

***United States - Sunset Review of Anti-dumping Measures on
Oil Country Tubular Goods from Argentina***

(WT/DS268)

**Oral Statement of the United States at the Second Substantive Meeting
of the Panel with the Parties**

February 3, 2004

Mr. Chairman, members of the Panel:

1. The United States appreciates this opportunity to comment on the issues raised in this proceeding.
2. This dispute is not complicated. It involves three overarching questions, some of which the Appellate Body has already explored at length. First, what does the Antidumping Agreement require with regard to sunset reviews? Second, has Argentina demonstrated that U.S. law fails to meet those requirements? Third, has Argentina demonstrated that the U.S. application of its law also fails to meet those requirements?
3. Consistent with principles of treaty interpretation reflected in Article 31 of the *Vienna Convention*, an analysis of rights and obligations must begin with the text of the agreement being interpreted. Article 11.3 of the Antidumping Agreement provides that an antidumping duty must be terminated unless a Member makes a finding of likelihood of continuation or recurrence of dumping and injury. Article 11.4 makes clear that the rules of Article 6 regarding evidence and procedure are applicable in these sunset reviews. Therefore, a Member must make a determination of likelihood with regard to dumping and injury and must afford interested parties the opportunity to participate and present evidence. In addition, Article 17.6(i) of the Antidumping Agreement provides that a panel's examination of the facts is limited to whether

those facts were properly established before and examined by the domestic investigating authority in a manner that is unbiased and objective, not whether the facts established at the time – or new ones impermissibly introduced here – might have led to a different conclusion.

4. We will first address issues concerning the Department of Commerce's determination regarding the likelihood of dumping, followed by the U.S. International Trade Commission's determination regarding the likelihood of injury. In doing so, the United States will again confirm that U.S. law – as such and as applied – is not inconsistent with the obligations contained in the Antidumping Agreement. We will then conclude with some remarks on the procedural issues in this dispute.

Issues Concerning the Likelihood of Continuation or Recurrence of Dumping

5. Mr. Chairman, Argentina's claims in this dispute fail because they rely on obligations not found in Article 11.3 or anywhere else in the Antidumping Agreement.

6. Consistent with DSU Article 3.2 and previous panel and Appellate Body findings, the United States has argued that the Panel should interpret the text of the Antidumping Agreement, and in particular Articles 11.3 and 6, in accordance with the ordinary meaning of the terms of the Agreement in their context and in light of the Agreement's object and purpose.

7. Simply put, Article 11.3 provides that a definitive antidumping duty must be terminated unless the requisite finding – likelihood of continuation or recurrence of dumping and injury – is made. As the Appellate Body in *United States - Corrosion-Resistant Carbon Steel Flat Products from Japan* recently upheld, the Antidumping Agreement does not prescribe the means

a Member must employ in determining whether dumping and injury are likely to continue or recur in a sunset review.”¹

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

9. Argentina claims that Commerce’s expedited sunset procedures preclude Commerce from making a “determination” or conducting a “review.” We have demonstrated, however, that U.S. sunset procedures provide for participation by interested parties, including the submission of factual information and argument, as well as rebuttal to such information and argument. We have also demonstrated that Commerce makes its likelihood determination based on all the

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

² *Id.*, para. 123.

³ *Id.*, para. 124.

evidence on the administrative record, including the evidence submitted by the interested parties during the sunset review. Commerce thus arrives at, in the words of the Appellate Body, a “reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination.”⁴ Commerce’s procedures therefore are not inconsistent with the limited obligations of Article 11.3.

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

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

⁴ *Id.*, para. 111.

12. After providing all interested parties with ample opportunity to submit for the record their views, including any information they deemed relevant, Commerce reasonably concluded that, in the event of revocation, dumping is likely to continue or recur. Notably, respondent interested parties failed to provide evidence, either through the substantive responses to the notice of initiation or in rebuttal to the substantive response of the domestic industry, to persuade Commerce to find otherwise. This, in spite of the fact that, according to the Appellate Body, the Antidumping Agreement assigns a “prominent role to interested parties . . . and contemplates that they will be a primary source of information in all proceedings conducted under that agreement,” especially with regard to company-specific data.⁵

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

14. Argentina also claims that the expedited sunset procedures denied respondent interested parties an opportunity to defend their interests and to submit evidence, in violation of the obligations in Articles 6.1 and 6.2. As we have demonstrated at length in our written submissions, Commerce provides parties with ample opportunity to submit facts and arguments.

⁵ *Id.*, para. 199.

⁶ Second Submission of Argentina, para. 119.

Argentina has failed to show one instance where Siderca was denied an opportunity to defend its interests in this case. Instead, the record shows that Siderca, Argentina, and any other respondent interested party simply did not take advantage of the opportunities afforded them.

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

Issues Concerning the Likelihood of Continuation or Recurrence of Injury

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

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

18. We explained in our submissions that original injury investigations and sunset reviews are fundamentally different inquiries with different purposes. We also pointed to very specific

and fundamental obligations in Articles 3.1, 3.4 and 3.5 that just do not make sense in the context of sunset reviews.

19. Argentina's response on these points is telling. Essentially, Argentina sidesteps the issues. For example, we explained that the instruction in Article 3.1 to examine the volume of dumped imports and their effect on prices will often not be appropriate in a sunset review because imports may not be present in significant volumes, and they may not be sold at dumped prices.⁷ In response, Argentina does not explain how the volume and price effects analysis mandated by Article 3.1 will be relevant in a sunset review. Instead, Argentina essentially says that Article 3.1 applies to sunset reviews because all of Article 3 applies to these reviews.⁸ Argentina is answering the question by merely asserting the answer, without argumentation.

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

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

⁸ Second Submission of Argentina, para. 164.

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

¹⁰ Second Submission of Argentina, para. 183.

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

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

23. In *Japan Sunset*, the Appellate Body reiterated its earlier finding that "original investigations and sunset reviews are distinct processes with different purposes."¹³ The Appellate Body then found that investigating authorities are under no obligation to calculate or rely on dumping margins when they make their likelihood of dumping determination in a sunset review.¹⁴ (The Appellate Body explained that "it is consistent with the different nature and purpose of original investigations, on the one hand, and sunset reviews, on the other hand, to

¹¹ Second Submission of Argentina, para. 185.

¹² Second Submission of Argentina, para. 28.

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

¹⁴ *Japan Sunset*, para. 123 and 126.

interpret the Anti-dumping Agreement as requiring investigating authorities to calculate dumping margins in an original investigation, but not in a sunset review.”)¹⁵ The Appellate Body then concluded that *if* – and only *if* – investigating authorities choose to rely on dumping margins in making their likelihood determination, they are required to observe the disciplines of Article 2.4. In this case, neither Commerce nor the ITC relied on any particular dumping margins in making their likelihood determinations.

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

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

¹⁵*Japan Sunset*, para. 124.

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

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

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

29. With regard to pricing, Argentina focuses on the evidence of underselling, and asserts that authorities should not be permitted to rely on pricing information from the original investigation to the exclusion of more current data.¹⁷ However, the ITC did *not* rely exclusively on the evidence of underselling from the original investigation. There *was* evidence of more recent underselling, but the scope of this underselling was limited because subject imports had a limited

¹⁶Second Submission of Argentina, para. 190.

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

presence in the U.S. market in the period of review.¹⁸ Moreover, current pricing data may be limited in a sunset review if imports have declined as a result of the imposition of the order.

Argentina's suggestion that a finding of likely underselling must be based exclusively on current pricing data should be rejected.

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

31. Rather than debating synonyms, the United States believes it is more useful to examine the details of the ITC's analysis, as explained fully in our submissions.¹⁹ It is also worth noting that the ITC, using the "likely" standard, has made negative likelihood of injury determinations, leading to the revocation of antidumping measures, in over one-third of the first set of sunset reviews it conducted.

32. Argentina attempts to portray the ITC's determination as speculative and not based on record evidence. It generally does this by focusing on selected individual factors that the ITC considered and claiming that the ITC's conclusion was not based on empirical certainty. We

¹⁸ ITC Report, p. 21.

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

urge the Panel to reject this piecemeal analysis and to look at *all* of the evidence that the ITC considered and the *entirety* of its determination.

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

Procedural Issues

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

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

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

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

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

38. Argentina’s argument that third parties found the claim to be “clear” is, frankly, not relevant; the third parties are not defending their laws, and what may be “clear” enough for purposes of determining third-party participation in a dispute is not necessarily clear enough for the party forced to respond with precision to the claims being made.²²

²¹Submission of Argentina on U.S. Preliminary Request, para. 42.

²²Second Submission of Argentina, para. 257.

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

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

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

42. Finally, Argentina's argument that the United States has not made its case with respect to its preliminary ruling request, and thus the Panel should simply disregard some of the U.S.

²³Submission of Argentina on U.S. Preliminary Request, para. 88.

claims now,²⁴ is without merit. The United States has in fact made its case; Argentina has not rebutted these claims.

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

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

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

²⁴Second Submission of Argentina, para. 239.