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)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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EC – Bed Linen (21.5) (Panel)	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, adopted 24 April 2003, as modified by the Appellate Body Report, WT/DS141/AB/RW
US – Shrimp (21.5) (AB)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001
US – Zeroing (EC) (AB)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006

Exhibit List

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US-7	Mexican Secretariat of Trade and Industrial Development, Revised Final Resolution in the Anti-duping Investigation of High Fructose Corn Syrup, 20 September 2000
US-8	*Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe From Argentina*, 60 Fed. Reg. 31,953 (June 19, 1995) (final determination of sales at less than fair value).
US-9	U.S. Department of Commerce, Public Service List, Section 129 Determination, Oil Country Tubular Goods from Argentina

I. INTRODUCTION

1. The United States complied with the DSB recommendations and rulings in this dispute. First, the United States amended its regulations to eliminate the possibility that Commerce's order-wide determinations would be based on assumptions about likelihood or recurrence of dumping.

2. The United States also revised its sunset determination to remedy its consideration of the payment of cash deposits (based on a finding of dumping in the original investigation) at the rate of the original investigation as evidence that dumping had continued over the life of the order. Rather than relying on that information as evidence of a producer's dumping behavior, Commerce solicited additional information from the companies identified by Argentina as OCTG producers. Neither company was able to provide cost data from the actual period of review; Siderca provided estimated data instead. After carefully reviewing the estimated data, Commerce considered the information to be unreliable and made no finding as to whether Siderca had likely dumped over the period of review. With respect to Acindar, Commerce reviewed data from secondary independent sources and concluded that Acindar had likely dumped during the period of review. Therefore, Commerce cured the flaw identified by the original Panel.

3. Argentina contends that Commerce erred in collecting new information. The United States is unaware of any other dispute in which a complaining party took issue with an investigating authority's collection of new and relevant information in taking a measure to comply with DSB recommendations and rulings. As discussed further below, the United States has collected new information in the past; so has Mexico, for example. Even the arbitrator establishing the reasonable period of time under Article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") understood that Commerce would collect new information, only inquiring to confirm that such information would be confined to the original review period.

4. Indeed, a recurring theme of this dispute is the Argentine respondents' persistent reluctance to fulfill their obligation to provide the U.S. Department of Commerce ("Commerce") with information, information that Argentina in this proceeding has asserted was necessary for Commerce to make an affirmative determination. While Argentina emphasizes Commerce's obligation to be "active" rather than "passive" – without explaining just what that means – Argentina ignores the Appellate Body's recognition of the fact that exporters often possess the best evidence of their likely future pricing behavior.[1] In the original review, Siderca filed the thinnest of submissions and purported not to know the identity of the lone shipper of Argentinian OCTG during the period of review.[2] That shipper turned out to be Acindar – which never identified itself, preferring not to participate in the sunset review at all.

5. Having persuaded this Panel that the information upon which Commerce relied in

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[1] *US – Corrosion Resistant (AB)*, para. 199.

[2] Siderca August 2, 2000 Submission, at 3 (Exhibit ARG-25)

concluding that dumping continued over the life of the order was insufficient, Argentina now complains that Commerce has collected information to remedy the deficiency in the review record attributable to the refusal to participate by the longer shipper of Argentina OCTG at that time. The record reveals why Argentina has adopted this argument: the Argentine respondents did not provide key information that Commerce requested into seeking to comply with the DSB recommendations and rulings. Siderca elected to provide estimated cost data that was five to ten years out of date; Acindar provided no cost data at all.

6. In spite of all of this, Argentina attempts to lay blame for any evidentiary deficiencies on Commerce. Argentina goes further, advancing claims under Article 6 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") are simply unwarranted. Argentina acts as though it has obtained an "admission" from the United States that those aspects of Article 6 relating to evidence and procedure are applicable to the measure taken to comply. But the United States has never said anything to the contrary.

7. The United States takes its Article 6 obligations seriously. Indeed, Commerce went beyond the actual recommendations and rulings of this dispute, amending its regulations in order to make it as clear as possible that respondent interested parties may request a hearing. Argentina's response: Commerce is in breach because respondents did not request a hearing. Similarly, one of Argentina's Article 6 claims is based on Commerce's "late" placement on the record of the following background information:

> *About Preston Price Publishing*
>
> *Preston Publishing is the "scorekeeper" in today's ever-changing pipe & tube market. We do not buy, sell, manufacture or distribute pipe & tube.*
> *Preston Publishing Company, Inc. Was created in 1980 by Douglass P. Yadon, to track the world's shipment and consumption of steel pipe & tube.*
> *His 40 years of experience in the pipe and tube business has included both marketing and operations, and he has served as a consultant to the industry, as well as U.S. and foreign governments.*

8. The actual price information had been put on the record on November 22, 2005. Thus, Argentina takes issue not with the time when the actual price data were placed on the record, but rather with the time when purely descriptive information about the company that was the source of the price data was placed on the record. This is just one example of what Argentina holds up as a breach of Article 6 that should subject the United States to suspension of concessions for failing to comply in this dispute.

9. More perplexing still, Argentina takes the unusual position of advancing an argument that squarely *contradicts* findings the Panel made in the original proceeding. Unable to demonstrate

that an exporter's admission of likely dumping is anything but positive evidence, and unable to demonstrate that any information would be more probative in connection with a company-specific finding than that admission, Argentina now insists that Commerce erred by amending only the regulations to come into compliance with the Panel's findings regarding "deemed waivers." However, Argentina's argument requires the Panel to conclude that it erred when it expressly found that the "deemed waiver" category was a creation of the regulations, rather than the statute. The United States is not aware of any Article 21.5 proceeding in which a panel declared itself to have made an erroneous finding – and then found that the responding party failed to comply on the basis of the panel's own alleged error. That approach seems to turn the purpose of compliance proceedings on their head.[3]

10. Argentina has sought to bury these proceedings in an avalanche of claims that it cannot substantiate. The measures taken to comply were consistent with the DSB recommendations and rulings. Argentina is not concerned with whether the United States actually complied with those recommendations and rulings; rather, Argentina wants an adverse finding of any kind, no matter how tenuous the claim. The United States respectfully requests that the Panel decline to indulge that request.

II. THE WAIVER PROVISIONS

11. In its first submission, Argentina asserted that the statutory and regulatory provisions allowing respondents to waive participation in the Commerce portion of a sunset review are WTO-inconsistent in situations involving "affirmative waivers," *i.e.*, a situation in which a respondent files a statement of waiver, which includes an admission that it is likely to dump. Argentina now also asserts that the waiver provisions are inconsistent in situations involving respondent parties who do not file an affirmative statement of waiver.[4] Both of these arguments are without merit; indeed, the latter squarely contradicts findings made by the original Panel.

A. Affirmative Waiver

12. In its first submission, Argentina asserted that the waiver statute is WTO-inconsistent because it had not been repealed, and the amendment to the regulations could not render the statute "inoperative."[5] The United States rebutted these assertions by noting that nothing in the recommendations and rulings required the United States to repeal, amend, or render the statute inoperative. Argentina has not responded to that argument.

13. Argentina deviates from its original argument that waiver provisions are inconsistent whenever a respondent files a statement of waiver. It now contends that the waiver provisions

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[3] *See, e.g., US – Shrimp (21.5) (AB)*, para. 97.
[4] Argentina Second Submission, para. 156.
[5] Argentina First Submission, paras. 203-204.

are inconsistent in a scenario with *multiple* respondents, some of whom affirmatively waive participation.[6] Argentina asserts that the waiver provisions prevent Commerce from conducting a review, as required by Article 11.3, because "other evidence" adducing "conflicts" would not be weighed against these admissions of likelihood of dumping.[7]

14. Argentina made the same argument in its first submission. The United States responded:

> Argentina fails to specify *what* factual information is not being developed with respect to that company, and why that mystery factual information would be more probative than the company's own admission. It is worth noting that a sunset review is a prospective and counterfactual inquiry, and it is difficult to conceive of evidence that would establish that a company is not likely to dump in the future when the company has itself stated that it will.[8]

15. Argentina has no response for this argument. Rather, Argentina alters the factual scenario and then simply continues with the same vague assertions about how such a finding would prevent Commerce from conducting a "review."[9] Regardless of the number of participants in a proceeding, there is nothing WTO-inconsistent about a company-specific finding of likelihood based on that company's admission that it is likely to dump. Argentina has not proven the contrary.[10]

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[6] Argentina Second Submission, para. 170. Argentina conditions its argument on an "*arguendo*" assumption that a statement of likely dumping by an exporter is positive evidence. The United States would simply note that Argentina has offered no argument that such a statement is not positive evidence.

[7] Argentina Second Submission, para. 170.

[8] U.S. First Submission, para. 18.

[9] Japan suggests that importers could file statements that they will not import dumped merchandise. Japan Third Party Statement, para. 24. However, Japan's assertion here is belied by the Appellate Body's reasoning (and Japan's own arguments) in *US - Zeroing (EC)*. In that dispute, Japan took the position that margins of dumping must be calculated on an *exporter*-specific basis for *all* of the exporter's transactions over the period of review (*US – Zeroing (EC) (AB)*, para. 84), and the Appellate Body agreed. *US – Zeroing (EC) (AB)*, para. 128. The Appellate Body's analysis means that the margin of dumping must be calculated not on a transaction-specific basis at the time of importation but rather only after the period of review is complete (so that "all" the exporter's transactions can be taken into account, as Japan and the Appellate Body insist is required). Therefore, because the margin of dumping cannot be calculated until *after* the importations have been made, and cannot be calculated at the time of importation, the importer will have no way of knowing *at the time of importation* whether it was importing dumped merchandise into the United States. The importer will not know until after the period of review is complete, at some later date. Thus, Japan is suggesting that the importer file a statement that of necessity would be speculative; as a result, the probative value of such a statement could not possibly outweigh the exporter's own statement that it is likely to dump.

[10] Argentina casually, and without citation, states that "statutorily-mandated findings of likelihood are inconsistent with the obligations of Article 11.3." *See*, Argentina Second Submission, para. 172. That is simply not correct. The Appellate Body considered that a statutorily-mandated *assumption* of company-specific likelihood was not WTO-inconsistent. *See, e.g., US – OCTG (Argentina) (AB)*, para. 232. (The phrase "statutorily-mandated" does not appear in the original Panel's report; rather, the original Panel stated that an investigating authority simply

B. "Deemed" Waivers

16. In its second submission, Argentina stretches its arguments even further, arguing that the statute is WTO-inconsistent because it allegedly mandates a finding of likelihood with respect to companies that do not participate and do not file a statement of waiver. Argentina's argument runs contrary to the express findings this Panel made with regard to the statute.[11]

17. The United States recalls the Panel's description of the operation of the waiver provisions:

> According to Section 751(c)(4)(A) of the Tariff Act, an interested party in a sunset review may elect to waive its right to participate in the USDOC part of a sunset review. Section 351.218(d)(2)(i) of the Regulations provides that interested exporters who wish to waive participation may do so by submitting a statement of waiver to the USDOC. *Under Section 351.218(d)(2)(iii) of the Regulations, an exporter's failure to submit a complete substantive response to the notice of initiation is deemed to constitute a waiver of its right to participate in the USDOC proceedings.* In either case, the application of Section 1675(c)(4) of the Tariff Act leads to the same result: The USDOC "shall" find likelihood of continuation or recurrence of dumping with respect to an exporter which waives its right to participate.
>
> *We consider it important to note that the distinction between affirmative and deemed waivers stems from Section 351.218(d)(2)(iii) of the Regulations, not the Tariff Act.* The Tariff Act simply provides that interested parties *may choose* not to participate in the USDOC part of a sunset review, and that the effect of a waiver is an affirmative finding of likelihood by the USDOC. Section 351.218(d)(2)(iii) of the Regulations, however, creates the deemed waiver category by stipulating that submission of an incomplete, or no, response to the notice of initiation also constitutes a waiver. *Therefore, our findings regarding affirmative waivers will have implications on the Tariff Act whereas those relating to deemed waivers will only affect Section 351.218(d)(2)(iii) of the*

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cannot assume, without further inquiry, that a company is likely to continue dumping simply because it did not participate in a review. *See US – OCTG (Argentina) (Panel)*, para. 7.107.) As the United States has noted, any "statutorily-mandated" finding is no longer based on an assumption but rather on evidence provided by the respondent itself. Argentina has failed to explain how a respondent's statement that it is likely to dump would not constitute "positive" evidence.

[11] While Argentina states in Section VI.A of its second submission that the statute requires such a finding, Argentina later is less definitive, stating that "USDOC *may* have to make" a company-specific likelihood determination for companies that do not file an affirmative statement of waiver. *See* Argentina Second Submission, para. 172.

Regulations.[12]

The Appellate Body did not disturb these findings.

18. The circumstance Argentina describes – where a respondent does not participate but does not file a statement of waiver – is precisely what the Panel had called a "deemed waiver":

> according to Section 351.218(d)(2)(iii) of the Regulations, the USDOC will consider the failure of an interested party to submit a complete substantive response to the notice of initiation of a sunset review to constitute a waiver of participation in the USDOC's sunset review proceedings. We will refer to this as an "implicit " or "deemed" waiver.[13]

19. Commerce repealed Section 351.218(d)(2)(iii) and thus eliminated the deemed waiver provision, and Argentina does not argue to the contrary. Rather, Argentina now argues that the statute requires Commerce make an affirmative finding with respect to companies that do not file a statement of waiver and do not participate. But that argument runs counter to the Panel's own findings in the original proceeding. The Panel could not have made it clearer that the "deemed waiver" findings *had no implications* for the statute, but only for the regulations. Therefore, the United States came into compliance by amending only the regulations.

III. THE SECTION 129 DETERMINATION

20. Argentina continues to assert that Commerce was not entitled to collect new information, and that in any event Commerce's new determination is inconsistent with Article 11.3 of the AD Agreement.

A. Commerce's Use of "New Factual Information"

21. Argentina advances a position regarding the use of "new factual information" that is found nowhere in the text of the DSU, nor has it ever been referred to by a panel or the Appellate Body. Argentina asserts that Commerce could only have looked at "new" factual information (as opposed to "clarifying" information)[14] if the DSB had upheld the evidentiary basis for

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[12] *US – OCTG (Argentina) (Panel)*, para. 7.84-7.85 (emphasis added).

[13] *US – OCTG (Argentina) (Panel)*, para. 7.83.

[14] Argentina has failed to explain why the information Commerce collected does not fall within the category of "clarifying" information. In response to the U.S. argument that Argentina failed to explain the distinction between "new" information and "clarifying" information, Argentina simply states that, "[f]or Argentina, the distinction is clear *in this case*." Argentina Second Submission, para. 14 (emphasis in the original). Argentina simply asserts that the collected information was not "clarifying." Argentina Second Submission, para. 16. Again, Argentina fails to explain what that means.

Commerce's decision but found that Commerce had "failed to explain adequately its decision."[15]

22. Argentina's argument would have the curious consequence of permitting authorities to collect new information only where that information is unnecessary. If a Member's decision were found to have a "sufficient evidentiary basis," it would not, by definition, be necessary to gather additional evidence. Therefore, Argentina's argument effectively would prevent Members from ever collecting new information when doing so would be necessary.

23. Argentina argues that the textual basis for its position is found in Article 11.3.[16] However, Article 11.3 says nothing about when new information can or cannot be collected. The only "temporal limitation" in Article 11.3 is that the review must be *initiated* before the five year anniversary of the imposition of the order. Further, while Argentina suggests that its argument about "temporal limitations" and its effect on a Member's ability to collect new information is restricted to the facts of "this case," it is difficult to see how that is so. In particular, the United States does not see why that reasoning would not be equally applicable to, for example, a Member's measure taken to comply in connection with investigations. Under Article 5.10, investigations are subject to even stricter "temporal limitations": they must be *concluded* within 18 months. According to Argentina's theory, a Member that has to bring an investigation into compliance with WTO obligations would not be permitted to collect new information.

24. That theory runs counter to Members' conduct in past proceedings. As the United States noted in its first submission, the panel in *US – Privatization (21.5)* concluded that the United States was *obliged* to look at new information to come into compliance.[17] Argentina attempts to distinguish that report by contending that, "[f]inding that the authority has an obligation to consider evidence provided by the parties is not the same as saying that the authority has the right to develop the requisite evidentiary basis at any time . . ."[18] Thus, Argentina offers the view that if respondents, of their own accord, asked Commerce to consider additional facts, Commerce must do so; but Commerce cannot ask producers for that same information. The United States is unable to see the logic in such a proposition, which also has no basis in the text of the DSU.

25. Moreover, the United States is not the only Member to take the view that Members may collect new information. For example, in *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States* (WT/DS132), Mexico sought to bring its measure into compliance *inter alia* by soliciting new information regarding its injury determination.[19] Therefore, the United States is not alone in its view that the collection of new

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[15] Argentina Second Submission, para. 12.

[16] Argentina Second Submission, para. 10.

[17] *US – Privatization (21.5)*, paras. 7.252-7.253.

[18] Argentina Second Submission, para. 20.

[19] Mexican Secretariat of Trade and Industrial Development, Revised Final Resolution in the Anti-duping Investigation of High Fructose Corn Syrup, 20 September 2000, para. 11 (Exhibit US-7).

information for purposes of coming into compliance is permissible.

26. Further, in its first submission, the United States noted that the arbitrator in the proceeding under Article 21.3 (c) of the DSU understood that Commerce would be collecting new information (*e.g.*, through the questionnaires identified in the U.S. submission)[20] as part of its efforts to bring the measure into compliance – additional evidence that Argentina's position in this dispute is untenable. In response, Argentina argues that the arbitration report does not reflect the discussion as to whether Commerce's collection of new information would be confined to the original period of review. Notably, Argentina does not deny that the dialogue in question occurred. In any event, the United States merely made the point about the discussion of the collection of new information during the arbitration proceeding to highlight the general understanding, apparently shared by the arbitrator, that Members may collect such information as part of their efforts to come into compliance.

27. Finally, Argentina repeats its assertion that it had a "right" to termination of the order.[21] In its first submission, the United States pointed out that the Appellate Body has rejected this view.[22] Argentina fails to explain how it can continue to argue that it had a right to termination under Article 11.3 when that theory has been dismissed.

B. The Finding that Dumping Was Likely to Continue or Recur

1. Significant Decreases in Import Volumes

28. The United States explained in its first submission that Argentina has not demonstrated that the volume finding is a measure taken to comply. As the United States pointed out in its first submission, the Appellate Body has already reasoned that "we do not see why that part of a redetermination that merely incorporates elements of the original determination . . . would constitute an inseparable element of the measure taken to comply with the DSB rulings in the original dispute."[23] Argentina itself noted that the volume finding in the Section 129 determination was simply a "restatement of the inference" Commerce drew in 2000. Therefore, Argentina effectively acknowledges that Commerce simply did what the EC did in *EC – Bed Linen*: incorporate into a redetermination a finding from the original determination that it did not change, and did not have to change, to come into compliance.

29. In response, Argentina attempts to distinguish the present situation, arguing that here, Commerce "relied" on this finding for the "separate and independent purpose of its implementing

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[20] US Submission under Article 21.3(c), *US – OCTG (Argentina)*, p. 3.
[21] Argentina Second Submission, para. 25.
[22] US First Submission, para. 85.
[23] *EC – Bed Linen (21.5) (AB)*, para. 86.

measure."[24] But Argentina fails to explain how Commerce "relied" on the volume finding any more than the EC relied on its "other factors" analysis.

30. The United States considers it useful to recall the panel's reasoning in *EC – Bed Linen (21.5)*. The panel recognized the difference between an original proceeding and a proceeding under Article 21.5. Under an original proceeding, a Member has an opportunity to bring its measure into compliance within a reasonable period of time. Under an Article 21.5 proceeding, a Member found to have acted inconsistently with its WTO obligations does not have a reasonable period of time to comply; rather, the complaining party may proceed with a request for – and perhaps obtain – authorization to suspend concessions or other obligations.[25] The panel further noted that parts of panel reports that are not appealed must be considered final.[26]

31. Those discussions are directly relevant to the situation here. The original Panel made no finding that the United States had acted inconsistently with its WTO obligations in connection with its volume analysis. Argentina did not appeal the original Panel's decision not to make a finding. It would be unfair for the United States, which was under no obligation to take an action with respect to the volume analysis, to find out for the first time in an Article 21.5 proceeding that the Panel considers that analysis deficient. The United States could then be faced with a request for authorization to suspend concessions, with no reasonable period of time to bring the measure into compliance.

32. Argentina suggests that the United States was obliged to reconduct its volume analysis under the theory that the "jurisprudence at the time" implied that Commerce's volume finding would be WTO-inconsistent. It bears repeating that the United States is obliged come into compliance with the DSB recommendations and rulings in this dispute, not on alleged "jurisprudence" in other disputes. The DSB made no such recommendation or ruling in this dispute. Further, the Appellate Body has explained that rulings in other disputes cannot "in and of themselves" establish WTO-inconsistency in a separate dispute.[27] Indeed, Argentina is not even arguing that *rulings* in other disputes form the "jurisprudence" in question; rather, Argentina seeks to rely on dicta that did not even result in an adverse finding.

33. Argentina also argues that Commerce "ignored" information Siderca placed on the record explaining the decline in import volumes. Commerce did not "ignore" the information. The information was not germane to the question at hand. As the Panel may recall, Commerce was faulted in the original proceeding for basing its conclusion about the Argentine producers' dumping behavior over the life of the order on the fact that an importer had paid cash deposits at the rate of the margin from the original investigation. To remedy that flaw, Commerce solicited

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[24] Argentina Second Submission, para. 98.
[25] *EC – Bed Linen (21.5) (Panel*), para. 6.45.
[26] *EC – Bed Linen (21.5) (Panel)*, para. 6.51.
[27] *US – OCTG (Mexico) (AB)*, para. 129.

information as to respondents' behavior. That included a request for raw *data* on shipments made during the period of review; if a respondent had not shipped during the period of review, then Commerce would take that fact into account in evaluating what the respondent's dumping profile had been over the life of the order. That is precisely what Commerce did with respect to Siderca, concluding that the absence of shipments, together with the unusable cost data, meant that no finding would be made with respect to Siderca.[28]

2. Acindar

34. With respect to the likelihood that Acindar was dumping over the life of the order, Argentina argues that Commerce can only rely on actual determinations of dumping,[29] rather than a finding that dumping had likely occurred over the life of the order. Argentina's argument ignores the fact that Article 11.3 provides no methodology for making a sunset determination, and in particular does not require a Member to make an actual determination of dumping. But it also has a more pernicious implication: it would enable respondents to manipulate the system by first depriving the investigating authority of information and then asserting that the lack of information prevents the investigating authority from continuing the order.

35. First, the Appellate Body has confirmed that Members are not obliged to calculate dumping margins in sunset reviews. Indeed, the existence of dumping itself is not a prerequisite to continuation of an order: Footnote 22 of the AD Agreement expressly provides that even if dumping has ceased over the life of the order, the order need not necessarily be terminated. Thus, if it is acceptable to continue an order when dumping has ceased, there is no reason why it cannot be acceptable to continue an order when the existence of dumping over the life of the order was likely.

36. Second, the paucity of information on the record as to whether Acindar dumped over the life of the order is due entirely to Acindar's own choices. Acindar declined to participate in the original sunset review and, therefore, provided no information on which Commerce could base its determination. Moreover, in the Section 129 proceeding, Acindar declined to provide any cost information from which Commerce could evaluate whether Acindar had likely dumped over the life of the order.[30] Indeed, Article 11.3 makes it clear that even if dumping had *not* continued, the order would not necessarily have to be revoked. Therefore, it stands to reason that if there is no evidence from which to deduce whether dumping did or did not occur, the investigating authority may deduce whether it was likely that dumping occurred over the life of the order. If not, then a respondent would have the incentive to withhold evidence from the record in order to

[28] Section 129 Determination, p. 9.

[29] Argentina Second Submission, para. 40.

[30] Indeed, it is curious that Acindar did not, like Siderca, attempt to provide any cost information, even cost information from a timeframe after the period of review. The United States recalls that Acindar had been found to have dumped during the period immediately after the review.

secure termination of the order.

37. Argentina asserts that Commerce's finding that Acindar was likely dumping during the period does not meet the requirements of actual dumping under Article 2 and should not be part of the basis for Commerce's likelihood determination.[31] However, Article 11.3 has no requirement that any finding of past dumping be made. In fact, Article 11.3 does not specify any criteria that must form the basis for a likelihood determination. Simply because the Appellate Body has recognized that Article 2 determinations of dumping during the period are a sufficient basis for likelihood does not mean that other types of evidence cannot also be a sufficient basis for a likelihood determination. In fact, the Appellate Body explained that:

> the Panel correctly noted that Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review. Nor does Article 11.3 identify any particular factors that authorities must take into account in making such a determination. Thus, Article 11.3 neither explicitly requires authorities in a sunset review to calculate fresh dumping margins, nor explicitly prohibits them from relying on dumping margins calculated in the past. This silence in the text of Article 11.3 suggests that no obligation is imposed on investigating authorities to calculate or rely on dumping margins in a sunset review.[32]

Argentina provides no textual or legal support rebutting the U.S. position that, in the absence of previous Article 2 determinations of dumping, a Member can rely upon findings that a party was likely dumping during the period and thus, would likely dump should the order be revoked.

38. Argentina argues that the United States should not have referred to the fact that Acindar was dumping at a 60.73% margin in its first submission to this panel.[33] Argentina is correct that this finding did not occur until after the original sunset review was conducted. In its Section 129 Determination, Commerce did not rely on this finding that Acindar was dumping because the finding was not published until after the original sunset determination was issued. Commerce only relied upon information available to it at the time of the original sunset review for its Section 129 Determination. The United States cited to this finding of Acindar's dumping in its first submission to demonstrate that its conclusions of likelihood were, in fact, accurate.

39. Argentina asserts that Commerce should have controlled for various factors that would have had an impact on the price comparisons between Acindar's sales and U.S. average prices. Specifically, Argentina argues that because the Preston Pipe & Tube Report does not report prices by specific size of pipe, and does not discriminate between plain end casing and casing

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[31] Argentina Second Submission, para. 43.
[32] *US – Corrosion Resistant (AB)*, para. 123.
[33] Argentina Second Submission, paras. 55-60.

that is threaded and coupled, Commerce did not control for the physical characteristics of the products being compared.[34] Argentina also argues that Commerce should have adjusted for different delivery terms between the Preston Pipe & Tube Report (*i.e.* U.S. average unit values) and Acindar's sales data gathered from CBP.[35]

40. Though these factors could have affected the price comparisons, Commerce had to rely on the available data to make its comparisons. The Preston Pipe & Tube Report did separate products by type of OCTG, whether welded or seamless, and whether carbon or alloy. These distinctions are the most critical for price comparisons. Its segregation of carbon welded tubing from carbon welded casing (the products that Acindar sold in the United States) does address much of the size concern Argentina raises as tubing is a small tubular product in limited sizes, and casing is larger size material. Additionally, though the 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. There was also insufficient data regarding Acindar's movement expenses to allow for adjustments to account for different delivery terms. 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.

41. Argentina then argues that the United States should have taken into account the fact that Acindar: was not investigated during the original investigation; principally produced steel long products; began producing OCTG in 1998; and was not a significant producer of OCTG.[36] None of these "facts" have any bearing on a likelihood determination. The only relevant facts are that Acindar exported subject OCTG to the United States during the period and was the only Argentine exporter, since the other exporter, Siderca, diverted its shipments to other export markets after the order was imposed. The size of Acindar's exports or its production mix is irrelevant. Commerce properly focused its likelihood determination on Acindar's actual export prices of OCTG to the United States. The other arguments listed by Argentina do not invalidate Commerce's finding that Acindar was likely dumping subject merchandise during the period and would likely continue to dump if the order was revoked.

42. Argentina next argues that Commerce "distorted and misused the information from the financial statements in this case."[37] This contention is unfounded. Information from Acindar's financial statements demonstrated that its "strategy has been and will continue to be to focus on the Argentine market *while using the export market to stabilize its overall sales volume during*

[34] Argentina Second Submission, para. 50.
[35] Argentina Second Submission, para. 50.
[36] Argentina Second Submission, para. 53.
[37] Argentina Second Submission, para. 54.

periods of slowdown in domestic economic activity."[38] In the Section 129 Determination, Commerce explained that, in "other words, Acindar planned to continue export sales in order to maintain its sales volume."[39] In light of the information gathered from Acindar's financial statements that it had decreasing sales and operating income, increasing costs, and overall losses, Commerce concluded that Acindar would likely export OCTG to the United States. Consequently, considering the depressed U.S. OCTG market, and the fact that Acindar's selling prices "were substantially lower than prevailing U.S. market prices," Commerce concluded that it was likely that Acindar was dumping during the period and would continue to do so if the order was revoked.[40]

43. Argentina argues that the information Commerce relied upon from Acindar's financial statements was not relevant to OCTG because OCTG was only a small percentage of Acindar's overall sales.[41] But the percentage of Acindar's overall sales represented by OCTG was itself not a not a relevant fact. The relevant point was that Acindar stated it would use exports to stabilize its overall sales volume, and this was confirmed by the fact that Acindar had been exporting OCTG during the period it was experiencing financial difficulties. Furthermore, the fact that its tube and structural division, of which OCTG is included, was profitable supports the conclusion that Acindar will continue to rely on this division to improve its overall situation. Acindar's financial statement provided affirmative evidence of the likelihood that it would continue to export to the U.S. market.

3. Siderca

44. Argentina continues to argue that Commerce erred in declining to make any finding regarding Siderca. Specifically, Argentina asserts that "in the event that the authority can find no positive evidence with respect to the dominant and only relevant producer, the obligation of Article 11.3 is not satisfied when the authority simply asserts that it will make 'no finding.'"[42]

45. Argentina makes this statement yet provides no textual support for this proposition. In fact, Article 11.3 does not require that a likelihood finding be made as to individual producers, a point underscored in the Panel Report itself. Moreover, as Commerce noted in the Section 129 determination, Siderca stated in its questionnaire response that it shipped *no* subject merchandise to the United States. Therefore, Commerce can hardly be faulted for not making a dumping finding regarding a company that had no exports. Indeed, at the time of the sunset review, there was only one exporter – Acindar. Argentina's assertion that Siderca was the "only relevant

[38] Section 129 Determination, at 10-11 (*quoting* Acindar's 2000 financial statement, at 12) (emphasis added) (Exhibit ARG-16).

[39] Section 129 Determination, at 11 (Exhibit ARG-16).

[40] Section 129 Determination, at 7-8 (Exhibit ARG-16).

[41] Argentina Second Submission, para. 54.

[42] Argentina Second Submission, para. 68.

producer" is simply wrong. The United States correctly relied upon a likelihood finding as to the *sole exporter* of OCTG to the United States during the period of review.

46. Notwithstanding that Commerce made no finding regarding Siderca, Argentina continues to quibble with Commerce's assessment of Siderca's cost information. As noted before, Siderca did not provide Commerce with actual costs for the period. Instead, Siderca used its costs for October *2005* and extrapolated what the costs would be for 1995-2000. It is curious that Argentina considers information five to ten years after the period of review to be probative, when Commerce preferred to use contemporaneous data;[43] but at the same time, Argentina contends information from 2001 is not relevant.[44]

47. It should be noted that Siderca's information was not reliable for several reasons. For example, the base for extrapolation, *i.e.*, the October 2005 data, did not account for the fact that Siderca had been significantly lowering its costs of production.[45] Moreover, as discussed further below, when comparing cost data between types of OCTG products, Commerce discovered that Siderca "reported lower costs for certain products that do not require such additional materials, processing, and testing."[46] Because of these problems in the cost data, coupled with the fact that Siderca made no sales during the period, Commerce properly determined not to use Siderca's cost of production data and did not make any findings regarding Siderca's likelihood of dumping during the sunset review period.

48. As seen in Commerce's memorandum, for each year Commerce combined costs for carbon casings and compared it with alloy casings for those same years and discovered that Siderca reported lower costs for the products that required additional materials, processing, and testing.[47] Argentina argues that Commerce's analysis of Siderca's cost data was not an "objective assessment" of the data and Commerce should have used direct comparisons instead of aggregating and weight averaging it into broader carbon and alloy categories.[48] Argentina makes these broad assertions, yet fails to substantiate them.

49. Argentina argues that it and the United States could not come to agreement as to releasing

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[43] Indeed, Commerce's use of contemporaneous data is consistent with the arbitrator's view that the information pertain to the original review period.

[44] Argentina Second Submission, paras. 55-60. Argentina criticizes the United States for referring to the fact that Acindar was found to have a dumping margin of over 60% in 2001. Argentina recognizes that Commerce did not consider that information in the Section 129 determination. Argentina Second Submission, para. 56.

[45] Argentina First Submission, para. 130.

[46] Section 129 Determination, at 8 (Exhibit ARG-16).

[47] Memo. Re: Inconsistencies in Siderca's Data, at 1 (Exhibit ARG-21); Section 129 Determination, at 8. Siderca had reported the data as carbon casings, plain end; carbon casings, threaded and coupled; alloy casings, plain end; and alloy casings, threaded and coupled.

[48] Argentina Second Submission, para. 65; Argentina First Submission, para. 83.

Siderca's cost data to the Panel.[49] That is simply not correct. The United States explained that Siderca and Acindar were free to release their own data, and Argentina did not disagree.[50] By contrast, Commerce's ability to release that same information is constrained by Article 6.5 of the Antidumping Agreement, which requires permission of the party submitting the information before such information can be released.

50. Argentina also asserts that Commerce "manipulated the data by weight-averaging the costs of finished and plain end pipes, skewing the comparisons so that they demonstrated the differences caused by the type of steel and the type of end finish."[51] Argentina's assertion is unfounded. Commerce grouped those items in that manner because the available public information grouped the products in that manner.[52] Siderca's cost data, if usable, would have been compared with this U.S. sales data to see if Siderca could have made sales in the United States above its costs.

51. Commerce also explained that "Siderca's cost calculations for non-OCTG products are problematic because their costs significantly exceed OCTG costs."[53] Argentina challenges Commerce's statement that costs for line pipe, standard pipe, structural tubing, mechanical tubing, and pressure pipe (*i.e.* non-OCTG) should not exceed the costs for OCTG because "the majority of tubular demand is in the lower value products . . ."[54] This is the common understanding in the industry and Argentina never argues it is not accurate – it only argues that there was no explicit evidence supporting this claim. In fact, Siderca is a significant producer of standard seamless pressure and line pipe (*i.e.* lower value pipe) and was a mandatory respondent in a seamless pipe investigation involving these products at the same time it was investigated in the OCTG case.[55] Therefore, because Siderca has such significant production of these products, this should have meant its non-OCTG costs were lower than its OCTG costs, yet the extrapolated costs did not reflect this.

52. Argentina also asserts that "Siderca reported the actual cost of the production lines used

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[49] Argentina Second Submission, para. 65, n. 67.

[50] It should be noted that Argentina originally raised the question of confidential information during discussions before the panel organizational meeting. At that time, Argentina advised the United States that it wished to submit its own companies' confidential information and that procedures might be necessary in order to ensure that third parties (not the United States) were adequately bound to protect the confidentiality of that information. Argentina contacted the United States again about the same issue and was advised again that Siderca and Acindar were free to release their own data, and that Commerce did not have to authorize the release of Siderca's and Acindar's data.

[51] Argentina Second Submission, para. 65; Argentina First Submission, para. 82 (emphasis removed).

[52] Memo Re: Information for the Record, at Att. III (Exhibit ARG-18).

[53] Section 129 Determination, at 8 (Exhibit ARG-16).

[54] Section 129 Determination, at 8 (Exhibit ARG-16).

[55] *Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe From Argentina*, 60 Fed. Reg. 31,953 (June 19, 1995) (final determination of sales at less than fair value) (Exhibit US-8).

for producing the products for which the USDOC requested information."[56] Significantly, Siderca does not claim that it accurately captured all of the costs for production. In fact, it concedes that "Siderca cannot provide the information in the form requested by the Department, [and has] endeavored to reconstruct some data to the best of [its] ability."[57] Siderca never argued it was an accurate reflection of *actual* costs – only that the extrapolated data reflected its guess as to what the costs might have been. Also, Siderca compared its average per unit costs for a production line for October 2005 to each of the intervening years in the period, 1995-2000, without indicating that it adjusted for product mix, which would have significantly affected these average costs. Nothing in Article 11.3 requires Commerce to use such speculative data.

53. Argentina then argues that the United States failed to address the information provided in Siderca's financial statement.[58] This argument is erroneous. The United States relied upon these financial statements as an indicator of the depressed OCTG market.[59] Specifically, Siderca's financial statement explains that its "sales for fiscal year 2000 were 25 percent lower than during the previous fiscal year, reflecting the effects of the drastic fall in world demand for tubes for the *oil industry*."[60] *Oil* country tubular goods (OCTG) are only used by the oil industry. If demand for tubular products is down in the oil industry, then shipments of OCTG will drop. The reduction in OCTG demand was so great that it caused at least a 25 percent drop in Siderca's total sales. In fact, because Siderca produces for other industries as well, the impact on its OCTG sales would likely have been greater than 25 percent for it to cause a 25 percent reduction in Siderca's total sales. Thus, Siderca's own financial statements supported the conclusion that the OCTG market was depressed.

54. Argentina argues that Commerce should have used Siderca's quarterly April-June 2000 statement as evidence that the downturn in the OCTG market had subsided.[61] However, the data for the previous few years reflected a downward trend and one quarter of positive results would not necessarily indicate a turn in the market. Furthermore, Commerce had requested full-year data for the five year period and comparing a three month interim statement would not be an accurate comparison. In fact, Commerce was using Siderca's fiscal year 2000 statement – the latest completed fiscal year at the time of the original sunset review. Finally, the quarterly statements are not audited and are thus, not as reliable as audited full year statements. Therefore, Commerce properly did not conclude that one quarter's worth of sales outweighed several years of trend data.

55. Before reaching its conclusion not to make a likelihood finding as to Siderca, Commerce

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[56] Argentina First Submission, para. 94.
[57] Siderca's Questionnaire Resp., Att. 2 (Exhibit ARG-15).
[58] Argentina Second Submission, para. 66.
[59] Section 129 Determination, at 9-10 (Exhibit ARG-16).
[60] Section 129 Determination, at 9 (emphasis added) (Exhibit ARG-16).
[61] Argentina Second Submission, para. 66.

thoroughly analyzed all cost data placed on the record and determined it was not reliable. Because Siderca had stopped exporting to the United States once the order was imposed, there was no sales data to use in the analysis. Without reliable cost or sales data on the record, Commerce's neutral decision as to Siderca is not inconsistent with Article 11.3.

C. Evidentiary and Procedural Requirements of Article 11.3 and Article 6

56. A previous panel has explained that Article 6 of the AD Agreement imposes substantive obligations without dictating any specific actions through which those obligations must be met. In *Guatemala – Cement II*, the panel recognized in the context of a discussion on Article 6.1 that:

> these provisions impose substantive obligations, without requiring those obligations to be met through any particular form [except as explicitly provided for]. What counts is whether, in practice, sufficient opportunity was provided . . .[62]

Though that dispute specifically discussed Article 6.1 obligations, this same framework of analysis is applicable to the remainder of the substantive obligations of Article 6. Argentina improperly asserts Commerce was required to take specific actions, rather than addressing whether Commerce through its actions met the substantive obligations at issue.

1. Article 6.1

57. Argentina argues that the United States did not act consistently with Article 6.1 of the AD Agreement because it did not "respond" to a letter that Siderca submitted only a week before the final determination was issued.[63] First, there is no obligation under Article 6.1 for a Member to respond to a letter. Article 6.1 requires Members to provide parties with the opportunity to provide evidence and argument. Second, Argentina's assertion is simply false. Commerce responded to the comments made in that letter in its Section 129 Determination.[64] Finally, Argentina was aware that the reasonable period of time expired on December 17, 2005. Therefore, the statement that the parties only discovered on December 16 that there would be no additional procedures simply rings hollow, inasmuch as the parties were aware that the reasonable period of time was imminently expiring.[65]

58. Argentina returns to its claim that the Section 129 Determination was not consistent with Article 6.1 because Commerce did not issue supplemental questionnaires, publish a preliminary

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[62] *Guatemala – Cement II (Panel)*, para. 8.119.
[63] Argentina Second Submission, para. 105.
[64] Section 129 Determination, at 3, 4-6 (Exhibit ARG-16).
[65] Siderca's counsel in the underlying proceeding acts as Argentina's counsel in this dispute.

determination, hold a hearing, or issue a schedule for comments.[66] Yet, as the United States explained in its first submission, none of these are required by Article 6.1. The United States met the substantive obligations of Article 6.1, giving the Argentine respondents several opportunities to submit evidence and legal argument. Argentina contends that the absence of these procedures strips Article 6.1 of any substantive meaning. That is incorrect. Argentina fails to recognize that there comes a point in every proceeding where an investigating authority must make its decision and cannot offer unlimited opportunities for parties to submit comments and rebuttals. In this proceeding, Commerce received argumentation from the respondents until two days before the determination was made, and three days before the reasonable period of time expired. There are no specific actions required to satisfy the Article 6.1 requirements. Rather, Members have a variety of options for meeting the *substantive* obligations of Article 6.1. Thus, Commerce provided the substantive rights that are required by Article 6.1.

2. Article 6.2

59. Rather than addressing the text of Article 6.2 of the AD Agreement, which plainly requires a hearing only on request, Argentina contends that the United States should have provided "more information regarding the timing of the hearing."[67] Any of the interested parties could have submitted requests for a hearing and chose not to do so. Commerce did not breach Article 6.2 by failing to hold a hearing that was never requested, nor does Article 6.2 require the provision of "more information" regarding the timing of a hearing that was never requested.

60. Ignoring the text of Article 6.2, Argentina argues that the United States suggested in its arbitration submission that it would hold a hearing.[68] Argentina seems to be suggesting that its claim is not that the United States breached Article 6.2, but that it breached the U.S. arbitration submission. Of course nothing in the DSU provides for such an argument. Moreover, the United States did not state that it would hold a hearing but rather included a hearing in its projected timeline, in case a party requested a hearing.

61. Argentina also argues that the United States breached Article 6.2 because Commerce "remain[ed] silent after Siderca asked for essential clarification with respect to the erroneous allegations of the Petitioners and with respect to the procedures . . ."[69] Argentina neither cites to the submission it is referencing, nor provides an explanation as to how this prevented the Argentine respondents from defending their interests. Commerce allowed all parties to submit comments and rebuttal comments and then responded to all of the interested parties' comments in its Section 129 Determination. Therefore, the United States met its obligations with respect to Article 6.2.

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[66] Argentina Second Submission, para. 106.
[67] Argentina Second Submission, para. 109.
[68] Argentina Second Submission, para. 109.
[69] Argentina Second Submission, para. 111.

3. Procedural Requirements in Articles 6.4, 6.5.1, 6.6, and 6.9

(a) Article 6.4

62. Argentina continues to pursue its claim under Article 6.4 of the AD Agreement. In doing so, Argentina misrepresents the U.S. argument about the relevance of the arbitration proceeding. The United States did not argue that there is a "hierarchy" between the arbitration report and Article 6.4. Rather, the United States noted that the obligations under Article 6.4 are, as specified in the text, applicable only whenever release of such information is practicable. The reasonable period of time is directly relevant to whether release of the information in question is practicable. A brief review of the proceeding will illustrate that Commerce did, whenever practicable, release all information subject to Article 6.4.

63. As the Panel may recall, Commerce was obliged to amend the waiver regulations because the "deemed waiver" exercised in the original sunset review had "tainted" the final determination. Commerce could not begin its Section 129 Determination until those regulations became effective. The regulations became effective October 31, 2005, and Commerce sent out questionnaires that same day. The timeline was as follows:

- November 22, 2005: Commerce places CBP and Preston Price data on the record
- November 30, 2005: Respondent interested parties provide questionnaire responses
  U.S. Steel provides response
- December 8, 2005: Domestic interested parties provide rebuttal submissions
- December 14, 2005: Respondent interested parties provide rebuttal submissions
- December 16, 2005: Commerce issues Section 129 determination

64. It is evident from the timeline that this proceeding had considerably greater time constraints than an original sunset review. Nevertheless, Commerce disclosed all information, and did so as soon as practicable. In particular, the United States notes that the memoranda placed in the file on December 16, 2005, were so placed only two days after respondents filed their rebuttal submissions. Argentina has not proven that it was practicable for Commerce to place those memoranda on the record any earlier.

65. Moreover, Argentina can only discharge its burden of proof by identifying each memorandum at issue and explaining why each memorandum met the criteria of Article 6.4, including what the information in question is, why it is relevant to the presentation of the respondent interested party's case, that it is not confidential, and that it was used by the

authorities in the proceeding. Argentina appears to place the burden on the Panel – or the United States – to examine the memoranda in this fashion. Argentina simply states that some of the memoranda are public and, therefore, meet the criteria of Article 6.4. It is evident that Argentina wishes the Panel to consider these documents in lump form, and a closer examination of the documents reveals why: the information in question was either provided to the parties as early as November 22, 2005, was confidential, was not relevant to the presentation of the respondent interested party's case, or was not used by the authorities in the proceeding.

Non-Confidential Versions of Confidential Memoranda

66. At the outset, it should be noted that Article 6.4 only applies to non-confidential information. Therefore, the memoranda containing confidential information are not subject to Argentina's Article 6.4 claim. As a result, Article 6.4 is not applicable to the confidential information in Exhibit ARG-18 (the price and CBP data), Exhibit ARG-21 (containing confidential Siderca information), and Exhibit ARG-23 (containing confidential Acindar information). Argentina argues that the non-confidential versions of these memoranda are subject to Article 6.4. There are several problems with this argument.

67. First, Argentina has failed to explain why Commerce's placement of the CBP and Preston Price data in the file on November 22, 2005, was inconsistent with Article 6.4.

68. Second, the United States recalls that the stated purpose of Article 6.4 is to enable those parties to "see all information that is relevant to the presentation of their cases . . . and to prepare presentations" on the basis of that information – the stated purpose of Article 6.4.[70] Argentina has failed to explain how placing the *non-confidential* versions of memoranda on the record would permit respondent interested parties to prepare presentations when respondents had access to the *confidential* versions.

Public Documents

69. The three remaining memoranda were, in fact, public documents, rather than non-confidential versions of confidential documents. However, even with respect to these documents, Argentina's claim fails.

- Exhibit ARG-22 (December 16, 2005, USDOC Memorandum to file from Mark Flessner regarding "Information from Preston Price Publishing.") This memorandum contains pages providing descriptive information about Preston Price Publishing – the source of

[70] Argentina is not arguing that the non-confidential versions were created or filed later than the confidential versions. Both the confidential and non-confidential memoranda have the same date and were placed in the file on the same date. As a result, Argentina is essentially advancing a claim regarding the confidential memoranda, when Article 6.4 expressly limits itself to non-confidential information.

data placed on the record on November 22, 2005. (That information is also available on the web.) Article 6.4 only concerns information that is relevant to the presentation of a party's case. While the *data* are relevant, and were placed on the record on November 22, 2005, the descriptive information about the company providing the data is not. Therefore, placing this memorandum in the file on December 16, 2005, is not inconsistent with Article 6.4.

- Exhibit ARG-24 (December 16, 2005, USDOC Memorandum to file from Mark Flessner regarding "Securities and Exchange Commission Filings of Domestic OCTG Producers.") These are simply the financial statements of domestic OCTG producers. These statements were cited in the determination[71] to support assertions made by the *respondents,* including Siderca's assertion that the OCTG market was depressed,[72] as well as its assertion that the United States is the world's largest market for OCTG.[73] Argentina has failed to explain why these documents were "relevant" to respondents' ability to "present their cases," inasmuch as the documents actually *confirmed* assertions respondents themselves made.

- Exhibit ARG-25 (December 16, 2005 USDOC Memorandum to file from Fred Baker regarding "Information for the Record."). This information consists of respondent and domestic interested parties' submissions in the original sunset review. Argentina has had access to the public file containing the same information since the original sunset review.

(b) Article 6.5.1

70. Argentina continues to assert that Commerce failed to require non-confidential summaries of confidential information. This is not correct. Commerce required interested parties to provide non-confidential versions of their confidential documents; as the United States explained in its first submission, the non-confidential versions themselves contained summaries of the confidential information that was bracketed.[74]

71. Rather than addressing this point, Argentina engages in an imprecise discussion of the timeliness of the receipt of unspecified confidential documents issued concurrently with the Section 129 determination. The United States recalls that Argentina's claim in connection with Article 6.5.1 of the AD Agreement was with respect to U.S. Steel's submission[75] – the public version of which was filed on December 2, 2005, not concurrently with the Section 129 determination. Therefore, Argentina's discussion is irrelevant to its Article 6.5.1 claim.

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[71] *See* Section 129 Determination, pp. 7, 11;
[72] Siderca's December 7, 2005 submission, p. 7 (Exhibit ARG-19).
[73] *US – OCTG (Argentina) (Panel)*, paras. 7.291 and 7.297.
[74] U.S. First Submission, para. 71.
[75] Argentina First Submission, para. 169.

72. Finally, Argentina contends that it is not clear that Acindar was represented by its own counsel.[76] Attached is a copy of the service list indicating that Acindar, in fact, was represented by counsel.[77][78]

(c) Article 6.6

73. Article 6.6 of the AD Agreement requires administering authorities to satisfy themselves as to the accuracy of the information upon which they rely in making their findings. As the United States pointed out in its first submission, the cost data submitted by Siderca were *per se* not accurate because they were self-described estimates, using 2005 data to estimate costs for the period 1995 to 2000, five to ten years earlier. Argentina fails to address this argument. Morever, Commerce explained carefully why the data were not reliable. Commerce explained how Siderca's estimated production cost data was inconsistent with other cost data for steel products in the Section 129 Determination.[79]

74. Further, the United States noted that the cost information was not information "upon which . . . findings are based," and Article 6.6 is therefore not applicable. Argentina has failed to explain why the lack of a decision constitutes a finding. Argentina states that the U.S. view that it has not acted inconsistently with Article 6.6 is premised on the assumption that the data were flawed. That is incorrect; the U.S. view is premised on the plain language of Article 6.6, which is limited to information upon which findings are based.

(d) Article 6.9

75. Article 6.9 requires authorities, before a final determination is made, to inform all interested parties of the essential facts under consideration that form the basis for the decision to apply definitive measures. As the United States noted, Argentina, as the complaining party, bears the burden of proving its claim, including proving that the information in question consists of "essential facts."

76. First, it should be noted that Argentina's rebuttal is limited to the two memoranda in

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[76] Argentina Second Submission, para. 124.

[77] U.S. Department of Commerce Public Service List, Section 129 Determination, Oil Country Tubular Goods from Argentina (Exhibit US-9).

[78] Argentina also asserts that "it is unreasonable, unfair, and a violation of Article 6.5 for the USDOC to ignore a specific request by an interested party to be advised of the allegations made against it." Argentina Second Submission, para. 124. Article 6.5 requires investigating authorities to treat confidential information as confidential and prohibits disclosure of such information without the permission of the party submitting it. It does not require USDOC to inform an interested party of the allegations made against it.

[79] Section 129 Determination, at 8-9 (Exhibit ARG-16). *See also*, Memo Re: Inconsistencies in Siderca's Cost Data (Exhibit ARG-21).

which Commerce describes the inconsistencies in the Argentine companies' data.[80] Therefore, the United States understands Argentina's claim to be limited to those memoranda.

77. Second, Argentina still fails to explain *why* those memoranda contain "essential facts", or how those essential facts formed the basis for the decision to apply definitive measures. Argentina simply offers the statement that the "memoranda were clearly part of the 'essential facts under consideration,' and were treated as such by the Section 129 Determination."[81] Therefore, Argentina *still* has not met its burden of proof with regard to these memoranda.

78. Moreover, Argentina cannot meet its burden of proof. The essential facts that formed the basis of the decision to continue the order were provided weeks in advance of the final determination. On November 22, 2005, Commerce placed the CBP data (Acindar's sales) and the Preston Publishing data (U.S. average unit values) on the record.[82] Those data formed part of the basis for the decision to continue the order and were the "essential facts." Commerce's identification of inconsistencies in the Argentine respondents' data are not "facts;" rather, they constitute reasoning by the investigating authority. Further, they are not the basis for the continuation of the order because the data were *not used* in making the final decision.

79. In this regard, the United States recalls the panel's analysis in *Argentina – Poultry*, where Argentina successfully defended an Article 6.9 claim under analogous circumstances. Argentina's investigating authority had disregarded certain normal value and export price data reported by Brazilian exporters. Brazil alleged that Argentina failed to disclose its rejection of data, in violation of Article 6.9.

80. The panel rejected Brazil's claim for two reasons. First, the panel rightly concluded that the *reasons* why data are rejected are not *facts.*[83]

> In our view . . . the failure to inform an interested party of a reason does not equate to failure to inform an interested party of an essential fact.[84]

Commerce's identification of inconsistencies in the Argentine respondents' data was a *reason* why the data were rejected and was not, itself, a fact. Therefore, the United States did not breach Article 6.9 with respect to those memoranda.

81. The *Argentina – Poultry* panel also explained that Argentina's rejection of certain data

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[80] Argentina Second Submission, para. 143 ("In the present case, the Argentina respondents could not defend their interests by addressing what the USDOC perceived to be 'inconsistencies in data.'")

[81] Argentina Second Submission, para. 142.

[82] Memo Re: Information for the Record (Exhibit ARG-18).

[83] *Argentina – Poultry*, para. 7.225.

[84] *Argentina – Poultry*, para. 7.225.

did not form the basis for the decision whether to apply definitive measures, and therefore, for a second reason, did not fall within the ambit of Article 6.9.[85] More specifically, the panel noted:

> In our view, however, the fact that certain normal value or export price data is not going to be relied on in making a final determination is not a fact which forms the basis for the decision whether to apply definitive measures. While we accept that the normal value and export price data ultimately used in the final determination are essential facts which form the basis for the decision whether to apply definitive measures, the fact that certain normal value and export price data is not going to be used is not.[86]

Thus, data *not* used cannot form the basis for the decision whether to apply definitive measures.

82. Rather than referring to *Argentina – Poultry*, which addresses a situation squarely analogous to the one in this dispute, Argentina relies on *Argentina – Tiles* for the proposition that the United States has acted inconsistently with Article 6.9.[87] *Argentina – Tiles* involved a different scenario from the one here. In that dispute, Argentina defended the Article 6.9 claim by asserting that the respondent interested parties had the opportunity to view the public file, which contained all of the essential facts. Those facts were simply questionnaire responses and other information provided by the interested parties.[88] By contrast, Commerce did not merely invite the interested parties to review the public file. Instead, Commerce – not the domestic interested parties – placed the Preston price and CBP data on the record and provided the Argentine respondents with both public and confidential versions of that information. Commerce did so on November 22, 2005, three weeks before the Section 129 determination was issued. Therefore, the Argentine respondents had the opportunity to address whether Commerce should have used the information. *Argentina – Tiles*, therefore, is inapposite to Argentina's Article 6.9 claim in this dispute.

83. Indeed, the panel in *Argentina – Poultry* expressly addressed *Argentina – Tiles*, stating that "our conclusion is entirely compatible with the finding of the *Argentina – Ceramic Tiles* panel. In our view, that panel concluded that factual information – rather than reasoning – represents the 'essential facts' . . . ."[89] As noted above, Commerce disclosed the essential facts on November 22, 2005.

84. Finally, the gravamen of Argentina's claim appears to be the lack of opportunity to explain why the responses should not be rejected and to suggest alternative sources for facts

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[85] *Argentina – Poultry*, para. 7.223.
[86] *Argentina – Poultry*, para. 7.224.
[87] Argentina Second Submission, para. 142.
[88] *Argentina – Tiles*, para. 4.966.
[89] *Argentina – Poultry*, para. 7.228.

available, rather than a failure to disclose essential facts forming the basis for the continuation of the order.[90] As the *Argentina – Poultry* panel noted, "we agree . . . that an investigating authority must inform interested parties why certain information is disregarded. However . . . that obligation is found in Article 6.8 . . . and not in Article 6.9."[91] The United States addresses that claim next.

4. Article 6.8 and Annex II

85. Argentina persists in its assertion that Commerce applied "facts available" to Siderca and Acindar in violation of Article 6.8 and Annex II of the Agreement.

86. With regard to Siderca, Argentina asks the Panel to "reject the U.S. assertion that the USDOC did not resort to facts available with respect to Siderca because 'the result of Commerce's analysis of Siderca's estimated cost information was *no* company-specific finding regarding Siderca.'"[92] Argentina goes on to state that the "U.S. assertion is premised on the erroneous assumption that these obligations apply only to information that supports the conclusions of the investigating authority . . . ."[93] Argentina is mistaken. The U.S. assertion is much simpler than that.

87. Article 6.8 states the circumstances under which a Member may make a determination "on the basis of facts available." The United States did not use *other* facts in lieu of the data provided by Siderca; the United States simply made no finding with respect to Siderca. Thus, Commerce did not use the "facts available" but rather declined to make any finding with respect to Siderca and used no facts in that respect. The United States was not required to make a company-specific finding in the course of making its determination. In other words, the question is quite simple: With respect to Siderca, which "facts available" did Commerce use?

88. Argentina appears to be referring to "facts available" not as the term is actually used in Article 6.8, but rather interchangeably with the decision by an investigating authority to reject information that has been provided. The plain language of Article 6.8 indicates that its applicability is triggered not by the rejection of the information, but by the use of facts available. Article 6.8 sets out conditions precedent to the use of facts available – "cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period of time or significantly impedes the investigation . . . ." If facts available have not been used, then there is no need to examine the conditions precedent to the use of facts available. That is the situation here: facts available were not used with respect to Siderca, and as a result, the obligations further to Article 6.8 have not been triggered.

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[90] Argentina Second Submission, para. 144.
[91] *Argentina – Poultry*, para. 7.227.
[92] Argentina Second Submission, para. 137.
[93] Argentina Second Submission, para. 137.

89. Argentina does not appear to deny that Siderca and Acindar did not provide the requested information. Rather, Argentina provides excuses as to why that information was not provided. Thus, "USDOC asked both Acindar and Siderca for information they did not have." "Siderca . . . did not retain product-specific costs from the period requested." "Acindar . . . no longer produces OCTG, . . . it did not have the product-specific cost information in the form requested by the Department, and . . . it was not required to have retained such information under Argentine law."[94]

90. Argentina seems to believe that Article 6.8 requires authorities to establish that respondents are "recalcitrant." However, Article 6.8 provides that an authority may use facts available not only when an interested party "refuses access to" information, but also when an interested party "otherwise does not provide" necessary information.[95] Argentina's interpretation would read the latter phrase out of Article 6.8. Argentina appears to assume that Article 6.8 is punitive. Article 6.8 is not punitive: it simply establishes that where interested parties do not provide necessary information, investigating authorities may use other information.

91. Argentina argues that the United States has failed to address its specific allegations regarding Annex II. Argentina ignores the fact that the United States pointed out that no facts available were used with respect to Siderca. Annex II is only applicable when Article 6.8 is applicable. The majority of Argentina's arguments regarding Annex II concern Siderca and are simply inapplicable.[96]

92. With respect to Acindar, Argentina asserts that there is:

> no indication whatsoever that the USDOC acted with 'special circumspection' within the meaning of paragraph 7. There is nothing in the Section 129 Determination demonstrating that the USDOC 'check[ed] the information from other independent sources at [its] disposal.' DOC never even asked Acindar to explain the general reference in its 2000 financial statement.[97]

As the United States noted, Acindar did not provide any cost information. Commerce therefore used alternate information from secondary sources. Argentina cannot credibly assert that Commerce failed to exercise "special circumspection" when Acindar gave Commerce no choice but to use information from independent sources.

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[94] Argentina Second Submission, para. 138.

[95] For purposes of this discussion, the United States is assuming *arguendo* that the information in question is "necessary information" for purposes of Article 6.8.

[96] Argentina First Submission, para. 184.

[97] Argentina First Submission, para. 184.

93. It is more puzzling that Argentina asserts that Commerce failed to check information from other independent sources at its disposal. Paragraph 7 of Annex II provides examples of independent sources, and they are the same sources that Commerce used: "published price lists" and "official import statistics."

94. Finally, Argentina seems to read paragraph 6 of Annex II as requiring a Member to inform all respondents when information provided by only one of them is not accepted.[98] However, paragraph 6 provides that if "evidence or information is not accepted, the supplying party should be informed forthwith . . . ." Therefore, there was no obligation to inform Acindar that Siderca's information was being rejected. As the United States noted in its first submission, Commerce made no finding regarding Siderca and did not use facts available regarding Siderca; therefore, the obligations under Annex II are simply not applicable with respect to Siderca.

IV. ARGENTINA'S REQUEST FOR A SUGGESTION

95. Argentina persists in asserting that it has a "right" to termination.[99] Argentina also persists in its assertion that the Panel should make a "suggestion" that the order be terminated.[100] Argentina has failed to explain just how a "suggestion" from the Panel would fulfill Argentina's alleged "right" to termination, or how it would prevent a "never-ending cycle" of litigation.[101]

96. Argentina believes its right to termination flows from the temporal limitations of Article 11.3. If that were true, then it is unclear why a suggestion would be necessary, inasmuch as there would purportedly be an inconsistency *per se* with Article 11.3. That is precisely the interpretation the Appellate Body rejected in *US – OCTG (Mexico).* Mexico argued that the panel, and the Appellate Body, should make a finding that the United States had "no legal basis to continue its . . . measure beyond . . . five years . . . ."[102] The Appellate Body refused to make such a finding, or to overturn the panel's refusal to make such a finding.

97. Argentina distorts the Appellate Body's analysis, concluding that the Appellate Body simply meant that the order did not have to be terminated "*immediately*," as if to imply that the order in fact had to be terminated, but at some later date.[103] That is simply not correct. The Appellate Body rejected Mexico's interpretation not only because the DSU provides Members a reasonable period of time to implement, but because it also accords to Members "the means of implementation."[104] The means of implementation in this dispute include the decision to

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[98] Argentina First Submission, para. 184.
[99] Argentina Second Submission, para. 174.
[100] Argentina Second Submission, para. 176.
[101] Argentina Second Submission, para. 183.
[102] *US – OCTG (Mexico) (AB)*, para. 183.
[103] Argentina Second Submission, para. 180 (emphasis in original).
[104] *US – OCTG (Mexico) (AB)*, para. 187.

terminate – or to correct the flaws in the determination, which is what the United States did. [105]

V. CONCLUSION

98. For the foregoing reasons, the United States respectfully requests that the Panel reject Argentina's claims.

[105] Argentina references a number of disputes in which suggestions have been made. Not one of those concerns an Article 21.5 proceeding.