

## ANNEX A

### FIRST WRITTEN SUBMISSIONS BY THE PARTIES

<b>Contents</b>		<b>Page</b>
Annex A-1	First Written Submission of Argentina <sup>1</sup>	A-2
Annex A-2	First Written Submission of the United States	A-87
Annex A-3	Submission from Argentina on the Request by the United States for Preliminary Rulings under Article 6.2 of the DSU	A-175

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<sup>1</sup> 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

#### TABLE OF CONTENTS

	<i>Page</i>
<b>I. INTRODUCTION .....</b>	<b>7</b>
A. ANTI-DUMPING DUTIES CANNOT EXIST IN PERPETUITY .....	7
B. HISTORY OF US TRADE REMEDY PROCEEDINGS AGAINST ARGENTINE OCTG .....	8
<b>II. FACTUAL BACKGROUND .....</b>	<b>11</b>
A. THE ANTI-DUMPING INVESTIGATION GIVING RISE TO THE ANTI-DUMPING DUTY ORDER ON ARGENTINE OCTG .....	11
B. SUNSET REVIEW OF OCTG FROM ARGENTINA .....	12
<b>III. PROCEDURAL BACKGROUND .....</b>	<b>15</b>
<b>IV. EXECUTIVE SUMMARY OF ARGENTINA'S CLAIMS .....</b>	<b>16</b>
A. CERTAIN US SUNSET REVIEW STATUTORY, REGULATORY, AND ADMINISTRATIVE PROVISIONS ARE WTO-INCONSISTENT AS SUCH .....	16
B. THE DEPARTMENT'S SUNSET REVIEW WAS INCONSISTENT WITH US WTO OBLIGATIONS .....	17
C. THE COMMISSION'S SUNSET REVIEW WAS INCONSISTENT WITH US WTO OBLIGATIONS .....	18
D. CONSEQUENTIAL VIOLATIONS OF THE ANTI-DUMPING AGREEMENT, THE GATT 1994, AND THE WTO AGREEMENT .....	19
<b>V. OVERVIEW OF US SUNSET REVIEW LAW .....</b>	<b>19</b>
A. SUNSET REVIEWS UNDER US LAW .....	19
1. Introduction .....	19
2. Procedures for determining the type of sunset review conducted: Expedited review or full review .....	20
3. Effect of conduct of expedited sunset review .....	21
4. Effect of a "waiver" determination by the Department in a sunset review .....	21
5. Implementing US Uruguay Round obligations: <i>The Statement of Administrative Action ("SAA")</i> .....	21
6. The Department of Commerce <i>Sunset Policy Bulletin</i> .....	23
7. The Department's "likelihood" determination .....	23
8. The Commission's "likelihood" determination .....	25
<b>VI. STANDARD OF REVIEW, BURDEN OF PROOF, AND THE SUBSTANTIVE WTO OBLIGATIONS AT ISSUE IN THIS DISPUTE .....</b>	<b>26</b>
A. STANDARD OF REVIEW .....	26

B.	BURDEN OF PROOF.....	27
C.	SUBSTANTIVE OBLIGATIONS AT ISSUE IN THIS DISPUTE.....	28
1.	<b>The primary obligation of Article 11.3 of the Anti-Dumping Agreement is termination of anti-dumping measures.....</b>	<b>28</b>
2.	<b>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.....</b>	<b>30</b>
3.	<b>The obligations in Articles 2, 3, 6 and 12 of the Anti-Dumping Agreement are applicable to reviews conducted under Article 11.3.....</b>	<b>31</b>
VII.	<b>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.....</b>	<b>33</b>
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.....	35
1.	<b>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.....</b>	<b>35</b>
2.	<b>The US Sunset Review Waiver Provisions are inconsistent with Articles 11.3, 11.4, 6.1, and 6.2 of the Anti-Dumping Agreement.....</b>	<b>38</b>
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.....	39
1.	<b>The Department’s sunset review practice unequivocally demonstrates an irrefutable presumption that dumping would be likely to continue or recur.....</b>	<b>39</b>
2.	<b>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 <i>Sunset Policy Bulletin</i>. Taken together, the US Sunset Statutory Provisions, the SAA, and the <i>Sunset Policy Bulletin</i> establish an irrefutable presumption that is inconsistent with Article 11.3 of the Anti-Dumping Agreement.....</b>	<b>43</b>
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.....	46
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.....	46
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 "re view" or make a "determination" as required under Article 11.3 of the Anti-Dumping Agreement .....	48
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.....	50
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.....	52
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 POSITIVE EVIDENCE. THE DEPARTMENT FAILED TO SATISFY THESE OBLIGATIONS IN ITS LIKELIHOOD DETERMINATION AND WITH REGARD TO THE LIKELY MARGIN REPORTED TO THE COMMISSION .....	53
1. The Department's likelihood determination is inconsistent with the Anti- Dumping Agreement.....	54
2. The likely margin of dumping of 1.36 per cent determined by the Department and reported to the Commission.....	56
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 .....	57
1. Sunset reviews of anti-dumping duty orders are subject to GATT Article X:3(a).....	57
2. The Department of Commerce sunset reviews violate GATT Article X:3(a).....	58
VIII. THE COMMISSION'S SUNSET REVIEW WAS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT AND THE GATT 1994.....	60
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 .....	60
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.....	65
1. The requirements of Articles 3.1 apply to reviews conducted under Article 11.3.....	65

2.	<b>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 .....</b>	<b>67</b>
3.	<b>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.....</b>	<b>70</b>
4.	<b>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.....</b>	<b>73</b>
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 .....	74
1.	<b>19 USC. §§ 1675a(a)(1) and (5) are inconsistent as such with Articles 11.3 and 3 of the Anti-Dumping Agreement.....</b>	<b>74</b>
2.	<b>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.....</b>	<b>76</b>
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 .....	76
E.	ASSUMING <i>ARGUENDO</i> 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 <i>DE MINIMIS</i> 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.....	78
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 .....	79
IX.	<b>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.....</b>	<b>79</b>
A.	THE US MEASURES VIOLATE THE BASIC PRINCIPLES OF THE ANTI-DUMPING AGREEMENT, AS PROVIDED IN ARTICLE 1 .....	80
B.	THE IDENTIFIED US MEASURES, WHICH CONSTITUTE A "SPECIFIC ACTION AGAINST DUMPING," VIOLATE ARTICLE 18.1 OF THE AGREEMENT .....	80

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.....	82
<b>X.</b>	<b>CONCLUSION.....</b>	<b>83</b>
A.	US SUNSET REVIEW STATUTORY, REGULATORY, AND ADMINISTRATIVE PROVISIONS AS SUCH VIOLATE THE ANTI-DUMPING AGREEMENT AND THE WTO AGREEMENT .....	83
B.	THE DEPARTMENT’S SUNSET REVIEW DETERMINATION VIOLATES THE ANTI-DUMPING AGREEMENT AND THE GATT 1994 .....	83
C.	THE COMMISSION’S SUNSET REVIEW DETERMINATION VIOLATES THE ANTI-DUMPING AGREEMENT .....	84
D.	CONSEQUENTIAL VIOLATIONS BY THE UNITED STATES OF THE ANTI-DUMPING AGREEMENT, THE GATT 1994, AND THE WTO AGREEMENT.....	84
<b>XI.</b>	<b>REQUEST FOR SUGGESTIONS FROM THE PANEL ON THE MANNER IN WHICH THE UNITED STATES SHOULD IMPLEMENT THE PANEL’S RECOMMENDATIONS.....</b>	<b>85</b>

## 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.”<sup>1</sup> 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.”<sup>2</sup>

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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<sup>1</sup> 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*”).

<sup>2</sup> 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’.”<sup>3</sup> 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*.<sup>4</sup>

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.<sup>5</sup> 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

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<sup>3</sup> *Id.* at para. 91.

<sup>4</sup> 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*”).

<sup>5</sup> *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.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

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

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<sup>6</sup> *Oil Country Tubular Goods from Argentina*, 49 Fed. Reg. 46,564 (Dep’t Comm. 1984)(final countervailing determ.)(ARG-18).

<sup>7</sup> *Oil Country Tubular Goods from Argentina*, 51 Fed. Reg. 20,240 (Dep’t Comm. 1986)(final anti-dumping determ.)(ARG-20).

<sup>8</sup> *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).

<sup>9</sup> *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 percent for the period 1988)(ARG-22).

<sup>10</sup> *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.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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<sup>15</sup> for the purpose of proving that it did not ship to the United States.

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<sup>11</sup> *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).

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

<sup>13</sup> *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).

<sup>14</sup> 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.

<sup>15</sup> *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.<sup>16</sup> 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 . . .".<sup>17</sup> 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.<sup>18</sup>

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

<sup>17</sup> 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).

<sup>18</sup> *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.<sup>19</sup> 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.<sup>20</sup>

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.<sup>21</sup> 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.<sup>22</sup> 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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<sup>19</sup> 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).

<sup>20</sup> *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).

<sup>21</sup> 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).

<sup>22</sup> *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).<sup>23</sup>

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.<sup>24</sup>

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."<sup>25</sup>

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.<sup>26</sup>

29. In the Commission's Sunset Determination,<sup>27</sup> 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.<sup>28</sup> 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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<sup>23</sup> *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).

<sup>24</sup> *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).

<sup>25</sup> *Id.* at 5.

<sup>26</sup> *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).

<sup>27</sup> *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).

<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup>

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.”<sup>34</sup> 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.”<sup>35</sup> 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.<sup>36</sup> The Commission emphasized that the “Tenaris alliance,”<sup>37</sup> with its global focus, would likely have a strong incentive to have a significant presence in the US market.<sup>38</sup> Further, the Commission found

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<sup>29</sup> *Commission’s Sunset Determination*) at 10-11 (citing Staff Report at II-17, attached) (ARG-54).

<sup>30</sup> *Id.* at 12 (citing Staff Report at I-18, II-17, attached).

<sup>31</sup> *Id.* at 13 (citing Staff Report at I-20, II-1-II-3, attached).

<sup>32</sup> *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).

<sup>33</sup> *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).

<sup>34</sup> *Id.* at 17.

<sup>35</sup> *Id.* at 19.

<sup>36</sup> *Id.* at 20.

<sup>37</sup> The Commission explained: “NKK, TAMSAs, 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.

<sup>38</sup> *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.<sup>39</sup>

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.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup>

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.<sup>43</sup>

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.<sup>44</sup>

### 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.<sup>45</sup> 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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<sup>39</sup> *Id.* at 19-20.

<sup>40</sup> *Id.* at II-17 (Staff Report).

<sup>41</sup> *Id.* at II-18 n.71 (Staff Report).

<sup>42</sup> *Id.* at II-19 (Staff Report).

<sup>43</sup> *Id.* at 22-23.

<sup>44</sup> *Id.*

<sup>45</sup> *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.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup>

#### 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

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<sup>46</sup> *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).

<sup>47</sup> 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.

<sup>48</sup> *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.<sup>49</sup> In these cases no respondent has been able to overcome the criteria prescribed by the SAA and the *Sunset Policy Bulletin* for termination<sup>50</sup> (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

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<sup>49</sup> US Department of Commerce Sunset Reviews (ARG-63).

<sup>50</sup> *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, hereby 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.<sup>51</sup> 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

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<sup>51</sup> 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.”<sup>52</sup> 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”<sup>53</sup> 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.<sup>54</sup> If no domestic interested party expresses a desire to participate, the Department will issue a final determination revoking the order within 90 days.<sup>55</sup> 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.”<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup>

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.<sup>59</sup> Respondent parties, however, are required to report substantially more information than domestic parties.<sup>60</sup>

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<sup>52</sup> See 19 USC. §§ 1675(c)(3)-(5)(ARG-1).

<sup>53</sup> 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.

<sup>54</sup> 19 C.F.R. § 351.218(d)(ARG-3).

<sup>55</sup> 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).

<sup>56</sup> 19 C.F.R. § 351.218(e)(1)(i)(A)(ARG-3).

<sup>57</sup> 19 C.F.R. § 351.218(e)(1)(ii)(A)(ARG-3).

<sup>58</sup> 19 C.F.R. § 351.218(e)(1)(ii)(C)(2)(ARG-3).

<sup>59</sup> 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.

<sup>60</sup> 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.<sup>61</sup>

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.<sup>62</sup>

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."<sup>63</sup>

### 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.

<sup>61</sup> 19 USC. § 1675(c)(4)(B)(ARG-1)(emphasis added).

<sup>62</sup> 19 C.F.R. § 351.218(d)(2)(iii) and 19 C.F.R. § 351.218(e)(1)(ii)(A)(ARG-3).

<sup>63</sup> 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.<sup>64</sup>

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*,<sup>65</sup> the Federal Circuit based its decision on a reading of both the language of the statute and the SAA.<sup>66</sup> 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.<sup>67</sup> Indeed, the Court stated that “[t]he SAA, of course, is more than mere legislative history.”<sup>68</sup> 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’.”<sup>69</sup> 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.<sup>70</sup>

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

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<sup>64</sup> *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).

<sup>65</sup> 243 F.3d 1301 (Fed. Cir. 2001)(ARG-7).

<sup>66</sup> *Id.* at 1308.

<sup>67</sup> *Id.* at 1308-09.

<sup>68</sup> *Id.* at 1309.

<sup>69</sup> *Id.*

<sup>70</sup> *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.’”<sup>71</sup>

57. The unique authority of the SAA has also been repeatedly recognized by courts in the United States.<sup>72</sup>

## 6. The Department of Commerce *Sunset Policy Bulletin*

58. The Department’s *Sunset Policy Bulletin*<sup>73</sup> 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.<sup>74</sup>
- In analyzing whether import volumes remained steady or increased, the Department normally will consider companies’ relative market share.<sup>75</sup>

## 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.<sup>76</sup> The SAA does not contain guidance as to particular circumstances that

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<sup>71</sup> 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).

<sup>72</sup> 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.”).

<sup>73</sup> *Policies Regarding the Conduct of Five-Year (“Sunset”) Reviews*, 63 Fed. Reg. 18,871 (Dep’t Comm., 1998)(“*Sunset Policy Bulletin*”)(ARG-35).

<sup>74</sup> *Id.* at 18,872.

<sup>75</sup> *Id.* at 18,873.

<sup>76</sup> 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.<sup>77</sup>

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.<sup>78</sup>

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,

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<sup>77</sup> 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.

<sup>78</sup> 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.<sup>79</sup>

## 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.<sup>80</sup>

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.<sup>81</sup>

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

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<sup>79</sup> *Id.* at 889-890 (emphasis added).

<sup>80</sup> 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).

<sup>81</sup> 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.”<sup>82</sup>

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.<sup>83</sup> 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.<sup>84</sup>

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.”<sup>85</sup>

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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<sup>82</sup> 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*”).

<sup>83</sup> 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*”).

<sup>84</sup> *Id.* at para. 56.

<sup>85</sup> 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.<sup>86</sup>

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*.<sup>87</sup> 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.<sup>88</sup> 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."<sup>89</sup>

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*."<sup>90</sup>

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.<sup>91</sup>

## 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

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<sup>86</sup> Appellate Body Report, *Hot-Rolled Steel from Japan*, para. 60.

<sup>87</sup> *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").

<sup>88</sup> See *Vienna Convention*, Art. 31(AR-59).

<sup>89</sup> Appellate Body Report, *United States – Gasoline*, at 23.

<sup>90</sup> Appellate Body Report, *Hot-Rolled Steel from Japan*, para. 60.

<sup>91</sup> *Id.* at para. 62.

the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.<sup>92</sup>

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.”<sup>93</sup> 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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<sup>92</sup> 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*”).

<sup>93</sup> 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.<sup>94</sup>

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.”<sup>95</sup>

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.<sup>96</sup> 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.’<sup>97</sup>

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.”<sup>98</sup> 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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<sup>94</sup> Panel Report, *Pipe Fittings from Brazil*, para. 7.113.

<sup>95</sup> 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).

<sup>96</sup> Appellate Body Report, *Steel from Germany*, paras. 58-118.

<sup>97</sup> *Id.* at para. 88 (emphasis added).

<sup>98</sup> *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.<sup>99</sup>

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.<sup>100</sup>

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

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<sup>99</sup> *Id.* at para. 63 (emphasis in original).

<sup>100</sup> *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.’”<sup>101</sup> 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.<sup>102</sup>

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.’”<sup>103</sup> 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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<sup>101</sup> 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*”).

<sup>102</sup> 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”).

<sup>103</sup> 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.*”<sup>104</sup> The Appellate Body has held that “the obligations in Article 3.1 apply to *all* injury determinations undertaken by Members,”<sup>105</sup> 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.”<sup>106</sup> 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.<sup>107</sup>

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<sup>104</sup> 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.

<sup>105</sup> 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*”).

<sup>106</sup> Appellate Body Report, *Hot-Rolled Steel from Japan*, para. 192 (quoting Appellate Body Report, *H-Beams from Poland*, para. 106).

<sup>107</sup> 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*<sup>108</sup> 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*”).

<sup>108</sup> 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."<sup>109</sup>

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.<sup>110</sup> The Department deemed Argentina to have waived its right to participate because of the "inadequate" response to the initiation notice.<sup>111</sup>

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.<sup>112</sup> 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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<sup>109</sup> *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).

<sup>110</sup> *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.").

<sup>111</sup> 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).

<sup>112</sup> 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.”<sup>113</sup> 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.<sup>114</sup>

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.<sup>115</sup>

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.”<sup>116</sup> 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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<sup>113</sup> The American Heritage Dictionary 388 (2d ed. 1982)(ARG-60).

<sup>114</sup> 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*”).

<sup>115</sup> Panel Report, *Sunset Review of Steel from Japan*, para. 7.177.

<sup>116</sup> 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.”<sup>117</sup> 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.<sup>118</sup>

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).<sup>119</sup> 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.<sup>120</sup>

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.<sup>121</sup>

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.<sup>122</sup>

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<sup>117</sup> *Id.* at para. 8.95.

<sup>118</sup> *Id.* at para. 8.96.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at para. 8.96.

<sup>121</sup> *Id.* at para. 8.91.

<sup>122</sup> 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'* 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

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.”<sup>123</sup> The investigating authorities must make a “fresh determination, based on credible evidence.”<sup>124</sup>

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]”).<sup>125</sup> 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.”<sup>126</sup>

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.

<sup>123</sup> Panel Report, *Steel from Germany*, para. 8.95.

<sup>124</sup> Appellate Body Report, *Steel from Germany*, para. 88.

<sup>125</sup> 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.

<sup>126</sup> 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.<sup>127</sup>

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...<sup>128</sup>

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

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<sup>127</sup> Panel Report, *Sunset Review of Steel from Japan*, para. 7.255.

<sup>128</sup> 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.<sup>129</sup>

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.<sup>130</sup>

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<sup>129</sup> (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 percent 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.

<sup>130</sup> 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.<sup>131</sup> In 100 per cent of these cases the Department determined that dumping would be likely to continue or recur.<sup>132</sup> 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*.<sup>133</sup> 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.<sup>134</sup> 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.<sup>135</sup> 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.<sup>136</sup> 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).<sup>137</sup> The Commission relied on the fact that the sole

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<sup>131</sup> For purposes of this discussion, Argentina does not consider the instances in which no domestic interested party participated in the sunset proceeding to constitute 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).

<sup>132</sup> US Department of Commerce Sunset Reviews (ARG-63).

<sup>133</sup> *Id.*

<sup>134</sup> *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).

<sup>135</sup> *Id.*

<sup>136</sup> *Industrial Nitrocellulose from Yugoslavia*, 64 Fed. Reg. 57,852, 57,853-54 (Dep’t Comm. 1999)(final results sunset review)(ARG-42).

<sup>137</sup> *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.<sup>138</sup>

137. Accordingly, it is clear to Argentina that when the *Sunset Policy Bulletin* states that the Department "normally"<sup>139</sup> 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<sup>140</sup> 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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<sup>138</sup> *Id.*

<sup>139</sup> 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).

<sup>140</sup> 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*”),<sup>141</sup> the Appellate Body upheld the Panel’s finding that a certain US practice, “the same person methodology, was inconsistent with the SCM Agreement,”<sup>142</sup> 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.<sup>143</sup> The Appellate Body also found that the administrative practice was inconsistent with sunset review rules under Article 21.3 of the SCM Agreement.<sup>144</sup>

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.<sup>145</sup> Both US courts<sup>146</sup> 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.”<sup>147</sup>

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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<sup>141</sup> WT/DS212/AB/R, adopted on 8 January 2003.

<sup>142</sup> *Id.* at para. 151 (emphasis in original).

<sup>143</sup> *Id.* at para. 162.

<sup>144</sup> *Id.* at para. 150.

<sup>145</sup> “[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).

<sup>146</sup> 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).

<sup>147</sup> 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.

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[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.<sup>148</sup>

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.<sup>149</sup>

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 Huettnerwerke v. United States*<sup>150</sup> cited the *Sunset Policy Bulletin* and noted that "[t]he *Sunset Policy Bulletin* parallels the language of the SAA."<sup>151</sup> 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

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<sup>148</sup> SAA at 889-90.

<sup>149</sup> 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).

<sup>150</sup> 193 F. Supp. 2d 1339 (CIT 2002)(ARG-15a).

<sup>151</sup> *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.<sup>152</sup>

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.<sup>153</sup> 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<sup>154</sup> 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.<sup>155</sup>

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 percent 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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<sup>152</sup> *Sunset Policy Bulletin* at 18,872 (ARG-35).

<sup>153</sup> See Appellate Body Report, *Steel from Germany*, para. 88.

<sup>154</sup> 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).

<sup>155</sup> 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.”<sup>156</sup> 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.<sup>157</sup>

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.<sup>158</sup>

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.<sup>159</sup> 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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<sup>156</sup> *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).

<sup>157</sup> *Issues and Decision Memorandum* at 3 (ARG-51).

<sup>158</sup> 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.”).

<sup>159</sup> *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.<sup>160</sup> 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

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<sup>160</sup> 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.”<sup>161</sup> 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.”<sup>162</sup> 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.<sup>163</sup>

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.”<sup>164</sup> Indeed, on the contrary, Article 11.3 of the Anti-Dumping Agreement requires investigating authorities to determine<sup>165</sup> 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.”<sup>166</sup> 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.”<sup>167</sup> Even though the authorities must make a prospective assessment, their determination “must itself have an adequate basis in fact”<sup>168</sup> 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.<sup>169</sup> 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

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<sup>161</sup> Panel Report, *Steel from Germany*, para. 8.95.

<sup>162</sup> Appellate Body Report, *Steel from Germany*, para. 88.

<sup>163</sup> Panel Report, *Sunset Review of Steel from Japan*, para. 7.177.

<sup>164</sup> Appellate Body Report, *Steel from Germany*, para. 88 (emphasis added).

<sup>165</sup> See discussion in section VII.A.1 above.

<sup>166</sup> Panel Report, *Steel from Germany*, para. 8.95.

<sup>167</sup> *Id.* at para. 8.115.

<sup>168</sup> *Id.* at para. 8.96.

<sup>169</sup> *Id.*

the original CVD, any changes in government policy, and any changes in relevant socio-economic and political circumstances.<sup>170</sup>

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.<sup>171</sup>

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."<sup>172</sup>

### **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.<sup>173</sup>

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at para. 8.91.

<sup>172</sup> Appellate Body Report, *Steel from Germany*, para. 63.

<sup>173</sup> *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.<sup>174</sup> 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

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<sup>174</sup> 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.<sup>175</sup> The Department deemed Argentina to have waived its right to participate either because of an "inadequate" response to the initiation notice.<sup>176</sup>

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.

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<sup>175</sup> *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).

<sup>176</sup> *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.<sup>177</sup> 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

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<sup>177</sup> 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.<sup>178</sup> 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.<sup>179</sup>

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. *Black's Law Dictionary* defines the term "likely" as "[p]robable" and "[i]n all probability."<sup>180</sup> *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."<sup>181</sup> 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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<sup>178</sup> 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.

<sup>179</sup> Panel Report, *Sunset Review of Steel From Japan*, paras. 7.176-7.177.

<sup>180</sup> Black's Law Dictionary 834 (5<sup>th</sup> 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).

<sup>181</sup> 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.<sup>182</sup> 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.”<sup>183</sup> 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.

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<sup>182</sup> Dep’t Commerce Margin Calculations for Final Determination 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).

<sup>183</sup> 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*."<sup>184</sup>

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<sup>184</sup> 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.”<sup>185</sup> 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.”<sup>186</sup> 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.”<sup>187</sup>

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.”<sup>188</sup>

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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<sup>185</sup> Panel Report, *Sunset Review of Steel from Japan*, para. 7.310.

<sup>186</sup> 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”).

<sup>187</sup> 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).

<sup>188</sup> 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.<sup>189</sup>

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.

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<sup>189</sup> *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<sup>190</sup> or injury based on "a concept that falls in between 'probable' and 'possible' on a continuum of relative certainty."<sup>191</sup> 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."<sup>192</sup> *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."<sup>193</sup> Similarly, *Black's Law Dictionary* defines the term "probable" as "likely."<sup>194</sup>

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.<sup>195</sup>

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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<sup>190</sup> 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...").

<sup>191</sup> Int'l Trade Comm'n Remand Determin. Pursuant to *Usinor Industeel S.A., et al v. United States*, No. 01-00006, July 2002) at 7 ("*Unisor Remand Determinaton*") (ARG-56).

<sup>192</sup> *Black's Law Dictionary* 834 (5<sup>th</sup> 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).

<sup>193</sup> *Webster's New Collegiate Dictionary* 660 (1979) (ARG-62).

<sup>194</sup> *Black's Law Dictionary* 1081 (5<sup>th</sup> ed. 1979).

<sup>195</sup> 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.<sup>196</sup>

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.<sup>197</sup>

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.<sup>198</sup>

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<sup>196</sup> *Usinor Remand Determination* at 5 (ARG-56).

<sup>197</sup> *Id.* at 7.

<sup>198</sup> 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.”<sup>199</sup> 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.”<sup>200</sup>

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.”<sup>201</sup> 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 . . . .”<sup>202</sup>

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).”<sup>203</sup> 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.”<sup>204</sup>

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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<sup>199</sup> *Usinor Remand Determination* at 5 (ARG-56).

<sup>200</sup> *Id.*

<sup>201</sup> 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”).

<sup>202</sup> *Usinor II* at 4-6 (ARG-16).

<sup>203</sup> *Nippon Steel Corp.*, slip. op. 02-153 at 7-8 (ARG-17).

<sup>204</sup> *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.<sup>205</sup>

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.”<sup>206</sup>

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.”<sup>207</sup>

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.<sup>208</sup> The Commission’s Sunset Determination makes clear that the Commission based its determinations on the mere

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<sup>205</sup> 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.

<sup>206</sup> See Appellate Body Report, *United States – Gasoline*, para. 23; Vienna Convention, Art. 31.

<sup>207</sup> 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.

<sup>208</sup> 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.<sup>209</sup> For example, when discussing the question of whether Tenaris<sup>210</sup> 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.<sup>211</sup> 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.<sup>212</sup> 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.

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<sup>209</sup> 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).

<sup>210</sup> The Commission refers interchangeably 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.

<sup>211</sup> *Id.* at 19.

<sup>212</sup> *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.*”<sup>213</sup> The Appellate Body has held that “the obligations in Article 3.1 apply to *all* injury determinations undertaken by Members,”<sup>214</sup> 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.”<sup>215</sup>

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.

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.<sup>216</sup>

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

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<sup>213</sup> Emphasis added.

<sup>214</sup> Appellate Body Report, *H-Beams from Poland*, para. 114 (emphasis added).

<sup>215</sup> Appellate Body Report, *Hot-Rolled Steel from Japan*, para. 192 (quoting Appellate Body Report, *H-Beams from Poland*, para. 106).

<sup>216</sup> 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.<sup>217</sup>

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.”<sup>218</sup> The Appellate Body in the same *HFCS* case recognized the “close relationship between the various paragraphs of Article 3 of the Anti-Dumping Agreement.”<sup>219</sup> Further, in *H-Beams from Poland*, the Appellate Body stated that “Article 3.1 informs the more detailed obligations in succeeding paragraphs,”<sup>220</sup> 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.”<sup>221</sup>

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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<sup>217</sup> Appellate Body Report, *Hot-Rolled Steel from Japan*, paras. 192-193 (footnotes omitted).

<sup>218</sup> 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*”).

<sup>219</sup> 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*”).

<sup>220</sup> Appellate Body Report, *H-Beams from Poland*, para. 106.

<sup>221</sup> *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.<sup>222</sup>

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*.”<sup>223</sup> 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”)<sup>224</sup> 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.”<sup>225</sup> Along those lines, the Commission alleged that producers in

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<sup>222</sup> Panel Report, *Sunset Review of Steel from Japan*, para. 7.100 (footnote omitted).

<sup>223</sup> *Id.* at para.7.177.

<sup>224</sup> SAA at 883 (ARG-5).

<sup>225</sup> *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.<sup>226</sup> The Commission emphasized that the “Tenaris Group,” with its global focus, would likely have a strong incentive to have a significant presence in the US market.<sup>227</sup> 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.<sup>228</sup>

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.<sup>229</sup> 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.<sup>230</sup> 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.<sup>231</sup> 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.<sup>232</sup> 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.”<sup>233</sup> The Commission, however, failed to reference any evidence (let alone “positive evidence”) to support this conclusion.

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<sup>226</sup> *Id.* at 20.

<sup>227</sup> *Id.* at 19.

<sup>228</sup> *Id.* at 19-20.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 19 n.126.

<sup>231</sup> *Id.* at 20 and at IV-6 to IV-8 (Staff Report).

<sup>232</sup> *Id.* at 19 n.128.

<sup>233</sup> *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.<sup>234</sup> 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.<sup>235</sup> Moreover, the Commission failed to note that at the end of the period examined, in 2000, domestic prices increased markedly.<sup>236</sup> 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.<sup>237</sup> 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.<sup>238</sup> 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.<sup>239</sup> 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

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<sup>234</sup> *Id.* at 20-21.

<sup>235</sup> *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).

<sup>236</sup> *Id.* at V-9 to V-11 (Staff Report).

<sup>237</sup> *Id.* at II-17 (Staff Report).

<sup>238</sup> *Id.* at II-18 n.71 (Staff Report).

<sup>239</sup> *Id.* at II-19 (Staff Report).

demand conditions in the near term.”<sup>240</sup> 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.<sup>241</sup> 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.<sup>242</sup> 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.<sup>243</sup> Finally, the Commission concluded that demand conditions were projected to be strong in the near term.<sup>244</sup>

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.<sup>245</sup> 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.”<sup>246</sup> 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.”<sup>247</sup>

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<sup>240</sup> *Id.* at 22-23.

<sup>241</sup> *Id.* at 22.

<sup>242</sup> *Id.* at 22-23.

<sup>243</sup> *Id.* at 22.

<sup>244</sup> *Id.* at 19.

<sup>245</sup> *Id.* at 22.

<sup>246</sup> Appellate Body Report, *H-Beams from Poland*, para. 128 (emphasis added).

<sup>247</sup> 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.<sup>248</sup>

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.<sup>250</sup>

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**

<b>Factor</b>	<b>Referenced</b>	<b>Not Considered</b>
Declines (actual or potential) in:		
Sales	X <sup>1</sup>	
Profits	X <sup>1</sup>	
Output	X <sup>1</sup>	

<sup>248</sup> Panel Report, *Pipe Fittings from Brazil*, paras. 7.310 and 7.314 (footnote omitted; emphasis added).

<sup>249</sup> *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	

<sup>1</sup> 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].<sup>251</sup>

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

<sup>250</sup> See *Commission's Sunset Determination* at 22-23.

<sup>251</sup> 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.<sup>252</sup>

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.<sup>253</sup> 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.<sup>254</sup> 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

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<sup>252</sup> Panel Report, *HFCS from the United States*, para. 7.128.

<sup>253</sup> Appellate Body Report, *H-Beams from Poland*, para. 108.

<sup>254</sup> 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.<sup>255</sup>

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."<sup>256</sup> 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."<sup>257</sup> 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."<sup>258</sup> The SAA further specifies that the Commission shall consider "factors that may only manifest themselves in the longer term."<sup>259</sup>

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

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<sup>255</sup> Appellate Body Report, *Hot-Rolled Steel from Japan*, paras. 222-223.

<sup>256</sup> 19 USC. § 1675a(a)(1)(ARG-1).

<sup>257</sup> 19 USC. § 1675a(a)(5)(ARG-1).

<sup>258</sup> SAA at 887 (ARG-5).

<sup>259</sup> *Id.*

law, however, the term “imminent” has been used to describe events potentially occurring several years into the future.<sup>260</sup>

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.<sup>261</sup> 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.”<sup>262</sup> 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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<sup>260</sup> 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).

<sup>261</sup> 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.

<sup>262</sup> *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 . . . .”<sup>263</sup> 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.<sup>264</sup> 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.<sup>265</sup> 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.<sup>266</sup> 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-

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<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at n.40.

<sup>265</sup> 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.

<sup>266</sup> *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.<sup>267</sup>

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.<sup>268</sup>

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<sup>267</sup> 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.

<sup>268</sup> 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*.<sup>269</sup> 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.<sup>270</sup> 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.

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<sup>269</sup> *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."

<sup>270</sup> *Commission's Sunset Determination* at IV-3, table IV-1 (Staff Report)(ARG-54). In 2000, by quantity, imports from Argentina represented 2.9 percent of total imports, and were less than 1.0 percent of such imports in each of the four preceding calendar years. These percentages are all below the 3percent 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.<sup>271</sup> 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,<sup>272</sup> 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.<sup>273</sup> 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,"<sup>274</sup> 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."<sup>275</sup> 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

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<sup>271</sup> *Commission's Sunset Determination* at 6, 10-16.

<sup>272</sup> 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.")

<sup>273</sup> 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.'"

<sup>274</sup> Appellate Body Report, *Steel from Germany*, para. 81 (italics in original).

<sup>275</sup> *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.<sup>276</sup>

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

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<sup>276</sup> *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. . . .<sup>277</sup>

302. A "specific action against dumping" of exports is an "action that is taken in response to situations presenting the constituent elements of 'dumping'".<sup>278</sup> 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."<sup>279</sup> 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]."<sup>280</sup>

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.<sup>281</sup>

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<sup>277</sup> 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*").

<sup>278</sup> Appellate Body Report, *United States – Anti-Dumping Act of 1916*, para. 130.

<sup>279</sup> *Id.* at paras.105-106 and 130; Appellate Body Report, *United States – Continued Dumping and Subsidy Act*, para. 240.

<sup>280</sup> Appellate Body Report, *United States – Continued Dumping and Subsidy Act*, para. 259.

<sup>281</sup> 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.<sup>282</sup>

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.<sup>283</sup>

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.

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Appellate Body Report, *United States – Continued Dumping and Subsidy Act*, para. 304.

<sup>282</sup> *Id.* at para. 302.

<sup>283</sup> 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.”<sup>284</sup>

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.

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<sup>284</sup> Appellate Body Report, *Steel from Germany*, para. 63.

## ANNEX A-2

### FIRST WRITTEN SUBMISSION OF THE UNITED STATES

7 November 2003

#### TABLE OF CONTENTS

	<u>Page</u>
<b>I. INTRODUCTION .....</b>	<b>91</b>
<b>II. PROCEDURAL BACKGROUND.....</b>	<b>92</b>
<b>III. FACTUAL BACKGROUND .....</b>	<b>95</b>
A. SUNSET REVIEWS UNDER US LAW.....	96
1. <b>The Statute .....</b>	<b>96</b>
(a) Statutory Provisions Related to Commerce's Determination .....	96
(b) Statutory Provisions Related to the ITC's Determination .....	97
2. <b>The Regulations .....</b>	<b>98</b>
(a) Commerce Regulations .....	98
(b) ITC Regulations .....	99
3. <b>Commerce's <i>Sunset Policy Bulletin</i> .....</b>	<b>99</b>
B. CERTAIN OCTG FROM ARGENTINA .....	100
1. <b>The Anti-Dumping Duty Investigation Order.....</b>	<b>100</b>
2. <b>The Sunset Review and Determination.....</b>	<b>100</b>
(a) Commerce's Determination of Likelihood of Continuation or Recurrence of Dumping .....	100
(b) The ITC's Determination of Likelihood of Continuation or Recurrence of Injury .....	102
(c) Notice of Continuation of the Order.....	106
<b>IV. REQUEST FOR PRELIMINARY RULINGS .....</b>	<b>106</b>
A. INTRODUCTION.....	106
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 .....	107
1. <b>Page 4 of the Panel Request does not "present the problem clearly" .....</b>	<b>108</b>
2. <b>The United States has been prejudiced by Argentina's failure to comply with Article 6.2 of the DSU .....</b>	<b>111</b>
3. <b>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 .....</b>	<b>111</b>
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 .....	112

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 .....	115
1.	<b>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.....</b>	<b>116</b>
2.	<b>Argentina’s claim that 19 USC. §§ 1675(c) and 1675(a)(c), the SAA, and the <i>Sunset Policy Bulletin</i>, taken together, establish an irrefutable presumption that is inconsistent with Article 11.3 of the AD Agreement.....</b>	<b>116</b>
3.	<b>Argentina’s claim that Commerce’s sunset review practice is inconsistent with Article X:3(a) of the GATT 1994.....</b>	<b>117</b>
4.	<b>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.....</b>	<b>118</b>
5.	<b>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.....</b>	<b>118</b>
E.	CONCLUSION.....	119
V.	<b>GENERAL LEGAL PRINCIPLES.....</b>	<b>119</b>
A.	SCOPE AND STANDARD OF REVIEW.....	119
B.	BURDEN OF PROOF: ARGENTINA BEARS THE BURDEN OF PROVING ITS CLAIMS.....	120
VI.	<b>LEGAL ARGUMENT.....</b>	<b>120</b>
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.....	120
1.	<b>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.....</b>	<b>122</b>
2.	<b>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.....</b>	<b>126</b>
(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 .....	127
(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.....	128
B.	THE PANEL SHOULD REJECT ARGENTINA’S CLAIMS CONCERNING AN ALLEGED “IRREFUTABLE PRESUMPTION” AND ITS INCONSISTENCY WITH ARTICLE 11.3 OF THE AD AGREEMENT .....	129
1.	<b>Argentina’s “irrefutable presumption” does not exist.....</b>	<b>129</b>
2.	<b>Assuming <i>arguendo</i> that a Commerce “irrefutable presumption” actually exists, the <i>Sunset Policy Bulletin</i> and Commerce “practice”, as such, cannot be found to be inconsistent with Article 11.3 of the AD Agreement .....</b>	<b>133</b>
3.	<b>Assuming <i>arguendo</i> that a Commerce “irrefutable presumption” actually exists, the <i>Sunset Policy Bulletin</i> and Commerce “practice,” as applied generally, cannot be found to be inconsistent with Article 11.3 of the AD Agreement.....</b>	<b>136</b>



4.	<b>Commerce's Sunset Determination in OCTG from Argentina was not inconsistent with Article 11.3 because of an "irrefutable presumption".....</b>	<b>136</b>
C.	COMMERCE'S SUNSET DETERMINATION IN OCTG FROM ARGENTINA IS NOT INCONSISTENT WITH ARTICLES 11, 2, 6, OR 12 OF THE AD AGREEMENT .....	136
1.	<b>Commerce's Determination to "expedite" the Sunset Review of OCTG from Argentina is not inconsistent with the AD Agreement.....</b>	<b>137</b>
2.	<b>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.....</b>	<b>138</b>
3.	<b>Commerce complied with the evidentiary and procedural requirements of Article 11.3 and Article 6 in the OCTG Sunset Review.....</b>	<b>140</b>
(a)	Commerce Afforded Siderca the Notice and Opportunity Required by Article 6.1.....	140
(b)	Siderca Was Afforded An Opportunity For A Full Defense of Its Interests in Accordance With Article 6.2.....	142
3.	<b>Commerce's Final Sunset Determination in OCTG from Argentina is not inconsistent with the obligation contained in Article 12 of the AD Agreement.....</b>	<b>144</b>
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 .....	146
1.	<b>Article 11.3 does not require a quantification of dumping or the use of any particular methodology for making the likelihood determination.....</b>	<b>146</b>
2.	<b>The margins determined in Commerce's original investigation, and the methodologies used to derive them, cannot be challenged before this Panel.....</b>	<b>148</b>
3.	<b>Commerce fully complied with its obligations under the AD Agreement in making the affirmative likelihood determination.....</b>	<b>148</b>
4.	<b>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.....</b>	<b>150</b>
E.	THE PANEL SHOULD REJECT ARGENTINA'S CLAIM UNDER ARTICLE X:3(A) OF GATT 1994 .....	150
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.....	152
G.	ARTICLE 3 DOES NOT APPLY TO SUNSET REVIEWS .....	154
H.	THE PANEL SHOULD REJECT ARGENTINA'S CLAIMS UNDER ARTICLE 3.1 OF THE AD AGREEMENT .....	157
1.	<b>Article 3.1 does not apply to sunset reviews .....</b>	<b>157</b>
2.	<b>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 .....</b>	<b>158</b>
(a)	The ITC's Findings on the Likely Volume of Imports .....	159

(b)	The ITC's Findings on the Likely Price Effects of Imports .....	163
(c)	The ITC's Findings on the Likely Impact of Imports .....	165
I.	THE ITC SUNSET DETERMINATION ON OCTG FROM ARGENTINA IS NOT INCONSISTENT WITH ARTICLE 3.4 OF THE AD AGREEMENT .....	165
J.	THE ITC SUNSET DETERMINATION ON OCTG FROM ARGENTINA IS NOT INCONSISTENT WITH ARTICLE 3.5 OF THE AD AGREEMENT .....	166
K.	THE TIME FRAME IN WHICH INJURY WOULD BE LIKELY TO RECUR .....	168
1.	<b>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 .....</b>	<b>168</b>
2.	<b>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 .....</b>	<b>169</b>
L.	THE ITC DID NOT ACT INCONSISTENTLY WITH ANY PROVISION OF THE AD AGREEMENT BY CONDUCTING A CUMULATIVE ANALYSIS IN THE OCTG SUNSET REVIEW .....	169
1.	<b>The AD Agreement does not prohibit cumulation in sunset reviews .....</b>	<b>169</b>
2.	<b>The ITC did not act inconsistently with Article 3.3 of the AD Agreement because Article 3.3 does not apply to sunset reviews .....</b>	<b>170</b>
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 .....	172
VII.	<b>CONCLUSION.....</b>	<b>174</b>

## 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.<sup>1</sup>

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.

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<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup>

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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<sup>2</sup> WT/DS268/1 (10 October 2002).

<sup>3</sup> WT/DS268/2 (4 April 2003).

<sup>4</sup> 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.

<sup>5</sup> 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:<sup>6</sup>

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.

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<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> 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."<sup>10</sup>

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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<sup>7</sup> 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.

<sup>8</sup> WT/DSB/M/147 (1 July 2003), paras. 30-33 (copy attached as Exhibit US-1).

<sup>9</sup> WT/DSB/M/150 (22 July 2003) (copy attached as Exhibit US-2).

<sup>10</sup> *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.<sup>11</sup> 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.<sup>12</sup>

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.

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<sup>11</sup> *Id.*, para. 33.

<sup>12</sup> *Id.*, para. 38.

A. SUNSET REVIEWS UNDER US LAW

1. The Statute<sup>13</sup>

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.<sup>14</sup> Commerce and the ITC each conduct sunset reviews pursuant to sections 751(c) and 752 of the Act.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

(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.<sup>18</sup> 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.<sup>19</sup>

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<sup>13</sup> 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.

<sup>14</sup> 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.

<sup>15</sup> Sections 751(c) and 752 of the Act (Exhibit ARG-1).

<sup>16</sup> 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.

<sup>17</sup> Section 751(d)(2) of the Act (Exhibit ARG-1).

<sup>18</sup> 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).

<sup>19</sup> 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.<sup>20</sup>

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.<sup>21</sup> 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.<sup>22</sup>

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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

(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.<sup>26</sup> 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.”<sup>27</sup> 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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<sup>20</sup> Section 751(c)(3)(B) of the Act (Exhibit ARG-1).

<sup>21</sup> Section 751(c)(5)(A) of the Act (Exhibit ARG-1).

<sup>22</sup> 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.

<sup>23</sup> Section 751(c)(4)(A) of the Act (Exhibit ARG-1).

<sup>24</sup> Section 751(d)(2) of the Act (Exhibit ARG-1).

<sup>25</sup> Section 752(c) of the Act (Exhibit ARG-1).

<sup>26</sup> Section 751(c) (Exhibit ARG-1).

<sup>27</sup> 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.<sup>28</sup> 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”)<sup>29</sup> 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.<sup>30</sup> 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<sup>31</sup> and the deadlines for required submissions.<sup>32</sup>

37. The Sunset Regulations describe specifically the information required to be provided by all interested parties in a sunset review.<sup>33</sup> 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.”<sup>34</sup> 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.<sup>35</sup> Rebuttals to substantive responses are due five days after the date the substantive response is filed.<sup>36</sup> 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.<sup>37</sup>

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.<sup>38</sup> Where domestic interested parties choose not to participate, the regulations provide that Commerce will make a negative likelihood determination and revoke the order.<sup>39</sup> Where the foreign interested parties

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<sup>28</sup> 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.

<sup>29</sup> Section 751(c)(6)(C) of the Act (Exhibit ARG-1).

<sup>30</sup> *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).

<sup>31</sup> 19 C.F.R. 351.218(d)(3) (Exhibit ARG-3).

<sup>32</sup> 19 C.F.R. 351.218(d)(3)-(4) (Exhibit ARG-3).

<sup>33</sup> 19 C.F.R. 351.218(d)(1)-(4) (Exhibit ARG-3).

<sup>34</sup> 19 C.F.R. 351.218(d)(3)(iv)(B) (Exhibit ARG-3).

<sup>35</sup> 19 C.F.R. 351.218(d)(3)(i) (Exhibit ARG-3).

<sup>36</sup> 19 C.F.R. 351.218(d)(4) (Exhibit ARG-3).

<sup>37</sup> 19 C.F.R. 351.218(d)(4) (Exhibit ARG-3).

<sup>38</sup> 19 C.F.R. 351.218(d)(2) (Exhibit ARG-3).

<sup>39</sup> 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.<sup>40</sup>

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.<sup>41</sup>

(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.<sup>42</sup> 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.<sup>43</sup> 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***<sup>44</sup>

43. In April 1998, Commerce issued a policy bulletin related to sunset reviews.<sup>45</sup> 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

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<sup>40</sup> 19 C.F.R. 351.308(f) (Exhibit US-3).

<sup>41</sup> 19 C.F.R. 351.309(e) (Exhibit US-3).

<sup>42</sup> A copy of the ITC’s sunset review regulations is attached as Exhibit US-4.

<sup>43</sup> 19 C.F.R. 207.62(a) (Exhibit US-4).

<sup>44</sup> 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.”

<sup>45</sup> *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.<sup>46</sup> 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.<sup>47</sup>

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.<sup>48</sup> 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.<sup>49</sup>

47. On 10 August 1995, the ITC published notice of its final affirmative injury determination involving OCTG from Argentina.<sup>50</sup> On 11 August 1995, Commerce issued an anti-dumping duty order on certain OCTG from Argentina.<sup>51</sup>

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.<sup>52</sup> In the notice, Commerce, as is its normal

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<sup>46</sup> *Sunset Policy Bulletin*, 63 FR at 18873 (Exhibit ARG-35).

<sup>47</sup> *Id.*

<sup>48</sup> 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).

<sup>49</sup> *Id.* at 33550.

<sup>50</sup> 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).

<sup>51</sup> 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.<sup>53</sup> Commerce also explicitly referred parties to the applicable regulation concerning requests for an extension of filing deadlines.<sup>54</sup>

50. On 2 August 2000, Siderca and domestic interested parties<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup> Siderca also stated that it believed that it was the only producer of OCTG in Argentina.<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup> 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.<sup>61</sup>

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<sup>52</sup> 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).

<sup>53</sup> *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).

<sup>54</sup> *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.

<sup>55</sup> 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.

<sup>56</sup> Exhibit ARG-57.

<sup>57</sup> Exhibit ARG-57, page 3.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*, page 4.

<sup>60</sup> "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).

<sup>61</sup> 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.<sup>62</sup> 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.<sup>63</sup>

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.<sup>64</sup> 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.<sup>65</sup>

(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.<sup>66</sup>

57. On 3 June 2000, the ITC instituted sunset reviews,<sup>67</sup> 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.<sup>68</sup>

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.<sup>69</sup> 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.<sup>70</sup>

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.<sup>71</sup>

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<sup>62</sup> *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).

<sup>63</sup> *Commerce Sunset Final Decision Memorandum*, page 5 (Exhibit ARG-51).

<sup>64</sup> *Id.*, pages 6-7; see also section 752(c)(3) of the Act (Exhibit ARG-1).

<sup>65</sup> *Commerce Sunset Final Decision Memorandum*, page 7 (Exhibit ARG-51).

<sup>66</sup> See Exhibit US-5.

<sup>67</sup> See Exhibit ARG-45.

<sup>68</sup> 65 Fed. Reg. 63889 (Exhibit US-8).

<sup>69</sup> 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”].

<sup>70</sup> 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.<sup>72</sup>
- 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.<sup>73</sup>
- 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.<sup>74</sup>

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.<sup>75</sup>

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.<sup>76</sup>

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."<sup>77</sup>

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<sup>71</sup> ITC Report at 15.

<sup>72</sup> ITC Report at 15.

<sup>73</sup> ITC Report at 16.

<sup>74</sup> ITC Report at 16.

<sup>75</sup> ITC Report at 17.

<sup>76</sup> ITC Report at 17.

<sup>77</sup> 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.<sup>78</sup>

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.<sup>79</sup>

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.<sup>80</sup>

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.<sup>81</sup>

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.<sup>82</sup>

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.<sup>83</sup>

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.<sup>84</sup>

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<sup>78</sup> ITC Report at 19.

<sup>79</sup> ITC Report at 19-20.

<sup>80</sup> ITC Report at 20.

<sup>81</sup> ITC Report at 20.

<sup>82</sup> ITC Report at 20-21.

<sup>83</sup> ITC Report at 21.

<sup>84</sup> 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.<sup>85</sup>

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."<sup>86</sup>

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.<sup>87</sup>

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.<sup>88</sup>

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.<sup>89</sup>

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.<sup>90</sup>

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<sup>85</sup> ITC Report at 21.

<sup>86</sup> ITC Report at 21.

<sup>87</sup> ITC Report at 20-21.

<sup>88</sup> ITC Report at 21-22.

<sup>89</sup> ITC Report at 22.

<sup>90</sup> 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.<sup>91</sup>

(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.<sup>92</sup>

#### 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.”<sup>93</sup> According to the Appellate Body: “This requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings.”<sup>94</sup>

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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<sup>91</sup> ITC Report at 22-23.

<sup>92</sup> 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).

<sup>93</sup> *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*”).

<sup>94</sup> *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:<sup>95</sup>

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:<sup>96</sup>

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<sup>95</sup> *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*"].

<sup>96</sup> *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.<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup> 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,<sup>100</sup> the SAA,<sup>101</sup> the *Sunset Policy Bulletin*,<sup>102</sup> the

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<sup>97</sup> 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.

<sup>98</sup> See Exhibit ARG-1.

<sup>99</sup> 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.

<sup>100</sup> 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.

<sup>101</sup> 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,<sup>103</sup> and the ITC regulations.<sup>104</sup> 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.

<sup>102</sup> 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.

<sup>103</sup> 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.

<sup>104</sup> 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.”<sup>105</sup> 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.<sup>106</sup> Although this type of defect can be overcome if a panel request “also sets forth facts and circumstances describing the substance of the dispute,”<sup>107</sup> 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.<sup>108</sup> 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:<sup>109</sup>

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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<sup>105</sup> *Korea Dairy Safeguard*, para. 124.

<sup>106</sup> *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 HBeams 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)*”].

<sup>107</sup> *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*”].

<sup>108</sup> *US - German Steel*, para. 170 (italics in original).

<sup>109</sup> *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.<sup>110</sup> 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."<sup>111</sup>

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.<sup>112</sup> 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.<sup>113</sup> 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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<sup>110</sup> 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.

<sup>111</sup> *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)*"].

<sup>112</sup> 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.

<sup>113</sup> 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."<sup>114</sup>

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.<sup>115</sup> 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:<sup>116</sup>

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.

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<sup>114</sup> WT/DSB/M/150 (1 July 2003), para. 32.

<sup>115</sup> 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.

<sup>116</sup> 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.<sup>117</sup> 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.<sup>118</sup>

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.<sup>119</sup>

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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<sup>117</sup> 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.

<sup>118</sup> *Korea Dairy Safeguard*, para. 124 (footnote omitted; italics in original).

<sup>119</sup> *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.<sup>120</sup> 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?"<sup>121</sup> 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.<sup>122</sup> 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."<sup>123</sup>

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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<sup>120</sup> 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.

<sup>121</sup> 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.

<sup>122</sup> *Id.*

<sup>123</sup> *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.<sup>124</sup> 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."<sup>125</sup>

113. In its first submission, Argentina has raised five matters that are not included in Section A or B of its panel request.<sup>126</sup> 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.
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.
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.
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.
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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<sup>124</sup> Constitution of the Panel Established at the Request of Argentina; Note by the Secretariat, WT/DS268/3 (9 September 2003).

<sup>125</sup> *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, Report of the Appellate Body adopted 16 November 1998, para. 92.

<sup>126</sup> 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.<sup>127</sup> 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."<sup>128</sup>

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.<sup>129</sup> 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 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. 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."<sup>130</sup>

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

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<sup>127</sup> 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.

<sup>128</sup> Argentina's first submission, para. 137.

<sup>129</sup> 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.

<sup>130</sup> 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.<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup> 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.”<sup>134</sup>

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.<sup>135</sup> 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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<sup>131</sup> 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.

<sup>132</sup> Neither Section A.4 nor any other portion of Section A mentions the SAA.

<sup>133</sup> 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.

<sup>134</sup> Argentina’s first submission, para. 210.

<sup>135</sup> 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."<sup>136</sup>

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.

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<sup>136</sup> 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."<sup>137</sup> 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.<sup>138</sup> 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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<sup>137</sup> *Thai Angles* (AB), para. 88.

<sup>138</sup> *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.<sup>139</sup>

**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.<sup>140</sup> 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.<sup>141</sup>

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.<sup>142</sup> 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.<sup>143</sup>

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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<sup>139</sup> *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.”).

<sup>140</sup> *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.

<sup>141</sup> *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.

<sup>142</sup> Argentina's first submission, paras. 114-117.

<sup>143</sup> 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.<sup>22</sup> The duty may remain in force pending the outcome of such a review.

<sup>22</sup> 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.<sup>144</sup>

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.<sup>145</sup> In sum, aside from the obligations contained in Article 11.3 and those provisions of Articles 6 and 12

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<sup>144</sup> 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*].

<sup>145</sup> 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 Commerce 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.<sup>146</sup> 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.<sup>147</sup> 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.<sup>148</sup>

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.<sup>149</sup> 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.<sup>150</sup>

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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<sup>146</sup> Argentina’s first submission, paras. 114-117.

<sup>147</sup> 19 USC. § 1675(c)(4)(A) (Exhibit ARG-1).

<sup>148</sup> 19 USC. § 1675(c)(4)(B) (Exhibit ARG-1).

<sup>149</sup> 19 C.F.R. § 351.218(d)(2) (Exhibit ARG-3).

<sup>150</sup> 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 ... ." <sup>151</sup> 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." <sup>152</sup>

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. <sup>153</sup> 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. <sup>154</sup> 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. <sup>155</sup>

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. <sup>156</sup> 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

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<sup>151</sup> 19 USC. § 1675(c)(1) (Exhibit ARG-1).

<sup>152</sup> 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).

<sup>153</sup> 19 C.F.R. § 351.218(a)-(d) (Exhibit ARG-3).

<sup>154</sup> 19 USC. § 1675(c)(4)(B) (Exhibit ARG-1); 19 C.F.R. § 351.218(d)(2) (Exhibit ARG-3).

<sup>155</sup> 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).

<sup>156</sup> 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,<sup>157</sup> (2) volume and value of exports of subject merchandise to the United States prior to the sunset review and the original investigation,<sup>158</sup> (3) percentage of the total exports of subject merchandise to the United States,<sup>159</sup> 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.<sup>160</sup> 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.<sup>161</sup>

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.<sup>162</sup> 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.”<sup>163</sup> “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.”<sup>164</sup> “Deduce” is further defined as to “[i]nfer, draw as a logical conclusion (*from* something already known or assumed); derive by a

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<sup>157</sup> 19 C.F.R. § 351.218(d)(3)(ii)(F) (Exhibit ARG-3).

<sup>158</sup> 19 C.F.R. § 351.218(d)(3)(iii)(B)-(C), (E) (Exhibit ARG-3).

<sup>159</sup> 19 C.F.R. § 351.218(d)(3)(iii)(D) (Exhibit ARG-3).

<sup>160</sup> 19 C.F.R. § 351.218(d)(3)(iv)(A)-(B) (Exhibit ARG-3).

<sup>161</sup> See 19 C.F.R. § 351.308(f) (Exhibit US-3); and the SAA, at 879-880 (Exhibit US-11).

<sup>162</sup> 19 C.F.R. §§ 351.218(d)(1)(i) and 351.218(d)(iii)(B) (Exhibit ARG-3).

<sup>163</sup> *Concise Oxford English Dictionary* (10<sup>th</sup> 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”).

<sup>164</sup> *New Shorter Oxford English Dictionary* 651 (1993).

process of reasoning.”<sup>165</sup> 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.<sup>166</sup> 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.<sup>167</sup> 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.<sup>168</sup>

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.<sup>169</sup> 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 351.218(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

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<sup>165</sup> *Id.* at 613.

<sup>166</sup> 19 C.F.R. 351.218(d)(2)(iii) (Exhibit ARG-3).

<sup>167</sup> 19 C.F.R. 351.218(e)(1)(ii)(A) (Exhibit ARG-3).

<sup>168</sup> 19 C.F.R. 351.218(e)(1)(ii)(C) (Exhibit ARG-3).

<sup>169</sup> 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.”<sup>170</sup> 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<sup>171</sup> – 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.”<sup>172</sup>

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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<sup>170</sup> *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”).

<sup>171</sup> 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.

<sup>172</sup> 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,<sup>173</sup> 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.”<sup>174</sup> 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.<sup>175</sup>

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.<sup>176</sup> 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

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<sup>173</sup> 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).

<sup>174</sup> 19 C.F.R. § 351.218(d)(3)(iv)(B) (emphasis added) (Exhibit ARG-3).

<sup>175</sup> 19 C.F.R. § 351.218(d)(4) (Exhibit ARG-3).

<sup>176</sup> 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.<sup>177</sup> 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.<sup>178</sup>

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<sup>177</sup> 19 C.F.R. § 351.218(e)(1)(ii)(c)(2) (Exhibit ARG-3).

<sup>178</sup> 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 States - 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.<sup>179</sup> 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;<sup>180</sup> (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;<sup>181</sup> 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.<sup>182</sup>

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":<sup>183</sup>

[19 USC. § 1675a(c)] establishes standards for determining the likelihood of continuation or recurrence of dumping. Under [§ 1675(c)(1)], Commerce will

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<sup>179</sup> Section VII.B itself is ambiguous as to the precise source of this alleged practice.

<sup>180</sup> 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.

<sup>181</sup> 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.

<sup>182</sup> See Argentina's first submission, paras. 124 and 147.

<sup>183</sup> 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.”<sup>184</sup> 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:<sup>185</sup>

[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.”<sup>186</sup> 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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<sup>184</sup> *New Shorter Oxford English Dictionary* (1993), page 1419.

<sup>185</sup> 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.

<sup>186</sup> *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.<sup>187</sup> 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:<sup>188</sup>

[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

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<sup>187</sup> The United States says “indicia” because as demonstrated by the use of the word “normally,” the criteria in the quoted passage are not dispositive.

<sup>188</sup> *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.<sup>189</sup> 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.<sup>190</sup> 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.<sup>191</sup> 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*."<sup>192</sup>

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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<sup>189</sup> 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.

<sup>190</sup> 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.

<sup>191</sup> Argentina's first submission, para. 129, fifth bullet.

<sup>192</sup> 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.<sup>193</sup> 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."<sup>194</sup> 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:<sup>195</sup>

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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<sup>193</sup> 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."

<sup>194</sup> *Export Restraints*, para. 8.85 (italics in original).

<sup>195</sup> *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.”<sup>196</sup> 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.<sup>197</sup> 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:<sup>198</sup>

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.”<sup>199</sup>

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.<sup>200</sup> 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

<sup>196</sup> Argentina’s first submission, para. 144, quoting from *AG Dillinger Huettenwerke v. United States*, 193 F. Supp. 2d 1339 (CIT 2002) (Exhibit ARG-15a).

<sup>197</sup> 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.”

<sup>198</sup> *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*”].

<sup>199</sup> *US – Japan Sunset*, para. 7.131.

<sup>200</sup> *Export Restraints*, paras. 8.126-8.132.

the measure “mandates” action that is inconsistent with WTO obligations, or “precludes” action that is WTO-consistent.<sup>201</sup> 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.<sup>202</sup>

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.<sup>203</sup> 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.<sup>204</sup>

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.”<sup>205</sup>

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<sup>201</sup> *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.

<sup>202</sup> *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.

<sup>203</sup> 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*].

<sup>204</sup> E.g., *US - India Plate*, paras. 7.22-7.24; *Export Restraints*, paras. 8.126, 8.129-8.130.

<sup>205</sup> 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.”<sup>206</sup>

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.<sup>207</sup> 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 ... .”<sup>208</sup>

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

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<sup>206</sup> *US - Japan Sunset*, para. 7.130.

<sup>207</sup> 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.

<sup>208</sup> 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.<sup>209</sup>

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.<sup>210</sup> 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."<sup>211</sup> 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.<sup>212</sup>

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].<sup>213</sup>

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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<sup>209</sup> Argentina's first submission, paras. 148-155.

<sup>210</sup> Adequacy Memorandum, at 1-2 (Exhibit ARG-50).

<sup>211</sup> *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.

<sup>212</sup> *Id.*

<sup>213</sup> 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.<sup>214</sup> As a general matter, Commerce is bound to follow its own regulations.<sup>215</sup> 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.<sup>216</sup>

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.<sup>217</sup> 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.<sup>218</sup>

## **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.<sup>219</sup> 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

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<sup>214</sup> 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).

<sup>215</sup> 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.

<sup>216</sup> 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).

<sup>217</sup> 19 C.F.R. § 351.308(f) (Exhibit US-3).

<sup>218</sup> 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.

<sup>219</sup> 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.<sup>220</sup> 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.<sup>221</sup> 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.<sup>222</sup>

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.<sup>223</sup> 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.<sup>224</sup> 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.<sup>225</sup>

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.<sup>226</sup> 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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<sup>220</sup> *Final Sunset Determination*, 65 Fed. Reg. at 66701 (Exhibit ARG-46).

<sup>221</sup> *See generally*, Siderca’s Substantive Response (Exhibit ARG- 57).

<sup>222</sup> *See Adequacy Memorandum*, at 2 (Exhibit ARG-50).

<sup>223</sup> 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).

<sup>224</sup> *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).

<sup>225</sup> *Decision Memorandum*, at 5 (Exhibit ARG-51).

<sup>226</sup> Section 351.308(f) (Exhibit US-3).

Argentina for the five-year period preceding the sunset review.<sup>227</sup> 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.<sup>228</sup> 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*.<sup>229</sup> 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.”<sup>230</sup>

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

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<sup>227</sup> *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).

<sup>228</sup> Argentina’s first submission, paras. 166-171.

<sup>229</sup> 65 Fed. Reg. 41053 (Exhibit ARG-44).

<sup>230</sup> 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.”<sup>231</sup>

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.<sup>232</sup> 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.<sup>233</sup>

226. Siderca’s statement that it had a zero share of total US exports was supported by relevant trade data.<sup>234</sup> 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.<sup>235</sup> 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<sup>236</sup> and that it was appropriate to conduct an expedited sunset review.<sup>237</sup>

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.<sup>238</sup> 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.<sup>239</sup>

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

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<sup>231</sup> 19 C.F.R. § 351.218(e)(1)(ii)(A) (Exhibit ARG-3).

<sup>232</sup> See Siderca Substantive Response (Exhibit ARG-57).

<sup>233</sup> Siderca Substantive Response, at 3-4 (Exhibit ARG-57).

<sup>234</sup> See *Adequacy Memorandum*, at 2 (Exhibit ARG-50).

<sup>235</sup> 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).

<sup>236</sup> 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.

<sup>237</sup> See *Adequacy Memorandum*, at 2 (Exhibit ARG-50).

<sup>238</sup> Siderca Substantive Submission, at 2-3 (Exhibit ARG-57).

<sup>239</sup> See *Decision Memorandum*, at 5 (Exhibit ARG-51).

the response<sup>240</sup> and may submit a rebuttal to any other party's substantive response to the notice of initiation.<sup>241</sup>

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.<sup>242</sup> 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.<sup>243</sup>

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.<sup>244</sup> An inadequate response is one that lacks required information or is simply not submitted.<sup>245</sup> 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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<sup>240</sup> 19 C.F.R. § 351.309(e) (Exhibit US-3).

<sup>241</sup> 19 C.F.R. § 351.218(d)(4) (Exhibit ARG-3).

<sup>242</sup> Argentina's first submission, para. 168-170.

<sup>243</sup> See Exhibit ARG-57.

<sup>244</sup> 19 USC. § 1675(c)(3)(B) (Exhibit ARG-1).

<sup>245</sup> 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.<sup>246</sup> 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."<sup>247</sup> 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.<sup>248</sup>

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.<sup>249</sup> An "adequate" number of responses is normally required, because Commerce makes its likelihood determination on an order-wide basis.<sup>250</sup> 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)."<sup>251</sup> 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.<sup>252</sup> 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

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<sup>246</sup> Argentina's first submission, para.170.

<sup>247</sup> 19 C.F.R. § 351.218(e)(2)(ii) (Exhibit ARG-3).

<sup>248</sup> Argentina's first submission, para. 170.

<sup>249</sup> 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).

<sup>250</sup> *See Sunset Policy Bulletin*, 63 Fed. Reg. at 18872 (Exhibit ARG-35).

<sup>251</sup> 19 C.F.R. § 351.308(f)(2) (Exhibit US-3).

<sup>252</sup> *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.<sup>253</sup> 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.<sup>254</sup> 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.<sup>255</sup> 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."<sup>256</sup> 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.<sup>257</sup> 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-

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<sup>253</sup> Argentina's first submission, para. 172-174.

<sup>254</sup> Argentina's first submission, para. 178.

<sup>255</sup> Argentina's first submission, para. 179-180.

<sup>256</sup> *US – Japan Sunset*, para. 7.30.

<sup>257</sup> 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.<sup>258</sup>

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.<sup>259</sup> 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.<sup>260</sup> 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.<sup>261</sup> 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.<sup>262</sup> 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.<sup>263</sup>

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

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<sup>258</sup> 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.

<sup>259</sup> *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).

<sup>260</sup> *Decision Memorandum*, at 3 (Exhibit ARG-51); and *Adequacy Memorandum*, at 2 (Exhibit ARG-50).

<sup>261</sup> *Decision Memorandum*, at 4-5 (Exhibit ARG-51).

<sup>262</sup> *Decision Memorandum*, at 5 (Exhibit ARG-51).

<sup>263</sup> *Decision Memorandum*, at 5 (Exhibit ARG-51).

with Article 2.1 of the AD Agreement in a sunset review.<sup>264</sup> 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.<sup>265</sup> 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.<sup>266</sup> 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.<sup>267</sup>

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

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<sup>264</sup> Argentina's first submission, para. 179, 180.

<sup>265</sup> *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).

<sup>266</sup> Argentina's first submission, paras. 181-196.

<sup>267</sup> 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.<sup>268</sup> 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.<sup>269</sup>

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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<sup>268</sup> Argentina's first submission, paras. 182, 183.

<sup>269</sup> *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."<sup>270</sup> 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.<sup>271</sup> 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.<sup>272</sup>

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

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<sup>270</sup> *Korea DRAMs*, para. 6.14.

<sup>271</sup> Argentina's first submission, para. 187.

<sup>272</sup> 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.”<sup>273</sup> 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.<sup>274</sup> 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.<sup>275</sup> 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.<sup>276</sup> 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.<sup>277</sup> 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.”<sup>278</sup> 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.”<sup>279</sup> 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.<sup>280</sup> 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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<sup>273</sup> 19 C.F.R. § 351.218(d)(3)(ii)(F) (Exhibit ARG-3).

<sup>274</sup> *Decision Memorandum*, at 4-5 (Exhibit ARG-51).

<sup>275</sup> Argentina’s first submission, paras. 182-188.

<sup>276</sup> Argentina’s first submission, para. 184.

<sup>277</sup> 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.”

<sup>278</sup> Argentina’s first submission, para. 186.

<sup>279</sup> See Argentina’s first submission, paras. 182 and 187.

<sup>280</sup> *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.<sup>281</sup> In making the sunset injury determination, the ITC "may consider the magnitude of the margin of dumping."<sup>282</sup> 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.<sup>283</sup> 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."<sup>284</sup> 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

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<sup>281</sup> Section 752(c)(3) (Exhibit ARG-1).

<sup>282</sup> Section 752(a)(6) (Exhibit ARG-1).

<sup>283</sup> Argentina's first submission, paras. 189-193.

<sup>284</sup> *New Shorter Oxford English Dictionary* 3488 (1993).

shippers and even with respect to the same person at different times and different places.<sup>285</sup>

272. “Impartial” means “[n]ot partial; not favouring one party or side more than another; unprejudiced, unbiased; fair.”<sup>286</sup> 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 producers in Commerce’s sunset review resulted in the partial administration of US sunset laws.<sup>287</sup> 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.<sup>288</sup>

273. “Reasonable” means “[i]n accordance with reason; not irrational or absurd.”<sup>289</sup> 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.<sup>290</sup>

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.”<sup>291</sup> 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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<sup>285</sup> *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*”].

<sup>286</sup> *New Shorter Oxford English Dictionary* 1318 (1993).

<sup>287</sup> *US – Japan Sunset*, para. 7.306.

<sup>288</sup> *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).

<sup>289</sup> *New Shorter Oxford English Dictionary* 2496 (1993).

<sup>290</sup> *Argentina – Bovine Hides*, paras. 11.87, 11.91-92.

<sup>291</sup> 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."<sup>292</sup> 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.<sup>293</sup>

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:<sup>294</sup>

[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.<sup>295</sup> 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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<sup>292</sup> 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.

<sup>293</sup> *US – German Steel*, para. 87.

<sup>294</sup> *US – Japan Sunset*, para. 7.8.

<sup>295</sup> 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.”<sup>296</sup>

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.<sup>297</sup> 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 . . . .”<sup>298</sup> 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.”<sup>299</sup> 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.<sup>300</sup> Thus seeking a synonym for “likely” as Argentina does would not advance the understanding of that term.

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<sup>296</sup> *US – Japan Sunset*, para. 7.8.

<sup>297</sup> ITC Report at 1.

<sup>298</sup> 19 USC. §1675a(a) (Exhibit ARG-1).

<sup>299</sup> ITC Report at 20.

<sup>300</sup> 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.”<sup>301</sup> 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.”<sup>302</sup> Therefore, on remand from the Court to apply the “likely” standard consistent with the Court’s articulation, the ITC’s determinations did not change.<sup>303</sup> Moreover, the one ITC remand determination reviewed by the Court on this question was affirmed.<sup>304</sup>

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.<sup>305</sup> 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.”<sup>306</sup> 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.<sup>307</sup>

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.<sup>308</sup> 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* (3<sup>rd</sup> 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).

<sup>301</sup> *Usinor Industeel v. United States*, Slip Op. 02-70, at 43-44 (CIT 19 July 2002) (Exhibit US-17).

<sup>302</sup> *Usinor Industeel v. United States*, Slip Op. 02-152 at 6 (CIT 20 December 2002) (Exhibit US-18).

<sup>303</sup> *Usinor Remand Determination* at 14 (USITC July 2002) (Exhibit US-19).

<sup>304</sup> *Usinor Industeel v. United States*, Slip Op. 02-152 at 24 (20 December 2002) (US-18).

<sup>305</sup> Argentina’s first submission, para. 215.

<sup>306</sup> SAA at 883 (emphasis added) (Exhibit US-11).

<sup>307</sup> *Id.*

<sup>308</sup> 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.<sup>309</sup> 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.<sup>310</sup> 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."<sup>311</sup> 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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<sup>309</sup> 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).

<sup>310</sup> Argentina's first submission, para. 234.

<sup>311</sup> 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.<sup>312</sup>

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.”<sup>313</sup> 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

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<sup>312</sup> 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).

<sup>313</sup> *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.<sup>314</sup>

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."<sup>315</sup> 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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<sup>314</sup> 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).

<sup>315</sup> 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.<sup>316</sup> Finally, Argentina relies on the Appellate Body report in *Hot-Rolled Steel from Japan*.<sup>317</sup> 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,”<sup>318</sup> 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.<sup>319</sup>

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”<sup>320</sup> 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.”<sup>321</sup> 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.<sup>322</sup>

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.<sup>323</sup>

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<sup>316</sup> Argentina’s first submission, paras. 235 and 239.

<sup>317</sup> Argentina’s first submission, paras 234 and 237, discussing *US - Hot-Rolled Steel*.

<sup>318</sup> AD Agreement, Article 17.6(i).

<sup>319</sup> *US – Japan Sunset*, para. 7.177.

<sup>320</sup> *US – Hot-Rolled Steel*, para. 193; *EC – Pipe Fittings*, para. 132.

<sup>321</sup> *US – Hot-Rolled Steel*, para. 192; *EC – Pipe Fittings*, para. 132.

<sup>322</sup> 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.

<sup>323</sup> 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.<sup>324</sup> 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.<sup>325</sup> 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.<sup>326</sup>

319. With respect to producers in Korea, the ITC took note of their unused capacity and compared it in size to total US consumption.<sup>327</sup>

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<sup>324</sup> ITC Report at 17.

<sup>325</sup> ITC Report at 16.

<sup>326</sup> ITC Report at 18.

<sup>327</sup> 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.”<sup>328</sup>

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<sup>329</sup> 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.<sup>330</sup>

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.<sup>124</sup> 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.<sup>126</sup>

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<sup>124</sup> 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.

<sup>126</sup> 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.<sup>331</sup> 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.<sup>332</sup>

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<sup>328</sup> ITC Report at 19.

<sup>329</sup> 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.

<sup>330</sup> ITC Report at 19.

<sup>331</sup> ITC Report at 19.

<sup>332</sup> 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.<sup>333</sup>

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.<sup>334</sup>

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.<sup>335</sup> 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."<sup>336</sup> 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,<sup>337</sup> Tenaris had a strong incentive to increase its share of the US market.<sup>338</sup>

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.<sup>339</sup> In fact, the Tenaris producers already had contracts with global oil and gas companies that covered all operations outside the United States.<sup>340</sup> 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.<sup>341</sup> While Argentina claims that the ability of the subject

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<sup>333</sup> ITC Report at 20.

<sup>334</sup> ITC Report at 20.

<sup>335</sup> Argentina's first submission, para. 244.

<sup>336</sup> ITC Report at 19 (emphasis added).

<sup>337</sup> *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).

<sup>338</sup> 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).

<sup>339</sup> ITC Report at 19.

<sup>340</sup> 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).

<sup>341</sup> 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.<sup>342</sup> 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.<sup>343</sup>

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."<sup>344</sup> 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."<sup>345</sup> 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.<sup>346</sup> 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.<sup>347</sup> 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."<sup>348</sup> 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.<sup>349</sup> (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.<sup>350</sup> In short, the evidence shows that the ITC

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<sup>342</sup> 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).

<sup>343</sup> 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).

<sup>344</sup> ITC Report at 19 (emphasis added).

<sup>345</sup> Hearing Tr. at 56 (Mr. Chaddick) (Exhibit US-20).

<sup>346</sup> Argentina's first submission, para. 245.

<sup>347</sup> ITC Report page 20.

<sup>348</sup> Argentina's first submission, para. 246.

<sup>349</sup> 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.").

<sup>350</sup> 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.<sup>351</sup> 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."<sup>352</sup> 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."<sup>353</sup> 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.<sup>354</sup>

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."<sup>355</sup> The ITC, however, never found that price was a "determinative" factor; it simply held that "price is a very important factor in purchasing decisions."<sup>356</sup> 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.<sup>357</sup> Furthermore, given that all

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<sup>351</sup> Argentina's first submission, paras. 247-251.

<sup>352</sup> ITC Report at 21.

<sup>353</sup> *Id.*

<sup>354</sup> *Id.*

<sup>355</sup> Argentina's first submission, para. 250.

<sup>356</sup> ITC Report at 21.

<sup>357</sup> *Id.* at II-17.

parties agreed that subject casing and tubing was interchangeable with the domestic like product,<sup>358</sup> and that customers would accept any high-quality, API-certified product regardless of origin,<sup>359</sup> 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.<sup>360</sup> These arguments are unavailing. Certain forecasts showed that demand for OCTG was likely to remain strong in the near future.<sup>361</sup> 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.<sup>362</sup> 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.<sup>363</sup>

338. As for underselling by imports, Argentina's complaints relate solely to the ITC's discussion of underselling during the current review period.<sup>364</sup> But the ITC itself placed little weight on this point, as it recognized that the orders had significantly reduced the volume of subject imports.<sup>365</sup> 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.<sup>366</sup> 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.<sup>367</sup> 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.<sup>368</sup> Second, evidence from the original investigation strongly supports a finding that imports can drive down domestic prices even during a period of strong demand.<sup>369</sup> 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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<sup>358</sup> *Id.* at 12.

<sup>359</sup> *Id.*

<sup>360</sup> Argentina's first submission, para. 249.

<sup>361</sup> ITC Report at 15.

<sup>362</sup> *Id.*

<sup>363</sup> 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.*

<sup>364</sup> Argentina's first submission, para. 249.

<sup>365</sup> ITC Report at 21.

<sup>366</sup> *Id.* at 20-21.

<sup>367</sup> Argentina's first submission, para. 249..

<sup>368</sup> ITC Report at 21 ("For most products, domestic prices peaked in 1998, fell significantly in 1999, then rebounded in 2000.").

<sup>369</sup> *Id.* at 22 ("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.").

(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.<sup>370</sup>

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."<sup>371</sup> 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.<sup>372</sup> 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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<sup>370</sup> Argentina's first submission, paras. 252-254.

<sup>371</sup> 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.

<sup>372</sup> 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,<sup>373</sup> presented detailed information concerning each of the Article 3.4 factors, as follows:

<b>Factor</b> (* indicates that the ITC discussed this factor specifically)	<b>Location in ITC Report</b>
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.”<sup>374</sup>

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

<sup>373</sup> Transcript of 15 June 2001 ITC Meeting at 5 (Exhibit US-21).

<sup>374</sup> 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.<sup>375</sup> The ITC described a number of conditions of competition that informed its analysis in the sunset review.<sup>376</sup> These included a review of forecasts of future demand, which suggested that demand would remain strong.<sup>377</sup> Strong demand is, of course, not likely to be “another cause” of injury.

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<sup>375</sup> Argentina's first submission, para. 269.

<sup>376</sup> ITC Report, pages 14-16.

<sup>377</sup> 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.<sup>378</sup> 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.”<sup>379</sup>

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”<sup>380</sup> or “upon expiry of the order”<sup>381</sup> 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.<sup>382</sup>

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”).<sup>383</sup>

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).

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<sup>378</sup> 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.

<sup>379</sup> 19 USC. §§ 1675a(a)(1), 1675a(a)(5) (Exhibit ARG-1).

<sup>380</sup> Argentina's first submission, para. 271.

<sup>381</sup> Argentina's first submission, para. 272.

<sup>382</sup> 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).

<sup>383</sup> 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.<sup>384</sup>

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.<sup>385</sup> 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.<sup>386</sup> Accordingly, the genesis of any obligation or right arising under the WTO Agreement is the text of the relevant provision.<sup>387</sup> 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.<sup>388</sup>

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<sup>384</sup> Argentina's first submission, paras. 276-277.

<sup>385</sup> Argentina's first submission, paras. 278-287.

<sup>386</sup> 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.

<sup>387</sup> 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.

<sup>388</sup> *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.<sup>389</sup>

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.<sup>390</sup> 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.<sup>391</sup> 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.<sup>392</sup> 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"<sup>393</sup> 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.<sup>394</sup>

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

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<sup>389</sup> 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."

<sup>390</sup> Argentina's first submission, para. 285.

<sup>391</sup> Vienna Convention on the Law of Treaties, Art. 31(1).

<sup>392</sup> Argentina's first submission, para. 284.

<sup>393</sup> Argentina's first submission, para. 286.

<sup>394</sup> 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.<sup>395</sup> 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.<sup>396</sup> 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.<sup>397</sup> 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.<sup>398</sup>

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.<sup>399</sup> 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."<sup>400</sup>

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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<sup>395</sup> Argentina's first submission, paras. 288-291.

<sup>396</sup> *US – Japan Sunset*, para. 7.102.

<sup>397</sup> See *US – Japan Sunset*, paras. 7.97-7.98.

<sup>398</sup> 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).

<sup>399</sup> 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).

<sup>400</sup> *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].<sup>401</sup>

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.<sup>402</sup>

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.<sup>403</sup> As demonstrated in Section IV.C.5, above, these dependent claims are not within the Panel’s terms of reference.

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<sup>401</sup> *US – German Steel*, AB Report, para. 69.

<sup>402</sup> *US – Japan Sunset*, Panel Report, para. 7.103.

<sup>403</sup> 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.”<sup>404</sup> 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:<sup>405</sup>

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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<sup>404</sup> See, e.g., Argentina's first submission, Section VII.C.1, VII.C.4, and para. 295.

<sup>405</sup> 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

TABLE OF CONTENTS

	<i>Page</i>
<b>I. INTRODUCTION .....</b>	<b>176</b>
<b>II. DSU ARTICLE 6.2 .....</b>	<b>177</b>
<b>III. ARGENTINA'S "PAGE FOUR" CLAIMS ARE WITHIN THE PANEL'S TERMS OF REFERENCE .....</b>	<b>178</b>
A. US COMPLAINT.....	178
B. RELEVANT WTO JURISPRUDENCE.....	179
1. Identification of measures.....	179
2. Identification of the legal basis of the complaint .....	180
(a) Claims versus Arguments.....	180
(b) Minimum Requirements.....	180
(c) Prejudice to the Defending Party.....	181
3. Narrative description.....	183
C. THE CHALLENGED MEASURES AND THE LEGAL BASIS OF ARGENTINA'S COMPLAINT HAVE BEEN ADEQUATELY IDENTIFIED .....	184
1. Argentina's Panel Request must be read as a whole.....	185
2. A full narrative description, while not required, has been provided.....	186
3. The United States has not suffered prejudice during the course of the panel proceedings.....	186
<b>IV. SECTIONS B.1, B.2 AND B.3 OF ARGENTINA'S CLAIMS ARE WITHIN THE PANEL'S TERMS OF REFERENCE.....</b>	<b>190</b>
A. US COMPLAINT.....	190
B. RELEVANT WTO JURISPRUDENCE.....	190
C. ARGENTINA'S POSITION .....	190
<b>V. THE "CERTAIN MATTERS" REFERRED TO BY THE UNITED STATES ARE ALL WITHIN THE PANEL'S TERMS OF REFERENCE.....</b>	<b>194</b>
A. US COMPLAINT.....	194
B. ARGENTINA'S POSITION .....	194
<b>VI. CONCLUSION.....</b>	<b>199</b>

## 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<sup>1</sup> 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."<sup>2</sup> 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.<sup>3</sup>

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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<sup>1</sup> 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").

<sup>2</sup> US first submission, para. 3.

<sup>3</sup> 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](http://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.<sup>4</sup> 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.<sup>5</sup>

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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<sup>4</sup> 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.

<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup> 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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<sup>6</sup> 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*”).

<sup>7</sup> 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.*<sup>8</sup>

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.”

. . . .

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<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup>

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."<sup>11</sup> 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

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<sup>9</sup> *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.

<sup>10</sup> 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.

<sup>11</sup> *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.<sup>12</sup>

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.<sup>13</sup>

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.*<sup>14</sup>

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.<sup>15</sup>

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<sup>12</sup> Appellate Body Report, *Korea – Dairy*, para. 123.

<sup>13</sup> *Id.* at para. 124.

<sup>14</sup> *Id.* at para. 127 (emphasis added).

<sup>15</sup> *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.<sup>16</sup>

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*”).

<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup>

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<sup>17</sup> 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.

<sup>18</sup> 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.”<sup>19</sup> 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.”<sup>20</sup> 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.”<sup>21</sup> 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 . . . .”<sup>22</sup>

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

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<sup>19</sup> *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.

<sup>20</sup> *Id.* at para. 24.

<sup>21</sup> *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.*

<sup>22</sup> *Id.* at para. 28.



regulations, codified at Title 19 of the United States Code of Federal Regulations §§ 207.60-69 (Subpart F).<sup>23</sup>

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.<sup>24</sup>

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.<sup>25</sup>

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.<sup>26</sup> 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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<sup>23</sup> Argentina’s Panel Request, Page Four.

<sup>24</sup> US first submission, para. 101.

<sup>25</sup> US first submission, para. 88 and at n.103.

<sup>26</sup> 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*.”<sup>27</sup> 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 . . . .”<sup>28</sup>

## **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 all 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.”<sup>29</sup>

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.”<sup>30</sup> 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 during the panel proceedings can only be determined at the end of such proceedings. For example, this was the position taken by the Panel in *Canada Aircraft*:

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<sup>27</sup> Panel Report, *High Fructose Corn Syrup*, para. 7.15 (emphasis added).

<sup>28</sup> *Id.*

<sup>29</sup> Panel Report, *EC – Bed Linen*, para. 6.25 (emphasis added).

<sup>30</sup> *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.*<sup>31</sup>

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.<sup>32</sup>

51. Regardless of when any determination of prejudice should be made, the more important point is that the United States has failed to substantiate any 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.’”<sup>33</sup>

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.<sup>34</sup> Instead, the actual prejudice that must be shown must rise

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<sup>31</sup> Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, para. 9.33 (emphasis added).

<sup>32</sup> 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).

<sup>33</sup> US First Submission, paras. 97 and 110.

<sup>34</sup> 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.<sup>35</sup>

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.<sup>36</sup>

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 . . . .<sup>37</sup>

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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<sup>35</sup> Appellate Body Report, *EC – Computer Equipment*, para. 70.

<sup>36</sup> Panel Report, *US – Lamb Safeguards*, paras. 5.51-5.53.

<sup>37</sup> 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.”<sup>38</sup> 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.”<sup>39</sup>

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.”<sup>40</sup> 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 . . .”<sup>41</sup> 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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<sup>38</sup> 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*”).

<sup>39</sup> 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.

<sup>40</sup> Third Party Submission of the European Communities, WT/DS268 (14 November 2003), Section 2.

<sup>41</sup> 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 . . . .”<sup>42</sup>

##### 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

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<sup>42</sup> US First Submission, para. 104.

Argentina's references to Article 11, or even to Article 11.4.<sup>43</sup> 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.<sup>44</sup>

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

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<sup>43</sup> 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."

<sup>44</sup> 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.”<sup>45</sup> 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.”<sup>46</sup>

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 . . . .”<sup>47</sup> 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

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<sup>45</sup> Panel Report, *US – Lamb Safeguards*, para. 5.39.

<sup>46</sup> *Id.* at para. 5.40.

<sup>47</sup> 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.<sup>48</sup>

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.<sup>49</sup>

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.'"<sup>50</sup>

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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<sup>48</sup> *Id.* at para. 93.

<sup>49</sup> See Appellate Body Report, *Korea – Dairy*, para. 123.

<sup>50</sup> 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.<sup>51</sup>

**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 any 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

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<sup>51</sup> 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.<sup>52</sup> 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,

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<sup>52</sup> 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.<sup>53</sup> 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?"<sup>54</sup> 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

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<sup>53</sup> See Written Questions Presented by Argentina for the Consultations on 14 November 2002 (Exhibit US-12), questions 13, 26, 28-31.

<sup>54</sup> *Id.* at question 13 (emphasis added).

with Article 11.3.<sup>55</sup> 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?”<sup>56</sup> 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

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<sup>55</sup> 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.

<sup>56</sup> *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.<sup>57</sup>

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 inadvertent”;

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

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<sup>57</sup> 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