

## ANNEX C

### SECOND WRITTEN SUBMISSIONS BY THE PARTIES

<b>Contents</b>		<b>Page</b>
Annex C-1	Second Written Submission of Argentina	C-2
Annex C-2	Second Written Submission of the United States	C-64

## ANNEX C-1

### SECOND WRITTEN SUBMISSION OF ARGENTINA

8 January 2004

#### TABLE OF CONTENTS

	<u>Page</u>
<b>I. INTRODUCTION .....</b>	<b>5</b>
<b>II. THE SUBSTANTIVE WTO OBLIGATIONS AT ISSUE IN THIS DISPUTE.....</b>	<b>6</b>
A. THE PRIMARY OBLIGATION OF ARTICLE 11.3 OF THE ANTI-DUMPING AGREEMENT IS TERMINATION OF THE ANTI-DUMPING MEASURE.....	6
B. THE OBLIGATIONS IN ARTICLES 2, 3, 6, AND 12 OF THE ANTI-DUMPING AGREEMENT ARE APPLICABLE TO REVIEWS CONDUCTED UNDER ARTICLE 11.3 .....	9
1. <b>Article 2 of the Anti-Dumping Agreement applies to sunset reviews conducted under Article 11.3.....</b>	<b>9</b>
2. <b>Article 3 of the Anti-Dumping Agreement applies to sunset reviews conducted under Article 11.3.....</b>	<b>11</b>
3. <b>Articles 6, 12, and 18 of the Anti-Dumping Agreement apply to sunset reviews conducted under Article 11.3.....</b>	<b>12</b>
<b>III. THE DEPARTMENT'S SUNSET DETERMINATION .....</b>	<b>13</b>
A. THE US SUNSET REVIEW WAIVER PROVISIONS, 19 USC. § 1675(C)(4) AND 19 C.F.R. § 351.218(D)(2)(III), ARE INCONSISTENT AS SUCH WITH THE ANTI-DUMPING AGREEMENT.....	13
1. <b>US arguments that waiver is applied on a company-specific basis are unavailing and do not alter the conclusion that the Waiver Provisions violate Articles 11.3, 11.4, 6.1, and 6.2.....</b>	<b>13</b>
2. <b>The US arguments that the Waiver Provisions merely serve as an efficiency mechanism are without merit .....</b>	<b>14</b>
B. 19 USC. § 1675A(C)(1), THE STATEMENT OF ADMINISTRATIVE ACTION, AND SECTION II.A.3 OF THE <i>SUNSET POLICY BULLETIN</i> ESTABLISH AN IRREFUTABLE PRESUMPTION OF LIKELY DUMPING IN DEPARTMENT OF COMMERCE SUNSET REVIEWS THAT VIOLATES AS SUCH ARTICLE 11.3.....	16
1. <b>19 USC. § 1675a(c)(1), the Statement of Administrative Action, and the <i>Sunset Policy Bulletin</i> are measures that can be challenged as such.....</b>	<b>17</b>
2. <b>19 USC. § 1675a(c)(1), the Statement of Administrative Action, and Section II.A.3 of the <i>Sunset Policy Bulletin</i> require decisive reliance by the Department on historical dumping margins and declines in import volume and thus establish an irrefutable presumption of likely dumping in Department of Commerce sunset reviews in violation of Article 11.3 as such.....</b>	<b>18</b>
3. <b>Argentina established a <i>prima facie</i> case as set forth in ARG-63 and ARG-64 and the United States has not rebutted the existence of the irrefutable presumption.....</b>	<b>23</b>
4. <b>The Department's consistent practice in sunset reviews both demonstrates the irrefutable presumption of likely dumping in US law and itself violates as such Article 11.3 of the Anti-Dumping Agreement.....</b>	<b>23</b>

5.	<b>Assuming <i>arguendo</i> that US law and practice establishing the irrefutable presumption are not inconsistent as such with Article 11.3, then the United States has not administered its law with respect to the Article 11.3 Likelihood of Dumping Determination in an impartial and reasonable manner in violation of Article X:3(a) of the GATT 1994.....</b>	<b>25</b>
C.	THE DEPARTMENT’S SUNSET REVIEW OF OCTG FROM ARGENTINA WAS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT .....	26
1.	<b>The Department’s determinations indicate that it applied the Waiver Provisions to Siderca; Application of the Waiver Provisions in the Sunset Review of OCTG from Argentina was inconsistent with Articles 11.3 and 6 of the Anti-Dumping Agreement.....</b>	<b>26</b>
(a)	The US Position in Its First Submission Is Inconsistent with Both the Department’s Sunset Determination and the Factual Record Before the Department .....	26
(b)	Even Accepting the US Explanation in Its First Submission, the Effect of the Application of the Waiver Provisions in the Sunset Review of OCTG from Argentina Is the Same Under Either Scenario .....	28
2.	<b>Assuming <i>arguendo</i> that waiver was only applied to the non-responding respondents, the Department’s conduct of an expedited review on the basis of the facts available was inconsistent with Articles 11.3, 6.8, and Annex II of the Anti-Dumping Agreement.....</b>	<b>29</b>
(a)	Under This Scenario, Argentina Was Limited To an Expedited Review and a Decision Based on Facts Available .....	29
(b)	The Department Violated Articles 6.1 and 6.2 of the Anti-Dumping Agreement .....	30
(c)	The Department Violated Article 6.8, 6.9, and Annex II Because the “Facts Available” Analysis Was Necessarily Limited To the Dumping Margin in the Original Investigation and the Information in the Substantive Response.....	32
3.	<b>The Department’s Determination that termination of the duty would be likely to lead to continuation of dumping was inconsistent with Articles 11.3 and 2 of the Anti-Dumping Agreement.....</b>	<b>32</b>
(a)	There Was No Evidence Before the Department That Dumping Continued During the Sunset Review Period .....	32
(b)	Decisive Reliance by the Department on a WTO-Inconsistent Margin (Because It Was Calculated Using the Practice of Zeroing) as the Basis for the Likelihood Determination Is Inconsistent with Article 11.3 .....	35
4.	<b>The “likely margin” reported by the Department to the Commission was inconsistent with Articles 2 and 11.3.....</b>	<b>38</b>
IV.	<b>THE COMMISSION’S SUNSET DETERMINATION.....</b>	<b>39</b>
A.	THE COMMISSION DID NOT APPLY THE CORRECT STANDARD FOR DETERMINING WHETHER TERMINATION OF THE ANTI-DUMPING DUTY ORDER WOULD BE LIKELY TO LEAD TO CONTINUATION OR RECURRENCE OF INJURY AND VIOLATED ARTICLES 11.3 AND 3.1 OF THE ANTI-DUMPING AGREEMENT .....	39
B.	THE COMMISSION’S SUNSET DETERMINATION WAS INCONSISTENT WITH ARTICLE 11.3 AND 3 OF THE ANTI-DUMPING AGREEMENT .....	41
1.	<b>The Commission’s Sunset Determination was inconsistent with Article 3.1 of the Anti-Dumping Agreement.....</b>	<b>41</b>

2.	<b>The Commission’s Determination was inconsistent with Article 3.4 of the Anti-Dumping Agreement.....</b>	<b>44</b>
3.	<b>The Commission’s Determination was inconsistent with Article 3.5 of the Anti-Dumping Agreement.....</b>	<b>45</b>
C.	THE COMMISSION’S APPLICATION OF A CUMULATIVE INJURY ANALYSIS IN THE SUNSET REVIEW OF OCTG FROM ARGENTINA WAS INCONSISTENT WITH ARTICLES 11.3 AND 3.3 OF THE ANTI-DUMPING AGREEMENT.....	45
1.	<b>The text of Article 11.3 prohibits cumulation. Under Article 3.3 of the Anti-Dumping Agreement, the use of cumulation is only permitted in “investigations,” and even then only where certain conditions are met.....</b>	<b>46</b>
2.	<b>Assuming <i>arguendo</i> that Articles 11.3 and 3.3 do not preclude cumulation, then the terms of Article 3.3 must be applied to any cumulative analysis in a sunset review.....</b>	<b>47</b>
D.	THE TIME FRAME WITHIN WHICH INJURY WOULD BE LIKELY TO CONTINUE OR RECUR UNDER ARTICLE 11.3 OF THE ANTI-DUMPING AGREEMENT.....	49
1.	<b>The US Statutory Provisions as to the time frame within which injury would be likely to continue or recur are as such inconsistent with Articles 11.3 and 3 of the Anti-Dumping Agreement.....</b>	<b>49</b>
2.	<b>The Commission’s application of the Statutory Provisions as to the time frame within which injury would be likely to continue or recur was inconsistent with Articles 11.3 and 3 of the Anti-Dumping Agreement.....</b>	<b>50</b>
V.	<b>CONSEQUENTIAL VIOLATIONS UNDER ARTICLE VI OF THE GATT 1994, ARTICLES 1 AND 18 OF THE ANTI-DUMPING AGREEMENT, AND ARTICLE XVI:4 OF THE WTO AGREEMENT.....</b>	<b>50</b>
VI.	<b>US REQUEST FOR PRELIMINARY RULINGS.....</b>	<b>51</b>
A.	ARGENTINA’S PANEL REQUEST COMPLIED FULLY WITH DSU ARTICLE 6.2.....	51
1.	<b>Introduction.....</b>	<b>51</b>
2.	<b>Argentina’s “Page Four” claims are within the Panel’s Terms of Reference.....</b>	<b>52</b>
3.	<b>Sections B.1, B.2 And B.3 of Argentina’s claims are within the Panel’s Terms of Reference.....</b>	<b>53</b>
B.	THE SO-CALLED “CERTAIN MATTERS” REFERRED TO BY THE UNITED STATES ARE ALL WITHIN THE PANEL’S TERMS OF REFERENCE.....	55
C.	THE UNITED STATES HAS IN NO WAY BEEN PREJUDICED DURING THE COURSE OF THE PANEL PROCEEDINGS.....	56
D.	CONCLUSIONS.....	60
VII.	<b>CONCLUSION.....</b>	<b>60</b>

## I. INTRODUCTION

1. On 15 December 2003, the Appellate Body confirmed in *Sunset Review of Steel from Japan* that Article 11.3 of the Anti-Dumping Agreement mandates termination of anti-dumping duties five years after their imposition. Continuation of an anti-dumping measure is an exception, and is only justified where the authority “determine[s]” in a “review” that termination of the measure would be likely to lead to continuation or recurrence of “dumping” and “injury.”<sup>1</sup>

2. The consequence for failing to satisfy the conditions are clear: termination of the measure. To invoke the exception and continue an anti-dumping measure beyond five years requires a “rigorous examination” of whether the continuation or recurrence of dumping and injury would be “probable.”<sup>2</sup> Further, the likelihood determination must be based on positive evidence<sup>3</sup> and is subject to the substantive standards established in the Anti-Dumping Agreement.<sup>4</sup>

3. The United States takes a very different view in its first submission and its oral statement. According to the United States, Article 11.3 is practically devoid of obligations and constitutes a single bare-bones commitment.<sup>5</sup> Under this view, anti-dumping measures can be continued indefinitely, on almost any basis. Indeed, the United States indicated during the Panel’s First Substantive Meeting with the Parties that, if a company dumped in the past, it is reasonable to assume that that company would dump in the future.

4. With respect to the likelihood of dumping determination, although the United States has a complicated scheme of procedural rules, a routine inspection reveals that the US Department of Commerce (the “Department”) never makes the meaningful “determination” required by Article 11.3. This is true whether the Department applies the waiver provisions or simply resorts to the three “checklist” criteria established by the statute, the Statement of Administrative Action (“SAA”), and the *Sunset Policy Bulletin*. There is only one factor that matters for the likelihood of dumping determination: whether the US industry participated in the sunset review. The evidence speaks for itself: In the 223 cases (as of December 2003) in which the US industry has expressed an interest in continuing the anti-dumping measure, the Department has found a likelihood of continuation or recurrence of dumping in each case. The US industry has 223 wins and 0 losses on the issue of likely dumping.<sup>6</sup>

5. In this particular case, after concluding that respondent interested parties had “waived” their participation (which results in a statutorily mandated finding of likelihood of dumping), and after invoking the “expedited review” procedures, the Department identified only two facts in its determination that dumping was “likely” to continue: (1) a five-year old margin, calculated on the basis of “zeroing;” and (2) a decline in import volume. The Appellate Body in *Sunset Review of Steel from Japan* spoke to both issues, and found that neither (independently or together) could support a

---

<sup>1</sup> See Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, circulated 15 December 2003, para. 104 (“*Sunset Review of Steel from Japan*”).

<sup>2</sup> *Id.* at paras. 111, 113.

<sup>3</sup> See Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, circulated 14 August 2003, para. 7.177 (“*Sunset Review of Steel from Japan*”).

<sup>4</sup> See Appellate Body Report, *Sunset Review of Steel from Japan*, para. 128.

<sup>5</sup> According to the United States, Article 11.3 is “very limited” and sets virtually no restraints or limitations on a Member’s ability to maintain anti-dumping measures. See US First Submission, para. 3. The United States stated during the Panel’s First Substantive Meeting with the Parties that “Article 11.3 does not prescribe how a Member should go about making a likelihood determination in a sunset review.” Opening Statement of the United States at the First Meeting of the Panel with the Parties, WT/DS268, 9 December 2003, para. 6 (“US First Oral Statement”).

<sup>6</sup> See US Department of Commerce Sunset Reviews (ARG-63 and ARG-64).

determination under Article 11.3 that dumping is likely to continue.<sup>7</sup> And when the dumping margin is extremely low – such as the 1.36 per cent margin in this case – the reliability of such margin is diminished further.

6. With respect to the likelihood of injury determination, the analysis by the US International Trade Commission (the “Commission”) is equally problematic. The Commission has insisted “likely” does not mean probable, and is now faced with the Appellate Body statement that likely does mean probable.<sup>8</sup> The Commission’s analysis of the volume, price, and impact factors in this case vividly demonstrates that the Commission certainly was not determining what was probable, as it often simply asserted that the conditions that existed at the time of the original injury investigation supported the view that injury was “likely” to continue or recur. Also, the cumulated analysis of the likelihood of injury diminishes the rights of individual WTO Members who have the misfortune of being included in the aggregate determination, and the US statutory provisions fail to satisfy the “likely” standard by extending the period of time outward (with no limitations) within which the Commission must consider whether domestic producers might be injured.

7. The plain wording of the US sunset determinations challenged by Argentina often contradict the arguments advanced by the United States in its First Submission.<sup>9</sup> In addition, the US First Submission suffers from a number of irreconcilable internal contradictions. These contradictions cast serious doubts regarding the US arguments in defence of the sunset determinations. The Panel must examine Argentina’s claims based on the words used in the US sunset determinations and not on the subsequent *post hoc* rationalizations of those decisions in the US written submissions.

8. The principal obligation and corresponding right created by Article 11.3 – termination of anti-dumping measures after five years – must not be diminished. Otherwise, the limited exception for maintaining an anti-dumping measure will supersede the principal obligation of Article 11.3. Therefore, Argentina respectfully requests that the Panel, in addition to making specific findings of WTO violations, suggest pursuant to DSU Article 19.1 that the United States terminate the anti-dumping duties on oil country tubular goods (“OCTG”) from Argentina and repeal or amend WTO-inconsistent laws, regulations, procedures, and administrative provisions.

## II. THE SUBSTANTIVE WTO OBLIGATIONS AT ISSUE IN THIS DISPUTE

### A. THE PRIMARY OBLIGATION OF ARTICLE 11.3 OF THE ANTI-DUMPING AGREEMENT IS TERMINATION OF THE ANTI-DUMPING MEASURE

9. The primary obligation of Article 11.3 of the Anti-Dumping Agreement is termination of anti-dumping duties after five years. The Appellate Body in *Sunset Review of Steel from Japan* reaffirmed the principle it first articulated in *Steel from Germany*. Continuation of the measure is the exception, and is only permissible if the authorities conduct a “review,” undertake a “rigorous examination” of the facts, and “determine” that termination of the anti-dumping measure would be likely to lead to continuation or recurrence of injurious dumping.<sup>10</sup> The Appellate Body also reaffirmed that, “[i]f any one of these conditions is not satisfied, the duty must be terminated.”<sup>11</sup>

---

<sup>7</sup> See Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 127-128, 130, 177.

<sup>8</sup> See *id.* at paras. 110-111.

<sup>9</sup> See Argentina’s Oral Statement in the Panel’s First Substantive Meeting with the Parties, DS268, 9 December 2003, para.7 (“Argentina’s First Oral Statement”).

<sup>10</sup> Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 104, 113.

<sup>11</sup> *Id.* at para. 104; see also Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion – Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, adopted 19 December 2002, para. 88 (“*Steel from Germany*”) (interpreting Article 21.3 of the SCM Agreement). The Appellate Body in *Sunset Review of Steel from Japan* concluded that, “[g]iven the parallel wording of these two articles, we believe that the explanation, in our Report in [*Steel from Germany*], of the nature of the sunset

10. In interpreting the meaning of the words “review” and “determine” in Article 11.3, the Appellate Body noted the “investigatory and adjudicatory aspects” of Article 11.3 reviews:

This language in Article 11.3 makes clear that it envisages a process combining *both* investigatory and adjudicatory aspects. In other words, Article 11.3 assigns an active rather than a passive decision-making role to the authorities. The words “review” and “determine” in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination.<sup>12</sup>

11. With respect to the evidentiary basis for the likelihood determination, the Appellate Body affirmed the Panel’s statement that the authority must ground its determination on a “sufficient factual basis” to allow it to “draw reasoned and adequate conclusions concerning the likelihood” of continuation or recurrence.<sup>13</sup> Moreover, the Appellate Body stated that its discussion in *Steel from Germany* of the sunset review provision in the SCM Agreement, Article 21.3, was an “apt description” of the Article 11.3 sunset review.<sup>14</sup> In *Steel from Germany*, the Appellate Body held that the authority must make a “fresh determination” in a sunset review that is forward-looking and “based on credible evidence.”<sup>15</sup> The Appellate Body in *Steel from Germany* thus affirmed the Panel’s statement in that dispute that the authority’s likelihood determination cannot be based solely on outdated information, but rather “should rest on the evaluation of the evidence that it has gathered during the original investigation, the intervening reviews *and finally the sunset review.*”<sup>16</sup>

12. Ultimately, the Appellate Body in *Sunset Review of Steel from Japan* made clear that the conduct of a review and the determination of the likelihood of dumping and injury in order to invoke the exception requires a “rigorous examination” that comports with the “exacting nature” of obligations imposed by Article 11.3:

Article 11.3 states that, notwithstanding the provisions of Articles 11.1 and 11.2, Members “shall” terminate an anti-dumping duty “unless” the authorities make an affirmative likelihood determination in a sunset review. This confirms that the mandatory rule in Article 11.3 applies in addition to, and irrespective of, the obligations set out in the first two paragraphs of Article 11. This also suggests to us that authorities must conduct a *rigorous examination* in a sunset review before the exception (namely, the continuation of the duty) can apply. In addition, our view of the *exacting nature of the obligations* imposed on authorities under Article 11.3 is supported by a consideration of the implications of initiating a sunset review. The last sentence of Article 11.3 allows the relevant duty to continue while the review is underway, and Article 11.4 contemplates that the review process may take up to one year. These provisions create an additional exception to the requirement that anti-dumping duties will be terminated after five years, permitting a Member to maintain the duty for the period during which the review is ongoing, regardless of the outcome of that review. This, too, suggests that the drafters of the Anti-Dumping Agreement saw the sunset review as a *rigorous* process that can take up to one year,

---

review provision in the *SCM Agreement* [(Article 2.3)] also serves, *mutatis mutandis*, as an apt description of Article 11.3 of the Anti-Dumping Agreement.” Appellate Body Report, *Sunset Review of Steel from Japan*, n.114 (citing Appellate Body Report, *Steel from Germany*, paras. 63 and 88.).

<sup>12</sup> Appellate Body Report, *Sunset Review of Steel from Japan*, para. 111.

<sup>13</sup> *Id.* at paras. 114-115 (citing Panel Report, *Sunset Review of Steel from Japan*, para. 7.271).

<sup>14</sup> *See id.* at n.114.

<sup>15</sup> Appellate Body Report, *Steel from Germany*, para. 88.

<sup>16</sup> Panel Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/R, adopted 19 December 2002, para. 8.95 (“*Steel from Germany*”) (emphasis added).

involving a number of procedural steps, and requiring an *appropriate degree of diligence* on the part of the national authorities.<sup>17</sup>

13. Finally, the Appellate Body in *Sunset Review of Steel from Japan* plainly stated the consequences where a WTO Member fails to conduct a sunset review or fails to make the required likelihood determination under Article 11.3: “If any one of these conditions is not satisfied, the duty must be terminated.”<sup>18</sup>

14. There is a WTO-inconsistent presumption built into the system established by the United States to implement its Article 11.3 obligation. The US waiver provisions mandate a finding of likely dumping without a review,<sup>19</sup> without any analysis, and without the requisite determination required by Article 11.3. The basis for the waiver mechanism itself presumably stems from the presumption that non-participation in sunset reviews (whether voluntarily or non-voluntarily) means that in the event of termination dumping would be likely to continue. Then, even if the Department does conduct a “review” (whether “expedited” or “full”), the irrefutable presumption prescribed by the statute, the SAA, and the *Sunset Policy Bulletin* operates to preclude the Department from conducting the type of “review” and from making the kind of “determination” required by Article 11.3.<sup>20</sup> In defending the US waiver provisions and denying the existence of the irrefutable presumption in its first submission, the United States attempts to diminish the import of Article 11.3’s use of the terms “review” and “determination.” According to the United States, as used in Article 11.3, “the words ‘review’ and ‘determine’ do not contain the broad substantive rules suggested by Argentina.”<sup>21</sup>

15. The US position is not tenable. The use of defined terms such as “dumping” and “injury” in Article 11.3 makes clear that the substantive provisions of other articles of the Anti-Dumping Agreement apply to the likelihood determination. Further, an authority’s likelihood determination must be grounded on a “sufficient factual basis”<sup>22</sup> that rests “on the evaluation of evidence that it has gathered during the original investigation, the intervening reviews *and finally the sunset review.*”<sup>23</sup>

16. The United States argues that “‘current information’ is not the issue in a sunset review conducted pursuant to Article 11.3.”<sup>24</sup> “Rather,” the United States submits, “the issue under Article 11.3 is whether dumping and injury are likely to continue or recur in the event of the expiry of the duty, an inherently forward-looking inquiry.”<sup>25</sup> Thus, the United States suggests that current information is not relevant to the prospective analysis of the likelihood of dumping and injury required by Article 11.3.

17. Consequently, under the US approach, the authorities do not conduct the kind of “rigorous examination” required by Article 11.3 in order to invoke the exception and to justify the continuation of an anti-dumping measure beyond five years.<sup>26</sup> As the Panel stated in *Sunset Review of Steel from Japan*:

We recall that one of the fundamental goals of the Anti-Dumping Agreement as a whole is to ensure that objective determinations are made based, to the extent possible, on facts. Thus, to the extent that it will rest upon a factual foundation, the prospective likelihood determination will inevitably rest on a factual foundation

---

<sup>17</sup> Appellate Body Report, *Sunset Review of Steel from Japan*, para. 113 (emphasis added).

<sup>18</sup> *Id.* at para. 104.

<sup>19</sup> See Argentina’s First Submission, Section VII.A.1

<sup>20</sup> See *id.* at Section VII.B.2.

<sup>21</sup> US First Submission, para. 154.

<sup>22</sup> Panel Report, *Sunset Review of Steel from Japan*, para. 7.177.

<sup>23</sup> Panel Report, *Steel from Germany*, para. 8.95 (emphasis added).

<sup>24</sup> US First Submission, para. 265.

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

<sup>26</sup> Appellate Body Report, *Sunset Review of Steel from Japan*, para. 113.



relating to the past and present. The investigating authority must evaluate this factual foundation and come to a reasoned conclusion about likely future developments.<sup>27</sup>

18. Accordingly, contrary to the US position, the authority must examine current information in order to support the prospective likelihood determination with a sufficient factual basis. A body of evidence consisting solely of past information for an affirmative likelihood determination is deficient and inconsistent with Article 11.3 and cannot constitute positive evidence that dumping would be likely to continue.

B. THE OBLIGATIONS IN ARTICLES 2, 3, 6, AND 12 OF THE ANTI-DUMPING AGREEMENT ARE APPLICABLE TO REVIEWS CONDUCTED UNDER ARTICLE 11.3

19. As Argentina set out in its first submission,<sup>28</sup> the Article 11.3 obligation requires compliance with other provisions of the Anti-Dumping Agreement, including Article 2 (Determination of Dumping), Article 3 (Determination of Injury), Article 6 (Evidence), Article 12 (Notice), and Article 18 (Final Provisions). The United States argues that the substantive obligations contained in other provisions of the Anti-Dumping Agreement do not apply to Article 11.3, particularly Articles 2 and 3.<sup>29</sup>

20. The WTO jurisprudence soundly refutes the US view on this point.<sup>30</sup>

**1. Article 2 of the Anti-Dumping Agreement applies to sunset reviews conducted under Article 11.3**

21. As confirmed by the Appellate Body in *Sunset Review of Steel from Japan*, Article 2 of the Anti-Dumping Agreement defines “dumping” “for the purposes of the Anti-Dumping Agreement,” including sunset reviews under Article 11.3.<sup>31</sup> The Appellate Body explained,

[T]he words “[f]or the purpose of this Agreement” in Article 2.1 indicate that this provision describes the circumstances in which a product is to be considered as being dumped for purposes of the entire Anti-Dumping Agreement, including Article 11.3. This interpretation is supported by the fact that Article 11.3 does not indicate, either expressly or by implication, that “dumping” has a different meaning in the context of sunset reviews than in the rest of the Anti-Dumping Agreement. Therefore, Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 suggest that the question for investigating authorities, in making a likelihood determination in a sunset review pursuant to Article 11.3, is whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping of the product subject to the duty (that is, to the introduction of that product into the commerce of the importing country at less than its normal value). The Panel also appeared to reach a similar conclusion.<sup>32</sup>

---

<sup>27</sup> Panel Report, *Sunset Review of Steel from Japan*, para. 7.279 (emphasis added).

<sup>28</sup> Argentina’s First Submission, Section VI.C.3.

<sup>29</sup> US First Submission, paras. 141-142.

<sup>30</sup> See Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 109, 127, 128, 130; Appellate Body Report, *Steel from Germany*, paras. 69 n.59, 79-81; Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999, para. 6.59 n.501 (“*DRAMs from Korea*”); Panel Report, *Sunset Review of Steel from Japan*, paras. 7.99-7.100, 7.176.

<sup>31</sup> See Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 126-128.

<sup>32</sup> *Id.* at para. 109.

22. The United States argues that only Article 2.1 applies to Article 11.3 insofar as it provides the general meaning for the term “dumping.”<sup>33</sup> The United States further contends that the remaining provisions of Article 2 do not apply to Article 11.3, because “Article 11.3 does not require a determination that a particular *amount of dumping* is likely to continue or recur in the future . . . .”<sup>34</sup> According to the United States, such a determination of likely dumping would be impossible as there is no way to measure likely future values for prices, costs, and profits in order to calculate the dumping margin pursuant to Article 2.<sup>35</sup> Therefore, the United States argues, the requirements of Article 2 do not apply to sunset reviews.

23. The Appellate Body expressly ruled that all the provisions of Article 2 – and not just Article 2.1 – apply to sunset reviews under Article 11.3.<sup>36</sup> In doing so, the Appellate Body reversed the Panel’s finding that “the substantive disciplines in Article 2 governing the calculation of dumping margins in making a *determination of dumping* [do not] apply in making a *determination of likelihood of continuation or recurrence of dumping* under Article 11.3.”<sup>37</sup> The Appellate Body stated,

Article 2 sets out the agreed disciplines in the Anti-Dumping Agreement for calculating dumping margins. As observed earlier, we see no obligation under Article 11.3 for investigating authorities to calculate or rely on dumping margins in determining the likelihood of continuation or recurrence of dumping. However, should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4. We see no other provisions in the Anti-Dumping Agreement according to which Members may calculate dumping margins.

...

It follows that we disagree with the Panel’s view that the disciplines in Article 2 regarding the calculation of dumping margins do not apply to the likelihood determination to be made in a sunset review under Article 11.3.<sup>38</sup>

24. Therefore, under Article 11.3, where the authority relies on dumping margins calculated in previous determinations in making the likelihood determination, it must ensure that those dumping margins are consistent with the requirements of Article 2.

25. Further, if the authority calculates a new dumping margin for the Article 11.3 review, then such a margin must satisfy the requirements of Article 2. In order to make the prospective analysis required by Article 11.3, the authority must base its likelihood determination on both past and current information.<sup>39</sup> To know whether dumping would likely “continue” or “recur” under Article 11.3, an authority must have current information about dumping.<sup>40</sup> In other words, it becomes necessary to determine if dumping exists in order to assess its probable continuation. Alternatively, it becomes necessary to determine the absence of dumping in order to assess prospectively the probability of recurrence. Therefore, to the extent the authority calculates a dumping margin in order to evaluate whether dumping is currently present or absent in order to make the likelihood determination under Article 11.3, that dumping margin must comport with the disciplines of Article 2.

---

<sup>33</sup> US First Submission, para. 254.

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

<sup>35</sup> *Id.* at para. 255.

<sup>36</sup> See Appellate Body Report, *Sunset Review of Steel from Japan*, para. 128.

<sup>37</sup> Panel Report, *Sunset Review of Steel from Japan*, para. 7.168.

<sup>38</sup> Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 127-128.

<sup>39</sup> See Panel Report, *Sunset Review of Steel from Japan*, para. 7.279 (“[T]he prospective likelihood determination will inevitably rest on a factual foundation relating to the past and present.”).

<sup>40</sup> See also Third Party Submission of the European Communities, para. 12.

26. Contrary to the US assertion, the substantive requirements of Article 2 apply to sunset reviews under Article 11.3.

**2. Article 3 of the Anti-Dumping Agreement applies to sunset reviews conducted under Article 11.3**

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

28. The logic behind the Appellate Body’s ruling in *Sunset Review of Steel from Japan* that “dumping” for purposes of Article 11.3 is subject to the disciplines of Article 2 requires the parallel finding that “injury” for purposes of Article 11.3 is subject to the disciplines of Article 3.<sup>41</sup>

29. Footnote 9 states: “Under this Agreement the term ‘injury’ shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.” (Emphasis added.) The Appellate Body used the SCM Agreement’s equivalent of this very footnote as an illustration of how the injury concept applies throughout the Agreement, including in sunset reviews.<sup>42</sup>

30. The US contention that Footnote 9 is a mere “drafting device” designed to avoid the need to recite each of the three distinct forms of injury throughout the agreement is unpersuasive.<sup>43</sup> 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.”<sup>44</sup> There is no reason why injury in Article 11.2 should be treated differently than injury for purposes of Article 11.3.

31. Nor does the United States attempt to explain how injury in Article 11.1 could possibly be different from injury in Article 3. Article 11.1 states that “[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.” There is no suggestion that the drafters of the Agreement intended in Article 11.1 anything other than injury as defined in Article 3 and specified in Footnote 9. And there can be no question that the overarching principles of Article 11.1 provide the immediate context of Article 11.3.

32. The Panel in *Sunset Review of Steel from Japan* interpreted Footnote 9 as follows:

[T]he term ‘injury’ as it appears throughout the Anti-Dumping Agreement – including Article 11 – is to be construed in accordance with this footnote, unless otherwise specified. This would seem to support the view that the provisions of Article 3 concerning injury may be generally applicable throughout the Anti-Dumping Agreement and are not limited in application to investigations. Article 11 does not seem to explicitly specify otherwise in the case of sunset reviews.<sup>45</sup>

33. The US also raises the distinction between the “determination of injury” in an original investigation and a “determination of the likely continuation or recurrence of injury” in a sunset

---

<sup>41</sup> See Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 126-128.

<sup>42</sup> See Appellate Body Report, *Steel from Germany*, para. 69 n.59.

<sup>43</sup> US First Submission, para. 291.

<sup>44</sup> Panel Report, *DRAMS from Korea*, para. 6.59 n.501; see also Panel Report, *Sunset Review of Steel from Japan*, para. 7.99.

<sup>45</sup> Panel Report, *Sunset Review of Steel from Japan*, para. 7.99.

review.<sup>46</sup> But this distinction does not alter the paramount legal requirement under the Anti-Dumping Agreement that the core focus of each determination – “injury” – must be interpreted in accordance with the provisions of Article 3.

34. Moreover, that Articles 3 and 11.3 do not reference each other does not indicate, as the United States argues,<sup>47</sup> that the provisions of Article 3 do not apply to Article 11.3 sunset reviews. Rather, explicit cross-referencing is not necessary, because the terms of Article 3 (through Footnote 9 and Article 3.1) apply throughout the Anti-Dumping Agreement, including in Article 11.3.<sup>48</sup>

35. In sum, Argentina views the issue as one of the fundamental disagreements between the United States and other WTO Members involved in this proceeding. Does “injury” as used in Article 11.3 differ from the meaning of “injury” as defined under the Agreement in Footnote 9, and do the substantive and procedural standards for evaluating injury contained in Article 3 apply to determinations made under Article 11.3? Under the Agreement, the clear answer to both of these questions is “yes.” Moreover, this is not merely Argentina’s view – all of the Third Parties similarly agree that this interpretation is mandated by the Agreement.<sup>49</sup>

### **3. Articles 6, 12, and 18 of the Anti-Dumping Agreement apply to sunset reviews conducted under Article 11.3**

36. Article 6 of the Anti-Dumping Agreement applies to reviews conducted under Article 11 by virtue of the cross-reference contained in Article 11.4: “The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article.” In particular, Article 6.1 requires that “[a]ll interested parties in an anti-dumping investigation shall be given . . . ample opportunity to present . . . evidence . . . .” And Article 6.2 requires that the authority provide all interested parties “a full opportunity for the defence of their interests.”

37. The Appellate Body in *Sunset Review of Steel from Japan* recognized that the cross-reference in Article 12.3 to Article 11 reviews indicates that the drafters of the Anti-Dumping Agreement intended for interested parties in Article 11.3 sunset reviews to have “the right to receive notice of the process and reasons for the determination.”<sup>50</sup> The United States does not dispute that the provisions of Article 12 apply *mutatis mutandis* to sunset reviews under Article 11.3.<sup>51</sup>

38. Article 18.3 of the Anti-Dumping Agreement expressly provides that “the provisions of this Agreement shall apply to investigations, *and reviews of existing measures*, initiated pursuant to applications which have been made on or after the date of entry into force of the WTO Agreement.” (Emphasis added.) Thus, the Anti-Dumping Agreement applies to sunset reviews of anti-dumping measures imposed prior to the entry into force for a Member of the WTO Agreement. The United States does not dispute this.

---

<sup>46</sup> US First Submission, paras. 289, 297-301.

<sup>47</sup> *See id.* at para. 296.

<sup>48</sup> Article 3.1 states that “[a] determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination . . . .” (Emphasis added.) The Anti-Dumping Agreement clarifies Article VI of GATT 1994. Therefore, the text of Article 3.1 unambiguously provides that all determinations of injury under the Anti-Dumping Agreement – whether a determination of injury in an original investigation or a determination of the likelihood of injury in a sunset review – are subject to the requirements of that article.

<sup>49</sup> *See* Third Party Submissions of European Communities, paras. 123-127; Japan, paras. 9-15; Korea, paras. 19-24, and Chinese Taipei, para. 7.

<sup>50</sup> Appellate Body Report, *Sunset Review of Steel from Japan*, para. 112.

<sup>51</sup> *See* US First Submission, para. 239.

### III. THE DEPARTMENT'S SUNSET DETERMINATION

A. THE US SUNSET REVIEW WAIVER PROVISIONS, 19 USC. § 1675(C)(4) AND 19 C.F.R. § 351.218(D)(2)(III), ARE INCONSISTENT AS SUCH WITH THE ANTI-DUMPING AGREEMENT

1. **US arguments that waiver is applied on a company-specific basis are unavailing and do not alter the conclusion that the Waiver Provisions violate Articles 11.3, 11.4, 6.1, and 6.2**

39. The US waiver provisions, 19 USC. § 1675(c)(4)(B) and 19 C.F.R. § 351.218(d)(2)(iii), violate Article 11.3 because they mandate a finding of likely dumping.<sup>52</sup> Under Article 11.3, if the WTO Member wishes to invoke the exception and continue the measure, it must meet specified requirements. The Panel in *Sunset Review of Steel from Japan* confirmed that Article 11.3 “precludes an investigating authority from simply assuming” that dumping and injury would likely continue or recur.<sup>53</sup> The Panel further recognized that “one of the fundamental goals of the Anti-Dumping Agreement as a whole is to ensure that objective determinations are made based, to the extent possible, on facts.”<sup>54</sup> Article 11.3 requires that the authority take action and ground its determination on a “sufficient factual basis” to allow it to “draw reasoned and adequate conclusions concerning the likelihood” of continuation or recurrence.<sup>55</sup> The Appellate Body confirmed that the authority “must conduct a rigorous examination in a sunset review before the exception (namely, the continuation of the duty) can apply.”<sup>56</sup> The authority must make a “fresh determination” that is forward-looking and “based on credible evidence.”<sup>57</sup>

40. The United States does not dispute that the application of the waiver provisions mandates a finding of likely dumping. The United States argues, however, that the waiver provisions do not preclude the Department from conducting a sunset review as required by Article 11.3, because the mandatory likelihood determination under section 1675(c)(4)(B) “is limited to the party that failed to respond.”<sup>58</sup> According to the United States, “regardless of whether a respondent interested party affirmatively waives participation or Commerce finds that the failure of the respondent interested party to file a substantive response or a complete substantive response constitutes a waiver, Commerce is still required by US law and its own regulations to initiate and conduct the required sunset review.”<sup>59</sup>

41. First, as explained in detail below, this is not how the waiver provisions were applied in this case. Siderca submitted a complete substantive response, but the Department nevertheless determined that it “did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation.”<sup>60</sup>

42. The US argument fails because it relies on an overly narrow interpretation of “review.” As is clear from the Appellate Body, Article 11.3 requires a “rigorous examination” of evidence that results

---

<sup>52</sup> See Argentina’s First Submission, Sec. VII.A.1.

<sup>53</sup> See Panel Report, *Sunset Review of Steel from Japan*, para. 7.177.

<sup>54</sup> *Id.* at para. 7.279.

<sup>55</sup> *Id.* at para. 7.177.

<sup>56</sup> Appellate Body Report, *Sunset Review of Steel from Japan*, para. 113.

<sup>57</sup> Appellate Body Report, *Steel from Germany*, para. 88.

<sup>58</sup> US First Submission, para. 146.

<sup>59</sup> *Id.* at para. 148.

<sup>60</sup> *Issues and Decision Memorandum for the Sunset Reviews of the AD Orders on Oil Country Tubular Goods from Argentina, Italy, Japan, and Korea* (Dep’t Comm., 31 Oct. 2000) (final results) at 5 (“*Issues and Decision Memorandum*”) (ARG-51); see also *Oil Country Tubular Goods from Argentina: Adequacy of Respondent Interested Party Response to the Notice of Initiation*, A – 357-810 (Dep’t Comm., 22 August 2000) at 1 (Siderca filed a “complete substantive response”) and at 2 (the Department determined Siderca’s response to be “inadequate”) (“*Determination to Expedite*”) (ARG-50).

in a meaningful review. The authority must actively evaluate a sufficient body of positive evidence and ultimately render a determination that is based on that evidence. The review required by Article 11.3 cannot be a mere formality and lack substance. By mandating a determination of likely dumping without an evaluation of evidence where a respondent interested party waives – or is deemed by the Department to have waived – participation in the sunset proceeding, the US waiver provisions violate Article 11.3. Indeed, even where only one out of multiple respondents subject to the order waives participation in a sunset review, the US waiver provisions violate Article 11.3. As the Appellate Body confirmed, Article 11.3's requirement to determine in a review whether the continuation or recurrence of dumping would be likely does not permit the Department to automatically conclude – without an evaluation of facts – that dumping would be likely. The problem is even more pronounced when multiple respondent interested parties are deemed to have waived their participation.

43. For example, in this case, the ultimate effect is the same whether waiver is applied on a company-specific or order-wide basis. In this case, the Department deemed the Argentine exporters to have waived, and thus issued a determination that dumping was likely to continue or recur pursuant to the waiver provisions. Therefore, waiver on the company level was equivalent to waiver on an order-wide basis because the Department deemed the companies accounting for 100 per cent of the alleged exports to have waived participation.

## **2. The US arguments that the Waiver Provisions merely serve as an efficiency mechanism are without merit**

44. The United States also attempts to cast the waiver provisions as an efficiency mechanism that enables the Department to save resources where respondent interested parties choose not to participate in the Department's sunset review.<sup>61</sup> According to the United States, “[n]othing in Article 11.3 specifically or the AD Agreement generally requires authorities to engage in such a waste of their own resources and the resources of private parties.”<sup>62</sup>

45. Casting the function of the waiver provisions as a vehicle for saving resources is not persuasive. Purported efforts to save administrative resources cannot be used to diminish a Member's substantive rights or to re-define obligations.<sup>63</sup>

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

47. The United States has applied the waiver provision in 173 of its 297 sunset reviews of anti-dumping duty orders – and in 78 per cent of the sunset reviews in which the domestic industry participated.<sup>64</sup> In all of these cases, the Department issued a finding that dumping would likely continue or recur pursuant to the statutory mandate.<sup>65</sup> In Argentina's view, this is something other

---

<sup>61</sup> US First Submission, paras. 148-49.

<sup>62</sup> *Id.* at para. 149.

<sup>63</sup> See Argentina's First Oral Statement, paras. 49-51.

<sup>64</sup> US Department of Commerce Sunset Reviews (ARG-63 and ARG-64).

<sup>65</sup> *Id.*

than efficiency. The sunset review of antifriction bearings from Sweden illustrates the “efficient” use of the waiver provisions and highlights the direct conflict with Article 11.3 – where there is no review, no analysis, and no determination by the Department. In that case the Department stated, “given that . . . respondent interested parties have waived their right to participate in this review before the Department, we determine that dumping is likely to continue if the orders were revoked.”<sup>66</sup>

48. Finally, in its first submission, the United States does not even address the issue of “deemed waivers,” where respondents attempted to participate, but the Department rejected their responses and deemed their inadequate responses to constitute a “waiver of participation.” The United States did concede, however, during questioning from the Panel at the First Substantive Meeting With the Parties on 9 December that, pursuant to the waiver regulation, 19 USC. § 351.218(d)(2)(iii), the Department will apply a deemed waiver for both incomplete substantive responses and for non-responses. However, according to the US First Submission, a party which submits a response to a notice of initiation is never considered to have “waived” its participation in a sunset review.<sup>67</sup> Sunset cases included in Exhibit ARG-63, however, contradict the US explanation and cast doubt on the US response to Argentina’s argument.<sup>68</sup>

49. The United States also argues that the waiver provisions do not violate Article 6.1, because US sunset laws and regulations afford interested parties “ample opportunity to present evidence in writing all evidence which they consider relevant.”<sup>69</sup> According to the United States, the US waiver provisions only “operate when a respondent interested party has chosen not to avail itself of the Article 6.1 rights that other provisions of the regulations guarantee.”<sup>70</sup>

50. Under the Department’s sunset regulations, the Department “will consider the failure by a respondent interested party to file a complete substantive response . . . as a waiver of participation in a sunset review before the Department.”<sup>71</sup> Applying this provision, the Department has deemed a respondent to have waived its participation where the Department considered the respondent’s response to the notice of initiation to be “inadequate” under 19 USC. § 351.218(e)(1)(ii)(A) – both

---

<sup>66</sup> *Antifriction Bearings from Sweden*, 64 Fed. Reg. 60,282, 60,284 (Dep’t Comm. 1999)(final results sunset review) (ARG-63, Tab 6).

<sup>67</sup> See US First Submission, para. 166, (“[The US waiver provisions] are relevant only when a respondent interested party has not responded to the notice of initiation of the sunset review by making the required first submission, the substantive response.”).

<sup>68</sup> See, e.g., *Cut-to-Length Carbon Steel Plate from Belgium*, 65 Fed. Reg. 18,292 (Dep’t Comm. 2000)(final results sunset review)(ARG-63, Tab 82). The Department received incomplete responses from two respondents, and therefore considered their responses to be “inadequate” under 19 C.F.R. § 351.218(e)(1)(ii)(A). See *Issues and Decision Memo for the Expedited Sunset Review of the AD Order on Cut-to-Length Carbon Steel Plate from Belgium* at 2-3 (ARG-63, Tab 82). In addition, the domestic interested parties urged the Department to deem the respondents’ failure to file complete responses as waivers of participation in the review. See *id.* at 2. In concluding that dumping was likely to continue or recur, the Department stated: “In the instant review, the Department did not receive an adequate response from any respondent interested party. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation.” See *id.* at 5. See also *Seamless Pipe from Argentina, Brazil, Germany, and Italy*, 65 Fed. Reg. 66,708 (Dep’t Comm. 2000)(final results sunset review)(ARG-63, Tab 212). For the sunset review of the order against Italian seamless pipe, the Department received a complete substantive response from a respondent interested party, but considered the response to be “inadequate” by virtue of the 50 percent rule under 19 C.F.R. § 351.218(e)(1)(ii)(A). See *Issues and Decision Memo for the Expedited Sunset Reviews of the AD Orders on Seamless Pipe from Argentina, Brazil, Germany, and Italy* at 3 (ARG-63, Tab 212). In concluding that dumping was likely to continue or recur, the Department stated: “In the instant reviews, the Department did not receive adequate response from any respondent interested party for the Argentinean, Brazilian, and Italian cases. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation.” See *id.* at 5 (emphasis added).

<sup>69</sup> See US First Submission, para. 164.

<sup>70</sup> See *id.* at para. 166.

<sup>71</sup> 19 C.F.R. § 351.218(d)(2)(iii) (emphasis added).

because the response was incomplete and because the respondent failed to satisfy the 50 per cent threshold test.<sup>72</sup> Indeed, the Department deemed Siderca's complete substantive response to constitute a waiver of participation.<sup>73</sup>

51. The Department's regulations regarding the "deemed waiver" thus deny respondent interested parties the opportunity to present evidence in violation of Article 6.1. Although the Department's regulations afford respondents the opportunity to submit evidence, these provisions are meaningless in the context of a deemed waiver where the Department issues a mandatory determination of likely dumping pursuant to the statute, despite a respondent's attempts to participate in the sunset proceeding.

52. Similarly, the US waiver provisions violate Article 6.2. In response to this argument, the United States again fails to address the consequences of a deemed waiver. By deeming a respondent interested party's inadequate response to constitute a waiver under 19 C.F.R. § 351.218(d)(2)(iii), the Department denies the respondent "a full opportunity for the defence of [its] interests." Indeed, a respondent hardly can be said to have a full opportunity to defend its interests where the Department issues a mandatory determination of likelihood without considering information and argument submitted by that respondent.

B. 19 USC. § 1675A(C)(1), THE STATEMENT OF ADMINISTRATIVE ACTION, AND SECTION II.A.3 OF THE *SUNSET POLICY BULLETIN* ESTABLISH AN IRREFUTABLE PRESUMPTION OF LIKELY DUMPING IN DEPARTMENT OF COMMERCE SUNSET REVIEWS THAT VIOLATES AS SUCH ARTICLE 11.3

53. In *Sunset Review of Steel from Japan*, the Appellate Body confirmed that the likelihood determination required under Article 11.3 could not be based on a presumption that dumping would be likely to continue or recur.<sup>74</sup>

54. In its first submission, Argentina presented three independent claims that demonstrate that the United States has established and/or employs an irrefutable presumption of likely dumping in violation of its WTO obligations.<sup>75</sup> First, the SAA and *Sunset Policy Bulletin* cannot be separated from the US statute and, taken together, the statute, SAA, and *Sunset Policy Bulletin* establish an irrefutable presumption of likely dumping in violation of Article 11.3 of the Anti-Dumping Agreement as such. Second, the consistent practice of the United States demonstrates that it always applies an irrefutable presumption of likely dumping in violation of Article 11.3 as such. Third, in the alternative (*i.e.*, in the event that the Panel were to find that the SAA and the *Sunset Policy Bulletin* could not be challenged as "measures," or that, individually or taken together with the statute, they were not inconsistent with Article 11.3), Argentina's first submission demonstrates that the United States has not administered its law with respect to the likelihood of dumping determination in an impartial and reasonable manner as required by Article X:3(a) of the GATT 1994.

55. The implications of not finding a violation pursuant to at least one of these claims would be significant for the WTO as a rules-based system. If countries can avoid treaty obligations by copying the text of treaty commitments into domestic legislation, and then publishing "administrative guidance" that either undermines the substantive obligations or results in consistent practice that is inconsistent with WTO obligations, then WTO obligations would become meaningless.

---

<sup>72</sup> See, e.g., *Seamless Pipe from Argentina, Brazil, Germany, and Italy*, 65 Fed. Reg. 66,708 (Dep't Comm. 2000)(final results sunset review)(ARG-63, Tab 212); *Cut-to-Length Carbon Steel Plate from Belgium*, 65 Fed. Reg. 18,292 (Dep't Comm. 2000) (final results sunset review) (ARG-63, Tab 82).

<sup>73</sup> See *Issues and Decision Memorandum* at 5 (ARG-51) ("In the instant reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation.")

<sup>74</sup> See Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 178, 191.

<sup>75</sup> See Argentina's First Submission, Sections VII.B. and VII.E.



**1. 19 USC. § 1675a(c)(1), the Statement of Administrative Action, and the *Sunset Policy Bulletin* are measures that can be challenged as such**

56. In its first submission, Argentina set forth its argument that the statute, the SAA, and the *Sunset Policy Bulletin* – taken together – are inconsistent with Article 11.3 as such, because they establish an irrefutable presumption of likely dumping.<sup>76</sup>

57. The likelihood of dumping standard under US law is “multi-layered” in the sense that the US Congress has delegated the likelihood determination to the Department, which has, in turn, issued rules – codified in the *Sunset Policy Bulletin* – governing the likelihood determination according to criteria prescribed by Congress in the statute and SAA. Therefore, in discerning the likelihood of dumping standard under US law, the statute, SAA, and *Sunset Policy Bulletin* are “inseparable and should not be read independently from each other when evaluating the overall conformity of the law with WTO obligations.”<sup>77</sup>

58. The statutory provision, 19 USC. § 1675a(c)(1), provides the starting point for the Department’s likelihood determination. Section 1675a(c)(1) instructs that, in determining whether revocation of an anti-dumping order would be likely to lead to continuation or recurrence of dumping, the Department “shall consider—(A) the weighted average dumping margins determined in the investigation and subsequent reviews, and (B) the volume of imports of the subject merchandise for the period before and the period after the issuance of the anti-dumping duty order . . . .”

59. As with the relevant statutory provision in *US – Export Restraints*, however, the statute cannot be read in isolation.<sup>78</sup> While the statute prescribes the two factors (i.e., previously calculated dumping margins and import volumes) that the Department must consider in making the likelihood determination, the statute does not articulate how the Department must interpret these in deciding whether dumping would be likely to continue or recur. In other words, the statutory provisions alone do not articulate the likelihood of dumping standard under US law.

60. In order to discern the likelihood of dumping standard under US law, the statute cannot be read independently from the SAA and the *Sunset Policy Bulletin*. As a matter of US law, the SAA has a unique status as the authoritative interpretive tool for the statute.<sup>79</sup> The SAA outlines the three criteria that Congress believes are “highly probative” of likely dumping: (1) continued dumping margins, (2) the cessation of imports, and/or (3) declining import volumes accompanied by the continued existence of dumping margins.<sup>80</sup>

61. The *Sunset Policy Bulletin* is an administrative instrument that, as with the issuance of regulations, the Department published in the *Federal Register*, and was subject to public comment prior to the initiation of the first US sunset review. The policies concerning sunset reviews set forth in the *Sunset Policy Bulletin* “are intended to complement the applicable statutory and regulatory provisions by providing guidance on methodological or analytical issues not explicitly addressed by the statute and regulations.”<sup>81</sup> With respect to the likelihood of dumping determination, Section II.A.3 of the *Sunset Policy Bulletin* further instructs that the Department “normally will” determine that the

---

<sup>76</sup> See *id.* at Section VII.B.2.

<sup>77</sup> Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, para. 7.27 (“*US – Sections 301-310*”).

<sup>78</sup> See Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R, adopted 23 August 2001, paras. 8.92, 8.100 – 8.101, 8.130 (“*US – Export Restraints*”).

<sup>79</sup> See *id.* at paras. 8.97-8.98.

<sup>80</sup> SAA at 889-890 (ARG-5).

<sup>81</sup> *Policies Regarding the Conduct of Five-year (“Sunset”) Reviews of Anti-Dumping and Countervailing Duty Orders*, 63 Fed. Reg. 18,871, 18,871 (Dep’t Comm. 1998)(“*Sunset Policy Bulletin*”) (ARG-35)(emphasis added); see also Appellate Body Report, *Sunset Review of Steel from Japan*, para. 95.

continuation or recurrence of dumping would be likely where at least one of the three criteria set forth in the SAA is satisfied, with no further analysis.<sup>82</sup>

62. Thus, in the end, the US likelihood standard is expressed in Section II.A.3 of the *Sunset Policy Bulletin*. Part of an overall framework with the statute and the SAA, the *Sunset Policy Bulletin* sets forth the presumption of likelihood of dumping that no respondent has ever been able to overcome. Argentina submits that the irrefutable presumption of likely dumping prescribed by Section II.A.3 of the *Sunset Policy Bulletin* is inconsistent with Article 11.3 as such.

63. In rebuttal, the United States argues that the *Sunset Policy Bulletin* has “no independent legal status,” and for that reason cannot be challenged as a WTO-inconsistent measure.<sup>83</sup> In doing so, the United States cites the Panel’s ruling in *Sunset Review of Steel from Japan* that the *Sunset Policy Bulletin* does not constitute a measure for purposes of a WTO challenge.<sup>84</sup>

64. The Appellate Body, however, has overruled the Panel’s finding that the *Sunset Policy Bulletin* is not a measure that is challengeable, as such, with the WTO Agreement.<sup>85</sup> The Appellate Body held that “measure” for purposes of WTO challenge is cast broadly, and includes administrative instruments such as the *Sunset Policy Bulletin*.<sup>86</sup> Accordingly, the Panel has the authority to decide whether Section II.A.3 of the *Sunset Policy Bulletin*, which is a distillation of 19 USC. § 1675a(c)(1) and the SAA, is inconsistent with Article 11.3 as such.

**2. 19 USC. § 1675a(c)(1), the Statement of Administrative Action, and Section II.A.3 of the *Sunset Policy Bulletin* require decisive reliance by the Department on historical dumping margins and declines in import volume and thus establish an irrefutable presumption of likely dumping in Department of Commerce sunset reviews in violation of Article 11.3 as such**

65. In *Sunset Review of Steel from Japan*, the Appellate Body evaluated whether Section II.A.3 of the *Sunset Policy Bulletin* is inconsistent with Article 11.3 as such. In addressing this issue, the Appellate Body stated,

We believe that a *firm evidentiary foundation* is required in each case for a proper determination under Article 11.3 of the likelihood of continuation or recurrence of dumping. Such a determination cannot be based solely on the *mechanistic application of presumptions*. We therefore consider that the consistency of Sections II.A.3 and 4 of the *Sunset Policy Bulletin* with Article 11.3 of the Anti-Dumping Agreement hinges upon whether those provisions instruct [the Department] to treat dumping margins and/or import volumes as *determinative or conclusive*, on the one hand, or merely indicative or probative, on the other hand, of the likelihood of future dumping.<sup>87</sup>

66. Thus, the Appellate Body determined that, if the *Sunset Policy Bulletin* is interpreted by the Department as directing it to consider continued dumping margins and declining volumes (*i.e.*, satisfaction of any of the three criteria prescribed by Section II.A.3) as conclusive of likely dumping, then the *Sunset Policy Bulletin* would be inconsistent with Article 11.3 as such. The likelihood

---

<sup>82</sup> *Sunset Policy Bulletin* at 18,872 (ARG-35).

<sup>83</sup> US First Submission, para. 195.

<sup>84</sup> *See id.* at para. 196 (citing Panel Report, *Sunset Review of Steel from Japan*, paras. 7.125-7.126).

<sup>85</sup> *See* Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 94-100.

<sup>86</sup> *See id.* at paras. 84-88.

<sup>87</sup> *Id.* at para. 178 (emphasis added).

determination required by Article 11.3 must be based on “all relevant evidence,” not on “the mechanistic application of presumptions.”<sup>88</sup>

67. Ultimately, however, the Appellate Body did not decide whether the *Sunset Policy Bulletin* is inconsistent with Article 11.3 as such. The Appellate Body concluded that, because the Panel had not made any factual findings as to the “consistent application” of Section II.A.3, it could not fully discern that provision’s “meaning.”<sup>89</sup> Consequently, it could not determine whether Section II.A.3 directs the Department to consider the three criteria to be conclusive of likely dumping.

68. Here, however, Argentina has submitted extensive evidence of the Department’s “consistent application” of Section II.A.3. Thus, under the guidance provided by the Appellate Body in *Sunset Review of Steel from Japan*, the Panel has the evidence before it to discern the meaning of Section II.A.3 and to make the proper ruling that the three criteria are inconsistent with Article 11.3 as such.<sup>90</sup> Argentina’s Exhibits ARG-63 and ARG-64<sup>91</sup> demonstrate that the Department follows the instruction of Section II.A.3 in every sunset review, and every time it finds that at least one of the three criteria is satisfied, the Department makes an affirmative finding of likely dumping without considering additional factors. The Department’s consistent application of Section II.A.3 thus demonstrates its meaning: Section II.A.3 directs the Department to attach decisive weight to historical dumping margins and declining import volumes (or the cessation of imports altogether) in every case. Therefore, because Section II.A.3 of the *Sunset Policy Bulletin* instructs the Department to treat satisfaction of any one of the three criteria as conclusive of likely dumping, the measure is inconsistent with the Article 11.3 obligation to determine on the basis of all relevant evidence whether termination of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping.<sup>92</sup>

69. The Department’s 10 December 2003 final determination in the sunset review of the anti-dumping order on stainless steel wire rod from Spain provides a telling illustration of how the Department mechanistically treats the Section II.A.3 criteria as decisive without considering other relevant evidence.<sup>93</sup> As in all sunset reviews, the Department followed the instruction of Section II.A.3 and considered only historical dumping margins and import volumes. The dumping margin for the only identified respondent interested party had declined since the imposition of the order, from 4.73 per cent in the original investigation to 0.80 per cent in the only completed administrative review.<sup>94</sup> Meanwhile, the volume of the subject imports declined significantly the year the order was imposed, but thereafter import volume to the United States resumed to pre-order levels.<sup>95</sup> This evidence should have required a finding that continuation or recurrence of dumping would not be likely, as even the SAA recognizes that “declining (or no) dumping margins accompanied by steady

---

<sup>88</sup> *Id.* at paras. 178, 191 (“As we have found in other situations, the use of presumptions may be inconsistent with an obligation to make a particular determination in each case using positive evidence. Provisions that create ‘irrebuttable’ presumptions, or ‘predetermine’ a particular result, run the risk of being found inconsistent with this type of obligation.”).

<sup>89</sup> *See id.* at paras. 184, 190; *see also* Appellate Body Report, *Steel from Germany*, paras. 148, 157.

<sup>90</sup> Indeed, Argentina submits that the Panel must make factual findings as to the meaning of Section II.A.3, as evidenced by the Department’s consistent application of the measure, if only to preserve Argentina’s rights for appeal.

<sup>91</sup> Argentina introduces Exhibit ARG-64 in this second submission. ARG-64 consists of Argentina’s review of the Department’s sunset proceedings conducted since September 2003, and thus supplements ARG-63.

<sup>92</sup> *See* Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 178, 191.

<sup>93</sup> *See Issues and Decision Memorandum for the Expedited Sunset Review of the Anti-Dumping Order on Stainless Steel Wire Rod from Spain*, (10 December 2003)(ARG-64, Tab 4). The final results of this review were published on December 10, 2003, during the Panel’s First Substantive Meeting with the Parties in the instant dispute.

<sup>94</sup> *See id.* at 4.

<sup>95</sup> *See id.* at 6.

or increasing imports may indicate that foreign companies do not have to dump to maintain market share in the United States and that dumping is *less likely* to continue or recur if the order were revoked.”<sup>96</sup> Nevertheless, the Department rigidly applied the Section II.A.3 criteria and concluded, “We find that revocation of the order on SSWR from Spain is likely to continue or recur if the order were revoked, because of the existence of dumping margins above de minimis level and the decrease of import levels following the imposition of the order.”<sup>97</sup>

70. The United States cannot dispute that, in following Section II.A.3, the Department always treats satisfaction of any one of the three criteria as conclusive.

71. Further, by requiring the Department to treat satisfaction of any one of the three criteria as conclusive of likely dumping, Section II.A.3 establishes an irrefutable presumption of likely dumping. Here, again, Argentina’s extensive evidence of the Department’s consistent application of Section II.A.3 demonstrates the invariable consequence – and thus the meaning – of that provision. In 100 per cent of the sunset reviews in which the domestic industry participated, the Department followed the instructions of Section II.A.3, and in each case, the Department rendered an affirmative likelihood determination.<sup>98</sup> Therefore, because Section II.A.3 requires the Department to apply a mechanistic presumption of likely dumping, Section II.A.3 is inconsistent with the Article 11.3 obligation to determine on the basis of all relevant evidence whether termination of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping.<sup>99</sup>

72. The United States takes the position that there is no irrefutable presumption of likely dumping under US law.<sup>100</sup> First, the United States asserts that permissive language in the SAA (“[f]or example,” “may provide strong indication,” and “highly probative”) and Section II.A.3 of the *Sunset Policy Bulletin* (“normally”) indicates that these provisions do not establish an irrefutable presumption.<sup>101</sup>

73. In *Sunset Review of Steel from Japan*, however, the Appellate Body examined this very language in evaluating whether Section II.A.3 is inconsistent with Article 11.3 and found that it did not resolve the issue.<sup>102</sup> Indeed, the Appellate Body found that other language in Section II.A.3 contradicted the notion that the intent behind use of the word “normally” was permissive.<sup>103</sup> Specifically, the Appellate Body noted that the following statement in Section II.A.3 suggested “by negative implication, that data relevant to the two factors mentioned in Section II.A.3(a)-(c) (namely, import volumes and historical dumping margins) *will* be regarded as conclusive in sunset reviews of final anti-dumping duties (as opposed to reviews of suspended investigations . . . )[:]”

The Department recognizes that, in the context of a sunset review of a suspended investigation, the data relevant to the criteria under paragraphs (a) through (c), above, [dumping margins and import volumes] *may not be conclusive* with respect to likelihood.<sup>104</sup>

---

<sup>96</sup> SAA at 889-90 (ARG-5) (emphasis added.).

<sup>97</sup> *Issues and Decision Memorandum for the Expedited Sunset Review of the Anti-Dumping Order on Stainless Steel Wire Rod from Spain* at 6 (10 December 2003)(ARG-64, Tab 4).

<sup>98</sup> See US Department of Commerce Sunset Reviews, ARG-63 (showing that, in the 217 sunset reviews in which the domestic industry participated as of September 2003, the Department found that dumping would be likely in each case); ARG-64 (showing that, in the six sunset reviews conducted by the Department since September 2003, the Department followed Section II.A.3 and found that dumping would be likely in each case).

<sup>99</sup> Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 178, 191.

<sup>100</sup> See US First Submission, para. 173.

<sup>101</sup> See *id.* at paras. 176, 178.

<sup>102</sup> See Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 179-181.

<sup>103</sup> *Id.* at para. 179.

<sup>104</sup> *Id.* (citing *Sunset Policy Bulletin* at 18,872 (ARG-35)).

Therefore, the Appellate Body determined that evidence of the consistent application of Section II.A.3 was necessary to discern its meaning.<sup>105</sup>

74. As discussed above, Argentina has produced extensive evidence demonstrating the Department's consistent application of Section II.A.3, and thereby, its meaning. The facts of the Department's sunset reviews speak for themselves: In 100 per cent of the sunset reviews in which a domestic interested party participated in the proceeding, the Department determined that dumping was likely to continue or recur; and in 100 per cent of the sunset reviews for which the Department determined that dumping was likely to continue or recur, the Department cited the authority of Section II.A.3 of the *Sunset Policy Bulletin*.<sup>106</sup> The Department thus treats Section II.A.3 as binding in all sunset reviews.

75. In addition, the United States asserts that the following statement in the *Sunset Policy Bulletin* disproves the existence of an irrefutable presumption:

[T]he Department normally will determine that revocation of an anti-dumping order or termination of a suspended dumping investigation is not likely to lead to continuation or recurrence of dumping where dumping was eliminated after issuance of the order or the suspension agreement, as applicable, and import volumes remained steady or decreased.<sup>107</sup>

76. The United States claims that this passage "completely undermines Argentina's case and rather spoils Argentina's story."<sup>108</sup> Argentina disagrees. Rather, this passage further supports Argentina's compelling story of US WTO violations in sunset reviews. Out of the 223 sunset reviews in which the domestic industry participated as of December 2003 (the 217 cases in ARG-63 plus the six cases in ARG-64), the Department cited this provision only four times.<sup>109</sup> More importantly, in each of those four cases, the Department found "good cause" to consider other factors<sup>110</sup> and found alternative grounds for its determination that dumping would be likely to continue or recur.<sup>111</sup> So this passage, which the United States considers its "silver bullet," is in fact a dead letter that has only been used against respondents to justify resorting to the "good cause" provision" in order to otherwise find that dumping would be likely to continue, as reflected in the four cases in which neither the waiver provisions nor the three checklists items were used for the likelihood determination.

77. How are respondents ever going to be able to refute or disprove the presumption of likely dumping prescribed by US law if the Department will always find likely dumping, even in the one rare circumstance in which it is supposedly permitted to determine that dumping would not be likely to continue or recur? Moreover, the Department's use of the "good cause" provision demonstrates its true application – as a tool to justify an affirmative likelihood determination in the rare instance where the Section II.A.3 criteria are not met.

---

<sup>105</sup> See *id.* at para. 184.

<sup>106</sup> See US Department of Commerce Sunset Reviews (ARG-63 and ARG-64).

<sup>107</sup> *Sunset Policy Bulletin* at 18,872 (ARG-35).

<sup>108</sup> US First Submission, para. 181.

<sup>109</sup> US Department of Commerce Sunset Reviews (ARG-63 and ARG-64).

<sup>110</sup> Pursuant to 19 USC. § 1675a(c)(2) (ARG-1), 19 C.F.R. § 351.218(e)(2)(iii) (ARG-3), and Section II.C of the *Sunset Policy Bulletin* (ARG-35).

<sup>111</sup> See *Sugar and Syrups from Canada*, 64 Fed. Reg. 48,362, 48,363-64 (Dep't Comm. 1999)(final results sunset reviews)(ARG-40); *Issues and Decision Memorandum for the Sunset Review of Gray Portland Cement and Cement Clinker from Venezuela* (Dep't Comm., 18 Feb. 2000)(prelim. results) at 3-5 (ARG-47); *Issues and Decision Memorandum for the Sunset Review of Uranium from Russia* (Dep't Comm., 27 June 2000)(final results) at 15-17 (ARG-48); *Issues and Decision Memorandum for the Sunset Review of Uranium from Uzbekistan* (Dep't Comm., 27 June 2000)(final results) at 9-11 (ARG-49).

78. Of these four cases, the full sunset review of the anti-dumping order on sugar and syrups from Canada is particularly illustrative of the great lengths the Department will go in order to render a determination of likely dumping, even where the evidence clearly commands a negative determination. In that case, the Department applied the Section II.A.3 criteria and preliminarily determined that dumping was not likely to continue or recur, finding that “the continued absence of a dumping margin for [the foreign respondent] and the continued existence of imports from [the respondent] in substantial quantities demonstrate[d] that [the respondent was] capable of selling the subject merchandise in the United States without dumping.”<sup>112</sup> The Department, however, reversed its preliminary results and issued an affirmative likelihood determination in its final results. The Department based its final determination on an “abbreviated cost test with the limited data on the record.”<sup>113</sup> The Department acknowledged that it was not its normal practice to examine costs and pricing during a sunset review, but it nevertheless found that the information on record amounted to “good cause” sufficient to “warrant consideration of such [other] factors.”<sup>114</sup>

79. The Department first compared the foreign respondent’s cost of production with sales prices in the Canadian home market. The Department did not, however, compare costs and sales prices for the same year; rather, it “compared a weighted-average home market price, based on 1997 price data supplied by [the respondent], with a COP based on 1998 costs derived from [the respondent’s] data.”<sup>115</sup> Based on this comparison, the Department concluded that the respondent had sold sugar in the Canadian home market at below its cost of production and that it thus “made below cost sales within an extended period of time in substantial quantities at prices which did not permit recovery of all costs within a reasonable period of time.”<sup>116</sup> Because the respondent’s home market sales failed the Department’s cost test, the Department determined that it would not be appropriate to compare home market sales prices to US export prices to assess dumping. Consequently, the Department compared the respondent’s constructed value with its verified average US export selling price. Based on this comparison, the Department “conclude[d] that at least some of [the respondent’s] sales to the United States [were] at prices below CV.”<sup>117</sup> The Department concluded that this information provided a sufficient basis for determining that dumping was likely to continue or recur if the order were revoked, despite the non-existence of dumping margins and a significant volume of imports.<sup>118</sup>

80. Based on all of the foregoing, Argentina submits that Section II.A.3 of the *Sunset Policy Bulletin* is inconsistent with the Anti-Dumping Agreement as such because it (1) instructs the Department to treat historical dumping margins and import volumes as decisive and conclusive of likely dumping, and (2) establishes a presumption of likely dumping that no respondent has been able to overcome.

81. Argentina respectfully urges the Panel to analyze Argentina’s claim. The Appellate Body’s report in *Sunset Review of Steel from Japan* shows the importance of the Panel deciding the issues that are properly placed before the Panel. In that case, despite the fact that the Government of Japan had presented evidence that the *Sunset Policy Bulletin* violated Article 11.3, the Panel stopped short of ruling on the claim because it erroneously considered that the *Sunset Policy Bulletin* could not be challenged. Because the Panel stopped short of a substantive analysis, the Appellate Body could not “complete the analysis” even though it recognized that the claim could have merit and that Japan had presented evidence. Argentina respectfully asks that the Panel not repeat this here, and that it

---

<sup>112</sup> *Sugar and Syrups from Canada*, 64 Fed. Reg. 20,253, 20,257 (Dep’t Comm. 1999)(prelim. results sunset review)(ARG-63, Tab 261).

<sup>113</sup> *Sugar and Syrups from Canada*, 64 Fed. Reg. 48,362, 48,363 (Dep’t Comm. 1999)(final results sunset review)(ARG-63, Tab 261).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 48,364 (emphasis added).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *See id.*

consider the claims put before it by Argentina, and the supporting evidence of Exhibits ARG-63 and ARG-64.

**3. Argentina established a *prima facie* case as set forth in ARG-63 and ARG-64 and the United States has not rebutted the existence of the irrefutable presumption**

82. Through Exhibits ARG-63 and ARG-64, Argentina has demonstrated that the presumption of likely dumping established by the *Sunset Policy Bulletin* has never been overcome. The facts are unequivocal: in 100 per cent of the sunset reviews in which the domestic industry participated (223/223), the Department has followed the directive of Section II.A.3, and in every case the Department rendered an affirmative determination of likely dumping. Argentina has thus satisfied its burden of establishing a *prima facie* case demonstrating the irrefutable presumption employed by the Department in sunset reviews.

83. The United States attempts to diminish the clear importance of the data by contending that there were only 35 cases in which the likelihood of dumping issue was “contested.”<sup>119</sup> The United States again fails to appreciate the nature of the obligation to determine the likelihood of dumping under Article 11.3. Lack of respondent party participation does not release the United States from its obligation under Article 11.3 to conduct a review and to make a determination that termination of the duty would be likely to lead to continuation or recurrence of injury. While respondent interested parties can be a “primary source of information” in anti-dumping proceedings, the United States still has “a duty to seek out relevant information”<sup>120</sup> and to ensure that its likelihood of dumping determination is supported by a “sufficient factual basis.”<sup>121</sup> Otherwise, it cannot invoke the exception of Article 11.3 (continuation of the measure).

84. In any event, even using the US figures, 35 out of 35 still proves Argentina’s claim. The United States simply cannot point to a single sunset review in which the presumption that dumping would likely continue was overcome. Therefore, the United States has failed to rebut Argentina’s *prima facie* case.

85. Further, ARG-63 and ARG-64 demonstrate that the Department always treats the satisfaction of any one of the three criteria prescribed by Section II.A.3 of the *Sunset Policy Bulletin* as conclusive of likely dumping. This evidence is indisputable.

**4. The Department’s consistent practice in sunset reviews both demonstrates the irrefutable presumption of likely dumping in US law and itself violates as such Article 11.3 of the Anti-Dumping Agreement**

86. Independent from its challenge of Section II.A.3 of the *Sunset Policy Bulletin*, Argentina challenges the Department’s consistent practice as such.

87. After the Appellate Body’s decision in *Sunset Review of Steel from Japan*, there can be no doubt that agency practice is challengeable as such in WTO dispute settlement proceedings. In that case, the Appellate Body evaluated whether “the type of instrument itself – be it a law, regulation, procedure, practice, or something else – govern[s] whether it may be subject to WTO dispute

---

<sup>119</sup> See US First Submission, para. 185. In any event, there were actually 43 cases in which the likelihood of dumping determination was – using the US term – “contested.” Argentina’s Exhibit ARG-63 shows that the response from foreign interested parties was deemed adequate in 28 cases and inadequate (based on a foreign party’s attempt to participate) in 17 cases. Thus, foreign interested parties attempted to participate in 45 Department sunset reviews. In 2 of these cases, however, the domestic industry withdrew from the proceeding. Thus, the foreign and domestic parties “contested” the likelihood determination in 43 sunset reviews.

<sup>120</sup> Appellate Body Report, *Sunset Review of Steel from Japan*, para. 199.

<sup>121</sup> Panel Report, *Sunset Review of Steel from Japan*, paras. 7.177, 7.279.

settlement[.]”<sup>122</sup> After reviewing the relevant WTO jurisprudence and agreement provisions,<sup>123</sup> the Appellate Body concluded “that there is no basis, either in the practice of the GATT and the WTO generally or in the provisions of the Anti-Dumping Agreement, for finding that only certain types of measure can, as such, be challenged in dispute settlement proceedings under the Anti-Dumping Agreement.”<sup>124</sup> The Appellate Body’s reasoning thus requires the conclusion that agency practice may be challenged as such.

88. As set forth above, Argentina submits that the consistent practice of the United States demonstrates that it always treats satisfaction of at least one of the three criteria ((1) continued dumping margins; (2) cessation of imports; and (3) declining volumes) as conclusive of likely dumping, and thus applies an irrefutable presumption of likely dumping in violation of Article 11.3.<sup>125</sup> There are no exceptions; the Department applies this likelihood standard in every sunset review in which the domestic industry participates.

89. Citing several panel decisions, the United States argues that, because the Department may depart from its practice as long as it explains its reasons for doing so, the Department’s consistent practice of employing the US likelihood standard in sunset reviews may not be challenged as such.<sup>126</sup> In light of the Appellate Body’s decision in *Sunset Review of Steel from Japan*, however, it is clear that US agency practice can be challenged as such in WTO disputes.<sup>127</sup>

90. The United States further argues that, even if the Department’s practice could be challenged as such, it could not be considered WTO-inconsistent, because the Department’s practice neither mandates action that is WTO-inconsistent, nor precludes action that is WTO-consistent.<sup>128</sup> According to the United States, the Department’s likelihood of dumping practice is not mandatory, because the Department may depart from it as long as it explains its reasons for doing so. In this regard, the United States asserts that, “[i]n accordance with the normal WTO rules on the allocation of the burden of proof, it is up to the complaining party to demonstrate that any challenged measure mandates WTO-inconsistent action or precludes WTO-consistent action.”<sup>129</sup>

91. Argentina submits that it has satisfied its burden. Again, Argentina has demonstrated that the Department employs the US likelihood standard in every sunset review in which the domestic industry participates.<sup>130</sup> Thus, Argentina has made its *prima facie* case establishing that the US likelihood standard is mandatory under the Department’s practice. Accordingly, the burden shifts to the United States to show that the Department can depart from its likelihood practice. Because the United States cannot point to a single sunset review in which the Department has done so, the United States has failed to rebut Argentina’s claim.

---

<sup>122</sup> Appellate Body Report, *Sunset Review of Steel from Japan*, para. 78 (emphasis added). See also Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities* (“US – CVDs on EC Products”) WT/DS212/AB/R, adopted 8 January 2003, paras. 50, 151, 162; *United States – CVDs on EC Products: Status Report by the United States*, WT/DS212/13 (28 Oct. 2003)(stating that the United States/Department changed a methodology to comply with its WTO obligations).

<sup>123</sup> See Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 85-87.

<sup>124</sup> *Id.* at para. 88.

<sup>125</sup> See US Department of Commerce Sunset Reviews (ARG-63 and ARG-64).

<sup>126</sup> See US First Submission, para. 198 (citing Panel Report, *Sunset Review of Steel from Japan*, para. 7.131; Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS260/R, adopted 29 July 2002, para. 7.22 (“*India Steel Plate*”).

<sup>127</sup> See Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 85-88.

<sup>128</sup> See US First Submission, para. 199.

<sup>129</sup> *Id.*

<sup>130</sup> See US Department of Commerce Sunset Reviews (ARG-63 and ARG-64). See also Appellate Body Report, *Steel from Germany*, para. 148.



**5. Assuming *arguendo* that US law and practice establishing the irrefutable presumption are not inconsistent as such with Article 11.3, then the United States has not administered its law with respect to the Article 11.3 Likelihood of Dumping Determination in an impartial and reasonable manner in violation of Article X:3(a) of the GATT 1994**

92. The GATT Article X:3(a) argument raised in Argentina's First Submission is an alternative claim.<sup>131</sup> This claim applies only if the Panel finds that US law is consistent with Article 11.3, or that the offending provisions are not "measures" that can violate US WTO obligations. In this event, the Department's sunset practice demonstrates that the United States has not administered its law with respect to the likelihood of dumping determination in an impartial and reasonable manner as required by Article X:3(a) of the GATT 1994.

93. Through its comprehensive analysis of the Department's sunset reviews, Argentina has established a clear and undeniable pattern of biased and unreasonable decision making by the Department in its administration of the laws, regulations, decisions, and rulings pertaining to sunset review.<sup>132</sup> It is simply not credible to believe that a review based on positive evidence could lead to an affirmative finding of likely dumping in each of the 223 cases in which the US industry requests continuation of the anti-dumping measure. A record of 223 wins and 0 losses (or even 35 wins and 0 losses to use the US figures of so-called "contested" cases) for the US industry demonstrates a lack of impartiality, and the unreasonable administration of national laws, regulations, decisions, and rulings.

94. On this issue the United States is unable to even muster a true rebuttal. The United States first argues that Argentina failed to demonstrate that the Department violated the Article X:3(a) requirement to administer the sunset review laws, regulations, decisions, and rulings in a "uniform" manner.<sup>133</sup> In fact, Argentina never challenged the uniformity of the Department's administration of sunset reviews in the first place. To the contrary, Argentina submits that the Department's uniform administration of sunset reviews demonstrates a clear pattern of biased and unreasonable decision making, because the only determinative factor in the Department's sunset review is US industry participation.

95. Second, the United States again attempts to deconstruct the clear import of Argentina's Exhibit ARG-63 by arguing that only the so-called "contested" cases are relevant for the purposes of Article X:3(a).<sup>134</sup> Under Article 11.3, however, the lack of respondents' participation does not relieve the authority from the obligation to make a determination based on positive evidence that dumping would likely continue or recur in order to invoke the exception and continue the anti-dumping measure. In any event, even using the erroneous US figures, 35 out of 35 still proves Argentina's claim. At a minimum, Argentina has satisfied its burden of establishing a *prima facie* violation of Article X:3(a), and the United States has failed to rebut that claim.

---

<sup>131</sup> See Argentina's First Submission, Sec. VII.E.

<sup>132</sup> See US Department of Commerce Sunset Reviews (ARG-63 and ARG-64).

<sup>133</sup> See US First Submission, para. 274.

<sup>134</sup> See *id.* at para. 275. On this point, Argentina again notes that there were actually 43 cases in which the likelihood of dumping determination was – using the US term – "contested."

C. THE DEPARTMENT'S SUNSET REVIEW OF OCTG FROM ARGENTINA WAS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

1. **The Department's determinations indicate that it applied the Waiver Provisions to Siderca; Application of the Waiver Provisions in the Sunset Review of OCTG from Argentina was inconsistent with Articles 11.3 and 6 of the Anti-Dumping Agreement**

96. The Department determined that because Siderca's response was "inadequate" the company had "waived" its right to participate in the sunset review. This is clear from the Department's *Issues and Decision Memorandum*: "In the instant reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation."<sup>135</sup>

97. As explained above, the US waiver provisions violate Article 11.3 because they mandate a finding of likely dumping. Article 11.3's requirements to conduct a "review" (which necessarily entails a "rigorous examination" of the facts) and to make a "determination" precludes the authority from mandating statutorily an affirmative finding of likely dumping. If the WTO Member wishes to invoke the exception and continue the measure, it simply does not have the choice of doing nothing, or of passively assuming that dumping and injury would likely continue or recur.<sup>136</sup> 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.<sup>137</sup> The authority must make a "fresh determination" that is forward-looking and "based on credible evidence."<sup>138</sup>

98. The application of the waiver provisions in the Argentine case violated Article 6.1 because it prevented the only known Argentine exporter, Siderca, from presenting evidence for meaningful consideration. Siderca had notified the Department of its desire to participate in the sunset review and its willingness to cooperate fully by filing a complete substantive response to the Department's notice of initiation. Nevertheless, the Department deemed Siderca to have waived its participation and thus issued a determination that dumping was likely pursuant to the statutory mandate of 19 USC. § 1675(c)(4)(B). Accordingly, application of the waiver provisions resulted in a mandatory determination of likely dumping without any analysis in violation of Article 6.1.

(a) The US Position in Its First Submission Is Inconsistent with Both the Department's Sunset Determination and the Factual Record Before the Department

99. The United States argues that the Department did not deem Siderca to have waived its participation in the sunset review of OCTG from Argentina.<sup>139</sup> Buried in footnote 216 of its first submission, however, the United States does concede ambiguity, stating that "[a]lthough based on this language it may appear that Commerce deemed all respondent interested parties to have waived their participation in the OCTG sunset review . . . ." The United States says instead that there were other Argentine exporters who did not respond at all to the notice of initiation. Also, at the Panel's First Substantive Meeting With the Parties, the United States conceded that with respect to this point the Department's sunset determination may have been "inartfully drafted."

100. Thus, under the theory expressed in the US First Submission, the exporters considered to account for all exports of Argentine OCTG to the United States waived their participation by failing

---

<sup>135</sup> *Issues and Decision Memorandum* at 5 (ARG-51).

<sup>136</sup> See Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 113-115; Panel Report, *Sunset Review of Steel from Japan*, paras. 7.177, 7.271.

<sup>137</sup> See Panel Report, *Sunset Review of Steel from Japan*, para. 7.177.

<sup>138</sup> Appellate Body Report, *Steel from Germany*, para. 88.

<sup>139</sup> See US First Submission, paras. 211- 213.

to respond to the notice of initiation, and the Department therefore had no choice but to follow the statutory mandate to make an affirmative finding of likely dumping in this case. If this is true, how can the United States now contend that the waiver provision did not affect Siderca, or that it did not diminish Argentina's rights under Article 11.3?

101. Initially, of course, there is the unambiguous language of the Department. The Department determined that Siderca's response was inadequate,<sup>140</sup> and that the Department did not receive "an adequate response from respondent interested parties" and that "this constitutes a waiver of participation."<sup>141</sup> Based on the statements in the Department's determinations there can be no serious dispute that the Department: (1) determined Siderca's response to be inadequate; and (2) applied the waiver provisions to Argentina.

102. With respect to the facts, there was no reasonable basis for the Department to have considered that there were other Argentine producers/exporters who failed to respond to the notice of initiation and who were thus the true subjects of the application of the waiver provisions. Nor has the Department ever explained these decisions in any of the documents related to its sunset review determination.

103. First, Siderca was the only Argentine producer/exporter investigated in the original investigation, and it was the only producer/exporter named in the subsequent reviews requested by the US industry. During the five-year period after imposition of the order, the domestic industry requested four administrative reviews, naming Siderca as the only exporter each time.<sup>142</sup> In at least one case, the representatives of the US industry identified Siderca as "the only know[n] producer" of the subject merchandise.<sup>143</sup> The Department initiated an administrative review in each year, but ultimately rescinded the reviews because there were no shipments to evaluate.<sup>144</sup> In all of these instances, however, Siderca's "no shipment certifications" led to additional questions from the Department and additional comments from the US industry. In all cases, Siderca explained that it was shipping to the United States, but that all of its shipments were either non-subject merchandise, or were not entering the United States for consumption in the United States. In all cases, the Department ultimately agreed with Siderca's certification that it made no shipments for consumption in the United States of subject merchandise, and therefore rescinded the annual reviews.

104. Further, the record developed in the Department's sunset review indicated that Siderca was the only producer/exporter of the subject merchandise. In its substantive response, Siderca indicated that it was the only producer of seamless OCTG, and, to its knowledge, it was the only producer/exporter of Argentine OCTG.<sup>145</sup> The Department acknowledged these statements (while

---

<sup>140</sup> See *Issues and Decision Memorandum* at 3 ("the Department determined Siderca's substantive response to be inadequate") and 7 ("the Department determined to conduct an expedited review because of its finding that Siderca did not provide adequate substantive responses") (ARG-51).

<sup>141</sup> *Id.* at 5.

<sup>142</sup> *Initiation of Anti-Dumping and Countervailing Duty Administrative Reviews*, 61 Fed. Reg. 48,882, 48,883 (Dep't Comm. 1996) (ARG-28); *Initiation of Anti-Dumping and Countervailing Duty Reviews*, 62 Fed. Reg. 50,292, 50,292 (Dep't Comm. 1997) (ARG-32); *Initiation of Anti-Dumping and Countervailing Duty Reviews*, 63 Fed. Reg. 51,893, 51,894 (Dep't Comm. 1998) (ARG-37); *Initiation of Anti-Dumping and Countervailing Duty Reviews*, 64 Fed. Reg. 53,318, 53,318 (Dep't Comm. 1999) (ARG-41).

<sup>143</sup> Letter from Schagrin Associates to the Honourable William M. Daley of 29 Aug. 1997 ("Oil Country Tubular Goods from Argentina: Request for Administrative Review") at 2 (ARG-58).

<sup>144</sup> *Oil Country Tubular Goods from Argentina*, 62 Fed. Reg. 18,747, 18,748 (Dep't Comm. 1997) (rescinded admin. review) (ARG-29); *Oil Country Tubular Goods from Argentina*, 63 Fed. Reg. 49,089, 49,090 (Dep't Comm. 1998) (rescinded admin. review) (ARG-36); *Oil Country Tubular Goods from Argentina*, 64 Fed. Reg. 4,069, 4,070 (Dep't Comm. 1999) (rescinded admin. review) (ARG-37); *Oil Country Tubular Goods from Argentina*, 65 Fed. Reg. 8,948, 8,949 (Dep't Comm. 2000) (rescinded admin. review) (ARG-43).

<sup>145</sup> Substantive Response of Siderca to the Department's Initiation of Sunset Review of the AD Order on OCTG from Argentina (2 August 2000), para. 6 ("Siderca's Substantive Response") (ARG-57).

misstating them slightly) by stating that “Siderca asserts that it is the only producer of OCTG in Argentina, and to its knowledge, there is no other producer of OCTG in Argentina.”<sup>146</sup> Thus, at the very least, the record developed by the Department casts doubt on the statistics relied upon by the Department for the adequacy determination. It is not clear why the Department chose to believe the statistics, instead of its understanding of Siderca’s position.

105. Finally, the Department had reason to doubt its data. On previous occasions, the Department concluded that the official statistics contained errors, in one case incorrectly classifying non-consumption entries as consumption entries,<sup>147</sup> and in another case misclassifying mechanical pipe as OCTG.<sup>148</sup>

106. From this record, it is not reasonable for the Department to have assumed that there were other Argentine producers/exporters who should have responded to the initiation notice, and whose failure would have such consequences for Argentina’s rights under Article 11.3. This unfounded assumption had dire consequences for Argentina as it resulted in the deemed waiver of Siderca and a statutorily mandated finding of likely dumping.

(b) Even Accepting the US Explanation in Its First Submission, the Effect of the Application of the Waiver Provisions in the Sunset Review of OCTG from Argentina Is the Same Under Either Scenario

107. In the sunset review of OCTG from Argentina, according to the US First Submission, it was the producers accounting for 100 per cent of the Argentine exports who were deemed to have waived their participation.<sup>149</sup> Therefore the statute mandated a determination that termination would be likely to lead to a continuation of dumping for the Argentine producers representing all exports to the United States.

108. Thus, whether waiver was applied to all “respondent interested parties” (as indicated in the Department’s Issues and Decision Memorandum) or whether waiver was applied only to the non-responding respondents, the result is equivalent to waiver on an order-wide level because the Department assumed that companies accounting for 100 per cent of the exports had waived participation. In this case there can be no doubt that the waiver provisions precluded the Department from conducting a “review” and making the “determination” required by Article 11.3. Siderca was viewed as irrelevant to the sunset determination, despite the fact that the record established that it was, at that time, the only known producer and exporter from Argentina. Under the statutory and regulatory rules applied in this case, Siderca, with no exports, had no chance to influence the Department because the Department considered that the exporters accounting for 100 per cent of the exports “waived” their participation. As the Appellate Body stated, “The words ‘review’ and ‘determine’ in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination.”<sup>150</sup>

---

<sup>146</sup> *Determination to Expedite* at 2 (ARG-50)

<sup>147</sup> *Oil Country Tubular Goods from Argentina*, 63 Fed. Reg. 49,089, 49,090 (Dep’t Comm. 1998) (rescinded admin. review) (ARG-36).

<sup>148</sup> *Oil Country Tubular Goods from Argentina*, 65 Fed. Reg. 8,948, 8,949 (Dep’t Comm. 2000) (rescinded admin. review) (ARG-43).

<sup>149</sup> US First Submission, para. 216.

<sup>150</sup> Appellate Body Report, *Sunset Review of Steel from Japan*, para. 111.

**2. Assuming *arguendo* that waiver was only applied to the non-responding respondents, the Department's conduct of an expedited review on the basis of the facts available was inconsistent with Articles 11.3, 6.8, and Annex II of the Anti-Dumping Agreement**

(a) Under This Scenario, Argentina Was Limited To an Expedited Review and a Decision Based on Facts Available

109. In the sunset review of OCTG from Argentina, the Department cites both the “waiver” provision, 19 USC. § 1675(c)(4)(B) and the “facts available” provision, 19 USC. § 1675(c)(3)(B), and therefore purports to rely on both provisions.<sup>151</sup> However, there is no basis under US law for the simultaneous application of these provisions to a single respondent. Indeed, these provisions are mutually exclusive with respect to a single respondent.<sup>152</sup>

110. The Department stated unambiguously that Siderca's response was “inadequate” and that “the Department did not receive an adequate response from respondent interested parties” and that “this constitutes a waiver of participation.”<sup>153</sup> There is also reference in the Department's determinations regarding the decision to conduct an expedited review, with citations to the Department's regulation related to determinations based on facts available.<sup>154</sup> Notwithstanding these statements, the United States asserts in its first submission that the Department did not apply facts available to Siderca.<sup>155</sup> Again, the answer that the United States provides in its first submission relates to the so-called “non-responding respondent interested parties” that is, Argentine companies other than Siderca who never responded to the invitation to file a substantive response.<sup>156</sup>

111. Here, the United States enters into a series of contradictions. In the Department's determination to conduct an expedited review, it noted that “[d]uring the five-year period from 1995 to 1999, the combined-average annual percentage of Siderca's exports of OCTG to the United States with respect to the total of exports of the subject merchandise to the United States was significantly below 50 per cent.”<sup>157</sup> Based on this finding, the Department determined Siderca's substantive response to be “inadequate” under 19 C.F.R. § 351.218(e)(1)(ii)(A) and thus conducted an expedited review pursuant to 19 C.F.R. § 351.218(e)(1)(ii)(C).<sup>158</sup>

112. According to the Department's sunset regulations, if respondent interested parties have provided an inadequate response, the Department will normally conduct an expedited review and issue its final results “based on the facts available[.]” (19 C.F.R. § 351.218(e)(1)(ii)(C); *see also* 19 USC. § 1675(c)(3)(B).) Section 351.208(f)(2) provides that the “facts available” consist of dumping margins from prior determinations and information contained in parties' substantive responses. Assuming *arguendo* that the waiver provisions were not the basis of the Department's sunset determination,<sup>159</sup> then the Department's citation to 19 USC. § 351.218(e)(1)(ii)(C) in the

---

<sup>151</sup> See, e.g., Issues and Decisions Memorandum at 4 (ARG-51) (citing section 1675(c)(4)(B)), and Determination to Expedite at 2 (ARG-50) (citing section 1675(c)(3)(B)).

<sup>152</sup> See Argentina's First Submission, paras. 100-101.

<sup>153</sup> *Issues and Decision Memorandum* at 5 (ARG-51).

<sup>154</sup> *Determination to Expedite* at 2 (ARG-50); *Issues and Decision Memorandum* at 3 (ARG-51).

<sup>155</sup> See US First Submission, paras. 214, 221, 234-36.

<sup>156</sup> See *id.* at para. 214.

<sup>157</sup> *Determination to Expedite* at 2 (ARG-50).

<sup>158</sup> *Issues and Decision Memorandum* at 3 (ARG-51); *Adequacy Determination* at 2 (ARG-50) (“we recommend that you determine Siderca's response to be inadequate”).

<sup>159</sup> Despite the statement in the Department's *Issues and Decision Memorandum* (ARG-51) at 4-5 that “respondent interested parties” waived their participation in the sunset review, the United States contends that it did not apply the waiver provisions to Siderca. See US First Submission, para. 211. The United States is also ambivalent as to whether it applied waiver to the non-responding respondents. In its First Submission, the United States indicates that the Department deemed the non-responding respondents to have waived their participation in the sunset review (*see* paras. 216, 155, and n.216) and, elsewhere, that it did not apply the

Department's *Determination to Expedite* and in its *Issues and Decisions Memorandum* demonstrates that the Department's sunset determination was based, at best, on "facts available."<sup>160</sup>

(b) The Department Violated Articles 6.1 and 6.2 of the Anti-Dumping Agreement

113. The conduct of the expedited review and the application of the waiver provisions in the sunset review of OCTG from Argentina violated Article 6.1 because they effectively prevented Siderca from presenting evidence for meaningful consideration by the Department regarding the likelihood of continuation or recurrence of dumping in order to inform its determination under Article 11.3. The Department acknowledged that Siderca both filed a complete substantive response to the notice to initiate a sunset review, and notified its willingness to participate fully in the instant sunset review.<sup>161</sup> Nevertheless, the Department's application of the waiver provisions to the so-called non-responding respondents dictated the result for Argentina as a whole. Thus, Siderca did not have an "ample opportunity to present . . . evidence which [it] consider[ed] relevant" when the Department deemed the respondents accounting for 100 per cent of the imports to have waived participation, which determination resulted in an automatic likelihood determination in violation of Article 6.1.

114. The conduct of the expedited review and the application of the waiver provisions to Siderca in the sunset review of OCTG from Argentina also violated Article 6.2, because Siderca did not have a full opportunity to defend its interests. Siderca could not defend its interests because the result was effectively foreclosed, given that the Department deemed the non-responding respondents accounting for 100 per cent of the imports to have waived participation, which determination resulted in an automatic likelihood determination.

115. The United States argues that, by limiting its substantive response to a "mere" four pages in length and not taking advantage of other opportunities to submit comments, Siderca failed to fully avail itself of the opportunities granted by the sunset regulations for the presentation of evidence.<sup>162</sup> In addition to the substantive response to the notice of initiation, the United States explains, Siderca could have submitted comments on the Department's adequacy determination (19 C.F.R. § 351.309(e)) and rebuttal comments to any other party's substantive response (19 C.F.R. § 351.218(d)(4)). Therefore, the United States concludes, the Department's sunset review of Argentine OCTG was not inconsistent with Articles 6.1 and 6.2.

116. The US argument fails for several reasons. First, contrary to the US assertion, Siderca did not fail to take the opportunity to present evidence. As the United States repeatedly recognizes in its First Submission, Siderca's response to the notice of initiation was a "complete substantive response" that met all of the Department's regulatory requirements.<sup>163</sup> Nevertheless, despite its submission of a complete substantive response, the Department deemed Siderca's response to be inadequate. This determination resulted in Siderca being deemed to have waived its participation in the sunset review, which in turn resulted in a mandatory likelihood determination. Consequently, with the determination that Siderca's response was inadequate, the case effectively ended, with the outcome preordained.

117. At the same time, under Article 6.1 and Annex II, it was the Department's obligation to "specify in detail the information required" from Siderca in order for the Department to undertake a review and make the required determination under Article 11.3. Siderca provided information that the United States characterizes as a "complete substantive response," and Siderca also offered to

---

waiver provisions to the non-responding respondents because the Department applied facts available to them (see para. 214).

<sup>160</sup> See *Determination to Expedite* at 2 (ARG-50) and *Issues and Decision Memorandum* at 3 (ARG-51).

<sup>161</sup> See *Determination to Expedite* at 1-2 (ARG-50).

<sup>162</sup> See US First Submission, paras. 228-29, 237.

<sup>163</sup> See *id.* at paras. 211, 213, 214, and 216.

cooperate fully in the review. The US statements now that the information was insufficient because it was limited to a “mere” four pages contradicts its statements that Siderca’s submission was a complete substantive response. The only way to reconcile the contradiction in the Department’s statements is for it to admit that, despite being a “complete substantive response,” Siderca’s response was either irrelevant to the Department’s determination, or Siderca’s response did not include the information that the Department was hoping to receive. Neither explanation, however, is acceptable under Articles 11.3, 6.1, 6.8, and Annex II.

118. Second, regarding the Department’s adequacy determination, the regulation provides that submitted “comments may not include any new factual information or evidence (such as supplementation of a substantive response to the notice of initiation) and are limited to five pages.”<sup>164</sup> Thus, the regulation precluded Siderca from submitting any new evidence with respect to the Department’s determination that Siderca’s response was inadequate.

119. Finally, by the time that the Argentine sunset review began, the Department had completed approximately 160 sunset reviews of anti-dumping measures, and it was well-known that the Department had designed and implemented a system which avoided any type of substantive determination. Hence, respondent participation was widely considered to be futile, and would in no way change the substantive outcome of the proceeding.

120. Commentators writing at the time of the Argentine sunset determination described the institutional bias of the Department in the conduct of its sunset reviews:

The relative treatment by Commerce of domestic and respondent interested parties, although in part consistent with the Statute and the legislative history, may provide some basis for the criticism often heard among outside observers that Commerce’s procedures are sometimes biased in favour of the domestic industry. It is not clear that respondent interested parties gain very much by participation in Commerce reviews and avoiding automatic judgments. The statute, the legislative history, and Commerce rules make it highly likely that Commerce will find a likelihood of dumping and will simply rely on the results of the original investigation. Commerce will probably arrive at the same conclusions regardless of foreign participation. In light of this and the high information burden on respondent interested parties, there is a clear incentive for respondent interested parties to forego participation at Commerce. In fact, most respondent interested parties have simply not responded in the majority of reviews initiated to date. As can be seen in Table 1, only nine responses from respondent interested parties have been received to date.<sup>165</sup>

121. The author of this article also interviewed several practitioners. Based on these conversations, he noted that: “[o]ne practitioner stated there is a very clear perception among respondents of an institutional bias at Commerce against respondents, and therefore there is a great reluctance to expend resources toward presenting their [sunset] case at Commerce.”<sup>166</sup>

122. The analysis done by Argentina for the purposes of this panel proceeding confirms the widely-held perceptions at the time: in every sunset review in which the domestic industry participated and in which the waiver provisions were not applied, the Department limited its

---

<sup>164</sup> 19 C.F.R. § 351.309(e) (emphasis added).

<sup>165</sup> See Peter A. Dohman, *Determinations of Adequacy in Sunset Reviews of Anti-Dumping Orders in the United States*, 14 AM. U. INT’L L. REV. 1281, 1331-32 (footnotes omitted) (1998-1999) (ARG-65) (at the time of writing this article, the author (who stated that the views expressed in the article were his personal views and not representative of the Commission) served as the Senior Economist to Commissioner Carol T. Crawford of the International Trade Commission).

<sup>166</sup> See *id.* at 1300 n.64 (ARG-65).

“analysis” to the SAA and *Sunset Policy Bulletin* criteria and found a likelihood of dumping.<sup>167</sup> By relying exclusively on the checklist criteria from the SAA and *Sunset Policy Bulletin*, the Department denies foreign interested parties an ample opportunity to present evidence and fully defend their interests, contrary to the obligations established by Articles 6.1, 6.2, and 11.3. Despite US protestations to the contrary, the United States is well aware of the fact that even if Siderca availed itself of other opportunities to submit comments, the outcome would have been the same. The United States cannot credibly argue that a more active intervention by Siderca would suddenly have tilted the record from 223/0 to 222/1.

- (c) The Department Violated Article 6.8, 6.9, and Annex II Because the “Facts Available” Analysis Was Necessarily Limited To the Dumping Margin in the Original Investigation and the Information in the Substantive Response

123. Again Argentina contends that the Department’s determination was based on the application of the waiver provisions in this case, which violates Articles 11.3, 6.1, 6.2, 6.8, 6.9, and Annex II of the Anti-Dumping Agreement. Even if the Panel accepts the United States’ argument that the determination was instead based on facts available, the substantive analysis of the WTO obligations does not change. A decision based on facts available also violates Articles 11.3, 6.1, 6.2, 6.8, 6.9, and Annex II.

124. “Facts available” can be used only as a last resort when investigating authorities are faced with recalcitrant and uncooperative parties. Accordingly, Article 6.8 and Annex II permit an investigating authority to make determinations based on “facts available” only when an interested party “refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation . . . .” In this case, however, Siderca provided all information required by the Department’s sunset regulations in its substantive response to the notice of initiation, and it agreed to cooperate fully in the investigation. Thus, Siderca was not an uncooperative party. Nevertheless, the Department considered Siderca’s complete substantive response to be inadequate based on the 50 per cent threshold test and thus determined to conduct an expedited review. Even worse, there was no determination that Siderca failed to cooperate. The Department thus violated Articles 6.8, 6.9, and Annex II.

125. As for the argument in the US First Submission that the Department used facts available only for the non-responding Argentine respondents, there is no support for this statement in the sunset determination. The concept of non-responding Argentine respondents is never even mentioned directly in the sunset determination. Even if it had been mentioned, as explained in detail above, it was not a reasonable and objective assessment of the facts to consider that such parties existed, and to condition Argentina’s rights in this way without further investigation. Limiting the analysis in this way violates Articles 11.3, 6.1, 6.2, 6.8, 6.9, and Annex II.

### **3. The Department’s Determination that termination of the duty would be likely to lead to continuation of dumping was inconsistent with Articles 11.3 and 2 of the Anti-Dumping Agreement**

- (a) There Was No Evidence Before the Department That Dumping Continued During the Sunset Review Period

126. Assuming *arguendo* that the likelihood determination was not based on the application of the waiver provisions, then the record before the Department reflects that the sole bases for the Department’s likelihood determination were: (1) the 1.36 per cent margin from the original investigation that was calculated using the practice of zeroing negative margins; and (2) the decline in

---

<sup>167</sup> See US Department of Commerce Sunset Reviews (ARG-63 and ARG-64).



volume of Argentine OCTG imports. These pieces of information – with nothing more – are insufficient to continue an anti-dumping measure under Article 11.3.

127. Following the imposition of the US anti-dumping measure on Argentine OCTG, Siderca chose to stop exporting to the US market. As the Appellate Body has explained, declines in import volumes following the imposition of anti-dumping duties can result from many factors apart from the duties.<sup>168</sup> The lack of shipments from Siderca was demonstrated through a series of annual reviews initiated by the Department. Each August from 1996-1999 (covering the five-year period relevant to the sunset review that forms the basis of this dispute), representatives of the US industry requested an annual review of shipments by Siderca. Under US law and practice, the petitioners are required to identify the exporter for which it requests a review, and each time during this period, the US industry requested a review only of Siderca. For example, the US industry's letter requesting the second review states: "Review is requested of Siderca because it is the only known producer of oil country tubular goods in Argentina . . . ."<sup>169</sup> As a result of such requests, the Department initiated a review in each of the four years following the issuance of the anti-dumping order on OCTG from Argentina, publishing an "initiation notice" naming Siderca as the exporter to be reviewed. In certain of the reviews, the Department also issued an anti-dumping questionnaire.<sup>170</sup>

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

129. Hence, given that Siderca did not ship to the United States following the imposition of the order, the only evidence before the Department was that Siderca had not continued to dump during the sunset review period. In addition, the alleged Argentine OCTG imports from the so-called non-responding respondents were of a very small quantity, and were not subject to administrative reviews to determine whether they were dumped. The Department could not simply presume that they were dumped, and use this as "evidence" that dumping was likely to continue in the future.

130. The Department did not gather or evaluate additional facts at the time of the sunset review, but instead based its decision that dumping would likely continue or recur only on the dumping margin of 1.36 per cent from the original investigation, and the fact that Siderca had stopped exporting OCTG to the United States.<sup>171</sup> This is the sum total of what the European Community aptly characterized as the "meagre crumb" of evidence supporting this likely dumping determination.<sup>172</sup>

131. The Department's reliance on the 1.36 per cent dumping margin established in the original investigation in 1995 cannot serve as a basis for the Department's determination that dumping would be likely to continue or recur.

---

<sup>168</sup> Appellate Body Report, *Sunset Review of Steel from Japan*, para. 177.

<sup>169</sup> Letter from Schagrin Associates to the Honourable William M. Daley of 29 Aug. 1997 ("Oil Country Tubular Goods from Argentina: Request for Administrative Review") at 2 (ARG-58).

<sup>170</sup> *Initiation of Anti-Dumping and Countervailing Duty Reviews*, 61 Fed. Reg. 48,882 (Dep't Comm. 1996)(initiating review for the period 11 Aug. 1995, through 31 July 1996)(ARG-28); *Initiation of Anti-Dumping and Countervailing Duty Reviews*, 62 Fed. Reg. 50,292 (Dep't Comm. 1997)(initiating review for the period 1 Aug. 1996, through 31 July 1997)(ARG-32); *Initiation of Anti-Dumping and Countervailing Duty Reviews*, 63 Fed. Reg. 51,893 (Dep't Comm. 1998)(initiating review for the period 1 Aug. 1997, through 31 July 1998)(ARG-37); *Initiation of Anti-Dumping and Countervailing Duty Reviews*, 64 Fed. Reg. 53,318 (Dep't Comm. 1999)(initiating review for the period 1 Aug. 1998, through 31 July 1999)(ARG-41).

<sup>171</sup> See *Issues and Decision Memorandum* at 5 (ARG-51).

<sup>172</sup> Third Party Submission of European Communities, para. 42.

- First, the rate is historic, with no relationship whatsoever to the forward-looking determination required to invoke the exception of Article 11.3 and continue the measure. The United States still has never offered a logical explanation of what this rate says about future dumping, let alone the likelihood of future dumping.
- Second, as explained in detail below in subsection b, in the original investigation the Department calculated the 1.36 per cent margin based on the practice of zeroing negative margins. In fact without the zeroing practice, there would have been no dumping margin at all, and there would have been no measure to review.<sup>173</sup>

132. To know whether dumping would likely “continue” or “recur” under Article 11.3, an authority must have current information about dumping.<sup>174</sup> In other words, it becomes necessary to determine if dumping exists in order to assess its probable continuation. Alternatively, it becomes necessary to determine the absence of dumping in order to assess prospectively the probability of recurrence.

133. As the Appellate Body explained, satisfying these obligations does not necessarily require the same type of calculation as may be performed in an Article 5 investigation, but the authorities have an obligation to act diligently and to collect evidence that can form the basis for the requisite determination.<sup>175</sup> 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 . . . .”<sup>176</sup> The Department, however, had rescinded each of the four administrative reviews of Siderca following the order, and thus did not have evidence of dumping margins throughout the history of the order. The Department’s reliance on such flawed and dated information necessarily resulted in speculation as to whether or not dumping would be likely to continue or recur were the order to be terminated, rather than a determination based on sufficient positive evidence.

134. Indeed, particularly in the facts of this case where the Department relied on Siderca’s small dumping margin of only 1.36 per cent, the Department had an obligation to gather and evaluate “persuasive evidence” in order to justify its determination of likelihood of dumping. As the Appellate Body has ruled, “mere reliance” on the determination made in the original investigation is not enough.<sup>177</sup> This reinforces Argentina’s view of the extreme and unfair situation presented in this case.

135. With respect to import volumes, the Appellate Body in *Sunset Review of Steel from Japan*, stated that:

[T]he second and third scenarios in Section II.A.3 relate to the situation where there is *no dumping* (either because imports ceased or because dumping was eliminated after the duty was imposed). The cessation of imports in the second scenario and the decline in import volumes in the third scenario could well have been caused or reinforced by changes in the competitive conditions of the market-place or strategies of exporters, rather than by the imposition of the duty alone. Therefore, a case-specific analysis of the factors behind a cessation of imports or a decline in import volumes (when dumping is eliminated) will be necessary to determine that dumping will recur if the duty is terminated.<sup>178</sup>

---

<sup>173</sup>See, on that issue, the Third Party Submissions of European Communities, paras. 79-89, and Japan paras. 22-28.

<sup>174</sup> See also Third Party Submission of European Communities, para. 12.

<sup>175</sup> See Appellate Body Report, *Sunset Review of Steel from Japan*, para. 111.

<sup>176</sup> US First Submission, para. 218.

<sup>177</sup> See Appellate Body Report, *Steel from Germany*, para. 88.

<sup>178</sup> Appellate Body Report, *Sunset Review of Steel from Japan*, para. 177.

136. The Department engaged in no such analysis in this case. Nor did it request additional information from Siderca who had pledged to cooperate fully. Instead, the Department relied solely on the 1.36 per cent dumping margin and the low import volumes. This does not constitute the “sufficient factual basis” for the substantive and meaningful determination required by Article 11.3.

(b) Decisive Reliance by the Department on a WTO-Inconsistent Margin (Because It Was Calculated Using the Practice of Zeroing) as the Basis for the Likelihood Determination Is Inconsistent with Article 11.3

137. There can be no doubt that the 1.36 per cent margin is based on a calculation method that is inconsistent with Article 2.4. To calculate the 1.36 per cent margin, the Department applied “zeroing” by setting all negative margins to zero, and summed the remaining positive margins. The effect is to disregard the existence and magnitude of the negative margins in determining the amount of “dumping” arising from the sales under review.

138. This can be seen clearly in Exhibit ARG-52 to Argentina’s First Submission. The comparison beginning on line 25 indicates “.” in the column “MRGOBS,” meaning that none of the transactions involving this particular product generated positive dumping margins, and the “Total Potential Uncollected Dumping Duties” (“TOTPUDD”) column for those same transactions similarly is blank. After setting all the “negative margins” to zero in this manner, the Department summed all of the positive margins (represented by the products listed in lines 124 of ARG-52), and divided the resulting figure by the total net US value to calculate the overall dumping margin for Siderca. As shown on the second page of ARG-52, dividing the “TOTPUDD” total (\$125,478.93, which, because of zeroing, does not reflect the “negative margins” generated on many sales) by the “TOTVAL” total (\$9,240,392.64) yields the 1.36 per cent margin relied on by the Department in the sunset review.

139. This method overestimated the overall dumping margin by ignoring the US sales that were not “dumped;” that is, in the words of Article 2.1 of the Anti-Dumping Agreement, were not “introduced into the commerce of another country at less than its normal value . . . .” This can be seen in greater detail in Exhibit ARG-66A, Results of the Department’s Margin Calculation for Siderca’s Sales (Without “Zeroing”), which reproduces the results of the Department’s analysis on a transaction-specific basis. As shown in Exhibit ARG-66A, the Department analyzed 385 individual sales transactions of Siderca in the original investigation.<sup>179</sup> Unlike the Department’s calculation, the output in Exhibit ARG-66A does not set the negative margins to zero in fields UMARGIN or PUDD; that is it does not zero. Instead, if the US price of the sale exceeds the weighted-average normal value for the comparison product (that is, if there was no dumping as defined in Article 2.1), the UMARGIN column reports a negative dumping margin on a per unit basis, the PUDD column shows the extended value of the negative dumping by multiplying the negative unit margin by the QTY, and the PCTEMARG column shows the percentage negative margin for each US transaction.

140. The results are clear and dramatic. Of the 385 US sales transactions examined by the Department, only 97 were “dumped” within the meaning of Article 2.1, while more than three times

---

<sup>179</sup> Exhibit ARG-66A, Results of the Department’s Margin Calculation for Siderca’s Sales (Without “Zeroing”), reports the output from the Department’s computer program, showing for each transaction, in order from left to right, the sequential line, or “observation” number on the output report (“OBS”), the invoice number (“INVOICU”), the sale date (“SALEDTU”), the quantity sold (“TOTQTY”), the “control number” or products involved in the US sales transaction (“CONNUMU”), the “control number” or products involved in the comparison market sale (“CONNUMT”), the “foreign unit price in dollars” (“FUPDOL,” which is the weighted-average normal value for the comparison market product), the United States price (“USPR,” which is the net US sales price for each transaction), the unit margin (“UMARGIN,” which results from subtracting the USPR from the FUPDOL), the extended margin or “potentially uncollected dumping margin” (“PUDD,” which results from multiplying the UMARGIN by the QTY), the value of the US sale (“TOTVAL,” which results from multiplying the USPR by the QTY), and the percentage dumping margin for each transaction (“PCTEMARG,” which results from dividing the EMARGIN by the VALUE).

as many sales (288) were not dumped. Further, the total value of dumping on the dumped sales was \$125,478.93 (as indicated in ARG-52, second page), while the total value of negative dumping on the non-dumped sales was more than 4 times higher, or \$527,638.38. When the PUDD field is summed without the practice of zeroing, and the total dumping considered by the Department (\$125,478.93) is offset by the total negative dumping (\$527,638.38), the result is a total negative dumping of \$402,159.45, which, divided by the total value of US sales of \$9,240,342.64, converts the 1.36 margin used by the Department to a negative 4.35 per cent margin. Clearly, this is not evidence of dumping as defined by Article 2.1.

141. This effect can also be seen on a product-specific basis, with results that are equally clear and dramatic. During the period of investigation, Siderca made four US sales of CONNUMU 1 (which can be verified by the "TOTOBS" column on ARG-52 for line 13, and which can be seen individually on lines 25, 42, 234, and 369 of Exhibit ARG-66A). The net US price, US quantity, average normal value, unit margin, extended margin, and net US value for each of the US sales of CONNUMU 1 are shown below.

OBS Number ARG-66A	Net US Price	US Quantity	Normal Value	Unit Margin	Extended Margin	US Value
	US\$ per Ton	Ton	US\$ per Ton	US\$ per Ton	("PUDD") US\$	US\$
	(A)	(B)	(C)	(D = C - A)	(E = B * D)	(F = A * B)
25	\$489.015	100.95	\$504.234	\$15.219	\$1,536.40	\$49,366.06
42	\$491.312	41.35	\$504.234	\$12.923	\$534.36	\$20,315.73
369	\$583.961	67.09	\$504.234	(\$79.727)	(\$5,348.85)	\$39,177.94
234	\$590.391	13.36	\$504.234	(\$86.157)	(\$1,151.05)	\$7,887.62

142. The total net US value for CONNUMU 1 was \$116,747.35. The corresponding total extended margin or "PUDD" was \$2,070.76 with zeroing and was negative \$4,429.14 without zeroing. The overall margin for CONNUMU 1 was 1.77 per cent with zeroing. Without zeroing, the overall dumping margin for CONNUMU 1 was negative 3.79 per cent. Ignoring the fact, and the extent to which, the third and fourth US sales were not dumped converted the negative margin to a positive margin for this product, just as it did on an overall basis, as demonstrated above.

143. Exhibit ARG-66B, Excerpt from the Department's Margin Calculation Program Demonstrating "Zeroing," shows the portion of the program that the Department used to calculate the overall dumping with zeroing for Siderca in the investigation. Lines 1 thru 4 of the program calculated the total quantity and value for all of US products sold by Siderca. This step is the same as the sum of F of the example above. Lines 12 thru 16 calculated the amount of dumping, total quantity and value of all US products that contributed to dumping. This is where zeroing is applied. Specifically line 13 of the program ("WHERE EMARGIN GT 0") instructed the computer to calculate the total amount of dumping, quantity and value only for those transactions generating positive extended margins. This step is the same as the sum of only the positive values in column E in the example above. Line 22 of the program calculates the overall margin by dividing the sum of all positive extended margins by the total net US value.

144. As shown in the example above, zeroing inflates the overall margin significantly, and, in this case, without zeroing there would have been no dumping margin. To avoid the overestimation of dumping margin, the Department simply needs to delete line 13 of the computer program and rerun the program. When this is done, using the same computer program the Department used in the original investigation and the same database that Siderca provided, the margin is a negative 4.35 per cent on an order-wide basis. This is, in fact, what is shown in Exhibit ARG-66A.

145. The Appellate Body recognized in *Sunset Review of Steel from Japan* that zeroing is not consistent with Article 2.4.<sup>180</sup> It does not yield a “fair comparison,” and it does not accurately reflect whether the product, as a whole, is being sold at less than normal value.

146. The Appellate Body ruled that when a Member relies on a dumping margin in making a determination in an Article 11.3 review, that margin must be WTO-consistent.<sup>181</sup> The Appellate Body explained that:

Article 2 sets out the agreed disciplines in the Anti-Dumping Agreement for calculating dumping margins. As observed earlier, we see no obligation under Article 11.3 for investigating authorities to calculate or rely on dumping margins in determining the likelihood of continuation or recurrence of dumping. However, should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4. We see no other provisions in the Anti-Dumping Agreement according to which Members may calculate dumping margins. In the CRS sunset review, USDOC chose to base its affirmative likelihood determination on positive dumping margins that had been previously calculated in two particular administrative reviews. If these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the Anti-Dumping Agreement.<sup>182</sup>

147. Accordingly, the Appellate Body “reverse[d] the Panel's consequential finding, in paragraph 8.1(d)(iii) of the Panel Report, that the United States did not act inconsistently with Article 2.4 of the Anti-Dumping Agreement in the CRS sunset review by relying on dumping margins alleged by Japan to have been calculated in a manner inconsistent with Article 2.4.”<sup>183</sup>

148. The Appellate Body reiterated that relying on a WTO-inconsistent margin can “taint the likelihood determination” under Article 11.3, and that such a margin need not have been challenged in the underlying administrative proceeding or in a WTO Challenge:

As explained above, if a likelihood determination is based on a dumping margin calculated using a methodology inconsistent with Article 2.4, then this defect taints the likelihood determination too. Thus, the consistency with Article 2.4 of the methodology that USDOC used to calculate the dumping margins in the administrative reviews bears on the consistency with Article 11.3 of USDOC's likelihood determination in the CRS sunset review. In the CRS sunset review, USDOC based its determination that “dumping is likely to continue if the [CRS] order were revoked” on the “existence of dumping margins” calculated in the administrative reviews. If these margins were indeed calculated using a methodology that is inconsistent with Article 2.4 – an issue that we examine below – the USDOC's likelihood determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3. Moreover, a legal defect of this kind cannot be cured by NSC's failure to take issue with it in the CRS sunset review or the administrative reviews. It follows that we cannot agree with the United States' suggestion that Japan's appeal on this issue must fail because: (i) NSC did not object, in either the CRS sunset review or the administrative reviews, to the methodology USDOC used to calculate the dumping margins in question; and (ii)

---

<sup>180</sup> See Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 134-135.

<sup>181</sup> See *id.* at paras. 126-132.

<sup>182</sup> *Id.* at para. 127 (footnotes omitted).

<sup>183</sup> *Id.* at para. 128.

Japan did not initiate dispute settlement proceedings in the WTO regarding USDOC's calculation of those margins in the context of the administrative reviews.<sup>184</sup>

149. The Appellate Body explained that zeroing (whether in the original investigation or otherwise) not only distorts the magnitude of the dumping margin, but may also result in a positive margin that otherwise would not exist:

When investigating authorities use a zeroing methodology such as that examined in *EC – Bed Linen* to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognized in the present dispute, “zeroing . . . may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing.” Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping.<sup>185</sup>

150. That is precisely the case with Siderca. There would have been no margin in the original investigation in the absence of zeroing. Consequently, the 1.36 per cent margin (calculated on the basis of zeroing negative margins) cannot constitute evidence that termination of the measure would be likely to lead to a continuation or recurrence of dumping. To be clear, Argentina is not claiming that the original dumping determination violated US WTO obligations because it was calculated based on the practice of zeroing negative margins. Rather, Argentina challenges the Department's reliance on that margin as the basis for its determination that dumping would be likely to continue under Article 11.3. The Appellate Body has clarified that the Department may not rely on a dumping margin which is inconsistent with the substantive standard of Article 2.4 as the basis for its likelihood determination under Article 11.3.

#### **4. The “likely margin” reported by the Department to the Commission was inconsistent with Articles 2 and 11.3**

151. The Department determined that if the order were revoked, the likely dumping margin to prevail would be 1.36 per cent. The Department reported this margin to the Commission for purposes of the Commission's sunset review and its likelihood of injury determination. Because the 1.36 per cent margin was inconsistent with Article 2 (because it was based on the WTO-inconsistent practice of zeroing negative margins), and additionally because it was constructed on the basis of the Department's “circumstance of sale” adjustment,<sup>186</sup> the Department's determination that this margin constituted the likely margin to prevail violated Articles 11.3 and 2.

152. The United States notes that the Department's reporting of the likely margin to the Commission in a sunset review is a construct of US law, rather than a requirement of Article 11.3.<sup>187</sup> Consequently, the United States argues, the Department's reporting of the 1.36 per cent margin to the Commission was not inconsistent with Article 11.3. This argument cannot be accepted. As the Appellate Body makes clear, once a Member undertakes either to calculate a dumping margin or to rely on a dumping margin, however, that margin must be consistent with the requirements of Article 2. In the case at hand, because the United States did not make a WTO-consistent determination that dumping would be likely to continue or recur, it was required to have terminated the measure.

---

<sup>184</sup> *Id.* at para. 130.

<sup>185</sup> *Id.* at para. 135 (footnotes omitted).

<sup>186</sup> See Argentina's First Submission, n.14.

<sup>187</sup> See US First Submission, para. 267.

#### IV. THE COMMISSION'S SUNSET DETERMINATION

153. Much of what is wrong with the Commission's determination of whether injury is likely to continue or recur in this case involves the question of proper standard. That is, what kind of analysis does Article 11.3 require when it states that the authorities must terminate the measure unless they find that injury is "likely" to continue or recur? In a typical case, such a challenge might be complicated by the fact that, unless the authorities explain precisely what standard they are applying, the standard itself may not be discernible from the agency's decision. Also, in this case, the United States correctly states, and Argentina acknowledges, that both Article 11.3 and the US statute use the same word, that is "likely."

154. The Panel's review of Argentina's claim on this issue, however, is facilitated by two striking facts. First, the Appellate Body recently confirmed Argentina's position that the term "likely" in Article 11.3 means "probable."<sup>188</sup> Second, the US First Submission, and its oral statement at the first substantive meeting, continues to take the position that "likely" does not mean "probable." Not only is this the United States' position before the Panel, but the United States has taken the position repeatedly before the US courts, and before a NAFTA panel reviewing the same Commission determination in this dispute.

155. As a result, the issue, as presented to this Panel, is very clear. The Appellate Body has stated what the standard is, and the United States has stated that it does not apply that standard. These statements regarding the applicable standard are reviewed briefly in Section A below. In addition, the Commission's determination, and the US First Submission, contain several glaring examples that the United States means what it says: it certainly does not apply a "probable" standard. These examples, and the conflict with the positive evidence standard of Article 3.1, are reviewed in Section B below. The rebuttal of the United States' position with respect to cumulation and the proper timeframe for determining whether "likely" injury will recur are reviewed in Sections C and D, respectively.

##### A. THE COMMISSION DID NOT APPLY THE CORRECT STANDARD FOR DETERMINING WHETHER TERMINATION OF THE ANTI-DUMPING DUTY ORDER WOULD BE LIKELY TO LEAD TO CONTINUATION OR RECURRENCE OF INJURY AND VIOLATED ARTICLES 11.3 AND 3.1 OF THE ANTI-DUMPING AGREEMENT

156. Argentina argued in its First Submission that the term "likely" as used in Article 11.3 has its common and ordinary meaning of "probable." The United States, in its First Submission, argues that "likely" simply means "likely," and that it does not mean "probable." The United States offers several other, secondary definitions of "likely" in support of its view that "likely" has no common and ordinary meaning, and that it does not mean "probable."

157. Any remaining doubt as to the meaning of "likely" was removed by the Appellate Body's decision in *Sunset Review of Steel from Japan*. The Appellate Body confirmed in that case that the ordinary meaning of "likely," as used in Article 11.3, is "probable."<sup>189</sup> The Appellate Body then observed that, "[i]n view of the use of the word 'likely' in Article 11.3, an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be probable if the duty were terminated – and not simply if the evidence suggests that such a result might be possible or plausible."<sup>190</sup>

---

<sup>188</sup> See Appellate Body Report, *Sunset Review of Steel from Japan*, para. 111.

<sup>189</sup> See Appellate Body Report, *Sunset Review of Steel from Japan*, para. 111; see also Panel Report, *DRAMS from Korea*, para. 6.48 n.494 (stating in the context of interpreting Article 11.2 "that 'likelihood' or 'likely' carries with it the ordinary meaning of 'probable'"); *Nippon Steel Corp. v. United States*, No. 01-00103, slip op. 02-153 at 7-8 (Ct. Int'l Trade Dec. 24, 2002)(ARG-17); *Usinor Industeel, S.A. v. United States*, No. 01-00006, slip op. 02-152 at 2 (Ct. Int'l Trade Dec. 20, 2002)(ARG-16).

<sup>190</sup> Appellate Body Report, *Sunset Review of Steel from Japan*, para. 111.

158. As explained in Argentina's First Submission, and not rebutted by the United States, the Commission has argued repeatedly before US courts that "likely" does not carry its ordinary meaning of "probable," but instead means something else. In its more recent declarations, the Commission stated that "likely" "captures a concept that falls in between 'probable' and 'possible' on a continuum of relative certainty."<sup>191</sup> The US First Submission tells the Panel not to worry about these changing standards and the litigation in the US courts because, ultimately, the reviewing court upheld the Commission's re-determination on remand, and that determination was the same as its initial determination, which the parties had disputed as being inconsistent with the "likely" standard.<sup>192</sup>

159. Argentina respectfully submits that the Panel should pay attention to the US litigation and the Commission's changing views as to the meaning of the term "likely." They are directly relevant to the standard that the agency applied during numerous sunset determinations, including the sunset determination in this case. In fact, the Commission has expressly taken the position before a NAFTA panel reviewing this very same OCTG sunset determination that "likely" does not, and cannot, mean "probable."<sup>193</sup> Before the NAFTA Panel, the Mexican company, TAMSA, argued that the Commission applied the improper standard, and that the Commission should have given the term "likely" its common and ordinary meaning, which is "probable" or "more probable than not." In responding to this argument, the United States included the following point heading in its brief:

**The Statement of Administrative Action's Explanation of the Likelihood Standard Excludes TAMSA's Theory That "Likely" Means "Probable"**<sup>194</sup>

160. In this section of its brief, the Commission relies on the SAA and claims:

The SAA explains, unambiguously, that after the revocation "[t]here may be *more than one* likely outcome." SAA at 883. The possibility of "more than one likely outcome" shows that Congress did not intend "likely" to mean "probable" or "more probable than not."<sup>195</sup>

161. The statements could not be clearer that the Commission in the underlying investigation did not consider "likely" to mean "probable." In fact, it considered the SAA to control the interpretation of the term "likely" and to preclude any notion that "likely" could mean "probable." As will be seen in Section B below, there is ample evidence from the review to demonstrate that the Commission did not apply a "probable" standard.

162. As for the United States' argument in its First Submission that the court upheld the Commission's decision in the underlying Usinor Remand, the argument misses the point. The point is that the court found that the Commission did not apply the correct standard initially, and it directed the Commission to apply the ordinary and common meaning of "likely," which is "probable." It is only after the Commission adjusted its analysis and applied a different standard that the court affirmed the Commission's remand determination. Thus, the Usinor litigation is yet another proof that the Commission initially applied the wrong standard.

---

<sup>191</sup> Int'l Trade Comm'n Remand Determ. Pursuant to *Usinor Industeel S.A., et al v. United States*, No. 01-00006 (July 2002) at 6 (non-proprietary version) (ARG-56 bis).

<sup>192</sup> US First Submission, para. 283.

<sup>193</sup> The NAFTA appeal in question was filed by the Mexican company, TAMSA. While this obviously was not a review requested by Argentina, it is, without question, a review of the same ITC determination that is before this Panel. As the United States reminded the Panel and Argentina in its First Submission and during the oral statement, it conducted this determination on a cumulated basis. Therefore, the arguments that it made regarding the likely standard before the NAFTA panel are directly relevant to this Panel's consideration of whether the Commission applied the correct standard.

<sup>194</sup> ITC Brief, *Oil Country Tubular Goods from Mexico, Results of Five-Year Review*, USA-MEX-201-1904-06 (8 Feb. 2002) (non-proprietary version) at 43 (excerpts included as Exhibit ARG-67).

<sup>195</sup> *Id.*



B. THE COMMISSION'S SUNSET DETERMINATION WAS INCONSISTENT WITH ARTICLE 11.3 AND 3 OF THE ANTI-DUMPING AGREEMENT

1. **The Commission's Sunset Determination was inconsistent with Article 3.1 of the Anti-Dumping Agreement**

163. Article 3.1 provides that, “[a] determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.” (Emphasis added.)

164. The United States argues that Article 3.1 does not apply to sunset reviews. According to the United States, the requirements of Article 3.1 are “potentially incompatible” with Article 11.3 reviews, because “[i]mports may not even be present in the market at the time of the sunset review, and they may not be sold at dumped prices.”<sup>196</sup> The US argument fails for several reasons. First, as previously established,<sup>197</sup> the provisions of Article 3 – including paragraph 1 thereof – apply to Article 11.3. Moreover, the United States ignores the language “for purposes of Article VI of GATT 1994[.]” The Anti-Dumping Agreement as a whole clarifies Article VI of GATT 1994. Thus, Article 3.1 makes clear that all determinations of injury – whether a determination of injury in an original investigation or a determination of the likelihood of injury in a sunset review – are subject to the requirements of Article 3. Finally, the United States ignores the fundamental requirement of Article 3.1: that a determination of injury shall be based on positive evidence and an objective examination of the facts. Article 3.1 makes clear that these fundamental principles apply to a likelihood of injury determination under Article 11.3.

165. Therefore, in evaluating whether the Commission's likelihood of injury determination in the sunset review of OCTG from Argentina was consistent with Article 11.3, the panel must consider whether the Commission based its determination on positive evidence and examined the facts objectively.

166. In its oral statement at the first panel meeting of 9 December 2003, the United States argued that the Commission's sunset determination was based on positive evidence and an objective evaluation of the facts.<sup>198</sup> Pointing to the Commission's determination, the United States asserted that “the [Commission] carefully reviewed an extensive array of factors and evidence relative to the likely volume, price effect and impact of imports on the domestic industry.”<sup>199</sup>

167. Mere citation to a voluminous record of information does not satisfy the requirement to examine the record objectively and to base conclusions on positive evidence. In evaluating whether the Commission's establishment of the facts was proper and its assessment objective, it is important to keep in mind that the Commission failed to apply the correct “likely” standard under Article 11.3 and conducted a cumulative injury analysis. As a result, the Commission simply did not support its determination that injury would likely continue or recur upon termination of the order on Argentine OCTG with a sufficient factual basis.

168. That the Commission failed to base its conclusions on positive evidence and objectively evaluate the facts is evident from its findings with respect to volume, price, and impact. Argentina has already discussed the Commission's findings in detail in the first written submission and oral

---

<sup>196</sup> US First Submission, para. 305.

<sup>197</sup> As established above in Section II.C.2, an authority's determination under Article 11.3 of whether “injury” would be likely to continue or recur must satisfy the requirements of Article 3.

<sup>198</sup> See US First Oral Statement, para. 23.

<sup>199</sup> *Id.* at para. 24.

statement at the first panel meeting, and will not recount all of the evidence here.<sup>200</sup> Argentina will, however, comment briefly on the Commission's approach with respect to each factor, as it illustrates the fundamental problem with the Commission's analysis: The Commission speculated that certain outcomes were possible, instead of relying on positive evidence that certain events were probable.

169. With respect to the volume of imports, the United States claims that "the [Commission] found that producers in the five countries involved had both the capacity and the incentive to increase their exports to the United States."<sup>201</sup> This assertion is somewhat misleading. With respect to the subject producers in Argentina, Italy, and Mexico (as well as the only Japanese producer to participate in the sunset review), the Commission actually found that "[t]he recent . . . capacity utilization rates represent[ed] a potentially important constraint on the ability of [the] subject producers to increase shipments of casing and tubing to the United States."<sup>202</sup> Thus, the Commission recognized positive evidence indicating that the volume of imports was not likely to increase significantly in the event of revocation of the orders.

170. Despite this positive evidence of capacity constraints, however, the Commission determined that the subject producers had "incentives" to shift "their productive capacity to producing and shipping more casing and tubing to the US market."<sup>203</sup> The Commission based its conclusion that the subject producers had "incentives" to ship more OCTG to the United States on five findings.<sup>204</sup> As demonstrated by Argentina in its first submission and at the first panel meeting, however, each one of these findings was based on speculation, rather than on positive evidence.<sup>205</sup> Further, in making these findings, the Commission frequently disregarded positive evidence supporting the opposite conclusion.<sup>206</sup> As a result, the Commission failed to determine, based on positive evidence, that the recurrence of injury upon revocation of the orders on OCTG was probable.

171. In sum, in the face of positive evidence indicating that the recurrence of injury was not likely based on the volume analysis,<sup>207</sup> the Commission invented "incentives" – based on conjecture and speculation – in order to render an affirmative likelihood determination. The Commission's approach to the volume factor demonstrates that it failed to support its determination with positive evidence and to objectively examine the record. The Commission's sunset determination was therefore inconsistent with Articles 3.1 and 11.3. Further, the Commission's evaluation of the volume factor demonstrates its failure to apply the "likely" standard of Article 11.3.

172. The US First Submission also reveals similar reliance on conjecture with respect to the price effects of the "likely" imports. In response to Argentina's claim that the Commission cited paltry evidence of likely underselling by imports and potential price effects of the imports, the United States makes the following statement in its brief:

As for underselling by imports, Argentina's complaints relate solely to the ITC's discussion of underselling during the current review period. But the ITC itself placed little weight on this point, as it recognized that the orders had significantly reduced the volume of subject imports. What was much more significant to the ITC – and

---

<sup>200</sup> See Argentina's First Submission, Sec. VIII.B.2; Argentina's First Oral Statement, paras. 115-126.

<sup>201</sup> US First Oral Statement, para. 26.

<sup>202</sup> *Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico*, USITC Pub. 3434, Inv. Nos. 701-TA-364, 731-TA-711, and 713-716 (June 2001) at 19 ("*Commission's Sunset Determination*") (ARG-54).

<sup>203</sup> *Id.*

<sup>204</sup> See *id.* at 19-20.

<sup>205</sup> See Argentina's First Submission, paras. 244-246; Argentina's First Oral Statement, paras. 119-123.

<sup>206</sup> See *id.*

<sup>207</sup> The evidence included the testimony of German Cura, President of Siderca, at the Commission's sunset hearing. See ITC Hearing Tr., *Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico* (8 May 2001) (Mr. German Cura) at 200-208 (ARG-68).

what Argentina completely ignores in its submission – is the fact that underselling by subject imports during the original investigations drove down US prices.<sup>208</sup>

173. This statement regarding price effects speaks volumes. In other words, the Commission admits that it had very little evidence of likely underselling by the likely imports. In fact, it says that it placed “little weight” on any such evidence. Instead, it gave greater weight to the information developed five years earlier in the original investigation. This admission runs completely contrary to the requirements of Article 11.3 and the rigorous examination required by the Appellate Body in *Sunset Review of Steel from Japan*. It is simply not acceptable for the reviewing authorities to rely on information from the original investigation that led to the measure as the same basis for continuing the measure for an additional five years. If the authorities cannot develop a sufficient factual basis to support the notion that imports are likely to have detrimental price effects on the domestic industry, then they cannot presume that those price effects will occur.

174. A similar admission appears in the very next paragraph of the US First Submission, where the United States attempts to refute Argentina’s arguments that it gave undue weight to the fact that domestic prices were increasing at the end of the period examined. The United States claims:

Second, evidence from the original investigation strongly supports a finding that imports can drive down domestic prices even during a period of strong demand. Thus, it was completely logical for the ITC to conclude that whatever current prices may be, imports would drive down or suppress the price of the domestic like product if the orders were revoked.<sup>209</sup>

175. These two sentences accurately portray the reality of the Commission’s analysis. From a finding in the original investigation that imports “can” drive down domestic prices, the Commission concludes that imports “would” drive down or suppress the price of domestic like products if the order were revoked. In other words, because it is possible (as demonstrated five years earlier), then it must be “likely” to occur if the orders are revoked. Again, this type of reasoning is unacceptable under Article 11.3, and it demonstrates that the Commission is not applying a “likely” standard and that the decision in this case is not based on positive evidence of likely price effects.

176. The United States’ defence of the Commission’s “impact” analysis suffers from the same problem. Despite the fact that the Commission found that the domestic industry’s condition had improved and that its current condition was “positive,” the Commission nonetheless found that “revocation of the orders likely would lead to a significant increase in the volume of subject imports, which likely would undersell the domestic like product and significantly depress or suppress the domestic industry’s prices, leading to a significant adverse impact on the domestic industry.”<sup>210</sup> In its only defence against Argentina’s argument with respect to the impact analysis, the United States offers the following sentence:

The ITC noted that in the original investigation, a significant increase in demand had not precluded subject imports from gaining market share and having adverse price effects.<sup>211</sup>

177. Once again, the conclusion of what is likely to occur in the future depends wholly on the fact that it occurred in the original investigation, five years in the past. In this particular instance, the problem is compounded because the Commission is reduced to saying that increased demand in the past had not precluded subject imports from gaining market share and having adverse price effects,

---

<sup>208</sup>US First Submission, para. 338 (footnotes omitted).

<sup>209</sup> *Id.* at para. 339 (emphasis added, footnotes omitted).

<sup>210</sup> *Id.* at para. 342.

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

and drawing the inference from this observation that likely imports were likely to have the same impact. One is left to imagine how an exporter could ever meet this standard given that, by definition, most anti-dumping measures in place in the United States had some evidence of adverse impact supporting the initial decision.

178. Article 11.3 demands a rigorous analysis of the likely consequences of revocation. With respect to injury, Article 3.1 and Article 11.3 require positive evidence that injury is likely to continue or recur in order for the measure to be continued. The Commission's conclusions with respect to volume, price, and impact in this case fall short of meeting the substantive and evidentiary standard.

## **2. The Commission's Determination was inconsistent with Article 3.4 of the Anti-Dumping Agreement**

179. Article 3.4 of the Anti-Dumping Agreement requires the authority to evaluate the following "relevant economic factors and indices having a bearing" on the domestic industry: actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity, factors affecting domestic prices, the magnitude of the margin of dumping, actual and potential negative effects on cash flow, inventories, employment, wages, growth, and ability to raise capital or investments.<sup>212</sup> In its sunset determination of OCTG from Argentina, however, the Commission failed to address several of the mandatory factors, and provided a mere mechanical recitation of several others. The Commission's determination was therefore inconsistent with Article 3.4.

180. The United States argues that, because there may not be an impact from dumped imports to evaluate at the time of the sunset review, "the obligations described in Article 3.4 cannot practicably be applied to all sunset reviews."<sup>213</sup> Even if a particular factor turns out not to be germane to the authority's analysis, however, the authority still has an obligation under Article 3.4 to address each factor. As stated by the Panel in *H-Beams from Poland*, the authority must provide "a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury."<sup>214</sup>

181. The United States also argues in its First Submission that the Commission in fact considered all of the elements identified in Article 3.4.<sup>215</sup> The United States includes on page 109 a table indicating the "location in ITC Report" of statistics related to the relevant factors. The US rebuttal is not effective and reflects a misunderstanding of the kind of analysis required by Article 3.4. In *Egypt – Steel Rebar*, the panel held that the mere presentation of tables of data concerning the economic factors and indices listed in Article 3.4, without more, does not constitute an "evaluation" in the sense of Article 3.4.<sup>216</sup> Accordingly, the panel ruled, in order to "rebut a *prima facie* case that its 'evaluation' under Article 3.4 was inadequate or did not take place at all[,] a Member must produce a "written record – whether in the disclosure documents, in the published determination, or in other internal documents – of how [the] factors [had] been interpreted or appreciated by [the] investigating authority during the course of the investigation . . . ."<sup>217</sup> The Commission did not do this in its determination, and the United States has failed to demonstrate otherwise in its First Submission.

---

<sup>212</sup> Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, para. 7.236 ("*H-Beams from Poland*"). The Appellate Body agreed with the panel report in entirety. See Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted April 5, 2001, para. 125 ("*H-Beams from Poland*").

<sup>213</sup> US First Submission, para. 346.

<sup>214</sup> Panel Report, *H-Beams from Poland*, para. 7.236.

<sup>215</sup> US First Submission, para. 347.

<sup>216</sup> Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002, para. 7.42 ("*Egypt – Steel Rebar*").

<sup>217</sup> *Id.* at para. 7.49.

### 3. The Commission's Determination was inconsistent with Article 3.5 of the Anti-Dumping Agreement

182. With regard to the required causation analysis, Article 3.5 directs the authority to “examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.” In the sunset review of OCTG from Argentina, however, the Commission failed to separate and distinguish the potential injurious effects of other causal factors from the potential effects of the dumped imports. Thus, the Commission's determination was inconsistent with Article 3.5.

183. The United States argues that “textual indications in Article 3.5” show that “it specifically is not applicable to sunset reviews.”<sup>218</sup> The United States attempts to demonstrate that each and every word of Article 3.5 cannot practicably apply to sunset reviews. For example, the United States points out that Article 3.5 refers to existing “injury,” but “in a sunset review, with an anti-dumping order in place, there may be no current injury or causal link . . . .”<sup>219</sup> In addition, the United States refers to the Article 3.5 requirement not to attribute the injurious effects from other known sources of injury to the dumped imports. With respect to this provision, the United States argues, “In a sunset review, where the focus is on evaluating the likely effect of imports upon expiry of the duty (*i.e.*, at some point in the future), other factors ‘which at the same time are injuring the domestic industry’ will not be ‘known’ to the investigating authority.”<sup>220</sup>

184. As demonstrated previously, however, according to Footnote 9 of the Anti-Dumping Agreement, “injury” for purposes of Article 11.3 “shall be interpreted in accordance with the provisions of [Article 3].” The fundamental requirement of Article 3.5 that the authority establish a causal link between the dumped imports and injury to the domestic industry is relevant to sunset reviews under Article 11.3. In the context of a sunset review, in order to render an affirmative likelihood of injury determination, Article 3.5 requires the authority to demonstrate that, upon termination of the anti-dumping measure, the subject imports – through either the continuation or recurrence of dumping – would be likely to cause injury to the domestic industry. In addition, Article 3.5 requires the authority not to ascribe the effects from other known potential sources of injury to the subject imports.

185. In the sunset review of OCTG from Argentina, the Commission failed to separate and distinguish the potential injurious effects of other causal factors from the potential effects of the dumped imports. The United States has been unable to demonstrate that the Commission satisfied the non-attribution requirement of Article 3.5.

#### C. THE COMMISSION'S APPLICATION OF A CUMULATIVE INJURY ANALYSIS IN THE SUNSET REVIEW OF OCTG FROM ARGENTINA WAS INCONSISTENT WITH ARTICLES 11.3 AND 3.3 OF THE ANTI-DUMPING AGREEMENT

186. As set out in the first submission and oral statement, Argentina submits that the Commission's application of a cumulative injury analysis in the sunset review of OCTG from Argentina was inconsistent with Articles 11.3 and 3.3 of the Anti-Dumping Agreement.<sup>221</sup> Argentina raised three independent arguments as to why the conduct of a cumulative analysis was WTO-inconsistent:

---

<sup>218</sup> US First Submission, para. 350.

<sup>219</sup> *Id.* at para. 352.

<sup>220</sup> *Id.* at para. 353.

<sup>221</sup> See Argentina's First Submission, VIII.D-F; Argentina's First Oral Statement, paras. 104-112.

- The text of Article 11.3 (and use of the singular “duty”) prohibits cumulation. This is further confirmed by the text of Article 3.3 of the Anti-Dumping Agreement, which limits cumulation to “investigations” and even then only where certain conditions are met;
- Assuming *arguendo* that Articles 11.3 and 3.3 do not preclude cumulation in sunset reviews, then the terms of Article 3.3 must be applied to any cumulative analysis in a sunset review. Application of either the *de minimis* or negligibility requirements (both of which must be satisfied) would have prevented cumulation in the sunset review of OCTG from Argentina; and
- The Commission’s use of a cumulative injury analysis in the sunset review of OCTG from Argentina was also inconsistent with Article 11.3, because it prevented the Commission from applying the correct “likely” standard.

187. Rather than recast these arguments in full, for purposes of this second submission, Argentina will focus this discussion on the US counterarguments. It is important to recognize at the outset that the Panel’s decision with respect to cumulation in *Sunset Review of Steel from Japan* rested on very narrow grounds, and that the issue of whether cumulation is permitted in Article 11.3 sunset reviews is still a matter of first impression under the Anti-Dumping Agreement.<sup>222</sup>

**1. The text of Article 11.3 prohibits cumulation. Under Article 3.3 of the Anti-Dumping Agreement, the use of cumulation is only permitted in “investigations,” and even then only where certain conditions are met**

188. According to the United States, “Argentina argues that because cumulation is not expressly permitted in Article 11.3, the ITC is prohibited from engaging in a cumulative analysis in a sunset review.”<sup>223</sup> The United States misconstrues Argentina’s argument. Argentina does not argue that Article 11.3 is silent with respect to cumulation. Argentina asserts that Article 11.3 – both pursuant to its terms and as interpreted in its context – expressly prohibits cumulation.

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

190. The United States contends that Article 11.3’s reference to the “duty” is not conclusive.<sup>224</sup> Yet, in *Sunset Review of Steel from Japan*, “[t]he United States argue[d] that the meaning of the word

---

<sup>222</sup> The Panel addressed the narrow issue of “whether the obligation relating to the negligibility standard under Article 5.8 for the purposes of a cumulative injury assessment under Article 3.3 in investigations also applies to sunset reviews under Article 11.3.” Panel Report, *Sunset Review of Steel from Japan*, para. 7.93. The Panel explicitly stated that it was not addressing the issue of whether Article 11.3 permits cumulation in the likelihood of injury determination: “For this reason, we do not address the more general issue of whether or not cumulation is permitted in sunset reviews.” *Id.* at 7.104 (emphasis added). In summarizing the Panel’s findings in *Sunset Review of Steel from Japan*, the Appellate Body stated, “The Panel also found (and Japan does not appeal these findings) no inconsistency with the United States’ WTO obligations in respect of . . . cumulation in sunset reviews . . . .” Appellate Body Report, *Sunset Review of Steel from Japan*, para. 6. Hence, the Appellate Body’s statement regarding what Japan had not appealed necessarily is limited to the narrow issue addressed by the Panel, and does not speak to the broader and still unresolved question of whether cumulation is permitted in sunset reviews.

<sup>223</sup> US First Submission, para. 363.

<sup>224</sup> *See id.* at para. 366.

‘duty’ in Article 11.3 is explained in Article 9.2 of the Anti-Dumping Agreement, which ‘makes clear that the definitive duty is imposed on a product-specific (*i.e.*, order-wide) basis, not a company-specific basis.’<sup>225</sup> The Appellate Body agreed with the United States “that this reference in Article 9.2 informs the interpretation of Article 11.3.”<sup>226</sup> Thus, the Appellate Body’s decision in *Sunset Review of Steel from Japan* confirms that the use of “duty” in the singular means that the authority must determine whether the termination of a single anti-dumping order – and not multiple anti-dumping orders – would be likely to lead to injury.

191. The Appellate Body’s decision in *Steel from Germany* suggests that it understands that the injury analysis in a sunset review is not conducted on a cumulated basis: “Thus, in our view, the terms ‘subsidization’ and ‘injury’ each have an independent meaning in the *SCM Agreement* which is not derived by reference to the other. It is *unlikely* that very low levels of subsidization could be demonstrated to *cause* ‘material’ injury.”<sup>227</sup> The Appellate Body’s statement would be true only where the injury analysis in a sunset review is not conducted on a cumulated basis.

192. Finally, the United States asserts that “cumulation in anti-dumping investigations was a widespread practice among GATT contracting parties prior to the adoption of Article 3.3 in the Uruguay Round, even though the Tokyo Round Anti-Dumping Code was silent on the subject.”<sup>228</sup> The fact that cumulation was not regulated by the Tokyo Round, however, weakens, rather than helps, the US argument. Prior to the Uruguay Round, the use of cumulation in injury determinations generated several conflicts. Consequently, the drafters of the Uruguay Round anti-dumping code – through Article 3.3. – limited the use of cumulation to “investigations,” and even then only where certain conditions are met.

193. Accordingly, by conducting a cumulative injury analysis in the sunset review of OCTG from Argentina, the Commission violated Articles 11.3 and 3.3.

## **2. Assuming *arguendo* that Articles 11.3 and 3.3 do not preclude cumulation, then the terms of Article 3.3 must be applied to any cumulative analysis in a sunset review**

194. In the alternative, Argentina argues that, even assuming that Articles 3.3 and 11.3 do not preclude cumulation in Article 11.3 reviews, then the terms of Article 3.3 must be applied to any such cumulative analysis in a sunset review.<sup>229</sup> The application of either the *de minimis* or negligibility requirements under Article 3.3 (by virtue of the cross-reference to Article 5.8) would have prevented cumulation in the Commission’s sunset determination of Argentine OCTG.

195. The US rebuttal to Argentina’s alternative argument relies on the premise that Article 3 does not apply to sunset reviews under Article 11.3.<sup>230</sup> As Argentina has demonstrated, however, the disciplines of Article 3 apply to Article 11.3.

196. In addition, the US relies on the Panel’s decision in *Sunset Review of Steel from Japan*.<sup>231</sup> In that decision, the Panel held that, because Article 3.3 is limited by its own terms to “investigations,” “the cross-reference in Article 3.3 to the negligibility standard in Article 5.8 does not apply to sunset reviews.”<sup>232</sup> Japan did not appeal this ruling.

---

<sup>225</sup> Appellate Body Report, *Sunset Review of Steel from Japan*, para. 150 (emphasis added).

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

<sup>227</sup> Appellate Body Report, *Steel from Germany*, para. 81.

<sup>228</sup> US First Submission, para. 370.

<sup>229</sup> See Argentina’s First Submission, Sec. VIII.E; Argentina’s First Oral Statement, para.108.

<sup>230</sup> See US First Submission, para. 373.

<sup>231</sup> See *id.* at paras. 374-378.

<sup>232</sup> Panel Report, *Sunset Review of Steel from Japan*, para. 7.102.

197. In response, Argentina first notes that the Panel's ruling in *Sunset Review of Steel from Japan* is not inconsistent with Argentina's assertion above that, because Article 3.3 restricts the use of cumulation to "investigations," Article 3.3 precludes the use of cumulation in sunset reviews. However, in the event that the Panel finds that cumulation is not prohibited by Articles 11.3 and 3.3, then the authorities must respect the substantive standards for cumulation in Article 3.3. The authorities may not cumulate in a manner that diminishes the rights of individual countries under Article 11.3. In this case, with negligible import volumes and a *de minimis* dumping margin, Argentina had a right to expect that its export performance would be taken into account in the likelihood of injury analysis, and not rendered irrelevant by an analysis that focused on the export practices of producers from other countries.

198. The United States also argues that "the application of Article 5.8's negligibility thresholds would be unworkable in the context of sunset reviews."<sup>233</sup> The United States suggests that it would not be practicable for the authority to assess whether the likely – as opposed to the current – volume of imports would be negligible. Article 5.8, however, explicitly directs the authority to consider whether the "actual or potential" volume of imports is negligible. Consequently, it is clear that Article 5.8 contemplates that in certain injury determinations the authority will need to estimate future import volumes.

199. Finally, as set out in Argentina's First Submission and oral statement,<sup>234</sup> 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.<sup>235</sup> As part of its analysis, the Commission did not find that the Argentine imports would have no discernible adverse impact on the domestic industry. In other words, the Commission reasoned that the Argentine imports could have a possible adverse impact on the domestic industry. This low standard, cast in a double-negative, runs directly counter to the "likely" standard established by Article 11.3. The United States does not respond to this argument in its First Submission.

200. This use of a double negative formulation is contrary to the panel's decision in *DRAMS from Korea*.<sup>236</sup> A "not unlikely" standard does not set the same standard as "likely." Worse still, the "no" discernible adverse impact test used by the Commission establishes a standard that is directly contrary to a "likely" standard. Under this formulation, finding any discernible impact leads to cumulation, which as in this case can lead to a finding of "likely" injury without regard to any "positive evidence" relating to probable imports from individual countries.

---

<sup>233</sup> US First Submission, para. 379.

<sup>234</sup> See Argentina's First Submission, Sec. VIII.F; Argentina's First Oral Statement, paras. 109-111.

<sup>235</sup> *Commission's Sunset Determination* at 6, 10-16. Pursuant to 19 USC. § 1675a(a)(7) "[t]he Commission shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry."

<sup>236</sup> Panel Report, *DRAMS from Korea*, para. 6.45 ("We consider that a failure to find that an event is 'not likely' is not equivalent to a finding that the event is 'likely.'")



D. THE TIME FRAME WITHIN WHICH INJURY WOULD BE LIKELY TO CONTINUE OR RECUR UNDER ARTICLE 11.3 OF THE ANTI-DUMPING AGREEMENT

**1. The US Statutory Provisions as to the time frame within which injury would be likely to continue or recur are as such inconsistent with Articles 11.3 and 3 of the Anti-Dumping Agreement**

201. In its first written submission, Argentina demonstrated that 19 USC. §§ 1675a(a)(1) and (5) are inconsistent as such with Articles 11.3 and 3 of the Anti-Dumping Agreement.<sup>237</sup> Section 1675(a)(1) directs the Commission to determine whether injury would be likely to continue or recur “within a reasonably foreseeable time.” The SAA explains that “‘reasonably foreseeable time’ ... normally will exceed the ‘imminent’ timeframe applicable in a threat of injury analysis.”<sup>238</sup> Moreover, section 1675(a)(5) mandates that the Commission “shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time.”

202. Article 11.3, however, requires the authority to determine whether termination of an anti-dumping measure would be likely to lead to the continuation or recurrence of injury *upon termination of the measure*. Thus, the authority’s likelihood of injury determination must not be based on speculation about possible market conditions several years into the future, but rather must be based upon the likelihood of injury upon “expiry” of the measure. By defining a “reasonably foreseeable time” as longer than an “imminent” time, the US statutory provisions are inconsistent with Article 11.3, which requires the determination to be based upon injury upon “expiry” of the duty.

203. The United States argues that Article 11.3 is silent on the question of the relevant time frame in which injury would be likely to continue or recur, and thus WTO Members “remain free to determine under their own laws and procedures the time frame relevant in sunset inquiries.”<sup>239</sup> There are two problems with this argument. First, the United States ignores the immediate context of Article 11.3. WTO Members adopted Article 11.3 to enforce the underlying principle of Article 11: that anti-dumping measures “shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.” Accordingly, when read together with its umbrella provision, Article 11.1, it is evident that the time frame in which injury would be likely to continue or recur under Article 11.3 must be as curtailed as possible to ensure that anti-dumping measures are maintained only as long as necessary to counteract injurious dumping. Second, unbridled discretion in defining the relevant time frame is not consistent with the “likely” standard of Article 11.3, and even less so when considered in light of 11.1.

204. Sections 1675(a)(1) and (5) are also inconsistent with Articles 3.7 of the Anti-Dumping Agreement. Article 3.7 requires injury determinations to be “based on facts and not merely on allegation, conjecture or remote possibility,” and that the circumstances under which injury would occur be “imminent.” The US provisions provide that the likelihood of injury determination need not be based on “imminent” injury, thereby fostering speculation.

205. The United States narrowly reads Articles 3.7 and 3.8 to be limited to threat determinations. Pursuant to Footnote 9 of the Anti-Dumping Agreement, however, “injury” under Article 11.3 must “be interpreted in accordance with the provisions of [Article 3,]” which includes Articles 3.7 and 3.8. Although Articles 3.7 and 3.8 only reference threat determinations specifically, both threat determinations and likely injury determinations require an assessment of future injury. Accordingly, the requirements of Articles 3.7 and 3.8 are relevant to sunset reviews under Article 11.3. Article 3.7

---

<sup>237</sup> See Argentina’s First Submission, Sec. VIII.C.1.

<sup>238</sup> SAA at 887 (ARG-5).

<sup>239</sup> US First Oral Statement, para. 33.

requires that the circumstances under which injury will occur be “imminent” (such as upon expiry of the duty) and Article 3.8 requires that authorities decide future injury cases with “special care.”

**2. The Commission’s application of the Statutory Provisions as to the time frame within which injury would be likely to continue or recur was inconsistent with Articles 11.3 and 3 of the Anti-Dumping Agreement**

206. The Commission applied 19 USC. §§ 1675a(a)(1) and (5) in the sunset review of OCTG from Argentina; therefore, its sunset determination was inconsistent with Articles 11.3 and 3. The Commission provides no indication at all as to the time period it considered to be a “reasonably foreseeable time” in the sunset review of OCTG from Argentina. The only known information was that the US industry was doing well at the time of the review. So Argentina is left to wonder when it was that the Commission believed that things would go bad. Not upon expiry of the duty says the United States.<sup>240</sup> Is the time period one year? Three years? Five years? In the end, are these periods the same? Are they all equally consistent with Article 11.3? In this case, there is no way to determine because the Commission did not indicate the time frame. Hence, these provisions were applied in a manner inconsistent with Article 11.3.

**V. CONSEQUENTIAL VIOLATIONS UNDER ARTICLE VI OF THE GATT 1994, ARTICLES 1 AND 18 OF THE ANTI-DUMPING AGREEMENT, AND ARTICLE XVI:4 OF THE WTO AGREEMENT**

207. In Section IX of Argentina’s First Submission, Argentina argued that the measures identified in the panel request, including the Department’s determination to conduct an expedited review, the Department’s Sunset Determination, the Commission’s Sunset Determination, and the Department’s determination to continue the order, and the relevant US laws, regulations, policies, and procedures, are inconsistent with the obligations of the United States under Article VI of the GATT 1994, Articles 1, 18.1, and 18.4 of the Anti-Dumping Agreement, as well as Article XVI:4 of the WTO Agreement.

208. In rebuttal, the United States submits that none of the measures identified by Argentina are inconsistent with provisions of the Anti-Dumping Agreement, and therefore, there can be no consequential violations.<sup>241</sup> For the reasons previously set out, however, Argentina believes that it has persuasively demonstrated that the identified US measures, both as such and as applied, violate the Anti-Dumping Agreement and GATT 1994. Accordingly, Argentina has also proven its consequential claims.

209. In addition, the United States argues that the Department’s Determination to Expedite does not constitute a “separately challengeable measure[.]”<sup>242</sup> The United States describes the Department’s Determination to Expedite as an “interlocutory decision” and lumps it into a vast category of “[h]undreds, perhaps thousands, of discrete preliminary decisions [that] went into what eventually became an anti-dumping measure.”<sup>243</sup> The United States unconvincingly seeks to diminish the significance of the Department’s Determination to Expedite. The Department’s inadequacy determination was the sole basis for either the deemed waiver or the application of facts available. Either way, the Department’s affirmative likelihood determination flowed directly from its

---

<sup>240</sup> US First Submission at para. 357.

<sup>241</sup> US First Submission, para. 382. The United States also contends that Argentina’s panel request did not properly identify its dependent claims. *See id.* at 381. Argentina addresses this argument in Section VI, below.

<sup>242</sup> *Id.* at 384.

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

inadequacy determination. The Department's Determination to Expedite thus constitutes a measure for purposes of WTO challenge.<sup>244</sup>

210. Even if the Determination to Expedite does not constitute a separate, challengeable measure, however, it is still necessarily before the panel. Because the inadequacy determination was integral to the Department's finding of likely dumping in the sunset determination, the inadequacy determination cannot be divorced from the Department's Sunset Determination. Therefore, whether it is considered a measure or not, the panel must evaluate the WTO-consistency of the Department's Determination to Expedite. Indeed, despite its argument that the Determination to Expedite does not constitute an independent measure, the United States itself recognizes that this determination may still be "challenged in WTO dispute settlement as part of a challenge to a *bona fide* measure[.]" such as the Department's Sunset Determination.<sup>245</sup>

## VI. US REQUEST FOR PRELIMINARY RULINGS

### A. ARGENTINA'S PANEL REQUEST COMPLIED FULLY WITH DSU ARTICLE 6.2

#### 1. Introduction

211. In its opening statement to the Panel on 9 December 2003, the United States said that "[n]owhere" in the US First Submission is there an allegation that Argentina's Panel Request failed to "identify the specific measures at issue."<sup>246</sup> As Argentina stated in its closing statement to the Panel on 10 December 2003, this is a welcome admission, for two reasons.

212. First, it confirms that the US measures that Argentina is challenging are limited, specific, and have been identified with precision in its Panel request. Second, this concession by the United States means that there now remains only a single Article 6.2 issue before the Panel: did Argentina fail to "present the problem clearly," such that the United States has suffered actual prejudice during the course of the panel proceedings? It is a wonder that the United States tries to advance such a claim given its assertion in its opening statement that:

[M]ost of the issues in this dispute should sound very familiar. Indeed, Argentina's 'as such' claims largely raise issues that have either been already addressed in other disputes or that are closely related to those addressed in other disputes.<sup>247</sup>

If this is true, how can the United States claim that it has suffered prejudice in this case?<sup>248</sup>

213. Argentina stands fully by all of the arguments it set out in its Submission on the US Request for Preliminary Rulings. While there is no need to repeat all of these arguments here, Argentina

---

<sup>244</sup> Further, the Appellate Body's discussion of what constitutes a measure for purposes of a WTO challenge makes clear that this determination can be challenged by Argentina. See Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 85-88.

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

<sup>246</sup> US First Oral Statement, para. 35.

<sup>247</sup> *Id.* at para. 4.

<sup>248</sup> The Appellate Body has repeatedly made clear that "[t]he procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes." Appellate Body Report, *United States – Tax Treatment For "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, para. 166. This was affirmed by the Appellate Body in *H-Beams from Poland* and *High Fructose Corn Syrup*; see Appellate Body Report, *H-Beams from Poland*, para. 97 and Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, n.45.

reiterates that its Panel Request complied fully with all of the requirements of DSU Article 6.2, including the requirement to “present the problem clearly.”

214. In considering US allegations that Argentina did not “present the problem clearly,” it is important to keep one, overarching principle in mind. The United States seems to believe that Article 6.2 imposes some kind of abstract, overarching requirement of “clarity.” The United States never defines what this standard of “clarity” is, or why Argentina’s request allegedly falls short. However, the Appellate Body has stated that assessing claims under DSU Article 6.2 is by no means an abstract exercise, or that a Panel Request must satisfy what the responding party considers to be “clear.”

215. Instead, the jurisprudence has stressed repeatedly that whether a Panel request can be considered to “present the problem clearly” must be assessed against the due process objective embodied by Article 6.2. This is explained further below.

## **2. Argentina’s “Page Four” claims are within the Panel’s Terms of Reference**

216. Argentina welcomes the belated US recognition of the well-established principle that a Panel Request must be read as a whole. Unfortunately, however, the positions advanced by the United States in the present proceedings show anything but a holistic approach. The US arguments related to “Page Four” of Argentina’s claims focus almost exclusively on a single word – “also.” This is exactly the kind of narrow approach the Appellate Body has instructed Panels not to take.

217. The United States is asking this Panel to parse the text of the Panel request. It hopes that the Panel will agree to:

- isolate and focus narrowly on the word “also”; and
- isolate and focus narrowly on Page Four.

218. Yet the jurisprudence demonstrates, quite unambiguously, that Panels considering their terms of reference cannot sever and isolate text in this way. Instead, the Appellate Body has enjoined Panels to take a broader approach.

219. Contrary to the assertions of the United States at the First Meeting of the Panel, Argentina’s arguments have not “switched.” Indeed, Argentina has explained the structure of the Request repeatedly to the United States, both at the DSB meeting of May 19, and in Argentina’s Submission on the US Request for Preliminary Rulings. To reiterate: Argentina used the word “also” on Page Four to indicate that it was elaborating on the previous pages. When the Panel Request is read as a whole, this is quite obvious.

220. Even assuming *arguendo* that the word “also” has to be segregated and interpreted separately from the rest of the text, the dictionary treats the word “also” as synonymous with the term “moreover.”

221. It is also important to emphasize the context in which the word “also” appeared. As Argentina stated in Argentina’s Submission on the US Request for Preliminary Rulings, the request said “Argentina also considers” that certain US laws are WTO-inconsistent, and not that Argentina considers that “certain US laws are also WTO-inconsistent.” The United States made no response to this point during the First Meeting of the Panel.

222. Another important contextual point ignored by the United States is that Argentina’s reference to US measures in that sentence was immediately qualified by the term “related to the determinations of the Department and the Commission.” The “determinations of the Department and the Commission” were described in detail earlier in the Panel request. For this reason, it is simply not

credible for the United States to argue that it is “impossible to discern the nature of Argentina’s problems.”<sup>249</sup>

223. The United States argued at the First Meeting of the Panel that “Argentina claims to have provided a narrative description in the first part of the panel request that remedies the deficiencies that otherwise exist with respect to Page 4.”<sup>250</sup> It also stated that “this narrative is little more than a chronology of events.”<sup>251</sup> Argentina would make two points in response to this US assertion.

224. First, Argentina did not claim that its “narrative description . . . remedies the deficiencies” of Page Four. Indeed, there are no “deficiencies” to “remedy.” Rather, Argentina argued that although a narrative description is not required, panels have in some cases “considered [a narrative] description to be relevant in determining whether a complaining party has met the obligations covered by Article 6.2.”<sup>252</sup> Argentina recalled that the *High Fructose Corn Syrup* Panel noted that the request in that case set forth “facts and circumstances describing the substance of the dispute,” which led the Panel conclude that it was “sufficiently detailed to set forth the legal basis of the complaint so as to inform the defending Member . . . and potential third parties of the claims made by the United States.”<sup>253</sup> Argentina then argued, and continues to maintain, that its Panel Request similarly “set forth facts and circumstances describing the substance of the dispute.”<sup>254</sup> It provided considerable detail about the US measures being challenged, including the WTO-inconsistent determinations of the Department and the Commission.

225. Second, with respect to the US assertion that the detailed factual information set out in Argentina’s Panel Request was “little more than a chronology of events,” Argentina would note that a “chronology of events” is synonymous with, and serves the purpose of, “setting forth the facts and circumstances” describing the substance of the dispute. In any event, Argentina’s Panel Request was not, in fact, limited to a “chronology,” but rather provided full details of the entire factual and legal background giving rise to the current dispute.

226. In any event, the United States has in no way suffered prejudice during the course of the Panel proceedings as a result of Argentina’s drafting of Page Four. This issue is discussed below, in section VI.C.

### **3. Sections B.1, B.2 And B.3 of Argentina’s claims are within the Panel’s Terms of Reference**

227. Argentina similarly provided extensive argumentation on this issue in Argentina’s Submission on the US Request for Preliminary Rulings, and it stands by those arguments.

228. At the First Meeting of the Panel, the United States claimed that “Argentina does not take issue with the findings of prior panels that citations to entire articles of the AD Agreement – including Article 6 – can fail to satisfy the requirements of Article 6.2.”<sup>255</sup> Argentina fully recognizes that some prior panels have made such rulings. However, it is of no particular relevance that prior panels have decided that citations to entire articles “can” fail to satisfy Article 6.2. Indeed, this US statement, read in isolation, does not convey an accurate picture of the state of WTO jurisprudence.

229. An accurate presentation of the state of the law was set out in Argentina’s Submission on the US Request for Preliminary Rulings, particularly paragraph 67, which noted that:

---

<sup>249</sup> US First Submission, para. 87.

<sup>250</sup> US First Oral Statement, para. 40.

<sup>251</sup> *Id.*

<sup>252</sup> Argentina’s Submission on the US Request for Preliminary Rulings, para. 30.

<sup>253</sup> *Id.* at para. 31.

<sup>254</sup> *Id.* at para. 45.

<sup>255</sup> US First Oral Statement, para. 41.

- a request for the establishment of a panel must set out claims, but not the arguments in support of those claims;
- the listing of the articles of the agreements claimed to have been violated satisfied the minimum requirements of Article 6.2 of the DSU;
- in assessing the consistency of the panel request with Article 6.2, the Panel must take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated; and
- as a related point, even if the Article cited in the panel request contains multiple obligations, the mere listing of such an Article will still meet the requirements of Article 6.2, absent actual prejudice.

230. Argentina also demonstrated in its Submission on the US Request for Preliminary Rulings that:

- its request for the establishment of a panel set out its claims with respect to Article 3 and 6 of the Anti-Dumping Agreement, but not the arguments in support of those claims;
- the listing by Argentina of Articles 3 and 6 satisfied the minimum requirements of Article 6.2 of the DSU, in that both Articles were listed;
- in assessing the consistency of the Argentina's Panel Request with Article 6.2, the Panel must take into account whether the ability of the United States to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the Panel Request "simply listed" Articles 3 and 6; and
- again, as a related point, even though Articles 3 and 6 of the Anti-Dumping Agreement contain multiple obligations, the mere listing of these Articles still meets the requirements of Article 6.2, absent actual prejudice suffered by the United States during the course of the panel proceedings.

The latter point was demonstrated clearly by the Appellate Body decision in *Korea Dairy*. As Argentina noted in its Submission on the US Request for Preliminary Rulings, in that case the Appellate Body recognized that "Article XIX of the GATT 1994 has three sections and a total of five paragraphs, each of which has at least one distinct obligation. Articles 2, 4, 5 and 12 of the Agreement on Safeguards also have multiple paragraphs, most of which have at least one distinct obligation."<sup>256</sup> However, the Article 6.2 request was nevertheless dismissed because "Korea failed to demonstrate to us that the mere listing of the articles asserted to have been violated has prejudiced its ability to defend itself in the course of the Panel proceedings."<sup>257</sup>

231. Therefore, the US assertion that "entire articles of the AD Agreement . . . can fail to satisfy the requirements of Article 6.2" simply misses the point. The fact that "entire articles" have been cited in a panel request is by no means determinative. What is determinative is whether actual prejudice has been suffered by the responding party.

232. Argentina would also note that in *H-Beams from Poland*, references to "entire articles" of the Anti-Dumping Agreement – in that case, Articles 2, 3 and 5 – were nevertheless found to be consistent with DSU Article 6.2. Thailand argued that "the Panel should have dismissed Poland's claims relating to Articles 2, 3 and 5 because each of these articles of the Anti-Dumping Agreement contains numerous, distinct obligations, and the request for the establishment of a panel submitted by

---

<sup>256</sup> Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, para. 129 ("*Korea Dairy*").

<sup>257</sup> *Id.* at para. 131.

Poland did not meet the standard of clarity demanded by Article 6.2 of the DSU with respect to the precise claims of Poland under these Articles.<sup>258</sup>

233. In other words, Thailand advanced virtually the same argument in that case that the United States is advancing in the present case with respect to Argentina's references to Articles 3 and 6 in the present case. It is important to note that the Appellate Body dismissed Thailand's request, further demonstrating the irrelevancy of the US argument that citations to "entire claims" somehow fail the Article 6.2 standard. Decisions such as *Korea Dairy* and *H-Beams from Poland* provide a definitive refutation of this argument.

234. During the First Meeting of the Panel, the United States also asserted that "Argentina's main argument" is that "the United States somehow knew from the consultations what Argentina's problems were."<sup>259</sup>

235. First, this is not "Argentina's main argument." As indicated above, Argentina has advanced a range of arguments to demonstrate that its references to Articles 3 and 6 meet the minimum requirements of DSU Article 6.2. These were set out in section IV of Argentina's Submission on the US Request for Preliminary Rulings.

236. Second, the characterization of Argentina's position by the United States (i.e., that "the United States somehow knew from the consultations what Argentina's problems were") is equally misleading. Argentina's Submission on the US Request for Preliminary Rulings raised a number of more comprehensive points, which may be summarized briefly as follows:

- Argentina's claims were first raised formally with the United States in the WTO context in October 2002, when Argentina issued its consultations request;
- the United States expressed no concerns about the nature or scope of the Argentina's claims prior to, during, or after the consultations, even though all issues were canvassed thoroughly during two sets of consultations;
- Argentina's Panel Request used very similar – and, in some cases, virtually identical language to that used in the consultations request;
- the United States, when faced with a Panel request, suddenly professed not to understand Argentina's claims; and
- this case is only one of a series of WTO "sunset" cases which raise the same or similar issues, in which the United States has put considerable resources into defending – claim by claim, argument by argument, and which, as the United States has already observed, "should sound very familiar."<sup>260</sup>

237. All of these factors go to a broader issue: the credibility – or lack thereof - of US assertions that it did not "understand" Argentina's claims under Articles 3 and 6.

B. THE SO-CALLED "CERTAIN MATTERS" REFERRED TO BY THE UNITED STATES ARE ALL WITHIN THE PANEL'S TERMS OF REFERENCE

238. Argentina's Submission on the US Request for Preliminary Rulings provided a full rebuttal of all of the US allegations regarding what the United States considers to be "new claims." As Argentina demonstrated in that submission, none of these claims are "new." All are found in the Panel request.

---

<sup>258</sup> Appellate Body Report, *H-Beams from Poland*, para. 82.

<sup>259</sup> US First Oral Statement, para. 42.

<sup>260</sup> US First Oral Statement, para. 35.

239. At the First Meeting of the Panel, the United States left unchallenged all but one of Argentina's arguments – ostensibly “in the interests of time.” The US delegation stated its hope that limiting itself to “one example,” that would “suffice to demonstrate the fatal flaws in Argentina's arguments.”<sup>261</sup> However, in an Article 6.2 claim, arguing by “example” will not “suffice.” The United States must prove all of its claims, including each of the five putative “new” claims. The United States was simply silent in response to four of the full refutations provided by Argentina in its Submission on the US Request for Preliminary Rulings. The Panel can now conclude that for the first, second, third, and fifth of the supposedly “new” claims, the United States has simply failed to discharge the burden to prove such claims.

240. As for the fourth “new” claim, the United States did manage to muster a couple of paragraphs in its statement in an attempt to support its position that the “as applied” claim regarding the time period considered by the Commission was not in Argentina's panel request. But these arguments are simply unconvincing.

241. As stressed repeatedly in Argentina's Submission on the US Request for Preliminary Rulings, the Panel Request must be read as a whole. In this specific context, this means recognizing that the language used by Argentina in Section B.3 of its Panel Request is part of the broader context of panel request, particularly the heading under which it appears.

242. The specific language in Section B.3 referred to certain statutory requirements related to the time period within which the Commission will assess whether injury would be likely to continue or recur. The heading to section B is “The Commission's Sunset Determination was inconsistent with the Anti-Dumping Agreement and the GATT 1994.” Read together – the specific language of Section B.3 together with the more general heading of Section B – the United States was clearly put on notice that Argentina would be raising both an “as such” and “as applied” claim.

C. THE UNITED STATES HAS IN NO WAY BEEN PREJUDICED DURING THE COURSE OF THE PANEL PROCEEDINGS

243. The issue of prejudice is critical to the Panel's determinations on the Article 6.2 issues. The law of the WTO is clear: any defending party advancing a claim under Article 6.2 must prove actual prejudice during the course of the Panel proceedings.

244. If the United States fails to demonstrate actual prejudice during the course of the Panel proceedings, then its Article 6.2 claims must fail. It is as simple as that.

245. Moreover, the United States cannot argue prejudice in a global, abstract way. Instead, it must demonstrate to the Panel the prejudice it has allegedly suffered during the course of the Panel proceedings for each of its Article 6.2 claims. This is the approach taken by other Panels such as that in *Egypt – Steel Rebar*:

[W]e requested Egypt to provide us, in respect of each claim that it requests us to dismiss, the two-part analysis referred to in *Korea – Dairy* and *EC – Bed Linen*, that is, the asserted lack of clarity in the Request for Establishment of a Panel, and evidence of any resulting prejudice to Egypt's ability to defend its interest in this dispute due to such lack of clarity.<sup>262</sup>

246. Evidently, the United States wishes that it did not have to prove prejudice. Indeed, during the US closing statement on 10 December, the US delegation stated that it did “not agree that a prejudice

---

<sup>261</sup> *Id.* at para. 45.

<sup>262</sup> Panel Report, *Egypt – Steel Rebar*, para. 7.25 (emphasis added, footnotes omitted).



requirement applies.” Nevertheless, the Panel must apply the law as it currently exists, not as the US delegation would prefer it to be.

247. The relevant cases on prejudice have been discussed in Argentina’s Submission on the US Request for Preliminary Rulings, but perhaps the state of the jurisprudence was put most succinctly by the *EC-Bed Linen* panel: “an allegation that the requirements of Article 6.2 of the DSU are not met will not prevail where no prejudice is established.”<sup>263</sup>

248. Indeed, the United States itself argued this position before the *Canada Wheat Board* panel. As cited earlier by Argentina, the United States argued before the *Wheat Board* panel that:

[E]ven if a panel request is insufficiently detailed “to present the problem clearly,” the panel is not automatically deprived of jurisdiction over the matter. Rather, the panel must examine, based on the “particular circumstances of the case,” whether the defect has prejudiced the ability of the responding party to defend itself.<sup>264</sup>

249. How has the United States “demonstrated” prejudice in this case? The answer: it has not. It has asserted, but has not proven, prejudice.

250. US arguments of “prejudice” essentially boil down to complaints about having to wait until receipt of Argentina’s submission. This demonstrably does not rise to the level of a violation of the due process rights of the United States. Indeed, in previous cases, similar assertions by defending parties were rejected by panels as insufficient for the purposes of demonstrating prejudice under Article 6.2. This is illustrated below.

251. A recent demonstration of this was provided by the panel in *EC – Pipe Fittings*:

[T]he European Communities has failed in any event to demonstrate to us any prejudice to its interests throughout the course of these Panel proceedings by the way these “claims” appeared in the Panel request. We asked the European Communities to indicate any prejudice that it had sustained. The European Communities responded as follows:

*The EC takes the view that in all the cases in which it has raised this objection its interests have been prejudiced by the lack of adequate notice of the issues. The scope of the claims that are explicitly made in Brazil’s panel request is already exceptionally broad. The EC is entitled to the period that elapses between the establishment of the panel and the presentation of the complainant’s first written Submission to prepare its defence. Such preparation is only possible if the complainant adequately specifies its claims in its panel request for incorporation into the terms of reference.*

However, it was evident to us from the participation of the European Communities in asserting its views in various phases of these Panel proceedings, including in its first written submission and in the first Panel meeting and in the exchanges between the parties preceding the first Panel meeting on preliminary issues, that *the EC’s ability to defend itself* had not been prejudiced over the course of these Panel proceedings.

---

<sup>263</sup> Panel Report, *European Communities - Anti-Dumping Duties on Imports Of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, para. 6.25 (emphasis added).

<sup>264</sup> Oral Statement of the United States at the First Panel Meeting, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276 (6 June 2003), paras. 6-8.

*We therefore consider that the text of the Panel request adequately indicates the nature of the problem addressed by Brazil's claims and deny the EC request to dismiss these allegations made by Brazil.*<sup>265</sup>

252. Similar complaints about “having to wait” were equally unavailing in *High Fructose Corn Syrup*:

*Mexico asserts that it had to wait until the first written submission of the United States, more than four months after the request for establishment, to have a clear idea of what the United States' arguments in support of its assertions were. Mexico argues that as a result of the failure of the United States to present the problem clearly and specify the factual and legal basis for the request, it was obliged to spend that time working "in the dark". In its comments on interim review, Mexico asserts that this resulted in the expenditure or squandering of resources that could otherwise have been devoted to preparing a timely defence.*<sup>266</sup>

253. At the First Meeting of the Panel, the Panel similarly found that this assertion did not rise to the level of prejudice required under DSU Article 6.2: “We find that Mexico has not demonstrated to us that it was prejudiced in its ability to defend its interests in the course of the proceedings in this dispute.”<sup>267</sup>

254. The US assertions of “prejudice” in this case are strikingly similar to those found to be insufficient in cases such as *EC – Pipe Fittings* and *High Fructose Corn Syrup*. As noted in Argentina’s Submission on the US Request for Preliminary Rulings, for the “Page Four” claims, the United States argued only that its “ability . . . to begin preparing its defence was delayed because, due to Argentina’s failure to comply with Article 6.2, the United States did not ‘know what case it has to answer.’”<sup>268</sup> For its challenge to Sections B.1, B.2 and B.3, the US First Submission stated that: “As in the case of Page 4 of Argentina’s panel request, the United States’ ability to begin preparing its defence has been impaired because, as a result of Argentina’s failure to comply with Article 6.2, the United States did not ‘know what case it has to answer.’”<sup>269</sup>

255. This is an exceedingly thin argument. It by no means constitutes a proven violation of “due process rights.” The Panels in *EC - Pipe Fittings* and *High Fructose Corn Syrup* did not take seriously such unsubstantiated assertions of “prejudice,” and dismissed the Article 6.2 requests. This Panel should follow the prudent course set by these earlier panels and similarly reject the US request.

256. It is also highly relevant to note that earlier Panels, in determining whether the wording of the Panel Request caused “prejudice,” have assessed whether there was any prejudice to the interests of Third Parties. This was set out in paragraphs 61 and 62 of Argentina’s Submission on the US Request for Preliminary Rulings.

257. In the present case, none of the Third Parties expressed any concerns about the alleged “lack of clarity” of Argentina’s Panel Request – not in the DSB, and not before the Panel.

258. To the contrary, many of the Third Parties specifically disavowed any difficulties with Argentina’s Panel Request:

---

<sup>265</sup> Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, paras. 7.22-7.24 (“*EC - Pipe Fittings*”). The EC did not appeal this issue.

<sup>266</sup> Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000, para 7.16 (“*High Fructose Corn Syrup*”).

<sup>267</sup> *Id.* (emphasis added).

<sup>268</sup> US First Submission, paras. 97 and 110 (emphasis added).

<sup>269</sup> *Id.* at para. 110 (emphasis added).

- the EC stated that the “Panel should not follow the United States suggestion to consider page 4 . . . in isolation from the rest of the request. Rather, in order to establish whether the conditions of Article 6.2 DSU are met, the Panel should consider the request as a whole.”<sup>270</sup> At the Third Party session, the EC reaffirmed that “the Panel should assess Argentina’s Panel Request as a whole, and not one specific part of it in isolation from the rest.”<sup>271</sup>
- Japan informed the Panel that it “had no particular problem with the panel request of Argentina when drafting our third party submission.”<sup>272</sup>
- The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu stated that “we did not encounter any difficulties related to DSU Article 6.2 in preparing our third party submission and oral statement.”<sup>273</sup>
- Mexico used even stronger language, advising the Panel that “el gobierno de Mexico considera que dicha solicitud cumple cabalmente con el artículo 6.2 de ESD y que se trata de una táctica dilatoria del gobierno de Estados Unidos para retrasar el análisis de este Grupo Especial del fondo del asunto. En caso de que el Grupo Especial determine llevar a cabo un procedimiento adicional para atender a dichas objeciones, México solicita respetuosamente que se respeten sus derechos como tercera parte en esta controversia.”<sup>274</sup>

259. This leaves the United States alone among WTO Members which ostensibly could not “understand” the nature of Argentina’s complaints because of the alleged “lack of clarity.” With no support among the Third Parties, the United States was reduced to arguing at the First Meeting of the Panel that the wording of Argentina’s Panel Request prejudiced “potential” third parties. The Panel need not detain itself on this line of argumentation. No other Panel in the history of the WTO has ever considered anything as remote as prejudice to “potential” third parties.

260. Moreover, the US assertions of “prejudice” have been amply contradicted by the conduct of the United States to date in these proceedings. The United States submitted a full, substantive (albeit unconvincing) submission responding to Argentina’s claims and it participated actively in the hearing. It will, no doubt, file a similarly detailed second submission, along with responses to the Panel’s questions. Indeed, this kind of active participation at all stages of the panel process was the basis for the rejection of similar Article 6.2 requests in Panels such as *EC – Bed Linens* (quoted above) and *US – Lamb Safeguards*.<sup>275</sup>

261. Finally, to reiterate a point Argentina has made earlier, and as the *Canada Aircraft* Panel made clear, it is not possible to assess the supposed prejudice to the United States “during the panel process” until the end of the panel process.<sup>276</sup>

---

<sup>270</sup> Third Party Submission of the European Communities, Section 2.

<sup>271</sup> Third Participant’s Oral Statement by the European Communities, WT/DS268, 10 December 2003, para. 3.

<sup>272</sup> First Third Party Oral Statement by Japan, WT/DS268, 10 December 2003, para. 2.

<sup>273</sup> First Third Party Oral Statement by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, WT/DS268, 10 December 2003, page 3.

<sup>274</sup> First Third Party Oral Statement by Mexico, WT/DS268, 10 December 2003, at 2. The English translation of this quotation is as follows: “The Government of Mexico considers that the referenced panel request complies completely with DSU Article 6.2, and that [the Preliminary Objections] represent a delaying tactic by the Government of the United States to delay the substantive analysis by this Panel. In the event that the Panel decides to carry out an additional proceeding to consider the referenced objections, Mexico respectfully requests that its rights as a Third Party in this case be respected.”

<sup>275</sup> Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177, 178/R, adopted 16 May 2001, paras. 5.51-5.53.

<sup>276</sup> Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, para. 9.33 (emphasis added).

#### D. CONCLUSIONS

262. Successful applications under DSU Article 6.2 are very rare in WTO dispute settlement. There is good reason for this: the Appellate Body has set the standard very high for a request under DSU Article 6.2 to be granted.

263. As noted above, there is no abstract standard of “clarity” under DSU Article 6.2. A Panel cannot strike claims from a Panel Request because the language used somehow displeases the responding party, or the responding party would have preferred different wording. A Panel can strike claims from a Panel Request only where it concludes that the due process rights of the respondent have been violated.

264. The respondent party must prove that it has suffered actual prejudice during the course of the Panel proceedings as a result of the wording of the panel requests. Vague assertions by the responding party that it had to wait for the complainant’s first submission clearly will not suffice, and have been emphatically rejected by prior panels.

265. This is particularly the case where, as here, the United States has filed a full reply to all of Argentina’s claims. Assertions of “prejudice” by the United States are simply not credible.

266. However, Argentina would emphasize that its defence to the Article 6.2 claims of the United States by no means rests on the “no prejudice” point alone. To the contrary, Argentina has demonstrated, both in its Submission on the US Request for Preliminary Rulings and in this Submission, that the wording of its claims were entirely clear – a point on which the Third Parties agree.

267. To apply what the Appellate Body said in *Korea Dairy*, it is unquestionable that the United States “had not been misled as to what claims were in fact being asserted against it as respondent.”<sup>277</sup>

268. Argentina therefore respectfully requests the Panel to dismiss the US preliminary requests and to adjudicate Argentina’s substantive claims entirely on the merits.

#### VII. CONCLUSION

269. Argentina refers the Panel to the specific requests it made of the Panel as set forth in paragraphs 314-323 of Argentina’s First Submission. Argentina incorporates those requests in full. In sum, Argentina respectfully requests the Panel:

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

270. As Argentina’s First and Second Submissions demonstrate, the Department’s and the Commission’s sunset determinations violate US obligations under Article 11.3.

271. In December, the Appellate Body reaffirmed that termination of an anti-dumping duty is the primary obligation of Article 11.3, that it is a “mandatory rule,” that continuation of the duty is the exception to this rule, and that this exception may be invoked only when the specified conditions for

---

<sup>277</sup> Appellate Body Report, *Korea Dairy*, para. 123 (“*Korea Dairy*”).

continuing the duty are satisfied, and that “[i]f any one of these conditions is not satisfied, the duty must be terminated.”<sup>278</sup>

272. With respect to the likelihood of dumping determination, the United States has developed three different procedures to implement its Article 11.3 obligation, each depending on the perceived level of participation in the process. In the end, it does not matter which procedure the United States uses. Regardless of the procedural route, the Department applies mandatory criteria which prevent precisely the type of factual and legal review that Article 11.3 requires in order to invoke the exception to termination. The Appellate Body leaves no doubt that “authorities must conduct a rigorous examination in a sunset review before the exception (namely, the continuation of the duty) can apply.”<sup>279</sup> The Appellate Body emphasized “the exacting nature of the obligations imposed on authorities under Article 11.3 . . . .”<sup>280</sup>

273. Rather than satisfy the “exacting” obligations of Article 11.3, the Department gives decisive and preponderant weight to the existence of dumping margins and to declines in import volume. Indeed, in discussing these very factors from the *Sunset Policy Bulletin*, the Appellate Body stated that the issue was “whether Section II.A.3 goes further and instructs USDOC to attach decisive or preponderant weight to these two factors in every case.”<sup>281</sup> Argentina’s Exhibits ARG-63 and ARG-64 demonstrate that, in fact, the Department gives “decisive and preponderant” weight to these two factors in every single case in which the domestic industry participated. Indeed, the US authorities’ failure to satisfy Article 11.3 obligations can be seen plainly in this case, and in all the other cases in which the US industry has expressed an interest. There is no substantive analysis with respect to the likelihood of dumping determination – let alone a “rigorous examination.” There is no positive evidence from which to infer likely behaviour. In the end, there is neither the “review” nor “determination” required by Article 11.3. As the Appellate Body explained, “[p]rovisions that create ‘irrebuttable’ presumptions, or ‘predetermine’ a particular result, run the risk of being found inconsistent with this type of obligation.”<sup>282</sup>

274. The 1.36 per cent margin from the original investigation – calculated on the basis of zeroing – and the decline in import volumes are an insufficient basis for the Department’s determination that dumping would be likely to continue. The Appellate Body spoke directly to reliance on zeroing and explained that such reliance would “taint” the likelihood determination under Article 11.3, and could not constitute the proper foundation for the likelihood determination.<sup>283</sup>

275. With respect to the likelihood of injury determination, the Commission fails to apply the correct legal standard – a “likely” standard. The Commission’s determination in this case rests on the notion that, because there was a finding of injury in the original investigation, so it must be that injury is “likely” to continue or recur in the event of termination. This case is a clear example of the varied uses of “possible” scenarios to support a finding of “likely” injury.

276. In its closing statement at the First Substantive Meeting, the United States warned of the dangers of creating additional obligations through dispute settlement. Such an approach, the United States admonished, would violate the rule in DSU Article 3.2 that panel rulings cannot add to the Members’ obligations. Argentina does not disagree, but notes that the United States focuses on only half of the story. The very same sentence referred to by the United States also stands for the proposition that “rulings of the DSB cannot . . . diminish the rights . . . provided in the covered

---

<sup>278</sup> Appellate Body Report, *Sunset Review of Steel from Japan*, para. 104.

<sup>279</sup> *Id.* at para. 113.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at para. 176.

<sup>282</sup> *Id.* at para. 191.

<sup>283</sup> *Id.* at para. 130.

agreements.”<sup>284</sup> The Appellate Body has contributed importantly to clarifying the meaning of the rights and obligations comprised in Article 11.3. Argentina submits that it had a right to termination of this measure and that the United States could continue the measure only by making findings consistent with Articles 11.3, 2, 3, 6, and 12 of the Anti-Dumping Agreement. This, the United States did not do, and as a result, the DSB must restore the right conferred to Argentina under Article 11.3, which is termination of the measure.

---

<sup>284</sup> See Argentina’s First Submission, para. 8.

## ANNEX C-2

### SECOND WRITTEN SUBMISSION OF THE UNITED STATES

8 January 2004

#### TABLE OF CONTENTS

	<u>Page</u>
<b>I. INTRODUCTION .....</b>	<b>64</b>
<b>II. REVIEW OF KEY APPELLATE BODY FINDINGS IN <i>JAPAN SUNSET</i>.....</b>	<b>65</b>
<b>III. OVERVIEW OF COMMERCE'S EXPEDITED SUNSET PROCEDURES.....</b>	<b>66</b>
A. THE AVAILABILITY OF REVOCATION PROCEDURES PRIOR TO INITIATION OF A SUNSET REVIEW.....	66
B. THE DECISION TO EXPEDITE.....	66
1. <b>Solicitation and evaluation of substantive responses.....</b>	<b>67</b>
2. <b>Assessment of adequacy.....</b>	<b>68</b>
C. RECORD EVIDENCE IN AN EXPEDITED SUNSET REVIEW .....	68
<b>IV. ARGENTINA HAS NOT MET ITS BURDEN OF DEMONSTRATING THAT COMMERCE'S SUNSET REVIEW PROCEDURES ARE INCONSISTENT WITH ARTICLE 11.3 AND ARTICLE 6.....</b>	<b>69</b>
<b>V. ARGENTINE RESPONDENT INTERESTED PARTIES DID NOT TAKE ADVANTAGE OF THE FULL OPPORTUNITY TO DEFEND THEIR INTERESTS.....</b>	<b>70</b>
A. REVIEW OF RESPONDENT INTERESTED PARTIES' OPPORTUNITIES TO SUBMIT FACT AND ARGUMENT IN THESE PROCEEDINGS.....	70
B. ARGENTINA'S CLAIMS REGARDING THE ANTI-DUMPING AGREEMENT .....	71
<b>VI. ARGENTINA HAS NOT DEMONSTRATED THAT THE ITC'S SUNSET REVIEW PROCEDURES ARE INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT.....</b>	<b>72</b>
A. THE "LIKELY" STANDARD OF ARTICLE 11.3.....	72
B. ARTICLE 3 OF THE ANTI-DUMPING AGREEMENT DOES NOT APPLY TO SUNSET REVIEWS .....	73
C. CUMULATION IN SUNSET REVIEWS.....	75
D. CONTRARY TO ARGENTINA'S ASSERTIONS, THE ITC PROPERLY ESTABLISHED THE RELEVANT FACTS AND ITS ASSESSMENT OF THOSE FACTS WAS OBJECTIVE.....	76
<b>VII. CONCLUSION.....</b>	<b>80</b>

## I. INTRODUCTION

1. Given the comprehensive nature of the Panel's questions regarding the Department of Commerce's ("Commerce") sunset review procedures, the United States will use this submission to place Argentina's claims regarding those procedures (1) within the perspective of the WTO agreements regarding sunset reviews; (2) in the context in which sunset reviews are conducted in the United States; (3) in terms of the actual sunset review procedures, in particular, the decision whether to expedite; and (4) in terms of this particular sunset review. In so doing, the United States will reconfirm that, no matter how they are analyzed, Argentina's as such and as applied claims regarding those procedures are baseless.

2. Because these claims are baseless, Argentina has sought to colour the proceedings by alleging a series of "irrefutable presumptions" in US sunset review law. As this submission will make clear, Commerce provides ample opportunity for parties to "refute" evidence on the record and findings made in the course of the sunset review. A party's failure to attempt to refute a finding does not make that finding irrefutable; it simply means the party has not availed itself of the opportunity to present facts and arguments. Article 11.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement") does not prescribe specific methodologies with respect to sunset reviews; instead, it requires Members to afford interested parties the full opportunity for a defence of their interests.<sup>1</sup> US sunset review law complies with this requirement.

3. The general tenor of Argentina's position with respect to Commerce's determination in this particular sunset review is that the review was conducted unfairly because Siderca was the "only exporter" of OCTG during the original investigation, yet Commerce found that Siderca did not meet the 50 per cent threshold normally used to assess whether to conduct an expedited or full sunset review.<sup>2</sup> Notwithstanding the significant fact that Siderca ignored more than one opportunity to suggest a different outcome, the United States notes that there is a second Argentine exporter of OCTG to the United States; this exporter did not respond to the notice of initiation.<sup>3</sup>

4. The United States is concerned that if the Panel adopts Argentina's arguments, it will create an incentive for respondent interested parties to participate minimally, if at all, in sunset review proceedings. According to Argentina's arguments, respondent interested parties should be permitted to refuse to participate fully in a sunset review, and then later have a WTO panel find that the results of that review are not consistent with WTO obligations. The United States does not believe that the Anti-Dumping Agreement permits respondent interested parties to bootstrap investigating authorities into revoking orders by participating minimally, if at all, in the proceedings. Indeed, the Appellate Body in *Japan Sunset* has made specific reference to the "prominent role" of interested parties in sunset reviews because they often have the "best evidence" of their likely future pricing behaviour.<sup>4</sup>

---

<sup>1</sup> See e.g., *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, Report of the Appellate Body, circulated 15 December 2003 ("*Japan Sunset*"), para. 123.

<sup>2</sup> First Written Submission of Argentina, para. 151.

<sup>3</sup> The United States notes the care with which Siderca described itself in its substantive response to the initiation of the sunset proceedings: "Siderca is the only producer of seamless OCTG in Argentina. To Siderca's knowledge, there is no other producer of OCTG in Argentina." Substantive Response of Siderca to the Department's Initiation of Sunset Review of the AD Order on OCTG from Argentina (2 August 2000) at 3 (emphasis added). (Exhibit ARG-57.) Siderca carefully qualified the latter statement, and only the latter statement. The United States understands Acindar, the other Argentine producer, to manufacture welded OCTG, rather than seamless OCTG.

<sup>4</sup> *Japan Sunset*, para. 199.



5. The United States believes that the facts and argument presented in this proceeding confirm that Commerce makes appropriate procedures available to respondent interested parties so that they may defend their interests in sunset review proceedings. This submission will provide the following in support thereof: A review of the Appellate Body's pertinent findings in *Japan Sunset*; an overview of US law governing Commerce's conduct of sunset reviews; a demonstration that the law is consistent with the Anti-Dumping Agreement; and a discussion of respondent interested parties' participation in the part of the review relating to the determination of likelihood of dumping.

6. This submission also addresses the determination by the US International Trade Commission ("ITC") that revocation of the duties would be likely to lead to continuation or recurrence of injury. Specifically, the submission responds to arguments made by Argentina in its oral statement at the Panel's first meeting and to certain points raised by third parties in their written submission and oral statements regarding the ITC's injury determination.

## II. REVIEW OF KEY APPELLATE BODY FINDINGS IN *JAPAN SUNSET*

7. In *Japan Sunset*, various aspects of the US sunset review regime were challenged, requiring the Appellate Body to examine the nature of the obligations arising from Article 11.3 of the Anti-Dumping Agreement. By closely reviewing the language of Article 11.3 and comparing it with language in other provisions of the Agreement, including Article 11.2, the Appellate Body concluded that "Article 11.3 does not prescribe any particular methodology to be used by investigating authorities in making a likelihood determination in a sunset review;"<sup>5</sup> "WTO Members are free to structure their anti-dumping systems as they chose, provided that those systems do not conflict with the provisions of the Anti-Dumping Agreement."<sup>6</sup> Furthermore:

Article 11.3 does not expressly state that investigating authorities must determine that the expiry of the duty would be likely to lead to dumping *by each known exporter or producer concerned*. In fact, Article 11.3 contains no express reference to individual exporters, producers, or interested parties . . . . We also note that Article 11.3 does not contain the word 'margins' . . . .<sup>7</sup>

The Appellate Body thus confirmed that a sunset review is fundamentally different from both an original investigation and an administrative review.

8. Based on this assessment, the Appellate Body also concluded that in a sunset review there is no "obligation for investigating authorities to make their likelihood determination on a company-specific basis."<sup>8</sup> The Appellate Body therefore upheld the right of the United States to conduct sunset reviews on an order-wide basis.

9. The Appellate Body further confirmed the significant role that respondent interested parties play in sunset review proceedings, an issue that is at the heart of this particular dispute. Indeed,

the Anti-Dumping Agreement assigns a prominent role to interested parties as well and contemplates that they will be a primary source of information in all proceedings conducted under the Agreement. Company-specific data relevant to a likelihood determination under Article 11.3 can often only be provided only by the companies themselves. For example, as the United States points out, it is the exporters or

---

<sup>5</sup> *Japan Sunset*, para. 149.

<sup>6</sup> *Japan Sunset*, para. 158.

<sup>7</sup> *Japan Sunset*, para. 149.

<sup>8</sup> *Japan Sunset*, para. 155.

producers themselves who often possess the best evidence of their likely future pricing behaviour – a key element in the likelihood of future dumping.<sup>9</sup>

10. Similarly, the Appellate Body recognized the importance of the administrative review process, which provides parties with the opportunity to request revocation of an anti-dumping duty order with respect to a particular exporter or producer.<sup>10</sup>

11. Because of a direct reference in Article 11.4, the Appellate Body concluded that the provisions of Article 6 regarding evidence and procedure apply to sunset review proceedings, a position with which the United States has agreed. Accordingly, "Article 6 requires all interested parties to have a full opportunity to defend their interests."<sup>11</sup> Bearing in mind that it is Argentina's burden to prove that the US sunset review proceedings do not comply with Article 6, the United States will nevertheless demonstrate that its sunset review proceedings provide a full opportunity for interested parties to defend their interests.

### III. OVERVIEW OF COMMERCE'S EXPEDITED SUNSET PROCEDURES

12. Prior to delving into the specific sunset review procedures of the United States, it bears repeating that a sunset review occurs only after affirmative determinations of dumping and injury have been made. Moreover, individual companies are provided the opportunity to have orders revoked in part, i.e., with respect to that individual company, prior to the initiation of a sunset proceeding.

#### A. THE AVAILABILITY OF REVOCATION PROCEDURES PRIOR TO INITIATION OF A SUNSET REVIEW

13. Specifically, revocation for a particular company from an anti-dumping duty order is possible by two methods under US law (revocations of anti-dumping duty orders, in part, are generally termed "company-specific" revocations in US parlance). The first and most common method is for a producer or exporter to seek revocation pursuant to section 351.222(b)(2) of Commerce's Regulations, i.e., after three annual administrative reviews wherein Commerce has calculated, in each review, a dumping margin of zero or *de minimis* for the producer or exporter seeking revocation.

14. The second method for a producer or exporter seeking revocation is the "changed circumstances" review.<sup>12</sup> Under this method, a producer or exporter may request a review at any time after providing information that changed circumstances warrant a review for the purposes of revocation of an anti-dumping duty order.

15. Thus, a producer or exporter may seek revocation for itself from an anti-dumping duty order prior to the initiation of a sunset review. The Appellate Body in *Japan Sunset* recognized the importance of the availability of these procedures in ensuring that an anti-dumping duty remain in force only so long as and to the extent necessary to counteract dumping which is causing injury.<sup>13</sup> In this context, the United States conducts its sunset reviews on an order-wide, rather than company-specific, basis.

#### B. THE DECISION TO EXPEDITE

16. With regard to sunset reviews themselves, Commerce will conduct either an expedited or a full review. The decision whether to conduct an expedited or full sunset review is based on a two-part

---

<sup>9</sup> *Japan Sunset*, para. 199.

<sup>10</sup> *Japan Sunset*, para. 158.

<sup>11</sup> *Japan Sunset*, para. 152.

<sup>12</sup> Section 751(b) of the Tariff Act of 1930 (Exhibit ARG-1), codified at 19 C.F.R. § 351.216.

<sup>13</sup> *Japan Sunset*, para. 199.

procedure: (1) Solicitation and evaluation of individual substantive responses (including waivers); and (2) Assessment of the adequacy of the aggregate response.

## 1. Solicitation and evaluation of substantive responses

17. In its notice of initiation, Commerce solicits substantive responses from respondent interested parties. These responses are due not later than 30 days after publication of the notice of initiation.<sup>14</sup>

18. Commerce examines each substantive response submitted by a domestic or respondent interested party to assess whether it is complete, i.e., whether it contains the information specified in the regulations.<sup>15</sup> A "complete" substantive response normally must contain the limited information required by section 351(d)(3)(ii) of the *Sunset Regulations*.

19. In terms of responses, section 751(c)(4)(A) of the Tariff Act of 1930 ("the Act") specifically provides a respondent interested party with an opportunity to affirmatively "waive" participation in the Commerce proceeding thereby affording the respondent interested party the opportunity to concentrate its resources on addressing the ITC's determination of likelihood of the continuation or recurrence of injury.<sup>16</sup> In addition, section 351.218(d)(2)(iii) of the *Sunset Regulations* provides that Commerce will consider a failure by a respondent interested party to submit a complete substantive response, whether based on no submission or submission of an incomplete response, as a waiver of that party's participation in Commerce's sunset review.<sup>17</sup>

20. Consequently, each Commerce determination concerning the completeness of the substantive response filed by the respondent interested party would be based on one of three sets of circumstances: (1) no submission of a substantive response based on an affirmative "waiver" statement by the respondent interested party that it did not wish to participate in Commerce's sunset proceeding; (2) a finding that the respondent interested party is "deemed" to have waived its right to participate based on the submission of an incomplete substantive response or the failure of the party to submit any substantive response; and (3) a finding that the respondent interested party submitted a complete substantive response.

21. In the first two circumstances, Commerce would make a finding that the failure to submit any substantive response or to submit an incomplete substantive response constitutes an incomplete substantive response from the particular respondent interested party who failed to submit a substantive response or who submitted an incomplete substantive response. When Commerce determines that a respondent interested party has waived its right to participate, Commerce is directed by section 751(c)(4)(B) of the Act to make an affirmative finding of likelihood of continuation or recurrence of dumping for that respondent interested party.<sup>18</sup> This is not a determination of likelihood for the entire order.

---

<sup>14</sup> 19 C.F.R. 351.218(d)(3)(i) (Exhibit ARG-3).

<sup>15</sup> See 19 C.F.R. 351.218(e) (Exhibit ARG-3) and Preamble, 63 Fed. Reg. at 13518 (Exhibit US-3).

<sup>16</sup> See 19 U.S.C. 1677(c)(4)(A) & (B); SAA at 880 (Exhibit US-11); and 19 C.F.R. 351.218(d)(2)(i) & (ii) (requirements for notice of waiver) (Exhibit ARG-3).

<sup>17</sup> 19 C.F.R. 351.218(d)(2)(iii) ("deemed waiver") (Exhibit ARG-3).

<sup>18</sup> See section 751(c)(4)(B) of the Act, providing that the affirmative likelihood determination resulting from the waiver described in section 751(c)(4)(A) only applies "with respect to that party." 19 U.S.C. § 1675(c)(4)(B) (Exhibit ARG-1); see also, SAA at 881 ("If Commerce receives such a waiver, Commerce will conclude that revocation or termination would be likely to lead to continuation or recurrence of dumping or countervailable subsidies with respect to that submitter.") (emphasis added) (Exhibit US-11).

## 2. Assessment of adequacy

22. Once Commerce has determined which respondent interested parties have filed complete substantive responses, Commerce will then normally evaluate whether the aggregate response to the notice of initiation, by the respondent interested parties who filed complete substantive responses, is "adequate."<sup>19</sup> The so-called 50 per cent threshold, provided in section 351.218(e)(1)(ii)(A) of the *Sunset Regulations*, is normally used to make this aggregate adequacy determination.<sup>20</sup>

23. In order to determine the adequacy of the aggregate response to the notice of initiation, Commerce sums, for the five years preceding the sunset review, the export volumes of the subject merchandise of all the respondent interested parties who filed complete substantive responses to the notice of initiation. If the export volumes represented by the respondent interested parties, in the aggregate, are more than 50 per cent of the total exports of the subject merchandise during the five year period, Commerce will normally find that the aggregate response to the notice of initiation is "adequate" and will conduct a full sunset review. If the export volumes represented by the respondent interested parties, in the aggregate, are not more than 50 per cent of the total exports of the subject merchandise during the five year period, Commerce will normally find that the aggregate response to the notice of initiation is "inadequate" and will conduct an expedited sunset review (although Commerce has made exceptions, as discussed in the US response to question 1 of the Panel).

### C. RECORD EVIDENCE IN AN EXPEDITED SUNSET REVIEW

24. Section 751(c)(3)(B) of the Act states that where interested parties collectively provide an inadequate response to a notice of initiation, Commerce may issue, without further investigation, a final determination based on the facts available.<sup>21</sup> It should be noted that in this context, the facts available include information provided in complete and incomplete substantive responses, as well as prior determinations.<sup>22</sup> Contrary to Argentina's assertion, facts available in this context is not a "euphemism for adverse inferences"<sup>23</sup> under section 351.308(f), applicable to sunset reviews. Interested parties who submitted complete substantive responses are afforded an opportunity to submit comments on Commerce's adequacy determination pursuant to section 351.309(e) of the *Sunset Regulations*. After consideration of these interested party comments on the adequacy determination, if Commerce still finds that the aggregate response to the notice of initiation is not more than 50 per cent of the total imports, then Commerce normally will conduct an expedited sunset

---

<sup>19</sup> See *Sunset Policy Bulletin*, 63 Fed. Reg. at 18872 (Exhibit ARG-35). An "adequate" number of substantive responses normally is required, because Commerce makes its likelihood determination on an order-wide basis.

<sup>20</sup> Section 751(c)(3) of the Act leaves to Commerce's discretion the choice of methodology for determining when the response from interested parties to the notice of initiation is "adequate" for the purposes of conducting a full sunset review. See SAA at 880 (in many cases, some but not all parties will respond; nevertheless, where parties demonstrate a "sufficient willingness to participate," the agency will conduct a full sunset review) (Exhibit US-11). Consequently, Commerce promulgated section 351.218(e)(1)(ii) of the *Sunset Regulations* to codify the 50 per cent threshold test and to give effect to section 751(c)(3) of the Act. See Preamble, 63 Fed. Reg. at 13518. (Exhibit US-3).

<sup>21</sup> The SAA in discussing section 751(c)(3) states that this provision "is intended to eliminate needless reviews. This section will promote administrative efficiency and ease the burden on agencies by eliminating needless reviews while meeting the requirements of the [Anti-Dumping and SCM] Agreements. If parties provide no or inadequate information in response to a notice of initiation, it is reasonable to conclude that they would not provide adequate information if the agencies conducted a full-fledged review. However, where there is sufficient willingness to participate and adequate indication that parties will submit information requested throughout the proceeding, the agencies will conduct a full review." SAA, at 880 (Exhibit US-11).

<sup>22</sup> Section 351.308(f)(2)(Exhibit US-27 ).

<sup>23</sup> Argentina's Oral Statement, para. 7.

review and base the final sunset determination on the facts available in accordance with section 751(c)(3)(B) of the Act.<sup>24</sup>

25. In making the order-wide final sunset determination in an expedited sunset review, Commerce will rely on all information on the administrative record of the sunset proceeding, including information in the substantive responses and rebuttal responses of the domestic interested parties, prior agency determinations, as well as the information submitted by respondent interested parties in their substantive and rebuttal responses.<sup>25</sup> Commerce normally will not accept additional submissions from any interested party, whether domestic or respondent, after that interested party's substantive submission is found to be incomplete. Nevertheless, any information submitted by an interested party in its substantive response is considered by Commerce when Commerce makes the final determination in an expedited sunset review, even in a case where the particular substantive response was found to be incomplete.<sup>26</sup>

26. At the conclusion of the sunset review, Commerce publishes the *Final Sunset Determination*, announcing the final likelihood determination, and issues a *Decision Memorandum* explaining the issues decided in the sunset review (including the likelihood determination), the methodologies employed, and factual bases supporting the final determination.

#### **IV. ARGENTINA HAS NOT MET ITS BURDEN OF DEMONSTRATING THAT COMMERCE'S SUNSET REVIEW PROCEDURES ARE INCONSISTENT WITH ARTICLE 11.3 AND ARTICLE 6**

27. WTO Members are free to structure their sunset reviews as they choose, provided the reviews do not conflict with the Anti-Dumping Agreement.<sup>27</sup> Argentina bears the burden of proving that Commerce's sunset review procedures conflict with the Anti-Dumping Agreement.

28. In this dispute, Argentina claims that Commerce's expedited "waiver" procedures violate Article 11.3 because a "waiver" mandates a finding of dumping through the application of "facts available."<sup>28</sup> Not only does Article 11.3 state nothing about findings and facts available, but Argentina's claim is essentially a simple mischaracterization of the procedures themselves. In addition, Argentina has not demonstrated that Commerce's expedited procedures mandate a finding of likely dumping simply because section 751(c)(3)(B) of the Act and section 351.308 of the *Sunset Regulations* provide that Commerce normally may rely on the "facts available" when making the final sunset determination in cases where the respondent interested parties do not demonstrate sufficient interest in participating in the sunset review. Section 351.308(f) clearly defines "the facts available" as prior agency determinations, the information submitted by the interested parties (notwithstanding whether their submissions were "complete"), and any other information on the administrative record. As demonstrated above, there is no negative inference to be associated with the use of the term "facts available" in this context. It simply defines all the information on the record and provides that the

---

<sup>24</sup> Section 351.218(e)(1)(ii)(C)(2) of the *Sunset Regulations* provides that Commerce may base its final sunset determination on "the facts available" without further investigation in a case where the aggregate respondent interested parties is inadequate or Commerce may exercise its discretion and conduct further investigation. The decision whether to conduct further investigation in an expedited sunset review is left to Commerce's discretion. See SAA at 879-880 (Exhibit US-11).

<sup>25</sup> See section 351.308(f)(1) of the *Sunset Regulations* (definition of "the facts available") (Exhibit US-27). If a respondent interested party submitted a statement of waiver or was deemed to have waived due to its failure to submit any substantive response to the notice of initiation, then, obviously, there would be no information from that respondent interested party for Commerce to consider in making the final sunset determination.

<sup>26</sup> See section 351.308(f)(2) of the *Sunset Regulations* (Exhibit US-27).

<sup>27</sup> *Japan Sunset*, para. 158.

<sup>28</sup> Argentina's Oral Statement, para. 47.

final sunset determination in an expedited review will be made on the basis of all the information on the administrative record of that review. Section 751(c)(3)(B) of the Act and section 351.218 of the *Sunset Regulations* require that the sunset determination be made using all the information on the administrative record.

29. Argentina has also claimed that the expedited sunset procedures violate the obligations in Articles 6.1 and 6.2 of the Anti-Dumping Agreement. In this regard, Argentina has made no demonstration that the expedited procedures, as such, preclude interested parties from submitting evidence or having a full opportunity to defend their interests.<sup>29</sup> Instead, as illustrated above, the expedited sunset procedures provide interested parties with the opportunity to submit a substantive response containing any information the party wishes Commerce to consider, to submit a rebuttal substantive response, to submit comments on Commerce's adequacy determination, and to request extension of deadlines for the submission of factual information. Consequently, Argentina has not shown how the expedited sunset procedures preclude any interested party from having a full opportunity to defend its interests. The United States notes that Members are merely required to offer respondent interested parties the opportunity to defend their interests; the United States is not required to ensure that respondent interested parties take advantage of that opportunity.

30. Simply put, Argentina has not met its burden of demonstrating how the expedited sunset procedures, as such, preclude WTO-consistent action or mandate WTO-inconsistent action.

## **V. ARGENTINE RESPONDENT INTERESTED PARTIES DID NOT TAKE ADVANTAGE OF THE FULL OPPORTUNITY TO DEFEND THEIR INTERESTS**

31. Because Article 11.3 does not prescribe detailed criteria for conducting sunset reviews, but rather sets forth minimal obligations with respect to evidence and procedure, the question in this dispute essentially is whether Argentina has demonstrated that Commerce did not provide respondent interested parties the opportunity to participate in the review and present evidence. A review of the proceedings will reveal that the respondent interested parties simply failed to take advantage of the opportunities available to them.

### **A. REVIEW OF RESPONDENT INTERESTED PARTIES' OPPORTUNITIES TO SUBMIT FACT AND ARGUMENT IN THESE PROCEEDINGS**

32. On 3 July 2000, Commerce published its notice of initiation of the sunset review of the anti-dumping duty order on certain OCTG from Argentina.<sup>30</sup> In the notice, Commerce, as is its normal practice, highlighted the deadline for filing a substantive response in the sunset review and the information that was required to be contained in the response.<sup>31</sup> Commerce also explicitly referred parties to the applicable regulation concerning requests for an extension of filing deadlines.<sup>32</sup> On 2 August 2000, a domestic interested party filed a response to the notice of initiation providing, *inter alia*, statistics indicating imports of Argentine OCTG during the period of review. That same day, Siderca filed a substantive response in which it stated that it had "no share of total exports of subject

---

<sup>29</sup> See, e.g., Argentina's Oral Statement, para. 48.

<sup>30</sup> *Initiation of Five-Year ("Sunset") Reviews of Anti-Dumping and Countervailing Duty Orders or Investigations of Oil Country Tubular Goods ("Sunset Initiation")*, 65 FR 41053, 41054 (3 July 2000) (Exhibit ARG-44).

<sup>31</sup> *Sunset Initiation*. The information requirements concerning substantive responses to notices of initiation of sunset reviews are set forth at 19 C.F.R. 351.218(d)(3) (Exhibit ARG-3).

<sup>32</sup> *Sunset Initiation*. 19 C.F.R. 351.302(c) provides that a party may request an extension of a specific time limit. 19 C.F.R. 351.302(b) provides that unless expressly precluded by statute, Commerce may, for good cause, extend any time limit established by its regulations. The US anti-dumping duty statute does not contain deadlines for submission of information in a sunset review (Exhibit US-3).

merchandise" during the period of review.<sup>33</sup> Siderca did not file a rebuttal submission, as it was entitled to do.<sup>34</sup> Therefore, Siderca permitted the record to indicate that there were imports of subject merchandise, for which cash deposits were paid pursuant to the anti-dumping order, and that Siderca, the lone respondent interested party that filed a submission, did not account for 50 per cent of those imports. Siderca did so even though the regulations clearly provide that under such circumstances, Commerce will "normally" expedite the review.

33. Siderca's failure to seize its opportunities continued. On 22 August 2000, Commerce issued an Adequacy Memorandum, in which it recited the facts received thus far in the proceeding (*i.e.*, imports of subject merchandise together with an admission by the sole respondent interested party to file a submission that it was not responsible for any of the imports) and concluded that Siderca did not account for 50 per cent of imports of the subject merchandise. Siderca did not file a response to the Adequacy Memorandum, as it was entitled to do pursuant to section 351.309(e). Not having received a response to its Adequacy Memorandum, Commerce then proceeded with an expedited review, as contemplated by the regulations to which Siderca was privy.

34. The facts on the record – as Siderca allowed them to stand – therefore supported a finding of dumping during the life of the order. Commerce found that dumping duties were levied and collected, at the dumping margins assigned in the original investigation, against Argentine OCTG imported into the United States during the five-year period preceding the sunset review. Commerce also examined import data from several sources, including the Census Bureau Statistics and the ITC Trade Database, and found that US imports of Argentine OCTG had declined substantially immediately after the order was imposed and remained at depressed levels for the entire five-year period prior to the sunset review. Based on these findings and absent any evidence or argument from Siderca to the contrary, Commerce concluded that dumping by Argentine exporters was likely to continue or recur in the event of revocation of the order.<sup>35</sup>

35. In this regard, Argentina's allegation that its "treatment in the sunset review depended entirely on the assumption that the US statistics were correct, that there were other exports from Argentina, and that these alleged other exports were relevant enough to trigger a waiver and/or expedited review"<sup>36</sup> is wrong. Argentina's "treatment in the sunset review" is the direct result of the meagre participation of its foreign exporters. Moreover, the United States notes that as the government of the country in which subject merchandise was produced, Argentina was an interested party and could have participated in the proceedings, had it chosen to do so.<sup>37</sup>

#### B. ARGENTINA'S CLAIMS REGARDING THE ANTI-DUMPING AGREEMENT

36. Argentina claims that Commerce's sunset determination in OCTG from Argentina is not consistent with Article 11.3 because a sufficient factual basis does not exist to support the final affirmative determination.<sup>38</sup> As noted above, Commerce created a factual record, including substantive responses from interested parties and prior proceedings.

37. Argentina relies heavily on the argument that the 1.36 per cent margin from the original investigation is flawed because it was calculated in 1995 (it is "old") and the margin was calculated using an allegedly WTO-inconsistent methodology. However, the Appellate Body in *Japan Sunset* has concluded that Members are not obligated to calculate "new" dumping margins.<sup>39</sup> They are

---

<sup>33</sup> Page 4, (Exhibit ARG-57).

<sup>34</sup> 19 C.F.R. 351.218(d)(4) (Exhibit ARG-3).

<sup>35</sup> *Decision Memorandum* at 4-5 (Exhibit ARG-51).

<sup>36</sup> Argentina's Oral Statement, para. 43.

<sup>37</sup> Section 771(9) of the Tariff Act of 1930.

<sup>38</sup> Argentina's Oral Statement, paras. 69-70.

<sup>39</sup> *Japan Sunset*, para. 149.

merely obligated to provide respondent interested parties opportunities to offer evidence in support of negative likelihood determination. Therefore, the magnitude of dumping is not pertinent to making a determination with regard to likelihood of dumping.<sup>40</sup>

38. Argentina also maintains that Commerce violated Article 6 because the expedited review procedures deprived Siderca of the opportunities for evidence submission and the defence of its rights under Article 6.1 and Article 6.2 of the Anti-Dumping Agreement. Argentina alleges, in particular, that the nature of Commerce's expedited sunset review in OCTG from Argentina denied Siderca a meaningful opportunity to submit evidence and impermissibly limited its ability to submit additional argument or factual information in defence of its interests.<sup>41</sup> As discussed above, Siderca had more than one meaningful opportunity to defend its interests. In its substantive submission, Siderca could have included any information to indicate to Commerce that there were no aggregate consumption imports of OCTG during the period of review, or that Commerce should not use the 50 per cent threshold in this particular case. Instead, Siderca simply focused on the magnitude of the dumping margin. Similarly, Siderca could have filed a rebuttal response to dispute or explain the statistics provided by the domestic interested party, which showed imports of subject merchandise; at that point, Siderca knew that, based on the record evidence, it would not satisfy the 50 per cent threshold normally used, based on Siderca's own lack of shipments. Further, Siderca failed to respond to the Adequacy Memorandum, which it was entitled to do. Again, the fact that respondent interested parties (again recalling that there are two Argentine exporters of OCTG) failed to take advantage of their opportunities does not mean that the United States failed to provide them.

39. In sum, there is no basis for Argentina's claim that Commerce's expedited sunset review procedures impermissibly limited an interested party's ability to present its case or defend its interests, and Argentina has not demonstrated that Siderca's ability to present its case or submit evidence was impaired in any way in the instant sunset review.

## **VI. ARGENTINA HAS NOT DEMONSTRATED THAT THE ITC'S SUNSET REVIEW PROCEDURES ARE INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT**

40. Argentina bears the burden of proving that the ITC's sunset review determination is inconsistent with the Anti-Dumping Agreement. Argentina has not met this burden.

41. Indeed, Argentina advanced arguments at the Panel meeting that are simply not accurate. These concern in particular the "likely" standard of Article 11.3, cumulation, and whether the ITC properly established the relevant facts and assessed those facts objectively. Each argument will be addressed in turn.

### **A. THE "LIKELY" STANDARD OF ARTICLE 11.3**

42. Argentina erroneously argues that decisions by US courts in other cases are relevant to this dispute. They are not. But even if they were, these US court decisions are not ultimately helpful to Argentina's argument that "likely" entails a high degree of probability. In the one case that has completed the first stage of judicial review, the court ultimately explained that it did not interpret "'likely' to imply any degree of 'certainty'."<sup>42</sup>

---

<sup>40</sup> It should be noted that Argentina's challenge in this dispute is to Commerce's *reporting* of the 1.36 per cent margin to the ITC for its use in making the determination of the likelihood of continuation or recurrence of injury. See Argentina First Written Submission, paras. 189 & 193.

<sup>41</sup> Argentina's First Written Submission, paras. 121-122.

<sup>42</sup> *Usinor Industeel v. United States*, Slip Op. 02-152 at 6 (CIT 20 December 2002) (Exhibit US-18).



B. ARTICLE 3 OF THE ANTI-DUMPING AGREEMENT DOES NOT APPLY TO SUNSET REVIEWS

43. Argentina argues that because the term "injury" has the same meaning in Article 11.1 as in Article 3, and because "the overarching principles of Article 11.1 provide the immediate context of Article 11.3," the term "injury" must have the same meaning in Article 11.3 as it does in Article 3.<sup>43</sup> The United States is not of the view that "injury" has the same meaning in Articles 3 and 11.1, on the one hand, and in Article 11.3, on the other. The analysis required by Articles 3 and 11.1, and by Article 11.3 is fundamentally different. Articles 3 and 11.1 speak of existing "injury." Article 11.3 on the other hand speaks of the likelihood of the "continuation or recurrence of . . . injury." These provisions have a different focus and involve entirely different determinations, as the Appellate Body has recognized on more than one occasion.<sup>44</sup>

44. Argentina questions whether the injury referred to in Article 11.3 can be any different than that referred to in Article 11.1.<sup>45</sup> The United States is of the view that Article 11.1 is best viewed as a statement of general principle as to the duration of anti-dumping duty measures, but not as providing specific content to Members' obligations under Article 11.3 with respect to sunset reviews.<sup>46</sup> This becomes clear if one considers the consequences of a literal interpretation of the two provisions. Article 11.1 would appear to require the revocation of an anti-dumping duty order as soon as it is no longer causing injury ("[a]n anti-dumping duty shall remain in force *only as long as* . . . necessary to counteract dumping which is causing injury"). Article 11.3 (and Article 11.2 for that matter), however, contemplates that an anti-dumping measure may be continued even if there is no current injury, if it is likely that injury will recur. Put another way, if Article 11.1 is read as providing specific content to Members' obligations under Article 11.3, it would make a nullity of that part of Article 11.3 that permits the continuation of a duty when injury is likely to recur. Such an interpretation flies in the face of the fundamental principle of treaty interpretation that treaties should not be interpreted in such a way as to make any of their provisions inutile.<sup>47</sup>

45. It is significant that neither Argentina nor any of the third parties have responded to the United States' observation that applying the definition of "injury" in footnote 9 to the determination of "recurrence of injury" in Article 11.3 would lead to absurd results. It would mean that the inquiry in a sunset review would become whether expiry of the duty would be likely to lead to continuation or recurrence of material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry. Continuation or recurrence of a threat of material injury would involve a very attenuated notion of future injury and would set an extremely low threshold in sunset reviews for continuing anti-dumping duty measures. The United States is of the view that this is not what was intended by Members when Article 11.3 was negotiated. Moreover, it is hard to see how many of the obligations of Article 3 would be relevant to an inquiry of whether expiry of the duty would be likely to lead to continuation or recurrence of material retardation of the establishment of an industry. The United States can see no basis for selectively applying parts of the definition of "injury" in footnote 9 to sunset reviews, but not applying others. Either the definition applies to Article 11.3 in its entirety or it does not apply at all.

46. The fallacy of Argentina's position that Article 3 applies to sunset determinations is apparent by considering an analogy (albeit an imperfect one). Suppose that there are two distinct inquiries: (1) whether at least one meter of snow is lying on the ground; and (2) whether it is likely that at least one meter of snow will fall within a month. Although both of these inquiries refer to "at least one

---

<sup>43</sup> Argentina's Oral Statement, paras. 98 and 101.

<sup>44</sup> *US – German Steel*, AB Report, para. 87, *US – Japan Sunset*, AB Report, para. 106

<sup>45</sup> Argentina's Oral Statement, para. 98.

<sup>46</sup> The text of Article 11.1 existed in its present form in the Tokyo Round Anti-Dumping Code (as Article 9.1 in that code), prior to the adoption of the provision for sunset reviews.

<sup>47</sup> See *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Report of the Appellate Body adopted 20 May 1996, page 23 (footnote omitted).

meter of snow" (in the same way that footnote 9 and Article 11.3 both use the word "injury"), the steps that would be appropriate to pursue each inquiry are quite different. The first inquiry might be pursued by measuring the depth of the snow at certain spots; the second inquiry might be pursued by certain meteorological analysis. However, it would be inappropriate to pursue the second inquiry using methods appropriate for the first (*i.e.*, by measuring the amount of snow currently on the ground).

47. Argentina misconstrues the Appellate Body's report in *Steel from Germany*, when it asserts that "[t]he Appellate Body used the SCM equivalent of [footnote 9] as an illustration of how the injury concept applies throughout the Agreement, including in sunset reviews."<sup>48</sup> In the section of the *Steel from Germany* report referred to by Argentina, the Appellate Body was merely listing "provisions of the SCM Agreement that apply independently of cross-references in that they contain explicit statements of their scope of application." Contrary to Argentina's suggestion, the Appellate Body made no finding that Article 15, note 45 of the SCM Agreement applies in sunset reviews. Argentina's reliance on the panel report in *DRAMs from Korea* also is unpersuasive.<sup>49</sup> The panel in that dispute was not considering the applicability of Article 3 to reviews under Article 11.2.

48. We next address arguments contained in the submissions and oral statements of third parties. The EC maintains that the reference in Article 3.1 to "a determination of injury for purposes of Article VI of GATT 1994" lends support to the conclusion that Article 3 obligations apply to sunset reviews.<sup>50</sup> This argument is unpersuasive. Article VI of GATT 1994 does not mention sunset reviews, and a sunset review does not entail a "determination of injury."

49. The EC also argues that Article 3 must be applicable to sunset reviews because otherwise members would have "completely unfettered discretion" in determining the likelihood of continuation or recurrence or injury.<sup>51</sup> The EC's concerns are unfounded. First, sunset reviews are subject to the provisions regarding evidence and procedure in Article 6 (by virtue of the explicit provision to this effect in Article 11.4). Furthermore, sunset reviews, if subject to dispute settlement, must satisfy the provisions of Article 17.6(i) of the Anti-Dumping Agreement, *i.e.*, the establishment of the facts must be found to have been "proper" and the evaluation of those facts to have been "unbiased and objective." Finally, as the Appellate Body has explained, "[t]he words 'review' and 'determine' in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of the process of reconsideration and examination."<sup>52</sup>

50. Japan's discussion of how selected provisions of Article 3 supposedly apply to sunset reviews in fact demonstrates just the opposite. Japan notes that Article 3.1 requires that authorities base their injury determination on an objective examination of "the volume of the dumped imports" and "the effect of dumped imports on prices."<sup>53</sup> But in a sunset review there may be no current imports, or they may not currently be dumped. Japan then explains that Article 3.2 sets forth further rules on how authorities shall consider the volume of dumped imports and price effects.<sup>54</sup> Again, these rules are inapplicable in sunset reviews because of the possible absence of dumped imports. Japan goes on to characterize Article 3.4 as providing the "detailed requirements for the examination of the impact of dumped imports under Article 3.1, and, therefore, for a determination of injury."<sup>55</sup> But, as explained

---

<sup>48</sup> Argentina's Oral Statement, para.96.

<sup>49</sup> Argentina's Oral Statement, para. 97.

<sup>50</sup> Third Participant's Submission by the European Communities, paras. 124-125.

<sup>51</sup> Third Participant's Submission by the European Communities, para. 126.

<sup>52</sup> *Japan Sunset*, para. 111.

<sup>53</sup> Third Party Submission of Japan, para. 11.

<sup>54</sup> Third Party Submission of Japan, para. 11.

<sup>55</sup> Third Party Submission of Japan, para. 12.

in the United States' first submission, there are also numerous textual indications in Article 3.4 that it is not applicable to sunset reviews.<sup>56</sup>

51. Next, Japan asserts that the causation and non-attribution requirements of Article 3.5 apply to sunset reviews because of the use of the phrase "within the meaning of this Agreement" in that article.<sup>57</sup> The simple answer to this is that a determination of the likelihood of continuation or recurrence of injury in a sunset review is not a determination of injury. As explained in the United States' first written submission, the obligations under Article 3.5 are incompatible with the nature of sunset reviews.<sup>58</sup>

52. In connection with its argument regarding the applicability of Article 3.5 to sunset reviews, Japan points to the likely margin of dumping for OCTG from Argentina, 1.36 per cent.<sup>59</sup> The United States notes that this is not the only margin that is relevant to these sunset reviews. The likely dumping margins applicable to the other four countries considered cumulatively with Argentina in these reviews were: Italy – 49.78 per cent, Japan – 44.20 per cent, Korea – 12.17 per cent, and Mexico – 21.70 per cent.<sup>60</sup>

53. Japan argues that the ITC failed to observe the non-attribution requirement of Article 3.5 to the extent that it did not separate and distinguish the effects of dumping on the domestic industry from the effects of several other specific factors.<sup>61</sup> As explained in the United States' first submission (paras. 348-354), the non-attribution analysis of Article 3.5 cannot be conducted in the context of sunset reviews. Japan also misrepresents the ITC Report when it states that: "[t]he ITC also noted that '[o]il and natural gas prices, the ultimate drivers of OCTG demand' and 'a slowdown in the US and/or world economy' would be factors contributing to likely injury to the domestic industry." The ITC Report (p. II-13) identified these as factors relevant to demand trends, but not as factors contributing to likely injury to the domestic industry.

54. Japan and Korea suggest that in a sunset review the ITC must first establish whether there is current injury, before considering likelihood of continuation or recurrence.<sup>62</sup> However, there is simply no textual basis in Article 11.3 for imposing a requirement that authorities first make a "present injury" determination before considering whether expiry of the duty is likely to lead to continuation or recurrence of injury.

55. Korea argues that investigating authorities should not be permitted to use "different substantive definitions and standards to determine whether initially to impose a measure (in an anti-dumping investigation) and whether to terminate or continue that measure (in a sunset review)."<sup>63</sup> Korea's position, like that advanced by the EC and Japan, fails to account for the fundamentally "different nature and purpose of original investigations, on the one hand, and sunset reviews, on the other hand."<sup>64</sup> A determination of injury and a determination of the likelihood of continuation or recurrence of injury involve fundamentally different inquiries.

### C. CUMULATION IN SUNSET REVIEWS

56. The only textual basis that Argentina offers for its argument that cumulation is not permitted in sunset reviews is that Article 11.3 refers to "any definitive anti-dumping duty" and to "the duty,"

---

<sup>56</sup> US First Submission, para. 346.

<sup>57</sup> Third Party Submission of Japan, para. 13.

<sup>58</sup> US First Submission, para. 350-353.

<sup>61</sup> Third Party Submission of Japan, para. 40.

<sup>62</sup> Third Party Submission of Japan, para. 14; Third Party Submission of the Republic of Korea, para. 11.

<sup>63</sup> Third Party Submission of the Republic of Korea, para. 9.

<sup>64</sup> *Japan Sunset*, para. 124

and that Article 11.1 refers to "an anti-dumping duty." Argentina's position that the drafters of the Anti-Dumping Agreement deliberately "have chosen the singular and have avoided the plural"<sup>65</sup> is unconvincing. The reference to "any definitive anti-dumping duty" is not necessarily to the singular.<sup>66</sup> Moreover, the reference in Article 11.3 to "the duty" is merely descriptive and is hardly evidence that the drafters intended to prohibit cumulation. (As noted in the United States' first submission,<sup>67</sup> cumulation in anti-dumping investigations was a widespread practice among GATT contracting parties prior to the adoption of Articles 3.3 and 11.3 in the Uruguay Round.)

57. Argentina seeks to bolster its argument by referring to "the object and purpose" of Article 11.3. As the United States pointed out in its first submission (para. 367), the relevant principle of treaty interpretation speaks of the object and purpose of *the treaty*, and not particular treaty provisions.<sup>68</sup> The United States does not agree with Argentina's suggestion that Article 11.3 merely rescinds anti-dumping duties. Article 11.3 is clear that expiry of such duties is only appropriate where it is not likely that this would lead to the continuation or recurrence of dumping and injury.

58. Argentina's claim that the United States has violated Article 11.3 by cumulating because "Argentina, and each WTO Member, negotiated for the right to have an anti-dumping measure affecting its exports removed after five years"<sup>69</sup> is similarly unpersuasive. The negotiating objective of the United States and certain other Members was to retain anti-dumping duties where warranted. The negotiating objectives of Argentina and perhaps other Members cannot be used to read into the Anti-Dumping Agreement obligations that do not exist in the treaty as reflected by its text. Indeed, it is the text reflects "the delicate balance of rights and obligations attained by the parties to the [Uruguay Round] negotiations."<sup>70</sup>

59. Argentina's suggestion that, if cumulation is permitted in sunset reviews, the limitations on cumulation in Article 3.3 must also apply is directly at odds with the Appellate Body's finding in *US – German Steel*<sup>71</sup> and therefore Argentina's argument should be rejected.

60. Argentina argues that the standards that the ITC applies in deciding whether to cumulate run "directly counter to the 'likely' standard established by Article 11.3."<sup>72</sup> Argentina is confusing the standards for (i) deciding whether cumulation in a sunset review is appropriate with (ii) the standard for determining whether expiry of the duty would be likely to lead to continuation or recurrence of injury. The Anti-Dumping Agreement is silent on the former question, and thus the standards that the ITC applied in deciding whether to cumulate cannot violate Article 11.3.

D. CONTRARY TO ARGENTINA'S ASSERTIONS, THE ITC PROPERLY ESTABLISHED THE RELEVANT FACTS AND ITS ASSESSMENT OF THOSE FACTS WAS OBJECTIVE

61. Article 17.6 provides that "in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective." Notwithstanding Argentina's misstatements and selective analysis about the factual record, the ITC did in fact properly establish facts and evaluate them in an unbiased and objective manner.

---

<sup>65</sup> Argentina's Oral Statement, para. 105.

<sup>66</sup> *The New Shorter Oxford English Dictionary* (p. 91) defines "any" as having singular or plural meanings. (Exhibit US-28).

<sup>67</sup> US First Submission, para. 370.

<sup>68</sup> *Vienna Convention on the Law of Treaties*, Art. 31(1).

<sup>69</sup> Argentina's Oral Statement, para. 107.

<sup>70</sup> *US – German Steel*, AB Report, para. 91.

<sup>71</sup> *US – German Steel*, AB Report, paras. 58-97.

<sup>72</sup> Argentina's Oral Statement, para. 109.

62. In its oral statement, Argentina seeks to cast doubt on the ITC's finding that the likely volume of subject imports would be significant if the anti-dumping duty orders were revoked. Argentina incorrectly states that the ITC found that "subject producers' capacity utilization rates represent a potentially important constraint on the ability of these subject producers to increase shipments of casing and tubing to the United States."<sup>73</sup> The ITC was not referring to all of the subject producers (i.e., the casing and tubing producers in the five countries subject to the sunset reviews) when it stated producers were "operating at capacity utilization rates that represent a potentially important constraint on [their] ability . . . to increase shipments of casing and tubing to the United States." This is clear from a review of pages 18-19 of the ITC Report.

63. On page 18 the ITC first reviewed the capacity of subject producers in Japan. It stated: "[i]n addition to the reported capacity of NKK [the only Japanese producer to have provided data to the ITC], we find that there is significant available capacity among the other Japanese producers."<sup>74</sup> Then, at the top of page 19 of the ITC Report the ITC reviewed the capacity of subject producers in Korea, and referred to "Korea's unused capacity for all pipe and tube products."<sup>75</sup>

64. Only after having considered available capacity in Japan and Korea did the ITC discuss the capacity utilization rates of "[p]roducers in *the other subject countries* (and NKK in Japan)" (emphasis added), and it was in connection with *these producers* that the ITC made the observation about capacity utilization rates representing a potentially important constraint on their ability to increase exports to the United States.<sup>76</sup> In short, the ITC's finding of potential capacity constraints on exports applies only to producers in Argentina, Italy and Mexico – and not to producers in Japan (except for NKK) and Korea.

65. This is especially significant because of the size of the casing and tubing industry in Japan. The ITC noted that "[i]n the original investigations, the import volume, market share, and production capacity of casing and tubing from Japan were the largest of the subject countries."<sup>77</sup> Because all but one of the Japanese producers declined to participate in this sunset review, the precise size of the Japanese industry was not known. However, according to the ITC Report, US producers stated that non-responding Japanese producers had the potential to supply 3.5 million tons of OCTG<sup>78</sup> – an amount that exceeded the total capacity of the US casing and tubing industry in 2000.<sup>79</sup> (Data on the capacity of those Korean producers that responded to the ITC's questionnaire is confidential.) In light of the foregoing, Argentina's argument that the ITC's volume finding was contradicted by the fact of capacity restraints is simply erroneous.

66. In addition to its conclusions about excess capacity in Japan and Korea, the ITC found that producers in Argentina, Italy, and Mexico, and NKK in Japan, would have incentives to devote more of their productive capacity to producing and shipping casing and tubing to the US market, despite their apparently high capacity utilization rates. The ITC gave a number of reasons for reaching this conclusion. Argentina's attempts in its oral statement to discredit the ITC's reasoning are unpersuasive.

---

<sup>73</sup> Argentina's Oral Statement, para. 117.

<sup>74</sup> *Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico*, USITC Pub. 3434, Inv. Nos. 701-TA-364, 731-TA-711, and 713-716 (June 2001) ("ITC Report") (Exhibit ARG-54) at 18.

<sup>75</sup> ITC Report at 19. The ITC's more specific findings as to unused capacity among Korean producers are redacted from the ITC Report because they reflect business proprietary information.

<sup>76</sup> ITC Report at 19.

<sup>77</sup> ITC Report at 18.

<sup>78</sup> ITC Report at II-8.

<sup>79</sup> The US casing and tubing industry's capacity in 2000 was 3.3 million tons. ITC Report at III-1, table III-1.

67. First, with respect to the ITC's finding that Tenaris would have a strong incentive to expand its presence in the US market, Argentina maintains that "the Commission only examines 'half' the story" and that "some of the companies forming the so-called Tenaris Alliance were outside the anti-dumping duty orders under review."<sup>80</sup> This assertion is incorrect. In fact, only one of the five Tenaris companies, Algoma in Canada, was not subject to the anti-dumping duty orders involved in these sunset reviews.<sup>81</sup>

68. Argentina argues that if Tenaris had really been interested in shipping to the United States, it could have done so through Algoma in Canada.<sup>82</sup> Argentina neglects to mention, however, that in 2000 – only one year before the reviews at issue here – counsel for Siderca assured the ITC, during a five-year review involving OCTG from Canada, that DST (the predecessor organization to Tenaris) had no intention of using the Algoma facility to ship OCTG to the United States.<sup>83</sup> Based at least in part on this assurance, the ITC lifted a longstanding anti-dumping order on OCTG from Canada. Tenaris' commitment not to ship OCTG from Canada completely undermines Argentina's argument that Tenaris could use Algoma to serve this market.

69. Also, in connection with the incentive for Tenaris to ship to the United States, Argentina suggests that this was not likely to occur because of long-term contractual commitments by Siderca and other affiliated producers to sell elsewhere.<sup>84</sup> The suggestion by Argentina that all of Tenaris' production was devoted to long-term contracts is at odds with Tenaris' own testimony in the sunset reviews. Siderca's President (who testified that he was responsible for exports of OCTG from all of the Tenaris companies) testified that its long-term agreements account for only about 55 per cent of its sales of OCTG.<sup>85</sup> In other words, Tenaris' commitments under long-term contracts would not present a significant impediment to expanding shipments to the United States.

70. The United States pointed out (in para. 328 of its first written submission) that Argentina's claim that Siderca's ability to ship to the United States was limited by long-term contractual commitments was also undermined by the fact that many of these contracts were with global oil and gas companies that would be eager to buy from Siderca in the United States. Argentina now asserts that the United States ignored evidence that the global companies with which Tenaris had contracts represented only 12-14 per cent of US oil and gas rigs.<sup>86</sup> In fact, the ITC did not ignore this evidence. As the ITC explained in its report (p. 19, n. 124), the evidence on the US market share of these companies was mixed: Tenaris claimed it was only 12-14 percent; the domestic industry claimed it was significantly greater. The ITC found that the US presence of these global companies to be significant under either estimate.<sup>87</sup>

71. Argentina contends that the evidence that global oil and gas companies already buying from Tenaris would also want to do so in the United States if the anti-dumping orders were revoked is

---

<sup>80</sup> Argentina's Oral Statement, para. 119.

<sup>81</sup> ITC Report at 16.

<sup>82</sup> Argentina's Oral Statement, para. 119, first subparagraph.

<sup>83</sup> See, *Certain Pipe and Tube from Argentina, Brazil, Canada, India, Korea, Mexico, Singapore, Taiwan, Thailand, Turkey, and Venezuela*, Inv. Nos. 701-TA-253 (Review) and 731-TA-132, 252, 271, 273, 276, 277, 296, 409, 410, 532-534, 536, and 537 (Review), USITC Pub. 3316 (July 2000) at 51 n. 310, and OCTG-IV-5 (Exhibit US-29).

<sup>84</sup> Argentina's Oral Statement, para. 119.

<sup>85</sup> *Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico*, Inv. Nos. 701-TA-364, 731-TA-711, and 713-716, ITC Hearing Transcript, ("ITC Hearing Tr."), pp. 200 and 205 (German Cura, Siderca) (Exhibit US-30). Argentina cites to this very testimony in its oral statement (para. 119, third subparagraph).

<sup>86</sup> Argentina's Oral Statement, para. 119, fourth and fifth subparagraphs.

<sup>87</sup> ITC Report, p. 19 n.124.

supported only by "a second-hand statement that one customer had expressed such a desire."<sup>88</sup> This is incorrect. This was not only the testimony of the president and chief executive officer of one of the largest distributors of OCTG in the United States;<sup>89</sup> the director of another large OCTG distributor told the ITC:

Most of the major end users already purchase from these subject producers internationally and the end users are unwavering in their desire to see the extremely low priced OCTG that they get internationally extended to the US market. They have said as much to me quite openly and I think you would hear the same thing from most of my colleagues up here today.<sup>90</sup>

72. The second reason that the ITC found that the subject producers would have an incentive to devote more of their capacity to shipping casing and tubing to the US market is that casing and tubing were among the highest valued pipe and tube products, generating among the highest profit margins.<sup>91</sup> Argentina characterizes this factor as "a general assumption rather than positive evidence."<sup>92</sup> Argentina is mistaken. The relatively high value (and profit margins) of casing and tubing was established during the ITC's sunset reviews,<sup>93</sup> and Argentina does not dispute this fact. It stands to reason that pipe and tube producers – as profit-maximizing entities – would seek to maximize their production of products with higher profit margins. Argentina's attempts to dismiss this factor as "conjecture and speculation"<sup>94</sup> is unpersuasive.

73. The third factor that the ITC relied on in determining that producers in Argentina, Italy, and Mexico, and NKK in Japan, would have incentives to increase their shipments of casing and tubing to the United States, is that prices for casing and tubing on the world market were significantly lower than prices in the United States.<sup>95</sup> Argentina's characterization of this evidence as "anecdotal" is misleading. As its report makes clear, the ITC relied on the testimony of three executives from firms that produce or distribute OCTG, who each testified that prices for casing and tubing in the United States were significantly higher than international prices.<sup>96</sup> Argentina also attempts to downplay this factor by noting that the ITC recognized that there was contradictory evidence as to the magnitude of the price differential.<sup>97</sup> The fact that Argentina does not dispute the existence of a price differential, but rather questions its magnitude, speaks for itself.

74. The fourth factor that the ITC relied on is that foreign casing and tubing producers also faced import barriers in other countries or on related products that were produced in the same facilities as OCTG. Import barriers in other countries existed in the form of a 67 per cent anti-dumping duty in Canada on casing from Korea. The import barriers on related products that the ITC identified were: (i) US anti-dumping duties on seamless standard pipe from Argentina, Japan, and Mexico; (ii) US import quotas on welded line pipe shipped from Korea; and (iii) US anti-dumping duties on circular, welded, non-alloy steel pipes from Korea.

75. Argentina seeks to downplay the Canadian anti-dumping duty on casing from Korea of 67 per cent.<sup>98</sup> However, it was reasonable for the ITC to take this factor into account, especially since

---

<sup>88</sup> Argentina's Oral Statement, para. 119, fifth subparagraph.

<sup>89</sup> ITC Hearing Tr. at 59 (Mr. Ketchum, Red Man Pipe and Supply) (Exhibit US-20).

<sup>90</sup> ITC Hearing Tr. at 55 (Mr. Stewart, Hunting Vinson) (Exhibit US-20).

<sup>91</sup> ITC Report, p. 19.

<sup>92</sup> Argentina's Oral Statement, para. 120, first subparagraph.

<sup>93</sup> ITC Report, p.16.

<sup>94</sup> Argentina's Oral Statement, para. 120, fourth subparagraph.

<sup>95</sup> ITC Report at 19-20.

<sup>96</sup> ITC Report at 19 n.128.

<sup>97</sup> Argentina's Oral Statement, para. 121, second subparagraph.

<sup>98</sup> Argentina's Oral Statement, para. 122, first subparagraph.

the Korean industry is heavily export-dependent, Canada is the second largest regional market for OCTG in the world,<sup>99</sup> and the Canadian duty was relatively high.

76. In connection with anti-dumping measures on related products, Argentina claims that there was no evidence that pipe and tube producers would ever shift production from other products to OCTG. This is simply false. In sworn testimony before the ITC, domestic producers specifically testified that there is a hierarchy of pipe and tube products, and that OCTG is at the top of that hierarchy.<sup>100</sup> These same producers also testified that their companies did switch production to higher-value products like OCTG as market conditions warranted.<sup>101</sup> This evidence directly supports the ITC's finding that if the orders on OCTG were revoked, Tenaris would have a strong incentive to shift products in order to increase its output of OCTG.

77. Finally, the ITC explained that industries in at least some of the subject countries were heavily export-dependent. The ITC noted that Japan and Korea in particular had very small home markets and depended nearly exclusively on exports.<sup>102</sup> Argentina seeks to minimize the significance of this factor by arguing that the ITC inferred that just because "certain companies have been successful in exporting," they would increase their exports to the United States by certain amounts.<sup>103</sup> Argentina misconstrues the ITC's finding in two respects. First, the ITC did not conclude merely that certain companies "have been successful in exporting;" rather, it found that the industries in at least some of the countries involved (and particularly in Japan and Korea) were *dependent* on exports because of very small home markets for their products. Second, the ITC did not infer from this export-orientation that these industries would increase their exports to the United States in specific amounts (as Argentina argues). Instead, this export-orientation was just one of a number of factors that led the ITC to conclude that the likely volume of subject imports would be significant if the anti-dumping duty orders were revoked.

78. Argentina's approach to the ITC's analysis of the likely volume of imports is to examine in isolation each factor that the ITC considered and to assert that each factor does not amount to positive evidence. However, the Panel is directed in Article 17.6 to assess whether the establishment of the facts was proper and whether the evaluation of those facts was unbiased and objective. The ITC properly developed an extensive record in the sunset reviews at issue and conducted an unbiased and objective analysis of that record. Although Argentina may have drawn a different conclusion based on those facts, that alone does not render the ITC's determination inconsistent with the Anti-Dumping Agreement.

## VII. CONCLUSION

79. Based on the foregoing, the United States renews its request that the Panel reject Argentina's claims in their entirety.

---

<sup>99</sup> The United States directs the Panel's attention to Figure II-1 on page II-5 of the ITC Report, which shows that the percentage of worldwide rig counts in 2000 was as follows: United States – 47.91 per cent, Canada – 17.99 per cent, Latin America – 11.87 per cent, Middle East – 8.16 per cent, Far East – 7.32 per cent, and Europe and Africa – 6.75 per cent.

<sup>100</sup> IT Hearing Tr. at 158-159 (Mr. Dunn, Lone Star Steel) (Exhibit US-30).

<sup>101</sup> ITC Hearing Tr. at 159 (Mr. Dunn, Lone Star Steel) and 161 (Mr. Barnes, IPSCO Tubulars) (Exhibit US-30)].

<sup>102</sup> ITC Report at 20.

<sup>103</sup> Argentina's Oral Statement, para. 123.