).

90. In the view of the United States, cumulation is generally allowed in both investigations and reviews. Article 3.3 is a provision that imposes certain restrictions on the use of cumulation in investigations, but not in reviews.

91. Nothing in the Anti-Dumping Agreement prevents a Member from cumulating imports. In the absence of a restriction, the measure is permissible and must be found to be in conformity with the Agreement. This is particularly true for sunset reviews, for which no methodology is prescribed.[67]

92. The United States notes that cumulation in anti-dumping investigations was a widespread practice among GATT contracting parties prior to the adoption of Article 3.3 in the Uruguay Round, even though the Tokyo Round Anti-Dumping Code was silent on the subject. If the negotiators of the Uruguay Round had intended to limit the practice of cumulation to investigations, it seems unlikely that they would have made no mention of the subject in Article 11.3.

REQUEST FOR PRELIMINARY RULINGS

Q27. The Panel notes the statement of the United States in paragraph 52 of its oral submission that it was prejudiced in its right to defend itself in these proceedings because of the alleged defects in Argentina's panel request. Please explain in what ways the United States was prejudiced with respect to each alleged inconsistency that the United States is raising in its request for preliminary rulings.

93. The *Understanding on Rules and Procedures Governing Disputes* ("DSU") provides carefully-established procedures to ensure that all parties to the proceeding are afforded due process. These procedures include deadlines calibrated to ensure that the proceeding moves expeditiously while providing parties adequate time to prepare its defence. The lack of due process in the early part of the proceeding, if not cured, is of particular concern because it risks tainting the remaining proceeding.

94. The violation in question is Argentina's failure pursuant to DSU Article 6.2 to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Argentina' s failure to do so initially, and its failure to cure the defect, deprived the United States of the opportunity to prepare defence; the United States did not know the legal basis of Argentina's specific claims. From panel establishment through panel selection through preparation of submissions, the United States has not been afforded the full measure of due process required under the DSU, compromising its ability to research the issues at hand, assign personnel, etc. As the Appellate Body has explained, "A defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence . . . . This requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings."[68] Indeed, "it is a corollary of the due process objective inherent in Article 6.2 that a complaining party, as the party in control the drafting of a panel request, should bear the risk of any lack of precision in the panel request."[69]

[67] *Japan Sunset*, para. 123.

[68] *Thailand – Anti-Dumping Duties on Angles, Shapes and Section of Iron or Non-Alloy Steel H-Beams from Poland*, WT/DS122/AB/R, Report of the Appellate Body adopted 28 September 2000, para. 88.

[69] *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276, Preliminary Ruling on the Panel's jurisdiction under Article 6.2 of the DSU, 25 June 2003, para. 25.

OTHER

Q29. During the five-year period of imposition of the anti-dumping duty at issue in this case, did any exporter other than Siderca ask for an administrative review for its own duty?

95. During the five years preceding the sunset review, no exporter or producer of Argentine OCTG requested an administrative review of its assigned margin of dumping, including Siderca. As explained in the US answer to question 13(b) from the Panel, the domestic interested parties requested administrative reviews of Siderca for each of three periods (1995-1996; 1996-1997; 1997-1998) prior to the sunset review. These administrative reviews were terminated after Commerce determined, for each of the relevant periods, that Siderca had no imports of OCTG for consumption in the United States. Notably, since the sunset review, another Argentina exporter of OCTG has participated in an administrative review.

Q30. The United States argues that certain US legal instruments such as the SPB cited by Argentina is not a measure that can be challenged as such under the WTO Agreements.[70] Please provide the Panel with detailed information regarding the legal status and interrelationships, if any, of the following instruments under US law, and in particular whether they are mandatory or discretionary. In particular, in light of the relevant WTO dispute settlement reports, the Panel would like to know whether each of these instruments have an operational life of their own under US law, and whether the DOC and the ITC are required to follow their provisions in sunset reviews.

(i) Tariff Act of 1930 (as amended by the URAA).

96. The Tariff Act of 1930, as amended (the statute or "the Act") is US law. Commerce is bound by the statute – e.g., there is no higher law except for the US Constitution. Consequently, the statute has an operational life of its own.[71] Many of the provisions in the statute are mandatory, although certain provisions are discretionary.

(ii) Statement of Administrative Action,

97. The SAA was prepared and submitted with the Uruguay Round Agreements Act. The function of the SAA is set forth in the SAA itself, as follows:

> This Statement describes significant administrative actions proposed to implement the Uruguay Round agreements. In addition, incorporated into this Statement are two other statements required under section 1103: (1) an explanation of how the implementing bill and proposed administrative action will change or affect existing law; and (2) a statement setting forth the reasons why the implementing bill and proposed administrative action are necessary or appropriate to carry out the Uruguay Round agreements.
>
> As is the case with earlier Statements of Administrative Action submitted to the Congress in connection with fast-track bills, this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law. Furthermore, the Administration understands that it is the expectation of the Congress

[70] *See, e.g.*, First Written Submission of the United States, paras. 193-195.
[71] *US – Export Restraints* para. 8.91.

> that future Administrations will observe and apply the interpretations and commitments set out in this Statement. Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretations of those agreements included in this Statement carry particular authority.[72]

98. In other words, the SAA is a type of legislative history. In the United States, legislative history is often considered for purposes of ascertaining the meaning of a statute, but cannot change the meaning of, or override, the statute to which it relates. It provides authoritative interpretative guidance in respect of the statute. The status granted to the SAA under the US system, however, is only in respect to its interpretive authority *vis à vis* the statute. Thus, the SAA operates only in conjunction with (and as an interpretive tool for) the US anti-dumping statute has no operational life of its own.[73] In addition, the SAA is not mandatory.

(iii) Sunset Regulations (Both the DOC's and the ITC's regulations), and

99. These regulations are US law. The regulations contain both mandatory and discretionary directives. The regulations have force and effect of law and must be followed where the language of the specific provision leaves no discretion. The regulations, however, have provisions that provide for the exercise of discretion by the applicable decision-maker. The regulations are issued in accordance with US federal agency rule-making procedures and are accorded controlling weight by US courts unless they are arbitrary, capricious, or manifestly contrary to the statute.[74] Thus, the regulations have an independent operational life of their own.[75]

(iv) Sunset Review Policy Bulletin.

100. Under US law, the *Sunset Policy Bulletin* is considered a non-binding statement, providing Commerce's general understanding of sunset-related issues not explicitly addressed by the statute and regulations.[76] In this regard, the *Sunset Policy Bulletin* has a legal status comparable to that of agency precedent. As with its administrative precedent, Commerce may depart from its policy bulletin in any particular case, so long as it explains the reasons for doing so.[77] The *Sunset Policy Bulletin* does nothing more than provide Commerce and the public with guidance as to how Commerce may interpret and apply the statute and its regulations in individual cases. The *Sunset Policy Bulletin* does not "do something concrete" for which it could be subject to independent legal challenge under the WTO agreements.

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[72] SAA, page 656 (Exhibit US-11). The reference to "section 1103" is to section 1103 of the Omnibus Trade and Competitiveness Act of 1988 ("1988 Act"). Among other things, the 1988 Act provided the Administration with fast-track negotiating authority with respect to the Uruguay Round.

[73] *US Export Restraints*, paras. 8.98 - 8.100.

[74] *See, e.g., Chevron USA. Inc. v. Natural Resources Defence Council, Inc.*, 467 US 837, 842, 81 L. Ed. 2d 694, 104 S. Ct. 2778-845 (1984).

[75] *US Export Restraints*, paras. 8108 - 8.113.

[76] *Sunset Policy Bulletin*, 63 FR at 18871 ("This policy bulletin proposes *guidance* regarding the conduct of sunset reviews. As described below, the proposed policies are intended to complement the applicable statutory and regulatory provisions by providing *guidance* on methodological or analytical issues not explicitly addressed by the statute and regulations.") (Emphasis added) (Exhibit ARG-35).

[77] As a matter of US administrative law, Commerce practice cannot be binding in the sense that Commerce is not obliged to follow its own precedent so long as it explains departures from such precedent. Thus, as a matter of law, Commerce practice cannot transform a discretionary measure into a mandatory measure.

Q31.

(a) Are "the SPB" and "the SAA" binding legal instruments under the US law?

101. No.

(b) If not, please explain the legal status of these two legal instruments under the US law and the purpose of having them?

102. Please see our responses to questions 30(ii) and 30(iv), as well as 20(d).

(c) Can the US administration depart from the provisions of the SAA and the SPB without formally amending them?

103. Both the SAA and the *Sunset Policy Bulletin* are forms of guidance and are not mandatory. Consequently, it is inapposite to discuss the SAA or the *Sunset Policy Bulletin* in terms of "departing" from them.

(d) Have the SAA and the SPB ever been amended?

104. No. There is no mechanism for amending the SAA.

ANNEX E-3

ANSWERS OF THE UNITED STATES TO QUESTIONS OF THE PANEL – FIRST MEETING (REVISED VERSION)

27 February 2004

EXPEDITED REVIEWS/WAIVER PROVISIONS

Q2. Please respond to the following questions regarding "expedited sunset reviews" under the US law?

(a) In what circumstances does the DOC decide to conduct an expedited sunset review? More specifically, does the US law require or allow the DOC to conduct an expedited sunset review in cases where there is an affirmative or deemed waiver as well? Or, are expedited reviews limited only to cases where the respondent interested parties' substantive response to the notice of initiation is found inadequate because their share in the total imports falls below the 50 per cent threshold prescribed under US law?

1. The US Department of Commerce (Commerce) decides whether to conduct a full or expedited sunset review based on a two-part procedure. First, Commerce solicits substantive responses from interested parties after publication of the notice of initiation of the review in the Federal Register.[1] Respondent interested parties, which include foreign exporters and governments,[2] have several options: They may (1) file a substantive response; (2) elect to waive their rights to participate in the review ("affirmative waiver"); or (3) refuse to provide a substantive response.[3] Commerce will determine whether each response received is "complete" per the criteria set forth in the regulations.[4] No response, or an incomplete substantive response, is considered a waiver ("deemed waiver").[5] Parties waiving their rights to participate in the review are considered likely to dump (a company-specific likelihood finding).[6]

2. Second, taking into account all of the responses received as part of the first step, including deemed and affirmative waivers, Commerce normally evaluates whether the exporters submitting complete substantive responses account for 50 per cent of the total imports of subject merchandise to the United States over the five calendar years preceding the initiation of the review ("50 per cent threshold").[7] If the responses do not meet the 50 per cent threshold, Commerce will normally conduct an expedited review to make an order-wide determination of the likelihood of continuing or recurring dumping (an order-wide likelihood determination).[8]

3. The likelihood finding with regard to one company under the first step is not dispositive of the results of the order-wide likelihood determination under the second step. Even if Commerce finds that dumping is likely with regard to one company, Commerce still must decide whether to conduct a

[1] 19 C.F.R. 351.218(d)(3) (Exhibit ARG-3).
[2] 771(9) of the Tariff Act of 1930 (19 USC. 1677(9).
[3] 19 C.F.R. 351.218(d) (Exhibit ARG-3).
[4] 19 C.F.R. 351.218(d)(3)(ii) (Exhibit ARG-3).
[5] 19 C.F.R. 351.218(d)(2)(iii) (Exhibit ARG-3).
[6] Section 751(c)(4) of the Tariff Act (19 USC. 1675(c)(4)) (Exhibit ARG-1).
[7] 19 C.F.R. 351.218(e)(1)(ii)(A) (Exhibit ARG-3).
[8] 19 C.F.R. 351.218(e)(1)(ii)(C) (Exhibit ARG-3).

full or expedited review to determine order-wide likelihood. The decision whether to expedite depends on the other respondent interested party responses.

4. (Please note that the 50 per cent threshold is not dispositive. Commerce may take other factors into account and has conducted several full sunset reviews under the anti-dumping and countervailing duty laws in which the aggregate response did not represent more than 50 per cent of imports. Most of these involved analyses of subsidization where the relevant government's participation is essential given the nature of the sunset review in the countervailing duty context. In at least one case, however, Commerce conducted a full sunset review in an anti-dumping case in which the aggregate response to the notice of initiation did not represent more than 50 per cent of imports for the five year period. In *Pineapple from Thailand*, the only respondent interested party to file a complete substantive response did not represent more than 50 per cent of the imports during the five year period preceding the sunset review.[9] Commerce nonetheless conducted a full sunset review because the respondent interested party was a significant exporter of the subject merchandise, was a respondent in the original investigation, represented nearly 50 per cent of the imports during the five year period (on average), and accounted for more than 50 per cent of the imports for the two years preceding the sunset review.)

(b) The Panel notes that the provisions relating to a deemed waiver, i.e. the presumption that a respondent interested party that submits an incomplete substantive response is deemed to have waived its right to participate, are found in the Regulations only. This matter does not seem to be dealt with under the Tariff Act. Would the United States agree that the only provisions of the US law relating to deemed waivers are contained in the Regulations?

5. Yes.

(c) If the DOC carries out an expedited sunset review in cases of an affirmative or deemed waiver as well, please explain whether there are any differences in the procedural rules that apply to these two sets of expedited sunset reviews, i.e. expedited reviews that result from a waiver and those that result from the submission of an inadequate response.

6. There is only one "type" of expedited review.

7. There is no difference in the treatment of a respondent interested party in an expedited sunset review conducted by Commerce whether that particular party waives its right to participate pursuant to an election (section 751(C)(4)(A)) or is deemed to have waived because it failed to respond or its substantive response to the notice of initiation was found to be inadequate.[10]

(d) Please explain the differences, if any, between expedited and full sunset reviews regarding the procedural rules that are followed by the DOC. Please explain for instance whether interested parties, especially the foreign exporters, in expedited sunset reviews have the right to submit evidence in addition to, and apart from, their response to the notice of initiation; whether they have the right to request a hearing; and whether the DOC issues a final disclosure as stated in Article 6.9 of the Agreement. Please respond in detail by referring to the relevant provisions of the US law in conjunction with Article 6 and Annex II of the Agreement.

[9] *See Preliminary Results of Full Sunset Review; Canned Pineapple Fruit from Thailand*, 65 Fed. Reg. 58509 (29 September 2000).

[10] *See* 19 C.F.R. 351.218(e)(2)(ii) (Exhibit ARG-3).

8. The Appellate Body in *Japan Sunset* has confirmed that Article 11.3 does not prescribe the methodology – or methodologies – that Members may use in conducting sunset reviews.[11] Article 11.4 ensures that the general procedural and evidentiary provisions of Article 6 apply in sunset reviews to give respondent interested parties basic due process. Expedited reviews are consistent with Article 11.3 and Article 6 as incorporated therein.

9. Whether the sunset review is full or expedited, Commerce's *Sunset Regulations* provide the due process and evidentiary requirements found in Article 6. Specifically:

(a) Section 351.218(d)(3) provides that interested parties will have 30 days from the notice of initiation of the review to submit complete substantive responses. In addition to identifying information that is required of interested parties, section 351.218(d)(3)(iv)(B) provides that parties may provide "any other relevant information or argument that the party would like [Commerce] to consider." (Emphasis added.)

(b) Section 351.218(d)(4) affords interested parties the opportunity to rebut evidence and argument submitted in other parties' substantive responses within five days of the submission of those responses.

(c) In cases where Commerce finds that the aggregate response to the notice of initiation from the respondent interested parties is inadequate, section 351.309(e) of Commerce's *Sunset Regulations* affords interested parties the opportunity to comment on whether an expedited review is appropriate.

10. Therefore, Commerce's regulations expressly provide parties – in both full and expedited reviews – with multiple opportunities to provide Commerce with any relevant information, to rebut any relevant information and argument submitted by other parties, and to comment on the appropriateness of conducting an expedited review even when the substantive responses have been inadequate. Section 351.308(f)(2) of Commerce's *Sunset Regulations* provides that Commerce normally will consider the substantive submissions – not just the complete ones – of all interested parties in making the order-wide likelihood determination in an expedited sunset review.

11. The differences between a full and an expedited sunset review are timing (the final sunset determination in an expedited sunset review is issued 120 days after the notice of initiation, rather than the full sunset review's 240 days)[12] and the fact that case briefs are not filed in an expedited case. Because as a rule hearings are tied to the contents of the case briefs,[13] hearings are generally not held in an expedited proceeding. It should be noted that the deadline for the submission of factual information is the same for both an expedited and a full sunset review proceeding and normally is no later than the deadline for the submission of the interested party rebuttal briefs.[14]

12. Article 6.9 requires that interested parties be informed of the essential facts. This requirement does not impose a particular means of disclosure. The United States has established an investigative and review process that allows interested parties to presented with all of the facts as they are presented to the authority, as well as arguments made about these facts.[15]

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[11] *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, Report of the Appellate Body, 15 December 2003 ("*Japan Sunset")*, paras 149 and 158.

[12] 19 C.F.R. 351.218(e)(ii)(2), 19 C.F.R. 351.218(f)(3) (Exhibit ARG-3).

[13] 19 C.F.R. 351.310(c) (Exhibit US-27).

[14] *See* 19 C.F.R. 351.218(d)(4) (Exhibit ARG-3).

[15] *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, Report of the Panel, adopted 28 September 2001 ("*Ceramic Floor Tiles")*, para 6.125.

13. Consistent with paragraph 1 of Annex II, the Commerce regulations set forth in detail the requirements for the submission of a complete substantive response and specify that interested parties may submit other information.[16] The regulations also make clear that respondent interested parties have 30 days to provide a complete substantive response[17] and if the collective responses are considered inadequate, an expedited review will normally be conducted and facts available used.[18] Consistent with paragraphs 5 and 6, Commerce does not require the information provided to be ideal; as noted above, parties are provided the opportunity to explain why they cannot provide particular information. Further, all evidence or information is accepted, even for incomplete substantive responses, pursuant to section 351.308(f) of the *Sunset Regulations.*

(e) Please explain whether exporters who submitted an incomplete response to the notice of initiation of a sunset review, and therefore are deemed to have waived their right to participate under Section 351.218(d)(2) (iii) of the DOC's Sunset Regulations, have the right to submit evidence in addition to, and apart from, their response to the notice of initiation; whether they have the right to request a hearing; and whether the DOC issues a final disclosure as stated in Article 6.9 of the Agreement. Please respond in detail by referring to the relevant provisions of the US law in conjunction with Article 6 and Annex II of the Agreement.

14.

15. If an exporter in fact submitted an incomplete substantive response – a hypothetical situation – that exporter would be deemed to have waived its right to participate in the sunset review, pursuant to section 351.218(d)(2)(iii). Therefore, the exporter would not have the right to submit additional evidence or request a hearing.

16. The US sunset review procedures meet Article 6 requirements. A notice of initiation is published in the *Federal Register*, respondent interested parties have 30 days to provide a complete substantive response and any other information they wish to provide, they are afforded the opportunity to respond to the adequacy determination (if they provided a complete substantive response),[19] and even if facts available is applied, the information in both incomplete and complete responses is taken into account.[20]

17. The sunset review procedures conform to the norms in Annex II. For example, the information required from respondent interested parties in a substantive response is set forth in the regulations and therefore precedes the notice of initiation, providing greater rights than those suggested under paragraph 1 of Annex II. Similarly, the regulations make clear that facts available may be used if information is not supplied within a reasonable time. Article 5 suggests that all information should be accepted and that authorities should not disregard any properly submitted, verifiable information. As noted above, even when expedited reviews are conducted and facts available are used, Commerce will consider the information provided in complete and incomplete substantive responses. Similarly, even though a respondent interested party's incomplete submission will preclude it from participating further, the evidence and information contained therein will be used at a minimum as part of facts available, if facts available is applied.[21]

[16] 19 C.F.R. 351.218(d)(iv) (Exhibit ARG-3).
[17] 19 C.F.R. 351.218(d)(3) (Exhibit ARG-3).
[18] 19 C.F.R. 351.218(e)(ii)(C)(2) (Exhibit ARG-3).
[19] 19 C.F.R. 351.309(e) (Exhibit US-27).
[20] 19 C.F.R. 351.308(f)(2) (Exhibit US-27).
[21] 19 C.F.R. 351.308(f)(2) (Exhibit US-27).

18. Article 6.9 requires that interested parties be informed of the essential facts. This requirement does not impose a particular means of disclosure. The United States has established an investigative and review process that allows interested parties to be presented with all of the facts as they are presented to the authority, as well as arguments made about these facts.[22]

Q3. The Panel notes that under US law the effect of failure to submit a complete substantive response is a deemed waiver, in which case the DOC is directed to find likelihood of continuation or recurrence of dumping. The effect of submitting an inadequate substantive response, however, seems to be the DOC's resort to facts available. In the latter case, will the DOC also find likelihood without further investigation? In other words, is there a difference between these two effects? Is it correct to state that the DOC is directed to find likelihood as a matter of US law only in the case of an incomplete substantive response, or does that also apply to complete but inadequate substantive responses?

19. As noted above, the assessment of likelihood may occur twice in a sunset review, but with different implications. First, a respondent interested party's waiver of participation, deemed or affirmative, will lead to a finding with regard to that party that the party is likely to continue to dump (or that dumping by that party will recur). Commerce will subsequently determine whether dumping is likely to continue or recur on an order-wide basis, i.e., taking into account the activities of all the companies that export the subject merchandise, including information provided in substantive responses. In other words, one company's failure to submit a complete substantive response results in a finding of likelihood with respect to that company, and not on an order-wide basis; Commerce could still, in light of other submissions and facts on the record, conclude that there is no order-wide likelihood of dumping.

Q4. The Panel notes that Section 1675(c)(4) of the Tariff Act of 1930 reads:

> **"(B) Effect of waiver**
>
> > **In a review in which an interested party waives its participation pursuant to this paragraph, the administering authority shall conclude that revocation of the order or termination of the investigation would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) with respect to that interested party."[23] (emphasis added)**

(a) Does this provision mean that the DOC will make no substantive analysis but will automatically determine that there is a likelihood of continuation or recurrence of dumping? How does the United States explain it in light of the obligation to determine under Article 11.3? In other words, is it the view of the United States that not carrying out any substantive determination in cases of an affirmative or deemed waiver discharges the investigating authority from its obligation to make a likelihood determination under Article 11.3?

20. No. As noted above, the assessment of likelihood may occur twice in a sunset review. The statute requires a finding of company-specific likelihood in the case of an affirmative waiver but does not mandate a determination of order-wide likelihood. Commerce will take the waiver into account for purposes of the 50 per cent threshold.

[22] *Ceramic Floor Tiles*, para 6.125.
[23] 19 USC. § 1675(c)(4) (Exhibit ARG-1 at 1152).

21. Article 11.3 does not mandate a particular methodology for Members conducting sunset reviews. The Appellate Body in *Japan Sunset* concluded that Members are free to structure sunset review proceedings as they wish, provided those proceedings are consistent with the obligations of Article 6.[24] Thus, the "determination" referenced therein need not be made with respect to each company subject to the order; instead, for the United States, the determination is made for the order as a whole.

22. The United States does not believe that its sunset reviews result in "not carrying out any substantive determination in cases of an affirmative or deemed waiver." The application of facts available, which includes information provided by the parties in their substantive responses, even if incomplete, assures that the determination is based on the facts on the administrative record, including prior dumping determinations (such as administrative reviews), as well as any information the parties wish to make available. It bears repeating that parties are entitled to include *any* relevant information in their substantive responses, and not just the information set forth under section 351.218(d)(ii). As a result, Commerce does make a substantive determination, and the sunset review procedures of the United States conform to the limited requirements of Article 11.3.

(b) For instance, in a case of a waiver, does the US law preclude the DOC from evaluating, as part of its likelihood determination, imports statistics and the results of administrative reviews – if any-- or any other piece of information that might be available to the DOC or that might have been submitted by the domestic interested parties?

23. The United States wishes to reiterate that a waiver does not result in an order-wide likelihood determination. Regardless of whether a company has waived its right to participate, with regard to the order-wide likelihood determination, Commerce is authorized to take into account facts available, including the information in the substantive responses (whether complete or incomplete) if an expedited review is conducted. Notably, respondent interested parties are entitled to include *any* relevant information in those responses. Additionally, Commerce may consider information from prior determinations (such as administrative reviews) in assessing order-wide likelihood.

(c) Hypothetically, in a sunset review where all of the interested foreign exporters submitted incomplete responses to the notice of initiation, would the above-quoted section of the Tariff Act require that the DOC find likelihood of continuation without considering the information contained in these incomplete responses? Please elaborate by referring to the relevant provisions of the US law.

24. No. As noted above, there is a difference between a company-specific likelihood finding and an order-wide likelihood determination. The Tariff Act requires a company-specific likelihood finding when that company has elected to waive participation. However, the Tariff Act does not mandate a particular order-wide likelihood determination.

25. If all of the respondent interested parties submitted incomplete responses, the regulations provide that Commerce will normally consider the collective response to be inadequate, and Commerce will normally proceed to an expedited review and use facts available.[25] In using facts available, Commerce will consider all of the information provided in the incomplete responses and information from prior proceedings to reach the order-wide likelihood determination.[26]

[24] *Japan Sunset*, paras. 156-57.
[25] Section 351.218(d)(ii)(C)(2) (Exhibit ARG-3).
[26] 19 C.F.R. 351.308(f)(2) (Exhibit US-27).

Q5. The Panel notes that Section 1675(c)(4)(B) of the Tariff Act of 1930 provides that when an interested party waives its participation in a sunset review, the DOC will find likelihood of continuation or recurrence of dumping with respect to that interested party. The Panel also notes that Section 351.218(d)(2) (iii) of the DOC's Sunset Regulations state that failure to submit a complete substantive response to the notice of initiation of sunset review will be deemed a waiver of that exporter's right to participate in that sunset review. Finally, the Panel notes the United States' statement in paragraph 235 of its first written submission that the DOC carries out its likelihood determinations in sunset reviews on an order-wide basis.

(a) The United States mentions in footnote 250 of its first written submission that the *Sunset Policy Bulletin* ("SPB") requires the DOC to make its likelihood determinations on an order-wide basis. Please specify whether there is any other provision in any other legal instruments under US law (e.g. the Statute or the Regulations) which requires that likelihood of continuation or recurrence of dumping determinations in sunset reviews be carried out on an order-wide basis.

26. Footnote 250 is a citation to the statement in the text that an "adequate" number of responses is normally required.[27] Footnote 250 does not state that the SPB requires Commerce to make its likelihood determinations on an order-wide basis.

27. Section 751(c)(1)(A) of the Act provides the Commerce shall conduct a sunset review of an anti-dumping duty order five years after publication of the anti-dumping duty order. The SAA, as the authoritative interpretive tool for the statute, makes it clear that section 751(c) requires Commerce to make the sunset determination on an order-wide basis.

(b) Given the US statement in paragraph 235 of its first written submission that the DOC is required to carry out its likelihood determinations in sunset reviews on an order-wide basis, what meaning should be given to the language "with respect to that interested party" in Section 1675(c)(4)(B) of the Tariff Act of 1930? If the US law requires that the DOC make its sunset determinations on an order-wide basis, what happens when one of the exporters waives its right to participate or fails to submit a complete response, which seems to lead to a deemed-waiver? Would the statutory provision that mandates a positive finding with regard to the waiving exporter also determine the overall likelihood determination to be made for the country concerned on an order-wide basis?

28. No; neither section 751(c)(4)(B) nor any other provision of US law or regulation mandates an order-wide affirmative likelihood determination in a sunset review based on the waiver of a single exporter.

(c) Suppose that exporter A, one of the exporters involved in a sunset review initiated against country X, submits an incomplete response to the notice of initiation and therefore is deemed to have waived its right to participate pursuant to Section 351.218(d)(2) (iii) of the DOC's Sunset Regulations. Would the DOC have to find likelihood for country X on an order-wide basis because it has to find likelihood as a matter of law for exporter A submitting incomplete response? In other words, would the affirmative finding with regard to exporter A also determine the overall order-wide determination for country X in this case? Please elaborate by referring to the relevant provisions under the US law.

29. No. As noted above, Commerce may make a company-specific likelihood finding and will subsequently make an order-wide likelihood determination. If an expedited review is conducted and

[27] First Written Submission of the United States, para. 235.

facts available are used, then the regulations provide that all of the factual information on the record will be applied in making the order-wide determination, including information from incomplete and complete substantive responses.[28] Thus, US law does not mandate that a likelihood finding with respect to one company result in a likelihood determination for the entire order.

(d) If your response to question (c) is in the negative, please explain whether a negative finding for country X on an order-wide basis would violate Section 1675(c)(4)(B) of the Tariff Act of 1930, which requires that the DOC make a positive determination for exporter A which submitted an incomplete response to the notice of initiation?

30. No violation of 751(c)(4)(B) or any other provision of US law would result. The statute requires only that likelihood be found with respect to the company that waived; it does not mandate that likelihood be found on an order-wide basis. As noted above, Commerce, even if using facts available, will consider information from prior proceedings and from all substantive responses, complete or otherwise.

Q6. The Panel notes that section 351.308(f) of the DOC's Regulations sets out the facts to be used by the DOC when applying facts available in a sunset review.

(a) Does this section define or limit the scope of facts available in sunset reviews? In other words, does this section allow the DOC to consider facts other than those set out therein when using facts available in a sunset review? Please respond in detail by referring to the relevant provisions of the US law in conjunction with Article 6 and Annex II of the Agreement.

31. Section 751(c)(3)(B) provides that Commerce will base its final sunset determination on the facts available if the order-wide response from respondent interested parties, in the aggregate, is found to be inadequate. Section 351.308(f) of the *Sunset Regulations* provides that, when Commerce is making the final sunset determination on the basis of the facts available, Commerce normally will rely upon prior agency determinations and information from the interested party substantive responses. The latter may include *any* information the respondent interested party considers relevant to the proceedings.

32. Article 6.8 of the AD Agreement provides that "[i]n cases which any interested party refuses access to, or otherwise does not provide, necessary information" a Member may make its determination on the basis of "facts available." In an expedited sunset review, respondent interested parties representing more than 50 per cent of the imports of the subject merchandise have affirmatively waived participation, filed an incomplete substantive response, or have failed to respond to the notice of initiation in any respect. In this context, Commerce normally uses the facts available to make its final sunset determination because the respondent interested parties have collectively failed to provide the necessary information. Nevertheless, paragraph 3 of Annex II to the AD Agreement provides that, when applying the facts available pursuant to Article 6.8, all properly submitted, verifiable information should be taken into account when the determination at issue is made. Section 351.308(f)(2) provides for consideration of this information when submitted in an interested party's substantive response, whether that substantive response is complete or incomplete.

(b) What is the significance of the word "normally" in this section?

33. Section 351.308(f) of the *Sunset Regulations* states that Commerce normally will base its final sunset determination on prior agency determinations and the information submitted in the parties' substantive responses. The use of the word "normally" in section 351.308(f) provides

[28] 19 C.F.R. 351.308(f)(2) (Exhibit US-27).

Commerce with the discretion to find that the factual circumstances in a particular case warrant Commerce's reliance on other or additional information when making the final order-wide sunset determination.

(c) What is the legal significance of the cross-reference in Section 351.308(f) of the Regulations to 752(b) and 752(c) of the Act? Given that the Statute does not have any provision about the inadequacy of substantive responses, does this cross-reference suggest that the provisions of Section 351.308(f) of the Regulations apply only in cases of an affirmative or deemed waiver, but not in cases where the substantive response is complete but inadequate because the exporters' share is below 50 per cent? Please respond in conjunction with the statements of the United States in paragraphs 156 and 170 of its first submission.

34. As noted above, there are two steps in assessing whether to conduct a full or expedited sunset review. The first is to evaluate whether the substantive responses (there may well be more than one exporter, for example) to the notice of initiation are complete or whether parties have waived their right to participate in the proceedings. These decisions are then folded into the second step, which is to determine whether the complete substantive responses represent 50 per cent of imports. Then, if Commerce decides to proceed with an expedited review, Commerce normally will apply facts available, as described in Section 351.308(f). Thus, it is entirely possible that there will be waivers and complete substantive responses in one proceeding, both of which are taken into account in determining whether to expedite and, correspondingly, use facts available.

35. The cross-reference to sections 752(b) and 752(c) of the Act is found in section 351.308(f) because these statutory provisions contain the mandatory elements Commerce "shall" consider in making an order-wide likelihood determination a sunset review. Commerce will consider any additional information in the parties' substantive response in light of the statutory requirements contained in sections 752(b) and 752(c) when making the final sunset determination.

(d) Please explain whether in a sunset review where the respondent interested party/parties account for less than 50 per cent of total exports of the subject product into the US market the DOC would take into account the information and evidence submitted by the respondent interested parties in their substantive responses to the notice of initiation of the sunset review? If so, explain why Section 351.218(e)(1)(ii)(C)(2) of the Regulations provides that the DOC would base its determinations on facts available in such cases. In other words, if the DOC is to take into account evidence submitted by the respondent interested parties to the notice of initiation no matter what their share in the total exports of the subject product into the US market is, why is it that the Regulations direct the DOC to resort to facts available if the respondent's share falls below 50 per cent?

36. In a sunset review in which the respondent interested party or parties do not meet the 50 per cent threshold, and Commerce has made a determination that the aggregate response to the notice of initiation was inadequate, Commerce would consider the information and evidence submitted by the respondent interested parties in their substantive responses when making the final sunset determination in accordance with section 351.308(f) of the *Sunset Regulations*.

Q7.

(a) Please explain the significance of the language "without further investigation" in Section 351.218(e)(1)(ii)(C)(2) of the DOC's Regulations. What does it imply? Does it mean that the DOC will not accept any submission of evidence by foreign exporters in expedited sunset reviews in addition to their responses considered to

be inadequate? Or does it imply that the evidence submitted by interested parties will not be evaluated or otherwise tested?

37. Section 351.218(e)(1)(ii)(C)(2) of the *Sunset Regulations* provides that Commerce will normally base its final sunset determination on "the facts available" without further investigation in a case where the aggregate respondent interested parties is inadequate. However, Commerce may exercise its discretion and conduct further investigation.[29] The use of the language "without further investigation" of section 351.218(e)(1)(ii)(C)(2) provides that Commerce is not required to request additional information.

38. Commerce normally will not accept additional submissions from any interested party, whether domestic or respondent, after that interested party's substantive submission is found to be "incomplete." Nevertheless, any information submitted by an interested party in its substantive response is considered by Commerce when Commerce makes the final determination in an expedited sunset review, even in cases where that substantive response was found to be "incomplete."[30]

(b) More generally, would it be correct to state that in terms of procedural rules, the only difference between a statutory finding of likelihood in a case of waiver and an expedited review in cases where the response is found to be inadequate is the fact that in the latter case the DOC will consider the information submitted by the foreign exporter in its complete substantive response to the notice of initiation?

39. Commerce will consider all information on the administrative record of the sunset proceeding, including information in the substantive responses and rebuttal responses of the domestic interested parties, prior agency determinations, and any other information received by Commerce, as well as the information submitted by foreign interested parties in their substantive and rebuttal responses.[31] If a respondent interested party submitted a statement of waiver, then, obviously, there would be no information from that party to consider.

Q8. The Panel notes the following provision in Section 351.218(d)(2) (iii) of the DOC's Sunset Regulations:

> **"(iii) No response from an interested party. The Secretary will consider the failure by a respondent interested party to file a complete substantive response to a notice of initiation under paragraph (d)(3) of this section as a waiver of participation in a sunset review before the Department."[32] (emphasis added)**

(a) Please explain the relationship between the terms "no response" and "a complete substantive response" as used in this section. Does this provision mean that submission of an incomplete response by an interested party is deemed as no response under US law? Does this provision treat an incomplete response as no response at all not withstanding how minimal the lacking portion of this response may be? Or, does it treat these two cases differently? Is there a waiver when the exporter fails to respond at all, or also when the exporter submits its response but the response doesn't contain all required information?

[29] *See* SAA at 879-880 (Exhibit US-11).
[30] 19 C.F.R. 351.308(f)(2) (Exhibit US-27).
[31] *See* section 351.318(f)(1) of the *Sunset Regulations* (Exhibit US-27) (definition of "the facts available").
[32] 19 C.F.R. § 351.218(d)(2) (Exhibit ARG-3).

40. When a respondent interested party submits an incomplete substantive response, Commerce will find that the incomplete response is the equivalent of no response from that respondent interested party for the purposes of determining likelihood on a company-specific basis.

41. Commerce does not reject incomplete submissions *per se*. The evaluation concerning the completeness of a substantive response depends on the individual circumstances and is done on a case-by-case basis.[33] In addition, Commerce has general authority to waive deadlines for good cause, unless expressly precluded by statute.[34] Therefore, if a response were incomplete, Commerce could extend the 30 day deadline to permit the respondent interested party to complete the submission.

42. There is a deemed waiver when an exporter submits either an incomplete substantive response or no response at all. Nevertheless, the information submitted in an incomplete substantive response will be considered by Commerce when making the final sunset determination.

Q9. The Panel notes the statement of the United States in paragraph 242 of its first written submission that:

> **"A determination that the aggregate response to the notice of initiation is inadequate can be based on the respondent interested parties electing waiver, or failing to respond, or in providing inadequate substantive responses, or on any combination of these scenarios."**

(a) Please explain whether the 50 per cent test is the sole basis for a determination of inadequacy, or whether, as the United States points out in the above-quoted paragraph, the respondents' response can be deemed inadequate in cases where there is an affirmative or deemed waiver, but the share of the cooperating respondents in total imports is above 50 per cent.

43. The term "inadequate" in the quoted part of the submission in fact refers to the completeness of the each substantive response submitted in response to the notice of initiation, rather than the adequacy of the aggregate responses.

44. The 50 per cent threshold is the normal basis for determining whether Commerce will conduct an full sunset review or a expedited sunset review. However, as noted above, Commerce has made an exception where the respondent interested party provided information indicating that complete substantive responses not meeting the 50 per cent threshold were nevertheless adequate. Commerce has not made a finding of inadequacy when the complete substantive responses met the 50 per cent threshold. Therefore, if a sufficient number of respondent interested parties (or just one, if it meets the 50 per cent threshold) simply adhere to the criteria set forth in the regulations, they can virtually ensure that a full review will be conducted. In other words, in practical terms it is up to the respondent interested parties to decide whether they want a full or expedited review.

(b) Please explain whether there have been cases where an inadequacy decision was based on the interested party's electing waiver, or failing to respond, rather than its share in total imports.

45. The election of waiver and the adequacy assessment are two distinct procedures. An affirmative or deemed waiver does not automatically result in a finding that the substantive responses

[33] *See* 19 C.F.R. 351.218(d)(3) (Exhibit ARG-3) and Preamble, 63 Fed. Reg. at 13518 (Exhibit US-3) (Commerce may consider incomplete company-specific substantive response to be complete or adequate where that interested party is unable to report the required information and provides explanation).

[34] 19 C.F.R. 351.302(b) (Exhibit US-3).

were inadequate. Instead, Commerce will normally assess whether the complete substantive responses to the notice of initiation are sufficient to meet the 50 per cent threshold. Other exporters meeting the 50 per cent threshold may have filed complete substantive responses, or may have submitted information sufficient to allow Commerce to conduct a full sunset review.

46. More specifically, if a respondent interested party submits a substantive response to the notice of initiation that does contain all the information required by section 351.218(d)(3) of the *Sunset Regulations*, then it has submitted a "complete" substantive response. If a respondent interested party submits a substantive response to the notice of initiation that does not contain all the information required by section 351.218(d)(3), then "normally" that party will be considered to have submitted an "incomplete" substantive response. Likewise, if a respondent interested party affirmatively waives its right to participate or fails to respond to the notice of initiation, then its response is also considered "incomplete".

47. Once Commerce has determined which company-specific substantive responses are "complete," Commence then normally applies the 50 per cent threshold to the total import volumes represented by all the respondent interested parties who filed a complete or adequate company-specific substantive response to determine whether the aggregate response to the notice of initiation is "adequate." Commerce then uses the results to determine whether to conduct a full or expedited sunset review.

(c) More generally, please explain whether under US sunset reviews law, "an affirmative or deemed waiver" and "an inadequate response" are two situations that are mutually exclusive. In other words, would it be accurate to state that under US law, certain circumstances lead exclusively to an affirmative or deemed waiver and some others exclusively to an inadequate response?

48. No; the existence of deemed or affirmative waivers is included in the consideration of the 50 per cent threshold to assess the adequacy of the aggregate substantive responses. For example, one exporter may have waived its right to participate, while another will have filed a complete substantive submission. If the latter meets the 50 per cent threshold or provides information as to why the 50 per cent threshold is not appropriate, then Commerce could find that the complete substantive responses were adequate, and therefore a full review would normally be conducted.

Q10. The Panel notes the US statement in paragraph 162 of its first written submission:

> **"[T]hat the United States may afford parties expanded opportunities to submit evidence and argument in a full sunset review is a matter of US policy, not an obligation under the AD Agreement, and is not grounds to find fault with the evidentiary and procedural rules governing expedited sunset reviews."**

(a) In the view of the United States, does Article 6 apply to sunset reviews in its entirety? Or, are there some provisions in this article that may not be applicable in the context of sunset reviews? Please respond in conjunction with the provisions of Article 11.4, especially the language "regarding evidence and procedure" contained therein.

49. Article 11.4 of the AD Agreement stipulates that the Article 6 provisions "regarding evidence and procedure" shall apply to reviews under Article 11. Thus, not all of the provisions of Article 6 are applicable to Article 11 reviews; rather, only the provisions of Article 6 regarding evidence and

procedure are so applicable. The Appellate Body in *Japan Sunset* recently confirmed that Article 11.3 does not prescribe substantive rules for the administration of sunset reviews.[35]

(b) If it is the view of the United States that Article 6 – either entirely or partially- applies to sunset reviews, where in Article 6 or elsewhere in the Agreement does the United States find support for its proposition that giving interested parties expanded procedural rights in full sunset reviews compared with expedited sunset reviews is not WTO-inconsistent?

50. As noted above, the Appellate Body in *Japan Sunset* confirmed that Article 11.3 does not prescribe the methodology Members may use in conducting sunset reviews. Therefore, unless the US sunset review procedures are in conflict with Article 6 or Article 11.3, these procedures are permitted under the Anti-Dumping Agreement. Nothing in the Anti-Dumping Agreement prohibits the United States from giving parties expanded procedural rights in full sunset reviews compared with expedited sunset reviews. The United States notes that the parties themselves effectively decide whether they want "expanded procedural rights."

Q11. The Panel notes the following part of the DOC's Issues and Decision Memorandum in the instant sunset review:

> **"In the instant sunset reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation ."**[36]

Is the Panel to understand that the DOC deemed Siderca to have waived its right to participate in this sunset review? If so, on what basis under US law? If your response is in the negative, please explain what meaning the Panel should give to this sentence.

51. No; Commerce found that Siderca had filed a complete substantive response and, consequently, would not have been found to have waived its right to participate in the sunset review proceeding.[37] The Decision Memorandum for the sunset review of OCTG from Argentina includes the final sunset determinations for the sunset reviews of OCTG from Italy, Japan and Korea also. In each of these other three sunset reviews, respondent interested parties failed to respond to the notice of initiation in any respect. Therefore, the above quoted passage is a reference to the failure of the respondent interested parties in the sunset reviews of OCTG from Italy, Japan, and Korea.

52. The Issues and Decision Memorandum demonstrates that Commerce made two findings – that Siderca had filed a complete substantive response and that no other respondent interested party had filed a substantive response in any of the sunset reviews covered by the Decision Memorandum.[38]

Q12. The Panel notes the argument of the United States, in paragraph 237 of its first written submission, that "Siderca did not avail itself of the opportunities made available by the Sunset Regulations for such defence in an expedited sunset review."

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[35] *Japan Sunset*, para 123.

[36] *Issues and Decision Memorandum for the Sunset Reviews of the AD Orders on Oil Country Tubular Goods from Argentina, Italy, Japan, and Korea* (Dept's Comm., 31 Oct. 2000) (final results) ("*Decision Memorandum")* (Exhibit ARG-51 at 5).

[37] *See Decision Memorandum* at 3 (Exhibit ARG-51) and *Adequacy of Respondent Interested Party Response to the Notice of Initiation,* A-357-810 (Dept's Comm., 22 August 2000) *("Adequacy Memorandum")* at 1-2 (Exhibit ARG-50).

[38] *Decision Memorandum* at 3-4 (Exhibit ARG-51).

(a) Please explain at which point(s) of time during the instant sunset review Siderca was given further opportunities to defend itself under US law but failed to do so.

53. Siderca had a number of opportunities to submit argument and information in support of its rights in the expedited sunset review of OCTG from Argentina. First, when a respondent interested party files a substantive response, one of the requirements of section 351.218(d)(3) is a statement from the submitter regarding the likely effects of revocation which includes any information, argument, and reasons supporting the statement. Siderca's entire claim in this regard was that Commerce should apply the *de minimis* standard found in Article 5.8 of the AD Agreement and, as a consequence, should revoke the order. In addition, section 351.218(d)(3)(iv)(B) provides interested parties the opportunity to submit any other relevant information or argument the interested party would like considered in the sunset review. Siderca made no other arguments or submission of factual information.[39]

54. Second, each interested party is afforded the opportunity to submit a response in rebuttal (a "rebuttal response"), pursuant to section 351.218(d)(3)(vi)(4) of the *Sunset Regulations*, to challenge any argument or information contained in the substantive responses of the other interested parties. Siderca did not file any rebuttal response despite the fact that the domestic interested parties had made allegations, supported by statistics, that there were shipments of Argentine OCTG in four of the five years preceding the sunset review. Siderca did not challenge these statistics or any other information in the domestic interested parties substantive responses, although it was provided the opportunity to do so.

55. Finally, as discussed in the US first written submission and in the US answers above, Commerce determines whether to conduct a full or expedited sunset review based on the adequacy of the aggregate response to the notice of initiation. In making this determination, Commerce determines whether the imports from the respondent interested parties who filed a complete substantive response, on an aggregate basis, represent more than 50 per cent of the imports of the subject merchandise during the five years preceding the sunset review. Commerce then issues an Adequacy Memorandum which announces the decision and the factual bases underlying the decision. This determination is subject to challenge by the interested parties, pursuant to section 351.309(e) of the *Sunset Regulations*.

56. Commerce issued its adequacy determination in the sunset review of OCTG from Argentina and based the determination on the import statistics provided by the domestic interested parties after verifying them using the ITC Trade Database.[40] (Commerce re-verified the import statistics for the final sunset determination using Commerce's Census Bureau IM-145 import statistics; *see Decision Memorandum* at 4-5 (Exhibit ARG-51)). Siderca did not challenge Commerce's adequacy determination, as it had the right to do pursuant to section 351.309(e) of the *Sunset Regulations*.

57. At no time did Siderca provide any statements or assertions that it would not dump in the future if the order were revoked, offer any explanations why it had ceased shipments of the subject merchandise after imposition of the duty, or submit any allegations that information submitted in the sunset review proceeding of OCTG from Argentina was inaccurate or incorrect. In this proceeding, the First Written Submission of Argentina implies that Siderca was the only producer of OCTG in Argentina during the sunset review and that Siderca's lack of shipments contradicts the data indicating that Argentine OCTG was in fact exported to the United States during the period of review. Siderca made similar statements in its complete substantive response to the notice of initiation. However, there is a second Argentine producer of OCTG: Acindar. The United States has conducted administrative reviews of Acindar since 2001, and as recently as 19 March 2003, Commerce found

[39] *See* Siderca's Substantive Response at 2-3 (Exhibit ARG-57).
[40] *See Adequacy Memorandum* at (Exhibit ARG-50).

Acindar to have a dumping margin of 60.73 per cent.[41] Moreover, it is the understanding of the United States that Acindar produces welded OCTG, whereas Siderca produces seamless OCTG (both are covered by the anti-dumping order). It is not beyond the realm of possibility that Siderca did not challenge the import statistics used during the sunset review because it was aware that another Argentine producer had begun to ship OCTG to the United States during the period of review and that Commerce's adequacy finding based on the 50 per cent threshold was in fact accurate.

58. To permit Argentina to raise factual issues now that neither it nor Siderca raised during the underlying sunset review would permit respondent interested parties to manipulate the system. Consistent with the general principles in Article 6, the United States afforded all Argentine exporters – and the Argentine government – the opportunity to present sufficient information to warrant a full sunset review. Siderca and Argentina declined to do so.

59. Therefore, in spite of Argentina's complaint, Commerce's likelihood determination was in fact correct, as evidenced by the dumping margin found with regard to Acindar after the sunset review.

(b) Which provisions of the DOC's Regulations, or other relevant legal instruments under US law, give interested exporters the right to defend their interests? Please respond in conjunction with the language "without further investigation" in section 351.218(e)(1)(ii)(C)(2) of the DOC's Regulations. What meaning should be given to this provision if the Regulations give interested exporters the right to defend their interests?

60. Please see US Answer to Question 7(a) above.

61. Section 751(c)(3)(B) provides that Commerce will base its final sunset determination on the facts available if the aggregate response from respondent interested parties, in the aggregate, is found to be inadequate. Section 351.218(e)(1)(ii)(C)(2) of the *Sunset Regulations* provides that Commerce "normally" will issue a final determination in a sunset review "without further investigation" when insufficient interest in participation is demonstrated by the interested parties. The provision for a final sunset determination "without further investigation" is intended to expedite the sunset review process. Nevertheless, Commerce has the discretion not to expedite and, even in cases where the sunset review is expedited, interested parties who supplied complete substantive responses may still submit rebuttal responses, a challenge to Commerce's adequacy determination, and have the right to supply any argument and information that interested party wishes Commerce to consider in the sunset review.

Q13.

(a) What was the amount of exports of the subject product by Argentine exporters other than Siderca during the five-year period of application of this measure? Who were the exporters that made such exports? What was the source of these statistics?

62. The domestic interested parties submitted import statistics in their substantive responses indicating that there were imports of the subject merchandise into the United States in each year, except 1996, from the imposition of the order until the sunset review.[42] These statistics show that there were approximately 45,000 net tons prior to the initiation of the original investigation, 26,000 net tons entered during the investigation, and an average of less than 900 net tons in each year from the imposition of the anti-dumping duty order on OCTG from Argentina until the sunset review.

[41] *Notice of Final Results and Decision in Part of Anti-Dumping Duty Administrative Review; Oil Country Tubular Goods, Other Than Drill Pipe, from Argentina*, 68 Fed. Reg. 13262, 13263 (19 March 2003).

[42] *See* Exhibit US-23.

63. The domestic interested parties supplied import statistics concerning imports of OCTG for the five year period prior to the sunset review.[43] These statistics were verified during the sunset review by using two independent sources: (1) ITC Trade Database; and (2) Commerce's Census Bureau IM-145 import data.[44]

64. Also, through administrative review procedures, the United States has identified Acindar as another Argentine producer of OCTG, and one that may have shipped OCTG to the United States during the period of review, as described above.

(b) The Panel notes Argentina's assertion in paragraph 43 of its first oral submission that the DOC's determination that there were exports of the subject product from Argentina into the United States during the period of imposition of the measure at issue was flawed because the DOC incorrectly recorded non-consumption entries as consumption entries. Please explain whether the so called "non-consumption entries" are those products in transit which are not destined for ultimate consumption in the United States?

65. First, the panel should be aware Siderca did not raise this issue during the underlying sunset review. Second, as detailed below, Argentina's assertion concerning the nature of these shipments and their effect on the accuracy of the import statistics used in the sunset review is significantly exaggerated.

66. In order to assist the Panel, however, we provide an accurate reiteration of the facts on this issue. During the five year period, there were four administrative reviews initiated for Siderca at the request of domestic interested parties. Commerce terminated each of these administrative reviews because Commerce determined that there were no consumption entries of OCTG from Argentina exported by Siderca during these periods.

67. In the administrative review initiated for the period 25 June 1995 – 31 July 1996, Commerce found that, although there were entries of Argentine OCTG during the period, there were no consumption entries of OCTG made by Siderca and, consequently, Commerce terminated the administrative review for Siderca.[45] Domestic interested parties claimed that Siderca made seven shipments of OCTG during the period that were not included in the import statistics. Commerce determined that six of the shipments were FTZ or TIB entries destined for re-export. For the seventh entry, "Siderca surmised that this shipment of [Argentine OCTG] involved parties other than itself."[46] The US Customs Service verified that there were no shipments of OCTG made by Siderca during the period under review. There was no assertion made by Siderca nor did Commerce find in this administrative review that the import statistics contained an error or errors.

68. In the administrative review initiated for the period 1 August 1996 – 31 July 1997, Commerce found that the one entry directly attributed to Siderca was destined for re-export and, consequently, Commerce terminated the administrative review for Siderca"[47] There was no finding that there were no consumption entries of OCTG made during the period. The only finding was that there were no entries of OCTG during the period under review exported by Siderca and that the one entry reportedly made by Siderca was in error.

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[43] *See* Exhibit US-23.

[44] *See Adequacy Memorandum* at 2 (Exhibit ARG-50) and *Decision Memorandum* at 3 (Exhibit ARG-51), respectively.

[45] *See Oil Country Tubular Goods from Argentina; Rescission of Anti-Dumping Duty Administrative Review*, 62 Fed. Reg. 18747, 18748 (17 April 1998) (Exhibit ARG-29).

[46] 62 Fed. Reg. at 18748 (Exhibit ARG-29).

[47] *See Oil Country Tubular Goods from Argentina; Rescission of Anti-Dumping Duty Administrative Review*, 63 Fed. Reg. 49089, 49090 (September 14, 1998) (Exhibit ARG-36).

69. In the administrative review initiated for the period 1 August 1997 – 31 July 1998, Commerce found that the one shipment of Argentine OCTG made during the period was entered for consumption in the United States, but that the shipment was not exported by Siderca.[48] Consequently, Commerce terminated the administrative review for Siderca.

70. Finally, in the administrative review initiated for the period 1 August 1998 – 31 July 1999, Commerce found that there were no entries of OCTG made by Siderca and, consequently, Commerce terminated the administrative review for Siderca.[49] There was no finding that there were no consumption entries of OCTG made during the period. In fact, Commerce determined that there was at least one entry of OCTG for consumption made during the period, but that Siderca was not the exporter.

71. Therefore, in the administrative proceeding covering the 1996-1997 period, Commerce determined that there was a minor error concerning one entry in the statistical reporting of the import statistics and, in the administrative review covering the 1998-1999 period, there was an undetermined amount of mechanical tubing misclassified as OCTG, but at least one entry of OCTG for consumption. Again, the Panel should note that Siderca did not raise this issue in either its substantive response or by filing a challenge to Commerce's adequacy determination in the sunset review where it could have been addressed in the context of the sunset proceeding and not for the first time before this Panel.

(c) Did the United States base its adequacy determination in the instant sunset review on these statistics?

72. Yes, as verified by the statistics compiled in the ITC's Trade Database and Commerce's Census Bureau IM-145 import statistics.[50]

Q14. Is there a legal basis for the 50 per cent threshold that determines the adequacy of the foreign exporter's response to the questionnaire in a sunset review?

73. Section 752(c)(3) of the Act leaves to Commerce's discretion the choice of methodology for determining when the response from interested parties to the notice of initiation is "adequate" for the purposes of conducting a full sunset review.[51] Consequently, Commerce promulgated section 351.218(e)(1)(ii) of the *Sunset Regulations* to codify the 50 per cent threshold to give effect to section 752(c)(3) of the Act.[52]

74. The context of sunset reviews is important in understanding the 50 per cent threshold. While an original investigation requires a factual assessment of dumping, a sunset review requires a counterfactual finding of "likelihood" of future dumping when a finding of dumping has already been made. Article 11.3 does not prescribe the methodology for conducting sunset reviews; instead, it requires that parties be given general procedural and evidentiary rights in accordance with Article 6. The Anti-Dumping Agreement does not require Members to expend resources to unearth information that is being withheld.

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[48] *See Oil Country Tubular Goods from Argentina; Rescission of Anti-Dumping Duty Administrative Review*, 64 Fed. Reg. 4069, 4070 (27 January 1999) (Exhibit ARG-38).

[49] *See Oil Country Tubular Goods from Argentina; Rescission of Anti-Dumping Duty Administrative Review*, 65 Fed. Reg. 8948 (23 February 2000) (Exhibit ARG-43).

[50] *See Adequacy Memorandum* at 2 (Exhibit ARG-50) and *Decision Memorandum* at 3 (Exhibit ARG-51), respectively.

[51] *See* SAA at 880 (Exhibit ARG-5) (in many cases, some but not all parties will respond; nevertheless, where parties demonstrate a "sufficient willingness to participate," the agency will conduct a full sunset review).

[52] *See* Preamble, 63 Fed. Reg. at 13518 (Exhibit US-3).

Q15.

(a) Does the cross-reference in Article 11.4 of the Agreement incorporate all provisions of Article 6 in Article 11.3? Does the same cross-reference also incorporate Annex II in Article 11.3?

75. No, the cross-reference in Article 11.4 specifically incorporates only those provisions of Article 6 regarding "evidence and procedure." Please see the answer to Question 10(a) above.

76. The reference in Article 6 to Annex II incorporates Annex II into Article 11.3. However, Annex II is only applicable to the same extent as Article 6.

(b) If you are of the view that the cross-reference in Article 11.4 makes article 6.1 of the Agreement applicable to sunset reviews, does Article 6.1 – together with its subparagraphs – require that the investigating authority send questionnaires to exporters in sunset reviews?

77. No. Article 6.1 requires that interested parties be given notice of the information the authorities require in respect of the investigation in question. It does not require that a "questionnaire" be sent. Commerce published its "sunset questionnaire" and made the reporting requirements part of its regulations.[53]

(c) What significance, if any, should be given to the use of the word "investigation" in paragraphs 1 and 6 of Annex II, and to the use of the word "should" rather than "shall" in all of its paragraphs?

78. The use of the word "investigation" means that the obligations contained in Annex II are limited to original investigations. The cross-reference in Article 11.4 concerning the application Article 6 to sunset reviews makes the obligations of Article 6 regarding evidence and procedure and, consequently, the obligations in Annex II regarding evidence and procedure applicable in sunset reviews also. The use of the word "should" indicates that the requirement is directory or recommended, rather than mandatory.

Q16. In this sunset review, did Siderca attempt to submit additional evidence to the DOC after its substantive response to the notice of initiation? If so, how did the DOC respond to such attempts?

79. No.

Q17. What is the significance of the word "may" in section 1675(c)(3)(B) of the Tariff Act of 1930?

80. The use of the word "may" means that Commerce has the discretion not to base the final sunset determination on "the facts available" if Commerce determines that other information is more appropriate. In other words, Commerce is not bound by the statute to use "the facts available" in every case where there is an inadequate response to the notice of initiation.

[53] *See* section 351.218(d) (Exhibit US-3).

OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING

Q20. The Panel notes Argentina's arguments in paragraphs 124-147 of its first written submission regarding the alleged irrefutable presumption under US law/practice regarding likelihood determinations in sunset reviews. Please respond to the following questions [. . .]

(c) Please explain how you identify "practice" and how you distinguish practice from law? In light of the WTO jurisprudence, please explain your views as to whether practice as such is challengeable under WTO law or not.

81. A Commerce administrative practice is neither a "measure" within the meaning of the relevant WTO agreements, nor a "mandatory" measure within the meaning of the mandatory/discretionary distinction. A "measure" – which can give rise to an independent violation of WTO obligations – must constitute an instrument with a functional life of its own – i.e., it must *do* something concrete, independently of any other instruments. It is well-established that a "practice" is not a measure.[54] Indeed, a practice under US law consists of nothing more than individual applications of the US AD law in the context of sunset reviews. While Commerce, like many other administrative agencies in the United States, uses the term "practice" to refer collectively to its past precedent, "practice" has neither a "functional life of its own" nor operates "independently of any other instruments" because the term only refers to individual applications of the US statute and regulations.[55] In contrast to the US statute and regulations, which clearly function as "measures", no general, *a priori* conclusions about the conduct of sunset reviews under US law can be drawn from an examination of "practice."

82. Moreover, even if "practice" could be considered a measure (and the United States' position is that it cannot), in order for any measure, as such, to be found WTO-inconsistent, the measure must be "mandatory", i.e., it must require WTO-inconsistent action or preclude WTO-consistent action. The Appellate Body and several Panels have explained the distinction between mandatory and discretionary measures. A Member may challenge, and a WTO panel may find against, a measure as such only if the measure "mandates" action that is inconsistent with WTO obligations, or "precludes" action that is WTO-consistent.[56] In accordance with the normal WTO rules on the allocation of the burden of proof, it is up to the complaining party to demonstrate that the challenged measure mandates WTO-inconsistent action or precludes WTO-consistent action.[57] "Practice" is *not* binding on Commerce, and, under US administrative law, Commerce may depart from its precedent in any particular case, so long as it explains the reasons for doing so. Therefore, this "practice" does not mandate WTO-inconsistent action or preclude WTO-consistent action.

[54] *See, e.g., United States – Measures Treating Export Restraints as Subsidies*, WT/DS194/R, Report of the Panel, adopted 29 June 2001 ("*US Export Restraints*").

[55] Japan's definition of "practice" does not comport with its status in US law. Japan describes practice as "administrative procedures", which it defines as "a detailed guideline that the administrating [sic] authority follows when implementing certain statutes and regulations." Japan's First Submission, para. 8. We define "administrative procedures" and "guidelines" in our answer to Question 82.

[56] Appellate Body Report, *US - Carbon Steel*, para. 162; *United States - Anti-Dumping Act of 1916* ("*1916 Act*"), WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, paras. 88-9; Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 2 February 2002, para. 259; *see also US – Export Restraints*, paras. 8.77-9; Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, adopted 30 August 2002, para. 6.22.

[57] Panel Report, *Brazil – Export Financing Programme for Aircraft – Second Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW/2, adopted 23 August 2001, para. 5.50.

(d) What, in your view, is the relationship between "practice" on the one hand and "the SPB" and "the SAA" on the other? Could the SPB and the SAA be considered as legal instruments that embody the US practice with regard to sunset reviews?

83. Neither the SAA nor the *Sunset Policy Bulletin* can be challenged as independent violations of the AD Agreement because they do not mandate or preclude actions subject to the AD Agreement. The SAA is a type of legislative history which, under US law, provides authoritative interpretative guidance in respect of the statute. Thus, the SAA operates only in conjunction with (and as an interpretive tool for) the US anti-dumping statute, and cannot be independently challenged as WTO-inconsistent.

84. Nor can the *Sunset Policy Bulletin* be challenged independently as a violation of WTO obligations. Under US law, the *Sunset Policy Bulletin* is a non-binding statement, providing Commerce's general understanding of sunset-related issues not explicitly addressed by the statute and regulations.[58] In this regard, the *Sunset Policy Bulletin* has a legal status comparable to that of agency precedent: Commerce may depart from its policy bulletin in any particular case, so long as it explains the reasons for doing so.[59] The *Sunset Policy Bulletin* does nothing more than provide Commerce and the public with a guide as to how Commerce may interpret and apply the statute and its regulations in individual cases. Absent application in a particular case, and in conjunction with US sunset laws and regulations, the *Sunset Policy Bulletin* does not "do something concrete" for which it could be subject to independent legal challenge under the WTO agreements.

Q21. Do Articles 2 and 3 of the Agreement apply to sunset reviews? If your response is in the affirmative, do these articles apply to sunset reviews in the same manner in which they apply to original investigations, or in a different manner? Please elaborate on the basis of the provisions of the Agreement and the relevant WTO case law.

85. No. In a sunset review, Commerce is analyzing whether dumping is likely to continue or recur in the absence of the discipline of the duty. An analysis of the likelihood of dumping under Article 11.3 does not require a determination of the magnitude of the margin of dumping because the amount of dumping is not relevant to the issue of whether dumping will continue or recur if the discipline is removed. In other words, the issue in an Article 11.3 sunset review is not *how much* the exporters may dump in the future, but simply *whether* they will dump in the future if the order were to be revoked. Given that there is no obligation under Article 11.3 to calculate a margin of dumping, the provisions of Article 2 relevant to the calculation of a margin of dumping are not applicable to sunset reviews. Indeed, the Appellate Body in *Japan Steel Sunset* concluded that the investigating authority is not required to calculate dumping margins in making a likelihood determination in a sunset review under Article 11.3.[60]

86. The United States explained its position that Article 3 does not apply to sunset reviews in paragraphs 287-302, 304-307, 344-346, and 348-354 of its first written submission, and in its second written submission in paragraph 44 *et seq*.

[58] *Sunset Policy Bulletin*, 63 FR at 18871 ("This policy bulletin proposes *guidance* regarding the conduct of sunset reviews. As described below, the proposed policies are intended to complement the applicable statutory and regulatory provisions by providing *guidance* on methodological or analytical issues not explicitly addressed by the statute and regulations.") (emphasis added) (Exhibit ARG-35).

[59] As a matter of US administrative law, Commerce practice cannot be binding because Commerce is not obliged to follow its own precedent so long as it explains departures from such precedent. Thus, as a matter of law, Commerce practice cannot transform a discretionary measure into a mandatory measure.

[60] *See Japan Sunset*, paras. 123-124, 155.

Q22. The Panel notes Argentina's statements in paragraphs 132, 184, 190 and 192 of its first written submission. In your view, does Article 11.3 require an investigating authority to calculate the likely dumping margin in a sunset review? If your response is in the negative, does Article 11.3 at least require some kind of comparison between the future export price and the future normal value? Please explain on the basis of the relevant provisions in the Agreement.

87. No.[61]

Q23. The Panel notes that the DOC's Issues and Decision Memorandum in the instant sunset review mentions that it was determined that dumping continued over the life of the measure in question and that the margin of dumping did not decline in the same period. Please explain the factual basis of that determination, in particular, please indicate whether the DOC calculated a dumping margin for Siderca or any other Argentine exporter after the imposition of the original measure.

88. As noted above, the Appellate Body in *Japan Sunset* confirmed that Article 11.3 does not require the calculation of a dumping margin. Commerce did not calculate a dumping margin in the sunset review for Siderca or any other Argentine exporter of OCTG during the five years preceding the sunset review because Siderca had ceased shipping to the United States during that time. In the sunset review, Commerce found that dumping continued to exist during the five years preceding the sunset review because there were shipments of Argentine OCTG during four of those five years and dumping duties were assessed on those same imports.[62] (In a subsequent administrative review, Commerce found a dumping margin of 60.73 per cent for Acindar, an Argentine producer of OCTG that the United States believes began to ship OCTG to the United States in 1997.)[63]

Q24. What was the factual basis of the DOC's likelihood of continuation or recurrence of dumping determination in this sunset review? What factual information was collected by the DOC and from what sources?

89. Commerce found that dumping was likely to continue or recur based on the existence of dumping and the continued depressed import volumes since the imposition of the OCTG order.[64] Both the domestic interested parties and Siderca supplied complete substantive responses which contained the factual information required by section 351.218(d)(3) of the *Sunset Regulations*. In addition, domestic interested parties each supplied Argentine OCTG import statistics in their substantive responses, which indicated that Siderca was not the only exporter of Argentina OCTG to the United States.[65] Commerce used both the ITC Trade Database and the Commerce's Census Bureau statistics to verify the OCTG import statistics submitted by the domestic interested parties.[66]

CUMULATION

Q26. Would cumulation be generally allowed (i.e. both in original investigations and reviews) in the absence of Article 3.3 of the Agreement? What provision, if any, of the Agreement would cumulation violate in the absence of Article 3.3? In other words, in your view, is Article 3.3 an authorization for the use of cumulation, or, is it rather a provision that imposes certain restrictions on the use of cumulation in investigations? Please elaborate on the basis of the relevant provisions of the Agreement.

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[61] *See* US Answer to Panel Question 21 and *Japan Sunset*, paras. 123-124, 155.

[62] *See Decision Memorandum* at 5 (Exhibit ARG-51).

[63] *Notice of Final Results and Rescission in Part of Anti-Dumping Duty Administrative Review; Oil Country Tubular Goods, Other Than Drill Pipe, from Argentina*, 68 Fed. Reg. 13262, 13263 (19 March 2003).

[64] *See Decision Memorandum* at 4-5 (Exhibit ARG-51).

[65] *See* Exhibit US-23.

[66] *See Adequacy Memorandum* at 2 (ARG-50) and *Decision Memorandum* at 4-5 (Exhibit ARG-51).

90. In the view of the United States, cumulation is generally allowed in both investigations and reviews. Article 3.3 is a provision that imposes certain restrictions on the use of cumulation in investigations, but not in reviews.

91. Nothing in the Anti-Dumping Agreement prevents a Member from cumulating imports. In the absence of a restriction, the measure is permissible and must be found to be in conformity with the Agreement. This is particularly true for sunset reviews, for which no methodology is prescribed.[67]

92. The United States notes that cumulation in anti-dumping investigations was a widespread practice among GATT contracting parties prior to the adoption of Article 3.3 in the Uruguay Round, even though the Tokyo Round Anti-Dumping Code was silent on the subject. If the negotiators of the Uruguay Round had intended to limit the practice of cumulation to investigations, it seems unlikely that they would have made no mention of the subject in Article 11.3.

REQUEST FOR PRELIMINARY RULINGS

Q27. The Panel notes the statement of the United States in paragraph 52 of its oral submission that it was prejudiced in its right to defend itself in these proceedings because of the alleged defects in Argentina's panel request. Please explain in what ways the United States was prejudiced with respect to each alleged inconsistency that the United States is raising in its request for preliminary rulings.

93. The *Understanding on Rules and Procedures Governing Disputes* ("DSU") provides carefully-established procedures to ensure that all parties to the proceeding are afforded due process. These procedures include deadlines calibrated to ensure that the proceeding moves expeditiously while providing parties adequate time to prepare its defence. The lack of due process in the early part of the proceeding, if not cured, is of particular concern because it risks tainting the remaining proceeding.

94. The violation in question is Argentina's failure pursuant to DSU Article 6.2 to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Argentina' s failure to do so initially, and its failure to cure the defect, deprived the United States of the opportunity to prepare defence; the United States did not know the legal basis of Argentina's specific claims. From panel establishment through panel selection through preparation of submissions, the United States has not been afforded the full measure of due process required under the DSU, compromising its ability to research the issues at hand, assign personnel, etc. As the Appellate Body has explained, "A defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence . . . . This requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings."[68] Indeed, "it is a corollary of the due process objective inherent in Article 6.2 that a complaining party, as the party in control the drafting of a panel request, should bear the risk of any lack of precision in the panel request."[69]

[67] *Japan Sunset*, para. 123.

[68] *Thailand – Anti-Dumping Duties on Angles, Shapes and Section of Iron or Non-Alloy Steel H-Beams from Poland*, WT/DS122/AB/R, Report of the Appellate Body adopted 28 September 2000, para. 88.

[69] *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276, Preliminary Ruling on the Panel's jurisdiction under Article 6.2 of the DSU, 25 June 2003, para. 25.

OTHER

Q29. During the five-year period of imposition of the anti-dumping duty at issue in this case, did any exporter other than Siderca ask for an administrative review for its own duty?

95. During the five years preceding the sunset review, no exporter or producer of Argentine OCTG requested an administrative review of its assigned margin of dumping, including Siderca. As explained in the US answer to question 13(b) from the Panel, the domestic interested parties requested administrative reviews of Siderca for each of three periods (1995-1996; 1996-1997; 1997-1998) prior to the sunset review. These administrative reviews were terminated after Commerce determined, for each of the relevant periods, that Siderca had no imports of OCTG for consumption in the United States. Notably, since the sunset review, another Argentina exporter of OCTG has participated in an administrative review.

Q30. The United States argues that certain US legal instruments such as the SPB cited by Argentina is not a measure that can be challenged as such under the WTO Agreements.[70] Please provide the Panel with detailed information regarding the legal status and interrelationships, if any, of the following instruments under US law, and in particular whether they are mandatory or discretionary. In particular, in light of the relevant WTO dispute settlement reports, the Panel would like to know whether each of these instruments have an operational life of their own under US law, and whether the DOC and the ITC are required to follow their provisions in sunset reviews.

(i) Tariff Act of 1930 (as amended by the URAA).

96. The Tariff Act of 1930, as amended (the statute or "the Act") is US law. Commerce is bound by the statute – e.g., there is no higher law except for the US Constitution. Consequently, the statute has an operational life of its own.[71] Many of the provisions in the statute are mandatory, although certain provisions are discretionary.

(ii) Statement of Administrative Action,

97. The SAA was prepared and submitted with the Uruguay Round Agreements Act. The function of the SAA is set forth in the SAA itself, as follows:

> This Statement describes significant administrative actions proposed to implement the Uruguay Round agreements. In addition, incorporated into this Statement are two other statements required under section 1103: (1) an explanation of how the implementing bill and proposed administrative action will change or affect existing law; and (2) a statement setting forth the reasons why the implementing bill and proposed administrative action are necessary or appropriate to carry out the Uruguay Round agreements.
>
> As is the case with earlier Statements of Administrative Action submitted to the Congress in connection with fast-track bills, this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law. Furthermore, the Administration understands that it is the expectation of the Congress

[70] *See, e.g.*, First Written Submission of the United States, paras. 193-195.
[71] *US – Export Restraints* para. 8.91.

> that future Administrations will observe and apply the interpretations and commitments set out in this Statement. Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretations of those agreements included in this Statement carry particular authority.[72]

98. In other words, the SAA is a type of legislative history. In the United States, legislative history is often considered for purposes of ascertaining the meaning of a statute, but cannot change the meaning of, or override, the statute to which it relates. It provides authoritative interpretative guidance in respect of the statute. The status granted to the SAA under the US system, however, is only in respect to its interpretive authority *vis à vis* the statute. Thus, the SAA operates only in conjunction with (and as an interpretive tool for) the US anti-dumping statute has no operational life of its own.[73] In addition, the SAA is not mandatory.

(iii) Sunset Regulations (Both the DOC's and the ITC's regulations), and

99. These regulations are US law. The regulations contain both mandatory and discretionary directives. The regulations have force and effect of law and must be followed where the language of the specific provision leaves no discretion. The regulations, however, have provisions that provide for the exercise of discretion by the applicable decision-maker. The regulations are issued in accordance with US federal agency rule-making procedures and are accorded controlling weight by US courts unless they are arbitrary, capricious, or manifestly contrary to the statute.[74] Thus, the regulations have an independent operational life of their own.[75]

(iv) Sunset Review Policy Bulletin.

100. Under US law, the *Sunset Policy Bulletin* is considered a non-binding statement, providing Commerce's general understanding of sunset-related issues not explicitly addressed by the statute and regulations.[76] In this regard, the *Sunset Policy Bulletin* has a legal status comparable to that of agency precedent. As with its administrative precedent, Commerce may depart from its policy bulletin in any particular case, so long as it explains the reasons for doing so.[77] The *Sunset Policy Bulletin* does nothing more than provide Commerce and the public with guidance as to how Commerce may interpret and apply the statute and its regulations in individual cases. The *Sunset Policy Bulletin* does not "do something concrete" for which it could be subject to independent legal challenge under the WTO agreements.

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[72] SAA, page 656 (Exhibit US-11). The reference to "section 1103" is to section 1103 of the Omnibus Trade and Competitiveness Act of 1988 ("1988 Act"). Among other things, the 1988 Act provided the Administration with fast-track negotiating authority with respect to the Uruguay Round.

[73] *US Export Restraints*, paras. 8.98 - 8.100.

[74] *See, e.g., Chevron USA. Inc. v. Natural Resources Defence Council, Inc.*, 467 US 837, 842, 81 L. Ed. 2d 694, 104 S. Ct. 2778-845 (1984).

[75] *US Export Restraints*, paras. 8108 - 8.113.

[76] *Sunset Policy Bulletin*, 63 FR at 18871 ("This policy bulletin proposes *guidance* regarding the conduct of sunset reviews. As described below, the proposed policies are intended to complement the applicable statutory and regulatory provisions by providing *guidance* on methodological or analytical issues not explicitly addressed by the statute and regulations.") (Emphasis added) (Exhibit ARG-35).

[77] As a matter of US administrative law, Commerce practice cannot be binding in the sense that Commerce is not obliged to follow its own precedent so long as it explains departures from such precedent. Thus, as a matter of law, Commerce practice cannot transform a discretionary measure into a mandatory measure.

Q31.

(a) Are "the SPB" and "the SAA" binding legal instruments under the US law?

101. No.

(b) If not, please explain the legal status of these two legal instruments under the US law and the purpose of having them?

102. Please see our responses to questions 30(ii) and 30(iv), as well as 20(d).

(c) Can the US administration depart from the provisions of the SAA and the SPB without formally amending them?

103. Both the SAA and the *Sunset Policy Bulletin* are forms of guidance and are not mandatory. Consequently, it is inapposite to discuss the SAA or the *Sunset Policy Bulletin* in terms of "departing" from them.

(d) Have the SAA and the SPB ever been amended?

104. No. There is no mechanism for amending the SAA.

ANNEX E-4

ANSWERS OF THE UNITED STATES TO QUESTIONS OF ARGENTINA – FIRST MEETING

8 January 2004

The Department's Sunset Review of OCTG from Argentina

Q1. Does Article 11.3 require countries to export to the United States in order to obtain termination of the measure? In a case where there are no exports, how would the Department make its determination of likelihood of dumping?

1. Article 11.3 of the AD Agreement does not provide criteria for making a likelihood determination in a sunset review.[1] The *Sunset Policy Bulletin* states that "normally" Commerce would find that a cessation of exports after the imposition of the order is highly probative that it would be likely dumping would continue or recur. Nevertheless, the likelihood determination ultimately would be based on all the facts present on the administrative record in a particular case.[2]

Q2. If there are some exports, but the company or companies representing 100 per cent exports to the United States during the 5 year period do not participate, what is the Department's conclusion regarding this company or companies? Does the statute mandate a likely dumping determination for this company or companies? What is the effect of this finding for the measure as a whole?

2. The statute mandates that Commerce make a company-specific likelihood finding with respect to a respondent interested party that has waived its right to participate in the sunset proceeding.[3] However, Commerce's final likelihood determination is made on an order-wide basis. In making that determination, Commerce will take into consideration all the facts present on the administrative record for that sunset review proceeding.

In this case:

(a) Did the Department conclude that the non-responding respondents were likely to dump?

3. Yes.

(b) What was the effect on the decision for the measure as a whole?

4. In the sunset review of OCTG from Argentina, Commerce considered these findings along with all the information on the record of the sunset review, including the prior agency determinations, the substantive and rebuttal responses of the domestic interested parties, and the substantive response

[1] See *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, Report of the Appellate Body, adopted 15 December 2003 ("*Japan Sunset*"), at para. 123.

[2] *See Sunset Policy Bulletin*, Section II.A, 63 Fed . Reg. at 18872 (Exhibit ARG-35).

[3] 19 USC. § 1671(c)(4)(B) (Exhibit ARG-1).

of the only Argentine respondent interested party to file a complete substantive response, Siderca, in accordance with section 751(c)(3)(B) of the Act and section 351.308(f) of the *Sunset Regulations.*[4]

(c) Given that the Department assumed that non-responding respondents represented 100 per cent of the exports, what opportunity did Siderca have to affect the outcome of the determination for the measure as a whole?

5. It is not known to the United States what may have been the effect, on the final sunset determination in the sunset review of OCTG from Argentina, of statements Siderca could have made or of any information Siderca may have provided because Siderca chose to participate minimally in the sunset review proceeding. In its substantive response, Siderca did not provide any argument or information beyond its assertions concerning the *de minimis* rate to be applied in a sunset review; nor did Siderca submit a rebuttal response, as provided in section 351.218(d)(4) of the *Sunset Regulations*. In addition, Siderca did not submit any comments on the adequacy determination generally or on the import statistics Commerce used to make the adequacy determination, as provided for in section 351.309(e) of the *Sunset Regulations*. In other words, Siderca failed to avail itself of several opportunities to affect the outcome of the determination.

(d) Under this scenario, what is the evidence that dumping is likely to continue?

6. As stated in the *Final Sunset Determination* and the *Decision Memorandum*, Commerce found that there was a likelihood of continuation or recurrence of dumping in the sunset review of OCTG from Argentina because there was evidence of dumping since the imposition of the order (i.e., there were entries of subject merchandise for which dumping duties were paid). Furthermore, Commerce considered that import volumes were reduced significantly and had remained depressed since the imposition of the order.[5]

Q3. In this case, did DOC attach any relevance to:

(a) the fact that Siderca was the only Argentine exporter ever investigated?

7. No.

(b) the errors that it had discovered in its own statistics in the no-shipment reviews?

8. No. For the administrative reviews initiated and later terminated for Siderca (periods of review ("POR"), 1995-1996, 1996-1997, and 1997-1998), only the administrative review for the 1996-1997 POR had no shipments of OCTG from Argentina. For the other two administrative reviews, although errors were discovered in the DOC's Census Bureau IM-145 import statistics with respect to Siderca's shipments of OCTG to the United States during these reviews, there were other shipments of OCTG from Argentina during these PORs. More importantly, Commerce's adequacy determination in the sunset review of OCTG from Argentina was made using the USITC's Trade Database, not the Census IM-145 data.

9. Notwithstanding Argentina's claims regarding the import statistics, neither Siderca nor any other interested party alleged, during the sunset review, that there were errors in the statistics Commerce used to make its aggregate adequacy determination. Notably, as the only respondent interested party to participate in the sunset review, Siderca did not file comments on the adequacy determination, as provided for in section 351.309(e) of the Sunset Regulations.

[4] *See Issues and Decision Memorandum for the Sunset Reviews of the AD Orders on Oil Country Tubular Goods from Argentina, Italy, Japan, and Korea* (Dep't Comm., 31 Oct. 2000) (final results) ("Decision Memorandum") at 4-5 (Exhibit ARG-51).

[5] *See Decision Memorandum* at 7 (Exhibit ARG-51).

(c) the fact that, even if some of the statistics represented Argentine OCTG, these exports were minuscule and commercially meaningless?

10. As discussed above, neither Siderca nor any other respondent interested party presented any arguments or comments in the sunset review of OCTG from Argentina concerning the import statistics Commerce used to determine the adequacy of the aggregate response and the effect the order had on shipments to the United States of Argentine OCTG. Notwithstanding Argentina's characterization of the import volumes ("minuscule and commercially meaningless"), the significant reduction and continued depressed condition of the Argentina OCTG imports for the five year period preceding the sunset review formed part of Commerce affirmative likelihood determination in the sunset review of OCTG from Argentina.[6]

Q4. The United States asserts that, under the waiver provisions, "there are two methods for a respondent interested party to waive its right to participate in a sunset review: (1) submit a statement affirmatively waiving participation; or (2) fail to submit a substantive response to Commerce's notice of initiation and allow Commerce to deem its non-response as a waiver of its right to participation." (US First Submission, para. 213). This reading, however, fails to acknowledge the regulation's instruction that Commerce "will consider the failure by a respondent interested party to file a <u>complete</u> substantive response . . . as a waiver of participation . . . ." (19 C.F.R. § 351.218(d)(2)(iii) (emphasis added)). Accordingly, the Department will deem a respondent interested party to have waived its participation where it files an incomplete substantive response. How is such a deemed waiver consistent with Articles 11.3?

11. In the sunset review of OCTG from Argentina, the respondent interested parties' response to the notice of initiation could only be characterized in two ways. First, Argentine respondent interested parties who filed a complete substantive response, namely Siderca. Second, the Argentine exporters of OCTG who collectively failed to respond to the notice of initiation at all. No respondent interested party filed an incomplete substantive response in the sunset review of OCTG from Argentina. Consequently, the relevance of this question to the present dispute is not clear to the United States. Furthermore, regardless of whether an interested party is considered to have waived participation, Commerce considers <u>any and all</u> information submitted during the sunset review in making the final sunset determination.

Q5. The United States argues that, "although Commerce used the facts available to make the final sunset determination of likelihood, Commerce did not apply facts available to the issue of whether there was a likelihood that dumping would continue or recur if the order were revoked with respect to Siderca specifically, because the sunset determination is made on an order-wide basis, not a company-specific basis." (US First Submission, para. 214). The United States thus suggests that the Department considered whether Siderca alone would be likely to dump upon termination of the order. What was the positive evidence that Siderca was likely to dump if the order were terminated?

12. Commerce makes its likelihood determination on an order-wide basis in all sunset reviews it conducts. In its final determination in the sunset review of OCTG from Argentina, Commerce did not base its finding of likelihood on Siderca alone.

Q6. In its first submission, the United States asserts that "'current information' is not the issue in a sunset review conducted pursuant to Article 11.3. Rather, the issue under Article 11.3 is whether dumping and injury are likely to continue or recur in the event of the expiry of the

[6] *See Decision Memorandum* at 4-5 (Exhibit ARG-51) and *Sunset Policy Bulletin*, 65 Fed. Reg. at 18872 (Exhibit ARG-35).

duty, an inherently forward-looking inquiry." (US First Submission, para. 265). How can a prospective determination of whether dumping is likely to continue, if there is no analysis of whether it exists currently? How does the United States support its statement in the Issues and Decision Memorandum that dumping continued throughout the order?

13. Nothing in Article 11.3 or elsewhere in the AD Agreement states how the Members are to determine likelihood in a sunset review. It is not clear to the United Stated how a current margin of dumping is necessarily indicative of future dumping. The AD Agreement recognizes this fact in providing footnote 9.

14. Since the affirmative preliminary determination in the original anti-dumping investigation of OCTG from Argentina, the United States has been collecting cash deposits on all entries of the subject merchandise. There have been no administrative reviews of the order. Therefore, for all imports of OCTG entered since the affirmative preliminary determination, the United States has been assessing and collecting dumping duties on OCTG from Argentina.

Q7. Does the United States agree that the determination in the original investigation was made on the basis of the practice of zeroing? Does the United States agree with Argentina's assertion that, without the practice of zeroing, Siderca would not have had a positive dumping margin? Leaving aside the question of whether zeroing was proper at the time of the investigation in 1994/95, does the United States believe that a margin calculated on the basis of zeroing can be relied upon as the evidence of likely continuation or recurrence of dumping in an 11.3 review?

15. The term "zeroing" is not found in the AD Agreement. It arose in the *EC – Bed Linen* dispute and involved the EC's calculation of dumping margins in an original investigation on an average-to-average basis. The Appellate Body found in that dispute determined that the EC's methodology was "inconsistent with Article 2.4.2 of the AD Agreement. Argentina has neither claimed nor demonstrated – nor does the United States agree – that the methodology Commerce used to calculate a dumping margin for Siderca in the original investigation is the same methodology considered by the Appellate Body in *EC Bed Linen*.

<u>The Commission's Sunset Review of OCTG from Argentina</u>

Q1. The United States argues that the Commission applies a "likely" standard in its sunset determinations. The United States supports this statement, in part, by referring to the fact that its national courts ultimately approved the Commission's remand determination in the Usinor litigation. Is it the United States' position that it applied the same standard ("likely") in the remand determination as it applied in the original sunset determination in that case?

16. No. The US International Trade Commission ("ITC") did not apply the same standard in the Usinor remand determination as it had in its original sunset determination in that case. As the ITC explained in its remand determination:

> For the purpose of the Commission's determinations on remand in these reviews we follow the Court's instructions to apply the meaning of "likely" as "probable," not "possible." To the extent the Court uses "probable" to impute to "likely" a higher level of certainty of result than "likely," we also apply that standard, but only for purposes of this remand, as we find such standard to be inconsistent with the statute and the SAA.[7]

[7] *Usinor Remand Determination* at 14 (USITC July 2002) (Exhibit US-19).

17. Later events made it clear that the ITC in the Usinor remand determination applied a "likely" standard that was more stringent than the US Court of International Trade actually construed US domestic law to require. This became evident when the Court subsequently stated in affirming the ITC's remand determination that the Court did not interpret "likely" to "imply any degree of certainty.[8] Moreover, there was no question on the Court's part that some of the Commissioners in the original determination had construed the term "likely" in a manner consistent with the US statutory requirements.[9] Indeed, apart from the uncertainty on the part of other Commissioners as to whether the Court's equating the meaning of the term "likely" with the word "probable" required application of a higher standard in sunset reviews, it is fair to say that there would have been little or no disagreement about the standard to be applied in such proceedings.

Q2. Does the United States believe that there is a difference between the term "injury" as used in Article 11.1 and the term "injury" as used in Article 11.3? Does the United States believe that the term "injury" as used in Article 11.1 is different from the term "injury" as used in Article 3?

18. The more appropriate question is whether there is a difference between the *determinations* called for in Articles 11.1 and 11.3. The United States submits that the analysis provided for in Article 11.1 is different than that required by paragraph 3 of Article 11. More specifically, paragraph 1 of Article 11 speaks of existing "injury," using the present tense of the verb "to be," i.e., "dumping which is causing injury." Paragraph 3, on the other hand, speaks of the likelihood of the "continuation or recurrence of . . . injury." These provisions have a different focus and involve entirely different determinations, as the Appellate Body has recognized on more than one occasion.[10]

19. As suggested by the response to the first part of Argentina's question, the United States also does not contend that there is a difference in the term "injury" as used in Article 3 and Article 11.1 of the Anti-Dumping Agreement.

Q3. In the sunset review of Argentine OCTG, did the Commission ever consider Argentine exports on an individual basis, that is, without cumulating the Argentine exports with those of other countries? If not, does the United States consider that Argentina has an independent right to termination under Article 11.3?

20. The ITC considered Argentine exports on an individual basis only in connection with its analysis of whether it was appropriate to cumulate the volume and effect of imports from the five countries subject to the sunset reviews. The ITC found that there likely would be a reasonable overlap of competition between the subject imports (including imports from Argentina) and domestically produced casing and tubing, and among the subject imports themselves, sufficient to warrant cumulation.

21. The United States does not consider that Argentina has a right to termination under Article 11.3 premised on the examination only of whether the revocation of the anti-dumping duty order relating to subject imports from Argentina will lead to a continuation or recurrence of injury. As discussed in the United States' second written submission, Article 11.3 does not confer such a right. Moreover, since imports from a group of countries may cumulatively cause injury even though imports from individual countries in this group do not,[11] it would be illogical to require that sunset

[8] *Usinor Industeel v. United States*, Slip Op. 02-152 at 6 (CIT 20 December 2002) (Exhibit US-18).

[9] *Usinor Industeel v. United States*, Slip Op. 02-152 at 6 (CIT 20 December 2002) (Exhibit US-18); *see also*, *Indorama Chemicals v. USITC*, Slip Op. 02-105 at 20 (CIT 4 September 2002) (sunset standard based on "likelihood," not certainty) (Exhibit US-26).

[10] *US-German Steel*, AB Report, para. 87, *US-Japan Sunset*, AB Report, para. 106

[11] *See European Communities - Anti-dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, Report of the Appellate Body, adopted 22 July 2003, para. 116.

reviews be conducted only on a country-specific basis. Such a requirement would permit anti-dumping duties to expire even though the expiry of the duty would be likely to lead to continuation or recurrence of injury.

Q4. On the facts of this case, could the Commission have rendered an affirmative likelihood of injury determination without conducting a cumulative analysis?

22. The ITC declines to speculate on what the outcome of the sunset review of casing and tubing from Argentina would have been in the absence of cumulation.

Q5. In certain portions of the determination, the Commission refers to "Tenaris." Did the Commission make any allowance for the fact that Tenaris included companies that were not subject to the orders under review? If so, please indicate where the record reflects any consideration of this fact.

23. The ITC recognized that one of the five companies that formed Tenaris (the producer Algoma in Canada) was not located in the five subject countries.[12]

Q6. Does any of the evidence relating to the likely price effects of imports and the likely impact of increased imports relate to Argentina? If so, was this evidence sufficient to demonstrate that injury was likely to continue or recur if the order applicable to Argentine OCTG were terminated?

24. Because the ITC cumulated the likely volume and impact of subject imports from the five countries involved, it did not generally focus on the likely price effects or impact of imports from any single country.

25. Some of the evidence relating to likely price effects relates to casing and tubing from Argentina. For example, in reviewing pricing data from the original investigation, the ITC noted that "[p]urchasers repeatedly stated that subject imports from Argentina, Italy, Korea, Japan, and Mexico exerted downward pressure on domestic prices.[13] Also, the ITC noted that subject imports were highly substitutable for domestic casing and tubing, and based this conclusion on questionnaire responses from producers, importers and purchasers of casing and tubing.[14] These questionnaire responses sometimes singled out casing and tubing from Argentina.[15] In analyzing the likely impact of subject imports, the ITC did not single out any of the five subject countries.

26. The ITC declines to speculate on what the outcome of the sunset review of casing and tubing from Argentina would have been if the data relating to casing and tubing from Argentina. had been examined in isolation.

Q7. In this case, did the Commission consider that injury was likely to continue or likely to recur? If the decision was based on the likelihood of a recurrence of injury, what was the positive evidence that imports from the individual countries would have an impact on the US market at the same time? If there was no positive evidence to support the proposition that imports from the countries would have an impact on the domestic industry at the same time, what is the basis for considering that the cumulated imports were likely to cause a recurrence of injury?

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[12] *Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico*, USITC Pub. 3434, Inv. Nos. 701-TA-364, 731-TA-711, and 713-716 (June 2001) ("*ITC Report*") at 16 (Exhibit ARG-54)

[13] *ITC Report* at 21.

[14] *ITC Report* at 21.

[15] *ITC Report* at II-17-18.

27. Article 11.3 does not prescribe the methodology Members use in conducting sunset reviews. The ITC found that revocation of the anti-dumping duty orders from the five subject countries, and the countervailing duty order on imports of casing and tubing from Italy, would be likely to lead to continuation *or* recurrence of material injury to an industry in the United States.[16] Such a finding is consistent with Article 11.3.[17] There is no obligation under Article 11 to determine that injury would be likely to recur as opposed to likely to continue, as there is no requirement for a determination that the dumping duties have eliminated the injury. Further, a finding that either injury is likely to recur or continue, when coupled with a similar finding regarding dumping, is adequate to permit retention of the anti-dumping duty order.

[16] *ITC Report* at 1.

[17] *See, United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon-Quality Line Pipe From Korea*, WT/DS202/AB/R, Report of the Appellate Body, adopted 8 March 2002, para. 167 (unnecessary to make a discrete finding of "serious injury" or "threat of serious injury" when making a determination whether to apply a safeguard measure).

ANNEX E-5

ANSWERS OF THE UNITED STATES TO QUESTIONS OF ARGENTINA – FIRST MEETING (REVISED VERSION)

27 February 2004

The Department's Sunset Review of OCTG from Argentina

Q1. Does Article 11.3 require countries to export to the United States in order to obtain termination of the measure? In a case where there are no exports, how would the Department make its determination of likelihood of dumping?

1. Article 11.3 of the AD Agreement does not provide criteria for making a likelihood determination in a sunset review.[1] The *Sunset Policy Bulletin* states that "normally" Commerce would find that a cessation of exports after the imposition of the order is highly probative that it would be likely dumping would continue or recur. Nevertheless, the likelihood determination ultimately would be based on all the facts present on the administrative record in a particular case.[2]

Q2. If there are some exports, but the company or companies representing 100 per cent exports to the United States during the 5 year period do not participate, what is the Department's conclusion regarding this company or companies? Does the statute mandate a likely dumping determination for this company or companies? What is the effect of this finding for the measure as a whole?

2. The statute mandates that Commerce make a company-specific likelihood finding with respect to a respondent interested party that has waived its right to participate in the sunset proceeding.[3] However, Commerce's final likelihood determination is made on an order-wide basis. In making that determination, Commerce will take into consideration all the facts present on the administrative record for that sunset review proceeding.

In this case:

(a) Did the Department conclude that the non-responding respondents were likely to dump?

3. Yes.

(b) What was the effect on the decision for the measure as a whole?

4. In the sunset review of OCTG from Argentina, Commerce considered these findings along with all the information on the record of the sunset review, including the prior agency determinations, the substantive and rebuttal responses of the domestic interested parties, and the substantive response

[1] See *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, Report of the Appellate Body, adopted 15 December 2003 ("*Japan Sunset*"), at para. 123.

[2] *See Sunset Policy Bulletin*, Section II.A, 63 Fed . Reg. at 18872 (Exhibit ARG-35).

[3] 19 USC. § 1671(c)(4)(B) (Exhibit ARG-1).

of the only Argentine respondent interested party to file a complete substantive response, Siderca, in accordance with section 751(c)(3)(B) of the Act and section 351.308(f) of the *Sunset Regulations.*[4]

(c) Given that the Department assumed that non-responding respondents represented 100 per cent of the exports, what opportunity did Siderca have to affect the outcome of the determination for the measure as a whole?

5. It is not known to the United States what may have been the effect, on the final sunset determination in the sunset review of OCTG from Argentina, of statements Siderca could have made or of any information Siderca may have provided because Siderca chose to participate minimally in the sunset review proceeding. In its substantive response, Siderca did not provide any argument or information beyond its assertions concerning the *de minimis* rate to be applied in a sunset review; nor did Siderca submit a rebuttal response, as provided in section 351.218(d)(4) of the *Sunset Regulations*. In addition, Siderca did not submit any comments on the adequacy determination generally or on the import statistics Commerce used to make the adequacy determination, as provided for in section 351.309(e) of the *Sunset Regulations*. In other words, Siderca failed to avail itself of several opportunities to affect the outcome of the determination.

(d) Under this scenario, what is the evidence that dumping is likely to continue?

6. As stated in the *Final Sunset Determination* and the *Decision Memorandum*, Commerce found that there was a likelihood of continuation or recurrence of dumping in the sunset review of OCTG from Argentina because there was evidence of dumping since the imposition of the order (i.e., there were entries of subject merchandise for which dumping duties were paid). Furthermore, Commerce considered that import volumes were reduced significantly and had remained depressed since the imposition of the order.[5]

Q3. In this case, did DOC attach any relevance to:

(a) the fact that Siderca was the only Argentine exporter ever investigated?

7. No.

(b) the errors that it had discovered in its own statistics in the no-shipment reviews?

8. No. For the administrative reviews initiated and later terminated for Siderca (periods of review ("POR"), 1995-1996, 1996-1997, and 1997-1998), only the administrative review for the 1996-1997 POR had no shipments of OCTG from Argentina. For the other two administrative reviews, although errors were discovered in the DOC's Census Bureau IM-145 import statistics with respect to Siderca's shipments of OCTG to the United States during these reviews, there were other shipments of OCTG from Argentina during these PORs. More importantly, Commerce's adequacy determination in the sunset review of OCTG from Argentina was made using the USITC's Trade Database, not the Census IM-145 data.

9. Notwithstanding Argentina's claims regarding the import statistics, neither Siderca nor any other interested party alleged, during the sunset review, that there were errors in the statistics Commerce used to make its aggregate adequacy determination. Notably, as the only respondent interested party to participate in the sunset review, Siderca did not file comments on the adequacy determination, as provided for in section 351.309(e) of the Sunset Regulations.

[4] *See Issues and Decision Memorandum for the Sunset Reviews of the AD Orders on Oil Country Tubular Goods from Argentina, Italy, Japan, and Korea* (Dep't Comm., 31 Oct. 2000) (final results) ("Decision Memorandum") at 4-5 (Exhibit ARG-51).

[5] *See Decision Memorandum* at 7 (Exhibit ARG-51).

(c) the fact that, even if some of the statistics represented Argentine OCTG, these exports were minuscule and commercially meaningless?

10. As discussed above, neither Siderca nor any other respondent interested party presented any arguments or comments in the sunset review of OCTG from Argentina concerning the import statistics Commerce used to determine the adequacy of the aggregate response and the effect the order had on shipments to the United States of Argentine OCTG. Notwithstanding Argentina's characterization of the import volumes ("minuscule and commercially meaningless"), the significant reduction and continued depressed condition of the Argentina OCTG imports for the five year period preceding the sunset review formed part of Commerce affirmative likelihood determination in the sunset review of OCTG from Argentina.[6]

Q4. The United States asserts that, under the waiver provisions, "there are two methods for a respondent interested party to waive its right to participate in a sunset review: (1) submit a statement affirmatively waiving participation; or (2) fail to submit a substantive response to Commerce's notice of initiation and allow Commerce to deem its non-response as a waiver of its right to participation." (US First Submission, para. 213). This reading, however, fails to acknowledge the regulation's instruction that Commerce "will consider the failure by a respondent interested party to file a complete substantive response . . . as a waiver of participation . . . ." (19 C.F.R. § 351.218(d)(2)(iii) (emphasis added)). Accordingly, the Department will deem a respondent interested party to have waived its participation where it files an incomplete substantive response. How is such a deemed waiver consistent with Articles 11.3?

11. In the sunset review of OCTG from Argentina, the respondent interested parties' response to the notice of initiation could only be characterized in two ways. First, Argentine respondent interested parties who filed a complete substantive response, namely Siderca. Second, the Argentine exporters of OCTG who collectively failed to respond to the notice of initiation at all. No respondent interested party filed an incomplete substantive response in the sunset review of OCTG from Argentina. Consequently, the relevance of this question to the present dispute is not clear to the United States. Furthermore, regardless of whether an interested party is considered to have waived participation, Commerce considers any and all information submitted during the sunset review in making the final sunset determination.

Q5. The United States argues that, "although Commerce used the facts available to make the final sunset determination of likelihood, Commerce did not apply facts available to the issue of whether there was a likelihood that dumping would continue or recur if the order were revoked with respect to Siderca specifically, because the sunset determination is made on an order-wide basis, not a company-specific basis." (US First Submission, para. 214). The United States thus suggests that the Department considered whether Siderca alone would be likely to dump upon termination of the order. What was the positive evidence that Siderca was likely to dump if the order were terminated?

12. Commerce makes its likelihood determination on an order-wide basis in all sunset reviews it conducts. In its final determination in the sunset review of OCTG from Argentina, Commerce did not base its finding of likelihood on Siderca alone.

Q6. In its first submission, the United States asserts that "'current information' is not the issue in a sunset review conducted pursuant to Article 11.3. Rather, the issue under Article 11.3 is whether dumping and injury are likely to continue or recur in the event of the expiry of the

[6] *See Decision Memorandum* at 4-5 (Exhibit ARG-51) and *Sunset Policy Bulletin*, 65 Fed. Reg. at 18872 (Exhibit ARG-35).

duty, an inherently forward-looking inquiry." (US First Submission, para. 265). How can a prospective determination of whether dumping is likely to continue, if there is no analysis of whether it exists currently? How does the United States support its statement in the Issues and Decision Memorandum that dumping continued throughout the order?

13. Nothing in Article 11.3 or elsewhere in the AD Agreement states how the Members are to determine likelihood in a sunset review. It is not clear to the United Stated how a current margin of dumping is necessarily indicative of future dumping. The AD Agreement recognizes this fact in providing footnote 9.

14. Since the issuance of the anti-dumping duty order following original anti-dumping investigation of OCTG from Argentina, the United States has been collecting cash deposits on all entries of the subject merchandise. There have been no administrative reviews of the order. Therefore, for all imports of OCTG entered since the anti-dumping duty order, the United States has been assessing and collecting dumping duties on OCTG from Argentina.

Q7. Does the United States agree that the determination in the original investigation was made on the basis of the practice of zeroing? Does the United States agree with Argentina's assertion that, without the practice of zeroing, Siderca would not have had a positive dumping margin? Leaving aside the question of whether zeroing was proper at the time of the investigation in 1994/95, does the United States believe that a margin calculated on the basis of zeroing can be relied upon as the evidence of likely continuation or recurrence of dumping in an 11.3 review?

15. The term "zeroing" is not found in the AD Agreement. It arose in the *EC – Bed Linen* dispute and involved the EC's calculation of dumping margins in an original investigation on an average-to-average basis. The Appellate Body found in that dispute determined that the EC's methodology was "inconsistent with Article 2.4.2 of the AD Agreement. Argentina has neither claimed nor demonstrated – nor does the United States agree – that the methodology Commerce used to calculate a dumping margin for Siderca in the original investigation is the same methodology considered by the Appellate Body in *EC Bed Linen*.

<u>The Commission's Sunset Review of OCTG from Argentina</u>

Q1. The United States argues that the Commission applies a "likely" standard in its sunset determinations. The United States supports this statement, in part, by referring to the fact that its national courts ultimately approved the Commission's remand determination in the Usinor litigation. Is it the United States' position that it applied the same standard ("likely") in the remand determination as it applied in the original sunset determination in that case?

16. No. The US International Trade Commission ("ITC") did not apply the same standard in the Usinor remand determination as it had in its original sunset determination in that case. As the ITC explained in its remand determination:

> For the purpose of the Commission's determinations on remand in these reviews we follow the Court's instructions to apply the meaning of "likely" as "probable," not "possible." To the extent the Court uses "probable" to impute to "likely" a higher level of certainty of result than "likely," we also apply that standard, but only for purposes of this remand, as we find such standard to be inconsistent with the statute and the SAA.[7]

[7] *Usinor Remand Determination* at 14 (USITC July 2002) (Exhibit US-19).

17. Later events made it clear that the ITC in the Usinor remand determination applied a "likely" standard that was more stringent than the US Court of International Trade actually construed US domestic law to require. This became evident when the Court subsequently stated in affirming the ITC's remand determination that the Court did not interpret "likely" to "imply any degree of certainty.[8] Moreover, there was no question on the Court's part that some of the Commissioners in the original determination had construed the term "likely" in a manner consistent with the US statutory requirements.[9] Indeed, apart from the uncertainty on the part of other Commissioners as to whether the Court's equating the meaning of the term "likely" with the word "probable" required application of a higher standard in sunset reviews, it is fair to say that there would have been little or no disagreement about the standard to be applied in such proceedings.

Q2. Does the United States believe that there is a difference between the term "injury" as used in Article 11.1 and the term "injury" as used in Article 11.3? Does the United States believe that the term "injury" as used in Article 11.1 is different from the term "injury" as used in Article 3?

18. The more appropriate question is whether there is a difference between the *determinations* called for in Articles 11.1 and 11.3. The United States submits that the analysis provided for in Article 11.1 is different than that required by paragraph 3 of Article 11. More specifically, paragraph 1 of Article 11 speaks of existing "injury," using the present tense of the verb "to be," i.e., "dumping which is causing injury." Paragraph 3, on the other hand, speaks of the likelihood of the "continuation or recurrence of . . . injury." These provisions have a different focus and involve entirely different determinations, as the Appellate Body has recognized on more than one occasion.[10]

19. As suggested by the response to the first part of Argentina's question, the United States also does not contend that there is a difference in the term "injury" as used in Article 3 and Article 11.1 of the Anti-Dumping Agreement.

Q3. In the sunset review of Argentine OCTG, did the Commission ever consider Argentine exports on an individual basis, that is, without cumulating the Argentine exports with those of other countries? If not, does the United States consider that Argentina has an independent right to termination under Article 11.3?

20. The ITC considered Argentine exports on an individual basis only in connection with its analysis of whether it was appropriate to cumulate the volume and effect of imports from the five countries subject to the sunset reviews. The ITC found that there likely would be a reasonable overlap of competition between the subject imports (including imports from Argentina) and domestically produced casing and tubing, and among the subject imports themselves, sufficient to warrant cumulation.

21. The United States does not consider that Argentina has a right to termination under Article 11.3 premised on the examination only of whether the revocation of the anti-dumping duty order relating to subject imports from Argentina will lead to a continuation or recurrence of injury. As discussed in the United States' second written submission, Article 11.3 does not confer such a right. Moreover, since imports from a group of countries may cumulatively cause injury even though imports from individual countries in this group do not,[11] it would be illogical to require that sunset

[8] *Usinor Industeel v. United States*, Slip Op. 02-152 at 6 (CIT 20 December 2002) (Exhibit US-18).

[9] *Usinor Industeel v. United States*, Slip Op. 02-152 at 6 (CIT 20 December 2002) (Exhibit US-18); *see also*, *Indorama Chemicals v. USITC*, Slip Op. 02-105 at 20 (CIT 4 September 2002) (sunset standard based on "likelihood," not certainty) (Exhibit US-26).

[10] *US-German Steel*, AB Report, para. 87, *US-Japan Sunset*, AB Report, para. 106

[11] *See European Communities - Anti-dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, Report of the Appellate Body, adopted 22 July 2003, para. 116.

reviews be conducted only on a country-specific basis. Such a requirement would permit anti-dumping duties to expire even though the expiry of the duty would be likely to lead to continuation or recurrence of injury.

Q4. On the facts of this case, could the Commission have rendered an affirmative likelihood of injury determination without conducting a cumulative analysis?

22. The ITC declines to speculate on what the outcome of the sunset review of casing and tubing from Argentina would have been in the absence of cumulation.

Q5. In certain portions of the determination, the Commission refers to "Tenaris." Did the Commission make any allowance for the fact that Tenaris included companies that were not subject to the orders under review? If so, please indicate where the record reflects any consideration of this fact.

23. The ITC recognized that one of the five companies that formed Tenaris (the producer Algoma in Canada) was not located in the five subject countries.[12]

Q6. Does any of the evidence relating to the likely price effects of imports and the likely impact of increased imports relate to Argentina? If so, was this evidence sufficient to demonstrate that injury was likely to continue or recur if the order applicable to Argentine OCTG were terminated?

24. Because the ITC cumulated the likely volume and impact of subject imports from the five countries involved, it did not generally focus on the likely price effects or impact of imports from any single country.

25. Some of the evidence relating to likely price effects relates to casing and tubing from Argentina. For example, in reviewing pricing data from the original investigation, the ITC noted that "[p]urchasers repeatedly stated that subject imports from Argentina, Italy, Korea, Japan, and Mexico exerted downward pressure on domestic prices.[13] Also, the ITC noted that subject imports were highly substitutable for domestic casing and tubing, and based this conclusion on questionnaire responses from producers, importers and purchasers of casing and tubing.[14] These questionnaire responses sometimes singled out casing and tubing from Argentina.[15] In analyzing the likely impact of subject imports, the ITC did not single out any of the five subject countries.

26. The ITC declines to speculate on what the outcome of the sunset review of casing and tubing from Argentina would have been if the data relating to casing and tubing from Argentina. had been examined in isolation.

Q7. In this case, did the Commission consider that injury was likely to continue or likely to recur? If the decision was based on the likelihood of a recurrence of injury, what was the positive evidence that imports from the individual countries would have an impact on the US market at the same time? If there was no positive evidence to support the proposition that imports from the countries would have an impact on the domestic industry at the same time, what is the basis for considering that the cumulated imports were likely to cause a recurrence of injury?

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[12] *Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico*, USITC Pub. 3434, Inv. Nos. 701-TA-364, 731-TA-711, and 713-716 (June 2001) ("*ITC Report*") at 16 (Exhibit ARG-54)

[13] *ITC Report* at 21.

[14] *ITC Report* at 21.

[15] *ITC Report* at II-17-18.

27. Article 11.3 does not prescribe the methodology Members use in conducting sunset reviews. The ITC found that revocation of the anti-dumping duty orders from the five subject countries, and the countervailing duty order on imports of casing and tubing from Italy, would be likely to lead to continuation *or* recurrence of material injury to an industry in the United States.[16] Such a finding is consistent with Article 11.3.[17] There is no obligation under Article 11 to determine that injury would be likely to recur as opposed to likely to continue, as there is no requirement for a determination that the dumping duties have eliminated the injury. Further, a finding that either injury is likely to recur or continue, when coupled with a similar finding regarding dumping, is adequate to permit retention of the anti-dumping duty order.

[16] *ITC Report* at 1.

[17] *See, United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon-Quality Line Pipe From Korea*, WT/DS202/AB/R, Report of the Appellate Body, adopted 8 March 2002, para. 167 (unnecessary to make a discrete finding of "serious injury" or "threat of serious injury" when making a determination whether to apply a safeguard measure).

ANNEX E-6

QUESTION OF THE EUROPEAN COMMUNITIES TO THE UNITED STATES – THIRD PARTIES SESSION

Does the United States consider that the phrase "during the investigation phase" in Article 2.4.2 *AD Agreement* means that Article 2.4.2 does not apply in an Article 11.3 review?

If so, does the United States consider that the word "investigation" in Article 2.4.2 *AD Agreement* refers only to initial or original investigations within the meaning of Article 5 *AD Agreement*, or does it also refer to an investigation as that word is used in Article 6 *AD Agreement* – and if not the latter, why not?

Taking into account the fact that 11.4 *AD Agreement*, unlike 11.5, does not use the term *mutatis mutandis*, does the United States consider that an Article 11.3 review does not involve an investigation within the meaning of Article 6 *AD Agreement*, notwithstanding the repeated use of the word "investigation" in Article 6, and if so, why?

Would the United States explain the consistency of its position with the use in WTO anti-dumping law, in United States legislation and in the United States documents relating to the contested determination, of the terms : definition of dumping; anti-dumping proceedings; initial or original investigation; and review investigation – with particular regard to the instances identified in footnotes 43, 46, 47 and 48 of the European Communities' written submission?

Having regard, in particular, to the *EC – Bed Linen* case, does the United States consider that, under the current *AD Agreement*, zeroing such as that used in the original dumping calculation in the present case would constitute a "fair comparison" within the meaning of Article 2.4 *AD Agreement*, and if so, why?

ANNEX E-7

ANSWERS OF MEXICO TO QUESTIONS OF ARGENTINA – THIRD PARTIES SESSION

In its oral statement to the Panel on 10 December, Mexico referred to the Sunset Review of Oil Country Tubular Goods (OCTG) from Mexico, included as Exhibit ARG-63, Tab-179, in Argentina's First Submission. Would Mexico indicate the type of review that was conducted and the result? Would Mexico indicate the nature and content of the information that it supplied to the Department of Commerce? Would Mexico please describe whether the information that Mexico provided to the Department of Commerce was relied upon by the Department in making its determination? Would Mexico please describe the basis for the Department's determination in that case?

This document contains the following replies to the clarifications requested by the Government of Argentina:

1. Type of review and results

In the sunset review of oil country tubular goods (OCTG) from Mexico, the Department of Commerce (hereafter the "Department") conducted a "full review" as defined in United States legislation. The decision to conduct a "full review" is mentioned in the documents included in Exhibit ARG-63, Tab-179, which includes the Department's Final and Preliminary Determinations in the sunset review. The result of the "full" review in this case was a decision that revocation would be likely to lead to a recurrence of dumping.

2. Nature and content of the information provided during the review

The two major Mexican exporters of OCTG took part in the review.

As described in the *Issues and Decisions Memorandum* accompanying both the Final Determination and the Preliminary Determination included in Exhibit ARG-63, Tab-179, both companies explained in detail that they had participated in annual reviews and that the Department had concluded that the two countries had not engaged in dumping. Particularly, in the case of TAMSA, the fact that for three consecutive reviews the margin of dumping was zero was the best evidence that dumping was not likely to continue or recur. Additionally, with regard to the fact that the Department used the margin of the original investigation (21.7 per cent, which was a result of a disputed claim that TAMSA withheld certain information related to the company's financial expenses during the sharp devaluation of the Mexican peso in 1994), TAMSA provided evidence to show that such rate from the original investigation could no longer be applicable owing to two significant changes since the time of the original investigation five years earlier. First, the company's level of foreign currency indebtedness had been significantly reduced. Second, the stability of the Mexican peso meant that there had been no major risk of a devaluation of the peso, similar to that used as the basis for the "best information available" calculation in the original investigation.

In the case of the other Mexican company, Hylsa explained that, because it had not been investigated in the original 1994/1995 investigation and, in the only annual review in which it had participated it was found not to be dumping, there was no factual basis to consider that it was ever dumping or that dumping was likely to continue or recur.

3. The Department's consideration of the information provided by the Mexican companies and the basis for the Department's determination

With regard to the question whether the Department relied upon the Mexican exporters' information and the basis for the Department's determination, the Preliminary and Final Determinations show that the Department totally ignored the information provided by the exporters. In fact, both determinations demonstrate that the Department relied systematically on the statute, the Statement of Administrative Action and the *Sunset Policy Bulletin* as the basis for its determination, without taking into account the information submitted by the exporters. Thus, the sole basis for determining that dumping was likely to continue or recur was import volumes.

This conclusion can be drawn from the *Issues and Decision Memorandum* included in Exhibit ARG-63, Tab-179. The Memorandum summarizes the arguments presented in the parties' case and rebuttal briefs, including TAMSA's argument that the Preliminary Determination "relied too heavily on 'inferences' when it determined that dumping is likely to recur" and Hylsa's argument that the information it submitted showed that dumping was not likely to recur. Notwithstanding this and other evidence submitted by the Mexican companies, the response to these arguments appears on page 4 of the Memorandum, demonstrating the following decision-making process:

(i) The statute, the Statement of Administrative Action and *Sunset Policy Bulletin* provide "guidance on methodological and analytical issues, including the basis for likelihood determinations". Particularly, the *Sunset Policy Bulletin* states that the Department "normally will determine that revocation of an anti-dumping order is likely to lead to continuation or recurrence of dumping where dumping was eliminated after the issuance of the order and import volumes of the subject merchandise declined significantly"; and

(ii) given the fact that there was a decrease in import volumes after the imposition of the anti-dumping measure in 1995;[1]

(iii) the Department concluded that "Because we continue to find that Mexican export volumes in the post-order period were significantly lower than pre-order levels, we also continue to find that a recurrence of dumping of OCTG from Mexico is likely if the order were to be revoked". Thus, the Department determined that, if the order were removed, it "would be likely to lead to continuation or recurrence of dumping at the following percentage weighted-average margins": TAMSA 27.70 per cent, Hylsa 21.70 per cent; "all others" 21.70 per cent. *Issues and Decision Memorandum*, included in Exhibit ARG-63, Tab-179.

[1] It is important to note that, responding to TAMSA's explanation of why the import volumes had decreased, the Department stated that the business justification for the lower volume "in no way conflicted with the Department's inference; if it became 'prudent and necessary' to make fewer sales at more fairly traded prices while the discipline of the order was in place, it is reasonable to infer that dumping would be likely to resume if such disciplines ceased to exist and it was not longer 'necessary' for TAMSA and other Mexican exporters to maintain the same business strategy".

ANNEX E-8

ANSWERS OF ARGENTINA TO QUESTIONS OF THE PANEL – SECOND MEETING

13 February 2004

1. The Panel notes "Heading A" on page 36 of Argentina's first written submission and Argentina's statements in paragraph 120 of its first written submission and paragraph 51 of its second written submission. Please clarify whether Argentina's claim challenging the US law's waiver provisions under Articles 11.3, 6.1 and 6.2 of the Agreement are limited to "deemed waivers", or, whether they also take issue with "affirmative waivers".

Response:

Argentina believes that both forms of waivers – "deemed waivers" and "affirmative waivers" – are inconsistent with Article 11.3 of the Agreement. The statute and the regulations mandate an affirmative determination of likelihood of dumping in the event of a waiver, whether resulting from an affirmative statement of waiver, no response, an incomplete response, or the 50 per cent threshold test. In Argentina's view, the notion of a statute and regulation mandating an affirmative determination of likelihood of dumping without any analysis is inconsistent with Article 11.3.

If a party does not cooperate (for example, through an affirmative waiver), the Anti-Dumping Agreement permits the investigating authority to render its determination on the basis of facts available, subject to the disciplines of Article 6.8 and Annex II. However, in no circumstance is the authority relieved from the obligation of conducting an investigation and making a determination based on evidence.

Argentina's challenge with respect to Articles 6.1 and 6.2 is limited to the "deemed waiver." Under the deemed waiver provision,[1] the Department considers an individual respondent to have waived participation where the respondent submits a substantive response that is inadequate – either because it is incomplete or because the respondent does not satisfy the 50 per cent threshold test.[2] By requiring the Department to render an affirmative likelihood determination for a respondent that submits a substantive response, the deemed waiver provision violates Articles 6.1 and 6.2.

As to Argentina's "as applied" argument, the only waiver(s) in the case of the Department's sunset review of the anti-dumping measure on Argentine OCTG would be classified as "deemed waiver(s)." No party affirmatively stated that it would not participate, and in fact the only response received indicated that the principal Argentine producer/exporter (Siderca) would cooperate fully. The deemed waiver(s) arose because (1) the Department considered Siderca's substantive response to be "inadequate"[3] and/or (2) the Department believed that other exporters should have responded. Either way, the statute and regulation then mandated that the Department render an affirmative likelihood determination. As explained in Argentina's brief, the deemed waiver led directly to an affirmative likelihood determination for Argentina in this case.

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[1] 19 C.F.R. § 351.218(d)(2)(iii).

[2] *See* 19 C.F.R. § 351.218(e)(1)(ii)(A)(requiring "complete" responses from exporters representing 50 per cent of total exports); 19 C.F.R. § 351.218(d)(2)(iii)(stating that incomplete responses will constitute waiver); and 19 USC. § 1675(c)(4)(B)(stating that waiver mandates an affirmative determination of likely dumping).

[3] *See Determination to Expedite* at 2 (ARG-50); *Issues and Decision Memorandum* at 3, 5, 7 (ARG-51).

2. The Panel notes that in sections VII.C.2 and VII.C.3 of its first written submission, Argentina challenges the application of the US waiver provisions to Siderca whereas in the following part of paragraph 6 of its second oral statement it also takes issue with the application of these provisions to Argentina:

> *Indeed, the Department's application of the waiver provisions to Siderca (or, at a minimum, to Argentina) is plainly indicated in the Department's Issues and Decision Memorandum.*

Please clarify the scope of Argentina's claim. More particularly, please explain whether, in the view of Argentina, the alleged application of the US waiver provisions in this sunset review impaired the rights of Argentina or Siderca.

Response:

Argentina's First Submission presents the waiver claim as it arises from the *Issues and Decision Memorandum*, which indicates that a waiver was applied to the "respondent interested parties,"[4] which Argentina reasonably interpreted to include Siderca. Nothing in the *Issues and Decision Memorandum* indicates that Argentina's understanding of the application of the waiver provision to Siderca was incorrect. The phrase "non-responding respondents" is never mentioned. Based on the description in the *Issues and Decision Memorandum*, Argentina considered that the waiver provisions were applied to Siderca, and therefore claimed that the application of the waiver provisions to Siderca was unjustified, violated Articles 11.3, 6.1, and 6.2 of the Agreement, and impaired Argentina's right under Article 11.3 to termination of the measure applied to its exports.

It was not until the US First Written Submission that the term "non-responding respondents" was used, and that the United States offered the argument that it did not apply the waiver provision to Siderca.[5] Argentina submits that accepting this argument by the United States would require the Panel to disregard the words used in the *Issues and Decision Memorandum*, which the Panel cannot do. Consistent with the statutory and regulatory scheme providing for "deemed waivers,"[6] the *Determination to Expedite* and the *Issues and Decision Memorandum* unambiguously state that the Department found Siderca's substantive response to be "inadequate," and that because the Department "did not receive an adequate response from respondent interested parties[,] . . . [t]his constitutes a waiver of participation."[7]

Even if the Panel accepts the US *ex post facto* justification, Argentina believes that the application of the waiver provisions to the so-called non-responding respondents also violates Articles 11.3, 6.1, and 6.2. With respect to Siderca, despite having offered to cooperate fully, the application of the waiver provision to the non-responding respondents mandated an affirmative likelihood determination, which prevented any type of "investigation" or "determination" based on an analysis of facts and arguments. With respect to Argentina, it deprived Argentina of termination of the measure without the type of substantive analysis that is required by Article 11.3, and without affording Argentina's principal OCTG producer and exporter, Siderca, the right to participate.

[4] *Issues and Decision Memorandum* at 5 (ARG-51).
[5] US First Submission, para. 216.
[6] *See* 19 C.F.R. § 351.218(e)(1)(ii)(A); 19 C.F.R. § 351.218(d)(2)(iii); and 19 USC. § 1675(c)(4)(B).
[7] *Determination to Expedite* at 2 (ARG-50); *Issues and Decision Memorandum* at 3, 5, 7 (ARG-51).

11. The Panel notes Argentina's allegation in its first written submission that in this sunset review the DOC failed to use the "likely" standard and applied a different standard instead.[8]

(a) The Panel notes that Argentina did not mention this claim in its second written submission. Please clarify whether Argentina is still pursuing this claim.

Response:

Argentina would like to clarify that it continues to make this claim. Argentina's claim is summarized in Heading D on page 58 of its First Written Submission. This claim contains several arguments including: (1) that Article 2 disciplines apply to Article 11.3 reviews; (2) that Article 11.3 reviews are prospective in nature and require fresh information; (3) that dumping must be "probable"; (4) that reviews are subject to the evidentiary requirements of Article 6; and (5) that the likely determination must be based on positive evidence. Argentina's claim, developed in Section D of its First Written Submission, is that the Department failed to satisfy each of these obligations and that its decision therefore violated the provisions of Articles 6 and 11.3.

In its Second Written Submission, Argentina developed the same arguments in Section III.C.3, beginning on page 40 (paragraphs 131-136). Paragraph 133 states: "The Department's reliance on such flawed and dated information necessarily resulted in speculation as to whether or not dumping would be likely to continue or recur were the order to be terminated, rather than a determination based on positive evidence."

In addition, Argentina's oral statement in the Panel's second substantive meeting with the Parties continues the development of this argument in paragraphs 20-23. In paragraph 22, Argentina speaks to the standard, stating: "Also, the United States still has never offered a logical explanation of what the 1.36 per cent rate says about future dumping, let alone the likelihood of future dumping. The rate is historic, with no relationship whatsoever to the forward-looking determination required to invoke the exception of Article 11.3 and continue the measure."

Finally, and equally important, throughout these proceedings, Argentina has argued that the Department employs a WTO-inconsistent presumption in all sunset reviews.[9] Operating together, the statute, the SAA, and Section II.A.3 of the *Sunset Policy Bulletin* direct the Department to treat historical dumping margins and past import volumes as decisive evidence of likely dumping in every sunset review, and ARG-63 and ARG-64 demonstrate that the Department, in fact, treats these factors as decisive in every case in which the domestic industry participates. In *Sunset Review of Steel from Japan*, the Appellate Body declared that giving these two factors alone decisive weight in every case would violate Article 11.3.[10] The US provisions thus prevent the Department from basing its likelihood determination on a factual basis sufficient to demonstrate that dumping would be likely to continue in the event of termination of the order. Therefore, through the application of the WTO-inconsistent presumption in the sunset review of Argentine OCTG, the Department failed to use the "likely" standard required by Article 11.3.

Argentina has argued consistently that the Department only considers domestic industry participation, import volume, and historical dumping margins in sunset reviews. Accordingly, the only manner in which the Department's determination can be upheld is if "likely" means something other than its common and ordinary meaning (i.e., "probable"), and if the type of analysis permitted to establish a likelihood is something other than required by the standards of Article 11.3, as reaffirmed

[8] Argentina's First Submission, para. 186.

[9] Argentina's First Submission, Sec. VII.B; Argentina's First Oral Statement, paras. 32-33, 36, 77-83; Argentina's Second Submission, Sec. III.B; Argentina's Second Oral Statement, paras. 57-67.

[10] *See* Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 176-178, 191.

by the Appellate Body.

(b) Please refer to the relevant part(s) of the record of this sunset review where this inconsistent standard can be found.

Response:

Whether reading its express terms or viewed in the light most favourable to the United States, the *Issues and Decision Memorandum* demonstrates that the Department failed to apply the correct "likely" standard.

In the first instance, the *Issues and Decision Memorandum* provides that waiver served as the basis for the Department's affirmative likelihood determination:

> *[S]ection 751(c)(4)(B) of the Act provides that the Department shall determine that revocation of an order is likely to lead to continuation or recurrence of dumping where a respondent interested party waives its participation in the sunset review. In the instant reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation.*[11]

Argentina submits that the Department's application of the waiver provision conclusively demonstrates that it did not apply the correct "likely" standard in the sunset review of Argentine OCTG. In discussing the "likely" standard under Article 11.3, the Appellate Body has stated that "an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be probable if the duty were terminated . . . ."[12] The Appellate Body has further held that a likelihood determination requires a "forward-looking analysis," the ultimate determination of which must be based on a "rigorous examination" of "all relevant evidence."[13] A statutorily-mandated finding of likely dumping is patently inconsistent with this exacting standard.

Assuming *arguendo* that waiver did not serve as the basis for the Department's likelihood determination, the *Issues and Decision Memorandum*, at best, indicates that the Department followed the direction of the statute, the SAA, and the *Sunset Policy Bulletin* and based its affirmative likelihood determination solely on two factors: (1) the existence of the 1.36 per cent margin from the original investigation, and (2) the decline in import volumes.[14] Under the guidance of the Appellate Body's decision in *Sunset Review of Steel from Japan*, the Department's decisive reliance on these two factors represents a presumption that dumping was likely to continue or recur.[15] A presumption of likely dumping cannot constitute positive evidence of likely dumping within the meaning of Article 11.3, the evidentiary standards of Article 6, and the interpretations of these provisions by the Appellate Body.[16] Therefore, the record demonstrates that the Department did not apply the likely standard required by Article 11.3 in this case.

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[11] *Issues and Decision Memorandum* at 4-5 (ARG-51)(emphasis added).

[12] Appellate Body Report, *Sunset Review of Steel from Japan*, para. 111 (emphasis added).

[13] *Id.* at paras. 105, 113, 191.

[14] *Issues and Decision Memorandum* at 4-5 (ARG-51)("In the Argentine case, there has been no decline in dumping margins coupled with an increase in imports. Rather, absent an administrative review, the dumping margin from the original investigation is the only indicator available to the Department with respect to the level of dumping. Because 1.27 [*sic*] per cent is above the 0.5 per cent *de minimis* standard applied in sunset reviews, we find that dumping has continued over the life of the Argentine order and is likely to continue if the order were revoked.").

[15] Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 176-178.

[16] *See id.* at paras. 178, 191.

12. The Panel notes that, in its second written submission, Argentina did not address its claim under Article 12.2 of the Agreement. Please clarify whether Argentina is still pursuing this claim.

Response:

Argentina has not abandoned its claim with respect to Article 12.2, which was set forth in paragraphs 177-180 of its First Written Submission. In Argentina's view, Article 12.2 is a substantive obligation with which the United States must comply in an Article 11.3 review by virtue of the explicit cross-reference in Article 12.3 stating that the provisions of Article 12 apply *mutatis mutandis* to Article 11 reviews.

The violation of Article 12 is made more clear in this case by the continuing changes in the position of the United States on several core issues, including whether Siderca's response was "adequate," to whom the Department applied the waiver provisions, the basis for the Department's determination that dumping continued over the life of the order, and the basis for the Department's likelihood determination. The United States has also indicated that a few key portions of its underlying decisions were "inartfully drafted." When the Panel cuts through all of these explanations and *ex post facto* justifications, the underlying decision cannot meet the substantive requirements of Article 12.2.

17. What is the supporting evidence in the record of this sunset review for your allegation that the Commission failed to apply the "likely" standard of Article 11.3 of the Agreement in this sunset review?

Response:

In *Sunset Review of Steel from Japan*, the Appellate Body confirmed that "likely" under Article 11.3 must be interpreted according to its ordinary meaning of "probable."[17] Although the US statute uses the word "likely," and the Commission used the term in its sunset determination of Argentine OCTG, mere reference to the word "likely" does not mean that the Commission applied the correct standard.

Two levels of evidence support Argentina's claim that, in the sunset review of Argentine OCTG, the Commission did not interpret likely by its ordinary meaning of probable and thus failed to apply the likely standard of Article 11.3: (1) admissions by the Commission itself; and (2) portions of the record from the Commission's sunset review demonstrating that it was not, in fact, applying a "likely" standard.

On at least two separate occasions, the Commission has admitted that it did not interpret "likely" to mean probable in the sunset review of OCTG from Argentina. In the Usinor remand, the Commission stated that in all of the sunset review decisions it considered as of 1 July 2002 (including the sunset review of Argentine OCTG), it followed the SAA and consistently interpreted "likely" as "a concept that falls in between 'probable' and 'possible' on a continuum of relative certainty."[18] More directly, the Commission expressly stated before a NAFTA panel reviewing the same sunset determination of Argentine OCTG that "likely" does not – and under the SAA cannot – mean "probable."[19] Therefore, the Commission has admitted that it did not consider "likely" to mean "probable," and that the standard that it applied **in this case** is less than "probable."

[17] *Id.* at para. 111.

[18] *Usinor Remand Determination* at 5, 6 (ARG-56 bis).

[19] ITC Brief, *Oil Country Tubular Goods from Mexico, Results of Five-Year Review* (8 Feb. 2002) at 43 (excerpt included as Exhibit ARG-67).

In addition, as Argentina has consistently argued throughout these proceedings,[20] the record of the sunset review demonstrates that the Commission did not apply the correct likely standard. The Commission based its conclusion that termination of the orders would be likely to lead to continuation or recurrence of injury on its findings with respect to the likely volume, price effects, and impact of the subject imports.[21] With respect to each of these factors, however, the Commission based its findings on speculation and conjecture, rather than on positive evidence that certain outcomes would be likely (*i.e.*, probable or more likely than not). Specifically:

> **Volume:** Despite positive evidence that showed that the likely volume of subject imports orders would not be significant upon termination of the orders, the Commission concluded that subject producers had "incentives" to devote more of their output to the US market and thus the likely volume would be significant.[22] Each of the alleged incentives, however, was based on evidence of possibility, rather than on positive evidence of likelihood.[23]
>
> **Price:** In paraphrasing the basis for the Commission's finding on price effects, the United States stated that "evidence from the original investigation strongly supports a finding that imports can drive down domestic prices even during a period of strong demand" and that this means therefore that "imports would drive down or suppress the price of the domestic like product if the orders were revoked."[24] This statement demonstrates the significance attached to the analysis in the original investigation, rather than positive evidence developed in the sunset review to support a "likely" injury determination. In fact, the Commission admitted in its decision that it had little record evidence upon which to draw conclusions regarding the likely price effect.[25] Yet the Commission, summarizing its decision on price effects, stated:
>
> > *Given the likely volume of subject imports, the high level of substitutability between the subject imports and domestic like product, the importance of price in purchasing decisions, the volatile nature of US demand, and the underselling by the subject imports in the original investigations and during the current review period, we find that in the absence of the orders, casing and tubing from Argentina, Italy, Japan, Korea, and Mexico likely would compete on the basis of price in order to gain additional market share. We find that such price-based competition by subject imports likely would have significant depressing or suppressing effects on the prices of the domestic like product.*[26]
>
> **Impact:** The Commission found that the domestic industry's condition had "improved" and that it was not "currently vulnerable."[27] Yet despite these findings of a healthy domestic industry, the Commission concluded that the subject imports would likely have a significant adverse impact on the domestic industry. As support for this conclusion, the Commission once again referred to its findings from the

[20] *See* Argentina's First Submission, paras. 231-232, 243-254; Argentina's First Oral Statement, paras. 116-126; Argentina's Second Submission, paras. 169-178; Argentina's Second Oral Statement, paras. 79-89.

[21] Commission's Sunset Determination at 17-23 (ARG-54).

[22] *See id*. at 19.

[23] *See* Argentina's First Submission, paras. 244-246; Argentina's First Oral Statement, paras. 116-125; Argentina's Second Submission, paras. 169-171; Argentina's Second Oral Statement, paras. 179-83.

[24] US First Submission, para. 339 (emphasis added).

[25] *Commission's Sunset Determination* at 21 (ARG-54)("While direct selling comparisons are limited because the subject producers had a limited presence in the US market during the period of review, the few direct comparisons that can be made indicate that subject casing and tubing generally undersold the domestic like product especially in 1999 and 2000.").

[26] *Id.*

[27] *Id.* at 22.

original investigation: "in the original investigations, subject imports captured market share and caused price effects despite a significant increase in apparent consumption in 1993 and 1994 as compared to 1992."[28] Thus, the Commission determined on the basis of possibility (in this case, demonstrated by events seven years earlier) that an outcome would be "likely." Such reasoning further shows that the Commission did not apply the "likely" standard required by Article 11.3 in this case.

In sum: (1) the Commission has expressly admitted that it did not in fact interpret likely to mean probable in this very case, and (2) the Commission's specific findings demonstrate that it did not apply the "likely" standard of Article 11.3 in the sunset review of OCTG from Argentina.

18. The Panel notes Argentina's allegations in paragraphs 183 and 185 of its second written submission that in the OCTG sunset review the Commission failed to carry out the causal link analysis required under Article 3.5 of the Agreement. Please clarify the basis of this claim. More specifically, please indicate whether there were some potential factors, other than likely dumped imports, that could have contributed to the likely injury and were not evaluated by the Commission in its sunset determinations.

Response:

Argentina firmly believes, and reiterates, its view that the "causal link" requirement of Article 3.5 applies to all injury determinations, including the injury determination in Article 11.3 reviews. The notion that a causal link is required between the dumped imports or between dumping and injury is present in Article VI of the GATT 94, and has been a constant feature of the regulation of dumping at the international level through the Kennedy, Tokyo, and Uruguay Round Anti-Dumping Agreements. There is no textual support for the view that the causation requirement was removed from the injury analysis required by Article 11.3. To the contrary, the statement in footnote 9 that injury "shall be interpreted in accordance with the provisions of this Article" can only be interpreted to mean that the basic requirement of a causal link between "likely" dumping and "likely" injury must be shown in all injury determinations under the Anti-Dumping Agreement, including those in Article 11 reviews.

With respect to the Panel's specific question, Argentina points out that its argument with respect to Article 3.5 was contained not only in paragraphs 183 and 185, but also 184. Paragraph 184 reiterates the basic proposition first explained in Section VIII.B.4 (beginning on page 82) of Argentina's First Written Submission. As explained in both briefs, and consistent with the Appellate Body's approach in *Hot-Rolled Steel from Japan*,[29] Argentina's position with respect to Article 3.5 is that: (1) the Commission was required to demonstrate a causal link between the likely dumping and the likely injury; and (2) that the Commission failed to analyze and distinguish the likely effects of other factors that could have contributed to any likely injury. Much of this occurs in the context in which the Commission found that the US industry was not currently vulnerable to injury,[30] and that other factors have a direct impact on the condition of the industry,[31] especially the demand for oil and drilling activities. Also, the Commission noted that non-subject imports had captured market share from the domestic industry,[32] and never explained how it distinguished the likely impact of these non-subject imports from the likely impact of the subject imports. Therefore, as explained in Argentina's

[28] *Id.* at 22 (emphasis added); *see also* US First Submission at para. 342 ("The ITC noted that in the original investigation, a significant increase in demand had not precluded subject imports from gaining market share and having adverse price effects.").

[29] Appellate Body Report, *Hot-Rolled Steel from Japan*, paras. 222-223.

[30] *Commission's Sunset Determination* at 22 (ARG-54).

[31] *See id.* at 14-16, II-9, II-10, and II-13.

[32] *See id.* at 22.

previous submissions,[33] while mentioning other factors, the Commission did not separate their likely effects from the potentially injurious effect of the likely subject imports.

[33] *See* Argentina's First Submission at paras. 267-269; Argentina's Second Submission, paras. 182-185.

ANNEX E-9

ANSWERS OF THE UNITED STATES TO QUESTIONS OF THE PANEL – SECOND MEETING

13 February 2004

Q3. The Panel notes the US response to Questions 2(a) and 3 from the Panel and the US statements in paragraph 21 of its second written submission. Does the US law require an individual likelihood determination only in respect of respondent interested parties that waive their right to participate in a sunset review?

1. Yes.

Q4. The Panel notes the following statement in the response of the United States to Question 3 from the Panel:

In other words, one company's failure to submit a complete substantive response results in a finding of likelihood with respect to that company, and not on an order-wide basis; Commerce could still, in light of other submissions and facts on the record, conclude that there is no order-wide likelihood of dumping.

(a) Please explain whether this scenario has ever happened. In other words, has there ever been a sunset review in which although the DOC had made a positive likelihood determination with respect to certain individual exporter(s) who had waived their right to participate, and later on in the final order-wide likelihood determination the DOC found no likelihood for the country as a whole, including the exporter(s) for which it had already found likelihood?

2. No. This scenario has never occurred.

(b) If, as the United States argues, the individual likelihood determination for exporters that waive their right to participate does not affect the final order-wide basis likelihood determination, then why is it that the US law requires that individual determinations be made for exporters who waive their right to participate?

3. The United States has not argued that a waiver "does not affect" the final order-wide likelihood determination. While the individual affirmative likelihood determinations may affect the order-wide likelihood determination, they do not determine, in and of themselves, the ultimate outcome of the order-wide analysis. Commerce considers all the information on the administrative record, including prior agency determinations and the information submitted by the interested parties or collected by Commerce, as well as any individual affirmative likelihood determinations, when making the order-wide likelihood determination.

(c) In the OCTG sunset review, did the application of the waiver provisions to Argentine exporters other than Siderca affect/determine the final outcome of the sunset review with respect to Argentina? Please respond in light of the fact that Siderca's share in the total imports of the subject product in the five-year period of application of the order at issue was zero.

4. The application of the waiver provisions did not determine the final outcome of the sunset review with respect to Argentina. Commerce's final affirmative likelihood determination in the sunset review of OCTG from Argentina was based on the existence of dumping and depressed import volumes over the life of the anti-dumping duty order on OCTG from Argentina. *See Decision Memorandum* at 4-5.

Q5. The Panel notes the US response to Question 4(c) from the Panel. On the basis of the scenario referred to in the mentioned Question, please respond to the following:

(a) Would Section 1675(c)(4)(B) of the Tariff Act of 1930 require that the DOC find likelihood with respect to the exporters that submit an incomplete response to the notice of initiation? If your response is in the negative, please explain the reasons thereof on the basis of the relevant provisions of the US law.

5. Section 1675(c)(3)(B) of the Act requires that where Commerce has an inadequate response from the respondent interested parties to the notice of initiation (order-wide response), then Commerce may issue the final sunset determination on the basis of the facts available. (Section 1675(c)(4)(B) requires a finding of likelihood with respect to a party that has affirmatively waived participation.) Section 351.308(f) of the *Sunset Regulations* defines "the facts available" in a sunset review as the prior agency determinations and any information submitted by the interested parties during the sunset review. Neither Section 1675(c)(3) nor section 1675(c)(4) of the Act addresses the issue of the "completeness" of a particular exporter's substantive response, but rather section 1675(c)(3) focuses on the response from the respondent interested parties, in the aggregate, to the notice of initiation.

(b) If your response to the question in (a) is in the affirmative, i.e. if the Statute would require a finding of likelihood with respect to the exporters that waive their right to participate in the mentioned sunset review, please explain whether in such a sunset review the DOC would nevertheless carry out an expedited sunset review to make an order-wide likelihood determination even though the DOC would have already found likelihood with respect to all exporters. If so, on what factual basis would the DOC base its order-wide determination?

6. Section 1675(c)(3)(B) of the Act requires that where Commerce has an inadequate response from the respondent interested parties to the notice of initiation (order-wide response), then Commerce may issue the final sunset determination on the basis of the facts available. Where the order-wide response is inadequate – which is not necessarily a function of the application of waiver provisions – Commerce would conduct an expedited review and "normally" base the final determination on "the facts available" in accordance with sections 351.218(e)(1)(ii)(C)(2) and 351.308(f) of the *Sunset Regulations*. Section 351.308(f) provides that "the facts available" include prior agency determinations and any information submitted by the interested parties. Thus, Commerce would base the final sunset determination in this scenario on all the information on the administrative record, whether submitted by the interested parties or collected by Commerce, and prior agency determinations. It should be noted that the substantive text of sections 351.218(e)(1)(ii)(C)(2) and 351.308(f) of the *Sunset Regulations* are prefaced with the word "normally" and provide Commerce with the discretion to deviate from requirements of these regulatory provisions where circumstances in a particular case warrant.

Q6. The Panel notes the US statement in paragraph 24 of its second written submission and the US response to Question 2(e) from the Panel. If the DOC does not consider the information submitted in an incomplete substantive response submitted by an exporter for purposes of the individual likelihood determination for that particular exporter, then for what purpose does the DOC take that information into account in the final order-wide determination?

7. Commerce considers all the information on the administrative record in making the order-wide likelihood determination in a sunset review, including information contained in an incomplete substantive response, but the relevance of the information submitted in an incomplete substantive response to the order-wide likelihood determination would depend on the nature of the information. For example, a respondent interested party might offer information and argument to explain depressed import volumes. Even if that party's response were incomplete, Commerce would take that information and argument into account in making the order-wide determination.

Q7. The Panel notes the following statement in the US response to Question 2(d) from the Panel:

The differences between a full and an expedited sunset review are timing (the final sunset determination in an expedited sunset review is issued 120 days after the notice of initiation, rather than the full sunset review's 240 days) and the fact that case briefs are not filed in an expedited case. Because as a rule hearings are tied to the contents of the case briefs, hearings are generally not held in an expedited proceeding. It should be noted that the deadline for the submission of factual information is the same for both an expedited and a full sunset review proceeding and normally is no later than the deadline for the submission of the interested party rebuttal briefs. ***(footnotes omitted, emphasis added)***

(a) Please explain the role of case briefs in full sunset reviews under the US law. What is their content? At what stage during the full sunset review are they submitted to the DOC?

8. As the United States noted in its first written submission, full sunset reviews may afford parties expanded opportunities to submit evidence and argument.[1] Case briefs provide such an opportunity. They normally contain a recitation of the issues parties consider to be relevant to the determinations Commerce must make in a sunset review and the parties' arguments concerning those issues. The case briefs provide the parties an additional opportunity to convince the administering authority of the correctness of their position on particular issues of import. Rebuttal briefs are the parties' responses to the arguments raised in the case briefs submitted by the other parties participating in the sunset review. Case briefs normally are due on day 160 (50 days after the preliminary sunset determination); rebuttal briefs normally are due on day 165 (5 days after the filing of case briefs). See sections 351.309(c)(1)(i) and 351.309(d)(1) of the Sunset Regulations respectively. Extensions of these deadlines may be requested pursuant to section 351.302(b) of Commerce's Regulations.

(b) Please explain whether there are any differences between full and expedited sunset reviews under the US law as to whether the following rights provided for in the Agreement can be used by exporters:

(i) The right to see the evidence submitted by other interested parties, as provided under Article 6.1.2 of the Agreement,

(ii) The right to see the full text of the application, as provided under Article 6.1.3 of the Agreement,

(iii) The right to submit information orally, as provided in Article 6.2 of the Agreement.

9. There are no differences between a full and an expedited sunset review with respect to the obligations contained in the cited obligations from Article 6 of the AD Agreement. Interested parties

[1] First Written Submission of the United States, para. 162.

are required to serve all submissions on the other interested parties in a sunset review, whether full or expedited. *See* section 351.303(f) of Commerce's *Regulations*. All documents submitted to or produced by the administering authority form the administrative record in any sunset review and are available in the public reading room in the Central Record Unit located at the US Department of Commerce. *See* sections 351.103 and 351.104 of Commerce's *Regulations*. In addition, meetings with the decision-maker in a sunset review, as well as other Commerce officials, can be requested and are routinely held, but if factual material is presented, the factual material also must be submitted in writing in accordance with section 351.309 of Commerce's *Regulations*. This requirement is in keeping with the obligation of Article 6.3 that oral information be reduced to writing prior to consideration by the authorities.

10. With respect to Article 6.1.3, the United States notes that under US law, sunset reviews are automatically initiated by the administering authority, not in response to the filing of an application. (The notice of initiation is published in the Federal Register and is therefore publicly available.)

Q8. Under the US law, in a sunset review in which some of the exporters have waived their right to participate (be it an affirmative or a deemed waiver), does the order-wide analysis to be carried out for the country as a whole entail any elements in addition to what is being examined in the context of company-specific determinations regarding the exporters that have waived their right to participate in the sunset review? Put differently, does the order-wide analysis entail any analysis that would not have been carried out at the company-specific level regarding the exporters that have waived their right to participate in the sunset review?

11. As noted in response to Question 5, the existence of waivers does not automatically result in an expedited review. Commerce normally considers the existence of dumping and the depressed import volumes to be highly probative evidence that dumping will likely continue or recur if the discipline of an order were removed. However, these factors are not necessarily company-specific. Therefore, any information on the record rebutting the probative value of these factors – e.g., reasons other than the anti-dumping order explaining why import volumes were depressed, or conditions in the country as a whole that explain why dumping is not likely to continue or recur – will be considered. In this regard, all the information on the administrative record of the sunset review including the information and arguments submitted by the interested parties and information collected by Commerce, as well as prior agency determinations, is considered in making the final sunset determination. For example, in the sunset review of OCTG from Argentina, Commerce addressed Siderca's comment concerning the applicability of the *de minimis* standard found in Article 5.8 of the AD Agreement in sunset reviews. *See Decision Memorandum* at 3-4.

Q9. The Panel notes the US statement that the decision concerning the incompleteness of an exporter's substantive response to the notice of initiation is made on a case-by-case basis by the DOC and that the DOC may consider an incomplete substantive response to be complete if the party submitting that response provides explanation as to why it was unable to provide that information[2] In this respect, the United States referred to section 351.218(d)(3) of the DOC's Regulations and to the preamble of the Regulations[3] However, the Panel notes that the cited portions of the Regulations deal with the DOC's adequacy determinations rather than waivers. Please clarify whether the cited provisions of the Regulations have any effect on the application of the waiver provisions of the US law to exporters that submit an incomplete response to the notice of initiation in sunset reviews.

12. A foreign interested party is required to file a substantive response that contains all of the information required by sections 351.218(d)(3)(ii) and (iii) of the *Sunset Regulations.* If a foreign interested party fails to provide all the information required by sections 351.218(d)(3)(ii) and

[2] Response of the United States to Question 8 from the Panel and footnote 33 thereto.
[3] Footnote 33 to the Response of the United States to Question 8 from the Panel.

(d)(3)(iii) of the *Sunset Regulations*, Commerce normally will find that substantive response to be "incomplete." If the substantive response is incomplete, then the foreign interested party who submitted the incomplete substantive response is deemed to have waived its right to participate in the sunset review pursuant to section 351.218(d)(2)(iii) of the *Sunset Regulations.*

13. Notwithstanding the above, Commerce may find a substantive response which does not contain all the information required by sections 351.218(d)(3)(iii) and (d)(3)(iii) of the *Sunset Regulations* to be "complete," despite the missing information, when the foreign interested party provides a reasonable explanation why it is unable to report the information. *See* Preamble, 63 Fed. Reg. at 13518. If Commerce found that the substantive response was "complete" despite missing information, the foreign interested party submitting this substantive response would not be deemed to have waived its right to participate in the sunset review. Although the cited section of the Preamble specifically references section 351.218(d)(3) of the *Sunset Regulations*, the text discusses both the determination concerning the "completeness" of a substantive response (reporting requirements of section 351.218(d)(3)) and the determination concerning the "adequacy" of the over-all response to the notice of initiation (section 351.218(d)).

Q10. Please explain whether anyone of the Argentine exporters subject to the OCTG sunset review other than Siderca affirmatively waived their right to participate, or whether they were deemed as having waived their right to participate in the OCTG sunset review. If there was a deemed waiver, please specify the grounds thereof.

14. No Argentine producer or exporter of OCTG affirmatively waived its right to participate in the sunset review of OCTG from Argentina. Commerce determined that there were exports of OCTG during the five-year period preceding the sunset review based on the import statistics provided by the domestic interested parties and verified by the Census Bureau's IM-145 import statistics and the ITC Trade Database. These non-responding respondents were deemed to have waived their rights to participate due to their failure to respond to the notice of initiation of the sunset review. *See* section 351.218(d)(2)(iii) of the *Sunset Regulations*.

OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING

Q13. The Panel notes the following statement in the DOC's Issues and Decision Memorandum in the OCTG sunset review:

Because 1.27 per cent is above the 0.5 per cent *de minimis* standard applied in sunset reviews, we find that dumping has continued over the life of the Argentine order and is likely to continue if the order were revoked[4] ***(underline emphasis added)***

Please explain whether the 1.27 per cent indicated in the memorandum is a typo and should therefore be read as 1.36 per cent. If not, please explain what this margin means.

15. The 1.27 per cent in the *Decision Memorandum* is a typographical error. The correct number is 1.36 per cent. See *Final Determination*, 65 Fed. Reg. at 66703; and *Decision Memorandum* at 1 and 3.

[4] *Issues and Decision Memorandum* (Exhibit ARG-51 at 5).

Q14. The Panel notes the statistics provided by Argentina in Exhibits ARG-63 and ARG-64 regarding the alleged consistent application of the provisions of sections II.A.3 and II.A.4 of the *Sunset Policy Bulletin* by the DOC. The Panel also notes the US statements in paragraphs 183-186 of its first written submission regarding these statistics.

(a) Please explain whether in your view the statistics provided by Argentina are factually correct or not. Please limit your response in this respect to whether or not the information submitted by Argentina in these two exhibits is flawed or not. If in your view these statistics are not factually correct, please explain in detail the reasons thereof.

16. The United States has not examined each and every sunset review cited by Argentina in Exhibit ARG-63 and Exhibit ARG-64. To the extent that the United States has addressed these exhibits in its written submissions, the United States has no reason to believe that the overall total of sunset reviews conducted and the ultimate outcomes in those sunset reviews as alleged by Argentina is significantly flawed.

(b) Please explain your views as to whether these statistics can be used by the Panel in inquiring whether the DOC perceives the provisions of the cited sections of the *Sunset Policy Bulletin* as determinative/conclusive for purposes of its sunset determinations.

17. These statistics have no bearing on whether the cited sections of the *Sunset Policy Bulletin* are determinative/conclusive for purposes of sunset determinations. That question can be answered solely on the basis of the status of the *Sunset Policy Bulletin* under US law, since Commerce must follow the requirements of US law, and not artificial and non-existent "presumptions" implied by Argentina from statistics. The status of the *Sunset Policy Bulletin* is clear and unequivocal. It is simply a transparency tool published by Commerce to provide guidance to interested parties as to Commerce's current thinking on how it might exercise its discretion under US law when conducting sunset reviews. The document has no independent legal status under US law and imposes no requirements whatsoever on Commerce to actually follow the methodologies set forth in the Bulletin in a particular sunset review, and Argentina has cited no provision of US law which suggests otherwise. The only requirements concerning the conduct of sunset reviews which Commerce must follow are set forth in the relevant statutory and regulatory provisions.

18. Moreover, in offering these statistics, Argentina focuses only on the result, and not on the legal and factual circumstances of each review which lead to that result. Again, Argentina can point to nothing on the record of any of these sunset reviews, or in US law generally, which indicates that the *Sunset Policy Bulletin* required any result in any case. And Argentina ignores the particular factual circumstances of these disputes which underpinned Commerce's ultimate findings.

19. Finally, these statistics at best indicate a "repeated pattern of similar responses to a set of circumstances.[5] As the United States discussed in its First Written Submission, and as a WTO panel has already found, such a pattern does not indicate that a "Member becomes obligated to follow its practice.[6] Therefore, the statistics do not indicate whether the *Sunset Policy Bulletin* is, as a matter of US law, determinative/conclusive as to how Commerce must act in a given review.

Q15. The Panel notes the US statements in paragraphs 15 and 23 of its second oral submission that neither the DOC nor the ITC relied on the original dumping margin in relation to their

[5] *United States - Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R, Report of the Panel adopted 29 July 2002, para. 722.

[6] *Id.* For full discussion, *see* First Written Submission of the United States at para. 198.

determinations the OCTG sunset review. The Panel also notes the following part of the DOC's Issues and Decision Memorandum:

Therefore, consistent with the *Sunset Policy Bulletin*, the Department determines that the margin calculated in the original investigation is probative of the behaviour of Siderca if the order were revoked as it is the only rate that reflects the behaviour of Siderca without the discipline of the order. As such, the Department will report to the commission the rate of 1.36 per cent from the original investigation for Siderca and all other exporters from Argentina.

Consistent with section II.B.1 of the *Sunset Policy Bulletin* and the SAA at 890, we determine that the rates from the original investigations are probative of the behaviour of producers and exporters of OCTG from Argentina. Therefore, we will report to the Commission the company-specific and "all others" rates from the original investigations.[7]

(a) The Panel notes that in its responses to Questions 23 and 24 from the Panel concerning the factual basis of the DOC's likelihood determination in the OCTG sunset review, the United States submitted that the DOC's determination was based on the existence of imports from Argentina and the continued collection of the anti-dumping duty on the imports of the subject product from Argentina in the five-year period of application of the subject order. Please explain how these statements can be reconciled with the above-quoted text of the DOC's Memorandum in as much as the DOC's alleged reliance on the original dumping margin is concerned.

20. The above quoted passages refer to the "margin likely to prevail" reported by Commerce to the ITC in the event the order were revoked. The "margin likely to prevail" is a construct of US law. The "margin likely to prevail" is the best evidence of the potential pricing behaviour of exporters if the order were revoked because it was the only evidence on the administrative record of OCTG from Argentina of the pricing behaviour of OCTG exporters without the discipline of the anti-dumping duty order in place. The "margin likely to prevail" is not used in any degree as a basis for the determination whether it is likely dumping will continue or recur if the order were revoked. Rather, Commerce first makes the likelihood determination, then determines the "margin likely to prevail" in the event of an affirmative order-wide likelihood determination. See SAA at 889 ("Likelihood of Dumping") and 890 ("Provision to the Commission of Dumping Margins").

21. Section 752(c)(3) of the Act directs that Commerce "shall provide" to the ITC a "margin likely to prevail" in the event of revocation. Section 752(a)(6) of the Act, however, provides that the ITC "may consider" the "margin likely to prevail" in making the likelihood of injury determination, but the statute leave the decision whether to use the "margin likely to prevail" in the injury analysis to the ITC' s discretion. See SAA at 890-91.

(b) Please explain what meaning the Panel should give to the above-cited parts of the Memorandum in light of the US statement that the DOC did not rely on the original dumping margin in its sunset determination in this sunset review.

22. As discussed in the US answer to Panel Question 15(a), the "margin likely to prevail" is a construct of US law and is reported to the ITC as such. It is not used by Commerce in making the likelihood determination. Indeed, Commerce must first determine whether dumping is likely to continue or recur before it is required to report the magnitude of the margin of dumping likely to prevail. The magnitude of dumping, however, whether past, present, or future, has no bearing on Commerce's likelihood determination. The magnitude of the dumping is immaterial because the

[7] *Issues and Decision Memorandum* (Exhibit ARG-51 at 7-8).

obligations of Article 11.3 require a determination of the likelihood of dumping and not a calculation of how much dumping is likely to continue or recur.

Q16. The Panel notes Argentina's allegations in Section III.C.3.b of its second written submission and Exhibits ARG-52, ARG-63a and ARG-63b regarding the methodology by which the DOC calculated the 1.36 per cent dumping margin in the original OCTG investigation.

23. As a preliminary matter, the United States notes that there are several procedural concerns with Argentina's Exhibits ARG-52, -66A, and -66B[8] As discussed at the second substantive panel meeting, none of these exhibits are part of or based on the record compiled by the United States in order to make its sunset determination. Pursuant to Article 17.5(ii) of the AD Agreement, the basis of this Panel's examination of the matter before it is the "facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member." Because neither Argentina nor Siderca placed this factual information on the record, these documents are not properly before the Panel.

24. Furthermore, the United States notes that paragraph 14 of the working procedures for this Panel provides that parties are to submit "all factual information to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals or answers to questions." Argentina did not submit Exhibits ARG-66A and -66B until its second written submission, nor is it submitting these exhibits "for purposes of rebuttals or answers to questions." Further pursuant to paragraph 14 of the Panel's working procedures, Argentina has not shown that there was any "good cause" to justify this belated submission and, because these exhibits are basic to Argentina's claims, Argentina cannot now seek to claim that these documents were prepared for purposes of rebutting arguments presented by the United States. While the United States responds as follows to the Panel's questions related to these documents, the United States respectfully requests that the Panel give effect to Article 17.5 of the AD Agreement and paragraph 14 of the Panel's working procedures by not considering these documents.

(a) Please explain on the basis of which methodology (e.g. weighted average to weighted average, transaction to transaction or weighted average to transaction) the DOC compared the normal value with the export price in this original investigation.

25. First of all, taking into account Article 18.3 of the AD Agreement, it must be noted that the record makes clear that the original investigation of OCTG from Argentina was initiated prior to the effective date of the AD Agreement. Furthermore, although the record of the sunset review does not specify the methodology that was used in the original investigation, the United States confirms that the original investigation did not utilize the weighted-average-to-weighted-average comparison methodology examined in *EC – Bed Linen*. Specifically, the United States used a weighted-average-to-transaction methodology in the original investigation of OCTG from Argentina.

(b) Please comment on Argentina's allegations regarding the alleged use of the so-called zeroing methodology in this original investigation. In particular, explain whether, as Argentina alleges, the DOC ignored export sales transactions that were not dumped in the calculation of the 1.36 per cent original dumping margin.

26. The record of the sunset review does not contain information responsive to this question. Nevertheless, the United States confirms that the 1.36 per cent margin was based on the results of comparisons of all export transactions.

[8] Based on the citation to Argentina's second submission, the United States understands the reference in the Panel's question to indicate Exhibit ARG-66A and -66B, rather than ARG-63a and -63b.

(c) Please explain whether the DOC reassessed, in the context of the instant sunset review, the conformity of the calculation methodology that had given rise to the 1.36 per cent dumping margin in the original OCTG investigation.

27. The United States did not reassess the calculation methodology and had no reason to reassess the calculation methodology in this sunset review because the magnitude of the margin did not form any part of Commerce's final likelihood determination in the sunset review of OCTG from Argentina. The record of the sunset review contained the final determination from the original investigation. The record contained no information challenging or even questioning that final determination. The final determination had not been previously challenged and neither Argentina nor Siderca placed information on the record calling into question the final determination. Moreover, the information necessary to reassess the final determination (Siderca's sales and cost information, the computerized transaction information, Commerce's verification findings, any legal briefs submitted to Commerce, and any other information which was pertinent to the final determination in the original investigation) was not part of Commerce's sunset review record. Consequently, there was no reason for an unbiased and objective administering authority to "reassess" the 1.36 per cent margin from the original investigation.

(d) Please explain your views about Argentina's assertion that had zeroing not been used in the calculation of the original dumping margin the result would have been a negative dumping margin of 4.35 per cent.[9]

28. Argentina's assertion appears to be based on Argentina's calculations, the output of which was presented to the Panel in Exhibit ARG-66A. Not only was this exhibit not based on source information contained in Commerce's sunset review record, Argentina has failed to identify any of the computer programming by which it manipulated Siderca's data to arrive at the output contained in Exhibit ARG-66A.

29. Beyond these substantive and procedural defects with Argentina's assertion, Argentina's assertion is legally flawed. Not only does the United States not concede that Exhibit ARG-66A demonstrates that Siderca's information could have supported the output contained in that exhibit, the exhibit itself appears to be based on weighted-average-to-transaction comparisons, whereas the Appellate Body report in *EC – Bed Linen* addressed only the weighted average-to-weighted-average comparison methodology employed by the EC in that case, and explicitly found that, with respect to that methodology only, there could be no "two stage" calculation. *EC – Bed Linen*, at para. 53. *EC – Bed Linen* did not address any weighted-average-to-transaction methodologies, or any other methodology in which a two-stage calculation would be both appropriate and necessary. Other than citation to *EC – Bed Linen* and *Japan Sunset*, neither of which addressed the methodology used in the original investigation of OCTG from Argentina, Argentina has failed to provide any factual or legal basis for its claim that the methodology used in the original investigation was WTO-inconsistent.

OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF INJURY

Q19. Would the United States agree, as a factual matter, that the ITC did not consider some of the injury factors set out in Article 3.4 of the Agreement in its likelihood of continuation or recurrence of injury determinations in the instant sunset review?

30. As the United States has noted, Article 3, and thus Article 3.4, do not apply in sunset reviews. Nevertheless, the ITC considered all of the Article 3.4 injury factors. Data concerning each of the injury factors is contained in the report that accompanies the views of the ITC Commissioners, as

[9] *See* Second Written Submission of Argentina, para. 140.

detailed in the chart accompanying paragraph 347 of the United States' first submission[10] This report (consisting of four parts, and running from page I-1 to E-6) is prepared by the ITC staff for the Commissioners and is made available to the parties before the Commissioners make their determinations. The ITC Commissioners review and approve the report before making their determinations and, thus, have considered all of the information in the report in reaching their determinations, even though in their views they may identify only certain of the injury factors as particularly relevant to their determinations. This approach is consistent with the text of Article 3.4 which states that the "list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

Q20. The Panel notes the distinction the United States makes between a determination of injury and a determination of the likelihood of continuation or recurrence of injury.

(a) Is the United States of the view that there is a fourth category of injury that applies in the context of sunset reviews in addition to the three mentioned in footnote 9 of the Agreement?

31. The United States is of the view that "the likelihood of continuation or recurrence of . . . injury" is a fourth type of determination regarding injury, separate from the three other types named in footnote 9. The three types of determinations in footnote 9 relate to a "determination of injury." A sunset review does not involve such a determination; rather, it involves a determination of continuation or recurrence of injury.

32. It is clear that "injury" cannot be defined in the same way in Article 11.3 as it is in footnote 9. If it were, then the inquiry in a sunset review would become whether expiry of the duty would be likely to lead to *continuation or recurrence of* material injury to a domestic industry, *threat of material injury to a domestic industry or material retardation of the establishment* of such an industry. Article 11.3 does not contemplate determinations of a continuation or recurrence of threat or material retardation as a basis for continuing to apply an anti-dumping duty after a sunset review.

(b) Would the United States agree that in a sunset review involving recurrence, as opposed to continuation, the investigating authority would have to satisfy itself about the likely recurrence of injury in the same manner in which it would determine injury in an investigation. Please elaborate.

33. No. A determination of injury in an investigation is quite different than a determination as to the likely recurrence of injury in a sunset review. They are, in the words of the Appellate Body "distinct processes with different purposes.[11] The analysis and the factors relevant to the two types of inquiry are not the same.

34. In an original anti-dumping investigation authorities examine the current condition of an industry and the current effect of imports that are not subject to anti-dumping duties. This is true whether the authorities are evaluating material injury, threat of material injury, or material retardation of the establishment of an industry.

35. In a sunset review, on the other hand, authorities examine the likely volume of imports in the future that may have been restrained by an anti-dumping duty order and the likely impact in the future of that volume on a domestic industry that has enjoyed the benefit of an anti-dumping order for the past five years. There may not be any current imports; these imports might not be dumped; and the domestic industry may or may not be currently injured or threatened with injury. In short, in a sunset

[10] There is one correction that needs to be made to this chart. The location in the ITC report of information on the margins of dumping is p. I-14, not p.V-1.

[11] *US – German Steel*, para. 87.

review the investigating authority must engage in counterfactual analysis to determine whether a prospective change in the status quo – *i.e.*, revocation of the order – would be likely to lead to continuation or recurrence of injury.

36. That said, the United States notes that there is no obligation under Article 11.3 for authorities to specify whether it has determined that injury would be likely to recur, as opposed to or that injury is likely to continue.

REQUEST FOR PRELIMINARY RULINGS

Q21. The Panel notes the US statement in paragraph 35 of its first oral statement that the United States has never argued that Argentina's panel request had failed to identify the contested measures in its request for establishment. The Panel also notes the US assertion in paragraph 90 of its first written submission and paragraph 37 of its second oral statement that Argentina's description of the measure at issue in the context of its page four claims is also vague. Please clarify whether the United States is also alleging that Argentina failed to identify the measure at issue, in the context of its page four claims.

37. It has never been clear to the United States what purpose, if any, Page Four serves, but the United States is not claiming that Argentina has failed to identify the measures at issue. Rather, the reference to "certain aspects" of the challenged measures contributes to Argentina's failure to "present the problem clearly," a requirement of Article 6.2 of the DSU. It is this that the United States is challenging.

Q22. The Panel notes the following statement in paragraph 82 of the US first written submission:

The United States, therefore, requests that the Panel accept Argentina's proposed clarification at face value and find that the claims falling within this category are not within the Panel's terms of reference due to Argentina's failure to comply with Article 6.2 of the DSU. *(emphasis added)*

What portions, if any, of the claims raised in Argentina's written submissions to the Panel find their basis exclusively in page four of Argentina's request for establishment? In other words, which claims, if any, that Argentina has raised during these panel proceedings have to be found by the Panel to be outside its terms of reference because of the alleged ambiguity of page four of Argentina's panel request?

38. The claims identified in Sections A and B of the Panel Request are limited to:

As such claims:

- 19 USC. 1675(c)(4), in violation of Articles 11.1, 11.3, 11.4, 2.1, 2.2, 2.4, 6.1, 6.2, 6.6, 6.8, .69, 6.10, 12.2, 12.3, and Annex II of the Anti-Dumping Agreement;[12]
- 19 C.F.R. 351.218(e), in violation of Articles 11.1, 11.3, 11.4, 2.1, 2.2, 2.4, 6.1, 6.2, 6.6, 6.8, 6.9, 6.10, 12.2, 12.3, and Annex II of the Anti-Dumping Agreement;[13]
- 19 USC. 1675a(a)(1), in violation of Articles 11.1, 11.3, and 3 of the Anti-Dumping Agreement;[14]

[12] Section A.1.
[13] Section A.1.
[14] Section B.3.

- 19 USC. 1675a(a)(5), in violation of Articles 11.1, 11.3, and 3 of the Anti-Dumping Agreement;[15]

As applied claims[16]

- the Department of Commerce's alleged application of waiver provisions to Siderca in the sunset review of OCTG from Argentina, in violation of Articles 11.1, 11.3, 11.4, 2.1, 2.2, 2.4, 6.1, 6.2, 6.6, 6.8, .69, 6.10, 12.2, 12.3, and Annex II of the Anti-Dumping Agreement;[17]
- the Department of Commerce 's alleged failure to conduct a review, in violation of Article 11.3 of the Anti-Dumping Agreement;[18]
- the Department of Commerce 's alleged failure to make a "determination" in violation of Article 11.3 of the Anti-Dumping Agreement;[19]
- the Department of Commerce 's Determination to Expedite based on the 50 per cent threshold;[20]
- the allegedly "virtually irrefutable presumption" of likelihood of continuation or recurrence of dumping, in violation of Article 11.3 of the Anti-Dumping Agreement and Article X:3(a) of the GATT 1994;[21]
- the Department of Commerce 's alleged application of a zeroing methodology, in violation of Articles 11.1, 11.3, 2.1, 2.2, and 2.4 of the Anti-Dumping Agreement;[22]
- the International Trade Commission's application of the "likely" standard, in violation of Articles 11.1, 11.3, 11.4, 3.1, 3.2, 3.3, 3.4, 3.5, and 6 of the Anti-Dumping Agreement;[23]
- the International Trade Commission's alleged failure to conduct an objective examination of the record and to base its determination on "positive evidence, "with respect to the volume of imports, price effects on domestic like products, and impact of imports of the domestic industry, in violation of Articles 11.1, 11.3, 11.4, 3.1, 3.2, 3.3, 3.4, 3.5, and 6 of the Anti-Dumping Agreement;[24]
- the International Trade Commission's use of cumulation, in violation of Articles 11.1, 11.3, 3.1, 3.2, 3.3, 3.4, and 3.5 of the Anti-Dumping Agreement.[25]

37. Argentina's written submissions, however, include claims beyond those listed in Sections A and B of the Panel Request. Moreover, Argentina has not argued that these additional claims are based on the listing of measures on Page Four (and indeed the lack of description of measures on Page Four certainly would make any such argument difficult to ascertain). These additional claims – not properly before the Panel because they are not within the Panel's terms of reference as established by Argentina's panel request – are found in Argentina's submissions as follows:

[15] Section B.3
[16] By "as applied," the United States means "as applied" in the sunset review of OCTG from Argentina.
[17] Section A.2
[18] Section A.2
[19] Section B.2
[20] Section A.3
[21] Section A.4
[22] Section A.5
[23] Section B.1
[24] Section B.2
[25] Section B.4

First Written Submission:

- Section VII.A: This section makes claims regarding the waiver provisions under Section 351.218(d)(2)(iii) of the regulations (deemed waivers). Section A of Argentina's Panel Request refers only to Section 351.218(e) of the regulations (adequacy of response to notice of initiation);[26]
- Section VII.B.2: This section makes claims regarding 19 USC. 1675(c) and 1675a(c), the SAA, and the *Sunset Policy Bulletin*. Section A of the Panel Request refers to 19 USC. 1675(c)(4) only and does not refer to the other provisions of 19 USC. 1675(c), 19 USC. 1675a(c), the SAA, or the *Sunset Policy Bulletin*. The only basis for a claim under these provisions would be their listing on Page Four;
- Section VII.E.1: This section makes a claim regarding US administration of its laws, regulations, decisions, and rulings with respect to sunset reviews in violation of Article X:3(a) of the GATT 1994. However, Section A.4 of the Panel Request only challenges the sunset determination of OCTG from Argentina in this regard, not all US laws, regulations, decisions, and rulings with respect to all sunset reviews.[27] The United States does not find a basis for this claim even in Page Four;
- Section VIII.C.2: This section makes a claim regarding the International Trade Commission's application of 19 USC. 1675a(a)(1) and (5) in the Sunset Review of OCTG from Argentina. However, Section B.3 of the panel request makes no reference to the sunset review from Argentina; instead, it challenges the statute "as such." The only basis for an "as applied" claim, therefore, would be the blanket reference on Page Four to the ITC 's "Sunset Determination;"
- Section IX: This Section on its face addresses measures that are only listed on Page Four (Article VI of the GATT 1994; Articles 1 and 18 of the Anti-Dumping Agreement; and Article XVI:4 of the WTO Agreement). The only basis for these claims would be Page Four;
- Section X: The Conclusion states that "US Sunset Review, Statutory, Regulatory, and Administrative Provisions As Such Violate the Anti-Dumping Agreement and the WTO Agreement." However, as noted above, the only measures identified in Sections A and B of the Panel Request are 19 USC. Section 1675(c)(4), 19 C.F.R. Section 351.218(e), Section 1675a(a)(1), and 19 USC. 1675a(a)(5). The only basis for claims regarding any other measures would be the list of measures on Page Four.

Second Written Submission:

- Section III.A: As in its First Submission, Argentina makes a claim regarding 19 C.F.R. Section 351.218(d)(2)(iii) (deemed waiver). Section A of the Panel Request only refers to Section 351.218(e);[28]

[26] The United States has stated that the extension of Argentina's claim to Section 351.218(d)(2)(iii) did not result in sufficient prejudice to warrant an objection because Argentina in its "brief description" under Section A.1 at least indicated that it intended to challenge the waiver provisions. See US First Written Submission, n.103.

[27] It should further be noted that Argentina has argued that use of the phrase "as such" in Section A.4 of the Panel Request makes the entire claim an "as such" claim. However, the language of the claim indicates that it is only the Sunset Determination in this case that is being challenged, and the underlying law and other sunset determinations are merely evidence in support of the "as applied" claim.

[28] *See* n. 26 above.

- Section III.B: This Section makes a claim regarding 19 USC. Section 1675a(c)(1), the Statement of Administrative Action, and the *Sunset Policy Bulletin* and argues that US law as such result in an irrefutable presumption of likelihood. Yet Section A.4 of Argentina's Panel Request only makes a claim that the irrefutable presumption as applied in this sunset determination. The only basis for an "as such" claim regarding the statute, the Statement of Administrative Action, and the *Sunset Policy Bulletin* would be Page Four;
- Section III.D.2: Argentina makes a claim regarding the ITC's application of the statutory provisions regarding time frame. Yet the Panel Request only contains an "as such" claim. The only basis for an "as applied" claim would be the blanket reference to the ITC's "Sunset Determination" on Page Four;
- Section V: This Section makes claims regarding "consequential" violations, and, as discussed above, these Articles (Article VI of the Anti-Dumping Agreement, Articles 1 and 18 of the Anti-Dumping Agreement, and Article XVI:4 of the WTO Agreement) are only found on Page Four.

ANNEX E-10

ANSWERS OF THE UNITED STATES TO QUESTIONS FROM ARGENTINA – SECOND MEETING

13 February 2004

Volume of imports

Q1. There are discrepancies in precise import volumes. Argentina submitted Chart 4 to its second oral statement to represent the Department's determinations in the four concluded annual reviews regarding the import volume. This chart shows that the Department had confirmed at least 154 MT of imports over the period. Argentina also takes the point from the Appellate Body that the authority cannot draw any presumption from the sole fact that there was a decline in import volume after the imposition of the order. The Appellate Body stated: "[A] case-specific analysis of the factors behind a cessation of imports or a decline in import volumes (when dumping is eliminated) will be necessary to determine that dumping will recur if the duty is terminated." (para. 177) With this background, did the United States undertake a case-specific analysis of the factors behind the decline in import volumes in this case? If so, please provide a detailed explanation of that analysis.

1. Notwithstanding Argentina's selective recitation of portions of the AB report in Japan Sunset and the misrepresentations contained in Chart 4, Commerce confirmed the import statistics using two different sources, the Census Bureau IM-145 import statistics and the ITC Trade Database. No respondent interested party, including Siderca, commented on Commerce's use of these import statistics during the sunset review of OCTG from Argentina despite being given the opportunity to do so.

Substantive Basis for the Department's Likelihood Determination

Q2. In its 3 February opening statement (para. 11), the United States confirmed that the Department's likelihood of dumping determination was based on the existence of entries that established a decline in volume and that dumping continued during period of the order. The Appellate Body said that procedures or "provisions" that create "presumptions" or "predetermine" a particular result "run the risk of being found inconsistent with this type of obligation." (*Japan Sunset*, para. 178)

(a) Did the Department presume from the payment of duties that dumping (as defined by Article 2) had continued during the period of the order?

2. The United States uses a retrospective system and does not calculate a margin of dumping unless it conducts an administrative review. Where there is no such administrative review, the United States assesses dumping duty liability at the cash deposit rate in effect for particular subject merchandise at the time of entry. In this case, the deposit rate for OCTG from Argentina at the time of entry for all the periods prior to the sunset review was 1.36 per cent because no annual reviews were completed. The United States believes that the existence of dumping and a reduction in the volume of imports since the imposition of a duty is probative of the likelihood of the continuation or recurrence of dumping. In the sunset review of OCTG from Argentina, neither Siderca nor any other respondent interested party submitted evidence contrary to this probative evidence.

(b) Does the United States consider that this constitutes positive evidence that dumping (as defined by Article 2) would be likely to continue or recur in the event of revocation?

3. The United States believes that the existence of dumping and a reduction in the volume of imports since the imposition of a duty is probative of the likelihood of the continuation or recurrence of dumping. In the sunset review of OCTG from Argentina, neither Siderca nor any other respondent interested party submitted evidence contrary to this probative evidence.

(c) Would the United States agree that in some cases there may be circumstances where it would be commercially unreasonable to undertake an administrative review to obtain a small refund of deposits?

4. A finding that it would be commercially reasonable to request an administrative review in a particular case would depend on the factual circumstances established in that case. The scenario posited by Argentina is not relevant to the present dispute because it supposes facts not in evidence in this case.

Q3. The United States has modified its position with regard to its basis for determining that dumping continued throughout the order. In the *Issues and Decisions Memorandum* the Department stated: "the Department finds the existence of dumping margins after the issuance of the orders is highly probative of the likelihood of continuation or recurrence of dumping." In its First Submission (para. 54) and its Second Submission (paras. 56), the United States indicated (consistent with the US statute) that it considered "dumping margins." In the second substantive meeting, the United States indicated that the basis for the Department's finding that dumping continued was based on the collection of anti-dumping duties. Is there a distinction between the existence of a dumping margin – whether from the original investigation or a review – and the payment of a duties at the deposit rate?

5. The United States has not modified its position with regard to Commerce's finding that dumping continued throughout the like of the dumping order on OCTG from Argentina. There is no difference between the existence of a dumping margin and the payment of duties at the deposit rate for the purposes of determining whether dumping has continued throughout the life of an order in a sunset review.

Q4. Please, compare paragraph 54 of the US First Submission with paragraph 23 of the US Opening Statement of February 3 and explain the contradiction.

6. There is no contradiction between these two statements. Commerce did not rely on the magnitude of the margin, but rather on the existence of dumping and the depressed import volumes throughout the life of the anti-dumping duty order on OCTG from Argentina.

<u>Waiver</u>

Q5. What is the information on the record in the sunset review regarding the non-respondent respondents?

7. The import statistics, verified by the Commerce's Census Bureau IM-145 import statistics and the ITC Trade Database, confirmed the existence of one or more non-responding respondents. These interested parties failed to respond to the notice of initiation of the sunset review for OCTG from Argentina.

Q6. Is the likelihood of dumping determination for the non-responding respondents based solely on their non-participation?

8. The facts in the sunset review of OCTG from Argentina establish that there were imports of Argentina OCTG during the five year period preceding the sunset review and that Siderca did not export OCTG during this period. This means that there were one or more exporters of Argentine OCTG who failed to respond to the notice of initiation of the sunset review. Therefore, based on the evidence of Argentine OCTG imports and the failure of certain Argentine exporters to respond, Commerce found that there was a likelihood of continuation or recurrence of dumping with respect to these non-responding respondents.

Q7. During the second substantive meeting, the United States indicated that there was nothing on the record to contradict Siderca's statement that Siderca was the only Argentine producer of OCTG. Nonetheless, the United States indicated that the imports statistics showed that there were other exporters of Argentine OCTG, which may have been produced by Siderca.

(a) How does the Department reconcile these statements with its findings in the *Issues and Decision Memorandum* (at page 5) that "there have been above *de minimis* margins for the investigated companies throughout the history of the orders"?

9. There were no administrative reviews of OCTG from Argentina, so the dumping margin calculated for Siderca in the original investigation continued to apply and continues to apply to Siderca. In addition, the "all others" rate (1.36 per cent), also calculated during the original investigation, was applied to all imports of Argentine OCTG during the period preceding the sunset review.

(b) Does the United States agree that the only "investigated compan[y]" in this case was Siderca?

10. Siderca was the only company investigation in the original investigation of OCTG from Argentina.

(c) Could the United States explain how imports into the United States of Siderca-produced OCTG, which exports were made by other exporters of potentially different nationalities, is probative of the issue of whether dumping is likely to continue or recur?

11. Siderca ceased shipping OCTG almost immediately after the imposition of the order, which is probative evidence that Siderca could not sell OCTG in the United States absent dumping. Siderca had the opportunity to explain why this factual situation was not probative in the sunset review, but failed to do so. Also, there were imports of OCTG from Argentina during the life of the order for which dumping duties were paid. The domestic interested parties placed evidence of these imports on the administrative record of the sunset review and Commerce verified the statistics. Siderca's only statement in this regard made during the sunset review was that it had not exported OCTG to the United States. It did not allege that these exports came from anywhere other than Argentina or that these exports were or were not produced by Siderca. Therefore, based on the evidence of Argentine OCTG imports and the failure of the Argentine exporters to respond, Commerce found that there was a likelihood of continuation or recurrence of dumping with respect to these non-responding respondents.

Q8. During the second substantive meeting, the United States indicated that it typically notifies the parties on the interested party list of the proceedings. Can the United States provide

a copy of the notice in this case and explain who the interested parties are, to the extent that they are not obvious from the interested party list?

12. Commerce created a web-site for sunset reviews that contains each anti-dumping and countervailing duty order. Each order has an interested party list appended which lists every interested party who has participated in an administrative proceeding covering the respective order since the imposition of the order. This list is updated with each subsequent proceeding, including administrative reviews. Therefore, the interested party list for the anti-dumping duty order on OCTG from Argentina will necessarily be longer at present than it would have been at the time the sunset review was conducted, because administrative reviews have been conducted since the sunset review. The list as it currently stands can be found at the Department of Commerce website, www.doc.gov.

Q9. The Department's *Issues and Decisions Memorandum,* the US First Submission, and US responses to questions indicate that the Department determined that the Argentine non-responding respondents were deemed to have waived participation. The Department also confirmed that Siderca did not ship during the relevant period. The Department confirmed that the waiver of the non-responding respondents meant that they would be likely to dump (response to question 2(a))? Based on the Department's determined that Siderca did not ship to the US market. How could the Department's waiver of the non-responding respondents not have had an impact on the order wide analysis?

13. Please see the answers of the United States to Panel Questions 4(b) and 4(c).

Facts Available/Expedited Review

Q10. The United States agreed in the first hearing that Article 6.8 and Annex II apply to Article 11.3 reviews.

(a) Does the United States continue to hold this view?

14. Yes.

(b) Does the United States continue to agree that Siderca filed a complete response and offered to cooperate fully?

15. Yes.

Q11. Did Siderca's conduct justify use of facts available within the meaning of Article 6.8 and Article II?

16. Commerce did not apply "facts available within the meaning of Article 6.8 and Annex II" to Siderca in the sunset review of OCTG from Argentina.

Q12. The United States says that "facts available" has no negative connotation (US Second Submission at para. 24).D

(a) Does the United States agree that section 351.218(d)(3) requires respondent interested parties to supply past dumping margins and historical import volume data in their substantive response?

(b) Does section 19 USC. section 1675a(c)(1) mandate that the Department "shall consider (A) the weighted average dumping margins determined in the investigation and subsequent reviews, and (B) the volume of imports of the subject merchandise for the period before and the period after the issuance of

the anti-dumping duty order or acceptance of the suspension agreement" in making the likelihood determination?

17. In the context of a sunset review, section 351.308(f) defines "the facts available" as prior agency determinations, information submitted by the interested parties, and any information on the administrative record of the sunset review, including the likelihood determinations concerning the non-responding respondents. In the sunset review of OCTG from Argentina, Commerce considered all the evidence on the administrative record including the prior agency determinations and any information submitted by the interested parties in accordance with section 351.308(f) of the Sunset Regulations.

Q13. The statute(1675(c)(3)(B)) and regulation 351.218(e)(1)(C)(2) state that, in an expedited review, the Department will "issue, without further investigation, final results of review based on the facts available . . .." In light of your response to question 3, how is this consistent with the Appellate Body's statement that the authorities are required to make a "fresh determination, based on credible evidence" when the facts available are limited to the margin from the original investigation and the volume decline?

18. In the context of a sunset review, section 351.308(f) defines "the facts available" as prior agency determinations, information submitted by the interested parties, and any information on the administrative record of the sunset review, including the likelihood determinations concerning the non-responding respondents. In the sunset review of OCTG from Argentina, Commerce made a fresh determination by considering all the information on the administrative record, including the information submitted by the domestic interested parties and Siderca, as well as prior agency determinations and the information collected by Commerce, in light of the new standard of likelihood of continuation or recurrence of dumping.

Zeroing

Q14. Does the United States agree that the 1.36 per cent dumping margin cited in the Department's sunset determination resulted from the division of a numerator of 125,478.93 by a denominator of 9,240,392.64, as represented in Exhibit ARG-52 to Argentina's First Submission?

(a) Does the United States agree that the net price of some of Siderca's US sales exceeded the weighted-average price to China for the matching product?

(b) Does the US agree that the extent to which the net price of sales to the United States exceeded the weighted-average net price to China is not reflected in the numerator of this calculation?

(c) Does the United States believe that CONNUM 1 (used in the example in paras. 141-142 Argentina's Second Submission) was "dumped" within the meaning of Article 2.

19. Article 17.5(ii) of the AD Agreement provides that the panel is to examine the matter based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member." The record of the sunset review which is before this panel contains only that information which was placed on the record by Argentina, Siderca, Commerce, or any other interested party that chose to participate in the review. As discussed below, the record of the sunset review contains the final determination of Commerce in the original investigation, and does not contain the information pertinent to Argentina's questions.

Q15. Does the United States agree with Argentina's description of the calculation methodology in paragraphs 137-144 of Argentina's Second Submission? If not, please explain the basis for your answer.

20. The United States does not agree with Argentina's description of the calculation methodology in paragraphs 137-144 of Argentina's second written submission. That discussion contains a number of legal and factual assertions, the basis for which Argentina has failed to establish and/or which are not properly before this Panel pursuant to Article 17.5(ii) of the AD Agreement.

Q16. Does the United States agree with the calculation in ARG-66A to the extent that it shows that the addition of the positive and negative "margins" would yield a negative $402,159.45? If not, why not?

21. Exhibit ARG-66A contains computer output which was not on the record of the sunset review. The computer programming used to create the output contained in ARG-66A is neither on the record of the sunset review, nor is it contained in the exhibit itself. Consequently, the United States does not agree with, and is not in any position to evaluate, anew, in the context of this dispute, the contents of Argentina's exhibit.

Q17. Paragraph 54 of the US First Submission indicates that the dumping margin from the original investigation was the only indicator available to the Department. In light of this, does the United States dispute that the margin that was calculated in the original investigation was part of the record from the sunset proceedings?

22. Commerce reported the margin from the original investigation, 1.36 per cent, to the International Trade Commission as the "margin likely to prevail" in the event the anti-dumping order on OCTG from Argentina was revoked.

23. Thus, the record in the sunset review contained the final determination of Commerce which stated that the margin calculated in that determination was 1.36 per cent. However, Siderca's detailed questionnaire responses and computerized cost and sales information, supplemental questionnaires issued by Commerce, verification findings, legal briefs, and other relevant documents and memoranda supporting the final determination in the original investigation were not placed on the record of the sunset review by Argentina, Siderca, or any other party.

Q18. Was the 1.36 per cent margin relied on by the Department for purposes of its likelihood determination in the sunset review established on the basis of a fair comparison in light of the Appellate Body's decisions in *Bed Linens* (paras. 55, 61, 62) and *Japan Sunset* (paras. 126-132)? If so, please explain how a "fair comparison" was established given that a negative margin of 4.536 would have been the result of the calculation without the use of zeroing?

24. First, Commerce did not rely on the 1.36 per cent calculated in the original investigation in making its likelihood determination in the sunset review of OCTG from Argentina. Rather, Commerce found that the existence of dumping and depressed import volumes since the imposition of the order was highly probative that dumping would be likely to continue or recur if the anti-dumping duty order on OCTG from Argentina were revoked.

25. With respect to the remainder of Argentina's question, the answer is yes. Although the calculation methodology used to establish the 1.36 per cent margin was not on the record of the sunset review, the United States confirms that the methodology was different from that used in *EC – Bed Linen*. Argentina has not explained the legal basis for its claims with respect to the United States' methodology to the extent that the methodology differs from that involved in *EC – Bed Linen*.

Q19. Under Article 17.6(i), the Panel is charged with assessing whether the Department's "assessment of the facts was proper and whether their evaluation of those facts was unbiased and objective." In the recent compliance panel appeal in the *Bed-Linens* case, the Appellate Body provided additional guidance on the applicable standard under Article 17.6(i):

> **In *US – Hot-Rolled Steel*, we stated that "[a]lthough the text of Article 17.6(i) is couched in terms of an obligation on *panels* . . . the provision, at the same time, in effect defines when *investigating authorities* can be considered to have acted inconsistently with the Anti-Dumping Agreement." We further explained that the text of Article 17.6(i) of the Anti-Dumping Agreement, as well as that of Article 11 of the DSU, "requires panels to 'assess' the facts and this . . . clearly necessitates an active review or examination of the pertinent facts." (Appellate Body Report, Recourse to Article 21.5, *Bed Linen from India*, para. 163)**

In light of this:

(a) What did the Department do to "assess" whether the 1.36 per cent margin that the Department relied on for its likelihood of dumping determination could serve as a "proper" basis for that determination?

26. As discussed above, Commerce did not rely on the 1.36 per cent calculated in the original investigation in making its likelihood determination in the sunset review of OCTG from Argentina. Rather, Commerce found that the existence of dumping and depressed import volumes since the imposition of the order was highly probative that dumping would be likely to continue or recur if the anti-dumping duty order on OCTG from Argentina were revoked.

27. With respect to Article 17.6(i) of the AD Agreement, that provision states that, "If the establishment of the facts was proper and the evaluation was unbiased and objective, [...], the evaluation shall not be overturned." Thus, the starting point for any review of Commerce's actions is, initially, Commerce's procedures for establishing facts, then Commerce's evaluation of those facts. In this case, the anti-dumping duty margin referenced by Commerce in its sunset review was placed on the record of the sunset review as part of the final determination from the anti-dumping duty investigation. The results of that investigation were unchallenged/unchanged. Although they had the opportunity available to them procedurally, neither Argentina, nor Siderca, placed any information or argument on the record of the sunset review seeking to call into question the validity of the margin calculation. Thus, the fact of the 1.36 per cent margin as the result of the initial investigation was not challenged on the record. Consequently, there was no reason for the United States, acting in an unbiased and objective manner, to question the validity of that margin.

(b) Given that the margin was calculated in the original investigation on the basis of zeroing, how does the Department defend it's "evaluation" of the 1.36 per cent margin as "unbiased and objective" in using that margin as the basis for its conclusion that "dumping" (as defined by Article 2) was likely to continue or recur?

28. It has not been established before this Panel or elsewhere that the margin calculated for Siderca in the original investigation of OCTG from Argentina was determined using a methodology not consistent with the obligations of Article 2; otherwise, see US answer above.

The Commission's Likely Standard

Q20. Does the United States consider to be accurate the Commission's description to a NAFTA panel of the likely standard applied to the OCTG sunset review (excerpt included as Exhibit ARG-67 to Argentina's Second Submission)?

29. See the response to the question below.

Q21. Does the United States agree that the description expresses the view that "likely" does not mean "probable"?

30. Two of the Commissioners, Vice Chairman Hillman and Commissioner Koplan, both of whom participated in the OCTG sunset reviews, consistently have applied the "probable standard or its equivalent,[1] since the commencement of the first US sunset reviews.[2] The description in the NAFTA panel brief concerning the approach taken by some other members of the ITC was based on their understanding that the term "probable" connoted a very high degree of certainty. *See, e.g.*, the discussion of this issue in the July 2002 Usinor submission (Exhibit ARG-56 at 6). As it became apparent from subsequent opinions of the US court, however, there are different connotations associated with the word "probable." Since the NAFTA panel brief was filed (in February 2002), at least two judges in a US court have implied that the term "probable" does not indicate a requirement for any particular level of certainty, let alone a high level of certainty. *Usinor Industeel v. United States*, Slip Op. 02-152 at 6 n.6 (20 Dec. 2002) ("the court has not interpreted 'likely' to imply any particular degree of certainty") (Exhibit US-18); *Indorama Chemicals (Thailand) Ltd. et al v. United States International Trade Commission*, Slip Op. 02-105 at 20-21 (4 Sep. 2002) ("standard is based on a 'likelihood' of continuation or recurrence of injury, not a certainty") (Exhibit US-32). This guidance from the US court was not available to the ITC when the brief to the NAFTA panel was drafted. Once the court clarified what it meant by the statement that "probable" was synonymous with the statutory term "likely," it became clear that the views of individual Commissioners as to the standard applicable in sunset reviews (including the standard applied in the OCTG sunset review) were either identical to that articulated by the court or indistinguishable from it. The US court recognized this point in affirming the ITC's unchanged affirmative remand determination in Usinor. For these reasons, the views of participating Commissioners in the OCTG sunset review remain consistent with the "likely" standard as that term has been defined by the US courts.

Evidentiary Basis

Q22. Paragraph 56 of the US Second Submission states that the margins reported by the Department to the Commission are relevant to the Commission's sunset determination? Does the United States believe that the 1.36 per cent margin was relevant to the Commission's sunset determination? Did the Commission consider that margin in its likelihood of injury analysis?

31. Paragraph 56 of the US second written submission does not state that the margins reported by Commerce to the ITC are relevant to the Commission's sunset determination.

[1] Vice Chairman Hillman has interpreted "likely" to mean "more likely than not."

[2] *Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, the Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom*, Inv. Nos. AA-1921-197 (Remand), 701-TA-231, 319-320, 322, 325-328, 340, 342, and 348-350 (Remand), and 731-TA-573-576, 578, 582-587, 604, 607-608, 612, and 614-618 (Remand), USITC Pub. 3526 (July 2002) at *Separate Views of Vice Chairman Jennifer A. Hillman Regarding the Interpretation of the Term "Likely"*, and *Dissenting Views of Commissioner Stephen Koplan Regarding the Interpretation of the Term "Likely."* (Exhibit US-31.)

32. The staff report accompanying the ITC's determination simply noted the margins (ranging from 1.36 per cent to 49.78 per cent) reported to the ITC by Commerce.[3] The ITC also noted these margins in its view[4] but did not discuss them further.

Q23. If so, did the Commission consider whether this margin had been "tainted" by the practice of zeroing?

33. As noted above, the ITC did not evaluate the margin specific to subject imports from Argentina as part of its likelihood of injury analysis.

Q24. Does the United States agree that if Article 3 applies to Article 11.3 reviews, then the failure to consider the margin would violate Articles 11.3 and 3.4?

34. The United States does not agree that Article 3 applies to Article 11.3 reviews. Additionally, the United States notes that Article 3.4 provides only for consideration of the magnitude of the duty and provides that no one factor is dispositive.

Q25. The Appellate Body in *Steel from Germany* (para. 88) stated that: "Where the level of subsidization at the time of the review is very low, there must be persuasive evidence that revocation of the duty would nevertheless lead to injury to the domestic industry." With respect to the obligation under Article 11.3, does the United States believe it was necessary for the Commission to consider the magnitude of the margin in determining whether revocation of the order on OCTG from Argentina would be likely to lead to continuation or recurrence of injury?

35. Article 11.3 does not impose an obligation to consider the magnitude of the margins as part of the analysis of whether revocation of the order would be likely to lead to continuation or recurrence of injury. If the ITC had evaluated the margins, it would have considered the margins from all five countries whose imports were cumulated in these sunset reviews, margins that ranged from 1.36 to 49.78 per cent.

Cumulation

Q26. Does the US agree that that Article 3.3 contains substantive disciplines on the use of cumulation? In the US view, are these substantive disciplines restricted to Article 5 investigations?

36. The United States agrees that Article 3.3 contains substantive disciplines on the use of cumulation, and that these disciplines are restricted to Article 5 investigations.

Q27. In the view of the US, is there any substantive discipline on the use of cumulation in an 11.3 review?

37. No.

Q28. If not, what is the US view as to why the Agreement would be disciplined in the context of an Article 5 investigation, but not in an Article 11.3 review?

38. The United States does not wish to speculate on the negotiating background to specific provisions of the AD Agreement. The United States notes, however, that there is a fundamental difference between investigations and sunset reviews that might explain why cumulation is disciplined in the former but not in the latter case. This difference is that in sunset reviews the

[3] ITC Report, p. I-14.
[4] ITC Report, p. 9 n.51.

imports being examined are restrained by the effects of an anti-dumping measure, and this may also explain why it was decided not to apply *de minimis* and negligibility conditions on the use of cumulation in sunset reviews. Indeed, the Appellate Body made a similar observation (in the countervailing duty context) when it stated that "[q]ualitative differences [between investigations and sunset reviews] may also explain the absence of a requirement to apply a specific *de minimis* standard in a sunset review[5]

Q29. Does the US have any textual support for its view that cumulation is permitted in Article 11.3 reviews?

39. As the United States explained in its first submission (para. 363), the genesis of any obligation or right arising under the WTO Agreement is the text of the relevant provision, and absent a textual basis, the rights of Members cannot be circumscribed. The question, therefore, is whether Argentina has any textual support for its view that cumulation is *not* permitted in sunset reviews. As the United States also explained in that submission (paras. 364-365), a prohibition on cumulation would run counter to the overall object and purpose of the AD Agreement.

[5] *US – German Steel*, AB Report, para. 87.

ANNEX E-11

COMMENTS OF ARGENTINA ON THE UNITED STATES' CLOSING STATEMENT AND THE UNITED STATES' RESPONSES TO THE PANEL'S AND ARGENTINA'S QUESTIONS – SECOND MEETING

20 February 2004

I. WAIVER/EXPEDITED REVIEW

US Position:

1. The United States admits that the waiver provisions of US law affect the order-wide likelihood determination, but the United States asserts that these provisions do not determine the final outcome of its order-wide likelihood determinations. This assertion is made both generally and in the specific case of the sunset review of Argentine OCTG. (US Answers to Second Set of Panel Questions, para. 4).

Argentina's Comment:

2. The US answer is not credible on any level, and the United States carefully avoids answering the difficult questions asked by the Panel.

3. First, the United States admits that there has never been a case in which waiver was applied on the company-specific level (leading to the statutorily-mandated likely dumping determination) and a negative determination was made on an order-wide basis (US Answers to Second Set of Panel Questions, para. 2.). Exhibits ARG-63 and ARG-64 show that waiver was applied 173 times, and each time the Department rendered an affirmative order-wide, likelihood determination. The United States simply cannot rebut the fact, proven by Argentina, that there has never been a negative likelihood of dumping determination in any case in which the waiver provision was applied.

4. Furthermore, in these cases the United States often cites the waiver provisions as the basis for its affirmative, order-wide likelihood decision, even when other exporters have attempted to participate.[1] This is precisely what happened in this case, in which the Department stated:

> Therefore, given that dumping continued after issuance of the orders, average imports continued at levels far below pre-order levels from 1995 through 1999, and respondent interested parties waived their right to participate in these reviews or failed to submit adequate substantive responses, we determine that dumping is likely to continue if the orders were revoked.[2]

[1] For example, the case provided at ARG-63, Tab 165 provides some striking similarities to the review at issue, and provides another reference point from which the Panel can judge the credibility of the U.S. statements about the effect of company-specific waivers. In the full sunset review of mechanical transfer presses from Japan, respondent interested parties provided an adequate aggregate response, and therefore the Department conducted a full review. Nevertheless, the Department based its affirmative likelihood determination in part on the waiver applied to certain of the respondents: "[W]e note that additional producers/exporters waived their right to participate in this review, which also constitutes grounds for likelihood of continuation or the recurrence of dumping should the order be revoked (see section 751(c)(4)(B))." (*Issues and Decision Memorandum for the Full Sunset Review of MTPs from Japan (Final Results)* at 3 (ARG-63, Tab 165)) (emphasis added).

[2] *Issues and Decision Memorandum* at 5 (ARG-51) (emphasis added).

This statement, viewed both separately and in the context of the Department's practice, demonstrates that: (1) the Department's system does not, in fact, operate as the bifurcated, two-step process that the United States explains in its answers; and (2) waiver is determinative in every case in which it is applied, including this case.

5. Even if the Panel were to accept the US explanation as a general proposition (i.e. relevant to Argentina's "as such" claim), the Panel must find that in this case the application of the waiver was determinative. Company-specific waivers (even if limited to non-responding respondents), combined with Siderca's zero share, and the "highly probative" value attached to lower export volumes and an assumed existence of dumping determined the outcome.

6. The United States declined to answer the Panel's specific question on this point. Question 4.c specifically asked the United States to answer the question in light of Siderca's zero share of exports. In other words, when company-specific waivers apply to companies accounting for 100 per cent of the exports, and statutorily mandated likelihood findings result for those companies, can there be a different finding on the order-wide level? The United States gave a non-answer and avoided referencing the fact that, in this case, the automaticity of the waiver finding, combined with the decision to expedite the review and make the determination on the basis of waiver and facts available, determined the outcome of this case.

7. The only possible explanation left for the United States is to explain that the result might be different if one of the exporters offers an explanation as to why the import volumes decreased. The United States attempts this explanation at paragraphs 7 and 11 of its response. This explanation is not credible. As Mexico explained in its written response to a question after the first substantive meeting, even in a full review in which its exporters explained the reasons for the lower shipment levels, the Department categorically dismissed the explanations, repeated the SAA/*Sunset Policy Bulletin* mantra of the highly-probative value of the original dumping margins and lower export volumes, and found dumping likely to recur. Argentina asks the Panel to review Mexico's response and the Department's decision at ARG-63, Tab 179, when judging the credibility of the explanation by the United States. And, there are several other examples included as supporting evidence in ARG-63 and ARG-64 to demonstrate the point, including the MTP case referenced in note 1 above.[3]

8. The US assertion that the Department will consider any information on the record that rebuts the probative value of the existence of dumping and depressed import volumes (US Answers to Second Set of Panel Questions, paras. 7 and 11) also contradicts the statute and the regulations. As Argentina has explained in past submissions, and the United States has never rebutted, under the statute, regulations, and *Sunset Policy Bulletin*, the Department will only consider such other information where "good cause" is shown and, pursuant to the regulation and *Sunset Policy Bulletin*, will do so only in "full reviews."[4] (Argentina's Second Submission, paras. 76-77; Argentina's Second

[3] In *MTPs from Japan*, although post-order import volumes had declined, the respondents explained the reasons for the reduction in volume. Nevertheless, the Department found that "deposit rates above *de minimis* continue[d] in effect for other producers/exporters of MTPs from Japan" and thus determined that dumping would be likely to continue if the order were revoked. (*Issues and Decision Memorandum for the Full Sunset Review of MTPs from Japan (Final Results)* at 3 (ARG-63, Tab 165)).

[4] 19 C.F.R. § 351.218(e)(2)(iii). For example, in the full sunset review of sugar and syrups from Canada (*Sugar and Syrups from Canada*, 64 Fed. Reg. 48,362 (1999) (ARG-63, Tabs 261)), the Department stated: "The Department's Sunset Policy Bulletin notes that the Department will consider other factors (such as prices and costs) in full sunset reviews where an interested party identifies good cause through the provision of information or evidence that would warrant consideration of such factors." (64 Fed. Reg. at 48,363 (ARG-63, Tab 261)) (emphasis added).

Oral Statement, paras. 53, 64-66) In full reviews, the Department has routinely rejected respondent interested parties' attempts to show "good cause" to consider additional factors.[5]

9. Finally, the United States continues to struggle with its explanations of the "deemed waiver" mechanism that results from US law and the implementing regulations. In question 5(a), the Panel clearly asks whether section 1675(c)(4)(B) requires the Department to find likelihood of dumping for respondents that file an incomplete response. The United States responds by answering that section 1675(c)(3)(B) deals with adequacy determinations and the application of facts available, and then adds parenthetically that section 1675(c)(4)(B) relates to affirmative waivers. (US Answers to Second Set of Panel Questions, para. 5).

10. At this stage of the proceeding, there is no reason for an indirect answer to this question. It is plainly the case that: (1) section 1675(c)(4)(B) of the codified statute mandates an affirmative likelihood determination for parties who have waived ("In a review in which an interested party waives its participation pursuant to this paragraph, the administering authority shall conclude that revocation of the order . . . would be likely to lead to continuation or recurrence of dumping . . . with respect to that interested party"); and (2) section 351.218(d)(2)(iii) of the implementing regulation treats parties submitting incomplete responses as having waived their right to participate ("The Secretary will consider the failure by a respondent interested party to file a complete substantive response to a notice of initiation . . . as a waiver of participation . . . ."). So, when a party submits an incomplete response, it is deemed to have waived its right to participate, and the statute mandates an affirmative likelihood finding. The United States avoids answering the Panel's question by not mentioning the implementing regulation, but subsequently acknowledges the effect of the regulation in its response to Panel Question 9.[6] (US Answers to Second Set of Panel Questions, para. 12).

11. In the case under review, the Department found Siderca's response to be "inadequate," (*Issues and Decision Memorandum* at 3,7) (ARG-51) and later justified the invocation of the waiver provisions by stating it had not received complete responses from the respondent interested parties. (*Id.* at 5.) It is hard to understand why the United States is being so indirect with its answers on this point given the clear words of the statute, regulations, and the *Issues and Decision Memorandum* in this case.

12. The US answers to the Panel's questions regarding the waiver and facts available provisions are not convincing. Argentina has established in the proceeding that:

- The waiver provisions of US law and regulations require an automatic determination that dumping is likely to continue or recur. Even if respondents try to participate, they can be deemed to have waived their participation.

[5] For example, in the preliminary phase of the full sunset review of magnesium from Canada, the respondent, for which the Department had calculated zero margins in the past four administrative reviews, argued that "good cause" existed for the Department to consider exchange rates in making the likelihood of dumping determination. (*Issues and Decision Memo for the Sunset Review of Pure Magnesium from Canada (Preliminary Results)* at 4 (ARG-63, Tab 201)) The Department declined to consider such information, basing its determination instead on a decline in volume: "Given that the Department has conducted numerous administrative reviews and is satisfied that observed patterns regarding import volumes are indicative of the likelihood of continuation or recurrence of dumping, we will not consider good cause arguments in this case." (*Id.* at 7) In the final results, the Department refused to consider the respondent's explanation for the decline in imports. (*Issues and Decision Memo for the Sunset Review of Pure Magnesium from Canada (Final Results)* at 5 (ARG-63, Tab 201)).

[6] Pursuant to the regulation, the Department in practice deems a respondent that submits an incomplete substantive response to have waived participation in the sunset review. (*See*, e.g., *Issues and Decision Memo for the Expedited Sunset Review of Cut-to-Length Carbon Steel Plate from Belgium* at 2-3, 5 (ARG-63, Tab 82)).

- In this case, the waiver provisions determined the result.

    - The Department said that Siderca's response was inadequate and that all of the respondents waived their right to participate.

    - Even if the Panel accepts the US explanation that only the "non-responding respondents" waived their right, the deemed waiver in this case determined the outcome.

Article 11.3 does not permit automatic decisions based on "deemed waivers." As seen in this case, the authority abdicated its responsibility to conduct an investigation and render a determination based on positive evidence. By abdicating this responsibility, the Member loses its right to invoke the exception in Article 11.3, and it must honour its obligation to terminate the measure.

II. SUBSTANTIVE BASIS FOR LIKELY DUMPING DETERMINATION

US Position:

The United States confirmed that "Commerce's final affirmative likelihood determination in the sunset review of OCTG from Argentina was based on the existence of dumping and depressed import volumes over the life of the anti-dumping duty order on OCTG from Argentina." (US Answers to Second Set of Panel Questions, para. 4).

A. DECLINE IN VOLUME

US Position:

The United States indicated that "reduction in the volume of imports since the imposition of a duty is probative of the likelihood of the continuation or recurrence of dumping." (US Answers to Argentina's Questions, paras. 2 & 3) The United States also noted that "Siderca ceased shipping OCTG almost immediately after the imposition of the order, which is probative evidence that Siderca could not sell OCTG in the United States absent dumping." (US Answers to Argentina's Questions, para. 11) Elsewhere, the United States asserted that the Department normally considers "depressed import volumes to be highly probative evidence that dumping will likely continue." (US Answers to Second Set of Panel Questions, para. 11) The progression of the US responses leads to the conclusion that the decline in import volumes was given decisive (if not conclusive and determinative) weight by the Department in this case. As noted above, along with the purported existence of dumping (based on the margin from the original investigation), the United States confirmed that "Commerce's final affirmative likelihood determination in the sunset review of OCTG from Argentina was based on . . . depressed import volumes over the life of the anti-dumping duty order on OCTG from Argentina." (US Answers to Second Set of Panel Questions, para. 4).

Argentina's Comment:

13. The Appellate Body said it "would have difficulty accepting that dumping margins and import volumes are always 'highly probative' in sunset reviews" and that such factors could not alone be presumed to constitute sufficient evidence of a likelihood of dumping (Appellate Body Report, *Sunset Review of Steel from Japan*, para. 177).

14. The United States did nothing to examine the reason for the decline. The Appellate Body expressly rejected such a passive approach. The Appellate Body stated that a "decline in import volume could well have been caused or reinforced by changes in the competitive conditions of the market-place or strategies of exporters, rather than by the imposition of the duty alone." Accordingly, the Appellate Body said that "a case-specific analysis of the factors behind a cessation of imports or a

decline in import volumes . . . will always be necessary." (*Id*) Here, the Department did nothing, which the United States appears to concede (US Answers to Questions from Argentina, para. 11).

15. ARG-63 and ARG-64 demonstrate that import volume along with the existence of dumping margins is treated by the Department as "conclusive and determinative" of likelihood of dumping in every sunset case. Thus, far from being simply "probative" of likely dumping or even "highly probative" as the United States indicates (echoing the SAA) in its responses, in practice, the Department attaches decisive weight to declines in import volume for purposes of determining the likelihood of dumping in every sunset case.

16. In light of the Department's consistent practice to treat import volume declines as conclusive and determinative of likely dumping, as evidenced in ARG-63 and ARG-64, it is simply not credible for the United States to argue that Siderca, or any other Argentine exporter for that matter, could have offered any additional information regarding the decline in Argentine OCTG and that such information would have had any effect on the outcome. For example, the Panel should view the US answers in light of two examples taken from ARG-63 and ARG-64:

- The record of the expedited sunset review of the anti-dumping order on stainless steel wire rod from Spain indicated that the dumping margin for the sole respondent declined after the order, and that the subject import volume had risen to pre-order levels. (*Issues and Decision Memo for the Expedited Sunset Review of Stainless Steel Wire Rod from Spain* at 4, 6 (ARG-64, Tab 4)) Under the SAA, this evidence should have led to a finding that continuation or recurrence of dumping would not be likely.[7] Nevertheless, the Department narrowly focused on the year immediately following the imposition of the order, during which time import volumes declined, and concluded on that limited basis alone that dumping would be likely to continue or recur. (*Id.* at 6)

- In the full sunset review of brass sheet and strip from the Netherlands, the facts showed that after imposition of the order, the sole respondent had obtained zero dumping margins in the three most recent administrative reviews. In addition, this respondent supplied the US market almost exclusively from its newly-purchased US facility, resulting in a decline in import volume. The Department ignored these facts – and the logical reason for the decline in volume – and simply cited the decline in import volume as conclusive evidence that termination would be likely to lead to a continuation or recurrence of dumping. (*Brass Sheet and Strip from the Netherlands (Preliminary Results)* 64 Fed. Reg. 46,637, 46,641, and 65 Fed. Reg. 735, 738 (final results), (ARG-63, Tab 32))

B. DUMPING MARGIN

US Position:

The US answers to questions 15.a. and 15.b. of the Second Set of Panel Questions continue the line, started in its Second Submission, that the Department did not rely on the margin from the original investigation in this case, and that, instead, it relied on the evidence of continued dumping. But in response to Argentina's question 3, the United States indicates: "There is no difference between the existence of a dumping margin and the payment of duties at the deposit rate for the purposes of determining whether dumping has continued throughout the life of an order in a sunset review." (US Answers to Second Set of Panel Questions, paras. 21-23).

Argentina's Comment:

17. The answer is both evasive and contradictory with the US position.

[7] "[D]eclining (or no) dumping margins accompanied by steady or increasing imports may indicate that foreign companies do not have to dump to maintain market share in the United States and that dumping is less likely to continue or recur if the order were revoked." SAA at 889-90 (ARG-5).

18. The issue is not whether the United States believes that the existence of a deposit rate based on the original margin, and collection of duties without a review, is evidence of continued dumping. This is, unambiguously, the US position which began in its Second Submission. The issues for the Panel to decide are: (1) is this really evidence of Article 2 dumping? and (2) what does such information say about the likelihood of dumping in the future (is it sufficient evidence of likelihood of dumping for purposes of Article 11.3)? The United States dodges these critical issues in its answers.

19. The statement is also contradictory. If there is no distinction between the existence of a dumping margin and the payment of duties at the deposit rate, how can the United States say that the Department relied on payment of duties at the deposit rate but that it did not rely on the dumping margin? This demonstrates the weakness of the US theory that collection of dumping deposits in a retrospective system can constitute: (1) evidence of dumping within the meaning of Article 2 (it cannot); and (2) positive evidence of likely dumping within the meaning of Article 11.3 (it cannot).

US Position:

The United States asserts that "[t]he magnitude of dumping, . . . whether past, present, or future, has no bearing on Commerce's likelihood determination." (US Answers to Second Set of Panel Questions, para. 22).

Argentina's Comment:

20. The US position is inconsistent with *Sunset Review of Steel from Japan*, in which the Appellate Body indicated that the magnitude of dumping is relevant to the likelihood of dumping determination:

> The *degree* to which import volumes of dumping margins have decreased will be relevant in making an inference that dumping is likely to continue or recur. Whether the historical data is recent or not may affect its probative value, and trends in data over time may be significant for an assessment of likely future behaviour. (Appellate Body Report, *Sunset Review of Steel from Japan*, para. 176)

21. Also, the US position misses an obvious point, and one that is also directly relevant to this case. The magnitude of the margin goes directly to the question of the existence of dumping (within the meaning of Article 2). And, the United States considers the existence of a dumping margin to be highly probative in determining whether dumping would be likely to continue or recur in the event of termination of the measure (for purposes of Article 11.3). That the "magnitude of the margin" and the "existence of dumping" are at times inseparable was explicitly recognized by the Appellate Body in *Sunset Review of Steel from Japan* in the context of its "zeroing" discussion, which is also at issue in this case. (*See* Appellate Body Report, *Sunset Review of Steel from Japan*, para. 135).

22. In addition, the US assertion conflicts with the US statute, 19 USC. § 1675a(c)(1)(A), which states that in making the likelihood of continuation or recurrence of dumping determination, the Department "shall consider – the weighted average dumping margins determined in the investigation and subsequent reviews . . . ." (emphasis added) The US position is also inconsistent with the Department's regulations which, at a minimum, require the Department to determine whether a particular margin is above or below the 0.5 per cent *de minimis* level established by the United States. *See* 19 C.F.R. § 351.106(c)(1) (requiring the Department "to treat as *de minimis* any weighted average dumping margin or countervailable subsidy rate that is less than 0.5 per cent"). The United States' statements that the magnitude of dumping "has no bearing" on the likelihood determination are therefore not credible.

III. US POSITION ON ARG-63 AND ARG-64

The United States first concedes that it "has not examined each and every sunset review cited by Argentina in Exhibit ARG-63 and Exhibit ARG-64" and then dismisses the significance of these exhibits. (US Answers to Second Set of Panel Questions, paras. 16-19). The United States went as far to say in its Closing Statement of 3 February 2004, that these exhibits are "meaningless." (US Second Closing Statement, para. 4)

Argentina's Comment:

23. Having acknowledged not having reviewed the sunset determinations cited in ARG-63 and ARG-64, the United States cannot credibly make the blanket assertions in its Closing Statement that these exhibits do not "shed any light on the nature of Policy Bulletin" and that ARG-63 and ARG-64 "provide no insights into the facts of those cases with respect to information on dumping and import volumes." (US Second Closing Statement, para. 4).

24. As Argentina explained, Exhibits ARG-63 and ARG-64 set out the legal and factual basis for the Department's sunset determination in every case in which the domestic industry participated. Contrary to the US statements, Argentina did in fact examine the factual and legal basis of every one of the Department's sunset determinations. Argentina digested each case and tabulated the legal and factual basis for the Department's determination in each case in which the domestic industry participated. Among other information, ARG-63 and ARG-64 set forth the stated basis for the Department's likelihood of dumping determination and establish that the Department gave "conclusive and determinative" weight to historical dumping margins and import volumes in every single case in which the domestic industry participated. Specifically, ARG-63 and ARG-64 contain the heading entitled "Stated Basis for Likelihood Determination," under which there are four columns, three of which represent the checklist criteria for the likelihood of dumping determination as outlined in the statute, the SAA, and the *Sunset Policy Bulletin*: (a) the existence of *continued dumping margins* – whether from the original investigation or an administrative review; (b) a finding that *imports ceased*; and (c) a *decline in the volume of imports* after dumping was eliminated. The charts in ARG-63 and ARG-64 also reflect a fourth category, which indicates whether the Department undertook the prospective analysis as required by Article 11.3 of the Anti-Dumping Agreement. This category (highlighted in yellow) has no data in it, as the Department has never undertaken the requisite Article 11.3 analysis.

25. Argentina also submitted all of the written determinations of the Department in every case to substantiate Argentina's claims and the information set forth in ARG-63 and ARG-64. Throughout this dispute, the United States has confined its arguments relating to ARG-63 and ARG-64 to saying that the only relevant cases are those so-called "contested" sunset reviews in which both the domestic industry and respondents participate. (Even for the so-called contested cases, however, the Department has never made a not likely determination, and the United States has thus failed to rebut Argentina's prima facie case that the Department's consistent practice demonstrates a WTO-inconsistent presumption, using whatever numbers – 223/223, 43/43, or 35/35). In fact, the United States has failed to offer a single rebuttal to any of the information in ARG-63 and ARG-64 that Argentina has presented as the basis for the Department's likelihood of dumping determination in the cases cited in ARG-63 an ARG-64. Rather, the United States indicated that it had no reason to believe that "the overall total of sunset reviews conducted and the ultimate outcomes in those sunset reviews" as presented by Argentina was flawed. (US Response to the Panel's Questions, para. 16)

26. Argentina has also referenced about a half-dozen other particular sunset reviews conducted by the Department during the course of the proceedings to support Argentina's claims.[8] The United

[8] *Issues and Decision Memo for the Expedited Sunset Review of Stainless Steel Wire Rod from Spain* at 4, 6 (ARG-64, Tab 4); *Industrial Nitrocellulose from Yugoslavia*, 64 Fed. Reg. 57,852, 57,853-54 (1999)(ARG-

States did not respond to Argentina's characterization of those cases, nor did the United States offer any rebuttals to the conclusions that Argentina drew from those specific cases.

27. As a separate matter, US characterizations of the *Sunset Policy Bulletin* and US arguments that the *Sunset Policy Bulletin* is not a measure that can be challenged are directly contrary to the Appellate Body rulings on this point. More importantly, such argumentation does not respond to or in any way rebut the evidence presented by Argentina in ARG-63 and ARG-64 that demonstrates that the Department attached decisive (if not conclusive and determinative) weight to dumping margins and import volumes in every case. The Department's sunset determinations in ARG-63 and ARG-64 provide support for the Appellate Body's observation that the following passage from the *Sunset Policy Bulletin* suggests by negative implication that the Department considers satisfaction of any of the three *Sunset Policy Bulletin* criteria as conclusive of likely dumping in sunset reviews of anti-dumping duty orders: "The Department recognizes that, in the context of a sunset review of a suspended investigation, the data relevant to the criteria under paragraphs (a) through (c), above, [dumping margins and import volumes] *may not be conclusive* with respect to likelihood." (Appellate Body Report, *Sunset Review of Steel from Japan*, para. 179, citing *Sunset Policy Bulletin*, at 18872).

28. Furthermore, the *Sunset Policy Bulletin* itself states that "the legislative history makes clear that continued margins at any level would lead to a finding of likelihood. *See* Section II.A.3." (*Sunset Policy Bulletin* (ARG-35) at 18872) The *Sunset Policy Bulletin*'s internal cross-citation to the three criteria in Section II.A.3 of the *Sunset Policy Bulletin* further supports Argentina's textual arguments (as confirmed by the Department's practice in ARG-63 and ARG-64) that consistent with the direction of the *Sunset Policy Bulletin*, the existence of dumping margins and volume declines are given conclusive and determinative weight by the Department in all cases.

29. In addition, the Panel should also assess the US position that the Department's consistent practice in ARG-63 and ARG-64 does not prove the existence of a WTO-inconsistent presumption, in light of statements in the US First Submission where the United States indicated that based on the *Sunset Policy Bulletin* criteria, "sometimes Commerce 'normally' will determine likelihood, and at other times it 'normally' will not." (US First Submission, para. 181). However, as the Department's consistent practice reflects, even in those cases where dumping margins declined or dumping was eliminated and imports rose to pre-order volumes – a scenario that the United States says will "normally" result in a not likely determination – the Department nevertheless still determined that dumping would be likely to continue in each such case. (*See*, e.g., *Issues and Decision Memo for the Expedited Sunset Review of Stainless Steel Wire Rod from Spain* at 4, 6 (ARG-64, Tab 4); *Sugar and Syrups from Canada*, 64 Fed. Reg. 48,362, 48,363-64 (1999) (ARG-63, Tab 261))

30. Finally, Argentina is not arguing that because the Department's practice shows a pattern, that it is therefore obligated to follow its practice. Rather, it is precisely the opposite. Because Section II.A.3 of the *Sunset Policy Bulletin* directs the Department to give decisive weight to these factors, it is not surprising that, in every case, the Department does in fact treat dumping margins and import volume as conclusive or determinative of likely dumping. The Department gives decisive weight to these factors, as demonstrated in this case, and in every case indicated in ARG-63 and ARG-64.

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42 and ARG-63, Tab 145); *Sugar and Syrups from Canada*, 64 Fed. Reg. 48,362, 48,363-64 (1999)(ARG-50 and ARG-63, Tab 261); *Issues and Decision Memo for the Sunset Review of Gray Portland Cement and Cement Clinker from Venezuela (Preliminary Results)* at 3-5 (ARG-47 and ARG-63, Tab 125); *Issues and Decision Memo for the Sunset Review of Uranium from Russia* at 15-17 (ARG-48 and ARG-63, Tab 282); *Issues and Decision Memo for the Sunset Review of Uranium from Uzbekistan* at 9-11 (ARG-49 and ARG-63, Tab 284).

IV. ZEROING

US Position:

"The United States did not reassess the calculation methodology and had no reason to reassess the calculation methodology in this sunset review because the magnitude of the margin did not form any part of Commerce's final likelihood determination in the sunset review of OCTG from Argentina." (US Answers to Second Set of Panel Questions, para. 27).

Argentina's Comment:

31. The United States cannot credibly say that the magnitude of the margin is irrelevant. The Appellate Body made clear that if zeroing affected the "magnitude" to the extent that it made the difference between dumping or no dumping as defined in Article 2, it is not only relevant, but it is the investigating authority's responsibility to ensure that it is "dumping" within the meaning of Article 2.

32. If the United States insists that it will not look at the magnitude, then it is declining to accept this responsibility, in which case it cannot rely on this piece of evidence as evidence of Article 2 dumping.

US Position:

The United States has, at this late stage, raised a number of procedural objections to Argentina's zeroing claim. (US Answers to Second Set of Panel Questions, paras. 23-24)

Argentina's Comment:

33. All of the US objections are wrong and should be rejected by the Panel. In stating that ARG-66A and B were only given to the Panel in Argentina's Second Submission and were not offered as rebuttal evidence (US Answers to Second Set of Panel Questions, para. 24), the United States completely ignores ARG-52 and the arguments in Argentina's First Submission. The United States responded to Argentina's First Submission by stating that it did not engage in *Bed Linens* zeroing, so Argentina provided evidence of exactly the type of zeroing that was used to calculate the 1.36 per cent margin relied on by the Department in the sunset review. In addition, the Panel has now asked specific questions to the United States regarding the use of zeroing, so there is little value in the United States arguing that the issue is not properly before the Panel. The fact is that this issue was included in the consultations,[9] the request for a panel, Argentina's First Submission, the US First Submission, Argentina's question to the United States after the first substantive meeting, Argentina's Second Submission, and now questions from the Panel.

34. Also, the United States complains that "Argentina failed to identify any of the computer programming by which it manipulated Siderca's data to arrive at the output contained in ARG-66A," (*Id.*, para. 28) even though footnote 182 of Argentina's First Submission identified the source of the data as the Department's 1995 determination, and ARG-66B showed precisely the computer programming used to remove the zeroing effect.

[9] *See* Exhibit US –12 to the U.S. First Submission (written question No. 25 of Argentina to the United States, submitted for the November 14, 2002 consultations).

US Position:

In responding to the Panel's substantive questions, the United States reminds the Panel that the original investigation pre-dated the entry into force of the Anti-Dumping Agreement, implying that the disciplines of Article 2 are not applicable to this sunset review. (US Answers to Second Set of Panel Questions, para. 25).

Argentina's Comment:

35. This is not a credible argument after the Appellate Body decision in *Sunset Review of Steel from Japan*. The Appellate Body clearly established that "dumping," in an Article 11.3 review, is the "dumping" defined in Article 2. Also, while the United States cites Article 18.3 to support its argument, it ignores the fact that Article 18.3 also states that the disciplines of the Anti-Dumping Agreement apply to reviews initiated after entry into force of the agreement, which describes this sunset review. This is perfectly consistent with the Appellate Body's decision that "dumping" in a sunset review is defined by – and only by – Article 2.

36. The answers in paras. 25, 26, and 29 of the US Answers to the Second Set of Panel Questions are non-responsive. The fact that this is not *Bed Linens* zeroing, and that "the 1.36 per cent margin was based on the results of comparisons of all export transactions" are non-answers. (*Id.*) The evidence before the Panel unambiguously shows that: (1) in most of the comparisons of US transactions to weighted-average normal values, the net price to the US exceeded the net normal value (*see* ARG-52, lines 25-58 and ARG-66, lines 98-385); (2) in calculating the PUDD (which is the numerator of the dumping margin calculation), the Department did not recognize the excess of the net US price over the normal value in any of these transactions; and (3) the numerator only included sales comparisons for which the dumping margin was "greater than zero," which effectively assigned a zero value to each of the individual results in which the US price exceeded the normal value (Argentina's Second Submission, para. 143; Exhibit ARG-66B, line 13 of programming).

37. If the Panel believes that it has to compare the results of this method to the type of zeroing done in *Bed Linens* (which Argentina believes is unnecessary), then the Panel would have to conclude that it is worse than *Bed Linens* zeroing. At least in an average-to-average comparison, high-priced US sales have some effect on the numerator of the dumping margin, as the higher priced sales into the importing market increase the weighted average, thereby lessening (or eliminating) the amount of dumping that results from the comparison to the weighted-average normal value. In the methodology at issue in this case, any excess of US price over normal value is ignored and is never considered in the calculation of the total amount of dumping, which is placed in the numerator of the dumping margin calculation.

38. Finally, it is not true that the decisions of the Appellate Body have been narrowly limited to zeroing in a system employing a weighted-average-to-weighted-average method of comparison. In its discussion regarding the distorting effect that zeroing has on establishing a fair comparison as required by Article 2.4, the Appellate Body decision in *Bed Linens* noted that transaction-specific-to-weighted-average comparisons could be used only in very limited circumstances as indicated in Article 2.4.2. (Appellate Body Report, *Bed Linens*, paras. 60-62) The United States has admitted that the 1.36 per cent margin resulted from a transaction-specific-to-weighted-average calculation (US Answers to Second Set of Panel Questions, para. 25), and it has never tried to justify that calculation under the exceptions listed in Article 2.4.2. More importantly, however, the problem, as the Appellate Body explained, is with the zeroing methodology, which is separate and independent from the particular type of comparison used.

39. Also the Appellate Body in *Sunset Review of Steel from Japan* addressed the US practice of zeroing in the context of Article 11.3 reviews, and recognized that the United States used a transaction-specific-to-weighted-average calculation methodology "in which no offset is granted to

the respondent for negative differences between normal value and export price (or constructed export price) of individual transactions." (para. 136, quoting the US First Submission, para. 125)) The Appellate Body reaffirmed the principle that a zeroing methodology has a distorting effect that is not consistent with the substantive requirements in Article 2.4 for a fair comparison. Thus, the Appellate Body's focus has not been on the type of zeroing that was done, or the comparison methodology in which the zeroing takes place. Its focus has properly been on the fact that zeroing – by not taking into account the results of comparison (whether on a model or transaction basis) in which the net import prices exceeds the net normal value – always overstates the margin of dumping and, consequently, a margin calculated on the basis of zeroing cannot serve as the basis for a likelihood of dumping determination.

V. INJURY

US Position:

The United States believes that:

- Article 3 does not apply to sunset reviews – not at all. (US Answers to Second Set of Panel Questions, para. 30)

- Despite footnote 9, "injury" as used in Article 11.3 is "a fourth type of determination regarding injury, separate from the other three types named in footnote 9." (*Id.* at para. 31).

- "Article 11.3 does not contemplate determinations of a continuation or recurrence of threat or material retardation as a basis for continuing to apply an anti-dumping duty after a sunset review." (*Id.* at para. 32)

- Textual support is not necessary for its view that cumulation is permitted in sunset reviews, and that the use of cumulation is unregulated in sunset reviews. (US Answers to Argentina's Questions, paras. 36 and 38)

Argentina's Comment:

40. The US answers demonstrate that the United States and Argentina have fundamentally different views of Articles 11.3 and 3 of the Anti-Dumping Agreement, and the differences relate almost exclusively to textual interpretations of the Agreement. If the United States is wrong about the application of Article 3, it is hard to imagine how the Panel could avoid a finding that the determination in this case is inconsistent with Article 3.

41. Footnote 9 defines "injury," not determinations of injury. In determining the likelihood of continuation or recurrence of "injury" under Article 11.3, the Anti-Dumping Agreement is clear that "injury" is defined by Footnote 9 and "shall be interpreted in accordance with the provisions of [Article 3]."

42. The United States provides absolutely no support – textual or otherwise – for its assertion that Article 11.3 does not contemplate determinations of a likelihood of continuation or recurrence of threat or material retardation.

43. As Argentina has demonstrated, the text of Articles 11.3 and 3.3 preclude cumulation in sunset reviews. (Argentina's First Submission, paras. 282-284; Argentina' Second Submission, paras. 189-190) In arguing that textual support is not necessary for its view that cumulation is permitted – and unregulated – in sunset reviews, the United States apparently relies on the fact that cumulation was used by GATT contracting parties prior to the adoption of Articles 3.3 and 11.3. (US First Submission, para. 370; US Second Submission, para. 56) However, the fact that cumulation was

not regulated prior to the implementation of the Uruguay Round agreements weakens, rather than helps, the US position. Through Article 3.3, the drafters of the Uruguay Round agreement code limited the use of cumulation to "investigations," and even then only where certain conditions are met.

US Position:

The United States asserts that, although the Article 3.4 factors are not required in a sunset review, in the sunset review of Argentine OCTG the Commission considered them all anyway. (US Answers to Second Set of Panel Questions, para. 30).

Argentina's Comment:

44. This is obviously contradicted by the US response at the Second Meeting of the Parties and in its response to Argentina's questions at paragraphs 30 – 34, in which the United States admitted to not considering the magnitude of the margin, which is one of the Article 3.4 factors. Again, the United States cannot have it both ways.

US Position:

The United States asserts for the first time that "two of the Commissioners, Vice Chairman Hillman and Commissioner Koplan, both of whom participated in the OCTG sunset reviews, consistently have applied the 'probable standard or its equivalent' since the commencement of the first US sunset reviews." (US Answers to Questions from Argentina, para. 30).

Argentina's Comment:

45. First, the Commission, as the US agency responsible for the likely injury determination in this case, submitted a brief (on behalf of Commission) in a NAFTA panel proceeding challenging the same determination in this case. The Commission's brief unequivocally states that the Commission did not apply – and in fact was precluded by the SAA from applying – a "probable" standard in this case. (*See* ARG-67) Both of the Commissioners noted were members of the Commission at the time that the Commission's NAFTA brief was filed, and there is no indication in the brief that they disagreed with the explanations to the NAFTA panel that likely does not and cannot mean "probable."

46. Second, the United States itself indicated during the question and answer session of the Panel's First Substantive Meeting with the Parties that the Commission is made up of individual Commissioners, that these individuals often have separate views, and that they come and go from the Commission, and given all of this, it was therefore important for the Panel to only consider what is written in the particular sunset determination that is subject to challenge. Even if there were separate or independent views suggesting that one or two Commissioners viewed "likely" to mean "probable" that does not change the nature of the determination reached by the Commission (as the single US authority responsible for the likelihood of injury determination) in this case.

VI. PRELIMINARY OBJECTIONS

A. GENERAL APPROACH TO DSU ARTICLE 6.2

US Position:

As it has throughout these proceedings, the United States continues its efforts to divorce portions of Argentina's claims from the panel request as a whole. The United States evidently would prefer to the Panel to sever, and then parse, isolated portions of Argentina's request. (*See* US Answers to Second Set of Panel Questions, para. 38).

Argentina's Comment:

47. Argentina offers two initial observations at the outset. First, the United States has failed to discharge its burden in establishing its claims under DSU Article 6.2. Second, the United States has failed to rebut any of Argentina's textual arguments that demonstrate that all of Argentina's claims are set forth in Argentina's panel request and that they fully comply with the requirements of Article 6.2.

48. As to its specific response, the United States failed to answer the Panel's question. In question 22, the Panel asked "what portions, if any, of the claims raised in Argentina's written submissions to the Panel find their basis exclusively in page four of Argentina's request for establishment?" Notwithstanding the focused nature of the Panel's inquiry – limited to the effect of severing "page four" – the United States used the question as an opportunity to recast Argentina's claims. In so doing, the United States completely misstates the claims advanced by Argentina. Apart from being non-responsive, the US tactic is wholly inappropriate. Accordingly, Argentina respectfully requests that the Panel reject completely the US responses in paragraphs 37 and 38.

49. The United States also addresses an issue not raised by the Panel's question. The US non-responsive response deals with the so-called claims that were allegedly outside the terms of reference. The reason for the lack of a straight-forward response to the direct question of the Panel by the United States is simple – the United States does not have an answer. This is not surprising to Argentina because page four of Argentina's panel request was not intended to – and does not – set forth additional claims. Indeed, there are no new claims on page four of the panel request. Consequently, even were page four to be artificially "severed" from Argentina's Panel Request, the effect would be minimal.

50. Argentina reiterates in the strongest possible terms that the Appellate Body has specifically instructed panels not to read panel requests in the manner requested by the United States. The Appellate Body has made clear that a panel request must be read "as a whole."

51. Argentina's claims are not found exclusively in Section A, or Section B, or on "Page Four." The totality of Argentina's claims are clear when the panel request is read as a whole – the narrative section, Section A, Section B, and page four. The request presents Argentina's claims as a seamless web. One section cannot be read in isolation of the others.

52. Moreover, contrary to the US assertion, the headings used by Argentina its panel request are also of relevance in defining the scope of Argentina's claims. The general headings indicated that Argentina was challenging the Determinations of the Department and the Commission. The individual paragraphs under the headings enumerated whether such challenges were being advanced on an "as such" basis, an "as applied" basis, or both.

53. The use of headings, like any other portion of the panel request, are relevant to the basic question: Was the United States put on notice as to the nature of Argentina's claims? As Argentina

has argued previously, it is clear that the United States was fully aware – at all stages – of the claims Argentina was advancing.

54. As the Appellate Body has made clear, Argentina has a right under the DSU to have its panel request read as a whole, and this US attempt to deviate from well-established jurisprudence should be firmly rejected by the Panel.

B. US INACCURATE CHARACTERIZATION OF ARGENTINA'S CLAIMS

US Position:

The United States asserts that Argentina's claims in Sections A and B "are limited to" certain measures then enumerated by the United States. (US Answers to Second Set of Panel Questions, para. 28).

55. The panel request, however, must be read in its totality. This means, as Argentina has made clear in its earlier submissions, that Sections A and B need to be read in conjunction with both Page Four and the opening narrative section.

56. Moreover, even the presentation of Argentina's Section A and B claims by the United States is incomplete and inaccurate. Throughout its comments, the United States sets out Argentina's claims as narrowly as possible, ignoring the actual language used by Argentina in its panel request. For example, in setting out Argentina's claims in Section A1, the United States lists only specific references to the US statute and regulations, while ignoring Argentina' broader references to "US laws, regulations and procedures."

57. The US answers are even more misguided when they assert that Argentina has challenged the Department's presumption on an "as applied" basis only. As Argentina demonstrated in its Submission of 4 December 2003, Argentina has challenged the Department's presumption both "as such" and "as applied." The US answers inaccurately characterize many of Argentina's positions. It repeatedly asserts that the "only basis" for a number of Argentina's claims would be page four. That is inaccurate. In its 4 December Submission, Argentina provided detailed textual argumentation as to why US allegations about the so-called "five additional claims" were unfounded. There are no "additional" claims – all of Argentina's claims are found in Argentina's Panel request, and in most cases no reference to page four is necessary. Argentina will not repeat all of those textual arguments here, other than to stress that: (i) the US Comments on these issues is not accurate; and (ii) Argentina stands fully by all of the textual arguments advanced in its earlier submissions to the Panel. The United States has never responded to, let alone rebutted, Argentina's textual arguments.

C. THE UNITED STATES HAS FAILED TO DEMONSTRATE PREJUDICE

58. Throughout these proceedings, the United States has repeatedly expressed its dissatisfaction with the need to demonstrate that it has sustained prejudice. It would evidently prefer to have its Article 6.2 claims adjudicated in clinical isolation, separated from the broader issue of whether the United States was actually misled as to the nature of Argentina's claims. However, the Appellate Body has emphatically rejected the narrow approach being advanced by the United States. In the absence of actual, demonstrated prejudice, the US request under Article 6.2 will fail.

59. Even in this final stage of the proceedings, the United States has still not demonstrated any prejudice. Indeed, the United States ignored the very specific request from the panel to indicate how it has suffered prejudice with respect to each of the alleged inconsistencies that the United States raised in its request for preliminary rulings. It instead advanced vague arguments about how the United States was allegedly compromised in "its ability to research the issues at hand, assign personnel, etc." As Argentina has indicated in its earlier submissions, such nebulous assertions have

been rejected by previous panels as insufficient to rise to the level of a violation of the due process rights of the respondent.

60. After having failed to demonstrate any prejudice whatsoever for the so-called "Page Four" and "Sections B1, B2 and B3" claims, the United States asserted that it did not have to demonstrate any prejudice at all for the so-called "additional claims." Apart from the fact that the United States cited no authority in support for this proposition, the US comments contradict this position.

61. In footnote 26 of the US answers (as indeed in footnote 103 of the US First Submission), the United States indicated that it would not object to the alleged "extension" of Argentina's claim regarding Section 351.218(e) of the Department's regulations to Section 351.218(d)(2)(iii). The United States indicates that it decided not to object to this so-called "additional claim" because "the extension of Argentina's claim to Section 351.218(d)(2)(iii) did not result in sufficient prejudice to warrant an objection . . . ." (emphasis added). Thus, the United States clearly recognizes that the obligation to demonstrate prejudice applies to all of its Article 6.2 claims, including the alleged "additional" claims.

62. Also, with respect to this specific issue, the United States cannot now reverse its position and object to Argentina's waiver claim related to Section 351.218(d)(2)(iii). The United States conceded that it was on notice regarding Argentina's waiver challenge, which the United States noted included a challenge to this regulatory provision, as the US First Submission reflects: "[T]he United States is not asserting that the prejudice it experienced thereby was of such a degree as to warrant a preliminary objection." (US First Submission, note 103) Clearly, the United States cannot now reverse its position under the guise of responding to the Panel's question about "page four."

63. In summary, the Panel should have little difficulty in concluding that the United States has demonstrably failed to prove the requisite elements under DSU Article 6.2, and for this reason the US preliminary objections can be dismissed in their entirety.

VII. ARGENTINA'S REQUEST UNDER DSU ARTICLE 19.1

US Position:

In its closing statement to the Panel on February 3, the United States urged the Panel not to make any suggestions under DSU Article 19.1, and stated that "GATT and WTO practice with respect to remedies has been to urge the respondent, where the panel rules against it, to bring the inconsistent measure into conformity with that Member's WTO obligations." (US Second Closing Statement, para. 34).

Argentina's Comment:

64. First, there is nothing improper about Argentina's request. DSU Article 19.1 specifically authorizes panels to make suggestions with respect to implementation.

65. Second, there have been many instances in which Panels have exercised their discretion to make a suggestion regarding implementation. To cite a few examples:

- in the *Argentina Poultry* case, the Panel suggested that Argentina repeal the measure imposing definitive anti-dumping measures on poultry from Brazil[10];

[10] *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted on 19 May 2003, para. 8.7.

- in the "Byrd Amendment" case, the Panel called for the repeal of the WTO-inconsistent US statute[11];

- in the *US – Textiles from Pakistan* case, the Panel called for the prompt removal of the import restriction[12];

- in the Guatemala Cement dispute, the Panel recommended the revocation of the anti-dumping measure[13]; and

- in the Lead Bars case, the Panel called for a revision of US administrative practices.[14]

66. This is a non-exhaustive list. Thus, Argentina's request is not improper, and it is certainly not unusual. Previous panels have recognized that suggestions under DSU Article 19.1 would be appropriate to help promote the resolution of the dispute, particularly where – as in the present case – the violations of the responding party are fundamental and pervasive.

67. In this case, Argentina's resort to DSU Article 19.1 is necessary given the right conferred to Argentina by Article 11.3 of the Anti-Dumping Agreement – termination of the anti-dumping measure after five years. Argentina's right was subject only to a limited exception that could be invoked by the United States only in the event that strict requirements were satisfied, and Argentina has demonstrated that the United States failed to satisfy the requirements necessary for continuing the measure. Consequently, the role of DSU Article 19.1 becomes critical to Argentina's ability to obtain the right denied by the United States. Argentina therefore respectfully urges the Panel to suggest that the measure be terminated so as to restore the right conferred to Argentina by Article 11.3.

[11] *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS 217/234/R, adopted on 27 January 2003, para. 8.6.

[12] *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/R, adopted on5 May 2001, para. 8.5.

[13] *Guatemala – Definitive Anti-Dumping Measures on Gray Portland Cement from Mexico*, WT/DS156/R, adopted on 17 November 2000, para. 9.6.

[14] *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R, adopted on 7 June 2000, para. 8.2.

ANNEX E-12

COMMENTS OF THE UNITED STATES ON ARGENTINA'S RESPONSES TO QUESTIONS FROM THE PANEL – SECOND MEETING

20 February 2004

I. EXPEDITED REVIEWS/WAIVER PROVISIONS

1. The Panel notes "Heading A" on page 36 of Argentina's first written submission and Argentina's statements in paragraph 120 of its first written submission and paragraph 51 of its second written submission. Please clarify whether Argentina's claim challenging the US law's waiver provisions under Articles 11.3, 6.1 and 6.2 of the Agreement are limited to "deemed waivers", or, whether they also take issue with "affirmative waivers".

1. Argentina's response further confuses the question of what precisely Argentina is challenging. According to Argentina's response to this question, both affirmative and deemed waivers "mandate an affirmative determination of likelihood of dumping" and "[i]n Argentina's view, the notion of a statute and regulation mandating an affirmative determination of likelihood of dumping without any analysis is inconsistent with Article 11.3." However, while Argentina expresses its "view," it does not explain precisely what claim it is in fact advancing in this proceeding with respect to Article 11.3. While the United States considers that it has fully addressed both the "deemed" and "affirmative" waiver issues, it notes that Argentina's failure to clearly identify the claims it is making also constitutes a failure to make a prima facie case with respect to either issue.

2. Argentina does explicitly state that its challenge with respect to Articles 6.1 and 6.2 "is limited to the 'deemed waiver.'" The United States therefore understands that Argentina's claims with regard to Articles 6.1 and 6.2 do not relate to "affirmative waivers."

2. The Panel notes that in sections VII.C.2 and VII.C.3 of its first written submission, Argentina challenges the application of the US waiver provisions to Siderca whereas in the following part of paragraph 6 of its second oral statement it also takes issue with the application of these provisions to Argentina:

> **Indeed, the Department's application of the waiver provisions to Siderca (or, at a minimum, to Argentina) is plainly indicated in the Department's Issues and Decision Memorandum.**

Please clarify the scope of Argentina's claim. More particularly, please explain whether, in the view of Argentina, the alleged application of the US waiver provisions in this sunset review impaired the rights of Argentina or Siderca.

3. Argentina continues to argue that the waiver provisions were applied to Siderca. The United States has already rebutted this argument. Argentina does not claim that Siderca's rights were impaired as a result but instead states that Argentina's rights under Article 11.3 to termination of the measure were violated. However, as we have already explained, it is simply inaccurate to state that the application of the waiver provisions settle the question of whether an order will be terminated.[1] Inasmuch as Argentina's Article 11.3 claim is premised on this false assumption, Argentina had no "right" to termination in this case.

[1] *See*, e.g., Answers of the United States to the First Set of Panel Questions, paras. 3 and 19.

4. Argentina then argues that application of the waiver provisions to the non-responding respondents violates Articles 11.3, 6.1, and 6.2 but does not explain how its rights to present facts and arguments and otherwise fully defend its interests were impaired in light of Argentina's non-participation in the review and Siderca's minimalist participation. Argentina does argue that the application of the waiver provisions "prevented any type of 'investigation' or 'determination'," deprived Argentina of termination of the measure under Article 11.3, and did not afford what Argentina refers to as its "principal" OCTG producer (as opposed to "the only producer"[2]) the right to participate. Again, there is no evidence that the waiver provisions prevented termination of the measure or that they resulted in failure to conduct "any type" of investigation or determination. Further, the only party that deprived Siderca of its right to participate was Siderca, through its failure to file a substantive response that addressed the issue of likelihood of continuation or recurrence of dumping, a rebuttal response, or comments on Commerce's adequacy determination.

II. OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING

11. The Panel notes Argentina's allegation in its first written submission that in this sunset review the DOC failed to use the "likely" standard and applied a different standard instead.[3]

(a) The Panel notes that Argentina did not mention this claim in its second written submission. Please clarify whether Argentina is still pursuing this claim.

5. Argentina's "clarification" concerning the "likely" standard is nothing more than Argentina's view as to whether there is sufficient evidence on the record to support the affirmative likelihood determination.

(b) Please refer to the relevant part(s) of the record of this sunset review where this inconsistent standard can be found.

6. Argentina's discussion of the record evidence in its answer to this question is misleading. First, the cited statutory provision (19 USC. 1677(c)(4)(B)) and its reference to an affirmative likelihood determination are, by their very terms, limited to non-responding interested parties. In other words, section 1677(c)(4)(B) mandates that Commerce shall find that there is a likelihood of continuation or recurrence of dumping "with respect to that interested party" when the interested party waives its participation in a sunset review.

7. Nothing in this provision or anywhere else in the US statute requires an affirmative likelihood determination on an order-wide basis simply because one or all the interested parties waived participation in the sunset review. As the Appellate Body in *Japan Sunset* noted, although "the authorities have a duty to seek out relevant information . . . Company specific data relevant to a likelihood determination under Article 11.3 can often only be provided by the companies themselves."[4] Nothing in Article 11.3 or elsewhere in the AD Agreement requires the administering authority to attempt to coerce information from recalcitrant interested parties in order to meet the obligations of the AD Agreement. Second, Commerce based its affirmative likelihood determination on the existence of dumping and the depressed import levels in the sunset review of OCTG from Argentina. Rather than address the probative nature of this evidence, Argentina simply continues to assert that this evidence is not sufficient to support the likelihood finding. Finally, Argentina again has selectively and incorrectly cited to the Appellate Body report in *Japan Sunset* for the proposition that the existence of dumping and depressed import volumes create a impermissible "presumption."

[2] *See* discussion in First Written Submission of the United States, note 3.

[3] First Written Submission of Argentina, para. 186.

[4] Appellate Body Report, *United States – Sunset Review of Anti-dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, at para.199.

The Appellate Body in *Japan Sunset* ultimately stated that the record evidence relied upon by Commerce in that case, the existence of dumping and depressed import volumes, were not unreasonable indicators of likely future dumping.[5] Like the Japanese respondent interested party in *Japan Sunset*, neither Argentina nor Siderca submitted any evidence to address the evidence of the existence of dumping and depressed import volumes since the imposition of the order on OCTG from Argentina.[6] Rather, the record evidence only demonstrates that neither Siderca nor Argentina raised any issues with respect to whether dumping was likely to continue or recur,[7] nor did they submit factual evidence to support a conclusion to the contrary.

12. The Panel notes that, in its second written submission, Argentina did not address its claim under Article 12.2 of the Agreement. Please clarify whether Argentina is still pursuing this claim.

8. The United States again asserts, as it did in its first written submission in response to this claim by Argentina, that the Commerce Department did provide notice and detailed explanations of its determinations in the *Final Sunset Determination*, the *Decision Memorandum*, and the *Adequacy Memorandum*, all of which were publicly available.[8] In addition, Argentina's assertion that the "United States has also indicated that 'a few key portions' of its underlying decision were 'inartfully drafted'" is misleading, in that the United States never stated that "key portions" were inartfully drafted and never suggested that the drafting of the decision prevented participants in the dispute from fully understanding Commerce's actions.

9. Finally, the United States notes Argentina's contentions about so-called "*ex post facto* justifications." Those are simply US responses to arguments which Argentina is advancing for the first time in this proceeding and which were not advanced during the review. Had Argentina or Siderca made these arguments during the review, as they had the opportunity to do, the United States could have addressed them then. To do so now for the first time and allege that by responding the United States is engaging in "*ex post facto* justifications" ignores the responsibility the Anti-Dumping Agreement places on parties to participate in sunset reviews, a responsibility the panel in *Japan Sunset* emphasized.

III. OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATIONOR RECURRENCE OF INJURY

17. What is the supporting evidence in the record of this sunset review for your allegation that the Commission failed to apply the "likely" standard of Article 11.3 of the Agreement in this sunset review?

10. Argentina claims that two types of evidence support its claim that the ITC did not properly apply the "likely" standard: (1) "admissions by the Commission;" and (2) the record in the sunset reviews. Argentina's arguments are unpersuasive.

11. With regard to the so-called admissions by the Commission, the United States draws the Panel's attention to paragraph 30 of the 13 February 2004, US answers to Argentina's questions. As explained there, earlier statements by the ITC (such as in the Usinor remand results and the NAFTA panel brief, both of which are cited by Argentina) were based on the understanding of some Commissioners that the term "probable" connoted a very specific and high degree of certainty – a misapprehension which the US courts have since clarified.

[5] *See id.* at para. 205.
[6] *See id.* at paras. 203-204.
[7] Siderca advanced an argument regarding the application of the *de minimis* standard but nothing to address the issue as to whether dumping was likely to continue or recur.
[8] *See* First Written Submission of the United States, paras. 238-248.

12. With regard to the record in the sunset reviews, the United States believes that when considered as a whole, it shows that certain outcomes would be likely (or "probable or more likely than not," as Argentina puts it). The United States has discussed the record in detail in its earlier submission and will not reiterate that discussion here.

18. The Panel notes Argentina's allegations in paragraphs 183 and 185 of its second written submission that in the OCTG sunset review the Commission failed to carry out the causal link analysis required under Article 3.5 of the Agreement. Please clarify the basis of this claim. More specifically, please indicate whether there were some potential factors, other than likely dumped imports, that could have contributed to the likely injury and were not evaluated by the Commission in its sunset determinations.

13. Consistent with its arguments throughout this case, Argentina stands one of the key principles of treaty interpretation, reflected in Article 31 of the Vienna Convention, on its head. Argentina asserts that "[t]here is no textual support for the view that the causation requirement was removed from the injury analysis required by Article 11.3." However, it is Argentina that must find textual support for the proposition that a causation requirement of Article 3.5 is required by Article 11.3. There is no such textual support. To the contrary, there are specific textual bases for concluding that the causation requirements of Article 3.5 are not applicable to sunset reviews.[9]

[9] *See* First Written Submission of the United States, paras. 287-302 and 352-353.

ANNEX F

REQUEST FOR THE ESTABLISHMENT
OF A PANEL

WORLD TRADE ORGANIZATION

WT/DS268/2
4 April 2003

(03-1912)

Original: English

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

Request for the Establishment of a Panel by Argentina

The following communication, dated 3 April 2003, from the Permanent Mission of Argentina to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 7 October 2002, the Government of the Republic of Argentina requested consultations with the Government of the United States of America pursuant to Article 4 of the World Trade Organization (WTO) Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 17.3 of the Agreement on Implementation of Article VI of GATT 1994 (the Anti-Dumping Agreement) regarding the determinations of the US Department of Commerce (Department) and the US International Trade Commission (Commission) in the sunset reviews of the anti-dumping duty measure on oil country tubular goods (OCTG) from Argentina.

The first consultation was held in Geneva, Switzerland, on 14 November 2002. A second consultation was held in Washington, D.C., on 17 December 2002. While the consultations enabled the parties to gain a better understanding of their respective positions, unfortunately the consultations failed to produce a mutually agreeable solution.

In the original anti-dumping duty investigation of OCTG from Argentina covering the period 1 January 1994 through 30 June 1994, the Department determined that Siderca S.A.I.C. (Siderca), an Argentine producer and exporter of OCTG, was dumping at a margin of 1.36 per cent.[1] The

[1] *Final Determination of Investigation of Sales at Less Than Fair Value of Oil Country Tubular Goods From Argentina*, 60 Federal Register 33539 (28 June 1995). The 1.36 per cent margin was calculated on the basis of the Department's practice of "zeroing" negative dumping margins.

Department did not conduct a substantive administrative review of the anti-dumping duty measure on OCTG from Argentina in the five years following its imposition.

On 3 July 2000, the Commission and the Department initiated sunset reviews of the anti-dumping measures on OCTG from Argentina, Italy, Japan, Korea, and Mexico.[2] Based on the Department's determination that the responses submitted by Argentine respondent parties to the initiation notice were "inadequate", the Department conducted an "expedited" sunset review of the anti-dumping duty measure applicable to OCTG from Argentina (Department's Determination to Expedite).[3] On the basis of the "expedited" review, the Department determined that termination[4] of the anti-dumping duty measure on OCTG from Argentina would be likely to lead to continuation or recurrence of dumping at 1.36 per cent (Department's Sunset Determination).[5]

The Commission determined that termination of the anti-dumping duty measure on OCTG (other than drill pipe – i.e., casing and tubing) from Argentina, Italy, Japan, Korea, and Mexico would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time (Commission's Sunset Determination).[6] The Commission also determined that termination of the anti-dumping duty measure on drill pipe from Japan would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. On 25 July 2001, the Department issued a determination to continue the anti-dumping duty measure on OCTG from Argentina (Department's Determination to Continue the Order).[7]

The Republic of Argentina considers that the Department's Determination to Expedite, the Department's Sunset Determination, the Commission's Sunset Determination, and the Department's Determination to Continue the Order are inconsistent with US WTO obligations, and that certain aspects of US laws, regulations, policies and procedures related to the administration of sunset reviews are inconsistent with US WTO obligations. The Republic of Argentina requests that a panel be established in accordance with Articles 4.7 and 6 of the DSU to address the specific claims related to the US sunset reviews of anti-dumping duty measure on OCTG from Argentina as set forth below.

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[2] *Notice of Initiation of Five-Year ("Sunset") Reviews*, 65 Federal Register 41053 (3 July 2000) (Department's notice); *Oil Country Tubular Goods From Argentina, Italy, Japan, Korea, and Mexico*, 65 Federal Register 41088 (3 July 2000) (Commission's notice).

[3] *Oil Country Tubular Goods From Argentina: Adequacy of Respondent Interested Party Responses to the Notice of Initiation*, Department of Commerce Memorandum For J. May from E. Cho, No. A-357-810 (22 Aug. 2000).

[4] Referred to as "revocation" under US law.

[5] *Final Results of Expedited Sunset Reviews: Oil Country Tubular Goods From Argentina, Italy, Japan, and Korea*, 65 Fed. Reg. 66701 (7 Nov. 2000) (together with the Department of Commerce Issues and Decision Memorandum for the Expedited Sunset Reviews of the Anti-Dumping Duty Orders on Oil Country Tubular Goods From Argentina, Italy, Japan, and Korea, dated 31 October 2000, and incorporated by reference into the Department's Sunset Determination).

[6] *Oil Country Tubular Goods From Argentina, Italy, Japan, Korea, and Mexico*, Inv. Nos. 701-TA-364 (Review), 731-TA-711, and 713-716 (Review), USITC Pub. 3434 (June 2001); 66 Federal Register 35997 (10 July 2001).

[7] Continuation of Countervailing and Anti-Dumping Duty Orders on Oil Country Tubular Goods from Argentina, Italy, Japan, Korea and Mexico, and Partial Revocation of Those Orders from Argentina and Mexico With Respect to Drill Pipe, 66 Fed. Reg. 38630 (25 July 2001).

A. THE DEPARTMENT'S DETERMINATION TO EXPEDITE AND THE DEPARTMENT'S SUNSET DETERMINATION ARE INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT AND THE GATT 1994

1. US laws, regulations, and procedures regarding "expedited" sunset reviews are inconsistent with Articles 11, 2, 6 and 12 of the Anti-Dumping Agreement. In particular, 19 U.S.C. § 1675(c)(4) and 19 C.F.R. § 351.218(e) operate in certain instances to preclude the Department from conducting a sunset review and making a determination as to whether termination of an anti-dumping duty measure would be likely to lead to continuation or recurrence of dumping, in violation of Articles 11.1, 11.3, 11.4, 2.1, 2.2, 2.4, 6.1, 6.2, 6.6, 6.8, 6.9, 6.10, 12.2, 12.3, and Annex II of the Anti-Dumping Agreement. When a respondent interested party is deemed by the Department to have "waived" participation in the Department's sunset review, US law mandates that the Department find that termination of the order would be likely to lead to continuation or recurrence of dumping, without requiring the Department to conduct a substantive review and to make a determination based on the substantive review.

2. The Department's application of the expedited sunset review procedures in the sunset review of OCTG from Argentina was inconsistent with Articles 11, 2, 6 and 12 of the Anti-Dumping Agreement because: (1) Siderca was deemed to have waived its right to participate in the sunset review, despite its full cooperation with the Department, in violation of Articles 11.1, 11.3, 11.4, 2.1, 2.2, 2.4, 6.1, 6.2, 6.6, 6.8, 6.9, 6.10, 12.2, 12.3 and Annex II; (2) the Department did not in fact conduct a "review" within the meaning of Article 11.3; and the (3) the Department failed to "determine" – as required by Article 11.3 – whether termination of the anti-dumping order would be likely to lead to continuation or recurrence of dumping.

3. The Department's Determination to Expedite the review of Argentina solely on the basis that Siderca's shipments to the United States constituted less than 50 per cent of the total exports from Argentina was inconsistent with Articles 11.1, 11.3, 11.4, 2.1, 2.2, 2.4, 6.1, 6.2, 6.6, 6.8, 6.9, 6.10, 12.2, 12.3 and Annex II of the Anti-Dumping Agreement.

4. The Department's Sunset Determination is inconsistent with Article 11.3 of the Anti-Dumping Agreement, and Article X:3(a) of the GATT 1994 because it was based on a virtually irrefutable presumption under US law as such that termination of the anti-dumping duty measure would be likely to lead to continuation or recurrence of dumping. This unlawful presumption is evidenced by the consistent practice of the Department in sunset reviews (which practice is based on US law and the Department's Sunset Policy Bulletin).

5. The Department's application of the standard for determining whether termination of anti-dumping measure would be "likely to lead to continuation or recurrence of dumping" is inconsistent with Articles 11.1, 11.3, 2.1, 2.2, and 2.4 of the Anti-Dumping Agreement. The Department's finding in this case that dumping was likely to recur in the event of termination, and that the likely margin of dumping would be 1.36 percent, is inconsistent with the standard established by Article 11.3 of the Anti-Dumping Agreement. The Department's reliance on the 1.36 per cent margin from the original investigation cannot support a determination that dumping would be likely to continue or recur under Article 11.3. In addition, the 1.36 per cent margin – calculated on the basis of the Department's practice of "zeroing" negative dumping margins – cannot support the Department's Sunset Determination or the Department's Determination to Continue the Order.

B. THE COMMISSION'S SUNSET DETERMINATION WAS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT AND THE GATT 1994

1. The Commission's application of the standard for determining whether the termination of anti-dumping duty measure would be "likely to lead to continuation or recurrence of ... injury" was

inconsistent with Articles 11, 3 and 6 of the Anti-Dumping Agreement. The Commission failed to apply the plain and ordinary meaning of the term "likely" and instead applied a lower standard in assessing whether injury would continue or recur in the event of termination, in violation of Articles 11.1, 11.3, 11.4, 3.1, 3.2, 3.3, 3.4, 3.5, and 6 of the Anti-Dumping Agreement.

2. The Commission failed to conduct an "objective examination" of the record and failed to base its determination on "positive evidence" regarding whether termination of the anti-dumping duty measure "would be likely to lead to continuation or recurrence" of injury. In particular, the Commission's conclusions with respect to the volume of imports, price effects on domestic like products, and impact of imports of the domestic industry demonstrate the Commission's failure to conduct an objective examination in violation of Articles 11, 3, and 6. The Commission's findings on these issues do not constitute "positive evidence" of likely injury in the event of termination, in violation of Articles 11.1, 11.3, 11.4, 3.1, 3.2, 3.3, 3.4, 3.5, and 6 of the Anti-Dumping Agreement.

3. The US statutory requirements that the Commission determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" (19 U.S.C. § 1675a(a)(1)) and that the Commission "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time" (19 U.S.C. § 1675a(a)(5)) are inconsistent with Articles 11.1, 11.3 and 3 of the Anti-Dumping Agreement.

4. The Commission's application of a "cumulative" injury analysis in the sunset review of the anti-dumping duty measures on OCTG from Argentina was inconsistent with Articles 11.1, 11.3, 3.1, 3.2, 3.3, 3.4 and 3.5 of the Anti-Dumping Agreement. There is no textual basis in the Anti-Dumping Agreement for conducting a cumulative injury analysis in an Article 11.3 review. Assuming *arguendo* that cumulation is permitted in Article 11.3 reviews, then the Commission was required to adhere to the requirements of Article 3.3 (including those related to *de minimis* margins and negligible imports) in the Commission's Sunset Determination. The Commission's cumulative injury analysis in the Commission's Sunset Determination failed to satisfy the Article 3.3 requirements.

Argentina also considers that certain aspects of the following US laws, regulations, policies, and procedures related to the determinations of the Department and the Commission are inconsistent with US WTO obligations, to the extent that any of these measures mandate action by the Department or Commission that is inconsistent with US WTO obligations or preclude the Department or Commission from complying with US WTO obligations:

- Sections 751(c) and 752 of the Tariff Act of 1930, as amended, codified at Title 19 of the United States Code §§ 1675(c) and 1675a; and the US Statement of Administrative Action (regarding the Agreement on Implementation of GATT Article VI) accompanying the Uruguay Round Agreements Act (the SAA), H.R. Doc. No. 103-316, vol. 1;

- The Department's *Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Anti-Dumping and Countervailing Duty Orders*; Policy Bulletin, 63 Federal Register 18871 (16 April 1998) (Sunset Policy Bulletin);

- The Department's sunset review regulations, codified at Title 19 of the United States Code of Federal Regulations § 351.218; and the Commission's sunset review regulations, codified at Title 19 of the United States Code of Federal Regulations §§ 207.60-69 (Subpart F).

Argentina considers that the Department's Determination to Expedite, the Department's Sunset Determination, the Commission's Sunset Determination, the Department's Determination to

Continue the Order and the above mentioned US laws, regulations, policies and procedures are inconsistent with the following provisions of the Anti-Dumping Agreement, the GATT 1994, and the WTO Agreement:

- Articles 1, 2, 3, 6, 11, 12, 18 and Annex II of the Anti-Dumping Agreement;
- Articles VI and X of the General Agreement on Tariffs and Trade (GATT) 1994; and
- Article XVI:4 of the WTO Agreement.

Accordingly, Argentina respectfully requests that, pursuant to Article XXIII of the GATT 1994, Article 6 of the DSU, and Article 17 of the Anti-Dumping Agreement, a panel with standard terms of reference be established at the next meeting of the Dispute Settlement Body to examine and find that the measures identified herein are inconsistent with US obligations under the Anti-Dumping Agreement, the GATT 1994, and the WTO Agreement. To that end, I would be grateful if this request could be included in the agenda of the Dispute Settlement Body scheduled for 15 April 2003.

The above text describes the legal basis of the claims. It does not restrict the arguments that Argentina may develop before the panel.

_____

WORLD TRADE ORGANIZATION

WT/DS268/R/Corr.1[*]
16 July 2004

(04-3050)

Original: English

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

Report of the Panel

Corrigendum

Annex A

Page A31

The last two sentences of paragraph 92, from "As will be ..." should be renumbered as paragraph 93.

Page A-45

The last two sentences of paragraph 144, from "With regard to the ..." should be renumbered as paragraph 145.

[*] In English only

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