

ANNEX D

ORAL STATEMENTS, FIRST AND SECOND MEETINGS

Contents		Page
Annex D-1	Opening and Closing Oral Statements of Argentina – First Meeting	D-2
Annex D-2	Oral Statement of the United States – First Meeting	D-38
Annex D-3	Third Party Oral Statement of the European Communities	D-46
Annex D-4	Third Party Oral Statement of Japan	D-53
Annex D-5	Third Party Oral Statement of Mexico	D-59
Annex D-6	Third Party Oral Statement of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu	D-60
Annex D-7	Opening and Closing Oral Statements of Argentina – Second Meeting	D-62
Annex D-8	Opening and Closing Oral Statements of the United States – Second Meeting	D-86

ANNEX D-1

OPENING AND CLOSING ORAL STATEMENTS OF ARGENTINA – FIRST MEETING

Opening Statement – 9 December 2003

I. INTRODUCTION

1. At the heart of this dispute is a fundamental disagreement between the United States and the rest of the WTO constituency regarding the sunset obligation of Article 11.3 of the Anti-Dumping Agreement. For the United States, Article 11.3 is practically devoid of obligations.¹ For the United States, anti-dumping measures can be continued indefinitely and on almost any basis. For the rest of the WTO constituency,² including Argentina, Article 11.3 establishes a fundamental obligation to terminate an anti-dumping measure five years after its imposition. Reliance on the limited exception to this obligation requires a Member to make specific findings that are based on evidence and that comply with the substantive standards established in the Anti-Dumping Agreement.

2. In this case, the United States did not terminate the measure applicable to Argentine OCTG, but rather invoked the exception and continued the order for an additional 5 years, at least. However, the United States did not make the findings required by Article 11.3, as Argentina explains in its First Submission and elaborates today.

3. The United States accuses Argentina of having a weak case and of distorting facts. Argentina does not believe such accusations are helpful. Instead, Argentina will present its arguments with a focus on the Anti-Dumping Agreement obligations, on the record of the underlying sunset proceedings, and on the practice of the United States. In doing so, Argentina will leave it for the Panel to evaluate the merits of the case.

4. The underlying facts are not complicated. The only Argentine exporter ever investigated in this case, Siderca, was found to have been dumping in 1994, based on the practice of zeroing negative margins, at a level of 1.36 per cent. Thereafter, the exporter stopped shipping to the United States, and the US Government conducted several reviews to confirm that it had stopped shipping. In the so-called sunset review proceedings five years later, the Department determined that dumping was likely to continue and the Commission determined that injury was likely to continue or recur. These are the essential facts.

5. This simple fact pattern may seem more complicated by the various types of procedures set up by the United States to implement its Article 11.3 obligations, the various levels of participation that are possible in these proceedings, and the consequences that the US system attaches to each level of participation. This is especially true with respect to the likely dumping determination by the Department of Commerce, whose sunset determinations have little to do with a substantive analysis of whether dumping is likely, and instead focus on the application of presumptions that lead to the inevitable conclusion that dumping is likely to continue or recur.

6. In its First Submission, the United States denies that there are any presumptions at work, and it defends its sunset laws, its sunset practice, and its sunset determinations in this case. As part of its

¹ According to the United States, Article 11.3 is “very limited” and sets virtually no restraints or limitations on a Member’s ability to maintain anti-dumping measures. (See US First Submission, para. 3.).

² See Third Parties submissions of Japan, European Communities, Chinese Taipei, and Korea.

presentation today, Argentina will demonstrate certain contradictions that arise from a comparison of the US sunset determinations challenged by Argentina and the arguments advanced by the United States in its First Submission. Indeed, Argentina will highlight several instances where the words of the sunset determination contradict the position asserted by the United States in its First Submission. The US First Submission also has a number of irreconcilable internal contradictions. Let me just review some of these examples, which we have placed on Chart 1 for ease of reference.

7. Chart 1 lists four issues related to the likely dumping determination which were key to the US decision not to terminate the measure. They go to the very heart of the issue of whether the United States made the type of determination required in order to invoke the exception provided for in Article 11.3. Yet on these key issues, the United States takes a very different position in its First Submission than it did in its sunset determination.

- With respect to waiver, the Department unambiguously stated in its sunset determination that the respondents waived their right to participate in the review. In its First Submission, the United States says that the Department did not deem Siderca to have waived its participation.
- With respect to Siderca's response, the Department clearly stated in its sunset determination that Siderca's response was inadequate.³ In its First Submission (para. 213), the United States says the exact opposite – "Siderca did not fail to file an adequate response but, rather, filed a complete substantive response." Moreover, elsewhere in the First Submission (para. 233), the United States asserts that: "An inadequate response is one that lacks required information or is simply not submitted."
- Notwithstanding the application of the waiver provisions to Siderca, the Department also cites in its final determination the provision for the conduct of an expedited review and application of "facts available," which is the euphemism for adverse inferences. In its First Submission (para. 214), the United States denies that it applied facts available to Siderca and explains that it applied facts available to the "non-responding respondents" from Argentina. This explanation not only contradicts the references in the sunset determination, but also contradicts the United States' explanation that any such "non-responding respondents" waived their right to participate, which mandates a finding of likely dumping.
- Finally, with respect to these "non-responding respondents," the Department never mentioned such a term in the sunset determination or in the WTO consultations prior to this panel proceeding. Yet Argentina learns through the First Submission filed by the United States that these "non-responding respondents" triggered the application of the waiver provisions, the inadequacy determination, and the decision to conduct an expedited review.

8. In addition to these contradictions relating to the purported basis for the Department's likelihood of dumping determination, the contrast between the treatment of Siderca's lack of shipments for the dumping and injury determinations is striking. For the likelihood of dumping, the lack of shipments was the key factor leading to waiver. For the likelihood of injury determination, Argentina's shipments were irrelevant because the Commission relied on speculation regarding non-Argentine imports, all of which were considered on a cumulated basis.

³ See ARG-46 (Department's Sunset Determination at 66,701) ("On the basis of ... inadequate responses... from respondent interested parties, the Department determined to conduct expedited reviews); ARG-50 (Department's Determination to Expedite at 2) ("...we recommend that you determine Siderca's response to be inadequate and that we should conduct an expedited (120 day) sunset review...); ARG-51 (*Issues and Decision Memorandum* at 3, 7) ("the Department determined Siderca's substantive response to be inadequate;" and "Siderca did not provide adequate substantive responses.").

9. This case will challenge the Panel in several ways, especially because of the procedures established in US law to implement the Article 11.3 obligation, and the contradictions between the sunset determination and the US First Submission. Yet, underneath all the discussion of the procedures in the First Submission, there is only one factor that matters for the likelihood of dumping determination: has the US industry participated in the sunset review? In the 217 cases in which the US industry has expressed an interest in continuing the anti-dumping measure, the Department has found a likelihood of a continuation or recurrence of dumping in each case. The US industry has 217 wins and 0 losses on the issue of likely dumping.

10. For the Commission's sunset determination, the picture is equally troubling. An analysis of the Commission's determination in this case shows that the Commission is not engaged in an analysis of whether injury is "likely" to continue or recur, but rather makes its determination based on isolated factors that cannot satisfy the common meaning of the term "likely." Further, the Commission makes its determination on a cumulated basis of all countries subject to the measure, which has the effect of negating the rights of individual Members who have the misfortune of being caught in the cumulated analysis.

11. Argentina will not repeat all of the arguments set forth in its First Submission and notes that this oral statement should not be viewed as exhaustive of Argentina's arguments. Argentina proposes to present its case in the following manner. First, Argentina will review the nature of the Article 11.3 obligation, which is fundamental to this case. Second, Argentina will explain the WTO-inconsistencies of the "likely" dumping determination by the Department. Third, Argentina will demonstrate the violations of the Agreement by the "likely" injury determination by the Commission. Fourth, Argentina will address briefly the preliminary objections that the United States has raised, and which Argentina rebutted in full in its submission of 4 December. Finally, Argentina will draw conclusions that place this case in the proper and necessary context.

II. THE ARTICLE 11.3 OBLIGATION

A. INTERPRETING ARTICLE 11.3 AND DEFINING THE SUNSET OBLIGATION IN PROPER CONTEXT

12. The only way to interpret the terms of Article 11.3 is to give the words their ordinary meaning and to interpret the words in their context – both the immediate context (i.e., the other paragraphs of Article 11) and the broader context (i.e., the other provisions of the Anti-Dumping Agreement, and the WTO Agreements as a whole), in accordance with their object and purpose.

13. Article 11.3 must be read in the context of the overarching obligation set out in Article 11.1. Article 11.1 fundamentally limits the use of anti-dumping duties in three significant respects: duration ("only as long as necessary"); magnitude ("only to the extent necessary"); and purpose ("to counteract dumping which is causing injury").

14. The panel in *EC – Pipe Fittings* recently reaffirmed the clear mandate of Article 11.1, noting that it "contains a general, unambiguous and mandatory requirement that anti-dumping duties 'shall remain in force only as long as and to the extent necessary' to counteract injurious dumping." The Panel added that Article 11.1 states "a general and overarching principle." (DS219, para. 7.113) This general principle is expressed substantively throughout the Anti-Dumping Agreement, including in the "sunset review" provisions of Article 11.3. To put it simply, and to paraphrase the Appellate Body's statement in *Steel from Germany*, if there is no determination of likely continuation or recurrence of injurious dumping, the measure must be terminated.

15. The United States would prefer to have this Panel focus its attention exclusively on Article 11.3, and ignore both the immediate context of Article 11, and the broader context of the Anti-Dumping Agreement. The *Vienna Convention* does not permit such an approach. The United States cannot assert that the Panel should base an interpretation of Article 11.3 of the Anti-Dumping

Agreement (as the United States does), entirely on the words used in that *one* provision; especially when the words used in that provision are defined elsewhere in the Agreement. Rather, it is necessary to interpret Article 11.3 by examining the ordinary meaning of *all* the provisions that together prescribe the relevant obligations of Article 11. Then the proper interpretation of the provisions must be applied to the facts of the case.

16. To summarize, the United States asserts that Article 11.3 is an “empty shell.” Argentina and the Third Parties participating in this case disagree, and contend that Article 11.3 incorporates the substantive standards of Articles 2, 3, 6, and 12. As we will see later, this fundamental difference regarding the meaning of Article 11.3 is the basis of this dispute.

B. THE PRIMARY OBLIGATION OF ARTICLE 11.3 IS TERMINATION OF THE MEASURE

17. The Appellate Body in *Steel from Germany* explained that the primary obligation of Article 21.3 – which parallels Article 11.3 of the Anti-Dumping Agreement – is **termination** of the measure after five years. Continuation of the measure is the exception, and only if there is strict adherence to the requirements of the Agreement. The Appellate Body has stated:

[W]e wish to underline the thrust of Article 21.3 of the SCM Agreement. An automatic *time-bound* termination of countervailing duties that have been in place for five years from the original investigation or a subsequent comprehensive review is *at the heart of this provision*. Termination of a countervailing duty is the rule and its continuation is the exception. The continuation of a countervailing duty must therefore be based on a *properly conducted review and a positive determination* that the revocation of the countervailing duty would “be likely to lead to continuation or recurrence of subsidization and injury.” (para. 88, emphasis added).

18. Article 11.3’s requirement to conduct a “review” and make a “determination” precludes the authority from assuming that dumping and injury would likely continue or recur. (*See* Panel Report, *Sunset Reviews of Steel from Japan*, DS244, para. 7.177.) The authority must take action and ground its determination on a “sufficient factual basis” to allow it to “draw reasoned and adequate conclusions concerning the likelihood” of continuation or recurrence. (*Id.*) In this regard, the authority’s determination cannot be based solely on outdated information, but rather “should rest on the evaluation of the evidence that it has gathered during the original investigation, the intervening reviews *and finally the sunset review*.” (*Id.*) The authority must make a “fresh determination” that is forward-looking and “based on credible evidence.” (Appellate Body Report, *Steel from Germany*, para. 88.)

19. The Appellate Body plainly stated the consequences where a WTO Member fails to conduct a sunset review or fails to make the required determination under Article 11.3: “If [a WTO Member] does not conduct a sunset review, or, having conducted such a review, it does not make such a positive determination, the duties must be terminated.” (*Steel from Germany*, para. 63).

C. OTHER PROVISIONS OF THE ANTI-DUMPING AGREEMENT APPLY TO ARTICLE 11.3 REVIEWS

20. The terms of Article 11 mandate compliance with other provisions of the Anti-Dumping Agreement, including Article 2 (which defines “dumping” “for the purposes of the Anti-Dumping Agreement,” including sunset reviews), Article 3 (which defines the meaning of “injury” under the Anti-Dumping Agreement, including its use in the Article 11.3), and Article 6 (which applies to reviews conducted under Article 11 by virtue of the cross-reference contained in Article 11.4), and Article 12. The textual analysis of the Appellate Body in *Steel from Germany* and the Panel Report in

DRAMS from Korea confirms that key substantive provisions of the Anti-Dumping Agreement apply to Article 11.3 reviews.⁴

21. The Third Parties agree that key substantive provisions of the Anti-Dumping Agreement (including Articles 2, 3, and 6) apply to reviews conducted under Article 11.3.⁵

D. THE US AUTHORITIES APPLIED THE WRONG STANDARD: THE ORDINARY MEANING OF “LIKELY” IN ARTICLE 11.3 IS “PROBABLE” AND NOT “POSSIBLE”

22. Article 11.3 requires the authorities to determine whether the expiry of the measures would be likely to lead to continuation or recurrence of dumping and injury. The US authorities failed to give the term “likely” its ordinary meaning.

23. Both WTO and US jurisprudence make clear that “likely” does not have the same meaning as “possible.”

24. Both the ordinary meaning of the term “likely” and the context of Article 11.3 require the application of a “probable” standard to the question of whether dumping and injury will continue or recur. In other words, the continuation or recurrence of dumping and injury must be more likely than not. Indeed, the United States itself has asserted before the WTO that the term “likely” means “probable.” In *Steel from Germany*, the United States expressly stated that “[t]he word ‘likely’ carries with it the ordinary meaning of ‘probable.’” (US Oral Statement at the First Meeting of the Panel, WT/DS213, 29-30 January 2002, para. 6).

25. Hence, in order to make a determination that is consistent with Article 11.3, the Department and the Commission must find that it is “likely” (*i.e.*, more probable than not) that termination of the anti-dumping measure will lead to the continuance or recurrence of dumping and injury, respectively.

E. SUMMING UP THE ARTICLE 11.3 OBLIGATIONS IN THIS CASE

26. The United States submits that it can invoke the exception of Article 11.3 by initiating a review and making a determination. The rest – the very substance of the determination – is not subject to any disciplines, according to the United States. Argentina and the Third Parties see it differently. Reading Article 11.3 within its context reveals that it is full of substantive obligations. If a Member wishes to invoke the exception and continue a measure beyond the 5 year limit established in Article 11.3, it is subject to specific disciplines that are common in the Anti-Dumping Agreement:

- It must conduct a review and make determinations within a specified time if it wishes to maintain the measure (required by Article 11.3);
- The conduct of the review and the determinations must satisfy the requirements of Article 6 and must be based on positive evidence;
- The authorities must find that dumping (within the meaning of Article 2) is “likely” to continue or recur (dumping must be more probable than not); and
- The authorities must find that injury (within the meaning of Article 3) is “likely” to continue or recur (injury must be more probable than not).

⁴ Appellate Body Report, *Steel from Germany*, paras. 69 n.59, 79-81; Panel Report *DRAMS from Korea*, para. 6.59 n.501.

⁵ Third Party Submissions of European Communities (paras. 89-96, 123-127), Japan (paras. 321), Korea (paras. 9-24), and Chinese Taipei (paras. 7-13).

The United States failed to satisfy its obligations in this case in every respect.

III. THE DEPARTMENT'S SUNSET REVIEW OF OCTG FROM ARGENTINA

27. Let us turn now to the Department's determination of whether dumping is likely to continue or recur. Throughout this oral presentation, Argentina will focus on the application of the US obligations in this specific case. However, such an exercise leads directly to laws and regulations developed by the United States, the instruments that inform those laws and regulations, and the Department's consistent practice in sunset reviews. Let us look briefly at the system that the United States established to implement its 11.3 obligation (section A), then let us look at the application of this system to Argentina in this case (section B), and finally we will look at the Argentine case in the context of the other cases the United States has decided (Section C).

A. US SUNSET PROCEEDINGS

28. **There is only one variable that matters in the whole of the US sunset regime governing Department sunset reviews: whether the domestic industry participates in the sunset review.** In all 217 sunset reviews (including Argentina's review) in which at least one domestic interested party participated, the Department determined that termination of the measure would be likely to lead to continuation or recurrence of dumping.

29. **The basis for the Department's determination of likely dumping in each of these 217 sunset reviews was either: (1) application of the waiver provisions; or (2) resort to the three "checklist" criteria established by the Statement of Administrative Action and the *Sunset Policy Bulletin*.**

30. **The Department applied the waiver provisions in 167 sunset reviews, 77 per cent of the sunset reviews in which the domestic industry participated.** In all of these cases, the Department issued a finding that dumping would likely continue or recur pursuant to the statutory mandate. Illustrative of the swift – and to use the US description – “efficient” operation of the waiver mechanism is the sunset review of antifriction bearings from Sweden, where the Department stated, “[G]iven that . . . respondent interested parties have waived their right to participate in this review before the Department, we determine that dumping is likely to continue if the orders were revoked.” (*Antifriction Bearings from Sweden* (found in Tab 6 of ARG-63)). The Department made a similar statement in the case being reviewed by the panel in this case: *The Issues and Decision Memorandum* at 4-5 (ARG-51)(“In the instant reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation.”).

31. The US waiver provisions violate Article 11.3 because they mandate a finding of likely dumping. Article 11.3's requirement to conduct a “review” and make a “determination” precludes a WTO Member from statutorily mandating an affirmative finding of likely dumping. To do otherwise would be to reduce Article 11.3 to a nullity, something a treaty interpreter may not do. If a WTO Member wishes to invoke the exception and continue an anti-dumping measure, it simply does not have the option of doing nothing, or of passively assuming that dumping and injury would be likely to continue or recur.

32. **Resort to the checklist criteria of the SAA/*Sunset Policy Bulletin*.** In those cases in which the Department does not apply the waiver provisions, the Department instead uses its other tool: the checklist criteria in the SAA and the *Sunset Policy Bulletin*. These US instruments limit the Department's so-called likelihood “analysis” solely to a consideration of: (1) the existence of dumping margins from the original investigation and subsequent administrative reviews; (2) whether imports of the subject merchandise ceased after issuance of the order; and (3) whether dumping was eliminated after imposition of the order and import volumes declined significantly.

33. The United States has not, and cannot, point to a single case in which the domestic industry participated in a DOC sunset review and the Department determined that dumping would not be likely. The facts of the DOC sunset reviews speak for themselves: In 100 per cent of the sunset reviews in which a domestic interested party participated in the proceeding, the Department determined that dumping was likely to continue or recur; and in 100 per cent of the sunset reviews for which the Department determined that dumping was likely to continue or recur, the Department relied on the directives of the SAA and the Department's *Sunset Policy Bulletin*.

34. For ease of reference Argentina has prepared Chart 2, which depicts the DOC sunset review system.

35. The first page demonstrates that there is only one dispositive factor in DOC sunset reviews. That is, whether the domestic industry participates. As the chart shows, in 100 per cent (all 217) cases in which the domestic industry participated, the Department determined that dumping would be likely. In those cases in which the US industry did not participate (74), the Department terminated the order.

36. Page 2 of the Chart shows the two tools used by the Department that give rise to the remarkable winning percentage of the US industry. The Department reaches the likely dumping determination either through the application of the mandatory waiver provisions or reliance on the SAA/*Sunset Policy Bulletin* checklist criteria. Together these two tools enable the Department to find likely dumping in any case in which the domestic industry is interested. At the end of the day, the waiver provisions and presumption under US law created by the SAA and *Sunset Policy Bulletin* simply preclude the Department from conducting a review and making the determination required by Article 11.3.

37. Page 3 of the Chart depicts the "deemed waiver" mechanism in US law, where a respondent interested party that attempts to participate in a DOC sunset review is "deemed" by the Department to have waived its right to participate by virtue of either an "incomplete" or "inadequate" substantive response. A party's response can be deemed inadequate solely on the basis that its imports are less than 50 per cent of the total exports to the United States from that party's country. This is precisely what happened to Siderca in this case.

38. Finally, as Page 4 of the Chart shows, no matter what type of review, and irrespective of the Department's adequacy determination, at the end of the day all roads lead to a likely dumping determination, whether through application of the mandatory waiver provisions or the presumption established by checklist criteria of the SAA and *Sunset Policy Bulletin*.

39. **The evidence speaks for itself.** The United States has implemented a complicated sunset review scheme. Yet, from a results standpoint, it does not really matter whether the Department issues a likelihood determination pursuant to application of the waiver provisions, or through the application of the checklist criteria (whether in an expedited or full sunset review). It does not matter that under the regulations a substantive response may contain "any other relevant information or argument that the party would like the [Department] to consider." And it does not matter that respondent parties are afforded opportunities to submit comments. Despite the US assertions to the contrary, there simply is no meaningful opportunity for respondents to participate in sunset reviews.

40. In addition to the inflexible application of the waiver provisions, Argentina's review of the Department's sunset determinations leads to the conclusion that the Department applies a presumption in favour of finding likely dumping that no party has ever overcome. The Appellate Body in *Steel from Germany* explained that while it would be difficult for a single case to serve as conclusive evidence of the Department's practice as such violating US WTO obligations, a comprehensive examination of all US sunset reviews and an analysis of the methodology used by the Department in those reviews might provide such an evidentiary basis. (Appellate Body Report, *Steel from Germany*,

para. 148.) The Appellate Body further explained that a violation might be established by “evidence of the consistent application of such laws” and that “the nature and the evidence required to satisfy the burden of proof will vary from case to case.” (para. 157).

41. ARG-63 embodies the results of Argentina’s review of all of the Department’s sunset reviews that were undertaken in order to provide empirical evidence in support of its claims. As of September 2003, the Department of Commerce had conducted 291 sunset reviews of anti-dumping duty orders. Argentina has analyzed all 291 of these sunset reviews and has recorded the Department’s findings for each in ARG-63. A perfect record of likely dumping in all cases in which the US industry has shown the slightest interest can in no way be considered to constitute a meaningful – or WTO-consistent – “determination” for the purposes of Article 11.3.

B. THE DEPARTMENT’S SUNSET REVIEW OF OCTG FROM ARGENTINA

42. **Key facts.** The only Argentine exporter ever investigated in the case was the company, Siderca. Siderca was the only exporter investigated in the original 1994 investigation (as it was the only investigated party also in 1984 and 1985 anti-dumping investigations, and in several administrative reviews under US countervailing duty law). Siderca had not shipped any OCTG to the United States for consumption during the relevant period for purposes of the sunset review. Siderca stated this to the Department in its substantive response in the Department’s sunset procedure. Siderca made similar “no-shipment” representations during each of the relevant administrative review periods. The Department conducted “no-shipment” reviews and in each instance verified Siderca’s claims that the company had not exported OCTG to the United States. Curiously, the US First Submission states that “No administrative reviews of the anti-dumping duty order on certain OCTG from Argentina were requested or conducted prior to the sunset review” (para. 48). However, four reviews were requested, even though they were rescinded when the Department verified the lack of consumption imports from Siderca.⁶

43. However, in the sunset review, the Department’s import data showed the existence of some Argentine OCTG imports to the United States. Because Siderca’s total exports of OCTG to the United States (zero exports) were less than 50 per cent of what was presumed to be OCTG exports from Argentina to the United States, the Department determined Siderca’s response to be “inadequate.” (ARG-50). In this sense, Argentina’s treatment in the sunset review depended entirely on the assumption that the US statistics were correct, that there were other exports from Argentina, and that these alleged other exports were relevant enough to trigger a waiver and/or expedited review under the US law and regulations. In fact, the US industry never alleged the existence of other Argentine exporters, the Department never reviewed or investigated other Argentine exporters, and the Department discovered through its own review that the statistics in fact had incorrectly recorded non-consumption entries as consumption entries.

44. **Application of Waiver Provision to Siderca.** The Department then determined that because Siderca’s response was deemed to be “inadequate,” the company was similarly deemed to have “waived” its right to participate in the sunset review. I quote from the *Issues and Decision Memorandum* at 4-5 (ARG-51) (“In the instant reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation.”). (See Chart 1)

45. Now let’s look at what the United States has said in its First Submission to this panel. The United States argues that the Department did not deem Siderca to have waived its participation in the sunset review of OCTG from Argentina (US First Submission, paras. 211- 213). Buried in footnote 216, the United States does concede ambiguity: it states that “although based on this

⁶ See Exhibits ARG-28, ARG-32, ARG-37, and ARG-41 for the reviews. See also ARG-29, ARG-36, ARG-38, and ARG-43 for the outcomes.

language it may appear that Commerce deemed all respondents interested parties to have waived their participation in the OCTG sunset review...” The United States says instead that there were other Argentine exporters who did not respond at all to the notice of initiation. In paragraph 146, the United States tells us that such a failure to respond has the consequence of a waiver, which, under the statute mandates an affirmative determination of continuation or recurrence of dumping. Let us return to Chart 2, where we see that a failure to respond leads directly to waiver of participation, for which the statute then mandates an affirmative likelihood determination, without any substantive review.

46. Thus, under the theory expressed in this part of the US First Submission (which is different than what the United States says in another part), the exporters considered to account for all exports of Argentine OCTG to the United States waived their participation by failing to respond to the notice of initiation, and the Department therefore had no choice but to follow the statutory mandate to make an affirmative finding of likely dumping in this case. If this is true, how can the United States now contend that the waiver provision did not affect Siderca, or that it did not diminish Argentina’s rights under Article 11.3?

47. **Why waiver violates Article 11.3.** The US waiver provisions violate Article 11.3 because they mandate a finding of likely dumping. Article 11.3’s requirement to conduct a “review” and make a “determination” precludes the authority from mandating statutorily an affirmative finding of likely dumping. If the WTO Member wishes to invoke the exception and continue the measure, it simply does not have the choice of doing nothing, or of passively assuming that dumping and injury would likely continue or recur. (*See* Panel Report, *Sunset Reviews of Steel from Japan*, DS244, para. 7.177.) The authority must take action and ground its determination on a “sufficient factual basis” to allow it to “draw reasoned and adequate conclusions concerning the likelihood” of continuation or recurrence. (*Id.*) The authority must make a “fresh determination” that is forward-looking and “based on credible evidence.” (Appellate Body Report, *Steel from Germany*, para. 88.)

48. **Additionally, waiver violates Articles 6.1 and 6.2.** The application of the waiver provisions in the Argentine case violated Article 6.1 because it prevented the only known Argentine exporter, Siderca, from presenting evidence for meaningful consideration. Siderca had notified the Department of its desire to participate in the sunset review and its willingness to cooperate fully by filing a complete substantive response to the Department’s notice of initiation. Nevertheless, the Department deemed Siderca to have waived its participation and thus issued a determination that dumping was likely pursuant to the statutory mandate of 19 USC. § 1675(c)(4)(B). Accordingly, by issuing a determination of likelihood without any analysis and without meaningful consideration of the information submitted by Siderca, the Department denied Siderca an “ample opportunity to present . . . evidence which [it] considered relevant”

49. The United States attempts to cast the waiver provisions as an “efficiency” mechanism that enables the Department to save resources where respondent interested parties choose not to participate in the Department’s sunset review. (US First Submission, paras. 148-49) Casting the function of the waiver provisions as a vehicle for saving resources is not persuasive. Purported efforts to save administrative resources can in no way negate a Member’s obligations under the Agreement.

50. The point is that Article 11.3 imposes an obligation on the Member maintaining an anti-dumping measure to conduct a review and make a determination of both likely dumping and likely injury in order for it to maintain that measure. If the national authorities are not willing to expend the resources necessary to satisfy their obligation to make a WTO-consistent “determination,” then they must terminate the measure. Also, it must be noted that the Anti-Dumping Agreement provides only one mechanism for the treatment of respondents who do not participate or who are not cooperative: Article 6.8 and Annex II provide the limited circumstances in which a Member may make a decision based on facts available for such parties. Thus, an additional so-called efficiency mechanism, that statutorily mandates a finding of a likelihood of a continuation or recurrence of dumping, is not permitted.

51. Finally, it must be stated that, in the name of “efficiency,” the United States has applied the waiver provision in 167 of its 291 sunset reviews. In Argentina’s view, this is something other than efficiency.

1. The Department’s decision to conduct an expedited review

52. The Department’s determination cites both the “waiver” provisions (19 USC. § 1675(c)(4)(B) and 19 C.F.R. 351.218(d)(2)(iii)) and the “facts available” provision (19 C.F.R. § 351.218(e)(1)(ii)(C)). The Department’s determination purports to rely on both provisions. However, there is no basis under US law for the simultaneous application of these provisions to a single respondent. Indeed, these provisions are mutually exclusive. (See discussion in Argentina’s First Submission, para. 100).

53. Putting aside the unambiguous language that the Department deemed Siderca’s inadequate response to constitute “waiver” of participation (*Issues and Decision Memorandum*, ARG-51 at 5), and despite language in its determinations regarding the application of facts available (ARG-51 at 3), the United States asserts that the Department did not apply facts available against Siderca. (US First Submission, paras. 214, 221, 234-36.) Again, the answer that the United States provides in its First Submission lies in the so-called “non-responding Argentine respondents;” that is, companies other than Siderca who never responded to the invitation to file a substantive response.

54. Here, the United States enters into a series of contradictions. First, the US assertion runs counter to the language in the Department’s determination. In the Department’s determination to conduct an expedited review, it noted that “[d]uring the five-year period from 1995 to 1999, the combined-average annual percentage of Siderca’s exports of OCTG to the United States with respect to the total of exports of the subject merchandise to the United States was significantly below 50 per cent.” (ARG-50) Based on this finding, the Department determined Siderca’s substantive response to be “inadequate” under 19 C.F.R. § 351.218(e)(1)(A)(i) and thus conducted an expedited review pursuant to 19 C.F.R. § 351.218(e)(1)(C)(2). (ARG-51) (*Issues and Decision Memorandum* at 3, 7) (“the Department determined Siderca’s substantive response to be inadequate;” and “Siderca did not provide adequate substantive responses.”); *Determination to Expedite* at 2 (ARG-50)(“we recommend that you determine Siderca’s response to be inadequate”). Based on such statements in the key documents explaining the Department’s actions, it is hard to understand how the United States can say in its First Written Submission that Siderca’s response was not inadequate (para. 225, 237), and that it did not apply facts available to Siderca.

55. Second, according to the Department’s sunset regulations, if the respondent interested parties have provided an inadequate response, the Department will normally conduct an expedited review and issue its final results “based on the facts available[.]” (19 C.F.R. § 351.218(e)(1)(ii)(C); see also 19 USC. § 1675(c)(3)(B).) Section 351.208(f)(2) provides that the “facts available” consist of dumping margins from prior determinations and information contained in parties’ substantive responses. Again, this is precisely what the Department’s *Issues and Decision Memorandum* says that it did, but which the United States now says that it did not do.

56. Third, the US explanation in its First Written Submission at paragraphs 214, 216, and 233 that facts available was applied to the “non-responding respondents” is flatly inconsistent with its explanation in paragraph 146 that the waiver provisions applied to the “non-responding respondents.” If the waiver provisions applied, then there was no need to apply facts available.

57. The Panel and Argentina deserve a straight answer from the United States to two critical questions: (1) was Siderca’s response adequate (in the proceeding, the United States expressly said no, and now it says yes); and (2) what happens when non-responding respondents do not respond to the notice of initiation (the United States says in paragraph 146 that the waiver provisions apply,

resulting in a mandatory affirmative finding, and the United States asserts in paragraphs 214, 216, 233 that they apply facts available to these companies).

58. Argentina submits that the Panel must review the decisions taken by the authorities, as explained by the authorities at the time they took the decision, and not as they later attempt to justify these decisions. Based on the statements in the Department's determinations, there can be no serious dispute that the Department: (1) determined Siderca's response to be inadequate; (2) applied the waiver provisions to Argentina; and (3) made the likely dumping determination, at least in part, based on the conduct of an expedited review and application of facts available. These actions by the United States were unjustified by the facts and objectively unreasonable, and in substance they violated Articles 11.3, 2, 6.8, 6.1 and 6.2, and Annex II.

59. With respect to the facts, there was no reasonable basis for the Department to have considered that there were other Argentine producers/exporters, and that the failure of these other producers/exporters to respond justified the decision to expedite the review and resort to "facts available."

- (a) Siderca was the only Argentine producer/exporter investigated in the original investigation, and it was the only producer/exporter named in the subsequent reviews requested by the US industry. During the five-year period after imposition of the order, the domestic industry requested four administrative reviews, naming Siderca as the only exporter each time. (ARG-28; ARG-32; ARG-37; ARG-41.) In at least one case, the representatives of the US industry identified Siderca as "the only know[n] producer" of the subject merchandise. (ARG-58). The Department initiated an administrative review in each year, but ultimately rescinded the reviews because there were no shipments to evaluate. (ARG-29; ARG-36; ARG-38; ARG-43.) In all of these instances, however, Siderca's "no shipment certifications" led to additional questions from the Department and additional comments from the US industry. In all cases, Siderca explained that it was shipping to the United States, but that all of its shipments were either non-subject merchandise, or were not entering the United States for consumption in the United States. In all cases, the Department ultimately agreed with Siderca's certification that it made no shipments for consumption in the United States of subject merchandise, and therefore rescinded the annual reviews.
- (b) Further, the record developed in the Department's sunset review indicated that Siderca was the only producer/exporter of the subject merchandise. In its substantive response, Siderca indicated that it was the only producer of seamless OCTG, and, to its knowledge, it was the only producer/exporter of Argentine OCTG. The Department acknowledged these statements (while misstating them slightly) by stating that "Siderca asserts that it is the only producer of OCTG in Argentina, and to its knowledge, there is no other producer of OCTG in Argentina." (ARG-50 at 2). Thus, at the very least, the record developed by the Department casts doubt on the statistics relied upon by the Department for the adequacy determination. It is not clear why the Department chose to believe the statistics, instead of its understanding of Siderca's position.
- (c) The Department had reason to doubt its data. On previous occasions, the Department concluded that the official statistics contained errors, in one case incorrectly classifying non-consumption entries as consumption entries (ARG-36 at 40,090), and in another case misclassifying mechanical pipe as OCTG (ARG-43 at 8949).

60. From this record, it is not reasonable for the Department to have assumed that there were other Argentine producers/exporters who should have responded to the initiation notice, and whose failure would have such consequences for Argentina's rights under Article 11.3. This unfounded

assumption had dire consequences for Argentina as it resulted in the deemed waiver of Siderca. In any event, whether the determination is based on waiver, or is made on the basis of the checklist criteria (whether in an expedited or full review), the outcome is the same – a determination of likely dumping.

61. **The Department's conduct of an expedited review, its application of the checklist criteria, and its reliance on facts available violated Article 6.8 and Annex II.** "Facts available" can be used only as a last resort when investigating authorities are faced with recalcitrant and uncooperative parties. Accordingly, Article 6.8 and Annex II permit an investigating authority to make determinations based on "facts available" only when an interested party "refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation." In this case, however, Siderca provided all information required by the Department's sunset regulations in its substantive response to the notice of initiation. Thus, Siderca was not an uncooperative party. Nevertheless, the Department considered Siderca's complete substantive response to be inadequate based on the 50 per cent test and thus determined to conduct an expedited review on the basis of the facts available pursuant to the statute and regulation. In doing so, the Department violated Article 6.8 and Annex II, because these provisions do not permit the application of facts available to a cooperative respondent. Even worse, there was no determination that Siderca failed to cooperate. Moreover, the Department failed to notify the parties of "essential facts" forming the basis of its decision, as required by Article 6.9.

62. As for the US argument in its First Submission that it used facts available only for the non-responding Argentine respondents, there is no support for this statement in the sunset determination. The concept of non-responding Argentine respondents is never even mentioned directly in the sunset determination. Even if they had been mentioned, it was not a reasonable and objective assessment of the facts to consider that such parties existed and to condition Argentina's rights in this way without further investigation.

63. **The Department's conduct of an expedited review and reliance on facts available violated Articles 6.1 and 6.2.** Argentina was surprised by the Department's adequacy determination, and the resulting determination to conduct an expedited review based on facts available. The only investigated Argentine exporter had filed a complete substantive response, and had indicated that it would cooperate fully in the Department's review. Further, the Department had direct knowledge that official statistics had been demonstrated to be incorrect in the past. Again, the Department's failure to provide notice of the "essential facts" forming the basis of its decision to conduct an expedite review based on facts available was inconsistent with Article 6.9.

64. The United States argues that, by limiting its substantive response to a "mere" four pages in length and not taking advantage of other opportunities to submit comments, Siderca failed to fully avail itself of the opportunities granted by the sunset regulations for the presentation of evidence. (US First Submission, paras. 228-29, 237). In addition to the substantive response to the notice of initiation, the United States explains, Siderca could have submitted comments on the Department's adequacy determination (19 C.F.R. § 351.309(e)) and rebuttal comments to any other party's substantive response (19 C.F.R. § 351.218(d)(4)). Therefore, the United States concludes, the Department's sunset review of Argentine OCTG was not inconsistent with Articles 6.1 and 6.2.

65. The US argument fails for several reasons. First, contrary to the US assertion, Siderca did not fail to take the opportunity to present evidence. As the United States repeatedly recognizes, Siderca's response to the notice of initiation was a "complete substantive response" that met all of the Department's regulatory requirements. (US First Submission, paras. 211, 213, 214, and 216). The Department thus received what it considered to be the requisite information to make the likelihood determination. Having submitted a "complete substantive response" and having offered to cooperate fully, Siderca could not have been expected to know that something more was necessary in order to have the Department undertake a substantive evaluation of whether dumping would be likely to

continue or recur. Under Annex II, it was the Department's obligation to "specify in detail the information required" from Siderca.

66. Second, regarding the Department's adequacy determination, the regulation provides that submitted "comments may not include any new factual information or evidence (such as supplementation of a substantive response to the notice of initiation) and are limited to five pages." (19 C.F.R. § 351.309(e) (emphasis added). Thus, the regulation precluded Siderca from submitting any new evidence with respect to the Department's determination that Siderca's response was inadequate.

67. Third, by the time that the Argentine sunset review began, it was well-known that the Department had designed and implemented a system which avoided any type of substantive determination. Hence, respondent participation was widely considered to be futile. The analysis done by Argentina for the purposes of this panel proceeding confirms the widely-held perceptions at the time: in every sunset review in which the domestic industry participated, the Department limited its "analysis" to the SAA and *Sunset Policy Bulletin* checklist criteria and found a likelihood of dumping. Consequently, it would not have mattered whether Siderca had submitted comments to the Department's adequacy determination, rebuttal comments, or had been granted a full review. By not truly considering all evidence submitted, the Department denies foreign interested parties an ample opportunity to present evidence and fully defend their interests, contrary to the obligations established by Articles 6.1 and 6.2. Despite US protestations to the contrary, the United States is well aware of the fact that even if Siderca availed itself of other opportunities to submit comments, the outcome would have been the same. The United States cannot credibly argue that a more active intervention by Siderca would suddenly have tilted the record from 217/0 to 216/1.

2. The substantive basis for the Department's Likelihood of Dumping Determination violated Article 11.3

68. Let us now turn to the stated substantive basis of the Department's likelihood of dumping determination. As noted above, the Department did not gather or evaluate additional facts at the time of the sunset review, but instead based its decision that dumping would likely continue or recur only on the following facts available: (1) the 1.36 per cent dumping margin calculated for Siderca in the original investigation, and (2) the fact that Siderca had ceased to ship OCTG to the United States. (*See Issues and Decision Memorandum* at 5 (ARG-51). This is the sum total of what the European Community aptly characterized in their Third Party Submission as the "meagre crumb" of evidence supporting this likely dumping determination.

69. This does not constitute the "sufficient factual basis" for the substantive and meaningful determination required by Article 11.3. For several reasons, the Department's reliance on the 1.36 per cent dumping margin established in the original investigation in 1995 cannot serve as a basis for the Department's determination that dumping would be likely to continue or recur.

- First, the rate is historic, with no relationship whatsoever to the forward-looking determination required to invoke the exception of Article 11.3 and continue the measure. The United States has still never offered a logical explanation of what this rate says about future dumping, let alone the likelihood of future dumping.
- Second, in the original investigation, the Department calculated the 1.36 per cent margin based on the practice of zeroing negative margins. In fact, without the zeroing practice, there would have been no dumping margin at all, and there would have been no measure to review.⁷ The Appellate Body has held that zeroing negative margins is inconsistent with Article 2.4.2 of the

⁷ See on that issue, the Third Party Submissions of European Communities (paras. 79-89) and Japan (paras. 22-28).

Anti-Dumping Agreement. (See Appellate Body Report, *Bed Linen from India*, para. 55.) Accordingly, the Department cannot rely on a WTO-inconsistent margin as a basis for a determination of likelihood of dumping under Article 11.3.

70. In order to establish in a sunset review whether it is necessary to maintain an anti-dumping measure, the authority will have to make a finding of likely dumping. To know whether dumping would likely “continue” or “recur” under Article 11.3, an authority must have current information about dumping.⁸ In other words, it becomes necessary to determine if dumping exists in order to assess its probable continuation. Alternatively, it becomes necessary to determine the absence of dumping in order to assess prospectively the probability of recurrence. The Department’s reliance on the 1.36 margin from the original investigation cannot satisfy either possibility. The United States argues that the Department determined that “dumping continued to exist throughout the history of the order . . .” (US First Submission, para. 218.) The Department, however, had rescinded each of the four administrative reviews of Siderca following the order, and thus did not have evidence of dumping margins throughout the history of the order. All it had was the five year-old margin from the original investigation – with a razor thin dumping margin, calculated on the basis of a WTO-inconsistent zeroing practice. There was no evidence that dumping continued after the issuance of the order and, consequently, the five-year old dumping margin could not provide the basis for a determination that dumping would be likely to “continue.”

71. Indeed, particularly in the facts of this case, where the Department relied on Siderca’s small dumping margin of only 1.36 percent, the Department had an obligation to gather and evaluate “persuasive evidence” in order to justify its determination of likelihood of dumping. As the Appellate Body has ruled, “mere reliance” on the determination made in the original investigation is not enough. (See Appellate Body Report, *Steel from Germany*, para. 88.) This reinforces Argentina’s view of the extreme and unfair situation presented in this case.

72. **The likely margin of dumping of 1.36 percent determined by the Department and reported to the Commission violated Articles 2 and 11.3.** The Department determined that if the order were revoked, the likely dumping margin to prevail would be 1.36 per cent. The Department reported this margin to the Commission for purposes of the Commission’s sunset review and its likelihood of injury determination. Because the 1.36 per cent was inconsistent with Article 2 (because it was based on the WTO-inconsistent practice of zeroing negative margins), and additionally constructed on the basis of the Department’s “circumstance of sale” adjustment⁹, the Department’s determination that this margin constituted the likely margin to prevail violated Articles 11.3 and 2.

73. The United States notes that the Department’s reporting of the likely margin to the Commission in a sunset review is a construct of US law, rather than a requirement of Article 11.3. (See First Submission by the United States at para. 267.) Consequently, the United States argues, the Department’s reporting of the 1.36 per cent margin to the Commission was not inconsistent with Article 11.3. This argument cannot be accepted. Once a Member undertakes either to calculate a dumping margin or to rely on a dumping margin, that margin must be consistent with the requirements of Article 2. In the case at hand, since the United States did not make a WTO-consistent determination that dumping would be likely to continue or recur, it was required to have terminated the measure.

⁸ See also Third Party Submission of the European Communities (para. 12).

⁹ See Argentina’s First Submission, footnote 14.

C. SIDERCA'S CASE CONSIDERED IN THE OVERALL CONTEXT OF THE IMPLEMENTATION OF ARTICLE 11.3 BY THE UNITED STATES AND THE DEPARTMENT'S CONSISTENT SUNSET PRACTICE

74. As is evident from the foregoing, the Department's sunset determination did not come close to satisfying the requirements of Article 11.3 and the substantive standards incorporated therein. The sunset review of OCTG from Argentina is not unique in this respect. Viewed in the context of consistent US practice in sunset reviews by the Department, the Argentine experience is, unfortunately, all too predictable and consistent.

75. First, as noted previously, the Department applied the waiver provisions in 167 sunset reviews, 77 per cent of the sunset reviews in which the domestic industry participated. In all of these cases, the Department issued a finding that dumping would likely continue or recur pursuant to the statutory mandate (*See* ARG-63).¹⁰

76. In all 217 sunset reviews in which at least one domestic interested party participated, the Department rendered an affirmative likelihood determination. Domestic industry participation is the only determinative factor in a Department sunset review. No matter what type of sunset proceeding is undertaken by the Department, the Department does not conduct the "review" and "determination" required by Article 11.3. The results are pre-ordained when the US industry participates. Indeed, the Department found that termination of the order would be likely to lead to continuation of dumping even where the producer could no longer export to the United States because its sole production facility was destroyed as a result of military action and, in any event, trade sanctions prevented imports into the United States.¹¹

77. The Department's rigid adherence to the mandate of the SAA and the *Sunset Policy Bulletin* limits its likelihood "analysis" solely to a mechanical review of: (1) the existence of dumping margins from the original investigation or subsequent administrative reviews; (2) whether imports of the subject merchandise ceased after issuance of the order; and (3) whether dumping was eliminated after imposition of the order and import volumes declined significantly.

78. The Department's "consistent application of" these checklist criteria in the SAA and the *Sunset Policy Bulletin* in its reviews demonstrates the mandatory nature of these instruments. Nevertheless, the United States takes the position that there is no irrefutable presumption of likely dumping in the Department's practice. (Para. 172.)

79. As noted previously, the United States has not cited a single case in which the domestic industry participated in a DOC sunset review and the Department determined that dumping would not be likely.

80. The United States argues that there were only 35 "contested cases." (Para.151.) The US argument again misses the point.

¹⁰ See, e.g., *Antifriction Bearings from Sweden*, 64 Fed. Reg. 60,282, 60,284 (1999)(ARG-63, Tab 6); *Ball Bearings from Singapore*, 64 Fed. Reg. 60,287, 60,289 (1999)(ARG-63, Tab 11); *Aspirin from Turkey*, 64 Fed. Reg. 36,328, 36,330 (1999)(ARG-63, Tab 14)). For example, in the final results of the sunset review of antifriction bearings from Sweden, the Department stated, "[G]iven that . . . respondent interested parties have waived their right to participate in this review before the Department, we determine that dumping is likely to continue if the orders were revoked." *Antifriction Bearings from Sweden*, 64 Fed. Reg. 60,282, 60,284 (1999)(ARG-63, Tab 6).

¹¹ *Industrial Nitrocellulose from Yugoslavia*, 64 Fed. Reg. 57,852 (Dep't Comm. 1999)(final results sunset review) (ARG-42).

81. First, the premise of the US argument is fundamentally flawed because participation by respondents is an irrelevant factor given the SAA/SPB checklist criteria and the presumption that has never been refuted in the Department's sunset reviews when the domestic industry was interested.

82. Moreover, the substantive rights of WTO Members under Article 11.3 cannot be conditioned upon the actions of private sector exporters. Article 11.3 places an affirmative obligation upon a Member to terminate anti-dumping measures in five years unless that Member makes specific findings based on positive evidence. In the event that a company fails to cooperate, then Members would be subject to the disciplines of Article 6.8 and Annex II.

83. More importantly, however, even using the US erroneous figures,¹² 35 out of 35 still proves Argentina's claim. These are still "unbeatable odds." Moreover, of these, the Department has conducted 28 full sunset reviews. In each case, the Department found that dumping would likely continue or recur upon expiry of the order. Argentina has satisfied its burden of establishing a *prima facie* case demonstrating the presumption employed by the Department in sunset reviews has never been refuted in cases in which the domestic industry participates.

84. **Underneath the clutter.** It is easy to get lost in the procedural rules the United States has created in its law. Yet, from a results standpoint, the framework does not matter. Through the waiver provisions or application of the checklist criteria (whether in an expedited or full sunset review), the Department issues a determination that dumping would be likely to continue or recur. **At the end of the day, there is only one variable that matters in the whole of the US sunset regime governing Department sunset reviews: whether the domestic industry participates in the sunset review.** In all 217 sunset reviews (including Argentina's review) in which at least one domestic interested party participated, the Department rendered an affirmative likelihood determination.

85. That domestic industry participation is the only determinative factor in a Department sunset review demonstrates that – despite the statute, regulations, and the Department's purported consideration of parties' arguments – the Department does not truly engage in a meaningful analysis based on adequate evidence of whether dumping would likely continue or recur upon termination of the order. No matter what type of sunset proceeding conducted by the Department, the Department does not conduct the "review" and make the "determination" required by Article 11.3 and the substantive provisions of the Anti-Dumping Agreement.

IV. THE COMMISSION'S SUNSET REVIEW

86. We now turn, Mr. Chairman, to the aspect of the case involving injury. Let us recall that injury is a common term in the implementation of GATT Article VI. Injury retains this essential meaning in Article 11 of the Anti-Dumping Agreement. In Article 11.3, injury is a fundamental precondition to the continuation of the order. That is, a Member must find a likelihood that injury will continue or recur before it can continue a measure beyond 5 years.

87. Article 11.3 requires a finding of likely injury based on an objective examination of positive evidence, and the obligation in Article 11.3 cannot be satisfied by a finding that recurrence of injury is

¹² In any event, there were actually 43 cases in which the likelihood of dumping determination was – using the US term – "contested." Argentina's Exhibit ARG-63 shows that the response from foreign interested parties was deemed adequate in 28 cases and inadequate (based on a foreign party's attempt to participate) in 17 cases. Thus, foreign interested parties attempted to participate in 45 Department sunset reviews. In 2 of these cases, however, the domestic industry withdrew from the proceeding. Thus, the foreign and domestic parties "contested" the likelihood determination in 43 sunset reviews.

one of several possibilities, without reaching the point of being “likely”. That is precisely what happened in this case.

A. THE COMMISSION GENERALLY DOES NOT APPLY THE “LIKELY” STANDARD REQUIRED BY ARTICLE 11.3

88. Let us first turn to the likely standard.

89. At the outset, Argentina submits that the United States should not be surprised that its trading partners are challenging the Commission’s interpretation of the word “likely,” or the Commission’s implementation of this aspect of the Article 11.3 obligation. The Commission has been subject to criticism and has been challenged in US courts for its incorrect interpretation of the term “likely.” There have been several challenges to the Commission’s “likely” standard in the US courts, and the decisions have been consistent: in none of these cases was the Commission’s original sunset decision upheld as correctly applying a “likely” standard.

90. The United States takes the position before this panel that the Commission applied a correct standard in the sunset determination of Argentine OCTG. The United States contends that the Commission is applying the correct standard, noting that US law uses the same term – “likely” – that appears in Article 11.3 (para. 282). The United States contends that “[i]t is incorrect to conclude that ‘likely’ can only mean ‘probable’ and cites secondary definitions of ‘likely’ that appear to convey a degree of certainty that is less than “probable” but more than “possible.” (US First Submission, para. 282 n.300) Moreover, the Commission has argued before US courts that “likely” does not carry its ordinary meaning of probable and that “the term ‘likely’ captures a concept that falls in between ‘probable’ and ‘possible’ on a continuum of relative certainty.”¹³

91. Argentina recognizes that US law uses the same term “likely” as in the Anti-Dumping Agreement. However, the similarities stop there. The application of the likely standard to the facts of this case demonstrates the violation of Articles 3 and 11.3. Argentina will review the application of the standard to the facts of this case later in our presentation.

92. However, with respect the standard, we have to recognize that the US position as to the meaning of the term “likely” has changed again. In *Steel from Germany* and *DRAMS from Korea* the United States accepted that “likely” means “probable.” The distinctions that the United States now tries to draw between the meaning of the terms likely and probable is inconsistent with the position the United States has taken in the WTO and is not tenable.

93. The United States tries to diminish the importance of these shifting positions in the sunset reviews, the US courts, and the WTO. This is so especially regarding the US litigation of the one case which has completed the first stage of judicial review, where the United States contends that the court ultimately approved the Commission’s sunset determination, and that the result did not change from the original determination. But this argument misses the point. This acceptance of the Commission’s finding was possible only after the court insisted that the term likely means probable, and that the Commission had to change its analysis to apply a likely, or probable, standard. Far from helping the US position, the affirmance of the remand determination only serves to emphasize the point that the Commission applied the wrong standard and that the result could only be sustained after the Commission fixed its decision.

¹³ See *Usinor Industeel, S.A. v. United States*, No. 01-00006, slip op. 02-152 at 4-6 (CIT 20 Dec. 2002)(ARG-16); *Nippon Steel Corp. v. United States*, No. 01-00103, slip op. 02-153 at 67 (CIT 24 Dec. 2002).

B. ARTICLE 3 OF THE ANTI-DUMPING AGREEMENT APPLIES TO ARTICLE 11.3 REVIEWS

94. With this background, we turn to the question of what must be “likely.” For Argentina and the other trading partners involved in this proceeding, the answer is clear: the answer is “injury,” which can only be injury as defined under the terms of the Anti-Dumping Agreement. For the United States, the issue is not so clear, and injury in Article 11.3 has a unique meaning, which is something different than injury as defined in Article 3.

95. Article 3 defines “injury” as that term is used throughout the Anti-Dumping Agreement. Thus, an authority’s determination under Article 11.3 of whether “injury” would be likely to continue or recur must satisfy the requirements of Article 3.

96. Footnote 9 states: “Under this Agreement the term ‘injury’ shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or a material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.” The Appellate Body used the SCM equivalent of this very footnote as an illustration of how the injury concept applies throughout the Agreement, including in sunset reviews. (See Appellate Body Report, *Steel from Germany*, para. 69, n.59.)

97. The US contention that Footnote 9 is a mere “drafting device” designed to avoid the need to recite each of the three distinct forms of injury throughout the agreement is unpersuasive. The Panel in *DRAMs from Korea* noted “that, by virtue of note 9 of the [Anti-Dumping] Agreement, the term ‘injury’ in Article 11.2 ‘shall be interpreted in accordance with the provisions of Article 3.’” (Panel Report, *DRAMs from Korea*, Para. 6.59 n.501; see also Panel Report, *Sunset Review of Steel from Japan*, para. 7.99). The United States has not offered any reasons for why injury for purposes of Article 11.2 should be treated differently than injury for purposes of Article 11.3.

98. Nor does the United States attempt to explain how injury in Article 11.1 could possibly be different from injury in Article 3. Article 11.1 states that “An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping that is causing injury.” There is no suggestion that the drafters of the Agreement intended in Article 11.1 anything other than injury as defined in Article 3 and specified in footnote 9. And there can be no question that the overarching principles of Article 11.1 provide the immediate context of Article 11.3. Is the United States saying that injury for the purposes of Article 11.3 is different than injury as referenced in Article 11.1?

99. The Panel in DS244 (another case involving Article 11.3) stated that:

The term ‘injury’ as it appears throughout the Anti-Dumping Agreement – including Article 11 – is to be construed in accordance with this footnote, unless otherwise specified. This would seem to support the view that the provisions of Article 3 concerning injury may be generally applicable throughout the Anti-Dumping Agreement and are not limited in application to investigations. Article 11 does not seem to explicitly specify otherwise in the case of sunset reviews.”

100. It is difficult to understand, and runs counter to logic, that negotiators who demonstrated care in choosing their words throughout the Agreement would define a term with such precision in footnote 9, specify that it applies throughout the Agreement, and then change the meaning of the term in Article 11.3 without being clear that the negotiators were doing so.

101. The US also raises the distinction between the “determination of injury” in an original investigation and a “determination of the likely continuation or recurrence of injury” in a sunset review. To the United States, the drafters intended a different kind of injury in Article 11.3. Again, missing from the United States argument is any reference to Article 11.1, which establishes the overarching general principle limiting the duration of an anti-dumping duty, and linking the duration

to the same injury that was required in order to impose the duty. Article 11.3 does nothing more than implement the principle of Article 11.1 in the specific context of a five-year review, and there is no indication that a different concept of injury was intended by the drafters or accepted by the Members.

102. Thus, an authority's determination of whether "injury" would be likely to continue or recur under Article 11.3 must meet the requirements of Article 3. Article 3.1 mandates that the authority's "determination of injury" be based on "positive evidence" and "an objective examination" of the likely volume of dumped imports and the effect of such imports on prices in the domestic market for like products, and the likely impact of these imports on domestic producers of such products. Articles 3.4, 3.5, 3.7, and 3.8 impose further obligations related to consideration of specific economic factors and indices having a bearing on the state of the domestic industry, causation, and special rules related to any future injury determinations.

103. In sum, Argentina views the issue as one of the fundamental disagreements between the United States and other WTO Members involved in this proceeding. Does "injury" as used in Article 11.3 differ from the meaning of "injury" as defined under the Agreement in footnote 9, and do the substantive and procedural standards for evaluating injury contained in Article 3 apply to determinations made under Article 11.3? Under the Agreement, the clear answer to both of these questions is "yes." Moreover, this is not merely Argentina's view – the Third Parties similarly agree that this interpretation is mandated by the Agreement.

C. THE COMMISSION'S APPLICATION OF A "CUMULATIVE" INJURY ANALYSIS IN THE SUNSET REVIEW OF THE ANTI-DUMPING DUTY MEASURE ON ARGENTINE OCTG WAS INCONSISTENT WITH ARTICLES 11.3 AND 3.3

104. Article 11.3 does not permit cumulation. A cumulative injury analysis under Article 11.3 would require an assessment of the combined likely effects of terminating multiple anti-dumping measures. Article 11.3, however, pertains only to individual anti-dumping measures. This is clear from the textual analysis of the provision and the object and purpose of the provision.

105. Pursuant to its terms, Article 11.3 applies to "any definitive anti-dumping duty" and requires the "expiry of the duty." In each reference, the drafters have chosen the singular and have avoided the plural. In addition, the context of Article 11.3 reinforces the clear text that Article 11.3 prohibits cumulation. Article 11.3 is an implementing provision of Article 11. Article 11.1, the umbrella provision of Article 11.3, directs that "an anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." Again, the drafters have used the singular. Thus, on its face and interpreted within its context, Article 11.3 does not permit a cumulative analysis of the likely injurious effects of multiple anti-dumping orders.

106. Through Article 3.3, the Anti-Dumping Agreement limits the use of a cumulative injury analysis to "investigations," and even then only where certain conditions are met. The fact that Article 3.3 provides for the conditioned use of cumulation in "investigations" but not in "reviews" indicates that a cumulative injury analysis is not permitted in the likelihood of injury determination made in an Article 11.3 review. It is difficult to understand why a textual limitation permitting cumulation only in investigation should be interpreted differently than the concept of *de minimis* which, according to the Appellate Body's interpretation, applies only to investigations.¹⁴ Indeed, the United States embraced the Appellate Body's rationale on this point.

107. The US violation of Article 11.3 is even more evident when one considers the extent to which cumulation undermined Argentina's rights under Article 11.3 in this case. Argentina, and each WTO Member, negotiated for the right to have an anti-dumping measure affecting its exports removed after five years, unless doing so would be likely to lead to continuation or recurrence of injury. Yet, the

¹⁴ See Appellate Body Report, *Steel from Germany*, paras. 68-69, 91-92.

United States never made such a finding in this case. The Commission never analyzed the effect of removing the anti-dumping measure on Argentine OCTG. Rather, the Commission performed a cumulative assessment, which essentially conditioned Argentina's right under Article 11.3 upon the actions of exporters from other WTO Members, and the Commission's interpretation of those actions. There is no basis in the text of Article 11.3 or of the object and purpose of the provision to suggest that Argentina's right to have the anti-dumping measure expire was intended to be conditioned in this way. Instead, Argentina has a right to expect termination, unless there is a finding based on positive evidence that termination of the anti-dumping measure on Argentine OCTG (not all anti-dumping measures on OCTG from other countries) would be likely to lead to a continuation or recurrence of injury.

108. Finally, assuming *arguendo* that Articles 3.3 and 11.3 do not preclude cumulation in Article 11.3 reviews, then the terms of Article 3.3 must be applied to any such cumulative analysis in a sunset review. Indeed, the application of either the *de minimis* or negligibility requirements (both of which must be satisfied) would have prevented cumulation in the Commission's sunset determination of Argentine OCTG. The US rebuttal to Argentina's alternative argument relies on the premise that Article 3 does not apply to sunset reviews under Article 11.3. As Argentina has noted, footnote 9 provides that "injury" under the Anti-Dumping Agreement "shall be interpreted in accordance with the provisions of ... Article [3]."

109. The Commission's use of a cumulated injury analysis in the sunset review of OCTG from Argentina was also inconsistent with Article 11.3, because it prevented the Commission from applying the correct "likely" standard. In reaching its decision to cumulate in this case, the Commission considered whether imports from each subject source had any possible discernible adverse impact on the domestic industry. (*Commission's Sunset Determination* at 6, 10-16.) The Commission included the imports from Argentina in the cumulated injury analysis because it did not find that the Argentine imports would have no discernible adverse impact on the domestic industry. In other words, the Commission cumulated imports from Argentina on the basis of a finding that these imports could have any possible adverse impact on the domestic industry. This low standard, cast in a double-negative, runs directly counter to the "likely" standard established by Article 11.3. The United States does not respond to this argument.

110. This use of a double negative formulation is contrary to the panel's decision in *DRAMS from Korea*. "Not unlikely" does not set the same standard as "likely." Worse still, "no" discernible adverse impact establishes a standard that is directly contrary to a "likely" standard. Under this formulation, finding any discernible impact leads to cumulation, which as we see in this case can lead to a finding of "likely" injury without regard to any "positive evidence" relating to probable imports from individual countries.

111. The Commission's use of a "possibility" standard for cumulation also conflicts with the reasoning of the Appellate Body in *Steel from Germany*, and the evidentiary requirements of Article 3.1 of the Anti-Dumping Agreement. (See Appellate Body Report, *Steel from Germany*, para. 81 (stating that "[i]t is *unlikely* that very low levels of subsidization could be demonstrated to *cause* 'material' injury," and that "[w]here the level of subsidization at the time of the review is very low, there must be persuasive evidence that revocation of the duty would nevertheless lead to injury to the domestic industry.") Such a statement only makes sense if one presumes that cumulation is not possible under Article 11.3.

112. As with the Commission's failure to apply the correct "likely" standard under Article 11.3, the Commission's decision to conduct a cumulative injury analysis demonstrates that the Commission did not support its determination that injury would likely continue or recur upon termination of the order on Argentine OCTG with a sufficient factual basis. It cannot seriously be argued that an affirmative likelihood of injury determination could have been made with respect to Argentina without a decision to cumulate the imports from several countries.

D. THE COMMISSION'S KEY FINDINGS DEMONSTRATE ITS FAILURE TO APPLY THE LIKELY STANDARD

113. In order to determine whether the Commission satisfied the standards of Article 11.3, the panel must consider whether the facts were properly established and whether the assessment of the facts was objective.

114. In the recent compliance panel appeal in the *Bed Linens* case, the Appellate Body provided additional guidance on the applicable standard under Article 17.6(i):

In *US – Hot-Rolled Steel*, we stated that “[a]lthough the text of Article 17.6(i) is couched in terms of an obligation on *panels* . . . the provision, at the same time, in effect defines when *investigating authorities* can be considered to have acted inconsistently with the Anti-Dumping Agreement.” We further explained that the text of Article 17.6(i) of the Anti-Dumping Agreement, as well as that of Article 11 of the DSU, “requires panels to ‘assess’ the facts and this . . . clearly necessitates an active review or examination of the pertinent facts.”¹⁵

115. To do this, the panel will have to review the written submissions of the parties in detail. We will not recount all of that evidence here.

116. Instead, we will focus on the volume findings in the Commission’s determination because these findings appear to drive the Commission’s overall conclusion, and because the Commission’s analysis with respect to “likely volume” best illustrates what Argentina considers to be the problem with the Commission’s analysis – that is, it relies on isolated factors that indicated that certain outcomes were possible, rather than relying on positive evidence that certain events were likely to continue or recur.

117. The Commission concluded “that the volume of subject imports [was] likely to increase significantly in the event of revocation.” (*See Commission’s Sunset Determination* at 19-20 (ARG-54). The Commission made this conclusion despite its recognition that the subject producers’ “capacity utilization rates represent a potentially important constraint on the ability of these subject producers to increase shipments of casing and tubing to the United States.” (*Id.*) Despite the existence of capacity constraints, the Commission determined that the subject producers had “incentives to devote more of their productive capacity to producing and shipping more casing and tubing to the US market.” (*Id.*) The Commission based its conclusion that the subject producers had “incentives” to ship more OCTG to the United States in the absence of the dumping measures on five findings. Let’s review each of them.

118. Again, Argentina has prepared a summary chart (Chart 3) for ease of reference. Chart 3 summarizes each of the five so-called incentives that the Commission cited, and explains why these “incentives” cannot defeat the positive evidence of capacity restraints, and cannot support a finding that injury is likely to continue or recur.

119. First, the Commission found that, “[g]iven Tenaris’ global focus, it likely would have a strong incentive to have a significant presence in the US market, including the supply of its global customers’ OCTG requirements in the US market.” (*Id.* at 19.)

- With respect to Tenaris, the Commission only examines “half” the story. Indeed, some of the companies forming the so-called Tenaris alliance were

¹⁵ Appellate Body Report, Recourse to Article 21.5, *Bed Linen from India*, para. 163.

outside of the anti-dumping duty orders under review. Thus, there was no incentive for the companies subject to the order to ship, given the existence of members of the alliance outside of the order. Moreover, other companies in the Tenaris alliance, such as Algoma, were not subject to an order and did not ship to the United States.

- The Commission characterized Tenaris as the “dominant supplier of OCTG products and related services to all of the world’s major oil and gas drilling regions except the United States.” (*Id.*)
- Siderca, put forth positive evidence indicating that the subject producers’ output was committed in long-term contracts, and that it and its affiliates sold primarily to end users. (Hearing Tr. At 5 (Testimony of German Cura))
- Yet the Commission concluded that the companies referred to as Tenaris would act according to this incentive and ship OCTG to the United States, apparently regardless of the long-term commitments maintained by Siderca and the other affiliated producers. The United States adds in its written submission that “many of those contracts were with the very end users most eager to see subject imports enter the US market.” (US First Submission, para. 328.)
- In making this assertion, the United States ignores the record evidence indicating that Tenaris, the dominant global supplier, had global contracts with companies that represented “only 12-14 per cent of US oil and gas rigs.” (*Commission Sunset Determination* at 19 n.124.) Moreover, the United States asserts that “testimony at the hearing indicated that customers already buying OCTG from the subject producers would immediately import the subject product if these orders were revoked.” (*Id.*) Yet in support of this assertion, the United States could only point to a second-hand statement that one customer had expressed such a desire. (*Id.* (citing Hearing Tr. At 58 (Mr. Ketchum, Red Man Pipe and Supply)(Exhibit US-20).)
- In concluding that Tenaris had a strong incentive to ship OCTG to the United States, the Commission failed to cite positive evidence that this so-called “incentive” would justify breaking long-term contracts and turning away long-term customers, for which positive evidence existed. It is a matter of common-sense that one does not become a “dominant” (Argentina prefers “leading”) supplier by breaking long-term contracts.
- The Commission’s finding that Tenaris had a strong incentive to ship OCTG to the US market was thus based on a mere possibility, rather than on positive evidence indicating that such shipments would be likely.

120. Second, the Commission found that, because “casing and tubing are among the highest valued pipe and tube products, . . . producers generally have an incentive, where possible, to shift production in favour of these products from other pipe and tube products that are manufactured on the same production lines.” (*Id.*)

- On its face, this statement is a general assumption rather than positive evidence. The statement that “producers generally have an incentive” is not enough support for establishing that something is likely to occur.

- In addition, this again contradicts the notion – based on positive evidence developed during the review – that a company would disregard long-term contracts to shift production.
- The Commission’s statement also fails to recognize that Siderca (and even Tenaris) had established its position as the dominant world supplier without the US market. This suggests that the company had developed a strategy that did not rely on the US market and was not, in fact, motivated by these purported “general incentives.”
- In sum, it is clear that the so-called incentive to shift production is not based in any way on positive evidence, but rather only on conjecture and speculation.

121. Third, the Commission found that “prices for casing and tubing on the world market are significantly lower than prices in the United States,” and that this price differential created “an incentive for subject producers to seek to increase their sales of casing and tubing to the United States.” (*Id.* at 19-20.)

- The Commission relied on anecdotal evidence with respect to its efforts to discern the so-called international prices.
- There is, as the Commission recognizes, contradictory evidence as to the magnitude of the price differential.
- Moreover, this anecdotal and contested evidence related to the supposed price differential, and did not relate to the ultimate proposition relied on by the Commission – that the Argentine producer would react to this incentive despite its long-term contracts and it was selling to end users.
- Notwithstanding the above points, the Commission embraces the evidence submitted by the US industry and once again accepted what can be described as a general assumption that exporters will ship to the US market in quantities sufficient to cause injury.
- Even accepting *arguendo* the possibility of competing record evidence on this point, the evidence ultimately relied on by the Commission does not establish a likelihood that any exporters would act in accordance with this general incentive.

122. Fourth, the Commission found that “subject country producers also face[d] import barriers in other countries, or on related products.” (*Id.* at 20.)

- With regard to trade barriers in third-country markets, the Commission could point to only one outstanding order on the subject merchandise: an anti-dumping order in Canada against imports from Korea. (*Id.* at 20.) This is hardly the “positive evidence” required to support a conclusion that increased exports would be likely to enter the US market.
- Moreover, the underlying premise supporting the Commission’s reliance on the existence of other anti-dumping orders one is the so-called incentive to shift production. As noted above, there was no evidence of product-shifting, it ignored evidence that product shifting would not occur, and in the end amounted to conjecture and speculation.

123. Finally, the Commission concluded that the industries in the subject countries were “dependent on exports for the majority of their sales.” From this, the Commission classified these producers as “export-oriented.” In turn, from this, it then stated that “the export orientation of the industries in the subject countries indicates that they would seek to re-enter the US market in significant quantities, as they did in the original investigation.” This statement deserves some analysis. In essence, from the observation that certain companies have been successful in exporting, the Commission reaches the conclusion that these companies will: 1) increase exports to the US market; 2) in significant quantities; and 3) in similar proportion as in 1994-95. This is the basis of the Commission’s so-called incentive. Argentina submits that this is pure conjecture, built upon several layers of speculation that does not even approach the standard required by Article 11.3.

124. Moreover, it must be noted that in connection with the Commission’s analysis of the so-called “incentives,” the Commission never considered how these incentives would operate with regard to producers and exporters in Argentina. Argentina finds it hard to accept that its right to termination under Article 11.3 can be completely disregarded without an examination of that focuses on Argentine producers and Argentine OCTG exports.

125. Argentina further recalls that these five factors were central to the Commission’s determination with respect to its finding that the likely volume would increase. In the end, what did the Commission do? The Commission determined that “the ability to achieve high levels of overall capacity utilization depends on maintaining high levels of casing and tubing production . . . capacity utilization rates represent a potentially important constraint on the ability of these subject producers to increase shipments of casing and tubing to the United States.” The natural conclusion flowing from this positive evidence is that there would not be an increase in volume. However, instead, the Commission invented “incentives,” based on conjecture and speculation, and then the Commission substituted these incentives to overcome the positive evidence of capacity constraints.

126. Similar short-comings exist with respect to the Commission’s price analysis and its impact analysis. Argentina invites the panel to keep this in mind as it reviews the Commission’s determination in evaluating whether the Commission satisfied the likely standard of Article 11.3.

V. COMMENT ON US REQUEST FOR PRELIMINARY RULINGS

127. Before concluding, Mr. Chairman, Argentina would like to turn briefly to the US request for preliminary rulings.

128. Argentina’s 4 December submission responds fully to the allegations made by the United States in its Request for Preliminary Rulings. However, Argentina here briefly highlights some of the WTO case law that should guide the Panel in assessing its interpretation of DSU Article 6.2. Argentina’s submission responds specifically to the three categories of allegations made by the United States: (i) the so-called “Page Four” claims; (ii) the claims under Sections B.1, B.2 and B.3; and (iii) the “certain matters” that the United States asserts were not included in Argentina’s Panel request.

129. Argentina first recalls the general principles enunciated by the Appellate Body:

- the terms of reference serve the due process objective of providing notice to the defending party and the third parties of the nature of the complainant’s case. Any finding that Article 6.2 has been violated is tantamount to a finding that due process rights have been violated;¹⁶

¹⁶ Appellate Body Report, *Steel from Germany*, para. 126.

- compliance with the requirements of Article 6.2 must be determined by considering the panel request as a whole, and not simply on the basis of isolated portions;¹⁷ and
- compliance must be assessed in the light of “attendant circumstances,” including actual prejudice to the defendant during the course of the panel proceedings.¹⁸

130. First, Argentina’s panel request must be read as a whole. In crafting its preliminary objection, the United States turns the principle of DSU Article 6.2 on its head. Indeed, rather than read Argentina’s panel request as a whole, the United States artificially severs the request, parses isolated language, and then contends that in this context the United States cannot discern the particular claims of Argentina. The US position is untenable. Considering the panel request as a whole, it is quite clear which violations are being alleged by Argentina. Indeed, Argentina has set out the WTO-inconsistencies with precision.

131. Second, the United States has not satisfied its burden of demonstrating it suffered actual prejudice during the course of the panel proceedings (which have only just begun). This is a critical flaw in the US complaint. A review of the US First Submission confirms that in no way have the “due process rights” of the United States been violated. The United States has provided detailed (albeit unconvincing) argumentation on the full range of claims, demonstrating clearly that the United States is fully aware of Argentina’s claims, and has responded substantively to them. It should also be noted that previous panels examining the issue of “prejudice” under DSU Article 6.2 have also considered, as a highly relevant factor, whether there was any prejudice to the interests of third parties by any alleged deficiencies in the panel request. In *Bed Linens*, for example, the Panel found that the fact that the third parties were able to make substantive submission on the issues “suggests a lack of prejudice to third parties’ interests in this dispute.”¹⁹

132. In the present case, none of the Third Parties have raised any concerns about any aspects of Argentina’s claims. Indeed, the European Communities, far from expressing any concerns about the alleged lack of clarity of Argentina’s request, stated to the contrary that the “Panel should not follow the United States suggestion ... Rather, in order to establish whether the conditions of Article 6.2 DSU are met, the Panel should consider the request as a whole.”²⁰

133. In summary, the US request for preliminary rulings fails both prongs of the two-part test set out by the Appellate Body for determining whether a panel request meets the requirements of Article 6.2 of the DSU. First, an examination of Argentina’s panel request, read as a whole, indicates that it is detailed, clear and specific, fully setting out Argentina’s claims. Second, the United States has utterly failed to substantiate its claim that it was allegedly prejudiced during the course of the Panel proceedings. In any event, as indicated above, the United States has been well aware of the full nature and extent of Argentina’s claims for over a year. In light of the attendant circumstances in this case, the United States cannot credibly claim that it was not aware of Argentina’s claims, “sufficient to allow it to defend itself.”

134. Accordingly, Argentina respectfully requests the panel to dismiss the US request for preliminary rulings in their entirety.

¹⁷ *Id.* at para. 127.

¹⁸ Appellate Body Report, *Korea Dairy*, para. 127.

¹⁹ Panel Report, *European Communities - Anti-Dumping Duties on Imports Of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, paragraph 6.28.

²⁰ Third Party Submission of the European Communities, 14 November 2003, Section 2.

VI. CONCLUSION

135. Let us conclude, Mr. Chairman. Argentina is confident that the Panel appreciates the extreme nature of this case, and the extreme nature of the conflict of the Department's and the Commission's determinations with the obligations of Article 11.3. Here we are, nearly a decade after a 1.36 per cent margin was calculated for Argentina's only investigated exporter. This margin, everyone concedes, was calculated on the basis of zeroing, and is below what is today a *de minimis* margin. Injury was determined originally on the basis of cumulated imports, as it was once again in the US sunset proceeding.

136. Despite these defects, this measure continues, and it is very likely to continue to exist well into the future if nothing is done. How is this possible in light of the fact that WTO Members included in the Uruguay Round a specific provision that requires termination of an anti-dumping measure unless specific conditions are met?

137. Argentina has presented to this Panel and to the WTO Members its view of how this troubling result has occurred.

138. With respect to likely dumping, the United States has arranged three different procedures to implement its Article 11.3 obligation, each depending on the perceived level of participation in the process. In the end, it does not matter which procedure the United States uses. All roads lead to the application of mandatory criteria which prevent precisely the type of factual and legal review that Article 11.3 requires in order to invoke the exception to termination. This can be seen plainly in this case, and in all the other cases in which the US industry has expressed an interest. There is no analysis, no positive evidence from which to infer likely behavior; in the end, no review.

139. With respect to likely injury, although the Commission does develop evidence, in the end it fails to apply the correct legal standard – a “likely” standard. It explains how there are several possibilities supporting injury. This case is a clear example of the varied uses of “possible” scenarios to support a finding of “likely” injury.

140. Argentina cannot conclude without noting the stark contradiction in the approach of the Department and the Commission in their respective sunset reviews. For its part, the Department considered Argentina's only investigated exporter to be irrelevant and therefore concluded that the Argentine exporter had “waived” its participation in the review. For its part, the Commission based its determination on speculation about the Tenaris alliance and on a cumulative assessment of exports from other countries, both subject to, and not subject to, the measure. In other words, the Commission's analysis is anything but an order-wide analysis, but rather conditions each Member's rights upon the actions of other companies from other Members. In the end, neither the approach of the Department or of the Commission is consistent with Article 11.3. There is one principal obligation under Article 11.3. Argentina had the right under Article 11.3 to have the anti-dumping measure on OCTG terminated unless the specified requirements of Article 11.3 have been satisfied to invoke the exception to maintain the measure. Argentina's rights have been violated by the exceedingly limited approach of the Department and by the overly expansive approach of the Commission.

141. Argentina respectfully requests the Panel:

- to find that in this case the US measures identified by Argentina, as such and as applied, violate US WTO obligations;
- to recommend that the United States brings its measures found to be inconsistent with the covered agreements into conformity with its WTO obligations; and

- to suggest, pursuant to DSU Article 19.1, that the only way for the United States to comply with these recommendations is through the immediate termination of the measure.

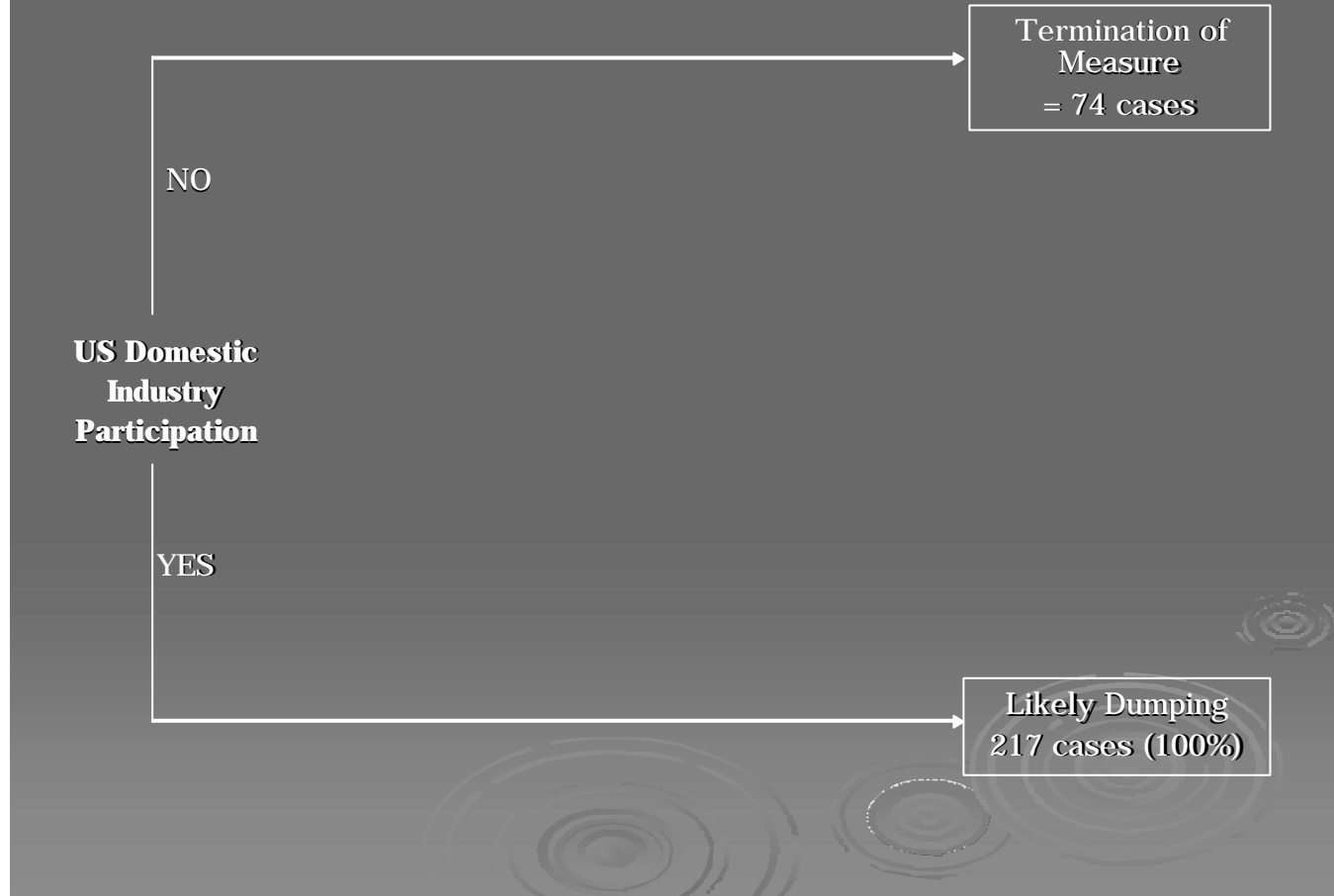
142. Argentina recalls that DSU Article 3.7 provides that the “first objective” of the dispute settlement mechanism is usually to “secure the withdrawal” of the WTO-inconsistent measure. This is particularly appropriate in the present case. Indeed, immediate termination of the anti-dumping duty is the only possible remedy, given the pervasive violations committed by the United States in this case. Article 11.3 requires termination after five years unless certain findings have been made within the specified time on the basis of evidence. Here, the United States did not make these findings and cannot now “cure” the multiple defects through another review or any action other than the immediate termination of the anti-dumping duty.

143. Unless the panel recommends termination in this case, this story will repeat into the future, not only for Argentina but for all the trading partners affected by US anti-dumping measures.

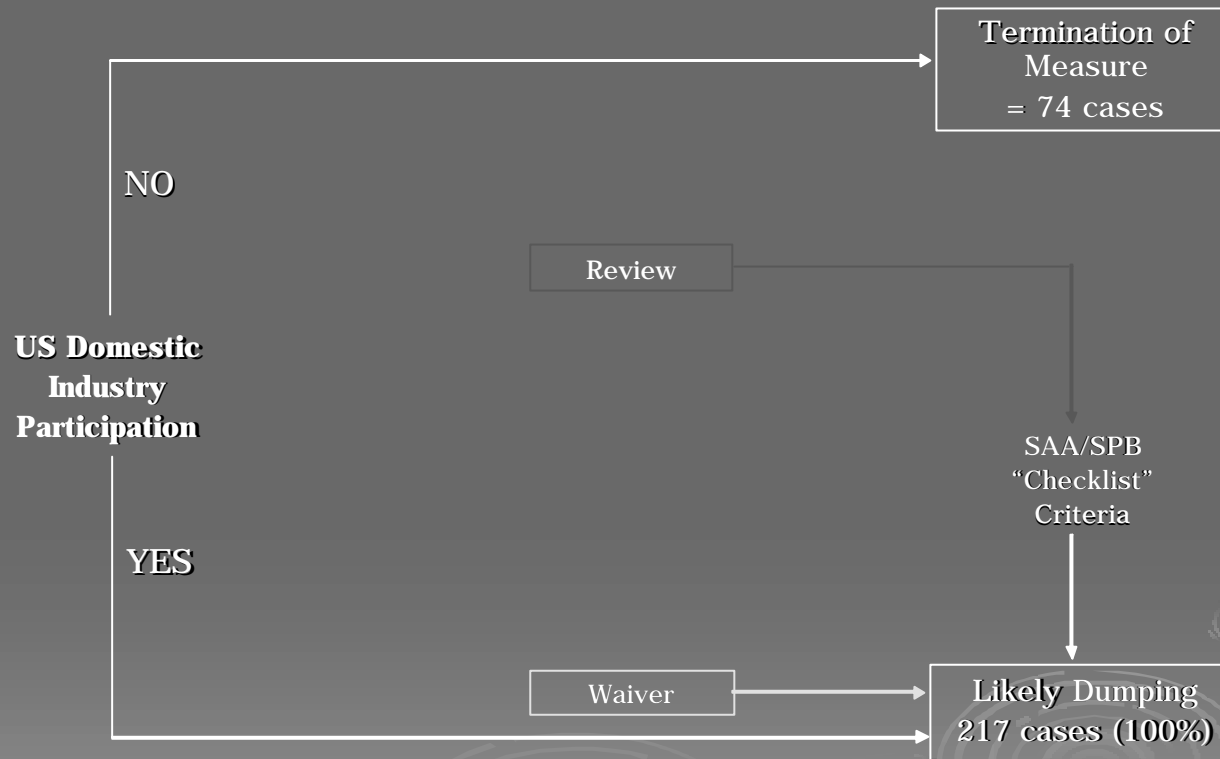
CHART 1: Contradictions in US Position

Issue	<u>In Sunset Determination</u>	<u>In First Submission</u>
Waiver	The Department deemed respondent interested parties to have waived participation ARG 51 (Issues & Decisions Memorandum at 5)	Siderca was not deemed to have waived participation (paras. 211-213)
Siderca's Response	Inadequate ARG 51 (Issues & Decision Memorandum at 3, 7) ARG 50 (Adequacy Determination at 2) ARG 46 (DOC Sunset Determination at 66,701)	Adequate (para. 213, 216, 233, 234)
Facts Available	Applied to Siderca ARG 51 (Issues & Decision Memorandum at 3)	Not applied to Siderca (paras. 214, 221)
Significance of "Non-responding Respondents"	Never mentioned	The reason for waiver, inadequacy, expedited review and "facts available" (paras. 214, 216)

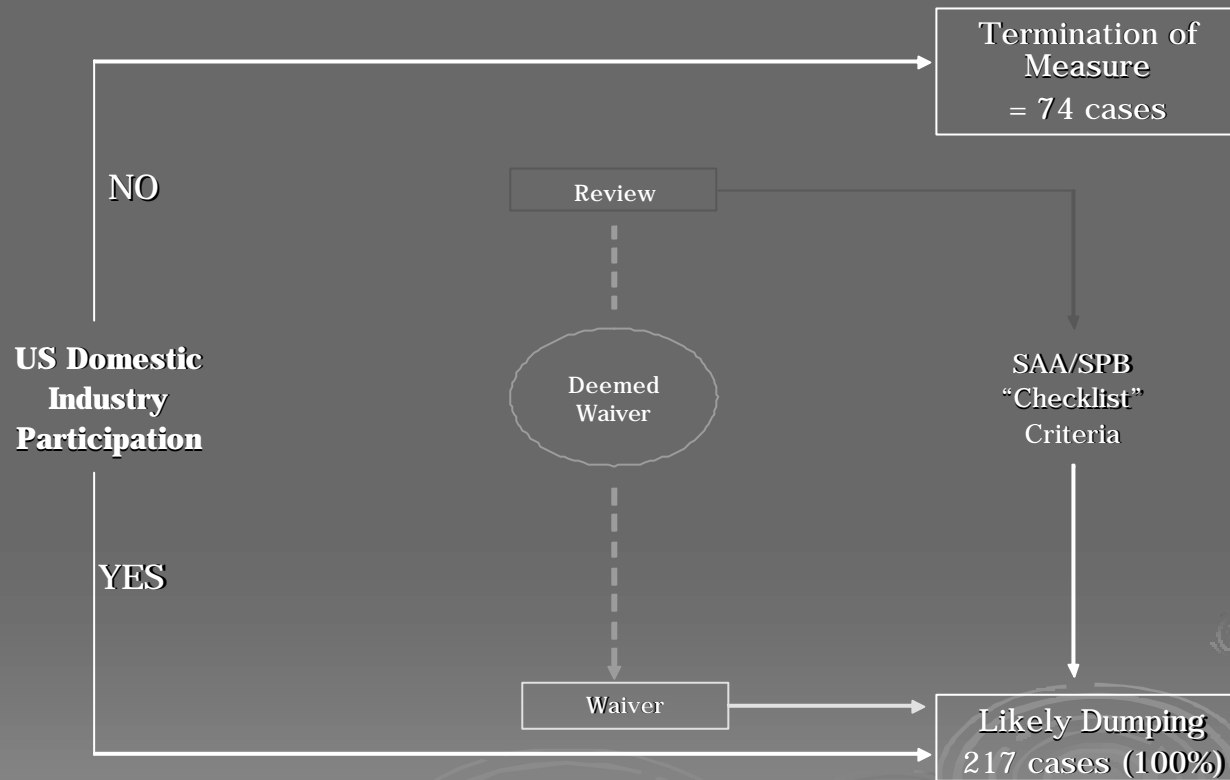
CHART 2 Department Sunset Review (Dumping)



Department Sunset Review (Dumping)



Department Sunset Review (Dumping)



Department Sunset Review (Dumping)

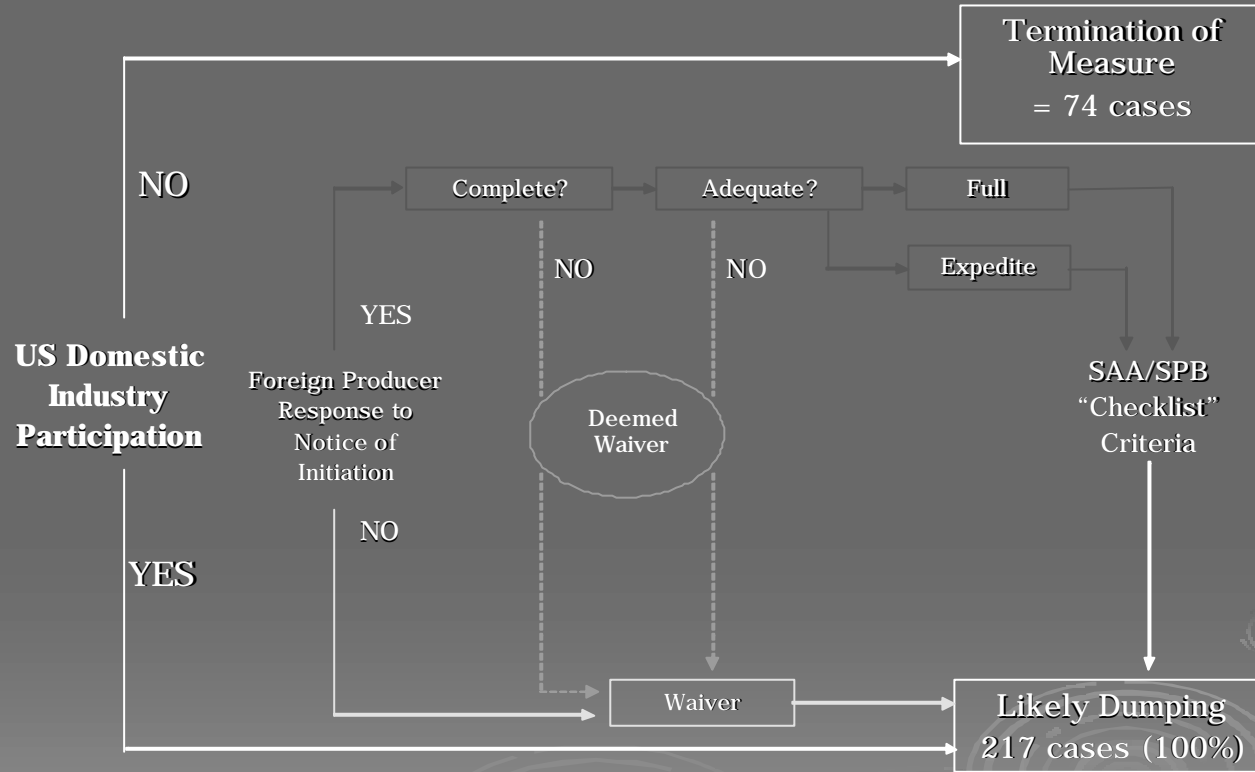


CHART 3: The Commission's "5-Incentive" Analysis

<u>Factors relied on as</u>	<u>"incentives" by the Commission</u>	<u>... are not "likely" because:</u>
1) <i>Global Focus</i> Tenaris has a Global Focus	Tenaris has a strong incentive to have a significant presence in the U.S.	<ul style="list-style-type: none"> • Evidence on the record does not support the "strong incentive" argument. • Tenaris mills from non-subject countries could have, but did not, access the U.S. market. • Tenaris developed its leading position without relying on the U.S. market
2) <i>OCTG Pricing</i> Casing and tubing are among the highest valued pipe and tube products generating among the highest profit margin	There is an incentive to shift production to OCTG and to ship more OCTG to the U.S.	There was positive evidence regarding products other than casing & tubing products that were part of Tenaris' overall strategy, associated with service to the oil and gas industry. Therefore, the ITC's "product shifting" is not possible for a leading, full range supplier.
3) <i>U.S. OCTG Pricing</i> Casing and tubing prices in the U.S. are higher than prices on the world market	There is an incentive to focus on the U.S. market for OCTG products	<ul style="list-style-type: none"> • Evidence regarding price differentials was disputed • Several producers had commitments to supply other markets
4) <i>Trade Remedies</i> There was one antidumping order in Canada against Korean OCTG	Exporters faced barriers in other countries or in related products, which would lead the exporters to ship more OCTG to the U.S.	There are no barriers against Argentine OCTG or related products
5) <i>Export Orientation</i> Producers are dependent on exports for the majority of their sales	Producers are export-oriented, and therefore shipments to the U.S. would be increased	There's a strong commitment to long-term contracts with overseas multinational companies. It is not logical to risk those contracts for spot sales in the US market

Closing Statement – 10 December 2003

1. Mr. Chairman, Members of the Panel: on one level, this case may seem very complex. There are many US laws, regulations and practices, including some of which even the US delegation characterized as “inartfully” drafted.

2. Yet underneath all the complexity of the US legal system lies a very simple truth: if the US industry wants a dumping order to be continued, the Department will find that dumping is likely to continue or recur. It’s as simple as that. Even a quick review of Argentina’s Exhibit 63 will indicate how clear and straightforward this case really is.

3. Argentina is confident that the Panel realizes full well the mechanical, pre-ordained nature of US sunset “determinations.” This approach is at odds with the requirements of the Agreement.

4. Mr. Chairman, let us consider briefly what we heard yesterday from the United States on “likely” dumping. With respect to waiver – and this is directly the Chairman’s questions to the United States and the US response to that question – the United States asserts on the one hand that waiver is applied on a company-specific basis. On the other hand, the United States indicated several times that the sunset determination is conducted on an order-wide basis, and that it never makes a likelihood of dumping determination on a company-specific basis. Yet the mandatory provisions of the statute unambiguously state that, in the event of “waiver,” the Department shall conclude that dumping is likely to continue or recur. What precisely does the statute mean? And, furthermore, what precisely did the Department mean when it said in its *Issues and Decision Memorandum* that, and I quote, “[S]ection 751(c)(4)(B) of the Act provides that the Department shall determine that revocation of an order is likely to lead to continuation or recurrence of dumping where a respondent interested party waives its participation in the sunset review. In the instant reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes waiver of participation.”

5. In response to a panel question yesterday, the United States spoke of “inartful” drafting with regard to the Department’s waiver regulation. The United States also declared “inartful” the drafting of certain aspects of the Department’s decisions. Argentina agrees with these characterizations of “inartful” drafting, but this explanation cannot excuse the US failure to comply with its obligations under Article 11.3.

6. But, as I stressed before, in the end, it does not matter which procedure the United States uses, and Argentina has demonstrated this through its empirical analysis provided in ARG-63. In the end, the US will apply its mandatory criteria, which prevent the type of factual and legal review that Article 11.3 requires in order to maintain the order. This can be seen plainly in this case, and in all the other cases in which the US industry has expressed an interest. There is no analysis, no positive evidence from which to infer likely behaviour; in the end, no review.

7. After some of the US statements yesterday, this result is not surprising to Argentina. The United States recited criteria from the *Sunset Policy Bulletin*. To paraphrase the US assertions, if a company dumped in the past it is reasonable to assume that it will dump in the future. If a company stopped shipping after the imposition of an anti-dumping duty order, it is reasonable to assume that the company cannot export without dumping. If a company’s volume has declined, it is reasonable to assume that the company will dump again if the order is lifted. These statements are the criteria established by the statute, SAA and the *Sunset Policy Bulletin*. These statements speak for themselves. These are in fact the sole criteria relied upon to make the likely dumping finding. Assumptions based on speculation cannot, however, satisfy the Article 11.3 standard.

8. With respect to the Commission's likely injury determination, the Commission confirmed that it did not consider the impact of likely Argentine OCTG imports on the United States industry; rather, it considered the impact of cumulated imports from 5 countries. Argentina cannot accept that such an approach is consistent with Article 11.3. If it were, Argentina's right to have measures terminated after 5 years is severely limited, and is something very different from what the text of Article 11.3 says that it is.

9. We also heard yesterday that the cumulated approach was essential in this case because of the "Tenaris" alliance. Yet, we also heard yesterday that the Commission did not consider the fact that the Tenaris Alliance had members outside of the order, free to export to the United States without any restrictions, but in fact did not do so. If Tenaris were motivated to act as the Commission presumes, why was it not shipping to the United States through its Tenaris Alliance member in Canada? Is this not positive evidence supporting the notion that these producers would not significantly increase their volume to the United States? It is, and it is essentially ignored by the Commission.

10. On the procedural issues, Mr. Chairman, I can be brief. As I said yesterday, we welcome the admission by the United States that Argentina's panel request has identified the specific measures at issue. This confirms what Argentina has said all along – that the US measures that Argentina are challenging are limited, specific, and have been identified with precision in our Panel request.

11. This concession by the United States also means that there now only remains one single Article 6.2 issue before the Panel: did Argentina fail to "present the problem clearly," such that the United States has suffered actual prejudice during the course of the panel proceedings?

12. Mr. Chairman, I will not repeat what is set out in our 4 December submission, which demonstrated the Argentina has complied fully with the Article 6.2 requirement to "present the problem clearly."

13. With respect to the alleged prejudice to the United States: as the *Canada Aircraft* decision stated, a Panel cannot assess prejudice during the panel process until the end of the panel process. In this regard, we recall what the statement with which the United States opened this proceeding yesterday, and I quote: "for anyone who follows WTO dispute settlement, most of the issues in this dispute should sound very familiar." Since the United States is "very familiar" with the issues, it seems highly unlikely that it, or any of the "potential" third parties, suffered any prejudice from the alleged lack of clarity in the claims set out in Argentina's Panel Request. I have to add that Argentina was quite surprised yesterday to hear the US delegation argue that actual prejudice may not be a fundamental prerequisite under Article 6.2. This is a complete contradiction of what the United States argued before the *Canada Wheat Board*, where it asserted, and I quote:

even if a panel request is insufficiently detailed "to present the problem clearly," the panel is not automatically deprived of jurisdiction over the matter. Rather, the panel must examine, based on the "particular circumstances of the case," whether the defect has prejudiced the ability of the responding party to defend itself [original emphasis].

14. There is much more I could say on these issues, particularly in light of the US oral statement of yesterday. We will respond fully to the US 9 December oral statement regarding Article 6.2 objections in our Second Written Submission.

15. Mr. Chairman, we would respectfully request that the Panel continue to bear in mind one fundamental point. At the end of the Uruguay Round, the drafters of the Anti-Dumping Agreement agreed that dumping orders would not, and could not, exist in perpetuity. Argentina and other WTO members negotiated – and paid for – the right to have orders terminated after five years, unless very stringent conditions were met. These conditions patently have not been met in this case.

16. Argentina respectfully requests the Panel:

- to find that in this case the US measures identified by Argentina, as such and as applied, violate US WTO obligations;
- to recommend that the United States brings its measures found to be inconsistent with the covered agreements into conformity with its WTO obligations; and
- to suggest, pursuant to DSU Article 19.1, that the only way for the United States to comply with these recommendations is through the immediate termination of the measure. This is the only remedy that can restore the right Argentina obtained in Article 11.3 to have measures applicable to its exports terminated after 5 years.

17. Argentina thanks the Panel for the opportunity to present its case.

ANNEX D-2

ORAL STATEMENT OF THE UNITED STATES – FIRST MEETING

9 December 2003

Mr. Chairman, members of the Panel:

1. On behalf of the United States delegation, I would like to thank you for agreeing to serve on this Panel.
2. Today, it is our pleasure to present the views of the United States concerning the issues in this dispute. Organizationally, we will first talk about some of the substantive issues, and then turn to the procedural issues.
3. With respect to the substantive issues, in our First Written Submission, we fully addressed the Argentine arguments made to date. Today, we will focus on what we consider to be the central issues. We will begin with a discussion of some of the issues concerning "dumping," and then turn to some of the issues relating to "injury."

Issues concerning the likelihood of continuation or recurrence of dumping

4. Mr. Chairman, for anyone who follows WTO dispute settlement, most of the issues in this dispute should sound very familiar. Indeed, Argentina's "as such" claims largely raise issues that either have been directly addressed in other disputes or that are closely related to those addressed in other disputes. In either case, the Panel faces a straightforward task. It should apply the WTO obligations in question based on the approaches taken in recent panel and Appellate Body reports.
5. For example, Argentina claims that an "irrefutable presumption" exists simply because Commerce has found likelihood in a particular number of sunset reviews. However, as a series of panels have found – including those in *US – Export Restraints*, *US – India Plate*, and *US – Japan Sunset* – the frequency of a particular outcome does not transform that outcome into a "measure" that may be challenged independently for its alleged WTO inconsistency.
6. With respect to Commerce's expedited sunset review regulations, Argentina has not demonstrated how these regulations breach Article 11.3 or any other obligation of the AD Agreement. This is not surprising given that, as the *US – Japan Sunset* panel observed, Article 11.3 does not prescribe how a Member should go about making a likelihood determination in a sunset review.
7. Argentina's claim that Commerce's reported "margin likely to prevail" is WTO-inconsistent rings hollow because Argentina has not demonstrated that any obligation exists to quantify dumping in a sunset review. In *US – German Steel*, the Appellate Body addressed Article 21.3 of the SCM Agreement – the counterpart to Article 11.3 – and found that there is no obligation to apply any *de minimis* threshold in a sunset review because Article 21.3 does not explicitly or implicitly contain such an obligation. The same holds true for Article 11.3 and the obligation to calculate a margin of dumping to determine likelihood. Indeed, given that almost identical language is found in both Article 21.3 of the SCM Agreement and Article 11.3 of the AD Agreement, the analysis applied by the Appellate Body for Article 21.3 is equally persuasive with respect to Article 11.3.
8. In this regard, there is also no basis in the AD Agreement for Argentina's claim that a determination of likelihood of continuation or recurrence of dumping under Article 11.3 of the AD Agreement must be made by determining a current level of dumping in a sunset review. To the

contrary, footnote 22 of the AD Agreement makes clear that a current level of dumping determined immediately prior to a sunset review is not determinative of the issue of likelihood in a sunset review.

9. Finally, Commerce's *Sunset Policy Bulletin* is not a legal instrument with independent status under US law – it is not a "measure." Nor is it "mandatory" within the meaning of the well-established mandatory/discretionary distinction.

10. Turning to Argentina's "as applied" claims, Argentina has based these claims either on an inaccurate understanding of the facts on the record or upon facts that Argentina failed to put in the record.

11. For example, Argentina claims that Siderca was found to have provided an inadequate submission in the sunset review proceeding and that this alleged finding resulted in an expedited review. This statement is disproved by a simple review of the record, and Argentina has not cited one instance in the administrative record of the OCTG review where Commerce made this alleged finding. In fact, in each of the three separate documents – the Final Sunset Determination, the Decision Memorandum, and the Adequacy Memorandum – Commerce clearly stated that Siderca had fully cooperated in the sunset review and had filed a complete substantive response. Notwithstanding Argentina's claims to the contrary, Commerce also clearly articulated in the Decision Memorandum and the Adequacy Memorandum that it had determined to expedite the review because none of the firms that had actually exported Argentine OCTG to the United States were participating in the sunset review proceeding.

12. Similarly, Argentina's claims that the expedited review process denied Siderca a full opportunity for submission of evidence and defence of its interests are belied by a simple examination of the facts. Notwithstanding the expedited nature of the review, Siderca had the right to file a complete substantive response, but chose to comment on only two issues and its treatment of those issues amounted to two pages of text. Siderca also chose not to exercise its right to file a rebuttal response. Siderca did not submit "any additional information" on its own behalf or on the behalf of the Argentine exporters, as permitted by section 351.218(d)(3)(iv) of Commerce's Sunset Regulations. In addition, no other Argentine interested party submitted any information or requested to participate in the proceeding. Given that Siderca and the Argentine exporters did not avail themselves of the existing opportunities for participation and defence of their interests, it is disingenuous for Argentina to now claim that the expedited nature of the proceeding resulted in a denial of opportunities to participate in contravention of Article 6. Moreover, the opportunities for defence and participation in an expedited review provide all that is required by Article 6.

13. Finally, Argentina claims that Commerce's report of the "margin likely to prevail" in the absence of the anti-dumping duty order breaches Articles 2 and 11.3, as applied in this case, because it objects to the calculation methodology used in the original investigation to derive the margin. First, as previously noted, there is no WTO obligation to quantify any margin for the dumping that is likely to continue or recur for purposes of a sunset review under Article 11.3 of the AD Agreement. Nor is there any WTO obligation to consider particular margins in a sunset injury analysis. Second, the measure at issue in this dispute is the sunset review, not the original investigation. If Argentina intended to make claims concerning that distinct measure, it has failed to properly do so. Finally, we note that Argentina has made no claim that, if the allegedly problematic methodology were modified, the margin likely to prevail would be affected or that there would be any change in the margin that would be meaningful for the US International Trade Commission's ("ITC") analysis.

Issues concerning the likelihood of continuation or recurrence of injury

14. Argentina has raised a number of issues regarding the ITC's determination of likelihood of continuation or recurrence of injury in the OCTG sunset review. We will focus today on four of those issues: first, whether the ITC applied the correct standard for determining whether termination of the

anti-dumping duty orders would be *likely* to lead to continuation or recurrence of injury; second, whether the obligations of Article 3 of the AD Agreement apply to sunset reviews; third, whether the ITC's determination was consistent with the evidentiary standards of Article 3.1; and fourth, whether the time frame provided for under US law for the likely recurrence of injury is consistent with Article 11.3 of the AD Agreement.

The ITC applied the correct standard for determining whether termination of the anti-dumping duty orders would be likely to lead to continuation or recurrence of injury

15. Argentina argues that the ITC misinterpreted the term "likely" in Article 11.3. Essentially, Argentina maintains that "likely" can only mean "probable," and that the ITC disregarded this meaning and interpreted "likely" to mean "possible." Both of these arguments are incorrect.

16. Trying to pin down the meaning of "likely" by seeking a synonym for that word – such as "probable" – is not helpful. The drafters did not use a synonym; they used "likely." Moreover, dictionaries define "likely" in various ways. And even if only one synonym were applicable, this would merely beg the question of how that synonym should be interpreted.

17. To properly define "likely," one must bear in mind the context in which it is used. In particular, one must consider the fundamental nature of the inquiry called for by sunset reviews. Sunset reviews inherently involve less certainty and precision than original investigations.

18. Contrary to Argentina's assertion, the ITC did *not* find that the recurrence of injury was merely possible. It examined the likely volume, price effects, and impact of imports if the orders were revoked. It examined each of these factors closely. For example, with respect to likely volume, the ITC found that the significant increases in import volume during the original investigation, substantial excess capacity in several of the subject countries, and a strong incentive on the part of foreign producers to establish a presence in the large, relatively higher-priced US market, supported the conclusion that the likely volume of imports would be significant if the orders were revoked.

Article 3 does not apply to sunset reviews

19. Argentina claims that Article 3 of the AD Agreement applies in its entirety to sunset reviews. But, there are numerous textual indications that this is not the case. For example, there are no cross-references in Article 3 to Article 11, or in Article 11 to Article 3.

20. Moreover, a determination of injury under Article 3 and a determination of likely recurrence of injury under Article 11.3 are entirely different animals. This is underscored by the fact that many of the obligations described in Article 3 simply cannot be applied in sunset reviews. For example, Article 3.1 specifies that a determination of injury shall involve an examination of the "volume of the dumped imports and the effect of the dumped imports on prices." Yet, in a sunset review imports may not even be present in the market at the time of that review, and they may not be sold at dumped prices.

21. Another example of the incompatibility between the provisions of Article 3 and the inquiry involved in a sunset review can be found in Article 3.5. Article 3.5 refers to the "dumped imports" and speaks of such imports in the present tense as "causing injury." However, in a sunset review there may be no dumped imports. Article 3.5 refers also to existing "injury" and describes an existing causal link between dumped imports and that injury. Again, in a sunset review, with an anti-dumping order in place, there may be no current injury or causal link. Indeed, it would be surprising if there were given the remedial effect of an anti-dumping measure.

22. In sum, it is clear from these textual provisions, and others described in our First Submission, that the obligations of Article 3 do not extend to sunset reviews.

The ITC's Sunset Determination was consistent with Article 3.1

23. Even though Article 3.1 does not apply to sunset reviews, the ITC's sunset determination effectively satisfies the Article 3.1 requirements. The ITC's determination was based on a proper establishment of the relevant facts and an unbiased and objective evaluation of those facts – as required by Article 17.6(i) of the AD Agreement – and was based on positive evidence.

24. As is clear from its report, the ITC carefully reviewed an extensive array of factors and evidence relative to the likely volume, price effect and impact of imports on the domestic industry. We will focus in this statement only on the ITC's findings with regard to the likely volume of imports, as it is representative of the ITC's approach.

25. The ITC first reviewed the volume of imports in its original injury investigation, to see how imports developed in the absence of dumping measures. The original investigation showed that the rate of increase in imports was far greater than the increase in demand at that time, and that the market share of subject imports rose significantly, at the expense of that of the domestic industry. After the anti-dumping duty orders went into effect, imports fell but remained a factor in the US market.

26. Turning to the likely volume of imports if the dumping orders were revoked, the ITC found that producers in the five countries involved had both the capacity and the incentive to increase their exports to the United States. The ITC gave five reasons for this.

27. First, the ITC found that the Tenaris alliance of OCTG producers (which has members in four of the five countries at issue here) with its global focus would have a strong incentive to gain a significant presence in the US market. Second, the ITC found that the subject producers would have an incentive to devote more of their capacity to shipping casing and tubing to the US market in that casing and tubing were among the highest valued pipe and tube products. Third, the ITC found that prices for casing and tubing on the world market were significantly lower than prices in the United States. Fourth, the ITC found that the subject producers faced import barriers on casing and tubing in other countries or on related products in the United States. Finally, the ITC found that the OCTG industries in at least some of the subject countries, especially Japan and Korea, were heavily export-dependent.

28. Argentina takes issue with only three of the ITC's reasons. First, it questions whether the Tenaris producers could re-orient to the United States production that was committed under existing contracts. But the evidence before the ITC plainly supports its finding. Tenaris is the dominant supplier of OCTG products and related services to all of the world's major oil and gas drilling regions except the United States. The United States represented the best growth opportunity for the Tenaris producers. The chief executive officer of one of the world's largest distributors of OCTG, in sworn testimony, told the ITC that: "It is simply not imaginable that [Tenaris] or the other subject companies would stay out of the United States which buys as much OCTG as the rest of the world combined and has the highest prices."¹

29. Argentina's second reason for challenging the ITC's volume finding is that there is only one trade barrier in third country markets facing casing and tubing. Argentina quite clearly overlooks the fact that the ITC examined not only import barriers on casing and tubing in third country markets but also barriers on related products in the United States – that is, lower-priced products that were produced in the same facilities as casing and tubing.

¹ See Exhibit US-20.

30. Finally, Argentina takes issue with the ITC's finding that foreign producers had an incentive to export casing and tubing to the United States because prices in the United States were higher than in other markets. As explained more fully in our First Submission, Argentina inaccurately characterizes both the evidence on which the ITC relied and the ITC's analysis of this issue. The evidence shows that the ITC did conduct an independent investigation of this issue by considering the relevant evidence submitted by both parties – and that this evidence demonstrated the existence of a substantial price gap between the United States and the rest of the world.

31. In sum, the ITC had ample evidence to support its finding that subject producers had strong incentives to shift into the US market and that the subject imports were likely to increase in volume.

The time frame in which injury would be likely to recur

32. Argentina claims that the provisions of US law regarding the time frame within which injury would be likely to recur are inconsistent with Articles 3 and 11.3 of the AD Agreement. These provisions instruct the ITC to determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" and to "consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time."

33. Argentina misconstrues Article 11.3, which does not specify the time frame relevant to a sunset inquiry. In the absence of any specific provision in Article 11.3, Members remain free to determine under their own laws and procedures the time frame relevant in sunset inquiries. It is inherently reasonable for the United States to consider the likelihood of continuation or recurrence "within a reasonably foreseeable time" and that the "effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time."

Procedural issues

34. Turning to the procedural issues, in its submission of 4 December,² Argentina fails to rebut the US case that portions of Argentina's panel request fail to comply with the requirements of Article 6.2 of the DSU and that certain claims asserted by Argentina in its First Submission are not within the Panel's terms of reference. To a large extent, Argentina's submission of 4 December fails to respond to US arguments at all, responding instead to arguments that the United States never made.

35. For example, Argentina asserts that the United States has alleged an inconsistency with the third requirement of Article 6.2 of the DSU – the requirement to "identify the specific measures at issue." This assertion is simply wrong. Nowhere in the US First Submission is there an allegation that Argentina's panel request is inconsistent with that requirement. Instead, the United States has complained about Argentina's failure to comply with the fourth requirement of Article 6.2 – the requirement to "present the problem clearly." Thus, paragraphs 25-28 and 33-38 of the 4 December submission contain responses to arguments the United States never made.

36. Similarly, notwithstanding Argentina's assertions to the contrary, the United States has *not* argued that a panel request must include arguments or that it must include narrative descriptions of claims. Thus, the Panel can ignore Argentina's argumentation on these points, as well.

37. What the United States *has* argued is that Article 6.2 requires that a panel request contain a "brief summary of the legal basis of the complaint sufficient to present the problem clearly." Where, as here, a "measure" is described ambiguously (such as by the phrase "certain aspects"), where the treaty provision in question is described ambiguously (such as by a reference to an entire article with

² *Submission from Argentina on the Request by the United States for Preliminary Rulings Under Article 6.2 of the DSU*, 4 December 2003 [hereinafter "4 December Submission"].

multiple paragraphs and obligations), and where there is no accompanying narrative description or argument, the problem will not be presented clearly.³

Page 4

38. Turning to the specific defects in the panel request, let us begin with what we have called "Page 4." Regarding Page 4, Argentina's assertion that the United States did not consider the panel request as a whole is simply wrong. In paragraphs 88-89 of the US First Submission, the United States explained how it looked at Sections A and B of the panel request to try and figure out the nature of the problems set forth on Page 4, and how it concluded – as would any reasonable and objective person – that the problems complained about on Page 4 were different from the problems complained about in Sections A and B. For example, when Argentina makes "as such" claims in Sections A and B regarding section 751(c)(4) and sections 752(a)(1) and (5) of the US Tariff Act of 1930, and then on Page 4 says that it "also" considers certain aspects of sections 751(c) and 752 to be WTO-inconsistent, a reasonable and objective person would conclude that Argentina was asserting new claims and not merely repeating the claims in Sections A and B.

39. Argentina's arguments appear now to have switched. Argentina told the DSB that Sections A and B of the panel request contain Argentina's "particular claims." Now, Argentina says "the essence of Argentina's claims" – whatever "essence" means – are contained in Sections A and B.⁴ This is just inaccurate. For example, Page 4 identifies the ITC's sunset regulations as a source of some (unidentified) problem, but where in Sections A or B is the "essence" of Argentina's "claim" set forth? The answer is: nowhere.

40. Finally, Argentina claims to have provided a narrative description in the first part of the panel request that remedies the deficiencies that otherwise exist with respect to Page 4.⁵ However, this narrative is little more than a chronology of events, which concludes, on page 2 of the panel request, with the same ambiguous assertion that appears on Page 4; namely, that "certain aspects of US laws, regulations, policies and procedures related to the administration of sunset reviews are inconsistent with US WTO obligations."

Sections B.1, B.2 and B.3

41. Turning to the defects in Sections B.1, B. 2 and B.3 of the panel request, we recall that these defects involve instances in which Argentina alleges inconsistencies with Articles 3 and 6 of the AD Agreement in their entirety. What is most interesting about Argentina's justification for these defects is what Argentina does not argue. Argentina does not take issue with the findings of prior panels that citations to entire articles of the AD Agreement – including Article 6 – can fail to satisfy the requirements of Article 6.2 of the DSU.⁶ Argentina also never explains why, in other portions of its panel request, it was able to identify with precision the particular paragraphs of Articles 3 and 6 of concern to it.⁷ Given Argentina's insistence that the entire panel request be considered, this omission on its part is especially curious.

42. With respect to the arguments that Argentina does make, they are unavailing. Argentina's main argument is that the United States somehow knew from the consultations what Argentina's problems were.⁸ However, as the panel in the *Canada Wheat* dispute found, this type of argument is

³ See First Submission by the United States of America, 7 November 2003, para. 87 [hereinafter "US First Submission"].

⁴ 4 December submission, note 26.

⁵ *Id.*, para. 45.

⁶ US First Submission, para. 105, note 119.

⁷ *Id.*, para. 106.

⁸ 4 December submission, paras. 71-77.

legally irrelevant for purposes of determining whether a panel request complies with Article 6.2 of the DSU.⁹ Moreover, as a factual matter, Argentina's argument fails, because the United States already has demonstrated how the consultations failed to shed light on the nature of Argentina's problems.¹⁰

43. Interestingly, Argentina seems to object to the US discussion of Argentina's questions at consultations.¹¹ This is a curious objection, given that it was Argentina that first cited these questions, arguing to the DSB that they somehow made up for any deficiencies in Argentina's panel request.

"Certain matters"

44. Finally, there are the "certain matters" that are not within the Panel's terms of reference, discussed in Section IV.D of the US First Submission. Because these matters are not within the Panel's terms of reference, the United States does not need to demonstrate prejudice as part of its analysis in this case. However, to be clear, the United States was, in fact, prejudiced by the inclusion in Argentina's First Submission of matters that were not included in Argentina's panel request.

45. In the interests of time, the United States will not comment on Argentina's defence of each one of these "matters," but instead will limit itself to one example that should suffice to demonstrate the fatal flaws in Argentina's arguments.

46. The United States has asserted that the claims set forth in Section VIII.C.2 of the Argentina First Submission are not within the Panel's terms of reference.¹² This section contains an "as applied" claim regarding the time period considered by the ITC. However, the only portion of the panel request dealing with the time period considered by the ITC is Section B.3, which clearly is limited to an "as such" claim regarding the relevant statutory provisions.

47. Argentina argues that an "as applied" claim should be read into Section B.3 because the heading of Section B refers to the "Commission's Sunset Determination."¹³ The problem, though, is that Section A of the panel request also has a heading that refers to Commerce's determinations, but the individual paragraphs of Section A clearly distinguish between "as such" and "as applied" claims. Section A.1 makes an "as such" claim with respect to Commerce's expedited review regime, while Sections A.2 and A.3 clearly make "as applied" claims regarding certain aspects of the expedited review regime as applied in the sunset review of OCTG from Argentina.

48. Thus, anyone reading the panel request as a whole – as Argentina says one must – would conclude that Argentina deliberately limited its claims regarding the time period considered by the ITC to an "as such" claim regarding the relevant statutory provisions. If Argentina had intended otherwise, it would have distinguished between the "as such" and the "as applied" claims as it did in Section A with respect to Commerce's expedited review system.

⁹ See US First Submission, para. 109, quoting *Canada – Wheat*, para. 25.

¹⁰ *Id.*, paras. 107-108.

¹¹ 4 December submission, para. 75.

¹² US First Submission, paras. 123-125.

¹³ 4 December submission, para. 111.

The United States has been prejudiced

49. Argentina's attempts to demonstrate compliance with Articles 6.2 and 7 of the DSU simply highlight the deficiencies in its panel request and its First Submission. The forced interpretive efforts in which Argentina engages to try to demonstrate the "clarity" of its panel request speak for themselves.

50. Thus, Argentina is really left with nothing other than the baseless assertions that: (1) the United States is afraid to engage on the substantive issues;¹⁴ and (2) the United States has not been prejudiced.

51. Concerning the first argument, the United States simply notes that we could have been spared this debate if Argentina simply had withdrawn its panel request and submitted a proper one after the United States expressed its concerns. Argentina waited over a year before even requesting consultations, so it is difficult to understand why Argentina refused to take approximately one more month for panel establishment in order to comply with the requirements of the DSU.

52. On the topic of prejudice, although this should not be relevant where – as here – there is a clear failure by Argentina to comply with the DSU, nonetheless the United States and potential third parties were prejudiced by Argentina's failure to comply with the requirements of the DSU. Members were unable to know the matter being referred to the Panel until well after panel establishment, and the United States was prejudiced in its ability to prepare its defence.

53. Moreover, it is appropriate to take into account not only the disadvantage experienced by the United States, but the utter lack of any justification by Argentina for the deficiencies in its panel request. For example, Sections A and B of the panel request show that Argentina is capable of drafting claims with precision, but yet Argentina offers no plausible explanation for the ambiguity on Page 4.

54. In summary, this Panel should follow the precedent set by the panel in the *Canada Wheat* dispute. Although in that case the panel found a failure to comply with the third requirement of Article 6.2 of the DSU – the requirement to identify the specific measures at issue – the panel's reasoning applies with equal force to Argentina's failure to "present the problem clearly." As that panel made clear, the due process objective of Article 6.2 requires that a panel request provide the respondent with the information necessary to begin preparing its case. The panel found that the US failure to comply with Article 6.2 "creates significant uncertainty regarding the identity of the precise measures at issue and thus impairs Canada's ability to 'begin preparing its defence' in a meaningful way."¹⁵

55. In this case, Argentina's failure to comply with Article 6.2 created significant uncertainty regarding the matters at issue, thereby impairing – i.e., prejudicing – the United States' ability to begin preparing its defence in a meaningful way.

56. Mr. Chairman, that concludes the opening statement of the United States. The US delegation looks forward to your questions and engaging in a constructive dialogue with the Panel.

¹⁴ 4 December submission, para. 2.

¹⁵ *Canada – Wheat*, para. 28.

ANNEX D-3**THIRD PARTY ORAL STATEMENT OF THE
EUROPEAN COMMUNITIES**

10 December 2003

TABLE OF CONTENTS

	<u>Page</u>
1. Introduction.....	47
2. Summary of written submission.....	47
3. Inadequacy Determination and Waiver of Participation.....	47
4. United States' interpretation of Article 11.3 of the AD Agreement in isolation from the rest of the AD Agreement	48
5. Likely continuation of dumping	50
6. Zeroing.....	52

Table of cases referred to in this statement

Short Title	Full Case Title and Citation of Case
<i>Argentina – Floor Tiles</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy</i> , WT/DS211/R, adopted 5 November 2001
<i>EC – Tube and Pipe</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/R, final report circulated 7 March 2003 Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003
<i>Egypt – Steel Rebar</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS/211/R, adopted 1 October 2002
<i>Guatemala – Cement II</i>	Panel Report, <i>Guatemala-Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico</i> , WT/DS156/R, adopted 17 November 2000
<i>US – Carbon Steel from Germany</i>	Panel Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/R, final report circulated 3 July 2002 Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R, adopted 28 November 2002
<i>US – DRAMs</i>	Panel Report, <i>United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of one Megabit or above from Korea</i> , WT/DS99/R, adopted 19 March 1999

Thank you Chairman and Members of the Panel.

1. Introduction

1. The European Communities intervenes as a third party in this case because of its systemic interest in the correct interpretation of the AD Agreement.

2. Summary of written submission

2. Our written submission contained observations on six points.

3. First, with respect to the preliminary objection raised by the United States, we consider that the Panel should assess Argentina's Panel Request as a whole, and not one specific part of it in isolation from the rest.

4. Second, with respect to the inadequacy determination, we consider that the cumulative effect of the relevant provisions in this case led to a situation in which the investigating authority was essentially relieved from any obligation to investigate, in a manner that is inconsistent with the AD Agreement.

5. Third, with respect to the likelihood determination, we consider that it was inconsistent with Article 11.3 AD Agreement, being based on out-of-date data together with a prospective determination.

6. Fourth, with respect to the *Sunset Policy Bulletin*, we consider it to be a measure subject to challenge under the WTO Agreement and "as such" inconsistent with Article 11 of the AD Agreement.

7. Fifth, with respect to zeroing, we agree that the United States was not entitled to use, for the purposes of a sunset review investigation under Article 11.3 AD Agreement, a dumping determination made using a zeroing methodology inconsistent with Article 2 AD Agreement.

8. Sixth, with respect to injury, we consider that the provisions of Article 3 of the AD Agreement also apply in the context of a sunset review investigation and determination.

9. To these observations we would like to add the following, concerning : the inadequacy determination; the United States proposition that Article 11.3 AD Agreement must be interpreted in isolation from all other substantive provisions of the Agreement; the likelihood determination; and zeroing.

3. Inadequacy Determination and Waiver of Participation

10. Under DOC's regulations,¹ DOC will consider a response to be 'adequate' only if respondent interested parties account for more than 50 per cent of total exports to the United States. If the response is considered inadequate, DOC will decide to expedite the review, and decide on the basis of "facts available".² Since Siderca had not exported to the United States during the period under review, and even though DOC found that it had filed a complete substantive response, DOC considered that its response was inadequate, and therefore decided to expedite the review.

¹ Section 351.218(e)(1)(ii)(A).

² Section 351.218(e)(1)(ii)(C).

11. As Korea has rightly stated, the 50 per cent threshold for determining the adequacy of responses of respondent interested parties has no basis in the AD Agreement.³ Panels have consistently held that an investigating authority may decide on the basis of “facts available” only under the specific conditions of Article 6.8 AD Agreement.⁴

12. Article 6.8 AD Agreement permits the authority to decide on the basis of facts available only in cases “in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation”. Article 6.8 does not permit an authority to resort to facts available merely because a respondent interested party, which has filed a complete substantive response, does not meet certain quantitative requirements regarding its import share.

13. The decision to expedite the review may lead to the exclusion of relevant evidence from the sunset review investigation, in a manner inconsistent with Article 6.1 and 6.2 AD Agreement. Moreover, it has the additional effect of largely relieving the investigating authority of the obligation to investigate imposed on it by Article 11.3 AD Agreement. The European Communities therefore considers that DOC’s regulations, as well as the decision to expedite the review in the present case, are incompatible with Articles 11.3 and 6.1, 6.2, and 6.8 AD Agreement.

14. Argentina has also challenged the provisions of United States law which provide that in certain cases, a respondent interested party is deemed to have waived participation in the proceedings.⁵ The European Communities notes that the United States has responded that DOC did not apply the waiver provision in the proceedings concerning Siderca.⁶

15. This notwithstanding, the European Communities considers that the provisions of United States law as such are incompatible with the AD Agreement. DOC’s regulations provide that failure by a respondent interested party to file a complete substantive response will be considered as a waiver of participation in the sunset review.⁷ Under United States law, the waiver has the effect that the administering authority shall conclude that revocation of the order or termination of the investigation would be likely to lead to continuation or recurrence of dumping with respect to that interested party.⁸

16. If a respondent interested party fails to provide necessary information, Article 6.8 AD Agreement provides that the investigating authority may decide on the basis of the facts available. However, no provision of the AD Agreement allows the investigating authority to simply assume that dumping is likely to continue or recur. By providing that, in the absence of a complete substantive response, the investigating authority will conclude, without further investigation, that dumping is likely to continue or recur, United States law is establishing a presumption which has no basis in the AD Agreement. The waiver provisions as such are therefore incompatible with Articles 11.3 and 6.8 AD Agreement.

4. United States interpretation of Article 11.3 of the AD Agreement in isolation from the rest of the AD Agreement

17. The foundation of the United States’ defence is its assertion⁹ that:

³ Korea's Written Submission, para. 31.

⁴ Panel Report, *Argentina – Floor Tiles* para. 6.20; Panel Report, *Egypt – Steel Rebar*, para. 7.147.

⁵ Argentina's First Written Submission, para. 109 and following.

⁶ US First Written Submission, para. 211.

⁷ Section 351.218(d)(2)(iii).

⁸ 19 USC § 1675(c)(4)(B).

⁹ US First Written Submission, para. 3.

“Article 11.3 is the **only provision** of the AD Agreement that sets forth the substantive requirements for determining whether an order should be revoked five years after its imposition.” (emphasis added)

18. Thus, according to the United States, procedural provisions aside, an investigating authority is free to ignore all other provisions of the AD Agreement when applying and interpreting Article 11.3. As the United States puts it¹⁰:

“In sum, aside from the obligations contained in Article 11.3 and those provisions of Articles 6 and 12 discussed above, the AD Agreement leaves the conduct of sunset reviews to the **discretion of the Member** concerned.” (emphasis added)

19. The European Communities does not agree with that assertion. We identify (non-exhaustively) at least six provisions of the AD Agreement that include requirements that are more than merely procedural, and which an investigating authority may not ignore in a sunset review investigation and determination. They are: Article 1; Article 2; Article 3; Article 4; Article 9; and Article 11.1.

20. The European Communities considers that it cannot be said that Article 1 of the AD Agreement is wholly irrelevant to the application and interpretation of Article 11.3. Article 1 is entitled “Principles”. It refers to the rules set out in Article VI GATT 1994. It twice refers to the “provisions” of the AD Agreement, without qualification or restriction – that is, to all of them, including Article 11.3. An investigating authority cannot therefore ignore the principles set out in Article 1 of the AD Agreement when applying and interpreting Article 11.3, any more than it can ignore Article VI GATT 1994.

21. Similarly, the European Communities does not agree with the United States when it asserts, in the above quotation, that an investigating authority is free to ignore Article 2 of the AD Agreement when applying and interpreting Article 11.3. Indeed, this bare assertion is not one that, ultimately, the United States is able to sustain, itself admitting that :

“Article 2, therefore, provides the **general meaning** of the term “dumping” as it is used throughout the AD Agreement, including in Article 11.3.”¹¹ (emphasis added)

22. The same comments apply with respect to Article 3 of the AD Agreement, concerning the determination of injury. Article 11.3 does not “otherwise specify” – so, in accordance with the terms of footnote 9 of the AD Agreement, the term “injury” in Article 11.3 must be taken to mean what is set out in the definition. The defined term in footnote 9 is “injury” not, as the United States would have it, “determination of injury”, which is simply the title of Article 3.¹² It may be that the United States wishes that the title of Article 3 would have been used in the definition in footnote 9, instead of the term “injury”. That is not, however, what the text of the AD Agreement provides for.

23. The European Communities further notes that Article 11.3 of the Agreement contains the words “domestic industry”. Article 4 of the Agreement contains the “definition of domestic industry”. The European Communities does not therefore agree that an investigating authority can ignore Article 4 of the AD Agreement when applying and interpreting Article 11.3.

24. Similar comments may be made with regard to Article 9 of the AD Agreement, which concerns not only the collection of anti-dumping duties, but also their “imposition”. Article 11.3 of the AD Agreement expressly refers to five years from the “imposition” of the duty; it also refers to

¹⁰ US First Written Submission, para. 142.

¹¹ US First Written Submission, para. 256.

¹² US First Written Submission, paras. 289 to 292.

“the expiry of the duty”, meaning the expiry of the imposition of the duty; and to the rule that “[t]he duty may remain in force” meaning the imposition of the duty may remain in force. Thus, a decision under Article 11.3 not to terminate the duty is a decision to impose the duty for a further period of up to five years. The European Communities does not therefore agree that an investigating authority is entitled to proceed without any regard whatsoever to Article 9 of the AD Agreement when applying and interpreting Article 11.3.

25. As outlined in our written submission, Article 11.1 of the AD Agreement also applies to sunset review investigations and determinations, as the Appellate Body has confirmed.¹³ The European Communities does not therefore agree with the United States when it asserts that an investigating authority is free to ignore Article 11.1 of the AD Agreement when applying and interpreting Article 11.3.

26. We conclude that the foundation of the United States’ defence in this case is manifestly erroneous.

5. Likely continuation of dumping

27. We would now like to make some comments in relation to the determination of likely continuation of dumping.

28. First, responding to certain assertions made by the United States,¹⁴ we would like to comment on the precise nature of the determination in this case. It is in the issues and decisions memorandum,¹⁵ Section 1, the sub-section entitled “Department’s Position”, final paragraph, final sentence, which states that DOC finds that dumping has continued over the life of the Argentine order. The only reason given for that finding is the dumping margin calculated in relation to the original period of investigation (1 January to 30 June 1994).

29. We conclude that the finding is one of continuation of dumping and that the sole basis for that finding was the original dumping margin calculated by reference to the period 1 January to 30 June 1994. Thus the determination was based on out-of-date data together with the prospective determination.

30. Second, we would like to re-iterate the importance of Article 11.1 of the AD Agreement, which the Appellate Body has correctly confirmed is relevant to the interpretation of Article 11.3.¹⁶ The text of Article 11.1 AD Agreement, and particularly its use of the present tense, clearly confirms, in the opinion of the European Communities, that there must be a minimum temporal relationship between a finding of dumping and the imposition of a duty. A dumping determination has a shelf-life. It is not forever. Thus, once the relevance of Article 11.1 of the AD Agreement is acknowledged – a relevance erroneously denied by the United States – the inevitable outcome of the analysis becomes clear.

31. Third, the European Communities does not agree with the unqualified assertion made by the United States that in a sunset review investigation “an authority is considering what will happen in the future”.¹⁷ The investigating authority must also consider what happened in the past. The United

¹³ Appellate Body Report, *US – Carbon Steel from Germany*, para. 70; Panel Report, *EC-Tube and Pipe*, para. 7.113.

¹⁴ US First Written Submission, para. 54.

¹⁵ Exhibit ARG-51.

¹⁶ Appellate Body Report, *US – Carbon Steel from Germany*, para. 70; Panel Report, *EC – Tube and Pipe*, para. 7.113.

¹⁷ US First Written Submission, para. 255.

States admits this in paragraph 151 of its First Written Submission, when it admits that the authority will consider information about “prior and current dumping margins”.

32. Fourth, the European Communities does not agree with the distinction drawn by the United States between “the existence of a dumping margin” and “the magnitude of a dumping margin”,¹⁸ at least for the purposes of the present case, which concerns the continuation of an alleged margin of just 1.36 per cent. Given such a small alleged margin, it is impossible to be certain whether or not it exists “in general terms”, without calculating its magnitude (and sign) in a meaningful and mathematical way by reference to the rules in Article 2 AD Agreement. Furthermore, if the only known previous measurement was made (years earlier) using rules now known to have influenced the outcome decisively one way rather than the other, it is impossible to rely on that earlier measurement in order to assert that, in general terms, the margin still exists, without in fact investigating and determining its current magnitude and sign. And it is doubly problematic to proceed in that way when what is asserted is the existence of a *continued* margin, and when the means of measuring that margin have, in the intervening period, changed as a matter of law.

33. Fifth, the United States makes much of its assertions that Siderca had ample opportunity to submit information to the investigating authority; and insists that the relevant factual information is that “... contained in the administrative records of Commerce and the ITC ...”.¹⁹ So be it. The factual information on the basis of which Siderca’s dumping margin, if any, during the period from 1 January to 30 June 1994, was calculated and could again be calculated *is* in DOC’s administrative records. All DOC would have needed to have done would have been to run the data through a standard computer programme - *little more than the push of a button*. Unnecessary, says the United States, because in general terms there is dumping as defined by Article 2 AD Agreement (*I know a dumping margin when I see one*) and it is certain that if I make a specific measurement the presence of dumping will be confirmed. But in circumstances where it is in fact certain that specific measurement will reveal no dumping at all, and all the data is already in the hands of the investigating authority, in the opinion of the European Communities, such an approach is not consistent with the requirement that an authority conduct *an unbiased and objective* investigation.

34. Sixth, in *US-DRAMs*, the Panel concluded :

“... the scope of application of the AD Agreement is determined by the scope of the post-WTO review. Any aspects of a pre-WTO measure that are not covered by the scope of the post WTO-review do not become subject to the AD Agreement by virtue of Article 18.3 of the AD Agreement. By way of example, a pre-WTO injury determination does not become subject to the AD Agreement merely because a post-WTO review is concluded relating to the pre-WTO determination of the margin of dumping.”²⁰

35. Assuming, for the sake of argument, that this is correct, it follows that any aspect of a pre-WTO measure that *is* covered by the scope of the post WTO-review *does* become subject to the AD Agreement. The critical question then becomes whether or not, if there would be a post-WTO review covering the aspect of dumping, in which reliance would be made on a post-WTO dumping determination inconsistent with the Agreement, the review determination could be attacked on the grounds that the original determination is flawed. If the answer to this question is in the affirmative, then it follows from the above quotation, cited with approval by the United States,²¹ that, by virtue of Article 18.3 of the AD Agreement, the same would apply when, as in the present case, the original dumping determination was made under the Tokyo Round Agreement. The Panel must answer this

¹⁸ US First Written Submission, para. 254.

¹⁹ US First Written Submission, para. 131.

²⁰ Panel Report, *US – DRAMs*, para. 6.14.

²¹ US First Written Submission, para. 260.

critical question in the affirmative, because the United States itself affirms that if, in the original determination, there is some breach of Article 2 of the AD Agreement “in general terms”, the review determination will also be vitiated.²² *US – DRAMs* therefore confirms that the fact that the original determination was made under the Tokyo Round Agreement offers no valid defence for the United States. The United States cannot escape this conclusion in this case particularly because it made a single determination of *continuation* of dumping, spanning the original investigation period, the life of the order, and stretching into the future.

6. Zeroing

36. With respect to zeroing, we would like to take this opportunity to re-iterate our agreement with the arguments presented not only by Argentina, but also by Korea, at pages 2 to 7, 12 and 14 of its written submission; by Japan, at pages 1 to 3, 5 to 8 and 19 of its written submission ; and by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, at pages 2 to 4 of its written submission. The relationship between Articles 2 and 11 of the AD Agreement is such that the United States was not entitled to use, in the contested sunset determination, the original dumping determination made in respect of the period 1 January to 30 June 1994 – a determination that involved zeroing inconsistent with Article 2 of the Agreement – as the *sole* basis for its determination of continuation of dumping.

* * *

Thank you for your attention.

²² US First Written Submission, para. 256.

ANNEX D-4

THIRD PARTY ORAL STATEMENT OF JAPAN

10 December 2003

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	54
II. ARGUMENT.....	54
A. DUMPING DETERMINATIONS IN SUNSET REVIEWS	54
1. The US arguments on requirements for “dumping” determination in sunset reviews are incorrect.....	54
2. Dumping determination based on margins calculated in a pre -WTO proceeding using the zeroing methodology is WTO-inconsistent.....	55
B. INJURY DETERMINATIONS IN SUNSET REVIEWS	55
C. WTO-INCONSISTENCY OF WAIVER PROVISIONS AS SUCH	56
1. Inconsistency of Waiver Provisions with Article 11.3 as such.....	56
2. Failure of US arguments based on Article 6.....	56
3. Expedite review procedures are also inconsistent with Article 6.2.....	57
D. WTO-INCONSISTENCY OF THREE SCENARIOS IN <i>SUNSET POLICY BULLETIN</i> AS SUCH	57
III. CONCLUSION.....	58

I. INTRODUCTION

1. Mr. Chairman and distinguished Members of the panel, on behalf of the Government of Japan, I thank you for your attention to this important matter. This morning, we will not repeat our arguments in our written submission. Rather, we would like to focus on certain arguments presented by parties that we did not address in detail in our written submission. Before discussing specific issues, Japan would like to note that the panel report in *US – Carbon Steel from Japan*¹ is currently pending before the Appellate Body. It is regrettable that the schedule of this panel meeting does not allow us to offer an argument based on the Appellate Body report. Japan believes that the Appellate Body will accept our arguments and respectfully requests this Panel to carefully review its analysis.

2. First of all, we would like to briefly touch upon the request by the US for preliminary ruling under Article 6.2 of the DSU. We don't intend to make a detailed argument on this matter. We confine ourselves to saying that we have had no particular problem with the panel request of Argentina, when drafting our third party submission.

II. ARGUMENT

A. DUMPING DETERMINATIONS IN SUNSET REVIEWS

1. **The US arguments on requirements for “dumping” determination in sunset reviews are incorrect**

3. The United States confuses the determination of “dumping” with the precise calculation of future dumping margins, and then attempts to reject the application of Article 2 to Article 11.3.² These arguments must be rejected.

4. The US argument does not recognize the significance of the terms “continuation or recurrence” in Article 11.3. The words “determine” and “continuation or recurrence” in Article 11.3 require the authorities to determine whether the dumping currently exists at the time of a sunset review and how the current state is likely to continue or change at a point in the future. Focusing only on the future event, the US fails to give any meaning to these explicit terms in Article 11.3.

5. Contrary to the US argument, Article 2 does not require the US authority to calculate precisely future dumping margins. The authorities' discretion, however, is not unlimited. As discussed in our third party submission, the authorities must base its determination on credible evidence in accordance with Articles 2 and 11.3. To determinate the current state of dumping, the authorities must have the credible evidence showing a positive margin of dumping, which may be calculated in the sunset review, or in some cases, in the most recent administrative review. To determinate that the dumping is likely to continue or recur, the authorities must have the credible evidence showing the projection of the export price and the normal value of the product at a point in the future. In both determinations, precise calculation of dumping margin is not the requisite. Thus, US argument should be rejected.

¹ Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, (“*US – Carbon Steel from Japan*”), WT/DS244/R (14 August 2003).

² See US First Submission, para. 254.

2. Dumping determination based on margins calculated in a pre-WTO proceeding using the zeroing methodology is WTO-inconsistent

6. The United States argues that Article 18.3 prevents Argentina from challenging the validity of the dumping margin calculated in the pre-WTO proceeding.³ We disagree.

7. Contrary to the US argument, Article 18.3 explicitly sets forth that the provisions of the AD Agreement shall apply to “reviews of existing measures.” This clarifies that the entire process of the sunset review of this OCTG case is subject to the current AD Agreement, including the establishment and evaluation of evidence. The panel report in *US – DRAMs* further clarified that the dumping margins in the original investigation, when it is used as the evidence in a sunset review, must be consistent with the provisions of the AD Agreement. The panel has specifically stated “the AD Agreement applies to those parts of a pre-WTO measures that are included in the scope of a post-WTO review.”⁴ The scope of a post-WTO review, a sunset review in this case, is not limited to the determination itself, but extends to evidence, on which the determination of the sunset review is based. The authorities cannot make a WTO-consistent determination, if its evidentiary basis is WTO-inconsistent. Therefore, the determination based on the margin of dumping calculated in a pre-WTO proceeding using the zeroing methodology, which is inconsistent with Article 2, is inconsistent with Articles 2 and 11.3 of the AD Agreement.

B. INJURY DETERMINATIONS IN SUNSET REVIEWS

8. The US argument on footnote 9⁵ of the AD Agreement is not based on the interpretation of its ordinary meaning, and thus must be rejected. As discussed in our third party submission, the first phrase of footnote 9 “{u}nder this Agreement” clarifies that the term “injury” throughout the whole AD Agreement, including the term in Article 11.3 shall be understood in accordance with footnote 9.

9. The phrase in the said footnote “shall be interpreted in accordance with the provisions of this Article”⁶ further clarifies application of substantive rules in Article 3 to Article 11.3. The phrase “likely to lead to continuation or recurrence” in Article 11.3 does not change the core concept of “injury”. To find a “recurrence” of injury, for example, the authorities must first find that injury through the effects of dumping ceased, and then must find that the injury will recur at a point in the future. These analyses do not affect the substantive requirement that the authorities must find injury based on positive evidence and on objective examination of the effect of dumped imports on prices and the volume of dumped imports. In the same vein, the requirement for evaluating economic factors listed in Article 3.4 as well as the causation and non-attribution requirements under Article 3.5 must be satisfied under the sunset review proceeding.

10. The United States argues that likelihood of injury as defined in Article 11.3 requires “decidedly different analysis”⁷ from that for the injury analysis in the original investigation. Contrary to the US argument, Article 3 expects prospective analysis even in the original investigation. Footnote 9 and the provisions of Article 3 clarify that all the provisions of Article 3 apply to the determination of the threat of material injury. Article 3.7 then sets forth that the authorities must examine a situation at a point in the future, at which the effects of dumping will cause material injury to the domestic industry. In a threat case, therefore, the examination of economic factors and causations under Articles 3.4 and 3.5 also must be made at the point in the future. The analysis of

³ See US First Submission, paras. 258-260.

⁴ Panel Report, *United States – Anti-Dumping Duties on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabits or Above from Korea* (“*US – DRAMs*”), WT/DS99/R (29 January 1999), para. 6.14.

⁵ See US First Submission, paras. 290-296.

⁶ *Ibid.*

⁷ US First Submission, para. 301.

“injury” in sunset reviews is quite analogous to the analysis required in Article 3 for the threat of material injury. As such, Article 3 contemplates the prospective injury analysis, as Article 11.3 requires. The US argument thus has no merits.

11. In this OCTG case, the ITC failed to evaluate individual factors as listed in Article 3.4. The ITC also failed to separate and distinguish the effects of known factors, which the ITC knew at the time of the sunset review, from effects of dumping. The ITC’s injury determination in the sunset review, therefore, was inconsistent with Articles 3.4 and 3.5.

C. WTO-INCONSISTENCY OF WAIVER PROVISIONS AS SUCH

1. Inconsistency of Waiver Provisions with Article 11.3 as such

12. As discussed in our third party submission, the Waiver Provisions are inconsistent with Article 11.3 because they require DOC to make an affirmative dumping determination in a sunset review without reviewing any evidence on the record or considering likelihood of continuation or recurrence of dumping, where a responding party fails to submit its substantive response.

13. Japan would like to note that the US argument that “the affirmative likelihood determination described in section 751(c)(4)(B) is limited to the party that failed to respond”⁸ appears to contradict with its own argument that a “dumping” determination in a sunset review must be made on an “order-wide” basis.⁹ If an affirmative finding for a non-responding party pursuant to the Waiver Provisions would be a basis of the overall order-wide determination, then the affirmative finding would necessarily affect adversely other parties. The United States should clarify this apparent discrepancy.

2. Failure of US arguments based on Article 6

14. The United States also attempted to justify its Waiver Provisions upon assumption that an exporter is obliged to submit information within 30 days after the initiation of a sunset review.¹⁰ Lack of a response from a responding party, however, does not provide justification for the authorities to make an affirmative dumping determination without any positive evidence. As discussed in our third party submission, the authorities have the serious primary burden to demonstrate the likelihood of continuation or recurrence of dumping. The burden cannot be shifted until the authorities establish the *prima facie* case based on positive evidence.

15. In addition, it appears that the United States considers that a public notice of the initiation in the *Federal Register* constitutes the questionnaire, and thus serves as notice to responding parties under Article 6.1.¹¹ We disagree.

16. This requirement under Article 6.1 must be understood in the context of Article 6.1.1 and Annex II. Article 6.1.1 requires that the responding parties shall be given at least 30 days for reply after “receiving questionnaires.” Thus, the requirements of Article 6.1 is based on the action of the authorities’ delivering questionnaires. In this case, DOC did not even issue questionnaires to respondents. DOC stated in the *Federal Register* only that interested parties may “respond to the notice of initiation.” DOC cannot passively sit by and hope that all the relevant information will simply appear, nor can DOC fault an interested party for not providing information that was not specifically requested.

⁸ US First Submission, para. 146.

⁹ US First Submission, para. 214 (“the sunset determination is made on an order-wide basis, not a company-specific basis.”)

¹⁰ See US First Submission, para. 144-145.

¹¹ See US First Submission, paras. 222-223.

17. Further, paragraph 1 of Annex II provides that the authorities shall “ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available.” A public notice in the territory of a Member cannot be a sufficient method to “ensure” that the party, which may be on the other side of the earth, is aware that DOC will be free to determine on the basis of the facts available, if the party fails to submit its response. DOC’s public notice, therefore, does not satisfy the notice requirements under Article 6.1.

3. Expedite review procedures are also inconsistent with Article 6.2

18. Japan notes that the rationale on the inconsistency with Articles 6.2 and 6.9 of the Waiver Provisions discussed in our third party submission also may apply to DOC’s expedited review procedures. DOC regulations on the expedite reviews provide that DOC does not make a preliminary determination,¹² and accordingly does not disclose to responding parties essential facts under Article 6.9, nor does DOC provide interested parties any opportunity to comment on these essential facts under Article 6.2. Thus, DOC’s expedited review procedures are also inconsistent with Articles 6.2 and 6.9.

D. WTO-INCONSISTENCY OF THREE SCENARIOS IN *SUNSET POLICY BULLETIN* AS SUCH

19. The United States argues that the *Sunset Policy Bulletin* must have “functional life of its own” and must be “mandatory” under its domestic jurisprudence to be WTO-inconsistent as such.¹³ The alleged criteria, however, are not provided in any provision of WTO Agreements nor have been confirmed by the Appellate Body.

20. Even assuming that the criteria of “functional life of its own” and “mandatory” nature of the instruments are relevant, the manner to establish that an instrument meets the criteria should not be limited to the mere language of the instrument. The Appellate Body in *US – Carbon Steel* has explained that a legal instrument is reviewable “as such” upon showing “consistent application” of the instrument, among other evidence.¹⁴

21. In this dispute, Argentina demonstrated that DOC applied the three scenarios in the *Sunset Policy Bulletin* consistently to all sunset reviews. The United States argues that DOC “may” depart from the *Sunset Policy Bulletin*, and that “Sometimes Commerce ‘normally’ will determine likelihood, and at other time it ‘normally’ will not”.¹⁵ The evidence, however, points to the contrary. DOC has strictly followed the three scenarios in all sunset reviews, and has never departed. Moreover, the mere language of “normally,” inserted immediately preceding the mandatory term “will,” does not relieve a Member from WTO-inconsistency inquiry as such. The three scenarios are therefore reviewable administrative procedures under Article 18.4.

¹² See Appendix VIII-B-Schedule for Expedited Sunset reviews in DOC sunset regulations, 63 Fed. Reg. 13516, 13525 (20 March 1998) (Exhibit US-3)

¹³ See US First Submission, paras. 194 and 200.

¹⁴ See Appellate Body Report, *US – Carbon Steel*, para 154.

¹⁵ US First Submission, para. 181.

III. CONCLUSION

22. For the foregoing reasons, Japan respectfully requests this Panel to clarify that the United States acted inconsistently with Articles 2.1, 2.4, 3.1, 3.4, 3.5, 6.1, 6.2, 11.3, and 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement.

ANNEX D-5

THIRD PARTY ORAL STATEMENT OF MEXICO

10 December 2003

Distinguished Members of the Panel

1. The main point of this dispute is compliance by the United States with its obligations under Article 11.3 of the Anti-Dumping Agreement. The obligation consists in terminating definitive anti-dumping duties after they have been in force for five years, unless it can be established that the requirements in the same article for maintaining them in force are met. Those requirements are that, in a review conducted under the terms of Article 11.3 of the Agreement, and other articles that are also applicable, it is determined that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.

2. The main point of this submission is to emphasize that, regardless of the procedural method used by the United States Department of Commerce, whenever any interested party of the industry in that country has requested the continuation of anti-dumping measures, the Department of Commerce has unfailingly found a justification to arrive at a positive determination of continuation or recurrence of dumping and injury.

3. Argentina has demonstrated in its submission the existence of a presumption, which operates without exception and without analysis in every case. The case of oil country tubular goods from Mexico, another case appearing in the same group of measures imposed in 1995 and included as Tab 179 in Exhibit 63 of Argentina's submission, is another very clear example. In this case the Department of Commerce decided to conduct a five-year review or sunset review. The background to that review was four annual reviews in which TAMSA, the main Mexican export firm, which participated in all of them, had had a dumping margin of ZERO in the last three reviews. YES, I repeat, the Mexican firm had a dumping margin of zero in three consecutive reviews.

4. Despite this, and on the basis of the pattern of irrefutable presumption established by the SAA and the SPB, the Department of Commerce arrived at a positive determination of continuation or recurrence of dumping without making any positive analysis or conducting a review based on actual evidence to substantiate its decision. This clearly shows that, over and above the arguments to try and "dress up" each case, the slightest participation by United States industry automatically leads to a positive determination by the Department of Commerce, something that has occurred in 100 per cent of the cases of five-year reviews or sunset reviews conducted to date.

5. Lastly, allow me to refer to the preliminary objections to Argentina's request to establish a Panel. In this connection, the Government of Mexico considers that the request fully complies with DSU Article 6.2 and that it is a delaying tactic by the United States Government to hold back an analysis by this Panel of the merits of the case. Should the Panel decide to adopt an additional procedure to meet those objections, Mexico respectfully requests that its rights as a third party to the dispute be respected.

ANNEX D-6

THIRD PARTY ORAL STATEMENT OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

10 December 2003

Thank you, Mr. Chairman and members of the Panel. We would also like to thank the delegations of Argentina and the United States for allowing us the time to express our views in this dispute as a third party.

Pursuant to our strong systemic interest in the proper interpretation of relevant WTO provisions dealing with sunset reviews, we presented in our third party submission what we consider to be the correct reading of Article 11.3 of the Anti-Dumping Agreement. We made three main points:

First, we believe that Articles 2 and 3 of the Anti-Dumping Agreement should be taken into account during sunset reviews. The text of Article 11.3 is unambiguous with regard to the requirements that authorities must meet in order to apply an anti-dumping order beyond five years: the authorities are obliged to “**determine**, in a review...that the expiry of the duty would be likely to lead to continuation or recurrence of **dumping** and **injury** [emphasis added].” While we recognize that the nature of a sunset review may differ from an original investigation because of the prospective element indicated by the words “likely to lead to continuation and recurrence”, the underlying determination to be made by the authorities, nevertheless, relates directly to dumping and injury.

Article 2 and Article 3 of the Anti-Dumping Agreement govern the “Determination of Dumping” and the “Determination of Injury.” These two articles inform Members as to the principles to be applied in determining what constitutes dumping, and what constitutes injury. Be it current or prospective, original or sunset review, the authorities, in making any determination on dumping and injury, cannot avoid referencing Article 2 and 3 because the two articles are the only articles in the Anti-Dumping Agreement that deals with the question of what constitute dumping and injury. Therefore, Article 11.3, by instructing the authorities to make a determination on the likelihood of continuation or recurrence of dumping and injury, must necessarily be also instructing the authorities to apply, wherever appropriate, Article 2 and 3.

Moreover, we believe that the text of Article 11.3 includes an obligation to make a **positive** determination that takes into account information relevant to the determination at hand, namely the likelihood of continuation or recurrence of dumping and injury. This determination should be separate from the original investigation. Past determination of dumping does not inform as to the likelihood of future dumping. Similarly, past injury based on past dumping margin does nothing to show the likelihood of future injury caused by dumping. Therefore, data and information from the original investigation must be updated and made relevant to the specific determination for sunset review.

In making that positive sunset determination, authorities cannot completely discard the disciplines outlined by Articles 2 and 3. Article 11.1 provides that “an anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract **dumping** which is causing injury [emphasis added].” The Panel in *EC – Pipe Fittings from Brazil* explained that Article 11.1 contains “a general and overarching principle, the modalities of which are set forth in paragraphs 2 (and 3) of that Article.” Article 11.1 thus informs Members of the purpose behind Article 11.3, which is the termination of the anti-dumping order within five years, except under limited circumstances. In

order for Article 11.3 to achieve that purpose, the sunset determination must follow the disciplines of Articles 2 and 3. Otherwise, Members would be able to conduct a cursory sunset review and extend the anti-dumping duty indefinitely, rendering Article 11.1 and 11.3 meaningless.

Second, we stated in our third party submission that in our view, the expedited review procedure resulting from a waiver determination, pursuant to 19 USC §1675(c)(4)(B), is inconsistent with Article 11.3. As we have already stated above, we consider the text of Article 11.3 to require the authorities to make a positive determination on the likelihood of continuation or recurrence of dumping and injury. On its face, 19 USC §1675(c)(4)(B) does not allow such a determination by the authorities once a foreign interested party is deemed to have waived its participation. Instead, the Department of Commerce is directed automatically to conclude, once participation is deemed waived, that the termination of the order would likely lead to continuation or recurrence of dumping. In our view, a review with the finding already mandated by statute can hardly be considered a “determination” within the meaning of Article 11.3. Therefore, 19 USC §1675(c)(4)(B) is inconsistent with Article 11.3.

Third, with regard to the issue of irrefutable presumption, we disagree with Argentina that an irrefutable presumption of likely dumping based on the Statement of Administrative Action and the *Sunset Policy Bulletin* can be inferred from the statistics on US sunset review determinations compiled by Argentina. We do believe, however, that the statistics raise a serious doubt as to the objectivity of the authorities in conducting sunset reviews. Therefore, we see the fact that dumping was found likely to continue or recur in 100 per cent of the sunset reviews in which a domestic interested party participated in the proceedings as strong evidence in establishing Argentina’s *prima facie* case of a violation of Article 3.1 of the Anti-Dumping Agreement. Furthermore, in failing to make an objective examination with regard to injury, the authorities did not properly conduct its sunset review, thus violating Article 11.3.

Finally, with regard to the preliminary issue, we consider it unnecessary in this case for us, as a third party, to make substantial comments on a purely procedural question. However, we would just like to state that we did not encounter any difficulties related to DSU Article 6.2 in preparing our third party submission and oral statement.

Members of the Panel, in sum, we believe that Articles 2 and 3 apply to sunset reviews and that the United States has acted inconsistently with Article 11.3 of the Anti-Dumping Agreement. The Panel should make its finding accordingly.

Thank you.

ANNEX D-7

OPENING AND CLOSING ORAL STATEMENTS OF ARGENTINA – SECOND MEETING

Opening Statement – 3 February 2004

I. INTRODUCTION

1. Mr. Chairman, members of the Panel, on 9 January 2004, the DSB adopted the report of the Appellate Body in *Sunset Review of Steel from Japan*. This decision expressly confirms the positions that Argentina has taken throughout this dispute about the obligations imposed on investigating authorities during sunset reviews.

2. The Appellate Body made clear that Article 11.3 imposes significant and substantive obligations on any WTO Member seeking to maintain an anti-dumping order beyond its scheduled expiration date. Indeed, the Appellate Body emphasized the “exacting nature” of the commitments under Article 11.3 (para. 113), and stated that authorities conducting a sunset review “must act with an appropriate degree of diligence” before arriving at a “reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination.” (para. 111) Nowhere in the Appellate Body decision is there an endorsement of “passivity” and “presumptions.” To the contrary, the Appellate Body stressed that “Article 11.3 assigns an active rather than a passive decision-making role to the authorities.”

3. Even prior to the Appellate Body decision, the US position in the current dispute lacked credibility. Now, however, the US position has become completely untenable.

4. The US Second Submission provides scant reference to the Appellate Body decision. Moreover, when the decision was adopted by the DSB on 9 January, the US statement – incredibly – made *no mention at all* of Article 11.3. Unfortunately for the United States, the Appellate Body’s decision in *Sunset Review of Steel from Japan* is dispositive on many of the issues currently before this Panel. Argentina highlighted the importance of the decision in its Second Submission, and will do so again this morning.

5. In the First Meeting of the Parties, Argentina explained the simple facts giving rise to this dispute. These facts led to several claims that US law, both as such and as applied, violates the substantive obligations of the United States. Argentina stands firmly behind all of its claims, which find significant support from the Appellate Body’s most recent articulation of the sunset obligation in *Sunset Review of Steel from Japan*.

6. In Argentina’s view, there is no basis to assert that the US Department of Commerce’s (the “Department”) sunset review of Argentine OCTG was decided by an analysis of the facts. Rather, the Department’s determinations make clear that the outcome of the case was the result of the application of the waiver provisions. Argentina respectfully asks that the Panel look to the Department’s written determination as the only valid explanation of what happened to Siderca/Argentina in the sunset review of Argentine OCTG. Indeed, the Department’s application of the waiver provisions to Siderca (or, at a minimum, to Argentina) is plainly indicated in the Department’s *Issues and Decision Memorandum*. (ARG-51 at 5) It is telling that the United States resorts to: (1) *ex post facto* rationalizations in efforts to explain that its sunset determinations do not mean what the words in those determinations indicate; and (2) argumentation that any confusion resulting from the language of the Department’s determinations is simply the result of “inartful” drafting.

7. Nevertheless, even when giving the United States the benefit of the doubt that the Department actually engaged in an analysis of facts, the US position on the core issue is unsustainable. Put simply, the legal and factual basis for the United States' decision to invoke the exception in Article 11.3 is in direct conflict with the "exacting" obligations of Article 11.3. Indeed, a 1.36 per cent dumping margin from the original investigation (calculated using the WTO-inconsistent practice of zeroing negative margins) and a decline in import volume – and nothing more – whether taken together or considered alone are an insufficient basis for the Department's determination of likely dumping under Article 11.3. This is clear after the Appellate Body's decisions in *Steel from Germany*, and *Sunset Review of Steel from Japan*.

8. It is also clear that when the domestic industry is interested in maintaining the measure, no respondent interested party has ever overcome the WTO-inconsistent presumption of likely dumping embodied in the US statute, the Statement of Administrative Action ("SAA"), and the *Sunset Policy Bulletin*, and as evidenced by the Department's consistent practice. The US industry has 223 wins and 0 losses on the issue of likely dumping. (See ARG-63 and ARG-64).

9. As for the likelihood of injury determination, analysis of the US International Trade Commission's (the "Commission") sunset determination in this case shows that the Commission, consistent with its practice, did not engage in any meaningful analysis of whether injury is "likely" to continue or recur, but rather based its determination on isolated factors grounded in speculation that cannot satisfy the meaning of the term "likely" – which, as the Appellate Body stated in December, means "probable." Further, the Commission made its determination on a cumulated basis of all countries subject to the measure, which has the effect of negating the rights of individual Members who are subject to a cumulated analysis.

10. Argentina will not repeat all of the arguments set forth in its First and Second submissions, and in its first oral statement. Today, Argentina will first review the nature of the Article 11.3 obligation in light of the *Sunset Review of Steel from Japan* case. Second, Argentina will demonstrate that the purported factual basis for the Department's determination of likely dumping is patently inconsistent with the requirements of Article 11.3. Third, Argentina will highlight the contradictions that continue in the US position, noting several instances where the US asks the Panel not to read literally the words used in the sunset determination. Fourth, Argentina will demonstrate that none of the US arguments is credible in light of the WTO-inconsistent presumption that is applied in all Department sunset reviews in which the domestic industry is interested. Fifth, Argentina will demonstrate the Commission's violations of the Anti-Dumping Agreement. Sixth, Argentina will briefly comment on the preliminary objections that the United States has raised, that Argentina has rebutted, and that now seem to be abandoned. Finally, Argentina will offer its conclusions.

II. TERMINATION OF THE MEASURE IS THE RULE; THE EXCEPTION CAN BE INVOKED ONLY THROUGH A "REVIEW" INVOLVING A "RIGOROUS EXAMINATION" LEADING TO THE REQUISITE "DETERMINATION" UNDER ARTICLE 11.3

11. The United States attempts to recast the Article 11.3 obligation as merely an obligation to afford parties the opportunity to participate in sunset reviews. In paragraph 31 of its Second Submission, the United States says: "the question in this dispute essentially is whether Argentina has demonstrated that Commerce did not provide respondent interested parties the opportunity to participate in the review and present evidence." Argentina could not disagree more; this case is about substantive obligations also. The United States cannot evade the "exacting" obligations under Article 11.3 by shifting the burden from the administering authority to respondent interested parties.

12. The United States completely ignores the unambiguous statements of the Appellate Body in *Sunset Review of Steel from Japan* about the significant and substantive obligations imposed by

Article 11.3, including the following: termination is the rule; continuation is the exception (para. 104); the nature of the obligations to conduct a “review” and make a “determination” (para. 111); the likelihood determination requires a “forward-looking analysis” (para. 105); Article 11.3 contains “exacting” obligations and requires a “rigorous examination” (para. 113); “dumping” as used in Article 11.3 means “dumping” in Article 2 (para. 109); the term “likely” in Article 11.3 means “probable” (paras. 110-111); that the *Sunset Policy Bulletin* is a measure that is subject to WTO-challenge (paras. 99, 101); that the *Sunset Policy Bulletin* might be shown – with evidence of the Department’s consistent application – to establish WTO-inconsistent presumptions (paras. 177-178). The rights and obligations flowing from Article 11.3 can hardly be characterized as simply “procedural.”

13. As Argentina has repeatedly stressed – and as the Appellate Body has made clear – the primary obligation of Article 11.3 is termination of anti-dumping duties after five years. The Appellate Body in *Sunset Review of Steel from Japan* reaffirmed the principle it first articulated in *Steel from Germany*. Continuation of the measure is the exception, and is only permissible if the authorities conduct a “review,” undertake a “rigorous examination” of the facts, and “determine” that termination of the anti-dumping measure would be “likely” to lead to continuation or recurrence of injurious dumping. (Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 104, 114) The Appellate Body also reaffirmed that, “[i]f any one of these conditions is not satisfied, the duty must be terminated.” (*Id.* at para. 104)

14. As noted above, in interpreting the meaning of the words “review” and “determine” in Article 11.3, the Appellate Body noted the “investigatory and adjudicatory aspects” of Article 11.3 reviews and that “authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination.” (*Id.* at para. 111)

15. With respect to the evidentiary basis for the likelihood determination, the Appellate Body affirmed the Panel’s statement that the authority must ground its determination on a “sufficient factual basis.” (*Id.*, paras. 114-115 (citing Panel Report, para. 7.271)) In addition, the Appellate Body has held that the authority must make a “fresh determination” in a sunset review that is forward-looking and “based on credible evidence.” (Appellate Body Report, *Steel from Germany*, para. 88)

16. Despite the clear findings of the Appellate Body, the United States continues to argue that Article 11.3 imposes only “limited requirements” on Members. (US Response to Panel Questions, para. 22) By focusing on procedure over substance, the United States seeks to shift the burden of the obligation under Article 11.3 completely to respondent interested parties. In so doing, the United States essentially ignores the “exacting nature” of the obligation Article 11.3 imposes on the importing Member in order to invoke the exception and justify the maintenance of an anti-dumping measure beyond five years: that is, the obligation to “determine” in a “review” that termination of the measure would likely lead to continuation or recurrence of dumping and injury.

III. THE LIKELIHOOD OF DUMPING

A. THE ALLEGED SUBSTANTIVE BASIS FOR THE DEPARTMENT’S LIKELIHOOD DETERMINATION VIOLATES US WTO OBLIGATIONS

1. The Department’s reliance on the decline in import volume, and on the 1.36 percent margin from the original investigation and the related deposit rate is legally insufficient under Article 11.3

17. The US Second Submission argues that the Department’s likelihood determination was based solely on two factors: “Commerce found that dumping duties were levied and collected, at the dumping margins assigned in the original investigation, against Argentine OCTG imported into the

United States during the five-year period preceding the sunset review. Commerce also . . . found that US imports of Argentine OCTG had declined substantially immediately after the order was imposed and remained at depressed levels for the entire five-year period prior to the sunset review.” (US Second Submission, para. 34)

18. **A decline in import volume alone is a legally insufficient basis for a Likelihood Determination under Article 11.3.** Following the imposition of the US anti-dumping measure on Argentine OCTG, Siderca chose to stop exporting to the US market. The Appellate Body has explained that declines in import volumes following the imposition of anti-dumping duties can result from many factors apart from the duties: “The cessation of imports . . . and the decline in import volumes . . . could well have been caused or reinforced by changes in the competitive conditions of the market-place or strategies of exporters, rather than by the imposition of the duty alone. Therefore, a case-specific analysis of the factors behind a cessation of imports or a decline in import volumes (when dumping is eliminated) will be necessary to determine that dumping will recur if the duty is terminated.” (Appellate Body Report, *Sunset Review of Steel from Japan*, para. 177 (emphasis added)) Despite the fact that Siderca had developed a successful business strategy without relying on the US market, the Department presumed that declining import volumes indicated that dumping would be likely to continue or recur upon termination of the order. In doing so, it was following the direction of the SAA and SPB.

19. The Department did not analyze the factors behind the decline in imports of Argentine OCTG. Nor did it request additional information from Siderca, which had pledged to cooperate fully.

20. **The 1.36 percent margin from the original investigation and the existence of a deposit rate are not evidence of continued dumping and cannot serve as the basis for the Department’s Likelihood of Dumping Determination.** The United States explains a new theory in its Second Submission regarding the continuation of dumping. It goes like this: a minimal quantity of OCTG was imported into the United States in the 5 years following the imposition of the measure, the US importer must have paid the 1.36 per cent deposit on the imports, and, because the importer did not request a review, the deposits were converted into definitive anti-dumping duties, thereby proving that dumping “continued.” The argument has major flaws.

- First, there is no mention of any of this on the record of the sunset review. The Department simply stated that “there have been above *de minimis* margins for the investigated companies throughout the history of the orders,” and therefore “dumping continued after the issuance of the orders[.]” (*Issues and Decision Memorandum* at 5 (ARG-51)). There is no reference to the payment of anti-dumping deposits constituting evidence of continued dumping.

- Second, the explanation given in the *Issues and Decision Memorandum* actually contradicts the new explanation by the United States. Who are the “investigated companies” from Argentina to which the Department refers? Everyone concedes that the only company ever investigated was Siderca (a seamless pipe producer), and the Department determined several times that Siderca did not ship OCTG to the US for consumption in the US. If Siderca, the only “investigated company,” did not ship, how can there be “above *de minimis* margins for the investigated companies” throughout the life of the history of the orders.” Clearly, the statements are simply wrong with respect to Argentina, and just as clearly they contradict the new explanation that the importation of OCTG from other, non-investigated, non-reviewed exporters constitutes the evidence of continued dumping.

- Third, the Department keeps talking about the “entries,” as if it had evidence on the record of many entries of Argentine OCTG during the relevant period. In fact, the Department had made several findings in annual reviews that any entries, if they existed, were extremely isolated, and were not explained on the record. To clarify this issue, Argentina refers the Panel to **Chart 4** (Exhibit ARG-69), which summarizes the Department’s findings with respect to import volume in the four annual reviews that it had completed by the time of its sunset review determination. In the end, the

record show possibly two entries, both welded, one of which was 154 tons and the other of an undetermined amount. We also know that the statistics used as the basis of the alleged volume of imports in each review contained several errors ranging from the misclassification of products to the inclusion of non-consumption entries. Chart 4 also contains references to the Exhibit number so that the Panel can review this evidence.

- Fourth, the new explanation offered by the United States makes no sense. The fact that an importer is required to pay a small anti-dumping duty deposit upon importation, and that the Department does not conduct a review of the imports made by the importer, says absolutely nothing about whether the imports are dumped or whether dumping has continued. Article 2 of the WTO Anti-Dumping Agreement defines dumping in terms of a substantive analysis of export price and normal value. Nothing in Article 2 provides that payment of a required deposit can subsequently be “deemed” to be an admission of dumping either for Article 2 and certainly not for Article 11.3. The United States cannot credibly argue that it has ever conducted such an analysis since the imposition of the measure in August 1995. It is surprising that the United States even offers this justification. The United States often explains to its trading partners that the deposits required as part of its retrospective assessment system are not evidence of dumping, and that it cannot determine whether dumping has occurred until it performs a substantive review of the actual imports during the relevant period. (See Panel Report, *US – Section 129(c)(1)*, DS221, paras. 2.6-2.8), emphasizing the need for a substantive analysis in an anti-dumping review in order to determine whether dumping exists in a retrospective system). The explanation in the Second Submission that these deposits prove the continuation of dumping is simply wrong. Any duties that might have been collected resulted from the lack of an administrative review, so that entries were liquidated without any substantive analysis of dumping.

21. For these reasons, the Panel must conclude that the United States had no evidence of continued dumping at the time of the sunset determination, and that the new theory offered now by the United States is nothing more than an *ex post facto* justification that the Panel must not consider. Such justifications cannot be accepted. (See Panel Report, *Poultry from Brazil*, DS241, para. 7.49 (“[W]e do not believe that, as a panel reviewing the evaluation of an investigating authority, we are to take into consideration any arguments and reasons that are not demonstrated to have formed part of the evaluation process of the investigating authority”); Panel Report, *Argentina – Ceramic Tiles*, DS189, para. 6.27; Panel Report, *Guatemala Cement*, DS156, para. 8.245))

22. Also, the United States still has never offered a logical explanation of what the 1.36 per cent rate says about future dumping, let alone the likelihood of future dumping. The rate is historic, with no relationship whatsoever to the forward-looking determination required to invoke the exception of Article 11.3 and continue the measure. As the Appellate Body made clear, “the likelihood determination is a prospective determination. In other words, the authorities must undertake a forward-looking analysis and seek to resolve the issue of what would be likely to occur if the duty were terminated.” (Appellate Body Report, *Sunset Review of Steel from Japan*, para. 105). The Appellate Body ruled that “mere reliance” on the determination made in the original investigation is not enough. (See Appellate Body Report, *Steel from Germany*, para. 88.) The Appellate Body rulings reinforce Argentina’s view of the extreme and unfair situation presented in this case.

23. The Department’s reliance on the 1.36 margin from the original investigation and the decline in imports cannot satisfy the obligation under Article 11.3.

2. Decisive reliance by the Department on a WTO-inconsistent margin as the basis for the Likelihood Determination is inconsistent with Article 11.3

24. The United States claims that during sunset reviews “Members are not obligated to calculate ‘new’ dumping margins. They are merely obligated to provide respondent interested parties opportunities to offer evidence in support of negative likelihood determination. Therefore, the magnitude of dumping is not pertinent to making a determination with regard to likelihood of

dumping.” (US Second Submission, para. 37, footnotes omitted). This answer demonstrates how the United States is attempting to recast the obligations under Article 11.3 and erroneously shift responsibility from the administering authority (which holds the substantive obligations under Article 11.3) to the exporters of the Member holding the right of termination under Article 11.3.

25. Argentina has not argued, and is not arguing, that Members are obligated to calculate a new dumping margin in connection with a review conducted under Article 11.3. However, the Appellate Body has made clear that reliance on a WTO-inconsistent margin – such as a margin calculated using the practice of zeroing – “taints” the likelihood determination under Article 11.3. Specifically, the Appellate Body found that “if a likelihood determination is based on a dumping margin calculated using a methodology inconsistent with Article 2.4, then this defect taints the likelihood determination too.” (Appellate Body Report, *Sunset Review of Steel from Japan*, para. 130)

26. In this case, there can be no doubt that the 1.36 per cent margin that the Department relied on as the basis for its likelihood of dumping determination was based on a calculation method that is inconsistent with Article 2.4. To calculate the 1.36 per cent margin, the Department applied “zeroing” by setting all negative margins to zero, and summed the remaining positive margins. The effect was to disregard the existence and magnitude of the negative margins in determining the amount of “dumping” arising from the sales under review. This can be seen clearly in Exhibit ARG-52 to Argentina’s First Submission and in Exhibit ARG-66 to Argentina’s Second Submission. (See Argentina’s Second Submission, paras. 43- 48). These Exhibits demonstrate that there would have been no dumping margin in this case without zeroing. In fact, without zeroing the margin would have been negative 4.35 per cent.

27. The Appellate Body recognized in *Sunset Review of Steel from Japan* that zeroing is not consistent with Article 2.4. (See paras. 134-135.) It does not yield a “fair comparison,” and it does not accurately reflect whether the product, as a whole, is being sold at less than normal value. The Appellate Body ruled that when a Member relies on a dumping margin in making a determination in an Article 11.3 review, that margin must be WTO-consistent. (See Appellate Body Report, *Sunset Review of Steel from Japan*, para. 127) The Appellate Body explained that zeroing (whether in the original investigation or otherwise) not only distorts the magnitude of the dumping margin, but may also result in a positive margin that otherwise would not exist:

When investigating authorities use a zeroing methodology such as that examined in *EC – Bed Linen* to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognized in the present dispute, “zeroing . . . may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing.” Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping. This conclusion led the Appellate Body to “reverse the Panel’s consequential finding . . . that the United States did not act inconsistently with Article 2.4 of the *Anti-Dumping Agreement* in the CRS sunset review by relying on dumping margins alleged by Japan to have been calculated in a manner inconsistent with Article 2.4.” (See Appellate Body Report, *Sunset Review of Steel from Japan*, para. 128)

28. To be clear, Argentina is not claiming that the original dumping determination violated US WTO obligations because it was calculated based on the practice of zeroing negative margins. Rather, Argentina challenges the Department’s reliance on that margin as the basis for its determination that dumping would be likely to continue under Article 11.3. The Appellate Body has

clarified that the Department may not rely on a dumping margin which is inconsistent with the substantive standard of Article 2.4 as the basis for its likelihood determination under Article 11.3.

29. In *Sunset Review of Steel from Japan*, the Appellate Body clarified the application of these principles in an Article 11.3 review, but ultimately did not find a violation by the United States. The only reason that it did not do so was the fact that the Panel had not considered the evidence and had not made a finding primarily because it decided that the disciplines of Article 2.1 did not apply to Article 11 reviews. That view has been discredited by the Appellate Body, and there can be no question that reliance on margins calculated in a manner inconsistent with the substantive standards of Article 2 may not serve as the basis for a likelihood determination under Article 11.3. The evidence of zeroing in this case is squarely before this Panel. Argentina respectfully submits that the Panel must consider this evidence and make the finding that was lacking in the panel decision before the Appellate Body in *Sunset Review of Steel from Japan*.

3. The Department's alleged application of facts available was inconsistent with Articles 11.3, 6.1, 6.2, 6.8, 6.9, and Annex II

30. Assuming *arguendo* that the waiver provisions were not the basis for the Department's sunset determination in OCTG from Argentina, then the Department's resort to the limited set of facts available – the 1.36 per cent margin and the decline in import volumes – was inconsistent with Articles 11.3, 6.1, 6.2, 6.8, 6.9, and Annex II. (See Argentina's Second Submission, Section III.C.2)

31. The Panel need not search further than the Department's own regulations to observe the severe consequences of the decision to conduct an expedited review in a case such as Argentina. It is not, as the United States says, an issue of only time frame. For example, section 351.218(e)(2)(i) virtually ensures that the only basis for the Department's likelihood determination will be the margin from the prior determinations, which in this case is limited to the original investigation. The regulation states that the Department will "rely" on the that margin except "under the most extraordinary circumstances" in a full review. Therefore, respondents in an expedited review such as this have no chance of escaping the Department's "reliance" on the margin from the original investigation, which by definition always will be a positive margin.

32. Articles 6.8 and Annex II permit an investigating authority to make determinations based on "facts available" only where an interested party "does not provide[] necessary information within a reasonable period or significantly impedes the investigation" Siderca, however, submitted a complete substantive response to the Department's notice of initiation and agreed to cooperate fully in the investigation, and the Department never found that Siderca failed to cooperate. Thus, the application of facts available against Siderca was inconsistent with Articles 6.8 and Annex II, and the failure to disclose the essential facts infringed the substantive requirements in Article 6.9.

33. The United States apparently recognizes that the application of facts available to Siderca would have been inconsistent with the Anti-Dumping Agreement, and for this reason argues that the Department did not apply facts available to Siderca. (See US First Submission, paras. 214, 221, 234-236) According to the United States, the Department applied facts available to the "non-responding respondents," rather than to Siderca. (See *id.* para. 214) Again, the US assertion is flatly contradicted by the Department's *Issues and Decision Memorandum* (ARG-51 at 3) which does not mention any non-responding respondents. The US assertion is yet another *ex post facto* rationalization. Moreover, the US assertion is inconsistent with its previous explanation that the Department applied waiver to the non-responding respondents. (US First Submission, para. 216)

34. Even if the Department had applied facts available, whether to Siderca or to the so-called non-responding respondents, the outcome is the same. Under the relevant provision, expedited sunset reviews are conducted "without further investigation" on the basis of "the facts available." (19 C.F.R. § 351.218(e)(1)(ii)(C)) Consequently, the Department's conduct of an expedited review in this case

precluded the Department from making the substantive and fresh “determination” required by Article 11.3, and denied Siderca the full opportunity to present evidence and defend its interest, in violation of Articles 6.1 and 6.2.

B. THE US ATTEMPT TO EXPLAIN THE DEPARTMENT’S SUNSET DETERMINATION AND ITS SUNSET PROCEDURES CANNOT CURE US VIOLATIONS OF ARTICLE 11.3

1. The Waiver Provisions as applied in the Department’s Sunset Review of Argentine OCTG violates US obligations

35. As explained above, the Department’s affirmative likelihood determination was not grounded on a sufficient factual basis. In fact, Argentina submits that the Department’s description of its decision demonstrates that it deemed Siderca to have waived participation in the sunset review and thus never engaged in any analysis in this case.

36. The Panel can disregard this set of US contradictory statements and *ex post facto* justifications and simply look at the words used by the Department itself in its *Issues and Decision Memorandum* states: “In the instant reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation.” (at 5 (ARG-51)(emphasis added)) As with the aggregate responses from Italy, Japan, and Korea, the Department found that Siderca’s complete substantive response was “inadequate.” (*See Determination to Expedite* at 2 (ARG-50); *Issues and Decision Memorandum* at 3, 7 (ARG-51)) Therefore, the statement in the *Issues and Decision Memorandum* that “the Department did not receive an adequate response from respondent interested parties” and that “this constitutes a waiver of participation” leads to one incontrovertible conclusion: The Department applied waiver to all respondent interested parties, including Siderca.

37. The Department’s application of waiver to Siderca precluded the Department from conducting the “review” and making the “determination” required by Article 11.3, and denied Siderca the opportunity to present evidence and defend its interest. The Department’s sunset review of Argentine OCTG was thus inconsistent with Articles 11.3, 6.1, and 6.2.

38. The United States has argued that the Department did not deem Siderca to have waived participation in the sunset proceeding. (*See* US First Submission, paras. 211-213, 216; US Answers to First Set of Panel Questions, para. 51) The US argument is not persuasive for two reasons. First, as Argentina has just shown, the express wording of the *Issues and Decision Memorandum* flatly contradicts the US assertion. Indeed, the United States itself has recognized in these proceedings that the language of the *Issues and Decision Memorandum* appears to indicate that the Department deemed Siderca to have waived participation. (*See* US First Submission, n.216) For this reason, in its answer to Panel Question 11, the United States essentially asks the Panel to not read words that are actually written and instead to replace the phrase “did not receive an adequate response” that is unambiguously set forth in the *Issues and Decision Memorandum* with the phrase “did not receive a complete substantive response” that the United States now asserts is what it meant to say. Similarly, the United States asks the Panel to read “respondents from Japan, Korea, and Italy” when it wrote “respondent interested parties.” (*See* US Answers to First Set of Panel Questions, paras. 51-52) Thus, the US argument is not simply an *ex post facto* rationalization, but rather a blatant attempt to change the unambiguous language in the *Issues and Decision Memorandum* to other words that comport with the explanation of the sunset system now offered by the United States in these proceedings.

39. Second, even accepting the US explanation that it applied “waiver” to the “non-responding” respondents, and that waiver is only applied at the “company-specific” level, no one can dispute that the application of the waiver provisions in this case led directly to an “order-wide” likelihood

determination. The “waived” companies were assumed to account for 100 per cent of the exports. Siderca, with no exports, had no chance to influence the Department’s final determination.

40. Finally, if true, the US assertion that the Department deemed so-called “non-responding respondents” to have waived participation in this case further demonstrates the utterly passive nature with which the Department conducts sunset reviews. This also highlights the illogical nature of the Department’s approach to determining “adequacy” – even accepting the US description of how it makes the adequacy determination. The Department is never in a position to know (and did not know in sunset proceeding involving Argentine OCTG) how many exporters have not responded – i.e., it could be none, one, ten, or more. Given the severe consequences flowing from the adequacy determination, the Department should have attempted to understand this basic fact.

41. **The US reliance on the minimal level of alleged OCTG exports during the period of review had severe consequences for Argentina.** The United States responds to a question from the panel by noting that the amount of exports averaged less than 900 tons in each year during the five-year period following imposition of the measure, declining from a level of 45,000 net tons prior to the initiation of the original investigation. According to the United States, the domestic interested parties provided the import statistics, and the Department verified the data by consulting the ITC Trade Database and the Department’s Census Bureau IM-145 import data.

42. The US response highlights the flaws with the Department’s reliance on these import statistics. Siderca participated in four “no shipment reviews” which revealed serious flaws with the statistics. The US attempts to down play those flaws, but Argentina insists that they are important. For this reason, we have prepared in **Chart 4** a chart summarizing the findings in the “no shipment reviews.” It is no wonder that the United States did not precisely answer question 13a from the panel. To this day, the Department has no idea of the volume of imports entering during the relevant period. This is a significant problem because those statistics led directly to: (1) the determination that Siderca’s complete substantive response was “inadequate”; (2) the application of waiver to Siderca or to Argentina; (3) the finding that dumping continued over the life of the order; and (4) the ultimate determination that dumping would be likely to continue or recur. Yet, despite the importance of the import statistics, the Department never disclosed to the parties the exact export figures, and the United States failed to respond to the Panel’s specific question on this point. For these reasons, the Department violated Articles 11.3, 6.1, 6.8, 6.9, and Annex II.

43. The United States now contends that, “through administrative review procedures, the United States has identified Acindar as another Argentine producer of OCTG, and one that may have shipped OCTG to the United States during the period of review” (US Response to Panel Questions, para. 64) In carefully phrasing this response, the United States fails to note that the administrative review to which it refers occurred years after the sunset review. Nor does the United States contend that the Department identified Acindar as another Argentine OCTG exporter in the instant sunset review. This is because there was no evidence in the record before the Department in either the sunset review or the four “no shipment reviews” that Acindar was a producer and exporter of OCTG during the relevant period.

44. If the Department had Acindar in mind, then the Department never disclosed these “essential facts” as required by Article 6.9. On the contrary, the only evidence that existed was Siderca’s statement that, to its knowledge, it was the only Argentine producer and exporter of the subject products. (See *Siderca’s Substantive Response*, para. 6 (ARG-57)) The Department cited this statement, but gave no explanation of why it, as the investigating authority, did not at least attempt to clarify this issue. This was consistent with statements by the US industry to the Department in the annual reviews, where the US industry only requested reviews of Siderca, and for the second requested review (for the period 8.1.96 – 7.31.97) stated: “Review is requested of Siderca because it is the only known producer of oil country tubular goods in Argentina” (ARG-58 at 2). In addition, the petitioners also stated during the course of these “no shipment” reviews that Siderca was

the “sole producer of OCTG in Argentina.” (ARG-36, at 49090) Therefore, the record evidence indicates that there was no reasonable basis for the Department to have considered that there were other Argentine producers/exporters that failed to respond to the notice of initiation and who were thus the true subjects of the application of the waiver provisions.

45. Consequently, the casual reference to Acindar as an Argentine OCTG exporter in its answers to the Panel’s questions is another *ex post facto* justification by the United States to support its determination. Argentina respectfully requests the Panel to consider only issues and facts reflected in the record. Nevertheless, this reference further highlights the decisive weight the authorities assigned to the non-investigated, “non-respondent respondents” accounting for 100 per cent of Argentine OCTG imports that were deemed to have waived participation in the sunset review, thus leading to the statutorily mandated determination of “likely” dumping. The United States also suggests in its Second Submission that the Argentine Government’s failure to participate in the sunset review contributed to “Argentina’s ‘treatment in the sunset review.’” (para.39) Argentina is surprised by this statement, as the United States never made this point in any of its written sunset determinations, or indicated that this consideration supported the Department’s likelihood of dumping determination. This is the first time that Argentina has heard the Department put forth this rationale, as it was not raised in the underlying sunset proceeding, or at any stage of this dispute – not in the consultations, in the US First Submission, or in the US Opening Statement.

2. The US Waiver Provisions are inconsistent as such with Articles 11.3, 6.1, and 6.2

46. Throughout these Panel proceedings, Argentina has consistently argued that the US waiver provisions are inconsistent as such with Article 11.3 of the Anti-Dumping Agreement, because they preclude the Department from undertaking the rigorous “review” and making the substantive “determination” required by this Article. The automatic judgments mandated by the US waiver provisions are patently inconsistent with the “exacting nature of the obligations imposed on authorities under Article 11.3.” (Appellate Body Report, *Sunset Review of Steel from Japan*, para. 113)

47. In its Second Submission and responses to the Panel’s first set of questions, the United States asserts that the waiver provisions are not inconsistent with Article 11.3 as such because they do not mandate that the Department render an affirmative likelihood determination for the order as a whole. (See US Second Submission, paras. 19-21; US Answers to First Set of Panel Questions, paras. 3, 19, 20, 23, 24, 28, 29, 30) Instead, the United States emphasizes, these provisions mandate a likelihood of dumping determination only with respect to the specific company that waived – or was deemed to have waived – participation in the sunset review. (See *id.*)

48. In making this argument, however, the United States never explains precisely how a company-specific waiver determination is made in the context of its so-called order-wide analysis. Nor does the United States explain why the statutory mandate of the waiver provisions – that the Department “shall” determine that the waiving company would be likely to dump – does not affect the order-wide determination. The simple reason for this is because the United States cannot do so; otherwise, the words of the US statute would be meaningless.

49. The United States thus refuses to acknowledge the impact of the waiver provisions on the Department’s final likelihood determination. Even where applied to only one of multiple respondents, the waiver provision necessarily taints the final likelihood determination. Article 11.3 simply does not permit the authority to make automatic judgments regarding the likelihood of dumping, even if limited to a particular respondent. Rather, the authority’s review must be “rigorous” and its ultimate determination must be based on positive evidence. (See Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 113-115) Article 11.3 does not permit the administering authority to conclude – without any basis in fact – that any particular respondent would be likely to dump upon termination of the measure. The Appellate Body confirmed that there is no place for the use of

“presumptions” in sunset reviews in place of the obligations set out in Article 11.3. (*See id.*, para. 191)

50. The US defence of the waiver provisions also fails to account for the numerous sunset reviews in which the Department did not receive a substantive response from any respondent interested party. (*See* US Department of Commerce Sunset Reviews (ARG-63 and ARG-64)) In such instance, the waiver provisions necessarily mandate an affirmative likelihood determination at the order-wide level. Such an automatic judgment is patently inconsistent with the Article 11.3 obligation.

51. The United States suggests that the waiver provisions are not inconsistent as such with the Anti-Dumping Agreement, because, “[i]n making the order-wide final sunset determination in an expedited sunset review, Commerce will rely on all information on the administrative record of the sunset proceeding, including information in the substantive responses and rebuttal responses of the domestic interested parties, prior agency determinations, as well as the information submitted by respondent interested parties in their substantive and rebuttal responses.” (US Second Submission, para. 25; *see also* US Answers to First Set of Panel Questions, paras. 10, 16, 17, 22, 25, 32, 39, 42, 61) As we have just shown, however, this argument does not alter the fact that the waiver provisions require the Department to make automatic judgments without any basis in fact. In addition, the US assertion is wrong on two levels.

52. First, the waiver provisions preclude the Department from considering company-specific information submitted by a respondent to which waiver has been applied. The United States acknowledges that a respondent that submits an incomplete substantive response will be “deemed” to have waived participation. (*See* US Answers to First Set of Panel Questions, para. 42) The statute thus mandates that the Department conclude that this respondent would be likely to dump upon termination of the anti-dumping measure, and, as a result, the Department must disregard any company-specific information contained in that respondent’s substantive response. Any other interpretation would render the plain language of the statute meaningless. The consequences of the “deemed” waiver – the denial of the opportunity to present evidence and defend one’s interest – also demonstrate that the US waiver provisions are inconsistent with Articles 6.1 and 6.2.

53. Second, the US sunset provisions as a whole restrict the Department’s “analysis” to the three scenarios prescribed in the SAA and the *Sunset Policy Bulletin*. (*See* 19 USC. § 1675a(c)(2); 19 C.F.R. §§ 351.218(d)(3)(iv)(A) and (e)(2)(iii); 19 C.F.R. § 351.308(f)(2); *Sunset Policy Bulletin*, Sections II.A.3 and II.C). Therefore, it is irrelevant that the Department’s regulations provide that respondent interested parties may include in their substantive responses “any other relevant information or argument that the party would like the [Department] to consider[.]” (19 C.F.R. § 351.218(d)(3)(iv)(B)). Also, the US regulations unreasonably restrict consideration of other information to “full reviews.” (*See* 19 C.F.R. § 351.218(e)(2)(iii))

54. As the preceding discussion has shown, in attempting to defend the Department’s likelihood determination in the sunset review of Argentine OCTG, the United States has made assertions that not only contradict the Department’s published determinations, but also contradict the United States’ own arguments. And then after the Panel pursued certain contradictions further, the United States was forced to concede that it made mistakes not only in the written sunset determination, but also in its First Submission. (*See* US Response to Question 9(a) from the Panel)

55. In its First Oral Statement, Argentina presented in **Chart 1** a list of significant contradictions between the Department’s sunset determination and its First Submission. The United States has tried to cure several contradictions with new arguments, which were never stated at the time of the sunset decision, and therefore are *ex post facto* rationalizations which cannot be considered by the Panel. For the Panel’s convenience and further review, we have organized the contradictions into two charts: **Chart 5** (Exhibit ARG-70) contains the *ex post facto* rationalizations, and **Chart 6** (Exhibit ARG-71)

contains the unresolved contradictions. If the Panel decides that some of the propositions advanced by the United States can be considered despite the fact that they are *ex post facto* rationalizations, then the Panel will confront a new problem: it will have to pick and choose between contradictory positions (i.e. adequate or inadequate response from Siderca, waiver, and application of facts available to Siderca, Argentina, and/or the “non-responding respondents,” etc.).

56. That the United States has been unable to articulate a consistent and coherent story over the course of these proceedings and to link that explanation with its discussion in the *Issues and Decision Memorandum* manifests its failure to reconcile the Department’s likelihood determination with Article 11.3. No matter the argument put forth by the United States, only one conclusion can be drawn: The Department failed to conduct the sunset review of OCTG from Argentina in a manner that is consistent with Article 11.3. Indeed, as Argentina has demonstrated previously, even when viewed in the light most favourable to the United States, the Department’s likelihood determination simply was not grounded on a sufficient factual basis to invoke the exception of Article 11.3 and continue the anti-dumping measure.

C. NONE OF THE US ARGUMENTS ARE CREDIBLE IN LIGHT OF THE WTO-INCONSISTENT PRESUMPTION IN ALL SUNSET CASES

57. In *Sunset Review of Steel from Japan*, the Appellate Body declared that “[p]rovisions that create ‘irrebuttable’ presumptions, or ‘predetermine’ a particular result, run the risk of being found inconsistent” with the “obligation of investigating authorities, in a sunset review, to determine, on the basis of all relevant evidence, whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping.” (Appellate Body Report, *Sunset Review of Steel from Japan*, para. 191)(emphasis added)

58. Operating together, the statute, the SAA, and the *Sunset Policy Bulletin* establish a WTO-inconsistent presumption of likely dumping in Department of Commerce sunset reviews. The statute provides the starting point for the Department’s likelihood determination by enumerating the two elements that the Department must consider in every sunset review: (1) historical dumping margins and (2) past import volumes. The SAA further clarifies the likelihood of dumping standard under US law by instructing how these two factors should be interpreted. The SAA provides that any of the following three scenarios are “highly probative” of likely dumping: (1) continued dumping margins, (2) the cessation of imports, and (3) declining import volumes accompanied by the continued existence of dumping margins. (See SAA at 889-890 (ARG-5)) Finally, Section II.A.3 of the *Sunset Policy Bulletin* directs the Department to determine that continuation or recurrence of dumping would be likely whenever at least one of the three criteria set forth in the SAA is satisfied. (See *Sunset Policy Bulletin* at 18,872 (ARG-35))

59. Ultimately, then, the US likelihood standard is expressed in Section II.A.3 of the *Sunset Policy Bulletin*. As the Appellate Body ruled in *Sunset Review of Steel from Japan*, the *Sunset Policy Bulletin* is a measure that may be challenged in WTO dispute settlement. (See paras. 99-100)

60. The Appellate Body also addressed the very issue raised in this dispute: whether Section II.A.3 of the *Sunset Policy Bulletin* is inconsistent as such with Article 11.3. In examining this issue, the Appellate Body determined that, if Section II.A.3 directs the Department to consider continued dumping margins and declining import volumes (i.e., satisfaction of any of the three prescribed criteria) as “determinative or conclusive” of the likelihood of future dumping, then the measure would be inconsistent with Article 11.3 as such. (Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, para. 178) The Appellate Body thus confirmed that the likelihood determination required by Article 11.3 must be based on “all relevant evidence,” not on “the mechanistic application of presumptions.” (*Id.* at paras. 178, 191)

61. In the end, the Appellate Body did not decide whether Section II.A.3 of the *Sunset Policy Bulletin* is inconsistent as such with Article 11.3, because it lacked the factual basis to do so (the Panel had failed to make factual findings as to the “consistent application” of Section II.A.3).

62. This Panel is not similarly constrained in the instant case. Argentina has submitted extensive evidence of the Department’s “consistent application” of Section II.A.3 of the *Sunset Policy Bulletin* in all sunset reviews in which the domestic industry participates. Argentina’s Exhibits ARG-63 and ARG-64 show that the Department follows the instruction of Section II.A.3 in every sunset review in which the domestic industry is interested, and every time it finds that at least one of the three criteria is satisfied, the Department makes an affirmative finding of likely dumping without considering additional factors. These facts are beyond dispute and the United States has not attempted to rebut these facts. The Department’s consistent application of Section II.A.3 thus demonstrates its meaning: Section II.A.3 of the *Sunset Policy Bulletin* directs the Department to attach decisive weight to historical dumping margins and declining import volumes (or the cessation of imports altogether) in every case. Therefore, Section II.A.3 is inconsistent with the Article 11.3 obligation to determine “on the basis of all relevant evidence” whether termination of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping. (See Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 178, 191)

63. By directing the Department to give decisive weight to the three prescribed criteria as conclusive of likely dumping, Section II.A.3 establishes a WTO-inconsistent presumption of likely dumping and predetermines the outcome of the Article 11.3 review. Argentina’s extensive evidence of the Department’s consistent application of the *Sunset Policy Bulletin* again speaks for itself: In 100 per cent of the sunset reviews in which the domestic industry participated, the Department followed the mandate of Section II.A.3, and in each case, the Department rendered an affirmative likelihood determination. (See US Department of Commerce Sunset Reviews, ARG-63 and ARG-64) The United States cannot dispute these facts. Therefore, because Section II.A.3 of the *Sunset Policy Bulletin* directs the Department to apply a WTO-inconsistent presumption of likely dumping, the measure is inconsistent with Article 11.3. (See Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 178, 191)

64. The role that the sunset regulations play in this overall framework reinforces the mechanics of the WTO-inconsistent presumption. Consistent with the WTO-inconsistent presumption of likelihood established by US law, the sunset regulations limit the substantive information that the Department is required to solicit to historical dumping margins and past import volumes. (See 19 C.F.R. § 351.218(d)(3)(iii)) Although – as the United States repeatedly highlights – the Department’s regulations provide that respondent interested parties may include in their substantive responses “any other relevant information or argument that the party would like the [Department] to consider[.]” (19 C.F.R. § 351.218(d)(3)(iv)(B)), the provision is hollow because the US sunset provisions as a whole restrict the Department’s “analysis” to the three criteria forming the presumption of likely dumping. (See 19 USC. § 1675a(c)(2); 19 C.F.R. §§ 351.218(d)(3)(iv)(A) and (e)(2)(iii), § 351.308(f)(2); *Sunset Policy Bulletin*, Section II.C)

65. In this regard, the US reliance on 19 C.F.R. § 351.308(f)(2) for the proposition that the Department considers all information provided in the substantive responses in expedited reviews is unavailing. By virtue of the cross reference contained in this regulation to section 1675a(c) of the statute, the true meaning of section 351.308(f) is that the Department will consider information other than historical dumping margins and past import volumes only where “good cause” is shown. (See also 19 C.F.R. §§ 351.218(d)(3)(iv) and (e)(2)(iii); Section II.C of the *Sunset Policy Bulletin*) As demonstrated by Exhibits ARG-63 and ARG-64, the Department has never considered “good cause” information in determining that dumping would not be likely to continue or recur. Subsection 351.218(e)(2)(iii) further restricts such consideration to “full reviews.”

66. Instead, the Department has always treated satisfaction of any one of the three criteria prescribed by the *Sunset Policy Bulletin* as decisive in rendering affirmative likelihood determinations. Indeed, even in the context of a full review, the US sunset provisions limit the Department's analysis to a consideration of the three criteria prescribed by the SAA and *Sunset Policy Bulletin*. (See 19 USC. § 1675a(c)(2); 19 C.F.R. §§ 351.218(d)(3)(iv)(A) and (e)(2)(iii); *Sunset Policy Bulletin*, Section II.C) As Mexico, a Third Party Participant in this case, explained in its response to a question posed during these proceedings, the US sunset review of OCTG from Mexico was a "full review" and these SAA/*Sunset Policy Bulletin* criteria were applied and served as the basis for the Department's affirmative likelihood of dumping determination in that case.

67. In sum, regardless of whether the Department conducts an expedited or full review, and regardless of the nature of the information provided by respondents, the application of the WTO-inconsistent presumption established by US law leads to the same outcome in every sunset review in which the domestic industry participates: likely dumping. Ultimately, the WTO-inconsistent presumption is best summarized by the United States in its own words in its response to a panel question during the first meeting of the Panel with the Parties: It is reasonable to assume that a company that has dumped in the past is likely to dump in the future. This is not surprising as that is what the SAA and *Sunset Policy Bulletin* direct the Department to do in every case. (See US Department of Commerce Sunset Reviews, ARG-63 and ARG-64) Therefore, consistent with the Appellate Body's guidance in *Sunset Review of Steel from Japan*, the Panel must find that the Department's sunset review of Argentine OCTG was inconsistent with Article 11.3.

IV. THE LIKELIHOOD OF INJURY

A. ARTICLE 3 OF THE ANTI-DUMPING AGREEMENT APPLIES TO SUNSET REVIEWS CONDUCTED UNDER ARTICLE 11.3

68. The reasoning of Appellate Body's recent decision in *Sunset Review of Steel from Japan* should silence any lingering debate as to whether Article 3 applies to sunset reviews under Article 11.3.

69. The Appellate Body found that the definition of "dumping" applied for the purpose of the entire Agreement, including for sunset reviews, in light of the specific wording of Article 2.1.

70. Similarly, Footnote 9 of the Anti-Dumping Agreement provides that, "[u]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 the material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of [Article 3]." (Emphasis added.) Accordingly, the Appellate Body's reasoning in *Sunset Review of Steel from Japan* requires the parallel finding that "injury" for purposes of Article 11.3 is subject to the disciplines of Article 3.

71. Ignoring the clear implication of *Sunset Review of Steel from Japan*, the United States continues to assert that Article 3 does not apply to Article 11.3 sunset reviews. (See US Second Submission, paras. 43-55) First, the United States asserts that "injury" under Articles 3 and 11.1 does not have the same meaning as in Article 11.3. (US Second Submission, para. 43) According to the United States, the analysis required by Articles 3 and 11.1, which speak of existing injury, is "fundamentally different" from that required by Article 11.3, which speaks of the likelihood of continuation or recurrence of injury. (*Id.*)

72. The distinction between the determination of injury in an original investigation and the determination of the likelihood of continuation or recurrence of injury in a sunset review, however, does not alter the Anti-Dumping Agreement's clear instruction that the core focus of each determination – "injury" – "shall be interpreted in accordance with the provisions of [Article 3]."

Further, the premise for the US argument – that Articles 3 and 11.1 speak of “existing injury,” rather than the likelihood of future injury – is flawed. Article 3 clearly pertains also to the threat of injury, i.e., to an analysis of future injury, not just to an analysis of existing injury.

73. Second, the United States argues that, “if Article 11.1 is read as providing specific content to Members’ obligations under Article 11.3, it would make a nullity of that part of Article 11.3 that permits the continuation of a duty when injury is likely to recur.” (US Second Submission, para. 44)

74. Argentina does not argue, however, that Article 11.1 sets out the specific obligation contained in Article 11.3. Rather, Article 11.1 is an umbrella provision that states “a general and overarching principle, the modalities of which are set forth in paragraphs 2 and 3.” (Panel Report, *Pipe Fittings from Brazil*, DS219, para. 7.113) In this light, “injury” as used in Article 11.1 cannot be interpreted differently in Article 11.3. In its second submission, the United States appears to agree that “injury” in Article 11.1 is subject to the provisions of Article 3. Yet the United States has failed to demonstrate that Article 3 does not similarly apply to Article 11.3.

75. There is no textual support for the position that the term “injury” as used in Article 11.1 is different than the term “injury” as used in Article 11.3

B. THE COMMISSION APPLIED THE WRONG STANDARD – “LIKELY” MEANS “PROBABLE”

76. The Appellate Body in *Sunset Review of Steel from Japan* also ended the debate over the meaning of likely. “Likely” means “probable.” (Para. 111)

77. Throughout these proceedings, the United States has consistently argued that “likely” as used in Article 11.3 does not mean “probable.” More significantly, the Commission expressly stated before a NAFTA panel that it did not interpret “likely” to mean “probable” in the very same sunset determination at issue in this dispute. (See ITC Brief included in ARG-67). Therefore, there can be no doubt that the Commission failed to apply the correct standard in this case. As we will discuss next, the Commission’s evidentiary findings with respect to the likely volume, price effects, and impact in the instant sunset review confirm this conclusion.

C. THE COMMISSION FAILED TO RELY ON POSITIVE EVIDENCE THAT INJURY WOULD BE LIKELY TO CONTINUE TO OR RECUR IN THE EVENT OF TERMINATION

78. Article 3.1 and Article 11.3 require positive evidence that injury is “likely” to continue or recur in order for the measure to be continued. The Commission’s conclusions with respect to volume, price, and impact in this case fall short of meeting the substantive and evidentiary standard.

79. First, **with respect to volume**, the Commission concluded that, “in the absence of the orders, the likely volume of cumulated subject imports . . . would be significant.” (*Commission’s Sunset Determination* at 20 (ARG-54)) In making this conclusion, the Commission recognized that most of the subject producers faced capacity constraints (*Id.* at 19), and thus, positive evidence that these subject producers would not likely increase their shipments of OCTG to the United States. (*Id.* at 19) To overcome this positive evidence, the Commission found that these subject producers had “incentives” to shift “their productive capacity to producing and shipping more [OCTG] to the US market.” (*Id.*) As Argentina has demonstrated in previous submissions, however, each one of these findings was based on speculation and conjecture, rather than on positive evidence of likelihood. Therefore, the Commission failed to determine, based on positive evidence, that the volume of subject imports would likely be significant upon termination of the orders.

80. The above discussion regarding capacity and the so-called incentives highlights that cumulation was wholly inappropriate in the sunset review of Argentine OCTG because: (1) it undermined Argentina’s individual right to termination of the anti-dumping measure under

Article 11.3; and (2) the basis for the Commission's decision to cumulate was inconsistent with the "likely" standard of Article 11.3 because the Commission simply presumed that since there was competition between imports in the original investigation, it was likely that there would be such competition in the event of termination. Finally, it should be noted that if the positive evidence of capacity constraints were not significant, the Commission would not have devoted so much of its determination to a discussion of the subject producers' "incentives" to shift productive capacity for sale to the United States. Simply put, the Commission's conclusion that the volume of the subject imports would likely be significant relied on its findings of incentives.

81. In its Second Submission, the United States also attempts to bolster the Commission's findings of incentives, either by citing to additional record facts or by simply restating the Commission's finding. (*See id.* at paras. 66-77) Nevertheless, the United States fails to show how the Commission's findings were based on positive evidence of likelihood, as opposed to conjecture and speculation. Further, the United States is unable to account for the Commission's frequent disregard of positive evidence that undermined its incentive findings.

82. For example, the United States points out that, in a previous sunset review of OCTG from Canada, counsel for Siderca assured the Commission that the predecessor organization to Tenaris "had no intention of using the Algoma facility to ship OCTG to the United States." (*Id.*) Based on this evidence, the United States concludes, "Tenaris' commitment not to ship OCTG from Canada completely undermines Argentina's argument that Tenaris could use Algoma to serve this market." (*Id.*)(emphasis added) As evidence that Tenaris had "committed" not to ship OCTG from Canada, the United States cites footnote 310 of the Commission's determination in the review of OCTG from Canada. (*See id.* (citing USITC Pub. 3316 (July 2000) at 51. n.310 (US-29)) This footnote, however, does not indicate that Tenaris had committed not to ship OCTG to the United States from Canada. Rather, it states, "We also note Siderca's sworn testimony that exports to the United States are not part of its business plan for the Algoma facility." (USITC Pub. 3316 (July 2000) at 51. n.310 (US-29)(emphasis added)) Algoma gave no "commitment," but rather stated that exports to the United States were not part of its business plan, just as Siderca explained that exports to the United States were not an important part of its business plan in this sunset review. Why the explanation of the Tenaris business plan was considered credible in the Canadian case, and not credible in the Argentine case, remains a mystery. These facts also expose the speculation in which the Commission engaged in this case: rather than consider Tenaris' actions in Canada to be positive evidence that the Tenaris Group was not likely to export significant quantities to the United States if the measures were removed, the Commission ignored the evidence and relied on its "incentive" analysis. The Commission never even acknowledged that a Tenaris company, Algoma, could have shipped to the United States but did not.

83. In sum, despite the extensive record assembled by the Commission in the instant sunset review, the Commission simply failed to determine, based on positive evidence, that the volume of subject imports would likely be significant in the absence of the orders.

84. **With respect to price**, the Commission's finding with respect to the likely price effects of the subject imports was also based on conjecture, rather than positive evidence of likelihood. As Argentina demonstrated in its Second Submission, in making its price findings, the Commission placed great weight on information developed five years earlier in the original investigation. (*See* Argentina's Second Submission, paras. 172-173)

85. The United States makes a similar admission it attempts to refute Argentina's arguments that the United States gave undue weight to the fact that domestic prices were increasing at the end of the period examined. The United States claims that "evidence from the original investigation strongly supports a finding that imports can drive down domestic prices even during a period of strong demand" and that this means therefore that "imports would drive down or suppress the price of the domestic like product if the orders were revoked." (US First Submission, para. 339)

86. It is striking that from a finding in the original investigation that imports “can” drive down domestic prices, the Commission concludes in the sunset review that imports “would” drive down or suppress the price of domestic like products if the order were revoked. In other words, because it is possible (as demonstrated five years earlier), the Commission concludes it must be “likely” to occur if the orders are revoked. This is not the standard set forth by Article 11.3. Further, this type of reasoning demonstrates that the Commission is not applying a “likely” standard, and that the decision in this case is not based on positive evidence of likely price effects.

87. Finally, **with regard to impact**, the Commission stated, “in the original investigations, subject imports captured market share and caused price effects despite a significant increase in apparent consumption in 1993 and 1994 as compared to 1992.” (*Commission's Sunset Determination* at 22) (ARG-54) (emphasis added). On this basis, the Commission concluded that, “despite strong demand conditions in the near term[,]” the subject imports would be likely to have a negative impact on the domestic industry in absence of the orders. (*Id.*) Thus, once again, the Commission based its conclusion of what is likely to occur on what occurred in the original investigation, five years in the past. In other words, the Commission determined on the basis of possibility (as demonstrated by events five years earlier) that an outcome is “likely.” Again, such reasoning is unacceptable under Article 11.3 and shows that the Commission did not apply the “likely” standard in this case.

88. In its defence against Argentina’s argument with respect to the impact analysis, the United States offers the following sentence: “The ITC noted that in the original investigation, a significant increase in demand had not precluded subject imports from gaining market share and having adverse price effects.” (US First Submission, para. 342, emphasis added)

89. Once again, we see that the conclusion of what is likely to occur in the future depends wholly on the fact that it occurred in the original investigation, five years in the past. In this particular instance, the problem is compounded because the Commission is reduced to saying that increased demand in the past had not precluded subject imports from gaining market share and having adverse price effects, and drawing the inference from this observation that likely imports were likely to have the same impact. Argentina wonders how an exporter could ever meet this standard given that, by definition, most anti-dumping measures in place in the United States had some evidence of adverse impact supporting the initial decision.

90. For these reasons, the Commission’s sunset determination in this case was inconsistent with Articles 3.1 and 11.3. Additionally, the United States has failed to rebut Argentina’s claim that the Commission’s sunset determination was inconsistent with Articles 3.4 and 11.3, because it cannot show on the record that the Commission properly evaluated the relevant economic factors prescribed by that provision. (*See Panel Report, Egypt – Steel Rebar*, DS211, para. 7.42, 7.49) As noted by Argentina, the Commission’s consideration of the WTO-inconsistent margin of 1.36 per cent (calculated using the practice of zeroing) that was reported by the Department to the Commission for purposes of the Commission’s sunset review was also inconsistent with US WTO obligations. If the Commission relied on this WTO-inconsistent margin in its determination, the determination was “tainted;” if not, then the Commission failed to comply with its obligations under Articles 3.4 and 11.3. (*See Argentina’s First Submission*, paras. 189-193; *Argentina’s Second Submission*, paras. 151-152) Finally, the Commission’s sunset determination was inconsistent with Article 3.5, because the Commission failed to distinguish the potential injurious effects of other causal factors from the potential effects of the dumped imports.

D. THE COMMISSION'S CUMULATIVE INJURY ANALYSIS IN THE SUNSET REVIEW OF OCTG FROM ARGENTINA VIOLATES THE ANTI-DUMPING AGREEMENT

1. **Contrary to US assertions, Argentina has the individual right to termination of the anti-dumping measure on OCTG from Argentina pursuant to Article 11.3 of the Anti-Dumping Agreement**

91. As Argentina has maintained throughout the course of these proceedings, every WTO Member has the right to have anti-dumping duties terminated after five years. The United States, however, expressly denies the existence of such a right. The United States takes the position in response to Argentina's third question that: "The United States does not consider that Argentina has the right to termination under Article 11.3 premised on the examination only of whether the revocation of the anti-dumping duty order relating to subject imports from Argentina will lead to a continuation or recurrence of injury."

92. Argentina could not disagree more on this point. Argentina's position that it has a right to termination is based directly on the text of Article 11.3. Nowhere in Article 11.3 is Argentina's right to termination conditioned on the export practices of private companies of other WTO Members. The United States has no textual argument to support its view, but rather relies on its unilateral assertion contradicting the common intention of the WTO Members, as reflected in the text. (*See EC-LAN Equipment* at para. 84) Indeed, no WTO Member can unilaterally deny a right conferred to another Member by the WTO Agreements. Permitting Members to disregard conferred WTO rights would undermine the careful balance of rights and obligations achieved in multilateral negotiations. Argentina respectfully asks the Panel to keep the United States' extraordinary statement in mind when considering whether cumulation is permitted in sunset reviews. In this case, without cumulating the effect of imports, the Commission could not have found that Argentine OCTG imports would likely injure the US market.

2. **Articles 11.3 and 3.3 preclude cumulation in the sunset reviews**

93. Argentina submits that the Commission's cumulative injury analysis in the sunset review of OCTG was inconsistent with Articles 11.3 and 3.3 of the Anti-Dumping Agreement.

94. First, with respect to the text of Article 11.3, the United States argues that references to "any definitive anti-dumping duty" and "the duty" are not evidence that the drafters intended to prohibit cumulation in sunset reviews. (*See US Second Submission*, para. 56) The US argument, however, is inconsistent with the position it took in *Sunset Review of Steel from Japan*. In that dispute, the United States argued that "duty" as used in Article 11.3 is defined by Article 9.2 of the Anti-Dumping Agreement, "which 'makes clear that the definitive duty is imposed on a product-specific (i.e., order-wide) basis, not a company-specific basis.'" (Appellate Body Report, *Sunset Review of Steel from Japan*, para. 150) In other words, the United States relied on the significance of the word "duty" and that it applies to one order (rather than to one company) to prove its point. The Appellate Body agreed with the United States that Article 9.2 informs the interpretation of "duty" in Article 11.3. (*Id.*) The Appellate Body therefore confirmed that the use of "duty" in the singular means that the authority must determine whether the termination of a single anti-dumping order – and not multiple orders – would be likely to lead to injury.

95. The United States also contends that it is incorrect for Argentina to refer to the "object and purpose" of Article 11.3. (US Second Submission, para. 57) According to the United States, "Article 11.3 is clear that expiry of such duties is only appropriate where it is not likely that this would lead to the continuation or recurrence of dumping and injury." (*Id.*) The Appellate Body, however, has confirmed Argentina's interpretation of the principal obligation of Article 11.3: termination of the anti-dumping duty after five years is the rule, and maintenance is the exception. (Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, para. 104) The US interpretation

turns the Article 11.3 obligation on its head, making continuation of anti-dumping measures the rule and termination the exception. In addition, the US endorsement of a “not likely” standard is inconsistent with Article 11.3. In *DRAMS from Korea*, the Panel clearly stated “that a failure to find that an event is ‘not likely’ is not equivalent to a finding that the event is ‘likely.’” (DS99, para. 6.45)

96. Second, the United States argues that Argentina’s alternative argument – that if cumulation is permitted in sunset reviews, the limitations on cumulation in Article 3.3 would have prevented cumulation in this case – is directly at odds with the Appellate Body’s findings in *Steel from Germany*. (See US Second Submission, para. 59, citing Appellate Body Report, *Steel from Germany*, paras. 58-97) In *Steel from Germany*, the Appellate Body merely held that the *de minimis* rule of Article 11.9 of the SCM Agreement – the parallel provision to Article 5.8 of the Anti-Dumping Agreement – does not independently apply to Article 21.3 – which is parallel to Article 11.3 of the Anti-Dumping Agreement. The Appellate Body did not address whether the *de minimis* rule of Article 11.9 applies to Article 21.3 in the context of applying a cumulative injury analysis by virtue of the cross-reference contained in Article 15.3, the parallel provision to Article 3.3 of the Anti-Dumping Agreement. (Appellate Body Report, *Steel from Germany*, para. 92) To the contrary, the Appellate Body’s decision in *Steel from Germany* suggests that it understands that the injury analysis in a sunset review is not conducted on a cumulated basis. (*Id.* at para. 81)

97. Finally, the United States addressed Argentina’s argument that the standards that the Commission applies in deciding whether to cumulate run directly counter to the “likely” standard established by Article 11.3. (See US Second Submission, para. 60) According to the United States, Argentina confuses the standard for deciding whether cumulation in a sunset review is appropriate with the standard for determining whether expiry of the duty would be likely to lead to continuation or recurrence of injury. (See *id.*) Because the “Anti-Dumping Agreement is silent on the former question,” the United States argues, “the standards that the ITC applied in deciding whether to cumulate cannot violate Article 11.3.” (*Id.*)

98. Argentina has not confused the two questions. Rather, Argentina submits that the threshold inquiry for cumulating – i.e., whether imports from each subject source had any possible discernible adverse impact – taints the likelihood determination in a sunset review. (See Argentina’s First Submission, paras. 292-294; Argentina’s Second Submission, paras. 199-200) For example, in the sunset review of Argentine OCTG, it cannot credibly be argued that the Commission could have determined that injury would likely continue or recur without having conducted a cumulated analysis. Consequently, the conduct of a cumulated injury analysis is not consistent with Article 11.3.

E. THE COMMISSION’S OVERALL APPROACH IN THE SUNSET REVIEW OF ARGENTINE OCTG IS FLAWED

99. As explained above, the Commission’s likelihood of injury determination is flawed because it rests on several possible outcomes. The flaws with the Commission’s likelihood of injury determination are further compounded because of the Commission’s use of a cumulative analysis.

100. First, in reaching its decision to cumulate in this case, the Commission initially considered whether imports from each subject source would have any possible discernible adverse impact on the domestic industry. The Commission cumulated the imports because it did not find that the imports would have no discernible adverse impact on the domestic industry. (See 19 USC. § 1675a(a)(7)) The language applied by the Commission (written with two negative clauses) meant that the Commission could cumulate imports that, considered individually, have any possible adverse impact on the domestic industry. (See 19 USC. § 1675a(a)(7)) This standard is directly counter to the “likely” standard established by Article 11.3. (See Appellate Body Report, *Sunset Review of Steel from Japan*, para. 110; Panel Report, *DRAMS from Korea* at paras. 6.48, 6.52-6.58) With respect to the second part of the Commission’s analysis as to whether to cumulate, the Commission considered whether the “imports would be likely to compete with each other.” (See 19 USC. § 1675a(a)(7))

Again, just as the Commission failed to apply the “likely” or “probable” standard throughout its analysis (*see, e.g.,* Argentina’s Second Submission, para. 159), it failed to apply that standard to the threshold question of whether to cumulate for purposes of the conduct of the Article 11.3 review.

101. Second, as Argentina demonstrated in its written submissions, the Commission’s finding of likelihood of injury hinges on supposed future occurrences – which while possible, do not constitute positive evidence of likelihood. Indeed, for many of its findings, the Commission simply presumed such events would occur simply because they were noted in the original investigation (*See, e.g.,* Argentina’s Second Submission, paras. 172-177). Thus, the flaws with the individual pieces of information relied on by the Commission are evident. Basic logic dictates that one cannot simply take the sum of purported possible scenarios to reach a “likely” outcome. In fact, when more future “variables” are relied upon to support the likelihood of a particular occurrence happening (in this case injury), this actually leads one to the conclusion that such an occurrence is less likely to happen. Yet, this same reasoning underpins the Commission’s analysis.

V. THE UNITED STATES HAS FAILED TO DISCHARGE ITS BURDEN UNDER ARTICLE 6.2 OF THE DSU: THE US PRELIMINARY OBJECTIONS MUST FAIL

102. Finally, Argentina will now take a moment to offer some brief observations with respect to the terms of reference. Such observations may not be necessary, as the United States seems to have all but abandoned its DSU Article 6.2 claim. Indeed, the US Second Submission makes no reference whatsoever to DSU Article 6.2.

103. Argentina reiterates that from the text of the panel request, it is clear that the so-called “Page Four” claims and the “B1/B2 and B3” claims all complied fully with DSU Article 6.2. Moreover, the five “certain matters” were all set forth in Argentina’s panel request and also complied fully with DSU Article 6.2. The United States has not rebutted any of Argentina’s textual arguments on these points. The United States has thus demonstrably failed to discharge its burden to prove that Argentina’s Panel request did not comply with Article 6.2.

104. Moreover, the Appellate Body has made clear that prejudice must be demonstrated for an Article 6.2 claim to succeed. The Appellate Body has also made clear (*Wool Shirts*) that “the burden of proof rests upon the party . . . who asserts the affirmative of a particular claim.” The United States has asserted prejudice, but has failed to discharge its burden to demonstrate it.

105. The Panel asked the United States to explain how it was “prejudiced with respect to each alleged inconsistency that the United States is raising in its request for preliminary rulings.” The United States failed to reply to the Panel’s direct question about “each alleged inconsistency,” presumably because it could not muster any credible arguments to this effect. The United States contented itself instead with a general complaint that “the United States has not been afforded the full measure of due process required under the DSU, compromising its ability to research the issues at hand, assign personnel, etc.”

106. As Argentina has stressed before, vague assertions about having to wait for the complainant’s First Submission have been rejected by previous panels as insufficient to rise to the level of violation of due process rights. The Panel should follow this sound precedent in the present case.

107. In summary, the United States has failed to rebut Argentina’s textual arguments that all of the disputed claims are properly set forth in Argentina’s panel request consistent with the requirements of Article 6.2. In addition, the United States has simply asserted, but has not demonstrated, any prejudice. Its Article 6.2 claims must therefore fail. Although Argentina has an exceptionally strong case on prejudice (or lack thereof), its Article 6.2 defence by no means is limited to the “no prejudice” point alone. Argentina affirms its earlier detailed statements that – on a purely textual analysis – the

US Article 6.2 claims are groundless. Argentina therefore respectfully requests the Panel to dismiss the US Article 6.2 requests in their entirety.

VI. BASED ON THE PERVASIVE AND FUNDAMENTAL US VIOLATIONS, THE PANEL SHOULD SUGGEST THAT THE MEASURE BE TERMINATED

108. In concluding today, Argentina refers the Panel to the specific requests it made of the Panel in paragraphs 314-323 of Argentina's First Submission, and paragraphs 269-276 of Argentina's Second Submission. Argentina incorporates those requests in full. In sum, Argentina respectfully requests the Panel:

- to find that in this case the US measures identified by Argentina, as such and as applied, violate US WTO obligations;
- to recommend that the United States brings its measures found to be inconsistent with the covered agreements into conformity with its WTO obligations; and
- to suggest, pursuant to DSU Article 19.1, that the only way for the United States to comply with these recommendations is through the immediate termination of the anti-dumping measure on OCTG from Argentina.

109. Argentina would like to take this opportunity to revisit the implications of DSU Article 3.2. (*See* Argentina's First Submission, para. 8; Argentina's Second Submission, para. 276) In its closing statement at the First Substantive Meeting, the United States warned of the dangers of creating additional obligations through dispute settlement. Such an approach, the United States admonished, would violate the rule in DSU Article 3.2 that panel rulings cannot add to the Members' obligations.

110. Argentina agrees that Panels should not – indeed cannot – add to the obligations of Members under the WTO Agreements. Yet, Argentina is by no means seeking to “add to” the obligations of the United States under the Anti-Dumping Agreement. To the contrary, Argentina is simply asking that the United States abide by the binding commitments that it accepted at the end of the Uruguay Round – nothing more, nothing less.

111. Moreover, the United States focuses on only half of the story. The very same sentence also states the proposition that “rulings of the DSB cannot . . . diminish the rights . . . provided in the covered agreements.” Such “rights provided in the covered agreements” include Argentina's rights under the Anti-Dumping Agreement, including Argentina's rights under Article 11.3. The Appellate Body has contributed importantly to clarifying the meaning of the rights and obligations comprised in Article 11.3. Argentina had a right to termination of the anti-dumping order on OCTG after five years. The United States could continue the measure only by making findings consistent with Articles 11.3, 2, 3, 6, and 12 of the Anti-Dumping Agreement. As Argentina has amply demonstrated, the United States failed to comply with these critical obligations. As a result, the DSB must restore the right conferred to Argentina under Article 11.3, which is termination of the measure.

112. Argentina respectfully urges the Panel to make the necessary suggestion that the measure be terminated in this case. Not to do so would invite the United States to extend the measure beyond the expressly prescribed period in Article 11.3. (*See* Appellate Body Report, *Sunset Review of Steel from Japan*, para. 113) The suggestion in this case is necessary to give meaning to the rights of Argentina in this case.

113. Argentina thanks you for your time and attention today, and would be pleased to respond to any questions the Panel may have.

Closing Statement – 3 February 2004

1. Mr. Chairman, members of the Panel: Argentina will not repeat all of its arguments here. At this point, we will limit ourselves to three broad points.
2. First, it is critically important that all WTO Members, including the United States, respect the careful balance of rights and obligations embodied in the Anti-Dumping Agreement.
3. Participants in the Uruguay Round reached agreement on a package of disciplines applicable to anti-dumping measures. The Agreement recognizes the rights of importing countries to use anti-dumping measures to counteract injurious dumping. However, the right to invoke such measures is predicated upon the strict compliance with the substantive obligations of the Agreement.
4. Among the most important obligations in the Agreement are those applicable to sunset reviews. Article 11.1 makes clear that anti-dumping measures are limited in duration (“only as long as necessary”), magnitude (“only to the extent necessary”), and purpose (“to counteract dumping which is causing injury”). Article 11.3 gives specific content to these overarching principles by requiring termination of anti-dumping orders after five years.
5. These obligations were a critical element of the overall, carefully calibrated equilibrium of rights and obligations accepted by Argentina, the United States, and other Members at the end of the Round. It is essential that this Panel give the full, substantive content to these rights.
6. In accepting the Uruguay Round package, participants thus agreed to meaningful disciplines on the use of anti-dumping measures. We did not agree to the mechanical application of presumptions. We did not agree to immutable practices that stack the deck against importers. We did not agree to rules that lead inflexibly to a pre-ordained result as soon as the US industry shows the slightest interest in maintaining the order. We did not agree to 223 to 0.
7. Argentina notes that the Panel asked the United States questions today regarding the automatic application of the waiver provisions and the resulting automatic judgment. The United States tries to give the impression that these provisions do not result in automatic judgments. Argentina respectfully reminds the panel that Argentina has challenged the waiver provisions as such. The statute requires that the Department “shall” make an affirmative determination of likelihood of dumping with respect to the company that is waived.
8. We therefore ask this Panel to ensure that the United States respects and implements fully the obligations that it accepted when it accepted the Anti-Dumping Agreement – nothing more, nothing less.
9. Second, in a related point, we would ask this Panel to be guided by the authoritative and unambiguous guidance it has received from the Appellate Body, most notably in the *Sunset Review of Steel from Japan* case. As Argentina has emphasized, the rulings of the Appellate Body provide a definitive disposition of many of the issues facing the Panel, including the obligation on investigating authorities to play an active role in the investigation.
10. At the beginning of this proceeding, the United States argued that Article 11.3 was essentially an empty shell. According to the United States, Article 11.3 provided few, if any, restraints on US authorities as they raced to placate the wishes of their domestic industry.
11. The Appellate Body decision has completely undermined the US position, and has confirmed what Argentina has maintained from the beginning – that the US measure against OCTG from

Argentina was without legal basis under the Anti-Dumping Agreement. As the Appellate Body emphasized, Article 11.3 is no empty shell – it is replete with significant and highly substantive obligations. The Appellate Body could not have been any clearer on the key point that “presumptions” and “passivity” have no role in sunset reviews. As the Appellate Body explained, “[p]rovisions that create ‘irrebuttable’ presumptions, or ‘predetermine’ a particular result, run the risk of being found inconsistent with this type of obligation.”

12. We would also emphasize that although the Appellate Body lacked the certain factual data upon which it could draw the necessary conclusions, the present Panel is not similarly constrained. Argentina has placed before this Panel all the factual basis it requires.

13. Argentina is thus confident that this Panel will render a decision that is consistent with the explicit direction of the Appellate Body. The Appellate Body has told Members that the sunset review is an “exacting” process that requires a “forward-looking analysis” and a “rigorous examination.” We also know that “likely dumping” means “probable” dumping, and that “likely injury” means “probable injury.”

14. In Argentina’s view, it is necessary for this Panel to apply these clear standards to the facts of this case. This will be a straightforward exercise. Argentina is also confident that once the Panel applies the Appellate Body’s guidance, there can be no other outcome than a finding of WTO-inconsistency.

15. Third, we would ask the Panel, during its deliberations, to give special attention to the particularly egregious facts of this case. For example, the Department’s determination that dumping was likely relied on nothing more than a 1.36 margin from the original investigation, calculated through the use of zeroing, and a decline in import volume. As Argentina has emphasized, the Appellate Body in the *Sunset Review of Steel from Japan* case found that neither factor, either independently or together, could support a determination under Article 11.3 that dumping is likely to continue. If this is the basis on which the Department could uphold a determination that dumping was “probable”, then the disciplines of Article 11.3 would be rendered essentially meaningless.

16. Thus, the Panel’s task in the present case is significantly simplified by the untenable factual basis upon which the United States seeks to justify its actions.

17. With respect to the preliminary issues raised by the United States, Argentina would make three comments. First, as Argentina has stressed repeatedly, and as the Appellate Body has made clear, a Panel request must be read *as a whole*. The Panel must reject the US attempt to narrowly interpret different portions of the document in isolation. Second, the United States said this morning that “nothing in the WTO agreements explicitly states that a lack of prejudice cures a violation of DSU Article 6.2.” However, this is not, and never has been, Argentina’s position. Rather, the Appellate Body has stated repeatedly that *a violation of Article 6.2 never arises at all unless prejudice has been established*. Moreover, prejudice must rise to the level of a violation of due process rights. However, even at this very late stage in the proceedings, the United States merely asserts, but has not established, actual prejudice. Third, Argentina would respectfully remind the Panel that the United States has never rebutted the textual arguments advanced by Argentina demonstrating that all of Argentina’s claims are in fact set forth in Argentina’s panel request and are therefore properly before the panel.

18. Finally, with respect to Argentina’s request for a suggestion by the Panel under DSU Article 19.1, Argentina does not agree that GATT and WTO practice has been exclusively for Panels simply to recommend that the measure be brought into conformity, without making any suggestions on how to do so. There are many examples where Panels have made such suggestions. Moreover, given the facts of this dispute, such a suggestion would be particularly appropriate.

19. The Panel has all of the legal and factual elements it needs to draw the inescapable conclusions about the WTO-inconsistency of the US measures. Your decision will be of vital importance not just for Argentina, but for the integrity of the multilateral trading system.

20. We thank you again for the time and attention that you have given to this dispute.

ANNEX D-8

OPENING AND CLOSING ORAL STATEMENTS OF THE UNITED STATES – SECOND MEETING

Opening Statement – 3 February 2004

Mr. Chairman, members of the Panel:

1. The United States appreciates this opportunity to comment on the issues raised in this proceeding.
2. This dispute is not complicated. It involves three overarching questions, some of which the Appellate Body has already explored at length. First, what does the Anti-Dumping Agreement require with regard to sunset reviews? Second, has Argentina demonstrated that US law fails to meet those requirements? Third, has Argentina demonstrated that the US application of its law also fails to meet those requirements?
3. Consistent with principles of treaty interpretation reflected in Article 31 of the *Vienna Convention*, an analysis of rights and obligations must begin with the text of the agreement being interpreted. Article 11.3 of the Anti-Dumping Agreement provides that an anti-dumping duty must be terminated unless a Member makes a finding of likelihood of continuation or recurrence of dumping and injury. Article 11.4 makes clear that the rules of Article 6 regarding evidence and procedure are applicable in these sunset reviews. Therefore, a Member must make a determination of likelihood with regard to dumping and injury and must afford interested parties the opportunity to participate and present evidence. In addition, Article 17.6(i) of the Anti-Dumping Agreement provides that a panel's examination of the facts is limited to whether those facts were properly established before and examined by the domestic investigating authority in a manner that is unbiased and objective, not whether the facts established at the time – or new ones impermissibly introduced here – might have led to a different conclusion.
4. We will first address issues concerning the Department of Commerce's determination regarding the likelihood of dumping, followed by the US International Trade Commission's determination regarding the likelihood of injury. In doing so, the United States will again confirm that US law – as such and as applied – is not inconsistent with the obligations contained in the Anti-Dumping Agreement. We will then conclude with some remarks on the procedural issues in this dispute.

Issues Concerning the Likelihood of Continuation or Recurrence of Dumping

5. Mr. Chairman, Argentina's claims in this dispute fail because they rely on obligations not found in Article 11.3 or anywhere else in the Anti-Dumping Agreement.
6. Consistent with DSU Article 3.2 and previous panel and Appellate Body findings, the United States has argued that the Panel should interpret the text of the Anti-Dumping Agreement, and in particular Articles 11.3 and 6, in accordance with the ordinary meaning of the terms of the Agreement in their context and in light of the Agreement's object and purpose.
7. Simply put, Article 11.3 provides that a definitive anti-dumping duty must be terminated unless the requisite finding – likelihood of continuation or recurrence of dumping and injury – is made. As the Appellate Body in *United States - Corrosion-Resistant Carbon Steel Flat Products*

from *Japan* recently upheld, the Anti-Dumping Agreement does not prescribe the means a Member must employ in determining whether dumping and injury are likely to continue or recur in a sunset review.¹

8. There is also no requirement in Article 11.3 or elsewhere in the Anti-Dumping Agreement to calculate or consider the magnitude of current dumping in making the likelihood of continuation or recurrence of *dumping* determination. Nor is there a requirement to calculate or consider past, present, or future dumping margins in making the likelihood of continuation or recurrence of *injury* determination. Furthermore, there is no requirement in Article 11.3 or elsewhere in the Anti-Dumping Agreement to make likelihood of dumping determinations on a company-specific basis. The Appellate Body in *Japan Sunset* has confirmed these points as well, recognizing that (1) "Article 11.3 neither explicitly requires authorities in a sunset review to calculate fresh dumping margins, nor explicitly prohibits them from relying on dumping margins calculated in the past"² and (2) that "dumping margins may well be relevant to, but they will not necessarily be conclusive of, whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping".³

9. Argentina claims that Commerce's expedited sunset procedures preclude Commerce from making a "determination" or conducting a "review." We have demonstrated, however, that US sunset procedures provide for participation by interested parties, including the submission of factual information and argument, as well as rebuttal to such information and argument. We have also demonstrated that Commerce makes its likelihood determination based on all the evidence on the administrative record, including the evidence submitted by the interested parties during the sunset review. Commerce thus arrives at, in the words of the Appellate Body, a "reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination."⁴ Commerce's procedures therefore are not inconsistent with the limited obligations of Article 11.3.

10. Argentina's statistics, which purportedly demonstrate an alleged lack of impartiality on the part of the United States, are irrelevant in light of these procedures. Argentina argues that Commerce relies solely on the participation of the domestic industry to determine whether dumping is likely to continue or recur, but here again Argentina misses the point: Where the domestic industry has, selectively, chosen to participate, it has placed evidence on the record that respondents have failed to rebut persuasively. The fact that the United States does not make affirmative determinations where the domestic industry fails to participate demonstrates that the United States does *not* simply continue every order without regard to the factual circumstances of each case. Thus, Argentina has failed to prove its claim regarding GATT Article X:3(a) and Article 11.3 of the Anti-Dumping Agreement.

11. In addition to these general legal issues, Argentina has made case-specific claims regarding Commerce's sunset determination involving oil country tubular goods from Argentina. Commerce's determination, however – that the expiry of the anti-dumping duty order would be likely to lead to the continuation or recurrence of dumping – is based on evidence regarding the existence of dumping and the depressed import volumes over the life of the order.

12. After providing all interested parties with ample opportunity to submit for the record their views, including any information they deemed relevant, Commerce reasonably concluded that, in the event of revocation, dumping is likely to continue or recur. Notably, respondent interested parties failed to provide evidence, either through the substantive responses to the notice of initiation or in rebuttal to the substantive response of the domestic industry, to persuade Commerce to find otherwise. This, in spite of the fact that, according to the Appellate Body, the Anti-Dumping Agreement assigns a "prominent role to interested parties . . . and contemplates that they will be a primary source of

¹ WT/DS244/AB/R, AB-20003-5, 15 December 2003, para. 123.

² *Id.*, para. 123.

³ *Id.*, para. 124.

⁴ *Id.*, para. 111.

information in all proceedings conducted under that agreement," especially with regard to company-specific data.⁵

13. Indeed, the only respondent interested party to file a substantive response, Siderca, filed no rebuttal at all in response to the evidence placed on the record by the domestic industry. Argentina claims that Siderca was simply discouraged from filing responses because of the arguable perception that participation is "futile";⁶ if so, why did Siderca file a substantive response at all? Why participate half-way? Contrary to Argentina's complaints, Commerce did conduct a review and made a determination based on record evidence; if Argentina wishes to assign blame for the contents of the record, it need only look as far as its own producers.

14. Argentina also claims that the expedited sunset procedures denied respondent interested parties an opportunity to defend their interests and to submit evidence, in violation of the obligations in Articles 6.1 and 6.2. As we have demonstrated at length in our written submissions, Commerce provides parties with ample opportunity to submit facts and arguments. Argentina has failed to show one instance where Siderca was denied an opportunity to defend its interests in this case. Instead, the record shows that Siderca, Argentina, and any other respondent interested party simply did not take advantage of the opportunities afforded them.

15. Finally, Argentina attempts to make much of the dumping margin calculated for Siderca in the original investigation. Argentina's only claim in this regard is that Commerce *reported* a dumping margin likely to prevail to the ITC that Argentina believes was based on a calculation methodology not in accordance with the Anti-Dumping Agreement. First, neither the ITC nor Commerce relied on the reported dumping margins in making their respective determinations. In addition, the only calculation methodology found not to be in accordance with the Anti-Dumping Agreement is the methodology in *EC – Bed Linens*. The methodology used by Commerce is not the same as the methodology in *EC – Bed Linens*.

Issues Concerning the Likelihood of Continuation or Recurrence of Injury

16. Argentina's grievances with the ITC's likelihood determination generally fall into two categories: Issues concerning the applicability of certain articles of the Anti-Dumping Agreement with respect to sunset reviews and issues concerning the ITC's analysis in this review.

17. The United States would first like to address two of the larger interpretative issues with regard to the Anti-Dumping Agreement and sunset reviews: The relevance of Article 3 and the availability of cumulation.

18. We explained in our submissions that original injury investigations and sunset reviews are fundamentally different inquiries with different purposes. We also pointed to very specific and fundamental obligations in Articles 3.1, 3.4 and 3.5 that just do not make sense in the context of sunset reviews.

19. Argentina's response on these points is telling. Essentially, Argentina sidesteps the issues. For example, we explained that the instruction in Article 3.1 to examine the volume of dumped imports and their effect on prices will often not be appropriate in a sunset review because imports may not be present in significant volumes, and they may not be sold at dumped prices.⁷ In response, Argentina does not explain how the volume and price effects analysis mandated by Article 3.1 will be relevant in a sunset review. Instead, Argentina essentially says that Article 3.1 applies to sunset

⁵ *Id.*, para. 199.

⁶ Second Submission of Argentina, para. 119.

⁷ First Submission of the United States, para. 305.

reviews because all of Article 3 applies to these reviews.⁸ Argentina is answering the question by merely asserting the answer, without argumentation.

20. Another example of specific obligations in Article 3 that make no sense in sunset reviews can be found in Article 3.5. We explained that the obligation to demonstrate that "dumped imports are . . . causing injury" often cannot be complied with in the context of a sunset review (again, because imports may not be present in significant volumes, may not be sold at dumped prices, and may not be causing present injury).⁹ Argentina responds by characterizing this as some sort of an attempt by the United States "to demonstrate that each and every word of Article 3.5 cannot practicably apply to sunset reviews."¹⁰ But, we are not talking about a few stray words here; we are talking about the core of the obligation in Article 3.5 – to demonstrate "that the dumped imports are . . . causing injury."

21. Argentina's discussion of the requirements of Article 3.5 is a good example of how Argentina is attempting to improperly expand the obligations on Members in sunset reviews. Article 3.5 instructs investigating authorities to examine "any *known* factors other than the dumped imports which at the same time are injuring the domestic industry." (The word "known" was added to this provision in the Uruguay Round and can only be construed as having narrowed the obligation under the Tokyo Round Anti-Dumping Agreement, which was not confined to an examination of "known" factors.) Yet, Argentina asserts that Article 3.5 required that the ITC "distinguish the *potential injurious effects* of other causal factors from the effects of the dumped imports," despite Article 3.5's limitation of the obligation to "known factors" causing injury.¹¹

22. Argentina argues that the logic behind the Appellate Body's finding in *Japan Sunset* regarding the applicability of Article 2 to sunset reviews "requires the parallel finding that "injury" for purposes of Article 11.3 is subject to the disciplines of Article 3."¹² In fact, the Appellate Body's report stands for just the opposite conclusion.

23. In *Japan Sunset*, the Appellate Body reiterated its earlier finding that "original investigations and sunset reviews are distinct processes with different purposes."¹³ The Appellate Body then found that investigating authorities are under no obligation to calculate or rely on dumping margins when they make their likelihood of dumping determination in a sunset review.¹⁴ (The Appellate Body explained that "it is consistent with the different nature and purpose of original investigations, on the one hand, and sunset reviews, on the other hand, to interpret the Anti-Dumping Agreement as requiring investigating authorities to calculate dumping margins in an original investigation, but not in a sunset review.")¹⁵ The Appellate Body then concluded that *if* – and only *if* – investigating authorities choose to rely on dumping margins in making their likelihood determination, they are required to observe the disciplines of Article 2.4. In this case, neither Commerce nor the ITC relied on any particular dumping margins in making their likelihood determinations.

24. So what does *Japan Sunset* teach us? The parallel finding with respect to the likelihood of continuation or recurrence of injury determination is that investigating authorities are under no obligation in a sunset review to make a new "injury" determination, as defined in Article 3, but that if they do, they should observe the disciplines of Article 3. In this case, the ITC did not make a new "injury" determination as part of its sunset review; it assessed whether injury was likely to continue or recur, and the obligations of Article 3 do not apply.

⁸ Second Submission of Argentina, para. 164.

⁹ First Submission of the United States, para. 351.

¹⁰ Second Submission of Argentina, para. 183.

¹¹ Second Submission of Argentina, para. 185.

¹² Second Submission of Argentina, para. 28.

¹³ *Japan Sunset*, para. 106 (quoting from *US-Carbon Steel*, AB Report, para. 87).

¹⁴ *Japan Sunset*, para. 123 and 126.

¹⁵ *Japan Sunset*, para. 124.

25. Argentina also argues that the Anti-Dumping Agreement prohibits use of cumulation in sunset reviews. It should be noted first that neither Article 11.3 nor any other provision in the Anti-Dumping Agreement prohibits cumulation. Argentina's argument that Article 11.3 expressly prohibits cumulation because it speaks of "duty" in the singular is unconvincing. One of the two supposed uses of the singular – the reference to "any definitive anti-dumping duty" – could just as well state the plural. And the reference to "the duty" is merely descriptive. If the drafters of Article 11.3 had intended to prohibit cumulation in sunset reviews, they surely would have found a more explicit way of doing so.

26. Argentina also relies on the Appellate Body's finding in *Japan Sunset* that Articles 11.3 and 9.2 do not require authorities to make their likelihood determinations on a company-specific basis.¹⁶ We fail to see how this has any relevance to the question of whether cumulation is permitted. If anything, Article 9.2 suggests that "an anti-dumping duty" is not limited to a single country because that article envisions that "an anti-dumping" duty might be applied to "all the supplying countries involved."

27. With regard to the ITC's analysis in the sunset review of OCTG from Argentina, two of Argentina's arguments merit special attention here: The ITC's pricing analysis and the application of the "likely" standard.

28. At the outset of this discussion, it bears repeating: Article 17.6(i) makes clear that the availability of an alternative interpretation of evidence on the record is not sufficient to find a determination inconsistent with the Anti-Dumping Agreement. Argentina must prove that the ITC's examination of facts was not unbiased and objective. Argentina's arguments, which are based on a misapprehension of the ITC's analysis, do not indicate that the ITC's examination was biased and unobjective.

29. With regard to pricing, Argentina focuses on the evidence of underselling, and asserts that authorities should not be permitted to rely on pricing information from the original investigation to the exclusion of more current data.¹⁷ However, the ITC did *not* rely exclusively on the evidence of underselling from the original investigation. There *was* evidence of more recent underselling, but the scope of this underselling was limited because subject imports had a limited presence in the US market in the period of review.¹⁸ Moreover, current pricing data may be limited in a sunset review if imports have declined as a result of the imposition of the order. Argentina's suggestion that a finding of likely underselling must be based exclusively on current pricing data should be rejected.

30. With regard to the ITC's overall determination, Argentina repeatedly claims that the ITC construed "likely" to mean "possible" in the underlying review. This is untrue, and there is no evidence to support it. Argentina also makes much of the question of whether "likely" means "probable." But Article 11.3 does not use the word "probable." As we have already stated, moreover, a debate about synonyms for "likely" does not advance this inquiry. The word "probable" itself has a variety of meanings and does not connote a specific degree of probability. For example, some would interpret the word to mean "more likely than not."

31. Rather than debating synonyms, the United States believes it is more useful to examine the details of the ITC's analysis, as explained fully in our submissions.¹⁹ It is also worth noting that the

¹⁶ Second Submission of Argentina, para. 190.

¹⁷ Second Submission of Argentina, paras. 172-173.

¹⁸ ITC Report, p. 21.

¹⁹ First Submission of the United States, paras. 313-43; Second Submission of the United States, paras. 61-78.

ITC, using the "likely" standard, has made negative likelihood of injury determinations, leading to the revocation of anti-dumping measures, in over one-third of the first set of sunset reviews it conducted.

32. Argentina attempts to portray the ITC's determination as speculative and not based on record evidence. It generally does this by focusing on selected individual factors that the ITC considered and claiming that the ITC's conclusion was not based on empirical certainty. We urge the Panel to reject this piecemeal analysis and to look at *all* of the evidence that the ITC considered and the *entirety* of its determination.

33. Finally, contrary to Argentina's suggestion,²⁰ the ITC did not use a double-negative "no discernible adverse impact" standard in lieu of the "likely" standard of Article 11.3. The question of whether imports from each subject country have a discernible adverse impact is part of the ITC's cumulation analysis under US domestic law. It has nothing to do with the application of the "likely" standard in sunset reviews.

Procedural Issues

34. Finally, we turn to the procedural issues briefly. First, with regard to Argentina's requests for specific remedies in section XI of its First Submission, the United States notes that GATT and WTO practice with respect to remedies has been to urge the respondent, where the panel rules against it, to bring the inconsistent measure into conformity with that Member's WTO obligations. Therefore, should this Panel agree with Argentina on the merits, it should nonetheless reject Argentina's requested specific remedy.

35. As for the other issues the United States described in its request for preliminary rulings, it remains perplexing that Argentina has chosen to devote resources to vigorously debate issues that would not exist had Argentina simply withdrawn its original panel request and drafted a proper one. Nevertheless, the United States has proven its claims. Nothing in Argentina's submissions refutes the arguments the United States has advanced. To the contrary, these arguments confirm that Argentina's panel request was inconsistent with Article 6.2 of the DSU.

36. More specifically, confusion persists with regard to the relevance of the "claims" on Page Four of Argentina's Panel Request. Argentina seems to believe that the placement of the word "also" in the first sentence of its Page Four "claims" and that quoting the dictionary meaning of "also" resolve the ambiguity as to whether these claims duplicate those in Sections A and B or are in addition to them.²¹ With all due respect, simply defining "also" does not clarify the meaning of the sentence with respect to the rest of the panel request. In addition, Argentina's insistence that the panel request be read "as a whole" provides no clarification on this point. The fact that this issue continues to be debated is itself evidence that the request was not clear.

37. It should also be noted that Page Four – in stark contrast to the other portions of the request – does not provide a "brief summary" of the legal basis of the claim, as required by Article 6.2 of the DSU, regardless of Argentina's assertions to the contrary. In Sections A and B, Argentina provided a description of the measures being challenged. On Page Four, Argentina did not. There is no discussion between the relationship of the articles alleged to have been violated and the legal references on Page Four. There is no summary of the legal basis of the claims – whatever they may be.

38. Argentina's argument that third parties found the claim to be "clear" is, frankly, not relevant; the third parties are not defending their laws, and what may be "clear" enough for purposes of

²⁰ Second Submission of Argentina, para. 199-200.

²¹ Submission of Argentina on US Preliminary Request, para. 42.

determining third-party participation in a dispute is not necessarily clear enough for the party forced to respond with precision to the claims being made.²²

39. Argentina makes an even more striking argument in connection with the US' concerns that Argentina's First Submission contains claims that are outside the terms of reference of the panel request. According to Argentina, the United States must show that it suffered prejudice in order for the Panel to find these matters outside the terms of reference.²³ There is no such requirement, and, not surprisingly, Argentina cites no support for this argument.

40. Argentina's prejudice argument implies that panel requests need only be drafted clearly if failure to do so would prejudice the respondent, and that these panel requests only form the terms of reference if failure to do so would prejudice the respondent. In other words, panel requests and the due process considerations of the DSU are meaningless unless the respondent loses the case. Needless to say, such a results-oriented approach to due process vitiates the procedural protections of the DSU.

41. Nonetheless, while nothing in the WTO agreements states that lack of prejudice cures a violation of DSU Article 6.2, the United States was in fact prejudiced by Argentina's deficient panel request in this dispute. As we noted at the first substantive meeting of the Panel, Argentina's vague panel request resulted in the United States being unable to prepare its defence from the start. One consequence of this is that we were rushed to complete our First Submission, which caused us to neglect to address until the first Panel meeting Argentina's improper request for a specific remedy from the Panel, as noted above.

42. Finally, Argentina's argument that the United States has not made its case with respect to its preliminary ruling request, and thus the Panel should simply disregard some of the US claims now,²⁴ is without merit. The United States has in fact made its case; Argentina has not rebutted these claims.

* * * * *

43. In closing, the United States urges the Panel to be mindful of two things in evaluating Argentina's claims: First, the obligations under Article 11.3 of the Anti-Dumping Agreement extend primarily to due process considerations. Article 11.3 does not establish substantive requirements with regard to the methodology a Member employs in conducting a sunset review. Second, with regard to the analysis underpinning the Commerce and ITC determinations, Article 17.6(i) provides that a panel may not overturn these determinations simply because another conclusion could have been drawn; if the Member establishes facts in a proper manner and examines those facts in a manner that is unbiased and objective, then the Member has met its obligations.

44. In this case, the United States afforded respondent interested parties the opportunity to place facts and arguments on the record. The United States evaluated those facts and arguments in an unbiased and objective manner. Argentina's claims must therefore be rejected.

45. Mr. Chairman, that concludes the opening statement of the United States for this second meeting of the Panel. The US delegation looks forward to your questions.

²² Second Submission of Argentina, para. 257.

²³ Submission of Argentina on US Preliminary Request, para. 88.

²⁴ Second Submission of Argentina, para. 239.

Closing Statement – 3 February 2004

1. Thank you very much. We have a few points to make in closing, touching on a few key issues.

Issues Concerning the Likelihood of Continuation or Recurrence of Dumping

2. The United States is still of the view that the *Sunset Policy Bulletin* is not a mandatory measure that can be challenged in WTO dispute settlement. Although the Appellate Body reversed the panel on this issue in *Japan Sunset* because it believed that the panel had not fully considered the relevant arguments, we are confident that this Panel, in properly considering all the relevant factors, would reach the same conclusion as the *Japan Sunset* panel. Under US law, the *Sunset Policy Bulletin* has no independent legal status; it is not a measure challengeable under WTO dispute settlement. Nor does the Bulletin mandate any behaviour whatsoever. This is true as a matter of fact, and any conclusion to the contrary would simply mischaracterize US law.

3. Also, contrary to Argentina's arguments, the statute, SAA, and the *Sunset Policy Bulletin* – whether considered individually or on their own – do not presume an affirmative likelihood determination in every sunset review. As explained in significant detail in the US First Submission, paras. 173-186, as the party asserting this fact, Argentina bears the burden of proving it; Argentina has failed to do so.

4. With respect to the *Sunset Policy Bulletin* and Section III.A.3, in particular, Argentina has failed to demonstrate that Commerce's consideration of dumping and import volumes is determinative – as opposed to probative – with respect to likelihood. In *Japan Sunset*, the Appellate Body itself recognized that Section III.A.3 does not necessarily instruct Commerce to treat these two factors as conclusive in every case (para. 181). Nor do Argentina's Exhibits 63 or 64 shed any light on the nature of the Policy Bulletin. These charts contain no information concerning WHAT evidence was on the record in the sunset review and how Commerce considered that evidence. In *Japan Sunset*, the Appellate Body stated that the "probative value of the two factors for a likelihood determination in a sunset review will necessarily vary from case to case." (Para. 176.) Argentina's Exhibits 63 and 64 provide no insights into the facts of those cases with respect to information on dumping and import volumes; nor do they indicate whether interested parties – domestic or respondent – provided any other information for Commerce's consideration. These charts, therefore, are meaningless.

5. In contrast, the facts in this case are enlightening. Siderca knew about the initiation of the sunset review and the required content of the substantive response, but did not take advantage of its opportunities to submit explanatory information on its likely dumping behaviour or its import volumes. As the Appellate Body stated in *Japan Sunset*, "The Anti-Dumping Agreement assigns a prominent role to interested parties ... and contemplates that they will be a primary source of information Company-specific data relevant to a likelihood determination under Article 11.3 can often be provided only by the companies themselves. . . . [I]t is the exporters or producers themselves who often possess the best evidence of their likely future pricing behaviour – a key element in the likelihood of future dumping." (Para. 199) Neither Siderca, nor any other Argentine exporter or producer, provided such data. The evidence that was provided led to Commerce's affirmative likelihood determination, not any "irrefutable presumption" allegedly contained in the *Sunset Policy Bulletin*.

6. In presenting questions on the dumping methodology, Argentina characterized the Japan Sunset report as interpreting the AD Agreement to require administering authorities to ensure that any margin on which they rely was calculated consistent with Article 2. We note again that Commerce did not rely on the magnitude of the dumping margin, but rather just the existence of continued

dumping throughout the existence of the order. We also note that nothing in the *Japan Sunset* report shifts the burden of proof for making a *prima facie* case of a claim from the complainant to the respondent, as suggested by Argentina.

7. We further note that *Japan Sunset* found that there was no obligation to calculate a dumping margin in a sunset review and, in this case, the United States did not calculate a dumping margin. While *Japan Sunset* did allow that claims under Article 2 could be reached in a sunset review, that finding does not alter the application of Article 17 of the AD Agreement – that a panel examine a matter based upon the facts made available in conformity with appropriate domestic procedures and whether the establishment of the facts was proper and whether the evaluation of the facts was proper, unbiased, and objective.

8. While Argentina is not barred from raising its Article 2 claims before this Panel, the factual basis for that claim must be the Commerce record and here, Argentina has failed to establish that the record facts provide a basis for its claims. As we noted in response to questions, and as Argentina agreed in paragraph 21 of its statement this morning, the Panel must limit its review to the record that was before the administering authority. The Commerce record does not contain any calculation methodology – rather, it contains the final determination of Commerce from the investigation. Argentina's Exhibits 52 and 66A and B were not part of the record before Commerce and are not properly before this Panel. In addition, even if the Panel were to consider Argentina's exhibits, those exhibits, if anything, only confirm that the United States used a calculation methodology distinct from that considered in *EC – Bed Linen*. Argentina has advanced no independent legal theory to support its Article 2 claim. Thus, even if the principles of *EC – Bed Linen* were applicable as *stare decisis*, which they are not, Argentina's claim would fail.

9. Argentina also argues that Commerce does not seek out relevant information in sunset reviews or evaluate information in an objective manner. Even a cursory review of the facts of this case belies Argentina's view. Commerce takes an active role in every sunset review, whether full or expedited. Commerce informs the foreign government of an impending initiation of a sunset review and encourages that government's participation in the sunset review. Commerce publishes a notice of initiation of the sunset review. Commerce has published its *Sunset Regulations* containing the questionnaire. These same regulations invite interested parties to submit any factual information or argument they wish Commerce to consider in the sunset review. Far from being passive, Commerce actively seeks factual information and argument relevant to the likelihood dumping determination.

10. As we noted earlier, Argentina fails to fully acknowledge the prominent role the AD Agreement assigns to interested parties. In this case, neither Siderca nor any other foreign interested party provided any additional factual information in the sunset review of OCTG from Argentina.

11. For those foreign interested parties who failed to respond to the notice of initiation, they were deemed to have waived their rights to participation. Argentina faults Commerce for not identifying the recalcitrant interested parties, rather than these parties themselves, despite the observation in *Japan Sunset* that company-specific data relevant to a likelihood determination can often be provided only by the companies themselves. Nothing in Article 11.3 or the AD Agreement requires the investigating authority to extract or divine information that an interested party does not wish to submit. Thus, any fault for the absence of information on the administrative record of the sunset review of OCTG from Argentina can only be assigned to Siderca and the non-responding respondents themselves.

Issues Concerning the Likelihood of Continuation or Recurrence of Injury

12. We would also like to respond to just two points that Argentina made this morning concerning the injury part of this case.

13. Our first point relates to Argentina's statement that "when more future 'variables' are relied upon to support the likelihood of a particular occurrence happening . . . this actually leads one to the conclusion that such an occurrence is less likely to happen." (Argentina oral statement, para. 101.) What is Argentina suggesting? That the United States should simplify its sunset review analysis, and consider fewer "future variables"? Surely, this would run counter to the Appellate Body's finding that authorities should conduct a "rigorous examination" in sunset reviews.

14. Second, Argentina questions how an exporter can ever meet the ITC's standard, given that the ITC will consider evidence of adverse impact from the original injury investigation. (Argentina oral statement, para. 89.) The answer to this question lies close at hand – in the same ITC report that we are considering, the ITC made a negative likelihood-of-injury determination for drill pipe from Argentina and Mexico, leading to the revocation of those anti-dumping measures. The answer also lies in the more than one third of the reviews in which the ITC made negative likelihood of injury determinations. We ask the Panel to reject Argentina's suggestion that the ITC imposes a standard that cannot be met.

Procedural Issues

15. With respect to Argentina's request that the Panel suggest "that the only way for the United States to comply with" any adverse "recommendations is through the immediate termination of the anti-dumping measure on OCTG from Argentina," in addition to our statements at the first Panel meeting and in our opening statement this morning, the United States notes that Article 19.1 of the DSU provides first and foremost that, "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement." This facilitates the goal of encouraging parties to reach mutually satisfactory solutions. It also recognizes that a Member generally has many options available to it to bring a measure into compliance. And although Article 19.1 also provides that, "[i]n addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations," most panels appropriately exercise their discretion to not provide such suggestions. We believe that, since the US measures at issue already conform to the WTO agreements, there is no need for either a recommendation or a suggestion. Nonetheless, should the Panel determine otherwise, we believe that the Panel in this dispute should also decline to make any suggestions in this regard.

16. With respect to prejudice, the United States has already responded to this issue in our First Submission (paras. 96-99) and our answers to the Panel's first set of questions (paras. 93-94). While Argentina may not agree with our responses, we nevertheless believe that our showing of prejudice is sufficient and valid. Indeed, previous panels such as the panel in the *Canada Wheat Board* dispute have relied on these very reasons, and we believe that this Panel should also follow suit.

17. Further, the United States has not abandoned its claims concerning the preliminary rulings by failing to address them in its second substantive response. For the record, parties only abandon claims by doing so affirmatively. In this instance, having made its case, and having reviewed Argentina's detailed but unconvincing response to the US' claims, the United States made the decision to devote its resources to answering the panel's questions and rebutting erroneous and misleading assertions in Argentina's oral presentation to the Panel in the first substantive meeting. Had Argentina's claims not been continually evolving and had Argentina presented the problem clearly at the beginning of this process, the United States could have afforded to devote the time and energy to rebutting each line of Argentina's response. If Argentina believes the United States has "abandoned" its due process claims

as a result of this supposed omission, then Argentina has itself provided evidence of the prejudice the United States has suffered in these proceedings.

18. Regardless, Argentina's argument that it may rely on the headings in the panel request to establish the claims in its panel request only confuses the issues further. There are two headings in the panel request. There are apparently three sets of claims (including Page Four, if those are claims). The two headings refer to "*the*" determination. Neither refers to the "as such" claims. Therefore, the headings do not clarify the claims within them.

19. In some cases, Argentina refers to the factual background portion of the request to expand the claims contained therein. Yet the last sentence of that section states that the "*specific claims*" are set forth below.

20. This concludes our closing statement. We would of course be happy to elaborate further on any of the issues raised today, should the Panel wish to ask additional questions. Thank you again for your time and attention.