United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods From Argentina: Recourse to Article 21.5 of the DSU by Argentina (WT/DS268)

Answers of the United States of America to Questions from the Panel to the Parties in connection with the Substantive Meeting of the Parties

July 24, 2006

Q1. The Panel notes that Argentina argues, and the United States does not contest, that the US law requires the USDOC to make its ultimate sunset determinations on an order-wide basis. Please explain whether this is the case and, if so, cite the relevant provisions of the US law (including regulations and/or policy provisions) which require the US investigating authorities to make their sunset determinations on an order-wide basis and provide copies thereof.

1. Section 751(c)(1)(A) of the Tariff Act provides that Commerce shall conduct a sunset review of an antidumping duty order five years after publication of the antidumping duty order.[1] The Statement of Administrative Action ("SAA") – an authoritative interpretive tool for the statute – confirms that section 751(c)(1) requires Commerce to make a sunset determination on an order-wide, rather than a company-specific, basis.[2]

Questions 3 through 8

2. Questions 3 through 8 relate to "Waiver Provisions." The following discussion of the general statutory and regulatory scheme regarding waivers, as well as U.S. actions taken to address the DSB rulings on this issue, provides background for the responses to these questions.

3. Section 751(c)(4) of the Tariff Act permits a respondent interested party to waive its participation in a Commerce sunset review.

4. Subparagraph (A) of section 751(c)(4) – "[i]n general" – permits a party to "elect not to participate" in a Commerce sunset review, without prejudice to the party's right to participate in the injury-related sunset review conducted by the U.S. International Trade Commission. By

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[1] 19 U.S.C. 1675(c)(1) (Exhibit ARG-33).

[2] SAA at 879 ("Commerce and the [U.S. International Trade] Commission will make their sunset determinations on an order-wide, rather than a company-specific basis.") (Exhibit US-12). The SAA is a type of legislative history. In the United States, legislative history is often considered for purposes of ascertaining the meaning of a statute. The function of the SAA is set forth in the SAA itself. *See* U.S. Answers to First Set of Panel Questions (8 January 2004), paras. 97-98, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods From Argentina* (WT/DS268).

using the verb "elect", the statute contemplates that a party will "elect not to participate" by taking affirmative action to signal that it has voluntarily chosen to waive its participation, *i.e.*, by submitting a waiver to Commerce.

5. The "Effect of Waiver" is set forth in subparagraph (B) of section 751(c)(4). Subparagraph (B) provides that, where an interested party "waives its participation pursuant to this paragraph [*i.e.*, paragraph (4) of section 751(c)]", Commerce shall conclude that revocation of the order would be likely to lead to continuation or recurrence of dumping "with respect to that interested party."

6. Thus, the only action required by section 751(c)(4) of the Tariff Act is that Commerce make an affirmative company-specific likelihood finding *as a consequence of a party choosing to submit a statement of waiver* in a sunset review. The Statement of Administrative Action – an authoritative interpretive tool for the statute – confirms this plain reading of the statutory provisions. Specifically, the SAA states,

> To reduce the burden on all parties involved, new section 751(c)(4) permits foreign interested parties ... to waive their participation in a Commerce sunset review. *If Commerce receives such a waiver,* Commerce will conclude that revocation ... would be likely to lead to continuation or recurrence of dumping ... with respect to *the submitter*.[3]

7. In other words, the statute permits parties to avoid incurring the time and expense of participating in the Commerce side of a sunset review when they wish only to contest the likelihood of continuation or recurrence of injury before the U.S. International Trade Commission. A party may do so by submitting a waiver statement to Commerce.

8. Commerce implemented the statutory waiver provision in its 1998 Sunset Regulations by setting forth the timing and contents of a statement of waiver.[4] The Panel referred to this category of waiver as "affirmative waiver."[5] At the same time, Commerce indicated that it also would treat failure to file a complete substantive response to the sunset review initiation notice as a waiver of participation.[6] As Commerce clarified in the Preamble to its 1998 Sunset Regulations, "failure to file a complete substantive response ... *also* will be treated as a waiver of participation."[7] The Panel referred to this category of waiver as "deemed waiver" and correctly

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[3]SAA at 881 (Exhibit US-12).

[4]*See* 19 C.F.R. 351.218(d)(2)(i) and (ii) (1998) (Exhibit US-13). Subparagraph (i) sets forth the timing for filing a statement of waiver, and subparagraph (ii) indicates the contents of a statement of waiver.

[5]Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods From Argentina*, WT/DS268/R, para. 7.83 ("Panel Report").

[6]19 C.F.R. 351.218(d)(2)(iii) (1998) (Exhibit US-13).

[7]Preamble to Commerce 1998 Sunset Regulations, 63 FR at 13518 (emphasis added) (Exhibit US-14).

found that the deemed waiver category was "create[d]" by section 351.218(d)(2)(iii) of Commerce's 1998 Sunset Regulations.[8]

9. As discussed in the U.S. submissions, to address the adverse findings of the DSB concerning both categories of waiver, Commerce amended its sunset regulations in October 2005 to eliminate the possibility that Commerce's order-wide likelihood determinations would be based on assumptions about likelihood. Specifically, Commerce revised the so-called "affirmative waiver" provisions so that a party electing not to participate in the Commerce sunset review would include in its waiver a statement that it would be likely to dump if the order were revoked.[9] Commerce also removed section 351.218(d)(2)(iii) from its sunset regulations, thus eliminating the provision that created the so-called "deemed waiver" category.[10] As explained in the Preamble to the amended sunset regulations, Commerce "will no longer make company-specific likelihood findings for companies that fail to file a statement of waiver and fail to file a substantive response to the notice of initiation."[11]

> ***Q3. The Panel notes that Section 751 (c)(4)(B) of the Tariff Act of 1930 requires the USDOC to find likelihood with respect to companies which waive their right to participate. The Panel also notes that Section 218(d)(2)(ii) of the Regulations stipulate that "every statement of waiver must include a statement indicating that the respondent interested party waives participation in the sunset review before the Department; a statement that the respondent interested party is likely to dump".***
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> ***Please explain, in light of the above-referenced provisions of the US law and its other provisions that may also be relevant, what the US law stipulates with respect to respondents that do not respond at all to the USDOC's questionnaire and those that provide incomplete responses. Specifically, please explain whether and how the US law also directs the USDOC to find likelihood for these exporters.***

10. United States law does ***not*** direct Commerce to find likelihood with respect to a respondent that does not respond at all to a Commerce questionnaire or that provides an incomplete response to a Commerce questionnaire. As discussed above, and as the original Panel found, Commerce's 1998 Sunset Regulations provided for the treatment of failure to file a complete substantive response to the sunset review initiation notice as a waiver of participation. Such treatment, *i.e.*, deemed waiver, was not required by the statute, but rather was created by

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[8]Panel Report, paras. 7.83 and 7.85.

[9]*See* 19 C.F.R. 351.218(d)(2)(ii) (2005), 2005 Sunset Regulations, 70 FR at 62064 (Exhibit ARG-12).

[10]*See* 2005 Sunset Regulations, 70 FR at 62064 ("Section 351.218 is amended by ... removing and reserving paragraph (d)(2)(iii) ....") (Exhibit ARG-12).

[11]Preamble to 2005 Sunset Regulations, 70 FR at 62062 (Exhibit ARG-12).

section 351.218(d)(2)(iii) of the regulations. Commerce removed section 351.218(d)(2)(iii) from its sunset regulations, thereby eliminating the concept and consequences of a deemed waiver.[12]

11. Thus, U.S. law does ***not*** stipulate any specific finding with respect to a respondent that does not respond at all to a Commerce questionnaire or that provides an incomplete response to a Commerce questionnaire. Rather, where a respondent does not respond to a questionnaire or provides an incomplete response, section 776 of the Tariff Act provides for Commerce's use of "facts otherwise available" in reaching its determination,[13] subject to certain conditions.[14] Commerce regulations concerning use of facts available in a sunset review also provide for reliance on, *e.g.*, evidence of dumping from prior Commerce determinations and information contained in parties' substantive responses to the sunset notice of initiation.[15] That is the approach identified by the original Panel in explaining the options available to an investigating authority when an exporter fails to participate in a proceeding.[16] As Commerce explained in its amended sunset regulations, in response to commenters who noted that the regulations no longer specify how Commerce will address the situation where a respondent interested party does not participate in a sunset review,

> As a general matter, the Department will make its order-wide, likelihood determination on the basis of the facts and information available on the record of the sunset review which may include, where appropriate, use of facts available as provided for in the statute and regulations.[17]

12. As previously stated, U.S. law does ***not*** require Commerce to make company-specific likelihood findings with respect to a respondent interested party that fails to participate in the sunset review. Commerce's sunset determinations supports this fact. Since the 2005 Sunset Regulations went into effect, Commerce has conducted and completed multiple sunset review proceedings. In several of the sunset proceedings, there was no respondent interested party participation. Under these circumstances, and as is evident from analyses in the decision memoranda, Commerce based its likelihood determination on the facts and information on the record of the sunset review; Commerce did ***not*** find that a company had elected to waive participation or make a company-specific likelihood determination with respect to the companies

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[12]*See* 2005 Sunset Regulations, 70 FR at 62064 ("Section 351.218 is amended by ... removing and reserving paragraph (d)(2)(iii) ....") (Exhibit ARG-12).

[13]19 U.S.C. 1677e (Exhibit US-15).

[14]*See* 19 U.S.C. 1677m(e) ("Use of Certain Information") (*e.g.*, the information is submitted by the established deadline, and the information can be verified) (Exhibit US-16).

[15]*See* 19 C.F.R. 351.308(f) (1998) (Exhibit US-17).

[16]Panel Report, para. 7.95.

[17]Preamble to 2005 Sunset Regulations, 70 FR at 62063 (Exhibit ARG-12) .

that failed to participate.[18]

Q4a) Please explain generally the relevance of the company-specific finding of likelihood under Section 751 (c)(4)(B) to the USDOC's order-wide determination.

13. As discussed in response to Question 1, under U.S. law Commerce is required to make its ultimate sunset determination on an order-wide basis. In making its order-wide determination, Commerce must consider all information and argument on the record of the sunset proceeding. Thus, while Commerce would consider a company-specific likelihood finding in making its order-wide likelihood determination, the relevance of such a company-specific finding to the ultimate likelihood determination always would depend on the facts on the administrative record in that sunset review. Although Argentina has failed to provide any support for its vague assertion that probative evidence contradicting an exporter's admission of likely dumping could even exist, Commerce would nevertheless take such as-yet-hypothetical information into account when making its order-wide likelihood determination. In such a situation, the weight given to a company-specific finding would be adjusted accordingly.

Q4b) Given the mandate of Section 751 (c)(4)(B) of the Tariff Act to find likelihood for companies that waive participation, would it be accurate to say that the USDOC has to find likelihood in its ultimate order-wide determination in every sunset review where the USDOC finds likelihood for individual companies that waive participation?

14. No. The only action mandated by section 751(c)(4) of the Tariff Act is that Commerce make an affirmative *company-specific* likelihood finding as a consequence of a party submitting a statement of waiver in a sunset review. As discussed above, the relevance of a company-specific finding always would depend on the facts on the administrative record in that sunset review. Commerce is *not* required to find likelihood in its ultimate order-wide determination just because a company elects not to participate in the sunset review.

Q5. Please explain whether there has been any sunset review where the USDOC found likelihood for individual exporters by virtue of Section 751 (c)(4)(B) of the Tariff Act and found no likelihood on an order-wide basis. If so, please provide a copy of the USDOC's final determination in such reviews.

15. Commerce amended its sunset regulations in October 2005 to address the DSB recommendations and rulings concerning the "waiver provisions." As discussed above, Commerce eliminated the so-called "deemed waiver" provision and revised the so-called

[18]*See, e.g., Final Results of the Expedited Sunset Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China, Issues and Decision Memorandum* (1 June 2006) (Exhibit US-18).

"affirmative waiver" provisions so that a party electing not to participate in the Commerce sunset review would include a statement that it would be likely to dump if the order were revoked. The amended regulations were effective for sunset reviews initiated on or after October 31, 2005. Commerce has made no company-specific likelihood findings pursuant to section 751(c)(4)(B) of the Tariff Act in sunset reviews initiated on or after October 31, 2005, because no company has filed a waiver statement in any of these reviews. In other words, the condition precedent for application of section 751(c)(4)(B) of the Tariff Act has not been implicated in any sunset reviews conducted since Commerce amended its sunset regulations in October 2005.

Q6. The Panel notes that Section 751(c)(4) of the Tariff Act of 1930 provides, in relevant part:

(4) Waiver of participation by certain interested parties

(A) In general

An interested party described in section 1677(9)(A) or (B) of this title may elect not to participate in a review conducted by the administering authority under this subsection and to participate only in the review conducted by the Commission under this subsection.

(B) Effect of waiver

In a review in which an interested party waives its participation pursuant to this paragraph, the administering authority shall conclude that revocation of the order or termination of the investigation would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) with respect to that interested party. (emphasis added)

a) Please explain whether electing not to participate within the meaning of subparagraph (A) constitutes a waiver within the meaning of subparagraph B.

16. Yes, electing not to participate within the meaning of subparagraph (A) does constitute a waiver within the meaning of subparagraph (B). Sections 351.218(d)(2)(i) and (ii) of Commerce's 2005 Sunset Regulations prescribe the timing and contents of the waiver statement to be filed by a party electing not to participate in a sunset review.

b) How does an exporter elect not to participate within the meaning of subparagraph A? Does remaining silent, i.e. not submitting any response to the USDOC's questionnaire, constitute an election not to participate within the meaning of subparagraph (A)? If so, does this constitute a waiver for the purposes of subparagraph B?

17. As discussed above, section 751(c)(4)(A) of the Tariff Act contemplates that a party will

"elect not to participate" by taking affirmative action to signal its waiver of participation, *i.e.*, by submitting a waiver to Commerce. The Statement of Administrative Action – an authoritative interpretive tool for the statute – confirms this reading of the statute.[19] Commerce implemented the statutory waiver provision in its 1998 Sunset Regulations by specifying the timing and contents of a waiver statement. In October 2005, Commerce revised its regulations so that a party electing not to participate in the Commerce sunset review would include in its waiver a statement that it would be likely to dump if the order were revoked. Commerce's revised sunset regulations, at 19 C.F.R. 351.218(d)(2)(i) and (ii), prescribe how an exporter may elect not to participate within the meaning of subparagraph (A) of section 751(c)(4) of the Tariff Act.

18. Remaining silent, *i.e.*, not submitting any response, does not constitute an election not to participate within the meaning of subparagraph (A) and does not constitute a waiver for purposes of subparagraph (B). As discussed above, in October 2005 Commerce removed section 351.218(d)(2)(iii) from its sunset regulations, thus eliminating the provision that created the so-called "deemed waiver" category.[20] As a result, Commerce "will no longer make company-specific likelihood findings for companies that fail to file a statement of waiver and fail to file a substantive response to the notice of initiation."[21] As discussed above, since the 2005 Sunset Regulations went into effect, Commerce has conducted and completed multiple sunset review proceedings. In several of the sunset proceedings, respondent interested parties failed to file a substantive response to the notice of initiation. Under these circumstances, Commerce based its likelihood determination on the facts and information on the record of the sunset review; Commerce did ***not*** conclude that these parties had elected to waive participation, nor did Commerce make a company-specific likelihood determination with respect to the companies that failed to participate.[22]

> ***Q7. Under what circumstances would a signed waiver statement constitute a sufficient evidentiary basis for an affirmative likelihood determination? Would your response depend on the circumstances of a given sunset review? For example, would your response differ in relation to: (i) a review in which the only exporter submits a signed waiver statement; (ii) a review in which, of the 20 exporters involved, 10 submit a signed waiver statement and 10 participate cooperatively; (iii) a review in which, of the 20 exporters involved, 1 submits a signed waiver statement and 19 remain silent? How would the company-specific conclusions of likelihood with respect to exporters that waive***

[19]SAA at 881 ("*If Commerce receives such a waiver*, Commerce will conclude that revocation ... would be likely to lead to continuation or recurrence of dumping ... with respect to *the submitter*") (emphasis added) (Exhibit US-12).

[20]*See* 2005 Sunset Regulations, 70 FR at 62064 ("Section 351.218 is amended by ... removing and reserving paragraph (d)(2)(iii) ....") (Exhibit ARG-12) .

[21]Preamble to 2005 Sunset Regulations, 70 FR at 62062 (Exhibit ARG-12) .

[22]*See, e.g., See, e.g., Final Results of the Expedited Sunset Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China, Issues and Decision Memorandum* (1 June 2006) (Exhibit US-18).

their right to participate (by signing a statement of waiver) in these scenarios be reflected in an ultimate order-wide determination?

19. Commerce is required to make its ultimate sunset determination on an order-wide basis. In making its order-wide determination, Commerce must consider all information and argument on the record of the sunset proceeding. Commerce would consider a company's waiver statement, including the company's statement that it would be likely to dump if the order were revoked, in making its order-wide likelihood determination. However, whether such a statement could constitute a sufficient evidentiary basis for an affirmative likelihood determination would depend on the specific facts and circumstances of a given sunset review. However, as discussed above in response to Question 5, Commerce has made no company-specific likelihood findings in sunset reviews subject to the amended sunset regulations because no company has filed a waiver statement in any of these reviews. Because no company has filed a waiver statement, there are no examples of how Commerce has reflected a company-specific likelihood determination(s) in the ultimate order-wide determination, and the question is a purely hypothetical one. The fact that no company has filed a waiver statement is not surprising. Waiver statements were rare in sunset reviews under the 1998 Sunset Regulations. Waiver statements in sunset reviews under the 2005 Sunset Regulations likely also will continue to be, as Argentina itself concedes, "rarely ... forthcoming".[23]

20. The facts the Panel has identified in its question would form part of the record and by regulation would be taken into account in making the order-wide determination. The probative value of any particular fact would depend on the other facts on the record.

Q8 The Panel notes that Section 751 (c)(4) of the Tariff Act does not define the term "waiver". The Panel also notes that Section 351.218(2)(ii) of the Regulations states that a statement of waiver "must include a statement indicating that the respondent is likely to dump."

Can this, in your view, be interpreted to mean that the Regulations nullify, or limit the scope of, the Statute in so far as the Statute refers to waiver.

21. The regulations neither nullify nor limit the scope of section 751(c)(4) of the Tariff Act, rather, as provided under U.S. administrative law, the regulations implement the statute and help define th conditions under which a party will "elect not to participate."

22. As discussed above, subparagraph (A) of section 751(c)(4) – "[i]n general" – permits a party to "elect not to participate" in a Commerce sunset review without prejudice to the party's right to participate in the injury-related sunset review conducted by the U.S. International Trade

[23]Argentina First Written Submission, para. 208.

Commission. By using the verb "elect", the statute contemplates that a party will "elect not to participate" by taking affirmative action to signal its waiver of participation, *i.e.*, by submitting a waiver to Commerce. The Statement of Administrative Action – an authoritative interpretive tool for the statute – confirms this reading of the statute. Specifically, the SAA states,

> To reduce the burden on all parties involved, new section 751(c)(4) permits foreign interested parties ... to waive their participation in a Commerce sunset review. *If Commerce receives such a waiver*, Commerce will conclude that revocation ... would be likely to lead to continuation or recurrence of dumping ... with respect to *the submitter*.[24]

23. Sections 351.218(d)(2)(i) and (ii) of Commerce's sunset regulations implement the statutory waiver provision by prescribing how an exporter may elect not to participate, *i.e.*, waive participation, in a sunset review.

24. Prior to the October 2005 amendments to the sunset regulations, Commerce also treated failure to file a complete substantive response to the sunset review initiation notice as a waiver of participation. As the Panel correctly found, such "deemed waivers" were "create[d]" by section 351.218(d)(2)(iii) of Commerce's 1998 Sunset Regulations.[25] There is no dispute that the regulatory provision pertaining to the deemed waiver category has been removed from Commerce's sunset regulations. The scope of the waiver provisions in the regulations is now simply coterminous with the statute.

> ***Q10. a) The Panel notes that the USDOC asked the Argentine exporters to submit their consolidated and unconsolidated financial statements for the 1996-2000 period, as well as to provide information relating to their costs and the volume of their shipments to the United States in the period of review.***
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> ***Please explain for what purpose the USDOC sought the mentioned information. More specifically, please explain whether the USDOC intended to, and the extent to which it did, determine whether these exporters actually dumped in the period of review, and how this relates to the obligations under Articles 11.3 and/or 2.1 of the Agreement. Please explain how exactly the USDOC intended to, and the extent to which it did, base its determination regarding the existence of dumping on the costs of the exporters, citing any record evidence supporting your response.***

25. Bearing in mind the obligation to make a determination as to whether dumping was likely to continue or recur if the order were revoked, and bearing in mind that there were no

[24]SAA at 881 (Exhibit US-12).
[25]Panel Report, paras. 7.83 and 7.85.

administrative reviews of Argentine companies during the sunset period of review (and that Siderca had ceased shipping), Commerce sought information that would permit it to make a determination as to whether dumping would likely continue or recur if the order were revoked, including evaluating the overall financial health of the Argentine OCTG industry. Aware that Acindar, the only exporter, had no home market or third country sales, Commerce drafted the questionnaire with the intention of asking questions that respondents could actually answer, and therefore requested the product-specific cost data to provide an estimate of the normal value.[26] Had the Argentine producers been able to report their actual product-specific cost information, it could have been verified by tying the costs back to the financial statements. Commerce did not seek to perform a calculation of a margin of dumping, nor was it obliged to perform such a calculation.

26. As the United States has noted, Article 11.3 does not require that a likelihood determination be based on a determination of the existence of dumping. Nor did Commerce seek to establish the existence of dumping. Instead, Commerce examined the available evidence on the exporters' behavior in order to ascertain whether dumping was likely to continue or recur if the order were revoked. To do so, Commerce sought to compare Acindar's product-specific costs with the importer data providing the prices of its U.S. sales. However, none of the Argentine producers maintained their product-specific cost data. Therefore, Commerce could not examine these costs to ascertain the companies' past behavior. Acindar provided its financial statements as requested, but provided no other information that could assist Commerce in making its determination for the period 1995-2000.

27. Therefore, Commerce used the other information available on the record of the proceeding with respect to Acindar – the U.S. average prices (which included goods exported to the United States) – and compared them with Acindar's sales prices. Acindar's sales prices were lower than the U.S. average prices. Commerce also reviewed Acindar's financial statements, which reflected its weakened financial position. Based on the totality of the evidence, Commerce concluded that it was likely that dumping would continue or recur if the order were revoked.[27]

> ***b) If the USDOC intended to determine whether the Argentine exports to the United States were dumped during the period of review, please explain why the USDOC did not seek information relating to these companies' domestic sales prices and their export prices to the United States. Please explain how the USDOC intended to, and the extent to which it did, determine whether these companies dumped in the past on the basis of information that it sought from them, i.e. their costs and the volume of their shipments to the United States,***

[26]Counsel for U.S. Steel noted that respondents would not have a viable home market. (Letter from Skadden, Arps, Exhibit ARG-27, pp. 5, 9.) In response, Siderca did not assert that its home market *was* viable (Exhibit ARG-19, p. 7); Acindar did not file any comments in response to petitioners' letter.

[27]Section 129 Determination, at 10 (Exhibit ARG-16).

citing any record evidence supporting your response. Please explain how this relates to the obligations under Articles 11.3 and/or 2.1 of the Agreement.

28. Commerce did not intend to determine whether the Argentine exports to the United States were dumped during the period of review. Rather, Commerce sought to collect information about past behavior to facilitate its evaluation of what would be likely to happen in the future. Commerce did not seek Argentine producers' export prices to the United States because it was aware of the brevity of the time available to conduct the proceeding. Commerce considered that, in the context of the limited amount of time available to conduct the proceeding, it could place the U.S. price information based on Acindar's importers' data on the record prior to the due date for the respondents' answers to the questionnaires and, having given the respondents the opportunity to comment on that data, instead have the respondents focus on gathering data Commerce could not access – cost data. Therefore, respondents were free to discuss the relevance of the data on the record as early as November 22, 2005, and to provide alternative data should they consider the existing price data inappropriate.

29. Siderca actually proposed comparing its costs to the Preston price data, in lieu of the comparison methodology proposed by petitioners' counsel.[28] Petitioners' counsel had proposed using Argentine average unit values based on Argentina's export classification system, but Siderca argued that such data did not form the most appropriate basis for comparison. Siderca then suggested that comparing its costs to the Preston price data, rather than the Argentine average unit values supplied by petitioners was more appropriate.

Q11a) Please explain to what extent, if at all, an investigating authority is bound by the definition of dumping found in Article 2.1 of the Agreement in a determination regarding the existence of dumping in the period of review in a sunset review under Article 11.3 of the Agreement. In other words, in your view, can an investigating authority determine the existence of dumping without having regard to the normal value and export price of the exporter(s) under review?

30. The Appellate Body in *US – Corrosion Resistant Steel Sunset Review* explained the relationship between Article 2.1 and Article 11.3, noting that Article 2.1 "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."[29] The Appellate Body went on to state 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

[28]December 7 Letter from Siderca, p. 5 (Exhibit ARG-19).

[29]Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, para. 109 (adopted 9 January 2004) ("*US – Corrosion-Resistant Steel Sunset Review (AB)*").

continuation or recurrence of dumping . . . (that is, to the introduction of that product into the commerce of the importing country at less than its normal value)."[30] Notably, however, the Appellate Body ultimately concluded that – even though the definition of dumping applies in sunset reviews, investigating authorities are nevertheless not obligated to calculate a margin of dumping.[31] Nor did the Appellate Body conclude that an investigating authority must calculate a future normal value and a future export price, or a past normal value and a past export price. Rather, the Appellate Body noted that Article 11.3 does not prescribe a methodology, nor identify particular factors to be examined.

31. The question for Commerce in the Section 129 proceeding was whether dumping would be likely to continue or recur if the order were revoked; in other words, would normal value likely exceed export price. To make that forward-looking determination, Commerce examined the past behavior of the two identified Argentine exporters. Commerce was aware that Acindar did not have a viable home market or third country sales.[32] Rather than asking respondents to provide information that Commerce knew the lone exporter could not provide, Commerce instead asked respondents to provide product-specific cost data. Commerce did so for the purpose of examining respondents' past behavior over the life of the order. Respondents were unable to provide actual product-specific cost data. Commerce therefore used "other independent sources" of information as set out in paragraph 7 of Annex II (*i.e.*, "published price lists, official import statistics and customs returns"). On the basis of Acindar's pricing behavior, as evidenced by the importer data, Commerce concluded that it was likely that Acindar had dumped during the life of the order. Acindar offered no contrary evidence. As a result, Commerce relied on the importer data and price lists as one basis to support its ultimate conclusion that dumping would be likely to continue or recur if the order were revoked.

> ***Q11b) In your view, is there a difference between calculating the margin of dumping for an exporter and determining the existence of dumping for that exporter? In other words, can an investigating authority determine that an exporter dumped in a given period in the past without calculating a margin of dumping or relying on a margin already calculated in the past? If your response is in the affirmative, please explain whether such a determination can be made without having regard to the two components of dumping, i.e. normal value and export price, set out in Article 2.1 of the Agreement.***

32. Article 5.1 provides for an investigation to determine the "existence, degree and effect" of any alleged dumping. Therefore, the Antidumping Agreement itself contemplates a distinction between the existence of dumping and the degree of dumping. For example, an exporter could

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[30]*See US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 109.

[31]*See US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 127.

[32]*Oil Country Tubular Goods Other than Drill Pipe*, 68 Fed. Reg. 13,262 and Issues and Decision Memorandum, at Comment 1 (Exhibit US-3).

stipulate that its normal value exceeded export price in a particular period. In that case, dumping would exist, but it would not be possible to calculate a margin of dumping.

33. Commerce did not determine the existence or degree of dumping during the sunset period of review, nor was it obliged to do so. Instead, Commerce examined the past behavior of Acindar, including Acindar's prices as reflected on the importers' customs entries, as well as the prevailing price in the United States, and concluded that it was likely that Acindar had dumped during the sunset period of review. There was no evidence to the contrary on the record of the proceeding.

34. Notably, Acindar did not even attempt to argue that it had not dumped, or that it would not dump if the order were revoked; rather, Acindar argued that it had not been a significant producer of OCTG during the sunset period of review.[33] However, Acindar was, of course, the *only* Argentine exporter of OCTG during the sunset period of review. Based on an examination of all of the facts, Commerce concluded that Acindar was likely to dump if the order were revoked – in other words, Commerce concluded that Acindar's export price would likely be lower than normal value.

Q11c) On what basis could an investigating authority properly find affirmative likelihood of continuation or recurrence of dumping other than with regard to the existence of dumping?

35. A determination of likelihood of continuation or recurrence of dumping is made on the basis of the facts before the investigating authority. Given the forward-looking nature of the inquiry, which must presume a fact not in existence (termination of the order), there is no one methodology, no single factor, that must be taken into account in reaching any conclusion about what is likely to happen in the future. At a minimum, no determination of the existence of dumping is necessary; Article 11.3 does not require it.[34] Indeed, the Agreement itself recognizes that a finding of *no* dumping is not dispositive of the question of whether dumping is likely to continue or recur.[35] The probative value of other factors would depend on the facts of each determination.

Q12. The Panel notes Argentina's claim regarding the comparison the USDOC made between Acindar's export prices and the average transaction price (by weighted average value) that prevailed in the US market for the subject product. The Panel also notes that the USDOC inferred from this

[33]Acindar Questionnaire Response (Exhibit ARG-14).

[34]Article 11.3 does not require separate determinations as to whether dumping is likely to continue, versus whether dumping is likely to recur.

[35]*See* Article 11.3 (dumping may *recur)* and Footnote 22 (absence of dumping in the most recent review does not require a negative determination in a sunset review).

comparison the conclusion that Acindar was likely dumping in the period of review.

a) Please explain the legal basis under the Agreement for basing a determination of dumping, be it likely or actual, on a comparison of an exporter's export price with the average transaction price (by weighted average value) that prevails in the country of imports for the subject product.

36. The United States considers that the circumstances of this sunset review must be kept in mind. First, the sole known exporter of Argentine OCTG to the United States *prior* to the sunset review stopped shipping to the United States after the imposition of the order. Therefore, there were no administrative reviews of that shipper and no dumping margins calculated pursuant to any such review. Second, a new entrant into the U.S. market appeared anonymously during the sunset period of review and was not subject to administrative review until after the sunset period of review. There was, therefore, for the sunset period of review, a limited amount of information, attributable entirely to the respondents' own choices (to stop shipping and to decline to participate in the sunset review). The answer cannot be the one advocated by Argentina – that a lack of shipping activity, or a failure to make oneself known, necessarily requires a negative determination as to what would happen if the order were revoked. It would be odd indeed for the Agreement to contemplate that the order may be continued even if a respondent has obtained a zero margin in its most recent administrative review, but that the order must be revoked if respondents manage to avoid having their transactions examined. The investigating authority must do what it can with the information it has, including the information submitted – or not submitted – by the respondents.

37. Article 11.3 does not prescribe any particular methodology to be used by an investigating authority in making a likelihood determination in a sunset review.[36] Commerce did not examine the existence of dumping, nor did it calculate a dumping margin; nor is an investigating authority obliged to do so under Article 11.3. As the Appellate Body has recognized, "a broad range of factors other than import volumes and dumping margins is potentially relevant to the authorities' likelihood determination."[37] Therefore, the legal basis for Commerce's analysis of the facts before it is Article 11.3, which does not prescribe the methodology or the factors to be examined.

38. The United States notes that the information Commerce examined is precisely the information identified in paragraph 7 of Annex II – customs returns and price lists. As the United States noted in its closing statement, if the Argentine respondents considered that there was a more suitable price list to be considered, the respondents were free to place such a list on the record. Commerce placed the Preston price list on the record on November 22, 2005, over a week before the respondents' questionnaire responses were due.

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[36] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 149.
[37] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 186.

39. Finally, as discussed below, in addition to comparing Acindar's export prices to contemporaneous prices in the United States for the same category of merchandise, Commerce also considered the condition of the OCTG market at the end of the sunset review period.

> ***b) The Panel notes Argentina's assertion that the USDOC ignored certain factors that affected this comparison, such as differences in the physical characteristics of the products compared, the levels of trade at which the comparison was made, as well as differences relating to transportation costs.***
>
> ***Please explain in detail and by referring to the relevant parts of the record, whether any of these factors were known to the USDOC in the Section 129 proceedings at issue and, if so, whether this was taken into account.***

40. The United States considers that, in keeping with the scope of the Panel's review as provided under Article 17.5(ii) of the Antidumping Agreement, it is important to recall the facts and arguments before the investigating authority. In response to Commerce's request for data on ten product categories, Siderca argued that there were "literally thousands" of product combinations within Commerce's categories,[38] suggesting that no comparison at all was possible. In response to comments from petitioners' counsel, Siderca then argued that Commerce should make an even *broader* comparison than the one Commerce had proposed in the questionnaire, and Siderca, in fact, used the Preston Pipe and Tube data as the basis for comparison.[39] Moreover, Argentina neglects to provide a method for making such adjustments given that the data is not that specific. Had Argentine producers maintained their product-specific cost data from the period, Commerce would have been able to conduct its analysis on a more specific level.

41. Recalling that Commerce was not calculating a dumping margin pursuant to Articles 2.2 *et seq*, Commerce nevertheless took into account characteristics that would have the greatest effect on price.[40] The Preston Pipe & Tube Report separated products by type of OCTG, whether welded or seamless, and whether carbon or alloy. Its segregation of tubing from casing also addressed much of the size concern Argentina now raises, as tubing is a small tubular product in limited sizes, and casing is larger size material. Even in the comparison Argentina raised during the panel hearing, Argentina conceded that there is minimal overlap in sizes between tubing and casing. Additionally, though the Preston Pipe & Tube Report does not distinguish between end finish (e.g. plain vs. threaded and coupled), the universe of material included in the carbon welded tubing and carbon welded casing groups does include both plain and threaded and coupled material, diminishing any impact this may have on price comparisons. With respect to transportation costs, we note that not all of the Preston Publishing selling prices included

[38]Siderca's Questionnaire Response, p. 4 (Exhibit ARG-15).
[39]Siderca's December 7 Letter, p. 5 (Exhibit ARG-19).
[40]U.S. Second Written Submission, at 12.

transportation costs. The Preston Pipe data included both domestic and import shipments. The terms of the latter were FOB mill.[41] Even had Commerce been able to adjust for these factors, Acindar's sales prices were so far below the U.S. average prices that the end result would likely have not changed.

42. The United States recalls that two of the exhibits Argentina presented during its oral argument, Exhibit ARG-34 And Exhibit ARG-35, were not on the record of the Section 129 proceeding. Therefore, Commerce did not have this information before it when making its determination. Consideration of such information cannot be reconciled with Article 17.5 (ii) of the Agreement.

43. Even if the Panel were to consider the facts introduced here, and not in the Section 129 determination, the price lists included therein are for seamless OCTG, yet Acindar sold only welded OCTG – a product with a very different cost and price structure. Furthermore, a price list is not the actual price arrived at for the sale. In fact, discounting of list prices was common practice during the period because of the depressed condition of the OCTG market.

44. Argentina asserted that the carbon versus alloy comparison shows a difference of less than 10 percent.[42] This comparison fails to accurately reflect the parameters of carbon and alloy products sold in the marketplace. Whereas there are a limited number of carbon grades, there are a multitude of alloy grades. Alloy market prices of OCTG will reflect a composite of these alloy grades. In fact, following the same logic of Argentina, if we were to compare non-normalized J55 carbon tubing to alloy P grade material, there would be a price difference of 35%. Commerce made every effort to take physical characteristics and other differences into account when making its comparisons. However, it was limited by the available information on the record – information that was limited because Argentine respondents failed to retain their product-specific cost data.

45. In short, Commerce analyzed the evidence on the record before it, which was sufficiently specific to enable a basic comparison of Acindar's prices to the prevailing prices in the market. Commerce was not calculating a margin of dumping, nor was it obliged to. Rather, Commerce engaged in an examination of Acindar's past behavior as a basis for evaluating what Acindar would be likely to do in the future.

Q13. The Panel notes that the USDOC's Section 129 Determination states that the USDOC did not use the cost data in Acindar's financial statements because those data related to a product category that included products other than the subject product. The USDOC stated that "the inclusion of costs related to the merchandise not subject to review would distort [the USDOC's]

[41]Information for the Record, app. III (Exhibit ARG-18).
[42]Argentina Opening Statement at Panel Meeting, at para. 33 (July 12, 2006).

analysis." Yet the USDOC relied on these financial statements with respect to its determination that the OCTG market was depressed in the period of review.

a) Please explain, by referring to the relevant parts of the record, the relevance of the financial statements of Siderca and Acindar for both the company-specific and order-wide phases of the USDOC's sunset determination in these proceedings. More specifically, please explain whether the USDOC used these statements in support of its order-wide determination that dumping was likely to continue or recur should the order be revoked and where such use is reflected on the record.

46. With respect to the company-specific determination for Acindar, Commerce found that the weakened condition of Acindar, as reflected in its financial statements, supported Commerce's finding that Acindar had likely dumped during the period and would likely continue to do so if the order were revoked.[43]

47. With respect to the order-wide determination, Commerce used Siderca and Acindar's financial statements in conjunction with SEC filings from U.S. producers to establish that there was a depressed OCTG market.[44] Specifically, Siderca's financial statement explained that, "[s]ales for the year were $486 million (25 percent less than the $645 million in the previous year) reflecting the effects of the drastic fall *in world demand for tubes in the oil industry*, caused by the fall in oil prices and shrinking steel markets."[45] The United States notes that Siderca stated on the record of the Section 129 proceeding that "1999/2000 was, by all accounts, a period in which the global OCTG market was depressed . . . ."[46]

48. In addition to Siderca's own statement on the record of the Section 129 proceeding, information from the financial statements of the other U.S. producers supported a finding of a depressed OCTG market. For example, Maverick Tube Corporation's 1999 10K report explains:

> Although drilling activity has been recovering from the recently depressed levels, no assurance can be given regarding the timing and extent of such recovery.[47]

49. The NS Group similarly explains that:

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[43]Section 129 Determination, at 10 (Exhibit ARG-16).

[44]Section 129 Determination, at 7 (Exhibit ARG-16).

[45]Siderca's Questionnaire Resp., at page 13 of Siderca's 2000 Financial Statement (emphasis added) (Exhibit ARG-15).

[46]Exhibit ARG-19 (p. 7).

[47]OCTG Filings of Domestic Producers, at Maverick's 1999 10K, p. 47 (Exhibit US-19).

> Demand for our OCTG products began to decline in the second half of fiscal 1998 and continued to decline significantly in fiscal 1999. Significant declines in oil and natural gas prices lead to a decline in drilling activity in the United States throughout most of 1999. This decline resulted in extensive industry-wide tubular inventories, which further negatively affected our OCTG business . . .
>
> The market conditions described above negatively affected our business during the latter half of fiscal 1998 and fiscal 1999. Our business experience indicates that oil and natural gas prices are volatile and can have a substantial effect upon drilling levels and resulting demand for our energy related products. Oil and gas prices and drilling activity began to improve in the fourth quarter of fiscal 1999, and have continued to improve into fiscal 2000. However, the timing and extent of such recovery is uncertain and we expect to incur operating losses in the energy products segment during the first half of fiscal 2000.[48]

50. These statements confirmed the weakness of the OCTG market during the period as well as the uncertainty facing the industry at the end of the period.

b) Please explain, by referring to the relevant parts of the record, whether the financial statements of these two companies reflected the overall production operations of these companies or whether the data relating to the subject product, i.e. OCTG, could be separately identified.

51. The financial statements reflected the overall production operations of the companies. Because both companies produce OCTG and non-OCTG products, the subject merchandise could be identified only in those parts of the financial statements that specifically reference OCTG production or sales, as opposed to non-OCTG production or sales. For example, even though the financial statements did not break out sales or costs for OCTG specifically, sometimes OCTG was mentioned in the text. One such example is when Siderca explained that "the international trade in tubes for the oil industry (OCTG – Oil Country Tubular Goods) was down 38 percent."[49]

c) Please explain whether the share of OCTG in these two companies' overall production operations was taken into account in making the inference on the basis of these statements that the OCTG market was depressed.

52. Siderca's financial statement stated that there was a "drastic fall in world demand for the

[48]OCTG Filings of Domestic Producers, at NS Group's 1998-99 10K, pp. 7-9 (Exhibit US-19).
[49]*See, e.g.*, Siderca's fiscal year ending March 31, 2000, at 3.

oil industry," which, as a matter of logic, meant there was a similar fall in the demand for OCTG.[50] Though the statements regarding Acindar's financial condition were more general, as explained above, Commerce referred to the SEC filings of U.S. OCTG producers to confirm the depressed situation of the OCTG market. The United States recalls that even Siderca asserted that the OCTG market was depressed in "1999/2000".[51]

d) Please explain why the USDOC made inferences regarding the state of the OCTG industry from Acindar's financial statements when it had found the information contained in those statements to be too broad for calculating a meaningful cost/price trend analysis.

53. Financial statements contain information that can be relevant to different aspects of a determination. While the financial statements did not contain sufficient information to calculate a trend analysis, they did provide one of many sources of support for the fact that the OCTG industry was depressed. Therefore, while there were several sources in support of the fact that the OCTG industry was depressed, there were no alternate sources to confirm whether the overall cost/price trend analysis reflected the reality of Acindar's OCTG production and sales.

Q14. a) Please state your reaction to Argentina's proposition, in paragraph 42 of its Oral Submission, that past events are not susceptible to prediction and that an investigating authority can determine that either dumping occurred in the past or it did not or one does not know.

54. Commerce did not "predict" past events, because a prediction is foretelling of something that has not yet occurred. Instead, Commerce looked at record evidence, including Acindar's actual sales prices to the United States and prevailing average prices in the United States. It then concluded that, based on the depressed OCTG market and significant underselling, Acindar had likely dumped during the period. Argentina seems to assume that inferences cannot be drawn about the past. However, Argentina does not explain why that is true.

55. Nothing in the text of Article 11.3 requires an investigating authority to determine that dumping occurred in the past or to conclude that it does not know whether dumping occurred in the past. Argentina's position would, not surprisingly, permit companies to manipulate proceedings to deprive the record of certain kinds of evidence in order to require a negative determination. That is not what Article 11.3 provides, nor is it consistent with the responsibility that each company bears when participating in an antidumping proceeding.

b) In your view, what is, if any, the difference between determining past dumping and past likely dumping?

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[50]Section 129 Determination, at 9 (Exhibit ARG-16) (emphasis added).
[51]Siderca December 7 Letter, p. 7 (Exhibit ARG-19).

56. Please also refer to the answers to question 11, above. The meaning of "dumping" is defined in Article 2.1 of the Agreement, *i.e.*, selling a product in another country at less than its normal value. To calculate a dumping margin, the remainder of Article 2 provides a specific methodology to take into account a variety of factors. In contrast, an Article 11.3 determination is a prediction of what is likely to occur if the order is revoked. There is no obligation to determine the existence of dumping, nor to calculate a margin.

57. Simply because Commerce used the term "likely dumping" to describe its findings concerning the comparison of Acindar's export prices to prevailing prices in the U.S. market does not mean that Commerce determined the existence of dumping, nor that the obligations with respect to calculation of a dumping margin under Article 2 apply. Rather, given the nature and constraints of the proceeding, Commerce sought to examine each company's behavior during the life of the order.

58. Commerce's determination that Acindar had likely dumped was based on Acindar's export sales to the United States and U.S. average unit values. Commerce had to rely upon U.S. average unit values as a type of surrogate for normal value out of necessity because there were no other reliable data.

59. Acindar had no viable home market, no third country sales, and did not keep its costs. Siderca also failed to keep its product-specific costs. As provided in Annex II, Commerce used a price list as a surrogate for normal value, and that price list was Preston Pipe & Tube.

60. These pricing data were not the only information underlying Commerce's likely past dumping finding as to Acindar. In addition to making the price comparison, Commerce concluded from information gathered from Acindar's financial statements that Acindar was in a weakened financial condition, also supporting Commerce's conclusion that Acindar had likely dumped during the period.[52]

Q*15. The Panel notes the following parts the USDOC's Section 129 Determination regarding the state of the OCTG industry:*

> ***We note that Acindar's U.S. sales of OCTG occurred shortly before the end of the original sunset review period. Absent evidence that Acindar intended to cease selling in the United States, and absent evidence that prevailing market conditions were likely to improve in the near future, we consider such sales indicative of Acindar's likely future pricing behaviour were the order to be***

[52]Section 129 Determination, at 10 (Exhibit ARG-16).

> ***revoked. (emphasis added)***
>
> ***Given the weakened condition of Siderca at the end of the original sunset review period, we consider that there was no valid indication that a sudden turn-around in the OCTG market was likely. (emphasis added)***

The Panel also notes Argentina's statement in paragraph 99 of its First Written Submission that "USDOC's conclusion that there is "no valid indication that a sudden turn-around in the OCTG market was likely" is demonstrably contrary to the evidence." In this regard, Argentina refers to Siderca's letter dated 7 December 2005 (Exhibit ARG-19). That letter states:

> ***Also, Siderca's Financial Statement for the period ending June 30, 2000 shows profitability increasing and links this increase with the recovery in the oil and gas sector that was already underway. (footnote omitted)***

This letter in turn refers to Siderca's letter dated 30 November 2005, found in Exhibit ARG-15. Financial statement of Siderca as at 30 June 2000, attached to the mentioned letter, reads in relevant parts:

> ***Improved crude and gas prices have been responsible for a steady recovery in the petroleum and steel markets. In this context, the level of business of the Company during the first quarter of the year recorded a significant improvement, based on a recovery of sales volumes and a gradual rise in prices on the international steel tube market. (emphasis added)***
>
> ***Business in the first quarter measured by sales volume totalled 185,882 tons and output reached 195,132 tons, more than in the same period for the previous year, when volumes totalled 124,921 tons and117,250 tons, respectively. These figures are an indication of the recovery experienced in the sector, and exports in particular. (emphasis added)***

The Panel notes that financial statements of Siderca for the fiscal year ending 31 March 2000, found in Exhibit ARG-36, reads in relevant parts:

> ***In the middle of the fiscal year oil prices began to record a significant recovers- hitting US$ 30 per barrel in March- generating an increase in drilling and investment activity by oil companies.***
>
> ***This recovery came too late to have a significant effect on the volume of sales for the year. (emphasis added)***
>
> ***The recovery in crude prices and the good level of gas prices will influence a steady recovery ion the oil and steel markets. This outlook, seen in the context of the introduction of new installations and significant improvements in costs at operating level, leads to an optimistic outlook for the coming year.***
>
> ***The international market for seamless tubes has seen a profound globalization in recent years. (emphasis added)***

The Panel also notes that the Preston Publishing data contained in Exhibit ARG-18 Attachment 3 indicates that the prices of all subject products showed an increasing trend towards the end of the period of review of the Section 129 Determination at issue, specifically from September 1999 through July 2000.

a) Please indicate the period of review in this Section 129 sunset review. Please explain which parts of that review period the above-referenced financial statements covered.

61. The period of review for the Section 129 Determination covered the same period as the original sunset review – August 1, 1995 through July 31, 2000.[53] The United States recalls that in response to the arbitrator's questions in the Article 21.3(c) proceeding, Commerce clarified that its collection of information would be limited to the original sunset review period. Commerce relied upon Acindar's yearly financial statements that covered the beginning of the period through June 2000, and Siderca's yearly financial statements that covered from the beginning of the period through March 2000.

> ***b) Did the USDOC consider the above-quoted information in the financial statements and the Preston Publishing data in its Section 129 Determination, in particular with regard to its proposition that the OCTG industry was depressed and that there was no indication of recovery in the near future?***

62. Commerce considered all record evidence in its assessment of the OCTG industry and its determination that there was no indication of recovery in the near future. However, the

[53]Questionnaire, at 1 (Exhibit ARG-13).

statements from Siderca's financial statement relating to the future state of the OCTG market were only predictions that were contradicted by statements in the U.S. producers' U.S. Securities and Exchange Commission ("SEC") filings. The United States notes that it did not place significant weight on Siderca's last quarterly statement as it represented only a quarter and was unaudited, while Commerce did rely on the full-year audited financial statements.[54]

63. As an initial matter, it should be noted that while a trend toward upward prices is discernable beginning in September 1999 and continuing through the end of the sunset period, the trend is not without setbacks. Specifically, the Preston data show that prices for five of the eight product categories dropped at least once during the period September 1999 through July 2000, and some dropped twice. For example, the Preston data show the following pricing data for the year 2000:

Carbon ERW Tubing:	January: $762; February: $759.
	April: $788; May: $781
Carbon Seamless Casing:	April: $684; May: $671
Alloy ERW Tubing:	February:$957; March: $948; April: $944
Alloy Seamless Tubing:	February: $1,035; March: $1,014;
	June: $1,050; July: $1,048
Alloy Seamless Casing:	April: $829; May: $822[55]

64. These data confirm the statements found in U.S. producers' SEC filings that repeatedly point toward the continuing volatility of market prices and uncertainty facing the industry at the end of the period. In addition to the cites above in 13(a), the following also confirms the volatility of the OCTG market. Lone Star explained that:

> Historically, over 60% of Lone Star's revenues have been generated through the sale of oilfield products. As a result, Lone Star's revenues are largely dependent on the state of the oil and gas industry, which has historically been volatile.[56]

65. Also, Maverick Tube Corporation's 1999 10K report explains that:

> As our recent experience indicates, oil and gas prices are volatile and can have a substantial effect on drilling levels and resulting demand for our energy related products . . . [57]

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[54]*See* U.S. Second Written Submission, at 16.
[55]Information for the Record, at app. III (Exhibit ARG-18).
[56]OCTG Filings of Domestic Producers, at Lone Star's 1999 10K, pp. 20 (Exhibit US-19).
[57]OCTG Filings of Domestic Producers, at Maverick's 1999 10K, p. 47 (Exhibit US-19).

66. Because of price volatility, price trends alone, in this particular industry, are not necessarily reliable, or sufficient, to indicate true market recovery. Commerce did not consider a slight increase in prices at the end of the period a sufficient indicator of a lasting shift in the demand for OCTG that had been depressed for the majority of the period.

Q16. The Panel notes Argentina's assertion in paragraph 30 of its Oral Statement that in the period of review of the Section 129 Sunset Determination at issue, the prices of the subject product in the United States were significantly higher than other markets. Please elaborate by referring to the relevant parts of the record of the measure at issue.

67. Commerce made no such finding, and Argentina has not identified the information on the record to which it was referring.

Q17. a) How, if at all, did the original panel address the parties' claims and arguments relating to the USDOC's volume analysis? Did it exercise "judicial economy"?

68. According to the Appellate Body:

> The practice of judicial economy . . . allows a panel to refrain from making multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute.[58]

69. In this dispute, the original Panel in its interim report did not address the WTO-consistency of the volume analysis. The United States considered that in doing so, the original Panel exercised judicial economy.[59] In response to a request from Argentina to make factual and legal findings, the original Panel in its final report made factual findings but declined to make any legal findings.[60] The original Panel concluded that, in view of the finding that reliance on the dumping margin was inconsistent with Article 11.3, there was no need to address whether the volume analysis was also inconsistent with Article 11.3, and the original Panel declined to make a legal finding in that regard. Argentina argued that such a finding could be necessary for purposes of appeal, but the original Panel considered that argument "hypothetical" and rejected it.[61] However, the original Panel did agree to make factual findings to permit Argentina to appeal.[62] Argentina did not appeal the original Panel's conclusion that it did not need to address

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[58]Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, para. 133 (adopted 27 September 2004) ("*Canada – Wheat Exports and Grain Imports*").

[59]U.S. Comments on Argentina's Comments on the Interim Report, para. 3.

[60]Panel Report, para. 6.11.

[61]Panel Report, para. 6.11.

[62]Panel Report, para. 6.11.

the volume analysis, nor did Argentina appeal the original Panel's exercise of judicial economy.

b) What considerations should guide this Panel in addressing the parties' claims and arguments in these 21.5 DSU proceedings? Would any prejudice arise to any party in the event the Panel did, or did not, address the volume analysis?

70. The United States considers that it is important to recall that this proceeding is a compliance proceeding. The question for this Panel is to assess the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB. As the United States noted in its opening statement, Argentina disregards the recommendations and rulings and appears to be asking the Panel to treat this proceeding as if it were an original proceeding. That approach is manifest in the lack of reference in Argentina's submissions to the recommendations and rulings of the DSB, and Argentina's insistence that the volume analysis is within the scope of this Article 21.5 proceeding. But this is not an original proceeding – it is a compliance proceeding.

71. The redetermination in this dispute, and the volume analysis, are analogous to the EC's redetermination, and the "other factors" analysis, in *EC – Bed Linen (21.5)*, and the considerations identified in that dispute are equally applicable here. The Appellate Body in *Bed Linen* explained that the part of a redetermination that merely incorporates elements of the original determination, and which the responding Member did not have to change in order to comply with the recommendations and rulings of the DSB, is not part of a measure taken to comply.[63] The panel in that dispute articulated the important differences between an original proceeding and a compliance proceeding, and particularly the prejudice that would inure to a responding Member if the two were confused:

> the defending Member would have no opportunity to bring its measure into conformity with the AD Agreement . . . . Moreover, the defending Member would be subject to potential suspension of concessions as a result of a finding of violation . . . which, because it was not the subject to any finding of violation in the original report, the Member was entitled to assume was consistent with its obligations under the relevant agreement. Such an outcome would not seem to be consistent with the overall object and purpose of the DSU to achieve satisfactory resolution of disputes, effective functioning of the WTO, to maintain a proper balance between the rights and obligations of Members, and to ensure that benefits accruing to any Member under covered agreements are not nullified or

[63]See U.S. First Submission, para. 34, citing *EC – Bed Linen (21.5) (AB)*, paras. 86-87.

impaired.[64]

72. The panel went on to note:

> [T]he dispute settlement system provides Members with time to bring inconsistent measures into conformity, prefers mutually acceptable solutions, and provides for suspension of concessions only as a last resort.[65]

73. These considerations apply in this instance as well. The original Panel did not make any recommendation or finding regarding the volume analysis. Therefore, the volume analysis was not part of the recommendations and rulings of the DSB, and the United States did not fail to implement the recommendations and rulings by not reconsidering the volume analysis. If this Panel were to make an adverse finding now, the United States would have no reasonable period of time to bring its measure into conformity with the Antidumping Agreement and would be subject to potential suspension of concessions as a result of a finding of breach that was not in the original report.

74. Argentina attempts to distinguish *EC – Bed Linen (21.5)*, arguing that in this dispute there was no finding that Argentina had failed to make a *prima facie* case.[66] Argentina misses the point. The reasoning in *EC – Bed Linen (21.5)* is not limited to circumstances in which a panel finds that a complaining party has failed to make a *prima facie* case, particularly in terms of the prejudice a responding party would suffer. The reasoning is applicable to circumstances in which an issue was litigated, but no finding of inconsistency was made. Under those circumstances, a Member has no reasonable period of time to bring its measure into compliance and faces a potential suspension of concessions. As the panel in *EC – Bed Linen (21.5)* noted, suspension of concessions, without the reasonable period of time to bring the measure into compliance, would not seem to be consistent with the balance of rights provided for under the DSU.

75. The United States notes that had Argentina considered a finding on the volume analysis to be "necessary" to resolve the dispute, Argentina could have appealed the original Panel's conclusion that such a finding was *not* necessary, and Argentina could have likewise appealed the original Panel's exercise of judicial economy as false.[67] This is particularly true because the

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[64]Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, para. 6.40 (adopted 24 April 2003, as modified by the Appellate Body Report, WT/DS141/AB/RW) ("*EC – Bed Linen (21.5) (Panel)*").

[65]*EC – Bed Linen (21.5) (Panel)*, para. 6.45.

[66]Argentina Opening Statement at Panel Meeting, para. 70.

[67]*See* Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, para. 335 (adopted 19 May 2005) ("In this case, the Panel's findings . . . were not sufficient to 'fully resolve' the dispute. . . . This constitutes false judicial economy and legal error.") ("*EC – Sugar (AB)*").

original Panel, in response to a request from Argentina, made factual findings to *enable* the Appellate Body to "complete the analysis" regarding the volume finding had Argentina appealed.[68] However, Argentina declined to appeal and accepted the original Panel's conclusion – that a finding of inconsistency regarding the volume analysis was not necessary to resolve the dispute. Having litigated the exact same issue in the original proceeding, and having accepted the original Panel's exercise of judicial economy, Argentina is now precluded from relitigating that issue as part of an Article 21.5 proceeding.

76. Argentina appears to be aware that it is precluded from relitigating the *same* issue for which no finding of inconsistency was made, and instead attempts to characterize the volume finding as a new element of the measure taken to comply, analogizing the volume analysis to *Australia – Automotive Leather II, Australia – Salmon,* and *US – Softwood Lumber (CVD) (21.5).* None of those disputes involves the factual posture here, which is the *absence* of a finding of WTO-inconsistency with respect to the issue in question in the original proceeding. The United States does not dispute that the *new* analysis undertaken in the Section 129 determination is within the scope of the Article 21.5 proceeding. The United States has not argued, for example, that Commerce's analysis of Acindar's likely dumping is not part of the measure taken to comply, because that issue was not litigated in the original proceeding, nor could it have been.

77. In response to the Panel's specific reference to *US – Softwood Lumber IV (21.5),* the reasoning in that report is not applicable to the facts of this dispute. The United States recalls that in *Softwood Lumber*, the recommendations and rulings of the DSB pertained to the "pass through" analysis conducted in the countervailing duty investigation.[69] The question for the panel, and the Appellate Body, was whether the pass through analysis in an *administrative review* – an entirely separate measure – was within the scope of the Article 21.5 proceeding.[70] There was no question but that the recommendations and rulings pertained to the pass through analysis; the question was whether that analysis, as found in an additional measure, fell within the scope of Article 21.5. By contrast, the volume analysis in this dispute was *not* part of the recommendations and rulings of the DSB.

c) Is the USDOC's volume analysis part of the measure taken to comply with the DSB recommendations and rulings for the purposes of Article 21.5 DSU? Why or why not? Would it have been possible for the original panel to address the USDOC's volume analysis?

[68]Panel Report, para. 6.11.

[69]Appellate Body Report, *United States - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada: Recourse to Article 21.5 of the DSU by Canada*, WT/DS257/AB/RW, para. 50 (adopted 20 December 2005) ("*US – Softwood Lumber (CVD) (21.5) (AB)*").

[70]*US – Softwood Lumber (CVD) (21.5) (AB)*, para. 54.

78. USDOC's volume analysis is analogous to the EC's "other factors" analysis in *EC – Bed Linen (21.5).* Both analyses were part of the original determination and were simply reincorporated into the redetermination. (Indeed, the EC had revised its other factors analysis to take into account different data on domestic industry sales,[71] whereas Commerce made no changes to its volume analysis but rather incorporated it by reference.) The United States was not obligated to reconsider that analysis to implement the recommendations and rulings of the DSB. Therefore, as in *EC – Bed Linen (21.5),* the volume analysis is "part of the redetermination that merely incorporates elements of the original determination" and is "an aspect of the original measure",[72] rather than part of the measure taken to comply.

Please indicate the relevance, if any, of the Appellate Body Reports in EC - Bed Linen (Article 21.5 - India) and US - Softwood Lumber IV (Article 21.5 - Canada) in your responses to the above questions.

UNITED STATES

Q18. The Panel notes Argentina's argument that the USDOC disregarded the comments made by the Argentine exporters with regard to the decline in the volume of imports. The Panel also notes the US' argument that these comments were not germane to the issue. Siderca's response to the questionnaire to which Argentina refers in this regard, reads in relevant part:

> ***Whatever the significance of a decline in export volume may be as a general matter, Siderca knows that, with respect to Siderca, it does not mean that the product could not be shipped without dumping. The cost data (even with the limitations explained above) supports Siderca's position: Siderca is a cost-efficient producer of OCTG and could have shipped OCTG products profitably to the United States.***

a) Please explain why the USDOC found these comments not to be germane to the issue of the decline in the volume of imports.

79. The United States has not contended that Siderca's comments regarding likely past dumping were not germane to the *volume analysis*. Rather, the United States has noted that Siderca's comments explaining the decline in import volumes were not germane to the *U.S. implementation of the recommendations and rulings of the DSB*, which pertained to Commerce's

[71] *EC – Bed Linen (21.5) (Panel)*, n. 75.
[72] *EC – Bed Linen (21.5) (AB)*, paras. 86-87.

reliance on the dumping margin from the original investigation, and not to Commerce's volume analysis.[73]

80. The United States notes that the comments identified in the question were based on Siderca's cost data. Far from ignoring Siderca's assertions about its cost data, Commerce in fact addressed the reliability of the cost data at length in the Section 129 determination and ultimately declined to make any finding as to whether Siderca had likely dumped, in part based on the lack of U.S. sales during the sunset period of review.[74]

81. The United States also notes that Siderca's comments were not responsive to the question asked. The question was not whether there had been a decline in imports resulting from the imposition of the order; rather, the question was a request for raw data concerning shipments *during the sunset period of review alone*. That information formed part of the basis for Commerce's decision not to make any finding regarding Siderca. Notably, in the Section 129 proceeding, Commerce did not ask for shipment data from any period *prior* to the sunset period of review, and the question afforded no basis for Siderca's discussion of declining import volumes.[75] Siderca's comments addressed a question that was not relevant to the Section 129 proceeding.

Q20. The Panel notes Argentina's allegation that by failing to respond to Siderca's letter dated 7 December 2005, the USDOC acted inconsistently with Articles 6.1 and 6.2.

c) How did the USDOC consider the views expressed in this letter?

82. Articles 6.1 and 6.2 pertain to an interested party's right to present evidence. Nothing in Articles 6.1 or 6.2 requires a Member to "respond" to each submission of any such evidence.[76]

83. In reaching its final determination Commerce considered all comments submitted by the interested parties. Pages four through five of the Section 129 Determination provide a summary of Siderca's comments from its December 7 letter, which were offered in rebuttal to a letter from counsel for petitioners. Commerce took these into consideration in its analysis. For example, in response to Siderca's comment that Commerce use Preston Pipe and Tube data on an "all OCTG" level, Commerce found that it would be "even less specific and overly broad."[77] In

[73]*See* U.S. Second Submission, para. 33.

[74]Section 129 Determination, at 9 (Exhibit ARG-16).

[75]By contrast, Commerce asks for data on *pre*- and post-order volumes in its standard sunset review questionnaire.

[76]*See* U.S. Second Written Submission, para. 57.

[77]*Compare* Siderca's Response to U.S. Steel's Comments, at 5-6 (Exhibit ARG-19), *with* Section 129 Determination, at 8-9 (Exhibit ARG-16).

addition, as noted above, counsel for petitioners had proposed using average unit values based on the Argentine export classification system, an approach Siderca opposed in its December 7 letter. Commerce did not use the approach suggested by petitioners' counsel.

Q21. The Panel notes Argentina's argument that the USDOC failed to make six memoranda available to the Argentine exporters.

b) Please explain whether it was "practicable" within the meaning of Article 6.4 of the Agreement for the USDOC to make these memoranda available to the Argentine exporters in these Section 129 proceedings.

84. Notwithstanding the limited time available, Commerce made available to all parties participating in the proceeding all the information submitted to or obtained by it in the Section 129 proceeding to the extent "practicable,"as required by Article 6.4. First, Commerce placed the Preston Pipe and Tube data and Acindar-specific importer data regarding Acindar's sales on the record on November 22, 2005 – before Argentine respondents' questionnaires were even due.[78]

85. Second, the December 16, 2005, memorandum regarding "Information for the Record," consisted of respondent and domestic interested parties' submissions in the original sunset review.[79] Argentina has had access to the public file containing the same information since the *original* sunset review.

86. Third, Commerce's memoranda regarding the inconsistencies in Siderca's and Acindar's data were part of the reasoning used in making the determination. Assuming *arguendo* that such reasoning is even contemplated by Article 6.4, Commerce disclosed the reasoning as soon as practicable. Commerce received Siderca's rebuttal of IPSCO's arguments on the cost data as on December 14, 2005. The memoranda on the deficiencies in the cost data were released just two days later, on December 16, 2005.

87. A more detailed discussion of whether it was "practicable" to make certain memoranda available earlier is provided in the U.S. first and second written submissions.[80]

Q24. Please explain whether the APO system under the US law also allows interested parties themselves, in addition to counsel for such parties, to see all confidential information submitted by other parties in a sunset review.

[78]This discussion only concerns the public versions of the memoranda as Article 6.4 only relates to public information. *See* Exhibit ARG-18.

[79]Exhibit ARG-25.

[80]U.S. First Written Submission, para. 67; and U.S. Second Written Submission, paras. 62-69.

88. Interested parties themselves are not allowed access to business proprietary information submitted under the APO. Instead, their independent representative can receive access to that information. This ensures the protection of interested parties' confidential information, pursuant to Article 6.5 of the Agreement.

Q26. a) The Panel's understanding of the method used by the USDOC with regard to product groupings the USDOC made for purposes of examining the reliability of Siderca's cost data is that the USDOC took the weighted average costs of, for example, carbon casing PE and carbon casing T&C, and compared that with the weighted average cost of alloy casing PE and alloy casing T&C. In other words, the USDOC took as the starting point of its product grouping for comparison the material used without taking into account the finishing.

Is this a correct characterization of the USDOC's methodology? Please explain by referring to the relevant parts of the record.

89. It is a correct characterization of *part* of Commerce's methodology for assessing the reliability of Siderca's submitted cost data.[81] This was only one of the items Commerce considered when assessing the reliability of data resulting from Siderca's cost extrapolation. Commerce looked at the data on a more specific basis as well.

90. Commerce considered the fact that the non-OCTG costs were significantly higher than for OCTG products.[82] This was an unexpected result because Siderca had been a large producer of standard line pipe – a lower value-added product – and thus these non-OCTG costs should have been lower. Commerce also found that Siderca had reported lower costs for **[ ]**. That is a result that should not occur.[83] The cost of producing an alloy is significant. In addition to the expensive costs of the alloying elements, working with an alloyed steel is more difficult – driving up the costs of production. The Preston Pipe and Tube data demonstrates the typical price differential between carbon and alloy. For example, in March 1998, carbon seamless casing was priced at $725/ton, while alloy seamless casing was priced at $917/ton – a difference of $192/ton. Regardless of whether the data is reviewed on a broader level or a more specific level, the costs did not reflect the reality of OCTG production.

91. With regard to Siderca's data, even when the costs for **[ ]** did not reflect the reality of the cost of production for OCTG. For example, Siderca reported that for the year ending March 1998, it only cost a little over **[**

[81]Section 129 Determination, at 8; and Inconsistencies in Siderca's Data, at 1 (Exhibit ARG-21). The entire Siderca memorandum is attached as an exhibit because Argentina only provided a portion of it in Exhibit ARG-37.

[82]Inconsistencies in Siderca's Data, at 2-7 (Exhibit ARG-21).

[83]Inconsistencies in Siderca's Data, at 6 (Exhibit ARG-21). The costs for [ ].

].

d) The Panel notes the US' argument that the USDOC made this product grouping in accordance with the public information available. The Panel also notes that the memo to which the United States refers in this regard, found in Exhibit ARG-18, contains a product grouping by Preston Publishing.

Please demonstrate, by referring to the relevant parts of this memo, how exactly the Preston product grouping formed the basis of the USDOC's grouping.

92. The Preston Publishing data are found in the form of a chart in appendix III of Commerce's November 22, 2005 memorandum to the file.[84] The chart indicates a sales price for each month of the sunset review period for ten product categories. Those product categories are:

- CARBON ERW TUBING;
- CARBON SMLS, TUBING;
- CARBON ERW CASING;
- CARBON SMLS,CASING;
- CARBON DRILL PIPE;
- ALLOY ERW TUBING;
- ALLOY SMLS,TUBING;
- ALLOY ERW CASING;
- ALLOY SMLS, CASING;
- ALLOY DRILL PIPE.

93. The characteristics that constitute these product categories were the only physical characteristics available to Commerce. The categories break down the price differences between carbon and alloy; seamless (SMLS) and welded (ERW); and tubing, casing, and drill pipe.[85] Commerce then compared each Acindar sale with the Preston Pipe and Tube price for that month and within the appropriate category. Thus, the comparison was both contemporaneous and product-specific. Siderca filed comments with Commerce concerning the Preston data arguing, for example, that Commerce should compare the Preston Pipe data on an aggregate basis with Siderca's cost data.[86]

e) Please explain whether the USDOC informed Siderca of the methodology that it was considering to use for the grouping of products.

94. Commerce informed Siderca of the product categories it was considering in an

[84]*See* Exhibit ARG-18.
[85]Drill pipe was not used in Commerce's analysis because it was previously revoked from the order.
[86]Siderca's December 7 Letter, at 5-6 (Exhibit ARG-19).

attachment to its October 31, 2005 questionnaire to Siderca.[87] The list of categories were based on carbon/alloy, and plain-end (PE)/threaded and coupled (T&C). Because Siderca produces only seamless OCTG, and Acindar produces only welded OCTG, the category of seamless/welded was also implicitly included in the product grouping. However, because Commerce later found that the Preston data did not create discrete categories for plain-end and threaded and coupled, Commerce had to modify those categories when it conducted its analysis.

95. Siderca was aware of the broader product grouping of the Preston Pipe and Tube data on November 22, 2005, when Commerce placed the data on the record. This was prior to Siderca's submission of its questionnaire response and all of its comments.

f) Please explain why the USDOC did not use the methodology proposed by Argentina.

96. First, the methodology proposed by Argentina before this Panel was not proposed to Commerce during the Section 129 proceeding. Indeed, Argentina's proposal is the *opposite* of what Siderca argued before Commerce during the proceeding. Argentina currently argues that Commerce should have made the comparison between carbon and alloy PE, and carbon and alloy T&C.[88] However, during the underlying proceeding Siderca argued against making such a comparison. Specifically, Siderca claimed that "the ten product categories identified in the Department's questionnaire are so broad they make any conclusions drawn from the data highly doubtful, . . ." In rebutting petitioners' counsel's proposed approach, Siderca then argued that Commerce make the comparison on a product-category level (i.e., all OCTG).[89]

97. Nevertheless, Commerce did review all of Siderca's data on the specific level that they were reported – including finishing, casing/tubing, and carbon/alloy. As explained in (a) above, Siderca's extrapolated costs failed to reflect the reality of OCTG production costs whether they were viewed on a specific level or an aggregate level.

Q27. Please explain for what purpose the USDOC requested the cost information from the Argentine exporters in these proceedings. More specifically, please explain whether the USDOC intended to use that information exclusively for its company-specific determinations or for its order-wide determination as well.

98. Commerce sent all Argentine producers questionnaires in order to elicit sufficient information to make an order-wide determination of likelihood. While Commerce is not required to make a company-specific determination in the absence of a waiver, Commerce does

[87]Questionnaire, at att. 1 (Exhibit ARG-13).
[88]Argentina's Opening Statement, at para. 57.
[89]Siderca's Response to U.S. Steel's Comments, at 5-6 (Exhibit ARG-19).

examine individual company behavior in order to ascertain whether dumping is likely to continue or recur if the order is revoked. Commerce requested the cost data to assist it in evaluating the companies' behavior over the life of the order.

Q28. Please explain whether the USDOC initially intended to make a company-specific determination for Siderca as it did for Acindar, citing any evidence on record. In other words, would the USDOC have made a company-specific determination for Siderca had that company's cost data been found to be reliable?

99. Commerce requested a variety of information from respondent interested parties. Commerce does not necessarily make company-specific determinations; rather, Commerce evaluates the behavior of respondent interested parties over the life of the order. Commerce requested the information with a view to evaluating Siderca's behavior. However, as the Section 129 determination notes, the combination of the deficiencies in the cost data *and* Siderca's lack of shipments during the period of review led Commerce to make no specific finding with regard to Siderca.[90] Had Siderca's cost information been reliable, it would remain true that Siderca had no shipments during the sunset period of review. Commerce would have weighed those facts together before deciding whether to make any particular finding regarding Siderca.

Q29. The Panel notes that the USDOC's Section 129 Determination reads in relevant parts:

> ***We disagree with Siderca's assertion that the company financial statements of Siderca and Acindar are not relevant for our likelihood analysis. Financial statements provide a good understanding of the status of the entire company, and reflect the company's overall selling practices. Taken together, these data are relevant indicators of likely future pricing trends.***

a) Would the United States agree that the USDOC's Section 129 Determination demonstrates that some information pertaining to Siderca, namely this company's financial statements, were used by the USDOC in the context of its order-wide determination?

100. The United States recalls that the purpose of a sunset review is to ascertain whether dumping and injury are likely to continue or recur if the order is revoked. There can be many aspects to such a determination, including aspects particular to companies – what their likely behavior may be – and more general elements pertaining to the industry as a whole – is it depressed or is it faring well. Consideration of all aspects results in the ultimate determination.

[90]Section 129 Determination, p. 7 (Exhibit ARG-19).

101. In this regard, the United States would note that a company's financial statements are not exclusively information "pertaining to" that company. Rather, as here, a financial statement can provide evidence as to the condition of the industry *as a whole*. There were multiple sources of information on the record concerning the condition of the OCTG industry, including the SEC filings of domestic producers (and an assertion by Siderca itself on the record of the Section 129 proceeding). These sources of information, taken together, along with other facts on the record, led to Commerce's ultimate conclusion that dumping was likely to continue or recur if the order were revoked.

102. Finally, the United States notes that the passages quoted in the question reflect a general discussion of the potential relevance of a company's financial statements. Commerce disagreed with Siderca's suggestion that the companies' financial statements were not relevant in making the likelihood determination. In that context, Commerce concluded that Siderca's financial statement provided information about the OCTG market *generally*, but Commerce did not use the financial statement to make any company-specific finding about Siderca.

b) Were Siderca's financial statements used as facts available or as Siderca's response to the USDOC's questionnaire?

Please elaborate.

103. Siderca's financial statements were used as Siderca's response to the questionnaire.

104. The United States notes that Article 6.8 provides that in "cases in which any interested party refuses access to, or otherwise does not provide, necessary information . . . determinations may be made on the basis of the facts available." Siderca provided the financial statement. Therefore, with respect to the financial statement, Article 6.8 is simply not applicable. Siderca did not "refuse access to" or "otherwise not provide" the information in question; to the contrary, Siderca provided it.

Q30. Please explain in detail whether, in your view, paragraph 3 of Annex II justified the rejection of Siderca's cost data. In particular, please explain whether the cost information submitted by Siderca was verifiable within the meaning of paragraph 3. Did the USDOC take any steps to verify such information?

105. As the United States noted in its submissions, Article 6.8 is applicable only if facts available are used. The United States did not make a finding with respect to Siderca, and therefore Annex II is not applicable. The United States made that point in its first submission, and again in its second, and Argentina has not rebutted the argument. The United States would note further that the question appears to presume that Siderca's cost information was "rejected"

within the meaning of paragraph 3 of Annex II. However, Commerce made its order-wide likelihood determination on the basis of its company-specific finding regarding Acindar as well as evidence about the condition of the OCTG industry, and a company-specific finding concerning Siderca was ultimately not necessary. Therefore, Siderca's cost information was not "necessary" within the meaning of Article 6.8, and Commerce's decision not to use the cost data was not a "rejection" of that information within the meaning of paragraph 3 of Annex II. Rather, Commerce weighed all the information on the record, and accorded greater weight to other information on the record.

106. In any event, the information was, by Siderca's own characterization, not verifiable within the meaning of paragraph 3 of Annex II. Siderca stated that it did not maintain its product-specific cost data and that the data provided were extrapolated based on 2005 data. The problem with Siderca's data is not that it could not be verified – Commerce did not contend that Siderca applied its methodology incorrectly; however, Commerce did consider that the methodology itself was flawed, resulting in costs that did not reflect the reality of OCTG production. While Commerce could have verified the 2005 data, verification would not have changed the end result: Siderca's extrapolation did not accurately reflect costs from 1995 to 2000.

Q31. The Panel notes the following part of the USDOC's Section 129 Determination:

> ***Although Siderca attempted to cooperate with the Department's request for information, upon analysis of Siderca's calculations, we have identified significant problems with its allocation of costs, with respect to both OCTG production and all tubular production.***

a) Please explain your views about the relevance of this determination to the issue of whether or not Siderca acted to the best of its ability in submitting its cost information to the USDOC within the meaning of paragraph 5 of Annex II to the Agreement.

b) Please explain how ideal the cost information submitted by Siderca was within the meaning of paragraph 5 of Annex II to the Agreement.

107. The following answers both a) and b):

108. As noted above, Annex II is not relevant to Commerce's Section 129 Determination because Commerce did not use "facts available" with respect to Siderca – it made no determination with respect to Siderca. As a result, the issue of whether Siderca acted to the best

of its ability was not implicated.

109. The United States further notes even when an interested party has acted to the best of its ability in submitting certain information, this does not mean that the investigating authority is obliged to use the information.[91] In the case at hand, Siderca's submitted cost information was estimated cost information based on data from October 2005, while the period considered was 1995 through 2000.

110. The cost information Siderca provided was far from ideal. For example, the contention that alloy costs were *lower* than carbon costs did not make sense. Furthermore, Siderca elected to extrapolate data based on October 2005 data – the most recent period available (the questionnaire was issued October 31, 2005, and responses were due November 30, 2005). However, as Argentina noted at the meeting of the Parties, Siderca maintains its data for 18 months. Thus, the use of information the *most* removed from the sunset period of review further rendered that information even less than ideal.

> ***Q32. a) In your view, was the USDOC under an obligation to inform Siderca of the fact that its cost information would not be used as well as to give Siderca a chance to make comments as to why the information had to be used by the USDOC pursuant to paragraph 6 of Annex II? If so, was the USDOC under an obligation to do it prior to the issuance of its Section 129 Determination?***
>
> ***b) Did the USDOC actually inform Siderca of this fact and give Siderca a chance to make comments? If so, when? Did Siderca know that its cost data were not going to be used by the USDOC in its determinations?***

111. The following answers both a) and b):

112. As detailed in its submissions, Commerce did not make a finding regarding Siderca, and therefore Commerce did not make a finding regarding Siderca on the basis of "facts available." Therefore, Annex II is not applicable. For that reason, Commerce was not under an obligation to inform Siderca that its information was not being used, or to provide an opportunity to provide further explanations.

[91]Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R and Corr.1, para. 7.64 (adopted 29 July 2002).