UNITED STATES - SUNSET REVIEWS OF ANTI-DUMPING MEASURES ON OIL COUNTRY TUBULAR GOODS FROM ARGENTINA

WT/DS268

FIRST SUBMISSION

BY THE

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Table of Contents

I. INTRODUCTION 1

II. PROCEDURAL BACKGROUND 2

III. FACTUAL BACKGROUND 6
A. Sunset Reviews Under U.S. Law 7
1. The Statute 7
a. Statutory Provisions Related to Commerce's Determination 7
b. Statutory Provisions Related to the ITC's Determination 9
2. The Regulations 9
a. Commerce Regulations 9
b. ITC Regulations 11
3. Commerce's *Sunset Policy Bulletin* 11
B. Certain OCTG from Argentina 12
1. The Antidumping Duty Investigation and Order 12
2. The Sunset Review and Determination 13
a. Commerce's Determination of Likelihood of Continuation or Recurrence of Dumping 13
b. The ITC's Determination of Likelihood of Continuation or Recurrence of Injury 15
c. Notice of Continuation of the Order 20

IV. REQUEST FOR PRELIMINARY RULINGS 20
A. Introduction 20
B. Because Page 4 of Argentina's Panel Request Fails to Conform to the Requirements of Article 6.2 of the DSU, the Panel Should Find that the Claims Set Forth on Page 4 Are Not Within the Panel's Terms of Reference 21
1. Page 4 of the Panel Request Does Not "Present the Problem Clearly" . . 22
2. The United States Has Been Prejudiced by Argentina's Failure to Comply with Article 6.2 of the DSU 26
3. The Panel Should Find that the Claims Set Forth on Page 4 of Argentina's Panel Request Are Not Within the Panel's Terms of Reference 27
C. Because Sections B.1, B.2 and B.3 of Argentina's Panel Request Do Not Present the Problem Clearly Within the Meaning of Article 6.2 of the DSU, the Panel Should Find that Argentina's Claims in Those Sections Alleging Inconsistencies With Article 3 and Article 6 of the AD Agreement Are Not Within the Panel's Terms of Reference 28
D. The Panel Should Find That Certain Matters Included in Argentina's First Submission Are Not Within the Panel's Terms of Reference Because Those Matters Were Not Included in Argentina's Panel Request 31

1. Argentina's Claim That Commerce's Sunset Review Practice, Both as Such and as Applied, Is Inconsistent with Article 11.3 of the AD Agreement . . . 33
2. Argentina's Claim that 19 U.S.C. §§ 1675(c) and 1675(a)(c), the SAA, and the *Sunset Policy Bulletin*, Taken Together, Establish an Irrefutable Presumption that Is Inconsistent with Article 11.3 of the AD Agreement . . . 34
3. Argentina's Claim that Commerce's Sunset Review Practice Is Inconsistent with Article X:3(a) of the GATT 1994 . . . 35
4. Argentina's Claim that the ITC's Application of 19 U.S.C. §§ 1675a(a)(1) and (5) in the Sunset Review of OCTG from Argentina Is Inconsistent with Articles 11.3 and 3 of the AD Agreement . . . 35
5. Argentina's Claim that the U.S. Measures It Has Identified Are Inconsistent with Article VI of the GATT 1994, Articles 1 and 18 of the AD Agreement, and Article XVI:4 of the WTO Agreement . . . 36

E. Conclusion . . . 37

V. GENERAL LEGAL PRINCIPLES . . . 37
A. Scope and Standard of Review . . . 37
B. Burden of Proof: Argentina Bears the Burden of Proving Its Claims . . . 38

VI. LEGAL ARGUMENT . . . 39
A. Section 751(c)(4) of the Act and Section 351.218(d)(2)(iii) of Commerce's *Sunset Regulations* – the "Waiver" Provisions – Are Not Inconsistent, As Such, with the AD Agreement . . . 39
1. The Waiver Provisions Are Not Inconsistent with the Obligation to Conduct a "Review" and Make a "Determination" Under Article 11.3 of the AD Agreement . . . 40
2. Section 751(c)(4) of the Act and Section 351.218(d)(2)(iii) of Commerce's *Sunset Regulations* Are Not Inconsistent with Articles 6.1 and 6.2 of the AD Agreement . . . 46
a. Section 751(c)(4) and Section 351.218(d)(iii)(2) Are Not Inconsistent with the Obligation Under Article 6.1 to Provide Ample Opportunity to Submit Written Information . . . 47
b. Section 751(c)(4) of the Act and Section 351.218(d)(2)(iii) of Commerce's *Sunset Regulations* Are Not Inconsistent with Article 6.2 of the AD Agreement . . . 48

B. The Panel Should Reject Argentina's Claims Concerning an Alleged "Irrefutable Presumption" and Its Inconsistency with Article 11.3 of the AD Agreement . . . 49
1. Argentina's "Irrefutable Presumption" Does Not Exist . . . 50
2. Assuming *Arguendo* that a Commerce "Irrefutable Presumption" Actually Exists, the *Sunset Policy Bulletin* and Commerce "Practice", As Such, Cannot Be Found to Be Inconsistent with Article 11.3 of the AD Agreement . . . 55

3. Assuming *Arguendo* that a Commerce "Irrefutable Presumption" Actually Exists, the *Sunset Policy Bulletin* and Commerce "Practice," As Applied Generally, Cannot Be Found to Be Inconsistent with Article 11.3 of the AD Agreement 58
4. Commerce's Sunset Determination in OCTG from Argentina Was Not Inconsistent with Article 11.3 Because of an "Irrefutable Presumption" 59
C. Commerce's Sunset Determination in OCTG From Argentina Is Not Inconsistent with Articles 11, 2, 6, or 12 of the AD Agreement 59
1. Commerce's Determination to "Expedite" the Sunset Review of OCTG from Argentina Is Not Inconsistent With the AD Agreement 60
2. Commerce Conducted a Sunset Review for the Antidumping Order of OCTG from Argentina and Fully Considered All Record Information in Making the Final Sunset Determination 62
3. Commerce Complied with the Evidentiary and Procedural Requirements of Article 11.3 and Article 6 in the OCTG Sunset Review 63
a. Commerce Afforded Siderca the Notice and Opportunity Required by Article 6.1 64
b. Siderca Was Afforded An Opportunity For A Full Defense of Its Interests in Accordance With Article 6.2 66
3. Commerce's Final Sunset Determination in OCTG from Argentina Is Not Inconsistent with the Obligation Contained in Article 12 of the AD Agreement 69
D. Commerce's Analysis of Dumping In the Context of the Likelihood and "Margin Likely to Prevail" Determinations in the Sunset Review on OCTG from Argentina Were Not Inconsistent with Article 11.3 of the AD Agreement 71
1. Article 11.3 Does Not Require a Quantification of Dumping or the Use of Any Particular Methodology for Making the Likelihood Determination 72
2. The Margins Determined In Commerce's Original Investigation, And The Methodologies Used To Derive Them, Cannot Be Challenged Before This Panel 74
3. Commerce Fully Complied with its Obligations under the AD Agreement in Making the Affirmative Likelihood Determination 75
4. There Is No Obligation Under Article 11.3 of the AD Agreement to Calculate or Consider a Margin Likely to Prevail Upon Expiry of the Duty 76
E. The Panel Should Reject Argentina's Claim Under Article X:3(a) of GATT 1994 77
F. The ITC Applied the Correct Standard for Determining Whether Termination of the Antidumping Duty Order Would Be Likely to Lead to Continuation or Recurrence of Injury, and the ITC's Determination of Likelihood in the Sunset Review of OCTG from Argentina Was Consistent With Article 11. 3 and Article 3.1 of the AD Agreement 79
G. Article 3 Does Not Apply to Sunset Reviews 82

H. The Panel Should Reject Argentina's Claims Under Article 3.1 of the AD Agreement 86
1. Article 3.1 Does Not Apply to Sunset Reviews 86
2. The ITC's Sunset Determination Was Consistent with Article 3.1, Because It Was Based on a Proper Establishment of the Relevant Facts, an Unbiased and Objective Evaluation of Those Facts, and Positive Evidence 87
a. The ITC's Findings on the Likely Volume of Imports 88
b. The ITC's Findings on the Likely Price Effects of Imports 93
c. The ITC's Findings on the Likely Impact of Imports 95
I. The ITC Sunset Determination on OCTG from Argentina Is Not Inconsistent with Article 3.4 of the AD Agreement 96
J. The ITC Sunset Determination on OCTG from Argentina Is Not Inconsistent with Article 3.5 of the AD Agreement 99
K. The Time Frame in Which Injury Would Be Likely to Recur 100
1. The U.S. Statutory Provisions as to the Time Frame in Which Injury Would Be Likely to Recur Are Not Inconsistent With Articles 11.3 and 3 of the AD Agreement 100
2. The ITC's Application of the Statutory Provisions as to the Time Frame in Which Injury Would Be Likely to Recur Was Not Inconsistent With Articles 11.3 and 3 of the AD Agreement 101
L. The ITC Did Not Act Inconsistently with Any Provision of the AD Agreement by Conducting a Cumulative Analysis in the OCTG Sunset Review 102
1. The AD Agreement Does Not Prohibit Cumulation in Sunset Reviews 102
2. The ITC Did Not Act Inconsistently with Article 3.3 of the AD Agreement Because Article 3.3 Does Not Apply to Sunset Reviews 104
M. None of the "Measures" Identified by Argentina Is Inconsistent with Article VI of the GATT 1994, Articles 1 or 18 of the AD Agreement, or Article XVI:4 of the WTO Agreement 107

VII. CONCLUSION 108

I. INTRODUCTION

1. A centerpiece of the First Submission of Argentina in this dispute is Argentina's purported study of the sunset review practice of the U.S. Department of Commerce ("Commerce"), in which Argentina claims to have exhaustively researched all of Commerce's sunset review determinations and proven empirically that Commerce maintains an "irrefutable presumption" that a continuation or recurrence of dumping is likely, thereby generating an injustice in 100% of the 217 cases that Argentina considered relevant.[1]

2. As the United States will demonstrate, when one takes a closer look at this "study," what one really finds is that in *87 percent* of the 291 sunset reviews considered by Argentina – 252 reviews – the issue of likelihood of dumping was not contested by one side or the other. So why does Argentina make the egregiously erroneous claim that 217 Commerce sunset reviews were decided improperly?

3. The United States suspects that the answer relates to the fact that Argentina has a very weak case. With respect to its claims concerning inconsistencies with Article 11.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), Argentina is handicapped by the fact that: (1) Article 11.3 is the only provision of the AD Agreement that sets forth the substantive requirements for determining whether an order should be revoked five years after its imposition; and (2) the terms of Article 11.3 are very limited. It is hard to establish an inconsistency with an obligation when the obligation does not exist. However, the bulk of Argentina's case involves an attempt to do precisely that.

4. With respect to the factual issues concerning the specific determinations by Commerce and the U.S. International Trade Commission ("ITC") in their sunset reviews of oil country tubular goods ("OCTG") from Argentina, Argentina's situation is no better. As will be seen, these determinations are supported by the evidence of record, and Argentina's attempts to impugn these determinations border on the frivolous. For example, Argentina complains that Commerce denied an Argentine producer/exporter its rights under Articles 6.1 and 6.2 of the AD Agreement to submit information and argument in the sunset review on OCTG. Yet, as the United States will demonstrate, the record clearly shows that the company in question declined to take advantage of the ample opportunities provided under U.S. law to submit such material, and instead chose to limit itself to a mere 4-page, double-spaced submission.

5. These are but a few examples, but they are representative of the emptiness of Argentina's claims. Because facts like these pose problems for Argentina, it needs something like its study to distract from the real issues in this case, and from the fact that the United States has not acted inconsistently with any of its obligations under the AD Agreement, the *Marrakesh Agreement Establishing the World Trade Organization* ("WTO Agreement"), or the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

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[1] The "study" in question is contained in Exhibit ARG-63.

6. In terms of the structure of this submission, in Section II, the United States discusses the procedural background of this case, particularly as it relates to various claims by Argentina that are not within the Panel's terms of reference. In Section III, the United States sets forth the factual background to this dispute, describing the U.S. system of sunset reviews and the particular determinations made in OCTG from Argentina. In Section IV, the United States sets forth its request that the Panel make preliminary rulings that various claims by Argentina are not within the Panel's terms of reference. Finally, in Section V, the United States responds to the substantive arguments made by Argentina in its First Submission.

II. PROCEDURAL BACKGROUND

7. Although Commerce published its continuation of the antidumping duty order on OCTG from Argentina on July 25, 2001, Argentina did not request consultations with the United States until October 7, 2002.[2] A first round of consultations took place in Geneva on November 14, 2002, and a second round of consultations took place in Washington, D.C., on December 17, 2002.

8. On April 3, 2003, Argentina requested the establishment of a panel.[3] Upon receipt of the request, the United States immediately identified three categories of defects in the request. In Section IV, below, the United States is requesting preliminary rulings with respect to two of these defects.[4]

9. The first category of defects has to do with Argentina's failure to include in its panel request "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" with respect to a broad range of legislative and regulatory materials that Argentina purports to be challenging. In order to fully appreciate the nature and degree of Argentina's failure, it is necessary to describe the structure of the panel request in some detail.

10. The panel request begins with several descriptive paragraphs chronicling the determinations made by U.S. authorities and the consultations between the parties. This introductory material is then followed by two sections – A and B – which in turn contain several

[2] WT/DS268/1 (10 October 2002).

[3] WT/DS268/2 (4 April 2003).

[4] The third category of defects relates to the fact that Argentina's panel request purported to challenge several items that do not constitute "measures." As explained by the United States at the meeting of the Dispute Settlement Body ("DSB") on April 15, 2003, these items were: (1) the Statement of Administrative Action – or "SAA" – accompanying the Uruguay Round Agreements Act; (2) Commerce's *Sunset Policy Bulletin*; and (3) what Argentina characterized as Commerce's "Determination to Expedite." *See* WT/DSB/M/147 (1 July 2003), para. 33 (copy attached as Exhibit US-1). To the extent that Argentina, in its First Submission, persists in treating these items as "measures," the United States has dealt with this defect as a substantive issue rather than as a subject of its request for preliminary rulings.

numbered paragraphs. These numbered paragraphs collectively appear to describe the measures Argentina is challenging and the claims made with respect to these measures.[5]

11. Section A deals with the "dumping" side of a sunset review. Section A.1 contains an "as such" complaint about 19 U.S.C. § 1675(c)(4) – a U.S. statutory provision dealing with sunset reviews – and 19 C.F.R. § 351.218(e) – a provision of the Commerce regulations dealing with sunset reviews. Sections A.2-A.5 contain "as applied" complaints about various aspects of the determination made, and the procedures applied, by Commerce in its sunset review of the antidumping duty order on OCTG from Argentina.

12. Section B of the panel request deals with the "injury" side of a sunset review. Section B.3 contains an "as such" complaint about 19 U.S.C. §§ 1675a(a)(1) and 1675a(a)(5), both of which are U.S. statutory provisions dealing with sunset reviews. Sections B.1-B.2 and B.4 contain "as applied" complaints about various aspects of the determination made by the ITC in its sunset review of the antidumping duty order on OCTG from Argentina.

13. On page 4 of the panel request, however, Sections A and B are followed by the following two paragraphs:[6]

> Argentina also considers that certain aspects of the following US laws, regulations, policies, and procedures related to the determinations of the Department and the Commission are inconsistent with US WTO obligations, to the extent that any of these measures mandate action by the Department or Commission that is inconsistent with US WTO obligations or preclude the Department or Commission from complying with US WTO obligations:
>
> - Sections 751(c) and 752 of the Tariff Act of 1930, as amended, codified at Title 19 of the United States Code §§ 1675(c) and 1675a; and the US Statement of Administrative Action (regarding the Agreement on Implementation of GATT Article VI) accompanying the Uruguay Round Agreements Act (the SAA), H.R. Doc. No. 103-316, vol. 1;
>
> - The Department's *Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Anti-Dumping and Countervailing Duty Orders*; Policy Bulletin, 63 Federal Register 18871 (16 April 1998) (Sunset Policy Bulletin);

[5] As discussed below, Argentina subsequently did confirm before the DSB that its claims were contained in Sections A and B of the panel request. With one exception, the United States is not requesting preliminary rulings on the consistency of Sections A and B with Article 6.2 of the DSU.

[6] For ease of reference, the United States hereafter will refer to the quoted paragraphs as "Page 4" of the panel request, notwithstanding that portions of other paragraphs are included on page 4.

> - The Department's sunset review regulations, codified at Title 19 of the United States Code of Federal Regulations § 351.218; and the Commission's sunset review regulations, codified at Title 19 of the United States Code of Federal Regulations §§ 207.60-69 (Subpart F).
>
> Argentina considers that the Department's Determination to Expedite, the Department's Sunset Determination, the Commission's Sunset Determination, the Department's Determination to Continue the Order and the above mentioned US laws, regulations, policies and procedures are inconsistent with the following provisions of the Anti-Dumping Agreement, the GATT 1994, and the WTO Agreement:
>
> - Articles 1, 2, 3, 6, 11, 12, 18 and Annex II of the Anti-Dumping Agreement;
> - Articles VI and X of the General Agreement on Tariffs and Trade (GATT) 1994; and
> - Article XVI:4 of the WTO Agreement.

(Underscoring added).

14. In the first sentence of the first quoted paragraph on Page 4, Argentina uses the word "also." This suggests that the WTO inconsistencies alluded to on Page 4 are in addition to, and different from, the claims set forth in Sections A and B.

15. Argentina then proceeds to assert in the first sentence that "certain aspects" of the subsequently named laws, regulations, etc., are inconsistent with U.S. WTO obligations "as such," because they either mandate WTO-inconsistent behavior or preclude WTO-consistent behavior. However, Argentina provides absolutely no explanation as to how any aspect (or aspects) of these items is WTO-inconsistent. Instead, it simply lists the items, notwithstanding the fact that each of the items is voluminous and contains multiple requirements or statements. Then, on the next paragraph on Page 4, Argentina simply lists entire articles from the AD Agreement, the GATT 1994, and the WTO Agreement. Unfortunately for anyone trying to discern the nature of Argentina's problems, almost all of these WTO provisions consist of multiple paragraphs and contain multiple obligations. Argentina then merely asserts that all of the "measures" it has identified up to that point are inconsistent with the cited articles.

16. Argentina makes no effort to link a particular article to a particular alleged measure, or to otherwise describe the legal basis of the complaint in order to describe the problem. There is no explanation of the facts and circumstances describing the substance of the dispute accompanying these citations to entire articles. As a result, it is impossible to discern precisely what Argentina purports to be complaining about on Page 4.

17. A second set of defects appears in Sections B.1, B.2, and B.3 of Argentina's panel request, which deal with the sunset review determination of the ITC. In Sections B.1 and B.2, Argentina alleges an inconsistency with Article 6 of the AD Agreement in its entirety. In section B.3, Argentina alleges an inconsistency with Article 3 of the AD Agreement in its entirety. Both Articles 3 and 6, however, consist of multiple paragraphs and contain multiple obligations, and it seems implausible that Argentina is alleging that the ITC's determination or the relevant provisions of the U.S. statute are inconsistent with each one of those obligations.[7] Significantly, elsewhere in the request, Argentina was able to identify with precision the particular paragraphs of Articles 3 and 6 with which the U.S. measures allegedly were inconsistent.

18. Because of the above-noted defects, Argentina's panel request failed to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly," as required by Article 6.2 of the DSU. At the meeting of the DSB on April 15, 2003, the United States noted these defects, and suggested that Argentina withdraw its panel request and submit a new request that complied with Article 6.2 of the DSU.[8]

19. Instead of correcting the defects in its panel request, Argentina attempted to explain them away by means of a statement it made at the DSB meeting of May 19, 2003.[9] In the case of the first defect – the ambiguity concerning Argentina's "as such" challenge on Page 4 of the panel request – Argentina stated as follows: "It was Argentina's intention (as the panel request clearly provided) to set forth the particular claims in the paragraphs contained in Sections A and B of the document."[10]

20. Unfortunately, this attempt at clarification by Argentina did not necessarily eliminate the confusion concerning Page 4 of the panel request. For example, on Page 4, Argentina refers to the ITC's sunset regulations and asserts that "certain aspects" of these regulations are WTO-inconsistent. However, nowhere in any of the paragraphs contained in Sections A or B – the true location, according to Argentina, of its claims – is there any reference to the ITC's regulations. If, as Argentina asserted before the DSB, its claims are only contained in Sections A and B, does this mean that Argentina is not making any claims regarding the ITC's regulations? Or, if Argentina is making a claim regarding these regulations, what is the nature of that claim and where is it described in the panel request? Put differently, if Argentina has a problem with the ITC's regulations, what is that problem and why is that problem not presented clearly in the panel request?

21. With respect to the second defect, Argentina did not attempt to argue that it was possible to discern from the panel request the nature of Argentina's problem. Instead, it argued that a

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[7] Indeed, as will be discussed below, in the relevant portions of its First Submission, Argentina does not assert inconsistencies with Article 3 in its entirety, and does not assert *any* inconsistencies with Article 6.

[8] WT/DSB/M/147 (1 July 2003), paras. 30-33 (copy attached as Exhibit US-1).

[9] WT/DSB/M/150 (22 July 2003) (copy attached as Exhibit US-2).

[10] *Id*., para. 32.

U.S. panel request in an earlier dispute allegedly shared the same shortcomings as Argentina's request.[11] In addition, it argued that the questions presented by Argentina to the United States during the consultations somehow should have informed the United States of the nature of the claims embodied in Argentina's general references to Articles 3 and 6 of the AD Agreement.

22. Because Argentina refused to correct the deficiencies in its panel request, the DSB had no choice under the negative consensus rule but to establish a panel on the basis of that request at its May 19 meeting.[12]

23. Argentina's First Submission, submitted on October 15, 2003, added to the list of Argentina's procedural errors by raising matters that were not included in its panel request. These matters are as follows:

- The claim in Section VII.B.1 of Argentina's First Submission that Commerce's sunset review practice, both as such and as applied, is inconsistent with Article 11.3 of the AD Agreement.

- The claim in Section VII.B.2 of Argentina's First Submission that, taken together, the U.S. sunset statutory provisions, the SAA, and the Sunset Policy Bulletin are, as such, inconsistent with Article 11.3 of the AD Agreement.

- The claim in Section VII.E of Argentina's First Submission that Commerce sunset reviews collectively – not the sunset review on OCTG from Argentina – are inconsistent with Article X:3(a) of GATT 1994.

- The claim in Section VIII.C.2 of Argentina's First Submission that the ITC's application of 19 U.S.C. §§ 1675a(a)(1) and (5) in the sunset review of OCTG from Argentina was inconsistent with Articles 11.3 and 3 of the AD Agreement.

- The claim in Section IX of Argentina's First Submission that the U.S. measures identified by Argentina are inconsistent with Article VI of the GATT 1994, Articles 1 and 18 of the AD Agreement, and Article XVI:4 of the WTO Agreement.

III. FACTUAL BACKGROUND

24. Some of Argentina's claims purport to relate to the U.S. sunset review system, as such, while other claims relate to determinations made by Commerce and the ITC in the sunset review on OCTG from Argentina. Other claims appear to relate to the U.S. sunset review system as

[11] *Id.*, para. 33.
[12] *Id.*, para. 38.

applied generally. In order to facilitate the Panel's understanding of the issues raised, the United States first will provide an overview of how the United States conducts sunset reviews, followed by a discussion of the specific sunset review determination involving OCTG from Argentina.

A. Sunset Reviews Under U.S. Law

1. The Statute[13]

25. In 1995, the United States amended its antidumping duty statute to include provisions for the conduct of five-year, or so-called "sunset," reviews of antidumping duty measures, including antidumping duty orders.[14] Commerce and the ITC each conduct sunset reviews pursuant to sections 751(c) and 752 of the Act.[15] Commerce has the responsibility for determining whether revocation of an antidumping duty order would be likely to lead to continuation or recurrence of dumping.[16] The ITC conducts a review to determine whether revocation of an antidumping duty order would be likely to lead to continuation or recurrence of material injury.

26. Under section 751(d)(2) of the Act, an antidumping duty order must be revoked after five years unless Commerce and the ITC make affirmative determinations that dumping and injury would be likely to continue or recur.[17]

a. Statutory Provisions Related to Commerce's Determination

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[13] This section provides a general overview of the U.S. statutory provisions relating to sunset reviews. To be clear, however, the only provisions of the U.S. statute that Argentina is challenging "as such" and that are within the Panel's terms of reference are sections 751(c)(4), 752(a)(1), and 752(a)(5) of the Tariff Act of 1930, as amended.

[14] The U.S. antidumping duty and countervailing duty statute is found in title VII of the Tariff Act of 1930, as amended ("the Act"), 19 U.S.C. 1671 *et seq.* Title II of the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (1994), amended title VII in order to bring it into conformity with U.S. WTO obligations. Concurrent with the passage of the URAA, Congress approved a "Statement of Administrative Action" (or "SAA"). H.R. Doc. No. 316, 103d Cong., 2d Sess., Vol. 1 (1994). The United States has attached as Exhibit US-11, the portions of the SAA dealing specifically with sunset reviews. The SAA itself is not a statute or law, but instead is legislative history, albeit legislative history that provides authoritative interpretative guidance in respect of the statute to which it relates. *See United States - Measures Treating Export Restraints as Subsidies*, WT/DS194/R, Report of the Panel, adopted 23 August 2001, paras. 8.99-100 (discussing the status in U.S. law of the SAA) [hereinafter "*Export Restraints*"]. As demonstrated below, the SAA itself is not within the terms of reference of this Panel, but could properly be considered by the Panel for purposes of interpreting, as a matter of fact, the meaning of those statutory provisions that Argentina is challenging "as such" and that are within the Panel's terms of reference; *i.e.*, sections 751(c)(4), 752(a)(1), and 752(a)(5) of the Act.

The United States also notes that the term "antidumping duty order" is the U.S. law equivalent of the term "definitive duty" in the AD Agreement.

[15] Sections 751(c) and 752 of the Act (Exhibit ARG-1).

[16] Under the U.S. antidumping duty law, the term "revocation" is equivalent to the concept of "termination" and "expiry of the duty" as used in Article 11.3 of the AD Agreement.

[17] Section 751(d)(2) of the Act (Exhibit ARG-1).

27. Under the statute, Commerce automatically initiates a sunset review on its own initiative within five years of the date of publication of an antidumping duty order.[18] Thereafter, a review can follow one of three basic paths.

28. First, if no domestic interested party responds to the notice of initiation, Commerce will revoke the order within 90 days after the initiation of the review.[19]

29. Second, if the responses to the notice of initiation are "inadequate," Commerce will conduct an expedited sunset review and issue its final determination within 120 days after the initiation of the review.[20]

30. Third, if the responses to the notice of initiation are adequate, Commerce will conduct a full sunset review and issue its final determination within 240 days after the initiation of the review.[21] Commerce normally will consider the response to the notice of initiation to be adequate if it receives complete responses from a domestic interested party and respondent interested parties accounting on average for more than 50 percent of the total exports of subject merchandise.[22]

31. In both expedited and full sunset reviews, respondent interested parties may elect to waive participation in the sunset review conducted by Commerce, without prejudice to their participation in the sunset review conducted by the ITC.[23] The purpose of this procedure is to avoid forcing respondent interested parties to incur 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 on the ITC side.

32. As mentioned above, Commerce has the responsibility of determining whether revocation of an antidumping duty order would be likely to lead to continuation or recurrence of dumping. If Commerce's determination is negative – *i.e.*, if Commerce finds that there is no such likelihood – Commerce must revoke the order.[24] If Commerce's determination is affirmative,

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[18] Sections 751(c)(1) and (2) of the Act (Exhibit ARG-1); *see also* 19 C.F.R. 351.218(c)(1) (Exhibit ARG-1).

[19] Section 751(c)(3)(A) of the Act (Exhibit ARG-1). The term "domestic interested parties" is a shorthand expression for the interested parties defined in section 771(9)(C)-(G) of the Act. These are the types of interested parties who are eligible to file a petition for the imposition of antidumping duties.

[20] Section 751(c)(3)(B) of the Act (Exhibit ARG-1).

[21] Section 751(c)(5)(A) of the Act (Exhibit ARG-1).

[22] 19 C.F.R. 351.218(e)(1) (Exhibit ARG-3). The term "respondent interested parties" is a shorthand expression for the interested parties defined in section 771(9)(A)-(B) of the Act. These parties typically consist of foreign manufacturers, producers or exporters, or the U.S. importer of subject merchandise, or an association of such persons.

[23] Section 751(c)(4)(A) of the Act (Exhibit ARG-1).

[24] Section 751(d)(2) of the Act (Exhibit ARG-1).

however, Commerce transmits its determination to the ITC, along with a determination regarding the magnitude of the margin of dumping that is likely to prevail if the order is revoked.[25]

b. Statutory Provisions Related to the ITC's Determination

33. Section 751(c) of the Act requires the ITC to conduct a review no later than five years after issuance of an order or the suspension of an investigation, or a prior review, and to determine whether revocation of the order or termination of the suspended investigation would likely lead to the continuation or recurrence of material injury.[26] Section 752(a)(1) of the Act specifically addresses the ITC's determination in a section 751(c) review. This provision states that "the ITC shall determine whether revocation of an order, or termination of a suspended investigation, would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time."[27] More generally, section 752(a) of the Act specifies several factors for the ITC's consideration in making determinations in five-year reviews, including the likely volume, likely price effects and likely impact of subject imports on the domestic industry if the antidumping duty order is revoked.

34. Section 752(a)(7) grants the ITC discretion to engage in a cumulative analysis if: (1) reviews are initiated on the same day; and (2) imports would be likely to compete with one another and with the domestic like product in the United States market. It further provides that the ITC shall not cumulate imports from a country if those imports are likely to have no discernible adverse impact.

2. The Regulations

a. Commerce Regulations

35. In 1997, following the enactment of the URAA, Commerce revised its antidumping and countervailing duty regulations so as to bring them into conformity with the amended statute.[28] These revised regulations contained substantive provisions with respect to antidumping proceedings, as well as procedural provisions applicable to both antidumping and countervailing duty proceedings. These regulations, however, contained minimal guidance with respect to sunset reviews, essentially setting forth only the time frame for initiation and completion of such reviews.

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[25] Section 752(c) of the Act (Exhibit ARG-1).

[26] Section 751(c) (Exhibit ARG-1).

[27] Section 752(a)(1) (Exhibit ARG-1).

[28] Where, as in the case of the U.S. antidumping duty law, Congress entrusts an administrative agency with the administration of a statute, it is common for the agency to promulgate regulations that elaborate on, or clarify, the statute. While regulations are subordinate to the statute, they typically have the force of law if validly promulgated and consistent with the statute.

36. In 1998, in anticipation of the over 300 pre-URAA orders (referred to as "transition orders")[29] eligible for revocation by January 1, 2000, Commerce issued additional regulations addressing in greater detail the procedures for participation in, and conduct of, sunset reviews.[30] These *Sunset Regulations* created a framework both to implement statutory requirements and to provide a clear, transparent process. *Inter alia*, they specified the information to be provided by parties participating in a sunset review[31] and the deadlines for required submissions.[32]

37. The *Sunset Regulations* describe specifically the information required to be provided by all interested parties in a sunset review.[33] In addition, the regulations invite parties to submit, with the required information, "any other relevant information or argument that the party would like [Commerce] to consider."[34] These regulations constitute the standard request for information in sunset reviews and function as the standard questionnaire.

38. With respect to deadlines for required submissions, the *Sunset Regulations* provide that substantive responses to a notice of initiation are due 30 days after the date of publication in the *Federal Register* of the notice of initiation.[35] Rebuttals to substantive responses are due five days after the date the substantive response is filed.[36] The regulations also state that Commerce normally will not accept or consider any additional information from a party after the time for filing rebuttals has expired.[37]

39. Commerce's regulations also provide for "expedited" sunset review procedures where the domestic interest parties choose not to participate, or where substantive responses received from respondent interested parties are inadequate for Commerce's use in a full sunset proceeding.[38] Where domestic interested parties choose not to participate, the regulations provide that Commerce will make a negative likelihood determination and revoke the order.[39] Where the foreign interested parties fail to provide adequate responses, the regulations provide that Commerce will examine the information on the record of the sunset review proceeding and normally will base its likelihood determination on the basis of facts available prior to the

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[29] Section 751(c)(6)(C) of the Act (Exhibit ARG-1).

[30] *Procedures for Conducting Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders* ("*Sunset Regulations*"), 63 FR 13516 (March 20, 1998) (codified at 19 C.F.R. part 351) (Exhibit US-3).

[31] 19 C.F.R. 351.218(d)(3) (Exhibit ARG-3).

[32] 19 C.F.R. 351.218(d)(3)-(4) (Exhibit ARG-3).

[33] 19 C.F.R. 351.218(d)(1)-(4) (Exhibit ARG-3).

[34] 19 C.F.R. 351.218(d)(3)(iv)(B) (Exhibit ARG-3).

[35] 19 C.F.R. 351.218(d)(3)(i) (Exhibit ARG-3).

[36] 19 C.F.R. 351.218(d)(4) (Exhibit ARG-3).

[37] 19 C.F.R. 351.218(d)(4) (Exhibit ARG-3).

[38] 19 C.F.R. 351.218(d)(2) (Exhibit ARG-3).

[39] 19 C.F.R. 351.218(d)(1)(iii) (Exhibit ARG-3).

determination to expedite the review – the dumping margins from the original investigation and any administrative reviews, as well as any information supplied by the interested parties.[40]

40. The purpose of the "expedited" procedures is to provide all interested parties the option of concentrating their efforts on the ITC's injury proceeding, should they believe that such an approach would be in their best interests. Respondent interested parties may opt to file a formal waiver of their right to participate in the proceeding or, alternatively, they simply may choose not to respond to the notice of initiation. In addition, Commerce's regulations also provide the opportunity for interested parties to comment on the adequacy of the substantive and rebuttal responses and to address the appropriateness of conducting an expedited sunset review.[41]

b. ITC Regulations

41. The ITC has its own set of regulations pertaining to sunset reviews, which are set forth at 19 C.F.R. 207.60-69.[42] With respect to institution of a sunset review, under its regulations, the ITC initially determines whether to conduct a full review (which would generally include a public hearing, the issuance of questionnaires, and other procedures) or an expedited review. First, the ITC determines whether individual responses to the notice of institution are adequate. Second, based on those responses deemed individually adequate, the ITC determines whether the collective responses submitted by two groups of interested parties – domestic interested parties (producers, unions, trade associations, or worker groups), and respondent interested parties (importers, exporters, foreign producers, trade associations, or country governments) – demonstrate a sufficient willingness among each group to participate and provide information requested in a full review.[43] In its sunset review on OCTG, the ITC conducted a full review.

42. As demonstrated below in connection with the United States' request for preliminary rulings, even though Argentina refers to them cryptically in its panel request, the ITC regulations are not within the Panel's terms of reference, and Argentina does not advance any claims concerning them in its First Submission.

3. Commerce's *Sunset Policy Bulletin*[44]

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[40] 19 C.F.R. 351.308(f) (Exhibit US-3).

[41] 19 C.F.R. 351.309(e) (Exhibit US-3).

[42] A copy of the ITC's sunset review regulations is attached as Exhibit US-4.

[43] 19 C.F.R. 207.62(a) (Exhibit US-4).

[44] The United States would like to make it clear that the following discussion of the *Sunset Policy Bulletin* is designed merely to provide the Panel with a complete picture of the U.S. sunset review process. As demonstrated below, the *Bulletin* is not within the Panel's terms of reference, is not a "measure," and, even if it were considered a measure, is not a mandatory measure and, thus, cannot be challenged "as such."

43. In April 1998, Commerce issued a policy bulletin related to sunset reviews.[45] Commerce issued the policy bulletin to apprise interested parties of its anticipated methodologies and to assist Commerce staff in their conduct of sunset reviews. As described in the *Bulletin*, Commerce normally will determine that revocation of an antidumping order is likely to lead to continuation or recurrence of dumping where (1) dumping continued at any level above *de minimis* after the issuance of the order; (2) imports of the subject merchandise ceased after issuance of the order; or (3) dumping was eliminated after the issuance of the order and import volumes for the subject merchandise declined significantly.

44. The *Bulletin* also provides guidance as to how to determine the magnitude of the dumping margin that would be likely to prevail if the antidumping order were revoked. Commerce normally will select the margins from the investigation, because these margins are the only calculated rates that reflect the behavior of exporters without the discipline of an order in place.[46] Commerce may select a more recently calculated margin for a particular company if dumping margins declined or if dumping was eliminated after the issuance of the order and import volumes remained steady or increased.[47]

45. The *Sunset Policy Bulletin* provides a sketch of what Commerce, given particular factual scenarios, will "normally" do. It is not binding on either Commerce or private parties, but instead describes how Commerce anticipated acting on a regular, standard or ordinary basis. The *Sunset Policy Bulletin* does not suggest that Commerce will *always* find a likelihood of continuation or recurrence given the factual scenarios above.

B. Certain OCTG from Argentina

1. The Antidumping Duty Investigation and Order

46. On June 28, 1995, Commerce published its final affirmative antidumping duty determination on OCTG from Argentina.[48] In its final determination, Commerce found that the Argentine producer of OCTG that it had investigated – Siderca S.A.I.C. ("Siderca") – was dumping the subject merchandise in the United States. For Siderca, Commerce calculated a dumping margin of 1.36 percent based on Siderca's sales to the United States during the period

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[45] *Policies Regarding the Conduct of Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin* ("*Sunset Policy Bulletin*"), 63 FR 18871 (April 16, 1998) (Exhibit ARG-35). Commerce and other administrative agencies will sometimes issue informal documents such as policy bulletins when they wish to provide guidance to the public and agency staff, but are not yet in a position to make such guidance binding and mandatory by promulgating regulations.

[46] *Sunset Policy Bulletin*, 63 FR at 18873 (Exhibit ARG-35).

[47] *Id.*

[48] *Final Determination of Sales At Less Than Fair Value: Oil Country Tubular Goods from Argentina*, 60 Fed. Reg. 33539 (June 28, 1995) ("*Commerce Investigation Final*") (Exhibit ARG-26).

of investigation. Also, based on Siderca's dumping margin, Commerce calculated an "all others" duty rate applicable to OCTG from other Argentine sources of OCTG.[49]

47. On August 10, 1995, the ITC published notice of its final affirmative injury determination involving OCTG from Argentina.[50] On August 11, 1995, Commerce issued an antidumping duty order on certain OCTG from Argentina.[51]

48. No administrative reviews of the antidumping duty order on certain OCTG from Argentina were requested or conducted prior to the sunset review.

2. The Sunset Review and Determination

a. Commerce's Determination of Likelihood of Continuation or Recurrence of Dumping

49. On July 3, 2000, Commerce published its notice of initiation of the sunset review of the antidumping duty order on certain OCTG from Argentina.[52] In the notice, Commerce, as is its normal practice, highlighted the deadline for filing a substantive response in the sunset review and the information that was required to be contained in the response.[53] Commerce also explicitly referred parties to the applicable regulation concerning requests for an extension of filing deadlines.[54]

50. On August 2, 2000, Siderca and domestic interested parties[55] filed their substantive responses.

51. In its substantive response, Siderca did not state that it would not export OCTG to the United States if the order were revoked, nor did it state that it would not dump OCTG in the

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[49] *Id*. at 33550.

[50] 60 Fed. Reg. 40855 (Exhibit US-5). The full version of the ITC's opinion was published as a separate document in USITC Pub. 2911 (August 1995).

[51] *Antidumping Duty Order: Certain Oil Country Tubular Goods From Argentina*, 60 Fed. Reg. 41055 (August 11, 1995) ("*Antidumping Duty Order*") (Exhibit US-6).

[52] *Initiation of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders or Investigations of Oil Country Tubular Goods* ("*Sunset Initiation*"), 65 FR 41053, 41054 (July 3, 2000) (Exhibit ARG-44).

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

[54] *Sunset Initiation*. 19 C.F.R. 351.302(c) provides that a party may request an extension of a specific time limit. 19 C.F.R. 351.302(b) provides that unless expressly precluded by statute, Commerce may, for good cause, extend any time limit established by its regulations. The U.S. antidumping duty statute does not contain deadlines for submission of information in a sunset review. A copy of 19 C.F.R. 351.302 is attached as Exhibit US-7.

[55] The domestic interested parties consisted of Bethlehem Steel Corporation, IPSCO Tubulars, Inc., Lone Star Steel Company, Maverick Tube Corporation, Newport Steel and Koppel Steel Divisions of NS Group, Grant-Prideco, North Star Steel Ohio, and U.S. Steel Group, a unit of USX Corporation.

United States if the order were revoked.[56] Instead, Siderca merely argued that the dumping margin from the original investigation was not large enough to support a determination that dumping was likely to continue or recur in the absence of the duty. Specifically, Siderca argued that its 1.36 percent dumping margin from the investigation was below the 2 percent *de minimis* standard of Article 5.8 of the AD Agreement, which Siderca asserted applied to sunset reviews.[57] Siderca also stated that it believed that it was the only producer of OCTG in Argentina.[58] It acknowledged that it did not export OCTG to the United States during the five-year period preceding the sunset review, but did not assert that there were no other exporters of OCTG from Argentina to the United States.[59] Siderca did not provide any additional evidence or argument for Commerce's consideration on the likelihood issue in its substantive response. In addition, Commerce did not receive any substantive responses from Argentine exporters of OCTG during the sunset review, nor did any other Argentine exporter supply information for inclusion in Siderca's substantive response.

52. On August 7, 2000, Commerce received rebuttal comments on behalf of domestic interested parties in response to Siderca's comments. Siderca did not submit a substantive rebuttal brief or any other factual information or legal argument in the sunset review.

53. On August 22, 2000, Commerce determined to conduct an expedited sunset review because it had not received a complete substantive response from exporters accounting for more than 50 percent of Argentine exports to the United States during the relevant period.[60] Siderca did not comment on Commerce's determination to expedite the sunset review, notwithstanding that it had a right to do so under Commerce's regulations.[61]

54. On November 7, 2000, Commerce published its final expedited sunset determination, finding that continuation or recurrence of dumping was likely.[62] Commerce found that dumping had continued over the life of the order because there had been no administrative reviews and the dumping margin from the original investigation was the only indicator available to Commerce. Based on its findings that there was no decline in dumping margins and that the volume of imports had decreased after issuance of the order and remained at below pre-order levels, Commerce determined that there was a likelihood of continuation or recurrence of dumping.[63]

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[56] Exhibit ARG-57.

[57] Exhibit ARG-57, page 3.

[58] *Id*.

[59] *Id*., page 4.

[60] "Commerce Memorandum on Adequacy of Response to Notice of Initiation," dated 22 August 2000 (Exhibit ARG-50); *see also* 19 C.F.R. 351.218(e)(1)(ii)(A)-(B) (Exhibit ARG-3).

[61] 19 C.F.R. 351.309(e) (Exhibit US-3).

[62] *Final Results of Expedited Sunset Reviews: Oil Country Tubular Goods From Argentina, et al.* ("*Commerce Sunset Final*"), 65 FR 66701 (Nov. 7, 2000) (Exhibit ARG-46), and accompanying Decision Memorandum ("*Commerce Sunset Final Decision Memorandum*") (Exhibit ARG-51).

[63] *Commerce Sunset Final Decision Memorandum*, page 5 (Exhibit ARG-51)

55. As required under U.S. law, Commerce also reported to the ITC the magnitude of the margin of dumping likely to prevail if the order were revoked.[64] In deciding the magnitude of the margin likely to prevail to report to the ITC, Commerce considered the fact that import volumes had declined over the period preceding the sunset review. Commerce determined to report to the ITC the margins of 1.36 percent calculated in the original investigation for Siderca and "all others," because they were the only margins indicative of exporter behavior without the discipline of an order in place.[65]

b. The ITC's Determination of Likelihood of Continuation or Recurrence of Injury

56. In its final determination in the original investigation, the ITC made separate injury determinations for the two types of OCTG (casing and tubing and drill pipe), because it found these to be separate domestic like products.[66]

57. On June 3, 2000, the ITC instituted sunset reviews,[67] and on October 25, 2000, decided to conduct full reviews to determine whether revocation of the antidumping and countervailing orders on casing and tubing from Argentina, Italy, Japan, Korea, and Mexico, and on drill pipe from Argentina, Italy and Mexico would likely lead to continuation or recurrence of material injury.[68]

58. On July 10, 2001, the ITC published notice of its final determination in the sunset review, and issued its full opinion in a separate publication.[69] The ITC determined that revocation of the order on drill pipe from Japan was likely to lead to continuation of material injury within a reasonably foreseeable time, but that revocation of the orders on drill pipe from Mexico and Argentina was *not* likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. As a result, the antidumping duty orders on drill pipe from Mexico and Argentina were revoked.

59. With respect to casing and tubing, the ITC determined to evaluate the effects of subject casing and tubing imports from Mexico, Argentina, Italy, Japan and Korea on a cumulated basis.[70]

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[64] *Id.*, pages 6-7; *see also* section 752(c)(3) of the Act (Exhibit ARG-1).

[65] *Commerce Sunset Final Decision Memorandum*, page 7 (Exhibit ARG-51).

[66] *See* Exhibit US-5.

[67] *See* Exhibit ARG-45.

[68] 65 Fed. Reg. 63889 (Exhibit US-8).

[69] The ITC's notice was published at 66 Fed. Reg. 35997 (Exhibit US-9), and its full opinion was published as *Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico*, USITC Pub. 3434, Inv. Nos. 701-TA-364, 731-TA-711, and 713-716 (June 2001) (Exhibit ARG-54) [hereinafter "ITC Report"].

[70] ITC Report at 10-14.

60. The ITC identified a number of conditions of competition as relevant to its sunset review, including (as most relevant to this dispute) that:

- The United States is the largest OCTG market in the world.[71]

- Based in part on rising oil and gas prices, which appeared to be driven by long-term factors, the ITC found demand for casing and tubing to be currently strong and to be projected to remain strong in the reasonably foreseeable future. The ITC noted, however, that the volatility of the forces affecting oil and gas supply and demand globally made such forecasts difficult.[72]

- Production facilities in subject countries and in the United States produced a variety of products in addition to OCTG. The ITC found that producers could easily shift production away from other tubular products toward production of OCTG and vice versa. The ITC also found that OCTG commanded among the highest prices among tubular products, giving producers an incentive to make as much OCTG as possible in relation to other products.[73]

- The ITC noted the consolidation of five foreign producers of seamless casing and tubing (four of which were located in subject countries) into the Tenaris Alliance. Tenaris operated as a unit, submitting a single bid for OCTG contracts, and its customer base included large multi-national oil and gas companies that had operations in the United States.[74]

61. Against that background, the ITC considered the evidence gathered in the reviews. It noted that during the original period of investigation, subject imports of casing and tubing rose from 1992 to 1994. The ITC explained that after the orders went into effect subject imports decreased but remained a factor in the U.S. market. The ITC concluded that the current import volume and market share of subject imports were substantially below the levels of the original investigation, but that this likely reflected the restraining effects of the orders.[75]

62. The ITC explained that the volume of subject imports would likely increase significantly if the orders were revoked. Because it found that foreign casing and tubing producers could shift with relative ease between production of casing and tubing and production of other pipe and tube products, the ITC considered foreign producers' operations with respect to casing and tubing and

[71] ITC Report at 15.
[72] ITC Report at 15.
[73] ITC Report at 16.
[74] ITC Report at 16.
[75] ITC Report at 17.

with respect to all pipe and tube products produced on the same machinery and equipment as casing and tubing.[76]

63. The ITC concluded that there was substantial available capacity in the subject countries for increasing exports of casing and tubing to the United States. The ITC explained that producers had incentives to devote more of their productive capacity to producing and shipping more casing and tubing to the U.S. market. The ITC considered Tenaris' assertion that its preference to sell directly to end-users would limit its participation in the U.S. market if the orders were revoked. The ITC explained that Tenaris was the dominant supplier of OCTG products and related services to all of the world's major oil and gas drilling regions, except the United States. It noted that Tenaris sought worldwide contracts with oil and gas companies, and that many of Tenaris' existing customers were global oil and gas companies with operations in the United States. While the Tenaris companies sought to downplay the importance of the U.S. market, they acknowledged that it was the largest market for seamless casing and tubing in the world. Given Tenaris' global focus, the ITC found "it likely would have a strong incentive to have a significant presence in the U.S. market, including the supply of its global customers' OCTG requirements in the U.S. market."[77]

64. The ITC explained a second incentive for producers of the subject merchandise to devote more capacity to producing casing and tubing for the U.S. market. Casing and tubing were among the highest valued pipe and tube products, generating among the highest profit margins. Accordingly, producers generally had an incentive, where possible, to shift production in favor of these products from other pipe and tube products that were manufactured on the same production lines.[78]

65. A third incentive identified by the ITC was that prices for casing and tubing on the world market were significantly lower than prices in the United States. The ITC considered respondents' arguments that the domestic industry's claims of price differences were exaggerated, but it concluded that there was on average a difference sufficient to create an incentive for subject producers to seek to increase their sales of casing and tubing to the United States.[79]

66. The fourth incentive was that producers and exporters in the subject countries faced import barriers in other countries and on other pipe products (produced in the same facilities) in the United States. Finally, the ITC found that industries in at least some of the subject countries

[76] ITC Report at 17.
[77] ITC Report at 18-19.
[78] ITC Report at 19.
[79] ITC Report at 19-20.

depended on exports for the majority of their sales. Japan and Korea, in particular, had very small home markets and depended nearly exclusively on exports.[80]

67. On these bases, the ITC concluded that, in the absence of the orders, the likely volume of cumulated subject imports, both in absolute terms and as a share of the U.S. market, would be significant.[81]

68. In evaluating potential price effects, the ITC first reviewed the price effects findings it made in the original investigation, which reflected conditions before the orders were imposed. It found that the domestic and imported products were generally substitutable and that price was one of the most important factors in purchasing decisions. It concluded that, despite mixed evidence as to instances of underselling and overselling, underselling by subject imports was significant.[82]

69. The ITC also found in the original investigations that cumulated subject imports suppressed domestic prices to a significant degree, despite the unclear trend in domestic and import prices. The ITC found that the significant volumes of casing and tubing available from the cumulated subject countries effectively prevented domestic producers from raising prices, even though they were experiencing high manufacturing costs. Because imported and domestic casing and tubing were relatively close substitutes, changes in relative prices were likely to cause purchasers to shift among supply sources. As the ITC noted, purchasers repeatedly stated that subject imports exerted downward pressure on domestic prices.[83]

70. Turning to the evidence gathered in the reviews, the ITC found that the trend in prices of U.S.-made casing and tubing since 1995 had varied by product. It noted that for most products domestic prices peaked in 1998, fell significantly in 1999, then rebounded in 2000. The ITC also found that direct selling comparisons were limited, because the subject producers had a limited presence in the U.S. market during the period of review. Nevertheless, it found that the few direct comparisons that could be made indicated that subject casing and tubing generally undersold the domestic like product, especially in 1999 and 2000.[84]

71. The ITC also noted that subject imports were highly substitutable for domestic casing and tubing, and that price was a very important factor in purchasing decisions. Accordingly, the ITC found that the increases in subject import sales volume that were likely to occur would be achieved through lower prices.[85]

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[80] ITC Report at 20.
[81] ITC Report at 20.
[82] ITC Report at 20-21.
[83] ITC Report at 21.
[84] ITC Report at 21.
[85] ITC Report at 21.

72. The ITC found that in the absence of the orders, casing and tubing from Mexico, Argentina, Italy, Japan and Korea likely would compete on the basis of price in order to gain additional market share. The ITC concluded that "such price-based competition by subject imports likely would have significant depressing or suppressing effects on the prices of the domestic like product."[86]

73. The ITC reviewed its impact findings from the original investigation, which reflected conditions prior to the imposition of the orders. The adverse impact of the cumulated subject imports in the original determinations was reflected in the poor operating performance of the domestic industry (despite a sharp increase in U.S. consumption) and in the decline in market share.[87]

74. The ITC further found that the large volumes of cumulated subject imports, which purchasers generally viewed as good substitutes for the domestic product, were inhibiting the domestic industry from increasing market share and from raising prices. The ITC thus found in the original investigations that suppliers had to compete for market share and that the lowest price would generally prevail. In addition, the ITC determined that the adverse impact of cumulated subject imports was reflected in the inability of the domestic industry to raise prices sufficiently to cover costs between 1992 and 1994.[88]

75. With regard to the evidence gathered during the reviews, the ITC noted that the current condition of the domestic industry was positive, that the industry had recovered after the orders were imposed, and that it appeared to have benefitted from the discipline imposed by the orders. The ITC also noted that the industry's performance indicators rose and fell with the volatile swings in demand. It found that, on balance, the domestic industry's condition had improved since the orders went into effect, as reflected in most indicators over the period reviewed, and it did not find the industry to be currently vulnerable.[89]

76. The ITC further found, however, for the reasons previously given, that revocation of the orders likely would lead to a significant increase in the volume of subject imports, which likely would undersell the domestic like product and significantly depress or suppress the domestic industry's prices. With regard to demand, the ITC noted that in the original investigations, subject imports captured market share and caused price effects despite a significant increase in apparent consumption in 1993 and 1994 as compared to 1992. In these reviews, it found that, despite strong demand conditions in the near term, a significant increase in subject imports would likely have negative effects on both the price and volume of the domestic producers' shipments. The ITC found further that these developments likely would have a significant adverse impact on the production, shipments, sales, market share, and revenues of the domestic

[86] ITC Report at 21.
[87] ITC Report at 20-21.
[88] ITC Report at 21-22.
[89] ITC Report at 22.

industry. As the ITC also found, this reduction in the domestic industry's production, shipments, sales, market share, and revenues would result in the erosion of the domestic industry's profitability, as well as its ability to raise capital and make and maintain necessary capital investments.[90]

77. On this basis, the ITC determined that revocation of the antidumping and countervailing duty orders on imports of casing and tubing from Mexico, Argentina, Italy, Korea and Japan would be likely to lead to the continuation or recurrence of material injury to the domestic industry in the reasonably foreseeable future.[91]

c. Notice of Continuation of the Order

78. On December 15, 2000, the United States published notice of the continuation of the antidumping duty order on certain oil country tubular goods from Argentina based on the determinations by Commerce and the ITC finding likelihood of continuation or recurrence of dumping and injury, respectively.[92]

IV. REQUEST FOR PRELIMINARY RULINGS

A. Introduction

79. The Appellate Body has stated that: "A defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence."[93] According to the Appellate Body: "This requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings."[94]

80. In this dispute, this fundamental due process requirement has been denied the United States for several reasons. First, Argentina's request for the establishment of a panel failed to comply with the requirements of Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). Specifically, with respect to a major portion of Argentina's panel request, Argentina failed to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." As a result, the United States could not discern from the panel request "what case it has to answer, and what violations have been alleged," and was unable to "begin preparing its defence."

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[90] ITC Report at 22.

[91] ITC Report at 22-23.

[92] *Continuation of Antidumping and Countervailing Duty Orders on Oil Country Tubular Goods From Argentina, Italy, Japan, Korea, and Mexico, and Partial Revocation of Those Orders from Argentina and Mexico With Respect to Drill Pipe*, 66 Fed. Reg. 38630 (July 25, 2001) (Exhibit US-10).

[93] *Thailand - Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel H-Beams from Poland*, WT/DS122/AB/R, Report of the Appellate Body adopted 5 April 2001, para. 88 ("*Thai Angles*").

[94] *Id*.

81. As explained earlier, there are essentially two categories of defects in Argentina's panel request that made it impossible for the United States to discern the nature of Argentina's problems. The United States raised both of these defects before the DSB. With respect to the defect concerning Sections B.1-B.3 of the panel request, Argentina simply refused to acknowledge that the defects existed. The United States requests that the Panel find that the claims falling within this category are not within the Panel's terms of reference due to Argentina's failure to comply with Article 6.2 of the DSU.

82. In the case of the defects concerning Page 4, Argentina did appear to acknowledge that there was a problem, and offered before the DSB an interpretation of its panel request, stating essentially that portions of its panel request should be disregarded. The United States, therefore, requests that the Panel accept Argentina's proposed clarification at face value and find that the claims falling within this category are not within the Panel's terms of reference due to Argentina's failure to comply with Article 6.2 of the DSU.

83. An additional source of the denial of due process to which the United States is entitled is that in its First Submission, Argentina has raised matters that were not within the scope of that portion of its panel request that was in conformity with the requirements of Article 6.2. The United States requests that the Panel find that these matters are not within its terms of reference.

B. Because Page 4 of Argentina's Panel Request Fails to Conform to the Requirements of Article 6.2 of the DSU, the Panel Should Find that the Claims Set Forth on Page 4 Are Not Within the Panel's Terms of Reference

84. Article 6.2 of the DSU provides, in pertinent part, as follows:

> The request for the establishment of a panel shall . . . identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

The Appellate Body recently summarized these requirements as follows:[95]

> There are . . . two distinct requirements, namely identification of *the specific measures at issue*, and the provision of a *brief summary of the legal basis of the complaint* (or the *claims*). Together, they comprise the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.

[95] *United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr. 1, Report of the Appellate Body adopted 19 December 2002, paras. 125-127 (footnotes omitted; italics in original) [hereinafter "*US - German Steel*"].

> The requirements of precision in the request for the establishment of a panel flow from the two essential purposes of the terms of reference. First, the terms of reference define the scope of the dispute. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the *due process* objective of notifying the parties and third parties of the nature of a complainant's case. When faced with an issue relating to the scope of its terms of reference, a panel must scrutinize carefully the request for establishment of a panel "to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU."
>
> As we have said previously, compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be "cured" in the subsequent submissions of the parties during the panel proceedings. Nevertheless, in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced. Moreover, compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances.

85. The Appellate Body also has provided the following guidance concerning the requirement for a summary:[96]

> In its fourth requirement, Article 6.2 demands only a summary – and it may be a brief one – of the legal basis of the complaint; but the summary must, in any event, be one that is "sufficient to present the problem clearly". It is not enough, in other words, that "the legal basis of the complaint" is summarily identified; the identification must "present the problem clearly".

86. For the reasons set forth below, Page 4 of Argentina's panel request utterly fails to comply with the requirement to "present the problem clearly."

1. Page 4 of the Panel Request Does Not "Present the Problem Clearly"

87. Three aspects of Page 4 of Argentina's panel request make it impossible to determine what Argentina's problems are. First, in the first paragraph on Page 4, while Argentina identifies five discrete alleged "measures," it asserts that it is challenging only "certain aspects" of those five

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[96] *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, Report of the Appellate Body adopted 12 January 2000, para. 120 [hereinafter "*Korea Dairy Safeguard*"].

"measures," and then fails to identify what those "certain aspects" are.[97] Second, in the second paragraph on Page 4, Argentina indiscriminately lumps together various articles from three different WTO agreements, almost all of which consist of multiple paragraphs and contain multiple obligations. Finally, Argentina provides absolutely no narrative description on Page 4 of the legal basis of the complaint. As a result, it is impossible to discern the nature of Argentina's problems.

88. With respect to the alleged "measures," consider section 751(c), a provision of the Tariff Act of 1930 cited on Page 4 of the panel request. Section 751(c) consists of six paragraphs, each of which deals with a different aspect of sunset reviews and each of which contains different requirements.[98] Significantly, in Section A.1 of the panel request, Argentina states that it is challenging paragraph (4) of section 751(c) as such because it allegedly precludes Commerce from making the type of determination called for by the AD Agreement.[99] On Page 4, however, Argentina states that it "also" is complaining about "certain aspects" of section 751(c) as such. The use of the word "also" suggests that the complaint on Page 4 regarding section 751(c) involves something different from the complaint described in Section A.1, but the use of the cryptic phrase "certain aspects" makes it impossible to determine the precise portion of section 751(c) that Argentina is complaining about on Page 4. This ambiguity is puzzling, given that the references in Section A.1 to paragraph 4 of section 751(c) demonstrate that Argentina is capable of greater precision.

89. A similar problem exists with respect to the other "measures" referred to in the first paragraph on Page 4: section 752 of the Tariff Act of 1930,[100] the SAA,[101] the *Sunset Policy*

[97] The United States places quotation marks around the word "measures," because it does not agree that all of the documents identified by Argentina constitute measures for purposes of WTO dispute settlement.

[98] See Exhibit ARG-1.

[99] In Section A.1, Argentina cites to 19 U.S.C. §1675(c)(4), which is the U.S. Code citation for section 751(c)(4) of the Tariff Act of 1930.

[100] Section 752 is included in Exhibit ARG-1. Section 752 – which deals with likelihood determinations by Commerce and the ITC in sunset reviews and "changed circumstances" reviews – consists of three subsections, which, in turn, cumulatively contain sixteen paragraphs. In Section B.3 of the panel request, Argentina states that it is complaining about two specific statutory requirements that appear in paragraphs (1) and (5), respectively, of subsection (a) of section 752. On Page 4, however, Argentina shifts to ambiguity. Again, the use of the word "also" indicates that Argentina is complaining about something in addition to what it is complaining about in Section B.3, but the use of the phrase "certain aspects" makes it impossible to determine precisely what that something is.

[101] With respect to the SAA, Argentina does not even bother to provide the page number(s) on which the alleged WTO inconsistency(ies) appears. The SAA contains eighty-nine pages of text dealing with the AD Agreement. Even if one limits one's search to the thirteen pages of text directly relating to sections 751(c) and 752, it is impossible to discern from the panel request the precise content of those thirteen pages that Argentina considers to be WTO-inconsistent. The pages of the SAA dealing with sections 751(c) and 752 are attached as Exhibit US-11.

Bulletin,[102] the Commerce regulations,[103] and the ITC regulations.[104] In essence, in the first paragraph on Page 4, Argentina does nothing more than identify six different "laws, regulations, policies and procedures" and assert that "certain aspects" of these voluminous materials are problematic, without providing a clue as to what those problematic aspects are.

90. In addition to this vague description of the "measures," in the second paragraph on Page 4, Argentina indiscriminately lists six articles and one annex of the AD Agreement, two articles of the GATT 1994, and one article of the WTO Agreement. Because almost all of the articles consist of multiple paragraphs and contain multiple obligations, the reader must guess at the identity of the particular obligation(s) contained within an article with which a particular "measure" allegedly is inconsistent.

91. More fundamentally, in view of the absence on Page 4 of any narrative description of the problem, or of any indication of how the obligations in these listed articles are linked to the listed measures, the reader is left to guess at how each measure allegedly breaches an obligation. It is implausible to believe that Argentina is claiming that each of the "measures" is inconsistent with each of the obligations contained in each of the articles cited. Yet, without any recitation of the

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[102] The portion of the *Bulletin* dealing with sunset reviews in antidumping proceedings consists of three major sections, with eleven subsections. Argentina does not indicate the subsection – or even the section – it considers to be problematic, and it is impossible to discern from the panel request the precise content of the *Bulletin* that Argentina considers to be WTO-inconsistent. The *Sunset Policy Bulletin* is included in Exhibit ARG-35.

[103] With respect to the Commerce regulations, on Page 4 Argentina at least limits its challenge to one section of the regulations, section 351.218. However, section 351.218 consists of six subsections – (a) through (f) – that take up six pages in the U.S. Code of Federal Regulations and contain multiple requirements. In Section A.1 of the panel request, Argentina indicates that it is complaining about paragraph (e) of section 351.218, and Argentina identifies by paragraph the provisions of the AD Agreement with which paragraph (e) allegedly is inconsistent. Again, however, the use of "also" suggests that on Page 4 Argentina is complaining about some aspect of section 351.218(e) other than what is complained about in Section A.1 of the panel request, but the use of the phrase "certain aspects" makes it impossible to determine precisely what that something is. A copy of section 351.218 is attached as Exhibit ARG-3.

In this regard, in its First Submission, the focus of Argentina's wrath is no longer section 351.218(e), but section 351.218(d)(2)(iii). See Argentina First Submission, Section VII.A. This switch is misleading given the express reference in the panel request to section 351.218(e), and the omission of any reference to section 351.218(d)(2)(iii). However, unlike Page 4, Section A.1 of the panel request at least had a narrative explanation indicating that Argentina had a problem with the concept of "waiver" under the U.S. antidumping law. Thus, while the ability of the United States to defend itself certainly was not helped by this particular "bait-and-switch" gambit of Argentina, the United States is not asserting that the prejudice it experienced thereby was of such a degree as to warrant a preliminary objection. It does, however, serve to highlight the problems the United States encountered with respect to Page 4 of the panel request, where there was no narrative explanation to assist the United States in deciphering Argentina's jumble of "measures" and obligations.

[104] With respect to the ITC's regulations, Argentina cites to ten different sections of those regulations. These sections collectively establish a variety of mostly procedural requirements concerning sunset reviews. Argentina does not indicate which section – let alone the subsection – of the regulations it is complaining about, and it is implausible that Argentina is complaining about all ten sections. A copy of sections 207.60-69 of the ITC's regulations is attached as Exhibit US-4. As noted above, in its First Submission, Argentina has not pursued any claims regarding the ITC's regulations.

facts and circumstances describing the substance of these claims, the reader has no choice but to guess at the identity of these claims. There is, quite simply, no "brief summary of the legal basis of the complaint sufficient to present the problem clearly," as required by Article 6.2 of the DSU.

92. The Appellate Body has found that "where the articles listed establish not one single, distinct obligation, but rather multiple obligations . . . the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2."[105] Consistent with this finding, panels have found, for example, that references to Article 6, Article 9, or Article 12 of the AD Agreement are not sufficiently specific to satisfy the requirements of Article 6.2 of the DSU.[106] Although this type of defect can be overcome if a panel request "also sets forth facts and circumstances describing the substance of the dispute,"[107] Page 4 of Argentina's panel request is devoid of any such explanatory material. To paraphrase the Appellate Body, Page 4 of "the request [does not] give any indication as to *why* or *how*" the "measures" are inconsistent with U.S. WTO obligations.[108] In short, Page 4 of Argentina's panel request does not come anywhere close to satisfying the Article 6.2 obligation to "present the problem clearly."

93. Moreover, Argentina has offered no explanation for its failure to comply with Article 6.2. In Sections A and B of the request, Argentina demonstrates that it is perfectly capable (in most instances) of identifying with precision specific U.S. statutory and regulatory provisions and linking those provisions to specific paragraphs of WTO agreements. In addition, Argentina had more than one year in which to draft its panel request.

94. It is possible that Argentina may attempt to argue that the United States somehow knows from the discussions at the consultations the nature of Argentina's problems set forth on Page 4 of the panel request. Should Argentina make such an argument, the United States would have to vehemently disagree. As a factual matter, the consultations were singularly unenlightening as to the nature of the alleged WTO inconsistencies about which Argentina is complaining. For example, during the consultations, Argentina *never* discussed the ITC's regulations. More importantly, however, even if the consultations had been more informative as to the nature of Argentina's

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[105] *Korea Dairy Safeguard*, para. 124.

[106] *European Communities - Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, Report of the Panel, as modified by the Appellate Body, adopted 18 August 2003, para. 7.14(7) (discussing Articles 6, 9 and 12 of the AD Agreement) [hereinafter "*EC - Pipe Fittings*"]; and *Thailand - Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel H-Beams from Poland*, WT/DS122/R, Report of the Panel, as modified by the Appellate Body, adopted 28 September 2000, paras. 7.28-7.29 (discussing Article 6 of the AD Agreement) [hereinafter "*Thai Angles (Panel)*"].

[107] *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, Report of the Panel adopted 28 January 2000, para. 7.15 [hereinafter "*Mexico HFCS*"].

[108] *US - German Steel*, para. 170 (italics in original).

problems, that would not have absolved Argentina of its obligation to comply with Article 6.2 of the DSU. As one panel has found:[109]

> Article 6.2 requires that a panel request provide the necessary information, regardless of whether the same information, or additional information, is already available to the responding party through different channels, *e.g.*, previous discussions between the parties ... . [I]t is a corollary of the due process objective inherent in Article 6.2 that a complaining party, as the party in control of the drafting of a panel request, should bear the risk of any lack of precision in the panel request.

95. In summary, with respect to Page 4 of Argentina's panel request, because it is impossible to discern what Argentina's problems are, the request fails to comply with the requirements of Article 6.2 of the DSU.

2. The United States Has Been Prejudiced by Argentina's Failure to Comply with Article 6.2 of the DSU

96. The United States has been prejudiced by Argentina's failure to comply with Article 6.2 of the DSU.[110] With respect to the purpose underlying the requirements of Article 6.2 of the DSU, the Appellate Body previously has explained that: "A defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence. [...] This requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings."[111]

97. In the case of Page 4 of Argentina's panel request, the ability of the United States to begin preparing its defense was delayed because, due to Argentina's failure to comply with Article 6.2, the United States did not "know what case it has to answer." As mentioned before, the United States did not, for example, even know which section(s) of the ITC's regulations Argentina is complaining about or the specific WTO provision(s) with which the unidentified section(s) allegedly are inconsistent, and it is unreasonable to expect the United States to have begun preparing defenses against all the possible combinations of measures/claims that Argentina might possibly set forth in its first written submission.[112] If this denial of a due process right that the

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[109] *Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/12, Preliminary Ruling by the Panel issued 21 July 2003, para. 25 [hereinafter "*Canada Wheat Exports*"].

[110] The United States assumes, for purposes of argument, that a failure to comply with Article 6.2 can be excused by a finding that the respondent has not been prejudiced.

[111] *Thailand - Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel H-Beams from* Poland, WT/DS122/AB/R, Report of the Appellate Body adopted 28 September 2000, para. 88 [hereinafter "*Thai Angles (AB)*"].

[112] Indeed, the United States still does not know the nature of Argentina's problem with the ITC's regulations, because Argentina's First Submission does not discuss those regulations.

Appellate Body has characterized as "fundamental" does not constitute prejudice, then nothing does.

98. Moreover, as noted above, it is apparent from Sections A and B of the panel request that Argentina was capable of drafting its complaints with precision. The failure to employ similar precision on Page 4 leaves one with the unavoidable impression that the shift from precision to extreme ambiguity was not inadvertent.

99. Finally, this is not a case where the respondent failed to object earlier in the proceeding.[113] The United States identified the defects in Argentina's panel request at the first meeting of the DSB at which the request was on the agenda, made it clear at that time that it did not understand the substance of Argentina's complaint, and requested that Argentina submit a new panel request that complied with Article 6.2 of the DSU. Unfortunately, Argentina refused to remedy the defects in its panel request, thereby leaving the United States with no choice but to seek redress from the Panel.

3. The Panel Should Find that the Claims Set Forth on Page 4 of Argentina's Panel Request Are Not Within the Panel's Terms of Reference

100. Given Argentina's failure to comply with Article 6.2 of the DSU, the Panel should find that the claims set forth on Page 4 of Argentina's panel request are not within the Panel's terms of reference.

101. In fact, Argentina appears to have conceded as much at the DSB meeting of 19 May. To recall, in response to the problems identified by the United States with respect to Page 4 of the panel request, Argentina stated that: "It was Argentina's intention (as the panel request clearly provided) to set forth the particular claims in the paragraphs contained in Sections A and B of the document."[114]

102. The United States would take issue with Argentina's assertion concerning the clarity of its panel request. Nonetheless, if Argentina continues to abide by what it told the DSB, then it should have no problem with a finding that its claims are limited to those set forth in Sections A and B. Such a finding would remedy, at least somewhat, the prejudice to the United States. With one exception, discussed below, the United States believes that it understood the nature of the Argentine claims set forth in Sections A and B, and was able to begin preparing its defense with respect to

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[113] *See United States - Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R, WT/DS178/R, Report of the Panel, as modified by the Appellate Body, adopted 21 December 2000, para. 5.42.

[114] WT/DSB/M/150 (1 July 2003), para. 32.

those claims prior to the receipt of Argentina's First Submission.[115] Because these would be the only claims to which the United States would have to respond, it no longer would be prejudiced by its inability to begin preparing a defense in response to the claims – whatever they may be – included on Page 4 of the panel request.

C. Because Sections B.1, B.2 and B.3 of Argentina's Panel Request Do Not Present the Problem Clearly Within the Meaning of Article 6.2 of the DSU, the Panel Should Find that Argentina's Claims in Those Sections Alleging Inconsistencies With Article 3 and Article 6 of the AD Agreement Are Not Within the Panel's Terms of Reference

103. The second category of defects in Argentina's panel request appear in Sections B.1, B.2 and B.3 of the request, which read as follows:[116]

> B. The Commission's Sunset Determination was inconsistent with the Anti-Dumping Agreement and the GATT 1994:
>
> 1. The Commission's application of the standard for determining whether the termination of anti-dumping duty measure would be "likely to lead to continuation or recurrence of ... injury" was inconsistent with Articles 11, 3 and 6 of the Anti-Dumping Agreement. The Commission failed to apply the plain and ordinary meaning of the term "likely" and instead applied a lower standard in assessing whether injury would continue or recur in the event of termination, in violation of Articles 11.1, 11.3, 11.4, 3.1, 3.2, 3.3, 3.4, 3.5, and 6 of the Anti-Dumping Agreement.
>
> 2. The Commission failed to conduct an "objective examination" of the record and failed to base its determination on "positive evidence" regarding whether termination of the anti-dumping duty measure "would be likely to lead to continuation or recurrence" of injury. In particular, the Commission's conclusions with respect to the volume of imports, price effects on domestic like products, and impact of imports of the domestic industry demonstrate the Commission's failure to conduct an objective examination in violation of Articles 11, 3, and 6. The Commission's findings on these issues do not constitute "positive evidence" of likely injury in the event of termination, in violation of Articles 11.1, 11.3, 11.4, 3.1, 3.2, 3.3, 3.4, 3.5, and 6 of the Anti-Dumping Agreement.

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[115] As discussed below, however, the United States objects to Argentina's inclusion in its First Submission of matters not within the scope of Sections A and B of its panel request. In addition, the United States reserves the right to object should Argentina's future submissions also include claims that do not fall within the scope of Sections A and B of its panel request.

[116] WT/DS268/2 (4 April 2003), pages 3-4.

> 3. The US statutory requirements that the Commission determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" (19 U.S.C. § 1675a(a)(1)) and that the Commission "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time" (19 U.S.C. § 1675a(a)(5)) are inconsistent with Articles 11.1, 11.3 and 3 of the Anti-Dumping Agreement.

104. The defect in these three paragraphs is that Sections B.1 and B.2 allege an inconsistency with Article 6 of the AD Agreement in its entirety, while Section B.3 alleges an inconsistency with Article 3 of the AD Agreement in its entirety. These allegations do not comply with the Article 6.2 requirement to "present the problem clearly," because Articles 3 and 6 each consist of multiple paragraphs and contain multiple obligations. It is implausible that Argentina is claiming that the ITC acted inconsistently with each one of these obligations.[117] Without more, however, it is impossible to determine from the panel request the obligation(s) with which U.S. law or the ITC's actions allegedly are inconsistent; *i.e.*, it is impossible to discern the nature of Argentina's problem.

105. The Appellate Body previously has clarified that the consistency of panel requests with the requirements of Article 6.2 must be analyzed on a case-by-case basis:[118]

> Identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all. But it may not always be enough. There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of *clarity* in the statement of the legal basis of the complaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2.

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[117] Indeed, based on its First Submission, it appears that Argentina is not claiming that the United States acted inconsistently with Articles 3 and 6 in their entirety. With respect to Section B.3 and Argentina's claims that U.S. statutory requirements are inconsistent, as such, with Article 3, in its First Submission Argentina has claimed inconsistencies with Articles 3.1, 3.2, 3.4, 3.7 and 3.8. Argentina First Submission, paras. 270-275. With respect to Sections B.1 and B.2 and Argentina's claims regarding the ITC's application of the "likely" standard and the ITC's alleged failure to engage in an "objective examination" based on "positive evidence," in its First Submission *Argentina does not mention Article 6 at all. Id.*, Sections VIII.A and VIII.B.

[118] *Korea Dairy Safeguard*, para. 124 (footnote omitted; italics in original).

Consistent with the Appellate Body's reasoning, prior panels have found that the mere listing of entire articles of the AD Agreement fails to comply with Article 6.2 of the DSU.[119]

106. In this dispute, the circumstances are such that the mere listing of Article 3 or Article 6 does, indeed, "fall short of the standard of Article 6.2." This is demonstrated by the fact that elsewhere in its panel request, Argentina was able to cite to specific paragraphs of Articles 3 and 6. In Sections A.1-A.3, Argentina alleged inconsistencies with Articles 6.1, 6.2, 6.6, 6.8, 6.9 and 6.10. In Sections B.1-B.2 and B.4, Argentina alleged inconsistencies with Articles 3.1, 3.2, 3.3, 3.4 and 3.5. Thus, Argentina's failure to cite particular paragraphs of Article 6 in Sections B.1 and B.2, and its failure to cite particular paragraphs of Article 3 in Section B.3, must be due to the fact that: (1) Argentina was unsure as to the claims it intended to make; or (2) it knew what claims it intended to make, but wished to conceal that information for the time being. Neither motivation, however, constitutes an excuse for failing to comply with Article 6.2 of the DSU.

107. Argentina's suggestion to the DSB that the questions it posed at the consultations somehow enabled the United States to discern the meaning of Argentina's general references to Articles 3 and 6 is factually incorrect and legally irrelevant.[120] As a factual matter, the questions posed by Argentina shed little light on the nature of Argentina's complaints. In the case of Article 6, Argentina asked only *one* question. Included under the rubric of "General Questions Regarding Substantive Obligations of the Antidumping Agreement Applicable to Reviews Conducted Under Article 11.3", this question was as follows: "Does the United States consider that the requirements of Article 6 of the Antidumping Agreement apply to reviews under Article 11.3? If so, what are the specific requirements of Article 6 that apply to reviews conducted under Article 11.3?"[121] This question provided absolutely no information about Argentina's problem. It did not even ask about the sunset review on OCTG from Argentina. Instead, it did nothing more than solicit the views of the United States – not Argentina – on the general relationship, in the abstract, between Article 6 and Article 11.3.

108. Argentina's questions concerning Article 3 were no more illuminating. Questions 49 and 50 of the November 14 questions asked about Article 3.3 and the concept of cumulation.[122] In the second set of questions presented at the December 17 consultations, Questions 18-20 asked for U.S. views, in the abstract, concerning Article 3.3, Question 21 asked whether the provisions of Article 3 are mandatory or discretionary in antidumping investigations, and Questions 22-23 and 33 asked about the relationship, in the abstract, between Article 3 and Article 11.3. None of these questions

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[119] *EC - Pipe Fittings*, para. 7.14(7) (discussing Articles 6, 9 and 12 of the AD Agreement); and *Thai Angles*, paras. 7.28-7.29 (discussing Article 6 of the AD Agreement).

[120] Before the DSB, Argentina asserted that the 86 questions presented by Argentina at the consultations enabled the United States to discern the nature of the problem underlying Argentina's general reference to Articles 3 and 6 in the disputed sections of the panel request. Exhibit US-2, para. 34.

[121] This question was Question 5 of the questions posed by Argentina at the November 14 consultations. A copy of these questions, along with the questions posed by Argentina at the December 17 consultations, is attached as Exhibit US-12.

[122] *Id*.

shed any light on the nature of the problem reflected in Argentina's reference to Article 3 in Section B.3 of its panel request. To the extent that four of these nine questions related to Article 3.3 of the AD Agreement, one might conclude that Argentina had a concern about the use of cumulation in sunset reviews. However, cumulation appears to be the subject of Section B.4 of the panel request, not Section B.3.

109. In any event, it is legally irrelevant whether the questions posed by Argentina at consultations were informative as to Argentina's concerns at that time. The legally relevant question is whether Argentina's panel request complies with the requirements of Article 6.2 of the DSU. As noted above: "Article 6.2 requires that a panel request provide the necessary information, regardless of whether the same information, or additional information, is already available to the responding party through different channels, *e.g.*, previous discussions between the parties."[123]

110. The United States has been prejudiced by this failure of Argentina to comply with the requirements of Article 6.2. As in the case of Page 4 of Argentina's panel request, the United States' ability to begin preparing its defense has been impaired because, as a result of Argentina's failure to comply with Article 6.2, the United States did not "know what case it has to answer."

111. Accordingly, the United States requests that the Panel find that the claims of inconsistency with Article 6 of the AD Agreement set forth in Sections B.1 and B.2 of Argentina's panel request, and the claim of inconsistency with Article 3 of the AD Agreement set forth in Section B.3 of the panel request, are not within the Panel's terms of reference.

D. The Panel Should Find That Certain Matters Included in Argentina's First Submission Are Not Within the Panel's Terms of Reference Because Those Matters Were Not Included in Argentina's Panel Request

112. The Panel was established with standard terms of reference, which means that the Panel's terms of reference are limited to the matters raised in Argentina's panel request.[124] As the Appellate Body has previously explained: "The jurisdiction of a panel is established by that panel's terms of reference, which are governed by Article 7 of the DSU. A panel may consider only those claims that it has the authority to consider under its terms of reference. A panel cannot assume jurisdiction that it does not have."[125]

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[123] *Canada Wheat Exports*, para. 25.

[124] *Constitution of the Panel Established at the Request of Argentina; Note by the Secretariat*, WT/DS268/3 (9 September 2003).

[125] *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, Report of the Appellate Body adopted 16 November 1998, para. 92.

113. In its First Submission, Argentina has raised five matters that are not included in Section A or B of its panel request.[126] These matters consist of the following:

(1) Argentina's claim that Commerce's sunset review practice, both as such and as applied, is inconsistent with Article 11.3 of the AD Agreement, because it is allegedly based on an irrefutable presumption. This matter is discussed in Section VII.B.1 of Argentina's First Submission, at paras. 124-137.

(2) Argentina's claim that 19 U.S.C. §§ 1675(c) and 1675(a)(c), the SAA, and the *Sunset Policy Bulletin*, taken together, establish an irrefutable presumption that is inconsistent with Article 11.3 of the AD Agreement. This matter is discussed in Section VII.B.2 of Argentina's First Submission, at paras. 138-147.

(3) Argentina's claim that Commerce's sunset review practice is inconsistent with Article X:3(a) of the GATT 1994. This matter is discussed in Section VII.E of Argentina's First Submission, at paras. 194-210.

(4) Argentina's claim that the ITC's application of 19 U.S.C. §§ 1675a(a)(1) and (5) in the sunset review of OCTG from Argentina is inconsistent with Articles 11.3 and 3 of the AD Agreement. This matter is discussed in Section VIII.C.2 of Argentina's First Submission, at paras. 276-277.

(5) Argentina's claim that the U.S. measures it has identified are inconsistent with Article VI of the GATT 1994, Articles 1 and 18 of the AD Agreement, and Article XVI:4 of the WTO Agreement. This matter is discussed in Section IX of Argentina's First Submission, at paras. 295-313.

114. As explained below, none of these matters falls within the scope of Sections A or B of Argentina's panel request. Therefore, they are not within the Panel's terms of reference.

[126] As demonstrated above, the matters covered by Page 4 of the panel request – whatever they may be – are not within the Panel's terms of reference due to Argentina's failure to comply with Article 6.2 of the DSU. Accordingly, the United States addresses only the question of whether the new matters contained in Argentina's First Submission fall within the scope of Sections A or B of the panel request.

1. Argentina's Claim That Commerce's Sunset Review Practice, Both as Such and as Applied, Is Inconsistent with Article 11.3 of the AD Agreement

115. In Section VII.B.1 of its First Submission, Argentina claims that Commerce's sunset review practice, both as such and as applied, is inconsistent with Article 11.3 of the AD Agreement.[127] According to Argentina: "[B]ecause it is the Department's consistent practice to employ in its sunset reviews an irrefutable presumption of likely dumping, the United States is acting inconsistently with Article 11.3 of the Antidumping Agreement."[128]

116. The only portion of Argentina's panel request that makes any reference at all to an "irrefutable presumption" is Section A.4. However, Section A.4 does not contain an allegation that Commerce practice, either as such or as applied, is inconsistent with Article 11.3 of the AD Agreement. Instead, the only action alleged to be inconsistent with Article 11.3 as a result of this "irrefutable presumption" is the "Department's Sunset Determination;" *i.e.*, Commerce's sunset review determination in OCTG from Argentina.[129] Although Section A.4 contains a reference to Commerce practice, Argentina cites this practice simply as evidence of the irrefutable presumption that Commerce allegedly applied in the OCTG sunset review. Argentina makes no claim that the practice itself is inconsistent with Article 11.3, either as such or as applied. Moreover, none of the other paragraphs in Section A of the panel request can be construed as encompassing Argentina's claim concerning Commerce practice.

117. In addition, if Argentina actually is claiming that Commerce practice as applied in sunset reviews other than the review on OCTG from Argentina is inconsistent with Article 11.3, then the United States also objects on the grounds that no Commerce sunset review determination other than that involving OCTG from Argentina is enumerated in the panel request, and this matter was not the subject of consultations between the United States and Argentina. Articles 4.3, 4.7 and 6.2 of the DSU make it clear that there must be consultations on a matter before a panel can be requested. However, the only specific Commerce sunset review on which consultations occurred was the review involving OCTG from Argentina.

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[127] Argentina's discussion of this particular matter is somewhat confused, and it is not entirely clear as to whether Argentina is making both an "as such" and an "as applied" claim. In an excess of caution, the United States assumes that Argentina is making both.

[128] Argentina First Submission, para. 137.

[129] Specifically, in its panel request, Argentina asserts that: "The Department's Sunset Determination is inconsistent with Article 11.3 of the Anti-Dumping Agreement . . . because it was based on a virtually irrefutable presumption ... ." WT/DS268/2, page 3.

2. Argentina's Claim that 19 U.S.C. §§ 1675(c) and 1675(a)(c), the SAA, and the *Sunset Policy Bulletin*, Taken Together, Establish an Irrefutable Presumption that Is Inconsistent with Article 11.3 of the AD Agreement

118. In Section VII.B.2 of its First Submission, Argentina claims that 19 U.S.C. §§ 1675(c) and 1675a(a)(c), the SAA, and the *Sunset Policy Bulletin*, taken together, establish an irrefutable presumption that is inconsistent with Article 11.3 of the AD Agreement. According to Argentina: "Taken together, the U.S. sunset statutory provisions, the SAA, and the Sunset Policy Bulletin prescribe a standard that is inconsistent with Article 11.3 of the Antidumping Agreement."[130]

119. Again, the only portion of Argentina's panel request that makes any reference at all to an "irrefutable presumption" is Section A.4. However, Section A.4 does not contain an allegation that the statute, the SAA, or the *Bulletin* – taken together or in isolation – is inconsistent with Article 11.3 of the AD Agreement. Instead, the only action alleged to be inconsistent with Article 11.3 as a result of the alleged "irrefutable presumption" is the "Department's Sunset Determination;" *i.e.*, Commerce's sunset review determination in OCTG from Argentina.[131] Although Section A.4 contains a reference to "US law" and "the Department's Sunset Policy Bulletin," Argentina simply cites these as the source of the presumption that Commerce allegedly applied in the OCTG sunset review determination.[132] Argentina makes no claim in Section A.4 that the statutory provisions, the SAA and/or the *Bulletin* themselves are inconsistent with Article 11.3, either as such or as applied. Moreover, none of the other paragraphs in Section A of the panel request can be construed as encompassing such a claim.

120. Finally, other portions of Argentina's panel request make it clear that Argentina knows how to formulate a claim challenging U.S. law "as such." In Section A.1 of the request, Argentina clearly states its belief that: "US laws, regulations, and procedures regarding 'expedited' sunset reviews are inconsistent with" the AD Agreement. Likewise, in Section B.3, Argentina states that: "The US statutory requirements . . . are inconsistent with" the AD Agreement. The fact that Argentina did not make a comparable claim in Section A.4 can only be due to the fact that no such claim was intended. The inclusion of such a claim in Argentina's First Submission simply constitutes a belated and impermissible attempt to expand the jurisdiction of the Panel.

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[130] Argentina First Submission, para. 138.

[131] Specifically, in its panel request, Argentina asserts that: "The Department's Sunset Determination is inconsistent with Article 11.3 of the Anti-Dumping Agreement . . . because it was based on a virtually irrefutable presumption ... ." WT/DS268/2, page 3.

[132] Neither Section A.4 nor any other portion of Section A mentions the SAA.

3. Argentina's Claim that Commerce's Sunset Review Practice Is Inconsistent with Article X:3(a) of the GATT 1994

121. In Section VII.E of its First Submission, Argentina claims that Commerce's sunset review practice, both as such and as applied, is inconsistent with Article X:3(a) of the GATT 1994.[133] According to Argentina: "[T]he data drawn from the Department's own records demonstrates that the Department failed to administer in an impartial and reasonable manner U.S. antidumping laws, regulations, decisions and rulings with respect to the Department's conduct of sunset reviews of antidumping duty orders, in violation of Article X:3(a) of the GATT 1994."[134]

122. The only portion of Argentina's panel request that makes any reference at all to Article X:3(a) is Section A.4. However, Section A.4 does not contain an allegation that Commerce practice, either as such or as applied, is inconsistent with Article X:3(a). Instead, the only action alleged to be inconsistent with Article X:3(a) is the "Department's Sunset Determination;" *i.e.*, Commerce's sunset review determination in OCTG from Argentina.[135] Although Section A.4 contains a reference to Commerce practice "in sunset reviews," Argentina cites this practice simply as evidence of the alleged irrefutable presumption that was used in the review of OCTG from Argentina. Argentina makes no claim that the practice itself is inconsistent with Article X:3(a), either as such or as applied. Moreover, none of the other paragraphs in Section A of the panel request can be construed as encompassing a claim concerning the consistency of Commerce practice with Article X:3(a).

4. Argentina's Claim that the ITC's Application of 19 U.S.C. §§ 1675a(a)(1) and (5) in the Sunset Review of OCTG from Argentina Is Inconsistent with Articles 11.3 and 3 of the AD Agreement

123. In Section VIII.C.2 of its First Submission, Argentina claims that the ITC's application of 19 U.S.C. §§ 1675a(a)(1) and (5) in the sunset review of OCTG from Argentina is inconsistent with Articles 11.3 and 3 of the AD Agreement. According to Argentina: "[E]ven if the statutory language were consistent with the Antidumping Agreement, the ITC failed to apply the statutory language to the evidence before it to conclude that revocation of the orders would likely lead to continuation or recurrence of injury."[136]

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[133] Here, too, Argentina's discussion is somewhat confused, and it is not entirely clear as to whether Argentina is making both an "as such" and an "as applied" claim. In an excess of caution, the United States assumes that it is making both.

[134] Argentina First Submission, para. 210.

[135] Specifically, in its panel request, Argentina asserts that: "The Department's Sunset Determination is inconsistent with . . . Article X:3(a) of the GATT 1994 because it was based on a virtually irrefutable presumption ... ." WT/DS268/2, page 3.

[136] Argentina First Submission, para. 277.

124. Section 1675a(a)(1) requires the ITC to determine whether injury would be likely to continue or recur "within a reasonably foreseeable time," while section 1675a(a)(5) requires that the ITC "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time." The only portion of the panel request that refers to these provisions – and the concepts they embody – is Section B.3. However, it is quite clear from the text that the claim in Section B.3 relates to the statutory provisions "as such", and not "as applied." In Section B.3, Argentina states that: "The US statutory requirements . . . are inconsistent" with the AD Agreement. Section B.3 contains no reference to the "application" of these statutory provisions, either in general or in the sunset review of OCTG from Argentina.

125. Moreover, other portions of Argentina's panel request make it clear that Argentina knows how to formulate a claim challenging U.S. law "as applied." In Section A.2, Argentina complains about Commerce's "application" of its expedited sunset review procedures in the OCTG review, and in Section A.5, Argentina complains about Commerce's "application" of the "likely" standard. In Section B.1, Argentina complains about the ITC's "application" of the "likely" standard, and in Section B.4 complains about the ITC's "application" of a cumulative injury analysis. The fact that Argentina did not make a comparable claim in Section B.3 about the ITC's "application" of the standards in 19 U.S.C. §§ 1675a(a)(1) and (5) can only be due to the fact that no such claim was intended. Instead, the inclusion of such a claim in Argentina's First Submission again simply constitutes a belated and impermissible attempt to expand the jurisdiction of the Panel.

5. Argentina's Claim that the U.S. Measures It Has Identified Are Inconsistent with Article VI of the GATT 1994, Articles 1 and 18 of the AD Agreement, and Article XVI:4 of the WTO Agreement

126. In Section IX of its First Submission, Argentina claims that all of the "measures" it identified in its panel request are inconsistent with Article VI of the GATT 1994, Articles 1 and 18 of the AD Agreement, and Article XVI:4 of the WTO Agreement. These claims are consequential claims in the sense that they depend upon a finding that some other provision of the AD Agreement or GATT 1994 has been breached.

127. However, neither Section A nor Section B of Argentina's panel request refers to these provisions. Instead, the only portion of Argentina's panel request that makes any reference at all to Article VI, Articles 1 and 18, and Article XVI:4 is Page 4. As demonstrated above, however, the claims set forth on Page 4 are not within the Panel's terms of reference.

128. These dependent claims also are not within the Panel's terms of reference to the extent that they are dependent on a claim that itself is not within the Panel's terms of reference.

E. Conclusion

129. The portions of the panel request to which the United States is not objecting demonstrate that Argentina knows perfectly well how to file a panel request that conforms with the obligations of Article 6.2 of the DSU. This only tends to highlight the clearly defective nature of the remainder of Argentina's panel request.

130. The requirements of Article 6.2 exist for a reason, a reason which the Appellate Body has succinctly summarized as follows: "A defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence."[137] Here, Argentina has denied the United States that to which it is entitled by Article 6.2.

V. GENERAL LEGAL PRINCIPLES

A. Scope and Standard of Review

131. Articles 17.5 and 17.6 of the AD Agreement set forth standards concerning the scope and standard of review in disputes involving antidumping measures to which panels must adhere. With respect to the "scope" of review, Article 17.5(ii) of the AD Agreement directs a panel to limit its review to the facts that were before the investigating authority when it made its determination. With respect to the sunset review on OCTG from Argentina made by Commerce and the ITC, this means the evidence contained in the administrative records of Commerce and the ITC, respectively.[138] This concept is consistent with the fact that where a panel is reviewing the WTO-consistency of an action taken by an administrative agency, a panel is not to act as a trier-of-fact in the first instance or to otherwise engage in a *de novo* review of the evidence before the agencies.

132. With respect to the standard of review, Article 17.6(i) of the AD Agreement addresses a panel's review of the facts, providing as follows:

> in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, *even though the panel might have reached a different conclusion, the evaluation shall not be overturned*. (Emphasis added.)

133. In other words, panels are not to conduct their own *de novo* evaluation of the facts if the domestic investigating authority's establishment of the facts was proper and if its evaluation of the facts was unbiased and objective. This applies even if the panel – had it stood in the shoes of that authority originally – might have decided the matter differently.

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[137] *Thai Angles (AB)*, para. 88.

[138] *See, e.g., Mexico - HFCS*, para. 7.43 ("[W]e are required to consider this dispute on the basis of the facts before the investigating authority, pursuant to Article 17.5(ii) of the AD Agreement.").

134. Finally, with respect to the standard of review and a panel's review of interpretative issues, Article 17.6(ii) provides as follows:

> the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

135. This means, for example, that if dictionary definitions reveal that a treaty term has more than one ordinary meaning, an authority's measure that is based on one of those meanings could be permissible and in conformity with the AD Agreement.[139]

B. Burden of Proof: Argentina Bears the Burden of Proving Its Claims

136. It is well-established that the complaining party in a WTO dispute bears the burden of coming forward with argument and evidence that establish a *prima facie* case of a violation.[140] If the balance of evidence and argument is inconclusive with respect to a particular claim, the Panel must find that the complaining party, Argentina, failed to establish that claim.[141]

137. For the reasons discussed below, the United States believes that Argentina has failed to meet its burden to establish a *prima facie* case. In the event the Panel should find to the contrary, however, Argentina's claims are also rebutted below.

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[139] *Argentina - Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, Report of the Panel adopted 19 May 2003, paras. 7.337-7.343 (Argentina did not act inconsistently with Article 4.1 of the AD Agreement where its action was consistent with one, if not all, dictionary definitions of the phrase "major proportion.").

[140] *See, e.g., United States - Measures Affecting Imports of Woven Shirts and Blouses from India*, WT/DS33/AB/R, Report of the Appellate Body, adopted 23 May 1997, page 14; *EC Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body adopted 13 February 1998, para. 104; and *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, Report of the Panel, as modified by the Appellate Body, adopted 12 January 2000, para. 7.24.

[141] *See, e.g., India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, Report of the Panel, as affirmed by the Appellate Body, adopted 22 September 1999, para. 5.120.

VI. LEGAL ARGUMENT

A. Section 751(c)(4) of the Act and Section 351.218(d)(2)(iii) of Commerce's *Sunset Regulations* – the "Waiver" Provisions – Are Not Inconsistent, As Such, with the AD Agreement

138. Argentina claims that section 751(c)(4) of the Act and section 351.218(d)(2)(iii) of Commerce's *Sunset Regulations* (the so-called "waiver" provisions) are inconsistent, as such, with the AD Agreement. First, Argentina claims that these provisions preclude Commerce from conducting a sunset review and making a determination as to whether the expiry of the duty would lead to the continuation or recurrence of dumping, as required by Article 11.3 of AD Agreement. In particular, Argentina contends that when a respondent interested party is found to have waived participation in a sunset review, these provisions improperly require Commerce to find that the revocation of the order would be likely to lead to the continuation or recurrence of dumping without requiring Commerce to make any substantive likelihood determination.[142] Second, Argentina claims that these provisions are inconsistent with Articles 6.1 and 6.2 of the AD Agreement because they foreclose opportunities for a respondent interested party to present evidence or to defend its interests in a sunset review.[143]

139. As demonstrated below, Argentina's claims are based on a misrepresentation of the purpose and operation of the "waiver" provisions, and therefore have no merit. An accurate understanding of these provisions reveals that they do not mandate WTO-inconsistent behavior or preclude WTO-consistent behavior.

140. Before turning to the provisions themselves, however, it is important to recognize the limited extent to which the AD Agreement actually addresses sunset reviews. Indeed, the sole provision of the AD Agreement generating the need to conduct sunset reviews is Article 11.3. Article 11.3 provides as follows:

> Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.[22] The duty may remain in force pending the outcome of such a review.
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[142] Argentina First Submission, paras. 114-117.
[143] Argentina First Submission, paras. 121-122.

[22] When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

141. Thus, Article 11.3 establishes the simple requirement that five years after an order's imposition, it must either be terminated or a review must be conducted to determine whether termination of that order "would be likely to lead to continuation or recurrence of dumping and injury." Outside of this standard and the requirement to initiate a review or revoke the order, the text of Article 11.3 contains no provisions governing the conduct of sunset reviews, the type of evidence sufficient to satisfy the "likelihood test"or the methodologies or modes of analysis to be used in reaching a sunset determination. As articulated succinctly by the panel in *US – Japan Sunset*:

> Article 11.3 is silent as to how an authority should or must establish that dumping is likely to continue or recur in a sunset review. That provision itself prescribes no parameters as to any methodological requirements that must be fulfilled by a Member's investigating authority in making such a "likelihood" determination.[144]

142. To be sure, there are a few other provisions in the AD Agreement that reference sunset reviews by referencing reviews in general. Article 11.4 explains that any review under Article 11 "shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review" and that the provisions of Article 6 regarding "evidence and procedure shall apply to any review carried out under this Article." Article 12.3 states that the transparency and notice provisions of Article 12 apply "*mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11." Neither Article 6 nor Article 12, however, contains any provisions regarding the methodologies or analysis to be employed in making the determination of whether dumping and injury is likely to continue or recur. Attempts to read into Article 11.3 substantive obligations allegedly contained in other provisions of the AD Agreement have been soundly rejected.[145] In sum, aside from the obligations contained in Article 11.3 and those provisions of Articles 6 and 12 discussed above, the AD Agreement leaves the conduct of sunset reviews to the discretion of the Member concerned.

1. The Waiver Provisions Are Not Inconsistent with the Obligation to Conduct a "Review" and Make a "Determination" Under Article 11.3 of the AD Agreement

[144] *See United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, Appeal Notified 15 September 2003, para. 7.166. [hereinafter *US – Japan Sunset*].

[145] In *US - German Steel*, para. 112, the Appellate Body found that Article 22.1 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") – the counterpart to Article 12.1 of the AD Agreement – did not create an evidentiary standard applicable to the initiation of sunset reviews. In *US - Japan Sunset*, para. 7.33, the panel followed *US - German Steel* and found that Article 12.1 of the AD Agreement likewise does not create an evidentiary standard applicable to the initiation of sunset reviews.

143. Argentina claims that section 751(c)(4) of the Act and section 351.218(d)(2)(iii) of Commerce's *Sunset Regulations* "preclude" Commerce from making a "determination" and from conducting a "review" in accordance with the obligations of Article 11.3. Argentina argues that section 751(c)(4) and section 351.218(d)(2)(iii) of Commerce's *Sunset Regulations* are inconsistent with Article 11.3 because they (1) "preclude" Commerce from conducting sunset reviews, and (2) require Commence to make an affirmative determination of likelihood without further inquiry in cases where a respondent interested party fails to respond to the notice of initiation in a sunset review proceeding.[146] In order to understand why these claims are unfounded, it is first necessary to understand what these U.S. statutory and regulatory provisions provide and do not provide.

144. Section 751(c)(4)(A) provides that a respondent interested party may "waive" participation in a sunset review proceeding. This allows, but does not require, a respondent interested party to participate solely in the ITC's portion of the sunset review concerning the likelihood of continuation or recurrence of injury.[147] Should a respondent interested party explicitly choose to waive participation in Commerce's sunset review proceeding, section 751(c)(4)(B) directs Commerce to conclude that revocation of the order would be likely to lead to continuation or recurrence of dumping.[148]

145. Section 351.218(d)(2) of Commerce's *Sunset Regulations* provides: (1) the time, form and content for an express waiver; (2) that failure to respond to a notice of initiation will be taken as an implied waiver; and (3) that a waiver, whether express or implied, shall preclude acceptance of further information from the waiving party.[149] Section 351.218(d)(2)(iii) – the specific provision that Argentina complains of in its First Submission – provides that where a respondent interested party fails to respond to Commerce's notice of initiation of a sunset review, the waiver of that respondent interested party is presumed or implied.

146. Argentina's claim fails in two significant respects. First, Argentina narrowly reads section 751(c)(4) and section 351.218(d)(2)(iii) in isolation from other statutory and non-statutory elements of U.S. laws and regulations governing the conduct of sunset reviews. As discussed in detail below, it is clear that Section 751(c)(4) and section 351.218(d)(2)(iii) do not, in fact, preclude Commerce from conducting a sunset review as required by Article 11.3, because, when a respondent interested party fails to respond to Commerce's notice of initiation of a sunset review, the affirmative likelihood determination described in section 751(c)(4)(B) is limited to the party that failed to respond.[150]

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[146] Argentina First Submission, paras. 114-117.

[147] 19 U.S.C. § 1675(c)(4)(A) (Exhibit ARG-1).

[148] 19 U.S.C. § 1675(c)(4)(B) (Exhibit ARG-1).

[149] 19 C.F.R. § 351.218(d)(2) (Exhibit ARG-3).

[150] *See* section 751(c)(4)(B) of the Act, providing that the affirmative likelihood determination resulting from the waiver described in section 751(c)(4)(A) only applies "with respect to that party." 19 U.S.C. § 1675(c)(4)(B) (Exhibit ARG-1); *see also*, SAA at 881 ("If Commerce receives such a waiver, Commerce will

(continued...)

147. In addition, section 751(c)(4) does not alter or amend the requirements under other provisions of U.S. law for Commerce to initiate and conduct sunset reviews generally in accordance with Article 11.3. Principally, under section 751(c)(1) of the Act, Commerce remains obligated, five years after an order's imposition, to "conduct a review to determine . . . whether revocation of the . . . antidumping duty order . . . would be likely to lead to continuation or recurrence of dumping ... ."[151] In addition, section 751(c)(2) provides that "[n]ot later than 30 days before the fifth anniversary of the date described in paragraph (1), the administering authority shall publish ... a notice of initiation of a review."[152]

148. Commerce regulations elaborate on these statutory obligations by providing details about the timing of initiations, what is required to respond to a notice of initiation, and what information Commerce requires from interested parties.[153] Section 751(c)(4) and section 351.218(d)(2)(iii) of Commerce's *Sunset Regulations* provide for a "waiver" where respondent interested parties do not choose to participate in Commerce's sunset review proceeding. The result of such a waiver is that, with respect to the party waiving its right to participate, Commerce will conclude that revocation of the order would be likely to lead to continuation or recurrence of dumping for that non-responding party.[154] Section 751(c)(4) is not a provision which precludes the conduct of a sunset review. Indeed, regardless of whether a respondent interested party affirmatively waives participation or Commerce finds that the failure of the respondent interested party to file a substantive response or a complete substantive response constitutes a waiver, Commerce is still required by U.S. law and its own regulations to initiate and conduct the required sunset review.

149. Second, Argentina improperly reads Article 11.3 to require Commerce to conduct a full sunset review proceeding even where the respondent interested parties have indicated – either by means of an affirmative waiver or by a failure to respond – that they have no interest in participating in the review and where all existing evidence supports a determination that revocation would be likely to lead to continuation or recurrence of dumping. Nothing in Article 11.3 specifically or the AD Agreement generally requires authorities to engage in such a waste of their own resources and the resources of private parties.[155]

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[150] (...continued)
conclude that revocation or termination would be likely to lead to continuation or recurrence of dumping or countervailable subsidies with respect to that submitter.") (Emphasis added) (Exhibit US-11). The United States notes that the portion of the SAA submitted by Argentina as Exhibit ARG-5 conveniently omits page 881.

[151] 19 U.S.C. § 1675(c)(1) (Exhibit ARG-1).

[152] 19 U.S.C. § 1675(c)(2) (Exhibit ARG-1). Section 751(c)(3) provides truncated time-lines for completion of sunset reviews in instances where interested parties do not respond or provide inadequate substantive responses to Commerce's notice of initiation. 19 U.S.C. § 1675(c)(3) (Exhibit ARG-1).

[153] 19 C.F.R. § 351.218(a)-(d) (Exhibit ARG-3).

[154] 19 U.S.C. § 1675(c)(4)(B) (Exhibit ARG-1); 19 C.F.R. § 351.218(d)(2) (Exhibit ARG-3).

[155] The SAA in discussing section 751(c)(3) states that this provision "is intended to eliminate needless reviews. This section will promote administrative efficiency and ease the burden on agencies by eliminating needless reviews while meeting the requirements of the [AD and SCM] Agreements. If parties provide no or inadequate information in response to a notice of initiation, it is reasonable to conclude that they would not provide adequate
(continued...)

150. Argentina argues that by concluding that revocation would be likely to lead to continuation or recurrence of dumping in instances where a respondent interested party waives its participation by failing to respond to Commerce's notice of initiation, Commerce somehow fails to "determine" – within the meaning of Article 11.3 – whether dumping would be likely to continue or recur.[156] This argument, however, fundamentally overlooks the practical consequences that waiver has on the alternative conclusion. When viewed in light of these consequences, it is clear that section 751(c)(4) and section 351.218(d)(2)(iii) are not obstacles to Commerce making the required likelihood determination.

151. The consequence of a respondent interested party's decision not to participate in Commerce's review is the absence of information critical to the determination of whether dumping would be likely to continue or recur with respect to that non-responding party – specifically, information with respect to that foreign producer's or exporter's (1) view as to the likely effect of revocation,[157] (2) volume and value of exports of subject merchandise to the United States prior to the sunset review and the original investigation,[158] (3) percentage of the total exports of subject merchandise to the United States,[159] and (4) position as to the existence of other information suggesting whether or not it is likely to continue or resume dumping after revocation of the order.[160] Such information is within the control of foreign producers and exporters and cannot generally be obtained readily from other sources. Thus, an affirmative statement from a foreign producer or exporter that it will not participate in Commerce's review, or the failure of the respondent interested party to file a substantive response or a complete substantive response, leaves Commerce in the position of having to base its determination on the views of domestic interested parties and information already contained in the administrative record of the sunset review proceeding. This information includes prior and current dumping margins, Commerce's original investigation determination, and any information provided by interested parties, both the domestic and foreign interested parties, in their substantive responses and rebuttal responses.[161]

152. Under Commerce's *Sunset Regulations*, domestic interested parties must notify their intent to participate in Commerce's review within 15 days of initiation (15 days prior to when respondent interested parties are to submit their waivers, if any). A failure to do so results in automatic revocation.[162] Thus, domestic interested parties who do *not* believe revocation would be likely to lead to continuation or recurrence of dumping and, thus, no longer view continuation of the order as

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[155] (...continued)
information if the agencies conducted a full-fledged review. However, where there is sufficient willingness to participate and adequate indication that parties will submit information requested throughout the proceeding, the agencies will conduct a full review." SAA, at 880 (Exhibit US-11).

[156] Argentina First Submission, para. 109.

[157] 19 C.F.R. § 351.218(d)(3)(ii)(F) (Exhibit ARG-3).

[158] 19 C.F.R. § 351.218(d)(3)(iii)(B)-(C), (E) (Exhibit ARG-3).

[159] 19 C.F.R. § 351.218(d)(3)(iii)(D) (Exhibit ARG-3).

[160] 19 C.F.R. § 351.218(d)(3)(iv)(A)-(B) (Exhibit ARG-3).

[161] *See* 19 C.F.R. § 351.308(f) (Exhibit US-3); and the SAA, at 879-880 (Exhibit US-11).

[162] 19 C.F.R. §§ 351.218(d)(1)(i) and 351.218(d)(iii)(B) (Exhibit ARG-3).

necessary, will simply decline to state an intention to participate in the review and effectively agree to the automatic revocation of the order.

153. In other words, it is to be expected that if domestic interested parties do submit substantive responses, those responses inevitably will contain information that is supportive of, and not opposed to, an affirmative finding of likelihood. Therefore, if a respondent interested party does not submit information or argument in favor of revocation, the only interested party information on the record with respect to that respondent would be that of domestic interested parties in support of an affirmative finding of likelihood and continuation of the order. To the extent that other respondent interested parties have submitted information for consideration in the sunset review proceeding, Commerce also considers that information in making its final sunset determination.

154. It seems evident that Commerce could conduct a "review" and "determine" that revocation would be likely to lead to continuation or recurrence of dumping with respect to a particular respondent interested party where that same party failed to file a complete substantive response to Commerce's notice of initiation of the sunset review. It is clear that the words "review" and "determine" do not contain the broad substantive rules suggested by Argentina. "Review" may be defined as "a formal assessment of something with the intention of instituting change if necessary."[163] "Determine" may be defined as to "[c]ome to a judicial decision; make or give a decision about something ... [c]onclude from reasoning or investigation, deduce."[164] "Deduce" is further defined as to "[i]nfer, draw as a logical conclusion (*from* something already known or assumed); derive by a process of reasoning."[165] Thus, while Article 11.3 – through the use of the words "review" and "determine" – arguably requires Commerce to conduct a formal assessment of whether dumping is likely to continue or recur that is supported by some type of reasoning and evidence, it does not provide the procedures for conducting such an assessment or the analytical approach or evidence to be employed in the assessment.

155. Where respondent interested parties have failed to respond to Commerce's notice of initiation of a sunset review, section 351.218(d)(2)(iii) provides that these non-responding parties will be considered to have waived their rights to participate in the proceeding.[166] Although the determination to expedite a sunset review is made on a "case-by-case" basis, section 351.218(e)(1)(ii)(A) of Commerce's *Sunset Regulations* provides that Commerce normally will expedite the review where it has not received substantive responses from foreign interested parties representing more than 50 percent of the total exports of the subject merchandise for the five-year

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[163] *Concise Oxford English Dictionary* (10th ed. 2001) (Exhibit US-24); *see also New Shorter Oxford English Dictionary* 2582 (1993) (defining "review" as "[a]n inspection, an examination ... [a] general survey or reconsideration of some subject or thing ... a retrospect, a survey of the past").

[164] *New Shorter Oxford English Dictionary* 651 (1993).

[165] *Id.* at 613.

[166] 19 C.F.R. 351.218(d)(2)(iii) (Exhibit ARG-3).

period preceding the sunset review.[167] When Commerce has not received an adequate response from foreign interested parties (in the aggregate), section 351.218(e)(1)(ii)(C) of Commerce's *Sunset Regulations* provides that Commerce will make its final likelihood determination on the basis of the facts available.[168]

156. Section 351.308(f) of Commerce's *Sunset Regulations* provides that when Commerce makes a likelihood determination on the basis of "facts available," Commerce normally will rely on dumping margins from the original investigation and any subsequent administrative reviews, as well as any information submitted by interested parties in their substantive responses.[169] Thus, even in cases where there is an inadequate response from foreign interested parties to the notice of initiation, Commerce will make the final likelihood determination on the evidence developed during the sunset review proceeding to date.

157. Thus, with respect to the statutory instruction in section 751(c)(4)(B) that Commerce conclude that revocation would be likely to lead to continuation or recurrence of dumping with respect to a waiving respondent interested party, this instruction merely reflects the extent and type of information upon which Commerce would have to base its sunset determination in cases where a respondent interested party waived participation. Section 351.218(d)(2)(iii) addresses this lack of participation and the failure to supply the necessary information where a respondent interested party fails to respond to the notice of initiation of a sunset review. As such, section 751(c)(4) and section 351218(d)(2)(iii) are not provisions that "preclude" Commerce from conducting a "review" and "determin[ing]" whether dumping is likely to continue or recur.

158. Argentina also fails to understand the role of these provisions in furthering compliance with another important obligation of the AD Agreement relating to sunset reviews. Article 11.4 instructs as follows:

> "The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously ... ."

159. Article 6.14, in turn, provides as follows:

> The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

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[167] 19 C.F.R. 351.218(e)(1)(ii)(A) (Exhibit ARG-3).
[168] 19 C.F.R. 351.218(e)(1)(ii)(C) (Exhibit ARG-3).
[169] 19 C.F.R. 351.308(f) (Exhibit US-3).

160. "Expeditious" is defined as "promptly and efficiently."[170] Thus, the AD Agreement should not operate as a bar to the completion of reviews in as promptly and efficiently a manner as possible. The waiver provisions of U.S. law effectuate the expeditious completion of reviews by allowing a determination to be made in a sunset review as soon as it becomes evident that a finding of likelihood may be warranted. In other words, when a respondent interested party has chosen not to participate, the statute instructs Commerce to make such an affirmative finding of likelihood because the evidence before Commerce demonstrates that there is a likelihood of dumping *with respect to the waiving party* if the order were to expire. Under these circumstances, a full-fledged sunset review would be fruitless and a waste of administrative and party resources[171] – a result in direct contravention of the instructions of Articles 6.14 and 11.4 of the AD Agreement.

2. Section 751(c)(4) of the Act and Section 351.218(d)(2)(iii) of Commerce's *Sunset Regulations* Are Not Inconsistent with Articles 6.1 and 6.2 of the AD Agreement

161. Argentina also claims that the provision in U.S. law for expedited sunset reviews is inconsistent with certain obligations in Article 6 of the AD Agreement regarding evidence and procedure. Specifically, Argentina claims that section 751(c)(4) of the Act and section 351.218(d)(2)(iii) of Commerce's *Sunset Regulations* preclude Commerce, in expedited sunset reviews, from observing the obligations contained in: (1) Article 6.1 that all interested parties have "ample opportunity to present in writing all evidence which they consider relevant," and (2) Article 6.2 that all interest parties have a "full opportunity for the defense of their interests."[172]

162. As an initial matter, it is important to remember that any difference in the rules governing evidence and procedure in expedited as compared to full reviews is not relevant to whether U.S. laws and regulations concerning expedited reviews mandate WTO-inconsistent action. Indeed, because the evidentiary and procedural rules used in expedited reviews are consistent with the obligations of the AD Agreement, it is irrelevant that in so-called "full sunset reviews" the United States goes beyond what is required of it under the AD Agreement. In other words, that the United States may afford parties expanded opportunities to submit evidence and argument in a full sunset

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[170] *Merriam-Webster Online Dictionary* (2002) (Exhibit US-25); *see also New Shorter Oxford English Dictionary* 886 (1993) (defining "expeditious" as "[s]peedily performed or given; conducive to speedy performance").

[171] Moreover, in light of the task before Commerce immediately following the entry into force of the WTO Agreement – conducting reviews of 325 existing orders – prolonging reviews in cases where respondent interested parties have waived participation would be an inefficient use of administrative resources, taking resources away from those contested reviews involving large amounts of factual information and devoting them to needlessly extended reviews involving little, if any, disagreement among the parties and a limited factual record. Section 751(c)(4) is, thus, a means to allow Commerce to distribute its limited resources effectively to the more contested and complicated of cases.

[172] Argentina First Written Submission, paras. 120-122. Articles 6.1 and 6.2 apply to sunset reviews by virtue of the cross-reference in Article 11.4 to Article 6.

review is a matter of U.S. policy, not an obligation under the AD Agreement, and is not grounds to find fault with the evidentiary and procedural rules governing expedited sunset reviews.

a. Section 751(c)(4) and Section 351.218(d)(iii)(2) Are Not Inconsistent with the Obligation Under Article 6.1 to Provide Ample Opportunity to Submit Written Information

163. As to its substantive claims under Article 6, Argentina fails to demonstrate that either section 751(c)(4) or section 351.218(d)(4)(iii) impinges on any of the obligations it cites. Article 6.1 states as follows:

> All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

164. Under U.S. sunset laws and regulations, interested parties in expedited sunset reviews are afforded "ample opportunity to present in writing all evidence which they consider relevant." Specifically, section 351.218(d)(3) of Commerce's *Sunset Regulations* provides that interested parties will have 30 days from the notice of initiation of the review to submit substantive responses. In addition to identifying information that is required of interested parties,[173] section 351.218(d)(3)(iv)(B) of Commerce's *Sunset Regulations* provides that parties may provide "*any* other relevant information or argument that the party would like [Commerce] to consider."[174] Further, in section 351.218(d)(4) of Commerce's *Sunset Regulations*, interested parties are afforded the opportunity to rebut evidence and argument submitted in other parties' substantive responses within five days of their submission.[175]

165. Moreover, in cases where Commerce determines that the response to the notice of initiation from the respondent interested parties is inadequate, section 351.309(e) of Commerce's *Sunset*

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[173] Commerce regulations request that interested parties submit their contact information and that of any legal counsel; the identification of the subject merchandise and country subject to review; the citation and date of the notice of initiation; an expression of their willingness to participate and provide information in the review; information and argument with respect to the likelihood of continuation or recurrence of dumping and the likely dumping margin; and summaries of any findings of duty absorption, scope clarifications, circumvention and/or changed circumstances. In addition, from respondent interested parties, Commerce asks for the party's individual weighted average dumping margin from the investigation and any subsequent reviews, the party's value and volume of exports of subject merchandise for the five years preceding the year of the review's initiation (including quarterly data for the last three years); the party's value and volume of the party's exports of subject merchandise for the calendar year preceding the year of initiation of the original antidumping investigation; and the party's percentage of total exports of subject merchandise for the five calendar years preceding the review's initiation. 19 C.F.R. § 351.218(d)(3)(ii)-(iii) (Exhibit ARG-3).

[174] 19 C.F.R. § 351.218(d)(3)(iv)(B) (emphasis added) (Exhibit ARG-3).

[175] 19 C.F.R. § 351.218(d)(4) (Exhibit ARG-3).

Regulations affords interested parties the opportunity to comment on whether an expedited review is appropriate.[176] Thus, U.S. law and Commerce's regulations expressly provide parties with opportunities to provide Commerce with *any* relevant information, to rebut any relevant information and argument submitted by other parties, and to comment on the appropriateness of conducting an expedited review in the first instance. Thus, Commerce's *Sunset Regulations* fulfill the obligations of Article 6.1 by informing the interested parties of the type of information that will be required in every sunset review and by providing opportunities for submission of comments, rebuttal comments and *any* other information the interested party believes is relevant to the proceeding.

166. Finally, it should be emphasized that the provisions alleged by Argentina to be inconsistent with Article 6.1 – section 751(c)(4) and section 351.218(d)(2)(iii) – are provisions that govern the failure of a respondent interested party to participate in a sunset review proceeding in the first instance. These provisions do not dictate the type or amount of information that respondent interested parties may submit in a sunset review, but, instead, are relevant only when a respondent interested party has not responded to the notice of initiation of the sunset review by making the required first submission, the substantive response. In other words, these provisions operate when a respondent interested party has chosen not to avail itself of the Article 6.1 rights that other provisions of the regulations guarantee.

b. Section 751(c)(4) of the Act and Section 351.218(d)(2)(iii) of Commerce's *Sunset Regulations* Are Not Inconsistent with Article 6.2 of the AD Agreement

167. Article 6.2 addresses an interested party's right to "a full opportunity for the defense of their interests" and provides in relevant part:

> Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interest, so that opposing views may be present and rebuttal arguments offered.

168. There is nothing in section 751(c)(4), section 351.218(d)(2)(iii), or any other provision of the U.S. statute or regulations governing sunset reviews that precludes or impedes this opportunity. Indeed, as explained above, interested parties are given ample opportunity to submit written information and argument, rebut information and argument submitted by other parties, and even comment on the appropriateness of conducting an expedited review.

[176] 19 C.F.R. § 351.309(e) (Exhibit US-3).

169. Furthermore, under Commerce's *Sunset Regulations*, Commerce "normally" will conduct an expedited review when the aggregate response from the respondent interested parties is found to be inadequate.[177] Thus, nothing in U.S. sunset laws or regulations would preclude Commerce from conducting a full sunset review, notwithstanding the lack of an adequate response from respondent interested parties, were the circumstances found to warrant a full sunset review.

170. Regardless of whether an expedited or full review is conducted, all interested parties are afforded the right to fully defend their interests. The respondent interested party who submits a substantive response in an expedited sunset review is afforded the same opportunity to have its substantive response considered in the final likelihood determination, to rebut evidence and argument submitted by other parties, and to comment on the appropriateness of an expedited review. Indeed, section 351.308(f)(2) of Commerce's *Sunset Regulations* provides that Commerce normally will consider the substantive submissions of the interested parties in making the likelihood determination in an expedited sunset review. Argentina has not demonstrated that simply because Commerce conducts an expedited, rather than a full, sunset review, either section 751(c)(4) or section 351.218(d)(2)(iii) precludes respondent interested parties from having a full opportunity for the defense of their interests.[178]

B. The Panel Should Reject Argentina's Claims Concerning an Alleged "Irrefutable Presumption" and Its Inconsistency with Article 11.3 of the AD Agreement

171. In Section VII. B of its First Submission, Argentina includes a series of claims that are somewhat difficult to identify, but seem to amount to a recycled version of Argentina's arguments in Section VII.A that Commerce does not conduct a "review" or make a "determination." As the United States understands this section, the claims are based on the factual assertion that Commerce has a practice in sunset reviews of making an irrefutable presumption of a likelihood of continuation or recurrence of dumping.[179] Based on this factual assertion, Argentina claims that: (1) the practice and the instruments on which it allegedly is based are inconsistent, as such, with Article 11.3 of the AD Agreement;[180] (2) the practice and the instruments on which it allegedly is

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[177] 19 C.F.R. § 351.218(e)(1)(ii)(c)(2) (Exhibit ARG-3).

[178] Although the United States demonstrates below that all the foreign interested parties in the sunset review of OCTG from Argentina were afforded their full rights of defense, assuming *arguendo* that this were not the case, it would not be enough for a Member asserting an "as such" claim to establish that, in a particular case, a full right of defense may have been lacking. To find a violation "as such," Argentina would have to establish that U.S. sunset laws or regulations actually preclude the full right of defense. *See United Sates - Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, Report of the Panel adopted 30 August 2002, para. 6.22 [hereinafter "*US - Section 129*"], citing to *United States - Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, Report of the Appellate Body adopted 26 September 2000, paras. 88-89.

[179] Section VII.B itself is ambiguous as to the precise source of this alleged practice.

[180] In its First Submission, para. 138, Argentina asserts that: "Taken together, the U.S. sunset statutory provisions, the SAA, and the Sunset Policy Bulletin prescribe a standard that is inconsistent with Article 11.3 of the

(continued...)

based are inconsistent, as applied generally, with Article 11.3 of the AD Agreement;[181] and (3) the Commerce determination in the sunset review involving OCTG from Argentina is inconsistent with Article 11.3 to the extent that it applied the alleged practice/presumption.[182]

172. As the United States has demonstrated above, the Panel need not consider claim (1), because it is not within the Panel's terms of reference. Nevertheless, in this section, the United States will respond to Argentina's substantive arguments concerning all three claims. As demonstrated below, Argentina's claims must fail because: (1) the alleged irrefutable presumption does not exist; (2) the instruments that allegedly give raise to this irrefutable presumption do not constitute challengeable measures for purposes of the DSU; and (3) even if the instruments were subject to challenge, two of them – the *Sunset Policy Bulletin* and Commerce practice – are not "mandatory" within the meaning of the mandatory/discretionary distinction.

1. Argentina's "Irrefutable Presumption" Does Not Exist

173. As noted above, all of Argentina's claims in Section VII.B of its First Submission hinge upon the existence of a Commerce "irrefutable presumption" in sunset reviews that a continuation or recurrence of dumping is likely. As the party asserting this fact, Argentina bears the burden of proving it. Argentina fails to satisfy this burden, because, in fact, the alleged irrefutable presumption does not exist.

174. Significantly, Argentina cannot point to any document that establishes its "irrefutable presumption." It does not allege that any U.S. statutory provision establishes the presumption, nor could it, because there is no such provision. Instead, it turns to three items: the SAA, the *Sunset Policy Bulletin*, and supposed Commerce "practice." Let us examine each of these items in turn.

175. With respect to the SAA, Argentina quotes the following passage as evidence of its alleged "irrefutable presumption":[183]

> [19 U.S.C. § 1675a(c)] establishes standards for determining the likelihood of continuation or recurrence of dumping. Under [§ 1675(c)(1)], Commerce will examine the relationship between dumping margins, or the absence of margins, and the volume of imports of the subject merchandise, comparing the periods before and after the issuance of an order or the acceptance of a suspension agreement. For

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[180] (...continued)
Antidumping Agreement." This appears to be an "as such" claim.

[181] In its First Submission, para. 137, Argentina asserts that: "Thus, because it is the Department's consistent practice to employ in its sunset reviews an irrefutable presumption of likely dumping, the United States is acting inconsistently with Article 11.3 of the Antidumping Agreement." This appears to be an "as applied" claim concerning Commerce's behavior in sunset reviews in general, not just the review on OCTG from Argentina.

[182] *See* Argentina First Submission, paras. 124 and 147.

[183] Argentina First Submission, para. 142, quoting from the SAA at 889-90 (underscoring added).

> example, declining import volumes accompanied by the continued existence of dumping margins after the issuance of an order may provide a strong indication that, absent an order, dumping would be likely to continue, because the evidence would indicate that the exporter needs to dump to sell at pre-order volumes.
> . . . .
>
> [E]xistence of dumping margins after the order, or the cessation of imports after the order, is highly probative of the likelihood of continuation or recurrence of dumping.

176. "Irrefutable" means "[u]nable to refute or disprove."[184] The phrases in the above-quoted passage like "For example," "provide a strong indication," and "highly probative" are not indicative of a presumption that cannot be refuted or disproved, assuming they give rise to a presumption at all. Thus, this passage from the SAA – the only passage on which Argentina relies – cannot be the source of its alleged "irrefutable presumption."

177. Another item cited by Argentina as a potential source for its "irrefutable presumption" is the *Sunset Policy Bulletin*, from which Argentina quotes the following:[185]

> [T]he Department normally will determine that revocation of an antidumping order or termination of a suspended dumping investigation is likely to lead to continuation or recurrence of dumping where—
>
> (a) dumping continued at any level above *de minimis* after the issuance of the order or the suspension agreement, as applicable;
>
> (b) imports of the subject merchandise ceased after issuance of the order or suspension agreement, as applicable; or
>
> (c) dumping was eliminated after the issuance of the order or the suspension agreement, as applicable, and import volumes for the subject merchandise declined significantly.

Argentina asserts that the three criteria identified in quoted passage are "the natural consequences of the imposition of an antidumping measure."[186] The implication is that because these consequences *always* will follow the imposition of an antidumping measure, Commerce's

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[184] *New Shorter Oxford English Dictionary* (1993), page 1419.

[185] Argentina First Submission, para. 145, quoting from the *Sunset Policy Bulletin* at 18,872 (underscoring added). Note that the term "suspension agreement" used in the quoted passage is the U.S. term for an "undertaking" within the meaning of Article 8 of the AD Agreement.

[186] *Id*., para. 146.

consideration of them gives rise to the "irrefutable presumption;" *i.e.*, because one or more of these consequences always will be present, there can be no refutation of the presumption of likelihood.

178. There are at least two problems with this argument. First, the quoted passage clearly states that Commerce "normally" will determine likelihood where the described facts are present. The use of "normally" is incompatible with the notion of an "*irrefutable* presumption."

179. Second, Argentina is wrong when it suggests that the criteria set forth in the quoted passage are the "natural" or only consequences of the imposition of an antidumping measure. To the contrary, these criteria are only indicia of the consequences of the imposition of an antidumping measure *with respect to firms that must dump* in order to maintain a presence in the U.S. market.[187] If firms have to dump to remain competitive in the U.S. market, one would not be surprised to see "dumping continued at [a] level above *de minimis* after the issuance of the order or the suspension agreement, as applicable." Likewise, if firms have to dump to remain competitive in the U.S. market, one might expect to find that "imports of the subject merchandise ceased after issuance of the order or suspension agreement, as applicable." Finally, if firms must dump to be successful in the U.S. market, one likely consequence is that "dumping was eliminated after the issuance of the order or the suspension agreement, as applicable, and import volumes for the subject merchandise declined significantly."

180. However, there is at least one other consequence of the imposition of an antidumping measure that is equally "natural" – to use Argentina's terminology – at least for firms that are capable of competing fairly. This consequence is that after the imposition of an antidumping measure, dumping is eliminated and import volumes for the subject merchandise remain steady or increase. If this scenario should take place – and the scenario does not seem on its face to be implausible – it would seem to be an indicator of no likelihood of a continuation or recurrence of dumping that Commerce ought to take into account.

181. In fact, that is precisely what Commerce in the *Sunset Policy Bulletin* explains it normally will do:[188]

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

Notwithstanding that this statement appears on the same page and in the same column of the *Federal Register* as the passage quoted by Argentina, Argentina avoids any reference to it, for

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[187] The United States says "indicia" because as demonstrated by the use of the word "normally," the criteria in the quoted passage are not dispositive.

[188] *Sunset Policy Bulletin* at 18,872 (ARG-35).

obvious reasons: it completely undermines Argentina's case and rather spoils Argentina's story. This passage demonstrates that the *Bulletin* does nothing more than describe what Commerce "normally" will do when presented with different factual scenarios. Sometimes Commerce "normally" will determine likelihood, and at other times it "normally" will not.

182. This is hardly evidence of an "irrefutable presumption" of likelihood. Moreover, Argentina offers no evidence – let alone demonstrates – that it is impossible in all cases for firms subject to an antidumping measure to maintain or increase their presence in the U.S. market without dumping. Put differently, Argentina offers no evidence that the only way for a firm to maintain its presence in the U.S. market is to dump.

183. The final piece of "evidence" offered by Argentina is its exhibit ARG-63, which purports to exhaustively analyze Commerce's practice in sunset reviews and demonstrate the existence of the "irrefutable presumption." In fact, Exhibit ARG-63 does nothing of the sort.

184. What Exhibit ARG-63 actually shows is that the overwhelming majority of Commerce sunset reviews are uncontested by one side or the other. Of the 291 sunset reviews discussed in Exhibit ARG-63, 74 were reviews in which no domestic industry party participated and in which Commerce revoked the antidumping order in question.[189] In addition, if one looks closely at Exhibit ARG-63, one finds that there were 178 cases in which respondent interested parties chose not to participate either by not responding to Commerce's notice of initiation, submitting an affirmative waiver in response to the notice of initiation, or a combination of the two.[190] Thus, of the 291 sunset reviews discussed in Exhibit ARG-63, *87 percent* of those reviews were uncontested. Even if one limits oneself to the 217 reviews in which at least one domestic interested party expressed an interest, *82 percent* of those reviews were uncontested by respondent interested parties.

185. By the U.S. count, this leaves 35 cases (only *13 percent*) where the parties may have contested the existence of likelihood to some extent. In these cases, Commerce found likelihood, but that fact does not establish the existence of an "irrefutable presumption." Argentina appears to assert that the fact that "no respondent was able to overcome the irrefutable presumption that dumping would likely continue or recur established by the SAA and the Sunset Policy Bulletin criteria" proves that these documents do, in fact, establish such a presumption.[191] This is nothing more than circular reasoning, because it assumes the existence in these documents of an

[189] Argentina's self-serving and unsubstantiated assertion in footnote 131 of its First Submission that these sunset reviews are not really "reviews" is just that: self-serving and unsubstantiated.

[190] The cases break down as follows: (1) in 160 cases, no respondent interested party submitted a response to Commerce's notice of initiation; (2) in 5 cases, respondent interested parties submitted an affirmative waiver of participation; and (3) in 13 cases, there was a combination of no responses and affirmative waivers from the respondent interested parties.

[191] Argentina First Submission, para. 129, fifth bullet.

"irrefutable presumption." As demonstrated above, however, these documents do not establish an "irrefutable presumption."

186. It may well be that in these 35 cases, the evidence presented a scenario that satisfied one or more of the criteria that the *Sunset Policy Bulletin* identifies as indicia of likelihood. If so, the respondent interested parties may have been unable to demonstrate that the facts of their case called for a departure from the "normal" conclusion. It could be the case that one or more, or maybe all, of these parties may have been in the situation where they were not capable of competing in the U.S. market without dumping. We simply do not know.

187. However, there is one case, the record of which is before the Panel, and which speaks volumes about the emptiness of Argentina's "analysis." That case is the Commerce sunset review of OCTG from Argentina and Siderca's response to the Commerce notice of initiation, which Argentina includes as Exhibit ARG-57 to its First Submission.

188. Notwithstanding the fact that Siderca had other opportunities to submit information and argument, and notwithstanding Argentina's claims of rampant inconsistencies with Article 6, Exhibit ARG-57 represents the sum total of what Siderca had to say about the issue of likelihood of dumping. This limited statement is revealing in many ways.

189. In Exhibit ARG-57, Siderca did not assert that it would not export subject merchandise to the United States if the order were revoked. It did not even assert that it would not dump subject merchandise in the United States if the order were revoked. Instead, all that it said was that: "Revocation of the order would not result in antidumping margins above *de minimis*."[192]

190. If Exhibit ARG-57 is an example of the quality of the factual and legal submissions of respondent interested parties in Commerce sunset reviews, then it is small wonder that the percentage of affirmative likelihood determinations is high in those few cases where likelihood is contested. Assuming *arguendo* that a presumption even exists, Exhibit ARG-57 does not establish that the presumption is irrefutable. Instead, it establishes that in at least one case, no serious attempt was made to refute it.

191. The remainder of Argentina's argument concerning the existence of its "irrefutable presumption" is nothing more than a repetition of its arguments in Section VII.A of its First Submission concerning Commerce's alleged failure to conduct a "review" and "determine" something.[193] This has nothing to do with whether an "irrefutable presumption" exists.

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[192] Exhibit ARG-57, page 2. Siderca then goes on to refer to the *de minimis* standard for investigations in Article 5.8 of the AD Agreement, a standard which does not even apply to sunset reviews under Article 11.3.

[193] *See, e.g.,* Argentina First Submission, para. 131, in which Argentina complains about Commerce's failure to use "fresh information gathered during the course of the sunset review (*i.e.*, a prospective analysis), as required by Article 11.3 of the Antidumping Agreement."

192. In summary, Argentina fails to meet its burden of proof; *i.e.*, it fails to establish the existence of its alleged "irrefutable presumption." As a result, all of its claims in Section VII.B must fail.

2. Assuming *Arguendo* that a Commerce "Irrefutable Presumption" Actually Exists, the *Sunset Policy Bulletin* and Commerce "Practice", As Such, Cannot Be Found to Be Inconsistent with Article 11.3 of the AD Agreement

193. Even if one assumed *arguendo* that a Commerce "irrefutable presumption" actually exists, the *Sunset Policy Bulletin* and Commerce's practice, as such, cannot be found to be inconsistent with Article 11.3 of the AD Agreement. Neither the *Bulletin* nor Commerce practice constitutes a "measure," and even if they were considered measures, neither mandates WTO-inconsistent action nor precludes WTO-consistent action.

194. For something to be a measure for purposes of the WTO, it must "constitute an instrument with a functional life of its own" – *i.e.*, it must "*do* something concrete, independently of any other instruments."[194] Neither the *Bulletin* nor Commerce practice constitutes a legal instrument with a functional life of its own under U.S. law. Whatever authority Commerce has to act comes from the statute and its regulations. Neither the *Bulletin* nor Commerce practice authorizes Commerce to do anything.

195. With respect to the *Bulletin*, it has no independent legal status, but rather is comparable to agency precedent. The purpose of the *Bulletin* is to provide guidance with respect to sunset reviews and Commerce's conduct of them, both in terms of the procedural and substantive issues that may arise. However, Commerce is not bound by the *Bulletin* as it would be by the statute or its regulations. Like agency precedent, Commerce may depart from the *Bulletin* in any particular case, so long as it explains its reasons for doing so.

196. Therefore, it is not surprising that the panel in *US - Japan Sunset* found that the *Bulletin* did not constitute a measure. According to that panel:[195]

> The Bulletin provides guidance on certain methodological issues regarding the applicable statutory and regulator provisions. In our view . . . the Bulletin, in and of itself, does not mandate any obligatory behaviour. On its face, the Bulletin clearly states that sunset reviews are to be carried out in accordance with the provisions of the Statute and the Regulations. Japan has pointed to no other provision in the US legislation that would suggest that the Bulletin can in fact operate independently

[194] *Export Restraints*, para. 8.85 (italics in original).
[195] *US - Japan Sunset*, paras. 7.125-7.126.

> from other legal instruments under US law in such a way as to mandate a particular course of action.
>
> We therefore find that the Sunset Policy Bulletin, in and of itself, is not a legal instrument that operates so as to mandate a course of action. It follows that the Bulletin can not constitute a measure that can be challenged in WTO dispute settlement proceedings.

197. Argentina has not provided any evidence to support the notion that the *Bulletin* constitutes a measure with an independent functional life of its own. The only piece of information Argentina has provided is a quote from a U.S. court decision which states that "[t]he Sunset Policy Bulletin parallels the language of the SAA."[196] However, this statement merely indicates that the *Bulletin*'s language parallels that of the SAA. It says nothing about the legal status of the *Bulletin*.

198. The same principles apply with respect to Commerce practice. It is well-established that Commerce is not bound by its own administrative practice, but instead may depart from it as long as it explains its reasons for doing so.[197] Therefore, it is not surprising that prior panels have found that Commerce's administrative practice does not constitute a measure for purposes of the WTO. As explained by the panel in the *India Steel Plate* case:[198]

> The practice India has challenged is not, on its face, within the scope of the measures that may be challenged under Article 18.4 of the AD Agreement. In particular, we do not agree with the notion that the practice is an "administrative procedure" in the sense of Article 18.4 of the Agreement. It is not a pre-established rule for the conduct of anti-dumping investigations. Rather, ... a practice is a repeated pattern of similar responses to a set of circumstances – that is, it is the past decisions of the USDOC . . . . India argues that at some point, repetition turns the practice into a "procedure", and hence into a measure. We do not agree. That a particular response to a particular set of circumstances has been repeated, and may be predicted to be repeated in the future, does not, in our view transform it into a measure. Such a conclusion would leave the question of what is a measure vague and subject to dispute itself, which we consider an unacceptable outcome. Moreover, we do not consider that merely by repetition, a Member becomes obligated to follow its practice. If a Member were obligated to abide by its practice,

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[196] Argentina First Submission, para. 144, quoting from *AG Dillinger Huettenwerke v. United States*, 193 F. Supp. 2d 1339 (CIT 2002) (Exhibit ARG-15a).

[197] *See, e.g.*, *Rhodia, Inc. v. United States*, 240 F. Supp. 2d 1247, 1253 (CIT 2002), in which Commerce's reviewing court, the U.S. Court of International Trade, stated as follows: "As long as Commerce properly explains its reasons, and its practice is reasonable and permitted by the statute, Commerce's practice can and should continue to change and evolve."

[198] *United States - Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R, Report of the Panel adopted 29 July 2002, para. 7.22 (citation omitted) [hereinafter "*US - India Plate*"].

> it might be possible to deem that practice a measure. The United States, however, has asserted that under its governing laws, the USDOC may change a practice provided it explains its decision.

The panel in the *US - Japan Sunset* case also found that "practice as such can not be challenged before a WTO panel."[199]

199. Even if the *Bulletin* and Commerce's practice could be regarded as measures, they nonetheless could not be considered WTO-inconsistent because neither "measure" is "mandatory;" *i.e.*, neither requires WTO-inconsistent action or precludes WTO-consistent action.[200] The Appellate Body and several panels have explained the distinction between mandatory and discretionary measures. A Member may challenge, and a WTO panel may find against, a measure "as such" only if the measure "mandates" action that is inconsistent with WTO obligations, or "precludes" action that is WTO-consistent.[201] In accordance with the normal WTO rules on the allocation of the burden of proof, it is up to the complaining party to demonstrate that any challenged measure mandates WTO-inconsistent action or precludes WTO-consistent action.[202]

200. Argentina has not provided any evidence whatsoever that Commerce is bound by either the *Bulletin* or its administrative practice. This is not surprising, because, as demonstrated above, as a matter of U.S. law, Commerce is not so bound. However, if Commerce is not bound by these instruments, they cannot be said to mandate any action by Commerce, let alone WTO-inconsistent action.

201. While Argentina does not provide any evidence about the status of the *Bulletin* or Commerce administrative practice under U.S. law, it does cite *US - Countervailing Measures* for the proposition that practice can be subject to WTO challenge.[203] However, Argentina's reliance on *US - Countervailing Measures* is misplaced.

202. In *US - Countervailing Measures*, the panel's characterization of its findings relating to Commerce's "method" was not appealed, and the Appellate Body did no more than accept the panel's characterization. Moreover, at the panel stage, this issue was also not disputed; the EC was challenging two Commerce privatization methodologies applied in twelve specific countervailing

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[199] *US - Japan Sunset*, para. 7.131.

[200] *Export Restraints*, paras. 8.126-8.132.

[201] *United States - Anti-Dumping Act of 1916* ("*1916 Act*"), WT/DS136/AB/R, WT/DS162/AB/R, Report of the Appellate Body adopted 26 September 2000, paras. 88-89; *United States - Section 211 Omnibus Appropriations Act of 1998,* WT/DS176/AB/R, Report of the Appellate Body adopted 2 February 2002, para. 259; *see also Export Restraints*, paras. 8.77-8.79; *US - Section 129*, para. 6.22.

[202] *Brazil – Export Financing Programme for Aircraft – Second Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW//2, Report of the Panel, adopted 23 August 2001, paras. 5.49-5.50.

[203] Argentina First Submission, para. 139, citing *United States - Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, Report of the Appellate Body adopted 8 January 2003 [hereinafter "*US - Countervailing Measures*"].

duty investigations, and the United States focused its argumentation on the substantive issues. That the panel referred to these methodologies in this manner, and the Appellate Body thereafter, thus provides no guidance as to how either a panel or the Appellate Body would answer the question of whether non-binding administrative precedent, or practice, can be independently challenged as a measure, and whether, if it could be so challenged, it mandates a breach of a particular obligation. To the contrary, when panels have been faced with this question, they have uniformly concluded that U.S. administrative practice cannot, as such, be challenged as a measure.[204]

203. And, as mentioned before, even if administrative practice could be challenged as a measure, the Appellate Body has consistently applied the mandatory/discretionary distinction to find that measures that do not mandate a breach of an obligation do not breach that obligation. Thus, the findings in *US-Countervailing Measures*, as discussed above, do not support Argentina's assertion that either the *Bulletin* or Commerce practice can be challenged "as such."[205]

3. Assuming *Arguendo* that a Commerce "Irrefutable Presumption" Actually Exists, the *Sunset Policy Bulletin* and Commerce "Practice," As Applied Generally, Cannot Be Found to Be Inconsistent with Article 11.3 of the AD Agreement

204. In paragraph 137 of its First Submission, Argentina alleges that "because it is the Department's consistent practice to employ in its sunset reviews an irrefutable presumption of likely dumping, the United States is acting inconsistently with Article 11.3 of the Antidumping Agreement." This appears to be a claim that Commerce practice, as applied generally, is inconsistent with Article 11.3.

205. The United States is not certain what Argentina means by this claim of "practice, as applied generally." However, it appears to be nothing more than an attempt to get around the extensive body of panel reports finding that "practice as such can not be challenged before a WTO panel."[206]

206. Argentina bears the burden of proof with respect to this claim. In the view of the United States, Argentina has not satisfied its burden to present a *prima facie* case in that it has not explained how a general practice can suddenly become subject to challenge if the label "as applied"

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[204] *E.g., US - India Plate*, paras. 7.22-7.24; *Export Restraints*, paras. 8.126, 8.129-8.130.

[205] With respect to the SAA, it is simply legislative history, albeit legislative history of an authoritative nature. Under the U.S. legal system, legislative history may be used to interpret a statute, but cannot change the meaning of , or override, the statute to which it relates. As found by the panel in *U.S. Export Restraints*, para. 8.99, the SAA does not have "an operational life or status independent of the statute such that it could, on its own, give rise to a violation of WTO rules. Independent of the statute, the SAA does not *do* anything; rather it interprets (i.e., informs the meaning of) the statute." (Italics in original). Thus, the SAA, in principle, could be taken into account for purposes of determining whether the U.S. *statute* imposes the "irrefutable presumption" alleged by Argentina. However, as demonstrated above, the SAA, in fact, does not contain an "irrefutable presumption," nor does it require the statute to be interpreted so as to impose one.

[206] *US - Japan Sunset*, para. 7.130.

is substituted for the label "as such." In addition, Argentina also has failed to demonstrate that the "irrefutable presumption" on which this claim is based exists.

4. Commerce's Sunset Determination in OCTG from Argentina Was Not Inconsistent with Article 11.3 Because of an "Irrefutable Presumption"

207. Although most of Section VII.B of Argentina's First Submission seems to be devoted to an "as such" claim regarding Commerce sunset review practice, the heading to Section VII.B and the very last paragraph – paragraph 147 – do refer to the Commerce sunset determination in OCTG from Argentina.[207] According to Argentina, this determination "was inconsistent with Article 11.3 of the Antidumping Agreement because it was based on an irrefutable presumption under U.S. law ... ."[208]

208. This claim must be rejected because, as demonstrated above, Argentina has failed to prove that there is an "irrefutable presumption" under U.S. law. In addition, Argentina has failed to demonstrate that an "irrefutable presumption" was applied in the OCTG case. To the contrary, the United States has already demonstrated that the one Argentine company that responded to Commerce's notice of initiation – Siderca – did not make any attempt to show that it would not dump if the order were revoked. Instead, it merely asserted that any dumping margins would be *de minimis* based on the standard applicable to initial antidumping investigations. Thus, assuming *arguendo* that any sort of presumption exists at all, what Siderca's response shows is not that the presumption is "irrefutable," but rather that it was "unrefuted" in the OCTG case.

C. Commerce's Sunset Determination in OCTG From Argentina Is Not Inconsistent with Articles 11, 2, 6, or 12 of the AD Agreement

209. In Section VII.C of its First Submission, Argentina essentially recycles many of its "as such" arguments regarding these procedures, this time in the context of the Commerce sunset determination in OCTG from Argentina. As demonstrated above, however, Commerce's expedited sunset review procedures are not inconsistent, as such, with U.S. obligations under the AD Agreement. If these procedures are not WTO-inconsistent "as such," they do not automatically become WTO-inconsistent when they are applied. Instead, Argentina must prove that the manner in which these procedures were applied resulted in an inconsistency with one of the AD Agreement provisions that it cites. Argentina fails to make such a showing.

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[207] As noted in Section IV, above, Argentina's panel request claimed an inconsistency with Article 11.3 based on the use of an irrefutable presumption *only* in connection with the sunset review of OCTG from Argentina.

[208] Argentina First Submission, para. 147.

1. Commerce's Determination to "Expedite" the Sunset Review of OCTG from Argentina Is Not Inconsistent With the AD Agreement

210. Argentina's first claim with respect to Commerce's application of U.S. expedited sunset laws, regulations, and procedures is that "Siderca was deemed to have waived its right to participate in the sunset review, despite its full cooperation with" Commerce and in violation of Articles 11 and 6 of the AD Agreement.[209]

211. The facts, however, do not support Argentina's claim. Most importantly, Siderca was not deemed to have waived its right to participate in the sunset review. Rather, in keeping with section 351.218(d)(3) of Commerce's *Sunset Regulations*, Commerce found that Siderca submitted a complete substantive response to the notice of initiation.[210] Commerce also found, however, that no other respondent interested party submitted a complete substantive response and that the "combined-average percentage of Siderca's exports of OCTG to the United States with respect to the total exports of the subject merchandise to the United States was significantly below 50 percent."[211] Thus, in accordance with section 351.218(e)(1)(ii)(A) of Commerce's *Sunset Regulations*, Commerce determined to expedite the sunset review of the antidumping duty order on OCTG from Argentina.[212]

212. Additional evidence that Commerce did not deem Siderca to have waived participation in the sunset review is Commerce's own regulatory waiver provision. Section 351.218(d)(2) of Commerce's *Sunset Regulations* ("Waiver of response by a respondent interested party to a notice of initiation") reads:

> (i) *Filing a statement of waiver.* A respondent interested party may waive participation in a sunset review before the Department [of Commerce] under section 751(c)(4) of the Act by filing a statement of waiver ... .
>
> (ii) *Contents of statement of waiver.* Every statement of waiver must include a statement indicating that the respondent interested party waives participation in the sunset review ... .
>
> (iii) *No response from a respondent interested party.* The Secretary [of Commerce] will consider the failure by a respondent interested party to file a complete substantive response to a notice of initiation under paragraph (d)(3) of this section as

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[209] Argentina First Submission, paras. 148-155.

[210] Adequacy Memorandum, at 1-2 (Exhibit ARG-50).

[211] *Id.* In fact, by its own admission, Siderca had zero exports of subject merchandise to the United States in the five years preceding the initiation of the sunset review of OCTG from Argentina. *See* Exhibit ARG-57.

[212] *Id.*

> a waiver of participation in a sunset review before the Department [of Commerce].[213]

213. As these provisions make clear, there are two methods for a respondent interested party to waive its right to participate in a sunset review: (1) submit a statement affirmatively waiving participation; or (2) fail to submit a substantive response to Commerce's notice of initiation and allow Commerce to deem its non-response as a waiver of its right to participation. Importantly, with respect to the latter, Commerce's waiver regulation provides that when a respondent interested party fails to submit a substantive response, that failure will be deemed a waiver of *that* respondent interested party's participation in the sunset review.[214] As a general matter, Commerce is bound to follow its own regulations.[215] Consequently, Commerce would not have had the authority under its regulations to "deem" Siderca to have waived its right to participate in the sunset review of OCTG from Argentina because Siderca did not fail to file an adequate response but, rather, filed a complete substantive response.[216]

214. Argentina also claims that Commerce's expedited sunset review resulted in the application of facts available despite Siderca's "full cooperation with [Commerce]." Argentina again misstates the facts. In the sunset review of OCTG from Argentina, Commerce received only one complete substantive response from a respondent interested party – Siderca's. Thus, as to the non-responding respondent interested parties, Commerce was left in a position – consistent with Article 6.8 of the AD Agreement – to apply facts available. Pursuant to the *Sunset Regulations*, Commerce used for the final sunset determination as the facts available all the information on the record of the sunset review up to that time: (1) the findings of dumping from the original investigation; and (2) the information contained in the substantive responses of the interested parties, Siderca and the

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[213] 19 C.F.R. § 351.218(d)(2)(iii) (emphasis added) (Exhibit ARG-3).

[214] *See* 63 Fed. Reg. at 13518 (Exhibit US-3); *see also* SAA, at 881, discussing waiver provision in the statute at section 751(c)(3) (Exhibit US-11).

[215] *See Oy v. United States*, 61 F.3d 866, 871 (Fed. Cir. 1995) ("As a general rule, an agency is required to comply with its own regulations."); *Paralyzed Veterans v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998) ("It is axiomatic that an agency must act in accordance with applicable statutes and its regulations."). The Federal Circuit ("Fed. Cir") is the Court of Appeals for challenges to Commerce and ITC determinations in antidumping and countervailing duty cases.

[216] Commerce's Issues and Decision Memo states "[i]n the instant reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation." *See Sunset Decision Memorandum* at 5 (Exhibit ARG-51). Although based on this language it may appear that Commerce deemed all respondent interested parties to have waived their participation in the OCTG sunset review, in fact, Commerce was only referring to those respondent interested parties from which it received *no* substantive responses. Throughout its Issues and Decision Memo, Commerce summarized and responded to arguments and evidence presented by Siderca in its substantive response, indicating that it did not, in fact, treat Siderca as having waived its participation in the review. *See id.; see also* 19 C.F.R. § 351.218(d)(2)(i) (stating that if a respondent interested party waives its right to participate, Commerce "will not accept or consider any unsolicited submissions from that party during the course of the review"). (Exhibit ARG-3).

domestic interested parties.[217] Therefore, although Commerce used the facts available to make the final sunset determination of likelihood, Commerce did not apply facts available to the issue of whether there was a likelihood that dumping would continue or recur if the order were revoked with respect to Siderca specifically, because the sunset determination is made on an order-wide basis, not a company-specific basis.[218]

2. Commerce Conducted a Sunset Review for the Antidumping Order of OCTG from Argentina and Fully Considered All Record Information in Making the Final Sunset Determination

215. Argentina argues that because Commerce conducted an expedited sunset review, it "did not in fact conduct a 'review' within the meaning of Article 11.3" of the antidumping duty order on OCTG from Argentina.[219] As explained above, U.S. laws and regulations providing for the conduct of expedited sunset reviews do not violate any of the provisions of the AD Agreement. As such, their mere application in the instant review is not proof of an inconsistency with any provision of the AD Agreement. Commerce did conduct a "review" of the order on OCTG from Argentina within the meaning of Article 11.3 of the AD Agreement.

216. In the sunset review of OCTG from Argentina, Commerce received complete substantive responses from several domestic interested parties and from Siderca, the sole respondent interested party to submit a substantive response.[220] No Argentine producer or exporter of OCTG, other than Siderca, submitted information or participated in any fashion in the sunset review, nor did any respondent interested party supply information for submission in Siderca's substantive response.[221] Based on these facts, Commerce determined that the non-responding respondent interested parties had waived their rights to participate and, thus, Commerce expedited the sunset review.[222]

217. In an expedited sunset review, section 351.308(f) of the *Sunset Regulations* provides for the use of facts available for the final sunset determination. As "facts available," section 315.308(f) also provides that Commerce normally will examine the findings of dumping from the original investigation and any subsequent administrative reviews, and the information supplied by the interested parties in their substantive responses. Commerce made its final likelihood determination using this information.

218. Commerce considered both the fact that dumping was found in the original investigation and the information supplied by the interested parties, including the information supplied by

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[217] 19 C.F.R. § 351.308(f) (Exhibit US-3).

[218] In this regard, in *US - Japan Sunset*, para. 8.1(e)(ii), the panel found that the analysis of likely dumping on an "order-wide" basis was not inconsistent with Article 11.3.

[219] Argentina First Submission, paras. 158-159.

[220] *Final Sunset Determination*, 65 Fed. Reg. at 66701 (Exhibit ARG-46).

[221] *See generally*, Siderca's Substantive Response (Exhibit ARG- 57).

[222] *See* Adequacy Memorandum, at 2 (Exhibit ARG-50).

Siderca in its substantive response. Commerce determined that dumping continued to exist throughout the history of the order, that U.S. imports of OCTG from Argentina had decreased significantly after imposition of the order, and that imports had remained at this depressed level since the imposition of the antidumping order.[223] Commerce also addressed the only comment made by Siderca in its substantive submission, which concerned the *de minimis* standard to be applied in a sunset review.[224] Consequently, Commerce determined that dumping was likely to continue or recur if the order were to expire based on the information submitted by the interested parties in the sunset review and the results in the prior proceeding.[225]

219. Similarly, as explained above, Argentina has failed to establish that Commerce's conduct of an expedited sunset review "precluded" Commerce from being able to "determine" whether dumping was likely to continue or recur. To the extent Argentina is suggesting that section 351.308(f) limits Commerce's ability to make the likelihood determination, section 351.308(f) merely provides that Commerce *normally* will use the facts available criteria in making the likelihood determination, but nothing in the *Sunset Regulations* or elsewhere in U.S. law precludes Commerce from considering other information, even where facts available are used.[226] Indeed, for example, Commerce used import statistics generated by Commerce's Census Bureau to verify the import levels of OCTG from Argentina for the five-year period preceding the sunset review.[227] There was no other information in this case, nor did any interested party supply additional information for Commerce to consider in making the likelihood determination. Therefore, the mere fact that Commerce conducted an expedited sunset review of OCTG from Argentina does not result in a violation of Article 11.3 of the AD Agreement.

3. Commerce Complied with the Evidentiary and Procedural Requirements of Article 11.3 and Article 6 in the OCTG Sunset Review

220. Article 11.4 of the AD Agreement establishes that for sunset reviews, the "provisions of Article 6 regarding evidence and procedure shall apply ... ." Relying on this cross-reference, Argentina claims that Commerce's determination to expedite was inconsistent with Articles 6.1,

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[223] Section 351.308(f) also provides that Commerce normally will consider dumping found in any administrative reviews as "facts available" when making the likelihood determination in a sunset review. Exhibit US-3. In the case of OCTG from Argentina, there were no administrative reviews of the order for the five-year period preceding the sunset review. *See Decision Memorandum*, at 5 (Exhibit ARG-51).

[224] *Decision Memorandum*, at 5 (Exhibit ARG-51). In its substantive submission, Siderca, citing to Article 5.8 of the AD Agreement, suggested that the *de minimis* standard of two percent applicable to investigations should be applied in sunset reviews. Exhibit ARG-57, at 2. In the *Final Sunset Determination*, Commerce explained that the *de minimis* standard for sunset reviews is 0.5 percent and that the record evidence demonstrated that the likely margin was 1.36 percent, above *de minimis* for a sunset review. *Decision Memorandum*, at 5 (Exhibit ARG-51).

[225] *Decision Memorandum*, at 5 (Exhibit ARG-51).

[226] Section 351.308(f) (Exhibit US-3).

[227] *Decision Memorandum*, at 4-5 (Exhibit ARG-51). In making the determination to expedite the sunset review, Commerce used the USITC's Trade Database. *Adequacy Memorandum*, at 2 (Exhibit ARG-50).

6.2, and 6.8, and Annex II of the AD Agreement.[228] None of these articles, however, includes provisions that make Commerce's determination to expedite inconsistent with U.S. WTO obligations. In fact, Commerce fully complied with its Article 11.4 obligation in its determination to expedite.

221. Specifically, Commerce provided Siderca with the notice and opportunity to present evidence, argument, and rebuttal required by Articles 6.1 and 6.2. In addition, Commerce did not apply "facts available" with respect to Siderca's participation when it expedited the sunset review. Consequently, insofar as its treatment of Siderca in the sunset review proceeding is concerned, Commerce did not act inconsistently with Article 6.8 or Annex II.

a. Commerce Afforded Siderca the Notice and Opportunity Required by Article 6.1

222. Article 6.1 requires that interested parties "shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question." Article 6.1 thus establishes a general rule regarding the notice and opportunity to participate that interested parties should enjoy. Through Commerce's notice of initiation of the sunset review and Commerce's *Sunset Regulations*, Siderca was on notice regarding what information was required and what information Commerce considered relevant to its determination to conduct an expedited review. Moreover, Siderca had opportunities to present relevant evidence on this issue, and any other relevant issue, and Siderca availed itself of at least one of these opportunities. Accordingly, Commerce complied with Article 6.1 of the AD Agreement.

223. On July 3, 2000, Commerce initiated the sunset review and published a notice of initiation in the *Federal Register*.[229] The notice of initiation identified the relevant statutory and regulatory provisions at issue, as well as the *Sunset Policy Bulletin*. Moreover, the notice of initiation specified the information initially required from interested parties in their notices of intent to participate, as described at section 351.218(d) of Commerce's *Sunset Regulations*. The notice of intent to participate provision requires, *inter alia*, that respondent interested parties, provide "[f]or each of the five calendar years (or fiscal years, if more appropriate) preceding the year of publication of the notice of initiation, on a volume basis (or value basis, if more appropriate), that party's percentage of the total exports of subject merchandise . . . to the United States."[230]

224. The *Sunset Regulations* make clear that the respondent interested parties' percentage of total exports is an important factor in determining whether Commerce conducts a full or expedited sunset review. In particular, the regulations state that Commerce "normally will conclude that

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[228] Argentina First Submission, paras. 166-171.
[229] 65 Fed. Reg. 41053 (Exhibit ARG-44).
[230] 19 C.F.R. § 351.218(d)(2)(iii)(D) (Exhibit ARG-3).

respondent interested parties have provided adequate response to a notice of initiation where it receives complete substantive responses . . . from respondent interested parties accounting on average for more than 50 percent, on a volume basis (or value basis, if appropriate), of the total exports of subject merchandise to the United States over the five calendar years preceding the year of publication of the notice of initiation."[231]

225. On notice and apprised of the information that Commerce required for the sunset review, Siderca took the opportunity to present in writing the evidence and argument that Siderca (presumably) considered relevant regarding the sunset review, including information on its percentage of total exports. On August 2, 2000, Siderca filed a complete and timely substantive response to the notice of initiation.[232] In that response, Siderca asserted that it was the only Argentine producer of oil country tubular goods, and noted that since it did not export subject merchandise to the United States over the preceding five years, it had *no* share of the total exports to the United States.[233]

226. Siderca's statement that it had a zero share of total U.S. exports was supported by relevant trade data.[234] However, record evidence indicated that there were imports of OCTG from Argentina during the five-year period preceding the sunset review. According to the ITC Trade Database, there were imports of the subject merchandise from Argentina in four of the five years preceding the publication of the notice of initiation.[235] Based on this data and the other evidence before it, Commerce determined that Siderca's percentage of total exports to the United States was significantly below 50 percent[236] and that it was appropriate to conduct an expedited sunset review.[237]

227. In addition to explaining its share of total exports to the United States, the substantive response Siderca submitted in the sunset review proceeding addressed only two substantive issues: the likelihood determination generally and the *de minimis* standard it believed should be applied in

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[231] 19 C.F.R. § 351.218(e)(1)(ii)(A) (Exhibit ARG-3).

[232] *See* Siderca Substantive Response (Exhibit ARG-57).

[233] Siderca Substantive Response, at 3-4 (Exhibit ARG-57).

[234] *See Adequacy Memorandum*, at 2 (Exhibit ARG-50).

[235] *See Adequacy Memorandum*, at 2 (Exhibit ARG-50); and U.S. Steel Group, Substantive Response, at 12 (August 2, 2000); North Star Steel Ohio, Substantive Response, at 3, Attachment 1 (August 2, 2000) (Exhibit US-23).

[236] It should be noted that Commerce's examination of the respondent interested parties' percentage of total exports is consistent with the order-wide basis upon which Commerce conducts sunset reviews. Namely, Commerce makes a likelihood determination with respect to all producers/exporters of a particular product from a particular country, not just those that file substantive responses to the notice of initiation. *US – Japan Sunset*, paras. 7.207-208, rejected a claim that Commerce's order-wide approach was inconsistent with the AD Agreement.

[237] *See Adequacy Memorandum*, at 2 (Exhibit ARG-50).

a sunset review.[238] Commerce considered Siderca's comments on these issues and took those comments into account when it issued the final sunset determination on OCTG from Argentina.[239]

228. Although Siderca chose not to make any other submissions during the course of the sunset review beyond its August 2, 2000 substantive response, it is undisputed that Siderca had opportunities to do so. During an expedited sunset review, there are several opportunities for participating parties to make written submissions. In addition to the substantive response to the notice of initiation, participating parties may also file comments on Commerce's initial determination of the adequacy of the response[240] and may submit a rebuttal to any other party's substantive response to the notice of initiation.[241]

229. The fact that Siderca did not take advantage of these other opportunities, as well as Commerce's consideration of Siderca's substantive response in the sunset review, belie any notion that Siderca was prejudiced by the determination to expedite the sunset proceeding. In short, Siderca had notice of the information Commerce considered relevant to the determination to expedite, and Siderca had the opportunity on several occasions to present to Commerce whatever other information and argument Siderca considered relevant. The text of Article 6.1 requires nothing more.

b. Siderca Was Afforded An Opportunity For A Full Defense of Its Interests in Accordance With Article 6.2

230. Article 6.2 of the AD Agreement provides for the rights of interested parties to "a full opportunity for the defense of their interests," and states in relevant part:

> Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interest, so that opposing views may be present and rebuttal arguments offered.

231. Argentina claims that Siderca was denied the opportunity to fully defend its interests in accordance with Article 6.2, because Commerce allegedly applied the waiver provisions to Siderca and deemed Siderca to have waived its rights to participate in the sunset review.[242] Again, as demonstrated above in connection with Argentina's "as such" claim, there is simply nothing in U.S. law, regulation, or procedure governing sunset reviews that precludes or impedes this opportunity. To the contrary, interested parties are given ample opportunity to submit written information and

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[238] Siderca Substantive Submission, at 2-3 (Exhibit ARG-57).
[239] *See Decision Memorandum*, at 5 (Exhibit ARG-51).
[240] 19 C.F.R. § 351.309(e) (Exhibit US-3).
[241] 19 C.F.R. § 351.218(d)(4) (Exhibit ARG-3).
[242] Argentina First Submission, para. 168-170.

argument, rebut information and argument submitted by other parties, and to comment on the appropriateness of conducting an expedited review.

232. Argentina makes no showing that in the OCTG sunset review, Commerce failed to act in accordance with U.S. law and regulation. Instead, the record is clear that in the OCTG sunset review, Siderca chose to limit its participation to a 4-page, double-spaced presentation.[243]

233. Section 351.218(e)(1)(ii)(C) and section 351.308(f) of Commerce's *Sunset Regulations* provide for the use of facts available only in situations where interested parties fail to provide information requested for Commerce's sunset review determination. Specifically, these provisions permit expedited sunset reviews on the basis of facts available only in situations where interested parties' response to Commerce's notice of initiation is inadequate.[244] An inadequate response is one that lacks required information or is simply not submitted.[245] Thus, only in situations where interested parties fail to provide necessary information, do these provisions permit an expedited review determination on the basis of facts available.

234. Argentina attempts to confuse the issue by referring to Commerce's adequacy test (the so-called "50% threshold" test) provided in section 351.218(e)(1)(ii)(A) of Commerce's *Sunset Regulations*.[246] Section 351.218(e)(1)(ii)(A) provides that an adequate response from respondent interested parties exists if Commerce receives substantive responses from "respondent interested parties accounting on average for more than 50 percent, on a volume basis (or value basis, if appropriate), of the total exports of subject merchandise to the United States over the five calendar years preceding the year of publication of the notice of initiation."[247] Argentina argues that section 351.218(e)(1)(ii)(A) has the effect of requiring an expedited sunset review and, in turn, the use of facts available in this case where Siderca did *not* fail to submit necessary information in violation of Article 6.8.[248]

235. Argentina misinterprets section 351.218(e)(1)(ii)(A) of Commerce's *Sunset Regulations*. The section is not a provision requiring the use of facts available. Rather, it serves a ministerial function of allowing Commerce to decide when the conduct of an expedited review is appropriate when the number of respondent interested parties who provide a substantive response to the notice

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[243] *See* Exhibit ARG-57.

[244] 19 U.S.C. § 1675(c)(3)(B) (Exhibit ARG-1).

[245] 19 C.F.R. § 351.218(e)(1)(ii) ("[T]he Secretary normally will conclude that respondent interested parties have provided adequate response to a notice of initiation where it receives complete substantive responses ... .") (Exhibit ARG-3); *see also* 19 C.F.R. § 351.218(e)(i)(I)("[T]he Secretary normally will conclude that domestic interested parties have provided adequate response . . . where it receives a complete substantive response ... .") (Exhibit ARG-3).

[246] Argentina First Submission, para.170.

[247] 19 C.F.R. § 351.218(e)(2)(ii) (Exhibit ARG-3).

[248] Argentina First Submission, para. 170.

of initiation is inadequate.[249] An "adequate" number of responses is normally required, because Commerce makes its likelihood determination on an order-wide basis.[250] As such, Commerce must decide on an aggregate basis whether the response from respondent interested parties, as a group, is adequate to warrant a full sunset review. A determination that the aggregate response from respondent interested parties is inadequate and, thus, that a expedited review is warranted, is not a determination that an individual respondent interested party, who supplied a complete substantive response, would be likely to resume or continue dumping if the order were revoked.

236. In fact, Commerce regulations provide that, when resorting to facts available in an expedited sunset review, Commerce should "normally" rely on dumping margins from prior determinations and "information contained in parties' substantive responses to the Notice of Initiation filed under § 351.218(d)(3)."[251] Section 351.218(d)(3) of Commerce's *Sunset Regulations* provide for the submission of information from both domestic and respondent interested parties. In other words, in using facts available in an expedited sunset review, Commerce does not disregard information submitted by respondent interested parties who may have responded to the notice of initiation, but who did not in the aggregate account for 50 percent or more of subject exports. To the contrary, Commerce considers this information as part of the facts available in making its likelihood determination. This approach is in accordance with the obligations contained in Article 6.8 of the AD Agreement.

237. In the sunset review of OCTG from Argentina, as discussed above, Siderca filed a complete substantive response to the notice of initiation. In its substantive response, Siderca only raised two issues. As previously noted, Siderca's entire substantive response was a mere four pages of double-spaced text.[252] Siderca did not file any additional information on its own behalf or on behalf of the Argentine exporters of OCTG, as allowed by section 351.218(d)(3)(iv) of Commerce's *Sunset Regulations*. In addition, Siderca did not file any comments on Commerce's decision to expedite the sunset review, as allowed by section 351.309(e) of Commerce's *Sunset Regulations*. In sum, Argentina's claims that Siderca did not have an adequate opportunity to defend its interests because the sunset review was expedited in this case ring hollow, because Siderca did not avail itself of the opportunities made available by the *Sunset Regulations* for such defense in an expedited sunset review.

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[249] The sunset statute provides that when interested parties' response to the notice of initiation is inadequate, Commerce may conduct an expedited sunset review. The statute does not specify what to do in the event that some, but not all, interested party responses to initiation are inadequate. Thus, Commerce, in its role as the administering authority, determined that for respondent interested parties a response from such parties accounting for 50% or more of subject imports would be deemed an adequate response. *See* 19 U.S.C. § 1675(c)(3)(B) (Exhibit ARG-1); 19 C.F.R. § 351.218(e)(1)(ii)(A) (Exhibit ARG-3).

[250] *See Sunset Policy Bulletin,* 63 Fed. Reg. at 18872 (Exhibit ARG-35).

[251] 19 C.F.R. § 351.308(f)(2) (Exhibit US-3).

[252] *See* Exhibit ARG-57.

3. Commerce's Final Sunset Determination in OCTG from Argentina Is Not Inconsistent with the Obligation Contained in Article 12 of the AD Agreement to Provide Notice and Explanation

238. Argentina claims that Commerce's *Final Sunset Determination* and the accompanying *Decision Memorandum* in OCTG from Argentina are inconsistent with provisions of Article 12 because these documents allegedly fail to provide public notice and an adequate explanation of the decisions made in the sunset review.[253] Specifically, Argentina claims that the *Final Sunset Determination* and the *Decision Memorandum* are inconsistent with Article 12.2 because they fail to adequately explain the bases for Commerce's likelihood determination.[254] In addition, Argentina claims that these documents are inconsistent with Article 12.2.2 because they do not contain all relevant factual information necessary to make the likelihood determination.[255] As discussed below, Argentina mischaracterizes Commerce's factual and legal conclusions. In addition, with regard to Argentina's claim under Article 12.2.2, Argentina is attempting to use that provision as a vehicle for creating substantive standards for sunset reviews that simply cannot be found in the text of Article 11.3.

239. Article 12 establishes the "investigating authorities' obligations relating to public notice and explanation of determinations throughout an investigation."[256] Through Article 12.3, the provisions of Article 12 apply "*mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11 ... ."

240. Argentina's first claim under Article 12 is that because Argentina is unable to discern from the *Final Sunset Determination* and the accompanying *Decision Memorandum* "the actual basis for the Department's affirmative likelihood determination," Commerce acted inconsistently with Article 12.2.[257] Article 12.2 requires public notice of any determinations made in a sunset review and mandates that "[e]ach such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities."

241. However, as discussed in detail above, Commerce did provide notice and detailed explanations of its determinations in the *Final Sunset Determination*, the *Decision Memorandum*, and the *Adequacy Memorandum*, all of which were publicly available. Nonetheless, Argentina claims that it cannot discern the precise U.S. statutory provision – section 751(c)(4) or section 751(c)(3)(B) – upon which Commerce's final affirmative sunset determination was based. In addition, Argentina alleges that these U.S. statutory provisions are somehow "mutually

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[253] Argentina First Submission, para. 172-174.
[254] Argentina First Submission, para. 178.
[255] Argentina First Submission, para. 179-180.
[256] *US – Japan Sunset*, para. 7.30.
[257] Argentina First Submission, para. 178.

exclusive" and, thus, cannot both serve as a basis for the *Final Sunset Determination* in OCTG from Argentina.

242. Here, Argentina simply continues to misstate the facts of the OCTG sunset review and the meaning of U.S. law. First, the cited statutory provisions are not mutually exclusive in their application as alleged by Argentina. On the contrary, as explained above, they work in conjunction in cases where a respondent interested party choose to waive participation in the Commerce-administered portion of the sunset review proceeding. Section 751(c)(4) provides for a respondent interested party to elect waiver of participation, while section 751(c)(3)(B) provides for the use of facts available where the aggregate response from respondent interested parties is inadequate. A determination that the aggregate response to the notice of initiation is inadequate can be based on the respondent interested parties electing waiver, or failing to respond, or in providing inadequate substantive responses, or on any combination of these scenarios.[258]

243. Second, as a matter of fact and of law, Siderca did not waive its right to participate in the sunset review nor did Commerce find that Siderca had done so. Argentina repeatedly attempts to confuse the issue by alternatively referring to Siderca and Argentina as the respondent interested party when addressing the waiver issue. The *Final Sunset Determination*, the *Decision Memorandum*, and the *Adequacy Memorandum*, however, each clearly state that Siderca filed a complete substantive response.[259] Commerce's *Adequacy Memorandum* and the *Decision Memorandum* also make clear that Commerce's decision to expedite the review was based on the failure of Argentine producers/exporters of OCTG, other than Siderca, to respond to the notice of initiation.[260] Consequently, Commerce determined to expedite the sunset review and to use facts available in making the final sunset determination because the Article 11.3 likelihood determination is made on an order-wide basis and Siderca represented zero exports to the United States of OCTG during the five-year period preceding the sunset review.

244. Finally, as the *Final Sunset Determination* and the *Decision Memorandum* clearly explain, Commerce used, as fact available in accordance with section 351.308(f) of Commerce's *Sunset Regulations*, margins from the original investigation and the information submitted in the sunset review, including the information submitted by Siderca, as the bases for the affirmative likelihood determination.[261] The *Decision Memorandum* explains that Commerce found dumping throughout the history of the OCTG order and that the existence of dumping margins after imposition of the

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[258] Argentina's own study of Commerce sunset reviews shows that these scenarios can exist in combination. For example, on page 1 of Exhibit ARG-63, the data for Case 7 (bearings from France) shows that there were affirmative waivers of participation from some respondent interested parties, combined with no responses from others.

[259] *Final Sunset Determination*, 65 Fed. Reg. at 66701 (Exhibit ARG-46); *Decision Memorandum*, at 3 (Exhibit ARG-51); and *Adequacy Memorandum*, at 1 (Exhibit ARG-50).

[260] *Decision Memorandum*, at 3 (Exhibit ARG-51); and *Adequacy Memorandum*, at 2 (Exhibit ARG-50).

[261] *Decision Memorandum*, at 4-5 (Exhibit ARG-51).

duty is highly probative of the likelihood of dumping in the absence of the duty.[262] In addition, Commerce found that import volumes had decreased and remained depressed since the order was issued, indicating that the Argentine producers/exporters of OCTG may have had to dump to maintain market share.[263]

245. In light of these facts and in the absence of any rebuttal evidence from respondent interested parties – including Siderca – Commerce made an affirmative likelihood determination because it determined that the Argentine producers/exporters could not sell OCTG in the United States without dumping if the order were to be revoked. Although Argentina may disagree with the outcome, the *Final Sunset Determination* and the accompanying *Decision Memorandum* clearly explain the bases for Commerce's final affirmative likelihood determination and nothing in Article 12.2 requires more. Consequently, Commerce's *Final Sunset Determination* and the accompanying *Decision Memorandum* fulfill the obligations to provide public notice under Article 12.2.

246. In addition to its public notice claim under Article 12.2, Argentina claims that Article 12.2.2 requires that "fresh information" be gathered and that a dumping margin be calculated in accordance with Article 2.1 of the AD Agreement in a sunset review.[264] Argentina is wrong, because Article 12.2.2 does not impose any such substantive obligations.

247. Article 12.2.2 is a notice and report provision that requires an authority to provide explanations regarding matters of fact and law, the reasons or bases for any determinations, as well as the reasons for the acceptance and rejection of arguments and claims made in the proceeding. Article 12.2.2 does not contain substantive obligations for the conduct of, or for the methodologies to be used, in a sunset review. Nothing in Article 12 generally or Article 12.2.2 specifically contains any substantive provisions regarding the methodologies or analysis to be employed in making the determination of whether dumping and injury is likely to continue or recur.

248. In the past, attempts to read substantive obligations into Article 11.3 on the basis of unrelated requirements in Article 12 have been rejected.[265] The Panel should similarly reject Argentina's attempt to do so here.

D. Commerce's Analysis of Dumping In the Context of the Likelihood and "Margin Likely to Prevail" Determinations in the Sunset Review on OCTG from Argentina Were Not Inconsistent with Article 11.3 of the AD Agreement

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[262] *Decision Memorandum*, at 5 (Exhibit ARG-51).

[263] *Decision Memorandum*, at 5 (Exhibit ARG-51).

[264] Argentina First Submission, para. 179, 180.

[265] *US - German Steel*, para. 112 (finding that Article 22.1, the provision in the SCM Agreement corresponding to Article 12.1 of the AD Agreement, does not establish evidentiary standards applicable to the initiation of sunset reviews); and *US - Japan Sunset*, para. 7.33 (Article 12.1 does not establish evidentiary standards applicable to the initiation of sunset reviews).

249. Argentina claims that in the sunset review on OCTG from Argentina, Commerce was obligated, under Articles 2, 6, and 11.3 of the AD Agreement, to calculate and base its likelihood determination on a current and future amount of dumping.[266] As demonstrated below, Argentina is wrong.

1. Article 11.3 Does Not Require a Quantification of Dumping or the Use of Any Particular Methodology for Making the Likelihood Determination

250. Customary rules of interpretation of public international law dictate that the words of a treaty form the starting point for the process of interpretation. The text of Article 11.3 provides that a definitive antidumping duty must be terminated after five years unless the authorities determine that "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury." The focus of a sunset review under Article 11.3 is on future behavior; *i.e.*, whether dumping and injury are likely to continue or recur in the event of expiry of the duty, not whether or to what extent dumping or injury currently exists. Thus, neither the precise amount of dumping in any one year, nor the precise amount of likely future dumping, is of central significance to the results of the review; indeed, such precision is certainly not required.[267]

251. Under Article 11.3, authorities are required to determine whether continuation or recurrence of dumping is likely. Article 11.3 does not, however, set forth a methodology to be used in performing this likelihood analysis. Nor does Article 11.3 require quantification of past or future amounts of dumping. This is reinforced by note 22 of Article 11.3, which provides that "[w]hen the amount of the anti-dumping duty is determined on a retrospective basis, a finding in the most recent assessment proceeding ... that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty." No specific amount of dumping – even the most current – is decisive as to whether dumping is likely to continue or recur.

252. Argentina claims that the rules of Article 2 apply in their entirety to sunset reviews conducted under Article 11.3 because Article 11.3 requires a determination whether "dumping" is likely.[268] While correct that the term"dumping" appears in both Article 2 and Article 11.3, Argentina incorrectly ascribes all of the obligations contained in Article 2 to sunset reviews under Article 11.3

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[266] Argentina First Submission, paras. 181-196.

[267] *See, e.g.*, *United States - Anti-Dumping Duty on Dynamic Random Access Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, Report of the Panel adopted 19 March 1999, para. 6.43 [hereinafter "*Korea DRAMS*"] (discussing prospective analysis, albeit in the context of a different type of review). Although there is no requirement to quantify the amount of dumping likely to continue or recur, as discussed below, the United States does so under its domestic law. Commerce transmits this information to the ITC.

[268] Argentina First Submission, paras. 182, 183.

253. As its heading indicates, Article 2 sets forth obligations concerning the "Determination of Dumping." Within Article 2, Article 2.1 provides the general definition that a product is considered to be "dumped" where the export price of that product is less than the comparable price in the comparison market. The remaining provisions of Article 2 set forth, in significant detail, how the margin of dumping, *i.e.* the amount of dumping, is to be calculated.

254. Article 11.3 requires that an authority determine whether "expiry of the duty would be likely to lead to continuation or recurrence of dumping ... ." In other words, Article 11.3 requires a determination whether *dumping* is likely to recur – dumping, as defined by Article 2.1, meaning generally that the export price of a product is less than the normal value of that product. Article 11.3 does not require a determination that a particular *amount of dumping* is likely to continue or recur in the future, *i.e.*, if and when the duty is terminated – for the very reason that it would be impossible to make such a determination.

255. A determination of dumping consistent with the Article 2 rules requires, *inter alia*, that actual amounts of prices, costs, and profit be used in the proscribed calculation methodology. In a sunset review, an authority is considering what will happen in the future. It is self-evident that there are no values for prices, costs, and profits that have not yet occurred. Argentina's claim, that the requirements of Article 2 literally apply in a sunset review under Article 11.3, fails for this very reason.

256. This is not to say that Article 2 has no implications or application in Article 11.3 sunset reviews. As previously noted, Article 2.1 provides that, for the purposes of the AD Agreement, a product is considered to be "dumped" where the export price of that product is less than the comparable price in the comparison market. Article 2, therefore, provides the general meaning of the term "dumping" as it is used throughout the AD Agreement, including in Article 11.3. The panel in *US – Japan Sunset* reached this same conclusion.[269]

257. In the instant review, Commerce considered evidence that dumping continued over the life of the order and that import volumes declined significantly after the imposition of that order. As a result, Commerce found that dumping was likely to continue or recur in the future if the order were terminated. Nothing more is required under Article 11.3.

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[269] *US – Japan Sunset*, para. 7.168 ("We thus do not believe that the substantive disciplines in Article 2 governing the calculation of dumping margins in making a *determination of* dumping apply in making a *determination of likelihood of continuation or recurrence of* dumping under Article 11.3."). In so stating, the panel was drawing the distinction between the obligation to calculate a margin of dumping in accordance with the methodologies proscribed by Article 2 – *i.e.* to determine the magnitude of the margin of dumping – and the obligation in a sunset review under Article 11.3 to make a determination of the likelihood that "dumping" – *i.e.*, the mere existence of dumping – would be likely to continue or recur if the duty were to expire.

2. The Margins Determined In Commerce's Original Investigation, And The Methodologies Used To Derive Them, Cannot Be Challenged Before This Panel

258. Argentina maintains that the margin calculations in the investigation, which were considered by Commerce in making its sunset determinations, were performed in a manner that was inconsistent with WTO requirements, particularly the requirements of Article 2. Those specific margins and the methodologies used to derive them, however, cannot now be challenged before this Panel.

259. Article 18.3 of the AD Agreement provides that "the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement." The AD Agreement thus applies only to investigations that were based on U.S. dumping petitions filed after January 1, 1995, the date of entry into force of the WTO Agreement with respect to the United States. The antidumping investigation in this case was initiated on the basis of a petition filed prior to January 1, 1995. Thus, the specific margins calculated by Commerce in the original investigation, and the calculation methodologies used to derive them, cannot be challenged before this Panel.

260. An analogous situation was presented in *Korea DRAMs*. In that case, the United States maintained that a WTO dispute arising out of the final results of the third administrative review of the order did not provide an appropriate forum in which to challenge a product scope determination made during the original investigation. The United States pointed out that (1) the product scope determination had been made in an investigation prior to the creation of the WTO and the entry into force of the AD Agreement, and (2) product scope issues were not revisited during the third administrative review. The United States asserted, therefore, that claims regarding product scope were inadmissible under Article 18.3 of the AD Agreement. The panel agreed with the United States, finding that the AD Agreement applies only to those parts of a pre-WTO measure that "are included in the scope of a post-WTO review."[270] In the instant case, the specific amounts of the original dumping margins were not revisited in the sunset review. Consequently, those margins, and the methodologies used to derive them, cannot be challenged before this Panel.

[270] *Korea DRAMs*, para. 6.14.

3. Commerce Fully Complied with its Obligations under the AD Agreement in Making the Affirmative Likelihood Determination

261. Argentina claims that Commerce's likelihood determination was not based on "positive evidence" and that, as a result, Commerce's sunset review proceeding on OCTG from Argentina violated Article 6 obligations regarding evidence and procedure.[271] As discussed above, Argentina's Article 6 claims relating to Siderca's participation in the sunset review are based on an incorrect factual premise, because Commerce found that Siderca had filed a complete substantive response and did not find that Siderca had waived its rights to participate in the sunset review. In addition, Commerce afforded Siderca and the other Argentine producers/exporters opportunities to supply whatever comment, argument, or information they wished in defense of their interests in the sunset review of OCTG from Argentina in accordance with sections 351.218(d)(3)(ii)(G) and 351.218(d)(3)(iv)(B) of Commerce's *Sunset Regulations*.[272]

262. Indeed, Commerce's sunset questionnaire explicitly requests that interested parties, which would include Siderca and the Argentine OCTG exporters, provide "[a] statement regarding the likely effects of revocation of the order . . . , which must include any factual information, argument, and reason to support such statement."[273] Commerce requested information from Siderca and the Argentine exporters and the fact that Siderca failed to answer the questions in a more thorough manner is not an error that can be ascribed to Commerce.

263. As detailed above, Commerce considered the margins from the original investigation and the information submitted by the interested parties in the sunset review proceeding. Commerce reasonably found that the existence of dumping margins and depressed import volumes since the imposition of the duty indicated that it was likely that dumping of OCTG from Argentina would continue or recur if the order were revoked.[274] There is no indication that the quality of the evidence considered for the final sunset determination was compromised in any way. Thus, Commerce's examination of whether revocation of the order would be likely to lead to the continuation or recurrence of dumping was based on credible and undisputed evidence, and the sunset review proceeding in OCTG from Argentina complied with the obligation contained in Article 6.

264. Argentina makes a series of unsupported and unsubstantiated claims that Commerce's affirmative likelihood determination in the OCTG sunset review violated Articles 2 , 6 and 11.3 of

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[271] Argentina First Submission, para. 187.

[272] 19 C.F.R. § 351.218(d)(3)(ii)(G) (interested party is required to provide, in its substantive response, factual information, argument, and reason concerning the dumping margin likely to prevail for that party if the order is revoked); 19 C.F.R. § 351.218(d)(3)(iv)(B) (provides for submission of "any other relevant information that the party would like [Commerce] to consider.") (Exhibit ARG-3).

[273] 19 C.F.R. § 351.218(d)(3)(ii)(F) (Exhibit ARG-3).

[274] *Decision Memorandum*, at 4-5 (Exhibit ARG-51).

the AD agreement.[275] First, Argentina claims that Commerce cannot rely on "5 year old data from an original investigation" because a likelihood determination under Article 11.3 requires "fresh" data indicating the likelihood of future dumping.[276] Argentina does not explain what "fresh" data need be collected or how this information may be indicative of future dumping. Indeed, nothing in Article 11.3 dictates the information that an authority must gather, or the methodologies that it must employ, to determine the likelihood of continuation or recurrence of dumping.

265. Argentina also overlooks the fact that Commerce based its likelihood determination on evidence concerning import volumes over the life of the order and the information supplied by the interested parties, in addition to the dumping margins found in the original investigation. Moreover, "current information" is not the issue in a sunset review conducted pursuant to Article 11.3.[277] Rather, the issue under Article 11.3 is whether dumping and injury are likely to continue or recur in the event of the expiry of the duty, an inherently forward-looking inquiry.

266. Argentina also claims that the evidence supporting an affirmative likelihood determination made under Article 11.3 must indicate that dumping in the future is "probable," not just "possible."[278] In this regard, Argentina appears to claim that Commerce's likelihood determination is not supported by evidence demonstrating that there is a probability that dumping will continue or recur if the order were revoked. In its written submission to this Panel, Argentina does not explain how Commerce's likelihood determination fails to meet this "standard."[279] Nevertheless, as explained above, Commerce found that the existence of dumping margins over the life of the order and the depressed import volumes since the imposition of the duty were highly probative of the future behavior of Argentine exporters of OCTG.[280] Nothing submitted by the interested parties nor any other information on the record of the sunset review of OCTG from Argentina contradicts these findings.

4. There Is No Obligation Under Article 11.3 of the AD Agreement to Calculate or Consider a Margin Likely to Prevail Upon Expiry of the Duty

267. Under U.S. law, Commerce is required to determine whether the expiry of the duty is likely to lead to continuation or recurrence of dumping. If Commerce's likelihood determination is affirmative, it must report to the ITC the magnitude of the margin likely to prevail.[281] In making the

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[275] Argentina First Submission, paras. 182-188.

[276] Argentina First Submission, para. 184.

[277] *See* footnote 22, Article 11.3 of the AD Agreement, stating that "a finding in the most recent assessment proceeding . . . that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty."

[278] Argentina First Submission, para. 186.

[279] *See* Argentina First Submission, paras. 182 and 187.

[280] *Decision Memorandum*, at 5 (Exhibit ARG-51).

[281] Section 752(c)(3) (Exhibit ARG-1).

sunset injury determination, the ITC "may consider the magnitude of the margin of dumping."[282] The fact that Commerce reports a margin to the ITC is a construct of U.S. law, however, and not an obligation imposed by the AD Agreement.

268. Argentina maintains that, pursuant to Article 2 and Article 11.3, as applied in the instant case, the margins reported to the ITC as the rates of dumping likely to prevail in the event of revocation were improperly identified by Commerce.[283] Argentina is wrong, because there simply is no obligation under the AD Agreement to consider the magnitude of the margin likely to prevail in determining likelihood of continuation or recurrence of injury in a sunset review under Article 11.3. For this reason, the Panel should not and need not consider Argentina's arguments concerning the manner in which Commerce identified the margins that it reported to the ITC.

E. The Panel Should Reject Argentina's Claim Under Article X:3(a) of GATT 1994

269. Having failed to demonstrate that U.S. law and the application of that law are contrary to the AD Agreement, in Section VII.E of its First Submission, Argentina attempts to recycle its claims one last time by turning to Article X:3(a) of the GATT 1994. Argentina seems to allege that even if the Panel finds that none of the "measures" identified by Argentina are inconsistent – either as such or as applied – with any of the provisions of the AD Agreement cited by Argentina, the Panel nonetheless should find that these "measures" are inconsistent with the Article X:3(a) requirement that certain laws, regulations, judicial decisions and administrative rulings of general application be administered in a uniform, impartial, and reasonable manner.

270. At the outset, the United States reiterates that this claim is not within the Panel's terms of reference. In Section A.4 of Argentina's panel request, the claim under Article X:3(a) is made with respect to the specific Commerce sunset determination in OCTG from Argentina. Nevertheless, Argentina fails to demonstrate that Commerce has not administered U.S. sunset review laws and regulations in a uniform, impartial and reasonable manner.

271. Focusing on the ordinary meaning of Article X:3(a)'s terms, "uniform" is defined as "[o]f one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times."[284] Interpreting the same provision in a challenge to Argentina's administration of its customs laws, a panel explained that the term "uniform" means that the

> laws should not vary, that every exporter and importer should be able to expect treatment of the same kind, in the same manner both over time and in different

[282] Section 752(a)(6) (Exhibit ARG-1).
[283] Argentina First Submission, paras. 189-193.
[284] *New Shorter Oxford English Dictionary* 3488 (1993).

> places and with respect to other persons. Uniform administration requires that Members ensure that their laws are applied consistently and predictably ... . This is a requirement of uniform administration of ... laws and procedures between individual shippers and even with respect to the same person at different times and different places.[285]

272. "Impartial" means "[n]ot partial; not favouring one party or side more than another; unprejudiced, unbiased; fair."[286] Treatment in an unbiased and fair manner is distinguishable from identical treatment. For example, the panel in *US – Japan Sunset* rejected Japan's contention that requiring foreign producers/exporters to provide more information than domestic produces in Commerce's sunset review resulted in the partial administration of U.S. sunset laws.[287] The panel explained that because "foreign exporters will be the main source of information regarding dumping, or likelihood of continuation or recurrence of dumping," the quantity of information required from foreign exporters will necessarily differ.[288]

273. "Reasonable" means "[i]n accordance with reason; not irrational or absurd."[289] In *Argentina – Bovine Hides*, the panel found the administration of Argentine customs law unreasonable because there was "no reason" for allowing Argentinean hide buyers to see documents containing their customers' business confidential information.[290]

274. Taken together the terms of Article X:3(a) require, that in administering U.S. sunset review laws and regulations, Commerce must act in a manner that is consistent, unbiased and not irrational or absurd. As to the first of these requirements, one of Argentina's principal claims is that the various "measures" alleged by Argentina "establish an irrefutable presumption, as demonstrated by [Commerce's] consistent practice, that is inconsistent with Article 11.3."[291] Needless to say, it strains logic to understand how Argentina can sustain a claim that Commerce has violated Article X:3(a)'s demand for consistent application of sunset review laws and regulations when, at the same time, Argentina complains about Commerce's "consistent practice."

275. With respect to the requirements for an impartial and reasonable administration of U.S. sunset laws and regulations, Argentina has provided no evidence of bias or that Commerce has administered U.S. laws and regulations in an irrational or absurd manner. As demonstrated above, Argentina's "irrefutable presumption" does not exist, and a deconstruction of Argentina's

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[285] *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, Report of the Panel adopted 16 February 2001, para. 11.83 [hereinafter "*Argentina - Bovine Hides*"].

[286] *New Shorter Oxford English Dictionary* 1318 (1993).

[287] *US – Japan Sunset*, para. 7.306.

[288] *Id; see also Argentina – Bovine Hides* Panel Report, paras 11.99-.101 (finding that in providing private parties access to confidential business information of parties with conflicting commercial interests constituted a partial administration of Argentine customs laws).

[289] *New Shorter Oxford English Dictionary* 2496 (1993).

[290] *Argentina – Bovine Hides*, paras. 11.87, 11.91-.92.

[291] Argentina First Submission, para. 194.

"analysis" of 291 Commerce sunset reviews shows that in 87 percent of the cases, the issue of likelihood of dumping simply was not contested. In the 13 percent of the cases where likelihood was contested, Argentina provides no evidence – let alone proves – that those cases were decided in an impartial or unreasonable manner.

F. The ITC Applied the Correct Standard for Determining Whether Termination of the Antidumping Duty Order Would Be Likely to Lead to Continuation or Recurrence of Injury, and the ITC's Determination of Likelihood in the Sunset Review of OCTG from Argentina Was Consistent With Article 11. 3 and Article 3.1 of the AD Agreement

276. Argentina argues that the ITC's application of the standard for determining whether revocation of the antidumping order would be likely to lead to continuation or recurrence of injury was inconsistent with AD Agreement Article 11.3 because the ITC failed to apply the ordinary meaning of the term "likely." Argentina's argument that the ITC misinterpreted the word "likely" in Article 11.3 rests on two premises: first, that "likely" can only mean probable; and second, that the ITC disregarded this meaning and interpreted "likely" to mean "possible."[292] Neither of these premises is correct. Argentina also asserts, incorrectly, that the SAA directs the ITC to apply a standard that is inconsistent with Article 11.3.

277. Before turning to the interpretation of the word "likely" itself, it is worth recalling the fundamental nature of the inquiry called for by a sunset review. The determination of whether revocation of an order "would be likely to lead to" continuation or recurrence of injury is an inherently predictive inquiry. In this respect, as the Appellate Body has already recognized in the context of countervailing duty proceedings, a sunset review is fundamentally different from an original investigation:[293]

> We further observe that original investigations and sunset reviews are distinct processes with different purposes. The nature of the determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation. For example, in a sunset review, the authorities are called upon to focus their inquiry on what would happen if an existing countervailing duty were to be removed. In contrast, in an original investigation, the authorities must investigate the existence, degree and effect of any alleged subsidy in order to determine whether a subsidy exists and whether such subsidy is causing injury to the domestic industry so as to warrant imposition of a countervailing duty.

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[292] Argentina's submission is confusing on this point. In some places it asserts that the ITC used a standard based on injury being "possible." Argentina First Submission, paras. 213, 214, 215, and 222. Elsewhere, Argentina refers to the ITC's application of a standard that "falls in between 'probable' and 'possible' on a continuum of relative certainty." Argentina First Submission, paras. 211 and 221.

[293] *US – German Steel*, para. 87.

278. The panel in *US – Japan Sunset* also explained:[294]

> [O]riginal investigations and sunset reviews are distinct processes with different purposes, and that the text of the *Anti-dumping Agreement* distinguishes between investigations and reviews. We base our view on several elements, not least that under the text of the *Anti-dumping Agreement*, the nature of the determination to be made in a sunset review differs in certain fundamental respects from the nature of the determination to be made in an original investigation.

279. Thus, a sunset review – whether of a countervailing duty or antidumping duty order – necessarily involves less certainty and precision than would be attainable in an original investigation based on a retrospective analysis.[295] For example, in an original antidumping investigation, authorities examine the current condition of an industry without the benefit of an order in place to determine whether dumped imports are causing, or threatening to cause, material injury. In an original investigation, the condition of the industry is determined, *inter alia*, on the basis of existing evidence quantifying the domestic industry's sales, profits, output, operating income, market share, productivity, return on investment, capacity utilization, inventories and employment rates.

280. In a sunset review, on the other hand, authorities, in deciding whether to revoke the order, examine the likely volume of imports in the future that have been restrained by the discipline of the order and the likely impact in the future of that volume on a domestic industry that has enjoyed the benefit of an antidumping order for the past five years. Because of the presence of the order, it may be the case that at the time of a sunset review, dumped imports have ceased and the domestic industry is no longer experiencing, or being threatened with, material injury. In a sunset review, the investigating authority does not have the benefit of existing evidence regarding the future state of the domestic industry. Rather, in a sunset review, the investigating authority must engage in counterfactual analysis to determine whether a prospective change in the status quo – *i.e.*, revocation of the order – would be likely to lead to continuation or recurrence of injury. Thus, a determination of likelihood inherently involves less certainty and exactness than in an original investigation. "In light of the fundamental qualitative differences in the nature of these two distinct processes, . . . it [is] not . . . surprising . . . that the textual obligations pertaining to each of the two processes may differ."[296]

281. In the sunset review on OCTG, the ITC applied the standard set out in both Article 11.3 and U.S. law. Specifically, the ITC determined whether revocation of the antidumping and countervailing duty orders would be likely to lead to continuation or recurrence of material injury to

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[294] *US – Japan Sunset*, para. 7.8.
[295] *See US – Japan Sunset*, para. 7.178.
[296] *US – Japan Sunset*, para. 7.8.

an industry in the United States within a reasonably foreseeable time.[297] As an aid to determining whether revocation would be likely to lead to continuation or recurrence of injury, the U.S. statute requires the ITC to consider, *inter alia*, "the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked ... ."[298] In this case, the ITC examined each of these factors. For example, with respect to likely volume, the ITC found that the significant increases in import volume during the original investigation, substantial excess capacity in several of the subject countries, and a strong incentive on the part of producers in several of the subject countries to establish a significant presence in the large, relatively higher-priced U.S. market, among other things, supported the conclusion that "in the absence of the orders, the likely volume of cumulated subject imports, both in absolute terms and as a share of the U.S. market, would be significant."[299] In other words, the text of the ITC analysis shows that it expected injury to recur if the antidumping orders were to be revoked. The ITC did not find merely that injury was possible. Thus it is clear that the ITC properly applied the standard set out in Article 11.3. There is nothing in the determination to indicate that the ITC applied any standard other than the Article 11.3 standard.

282. This brings us back to the meaning of the word "likely." Argentina's claim that the ITC applied the wrong standard in its sunset review in the OCTG case is based on Argentina's assertion that the term "likely" must be interpreted to mean "probable." Article 11.3 does not use the word "probable." It refers to "likely," which is the term used in the U.S. statute and the term used by the ITC. It is incorrect to conclude that "likely" can only mean "probable." Dictionaries define "likely" in various ways.[300] Thus seeking a synonym for "likely" as Argentina does would not advance the understanding of that term.

283. It is true that the U.S. Court of International Trade, in interpreting "likely" under U.S. law, has found "probable" to be a synonym for "likely."[301] However, contrary to Argentina's suggestion that "probable" entails a higher degree of certainty than employed by the ITC, the Court has stated that it "has not interpreted 'likely' to imply any degree of certainty."[302] Therefore, on remand from the Court to apply the "likely" standard consistent with the Court's articulation, the ITC's

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[297] ITC Report at 1.

[298] 19 U.S.C. §1675a(a) (Exhibit ARG-1).

[299] ITC Report at 20.

[300] *See, e.g.*, *Ballentine's Law Dictionary* (3d ed. 1969) ("likely" is "not more than 'probable' and sometimes less than 'probable' depending upon the context," "the word 'likely' is used in the sense of sometimes more than possible, and less than probable") (Exhibit US-13); *The Random House Dictionary of the English Language* (1966) (likely means "seeming to fulfill requirements or expectations") (Exhibit US-14); *The American Heritage Dictionary of the English Language* (3rd ed.) (likely means "[w]ithin the realm of credibility; plausible") (Exhibit US-15); *Webster's Third New Int'l Dictionary of the English Language* (1981) (unabridged) (likely means "having a better chance of occurring than not") (Exhibit US-16).

[301] *Usinor Industeel v. United States*, Slip Op. 02-70, at 43-44 (CIT July 19, 2002) (Exhibit US-17).

[302] *Usinor Industeel v. United States*, Slip Op. 02-152 at 6 (CIT December 20, 2002) (Exhibit US-18).

determinations did not change.[303] Moreover, the one ITC remand determination reviewed by the Court on this question was affirmed.[304]

284. Argentina is also incorrect in arguing that, based on guidance from the SAA, the ITC applies a standard in which any determination – affirmative or negative – is permissible.[305] The SAA simply recognizes the inherently predictive nature of the inquiry involved in a sunset review, explaining that "[t]here may be *more than one* likely outcome following revocation."[306] The SAA explains further that

> [t]he possibility of other likely outcomes does not mean that a determination that revocation . . . is likely to lead to continuation or recurrence of . . . injury . . . is erroneous, as long as the determination of likelihood of continuation or recurrence is reasonable in light of the facts of the case.[307]

285. The SAA thus does nothing more than explain that the "likely" standard in sunset reviews does not mean that a continuation or recurrence of injury must be inevitable. The SAA simply recognizes that there may be more than one possible outcome when projecting into the future. Contrary to Argentina's assertion, the SAA does not direct the ITC to apply a standard that is inconsistent with Article 11.3. Moreover, the ITC has never interpreted "likely" to mean "possible."

286. For the foregoing reasons, the ITC applied the correct standard for determining whether termination of the antidumping duty orders at issue would be likely to lead to continuation or recurrence of injury, and the ITC's determination was otherwise consistent with Article 11. 3 of the AD Agreement.

G. Article 3 Does Not Apply to Sunset Reviews

287. Argentina asserts that Article 3 of the AD Agreement applies in its entirety to sunset reviews conducted under Article 11.3.[308] Argentina also claims that in its sunset review in the OCTG case, the ITC acted inconsistently with specific paragraphs of Article 3.

288. This series of claims by Argentina is premised on the notion that Article 3 does, in fact, apply to sunset reviews under Article 11.3. In this section, the United States explains why this fundamental premise is wrong, and that Article 3 does *not* apply to sunset reviews. In subsequent

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[303] *Usinor Remand Determination* at 14 (USITC July 2002) (Exhibit US-19).
[304] *Usinor Industeel v. United States*, Slip Op. 02-152 at 24 (December 20, 2002) (US-18).
[305] Argentina First Submission, para. 215.
[306] SAA at 883 (emphasis added) (Exhibit US-11).
[307] *Id*.
[308] Argentina First Submission, para. 234.

sections, the United States will address Argentina's claims concerning specific paragraphs of Article 3.

289. The inapplicability of Article 3 to sunset reviews under Article 11.3 is clear based on an analysis of the text of these treaty provisions. First, Article 3 addresses a "determination of injury," whereas Article 11.3 calls for a determination of "recurrence of injury." The nature of the two determinations are entirely different, as explained below.[309] Moreover, there are no cross-references in Article 3 to Article 11, or in Article 11 to Article 3.

290. Argentina relies on footnote 9 to Article 3 to support its position that Article 3 applies to sunset reviews.[310] The language of footnote 9 proves just the opposite. Footnote 9 states:

> Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

291. The text of footnote 9 to Article 3 existed in its present form in the Tokyo Round Anti-Dumping Code prior to the adoption of the Article 11.3 provision for sunset reviews at the conclusion of the Uruguay Round, with the only exception that the prior text referred to the "Code," whereas footnote 9 refers to the "Agreement."[311] Further, footnote 9, like its precursor in the Antidumping Code, is simply a drafting device that avoids unnecessary repetitions of the principle that actionable injury can take any of three distinct forms: present injury, threat of material injury, or material retardation of the establishment of an industry.

292. It is clear that (i) "material injury," (ii) "threat of material injury," (iii) "material retardation of the establishment of a domestic industry," and (iv) the likelihood of "continuation or recurrence of . . . injury" are each separate conditions, with separate elements, some of which are specified in the AD Agreement and some of which are implied. The drafters of the AD Agreement had the option of including the "likelihood of continuation or recurrence of injury" condition in footnote 9, but chose not to do so.

293. Applying the definition of "injury" in footnote 9 to the determination of "recurrence of injury" in Article 11.3 – as Argentina would have it – would lead to absurd results. It would mean that the inquiry in a sunset review would become whether expiry of the duty would be likely to lead to *continuation or recurrence of* material injury to a domestic industry, *threat of material injury to a domestic industry or material retardation of the establishment* of such an industry. Article 11.3

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[309] *Cf. US – Japan Sunset*, para. 7.167 (stating that there is a "substantial difference" between the reference in Article 11.3 to a determination of likelihood of continuation or recurrence of dumping and the reference in Article 2 to a determination of dumping).

[310] Argentina First Submission, para. 234.

[311] In the AD Code, the footnote was footnote 2 to Article 3.

does not contemplate determinations of a continuation or recurrence of threat or material retardation as a basis for continuing to apply an antidumping duty after a sunset review.

294. Another textual indication that footnote 9 does not apply to sunset reviews is the phrase "unless otherwise specified" in the footnote. Article 11.3 does specify otherwise: it states that in a sunset review investigating authorities are to determine the likelihood of a continuation or recurrence of injury, rather than engage in a "determination of injury" within the meaning of footnote 9 to Article 3.

295. In addition, footnote 9 is attached to the heading of Article 3, which is "Determination of Injury," and Article 3.1 speaks of – presumably – the same "injury" as a "determination of injury for purposes of Article VI of GATT 1994." Article VI of GATT 1994 does not mention sunset reviews, thereby further reinforcing the conclusion that footnote 9 does not apply to sunset reviews.

296. The inapplicability of Article 3 to sunset reviews under Article 11.3 is further underscored by the absence of any cross-references in Article 11.3 to Article 3. The existence of cross-references in paragraphs 4 and 5 of Article 11 to other articles of the AD Agreement indicate that the drafters would have been explicit had they intended to make the disciplines of Article 3 applicable to sunset reviews.[312]

297. The fact that Article 3 does not apply to sunset reviews is clear not only from the text of the AD Agreement, but also in view of the nature of a sunset review. As mentioned previously, the focus of a review under Article 11.3 differs from that of an original investigation under Article 3. As the Appellate Body observed in the context of sunset reviews under the SCM Agreement: "original investigations and sunset reviews are distinct processes with different purposes."[313] The difference between the nature and practicalities of the inquiry in an original investigation and of the inquiry in a sunset review demonstrate that the tests for each cannot be identical.

298. In an original investigation, the investigating authorities examine the current condition of an industry that has been exposed to the effects of unrestrained, dumped imports that are competing without remedial measures in place. In doing so, the authorities must examine the volume, price effects and impact of the unrestrained imports on a domestic industry that may be indicative of present injury or threat of material injury.

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[312] *Cf. US – Japan Sunset*, Panel Report para. 7.166 (stating that the existence of cross-references in Articles 11.4 and 11.5 to other articles of the AD Agreement, and the absence of such a cross-reference in Article 11.3 to Article 2, indicates that the disciplines of Article 2 are not applicable to sunset reviews); and *US - German Steel*, para. 69 (stating that the existence of cross-references in the SCM Agreement suggests that when the negotiators of the Agreement intended the disciplines of one provision to apply to another, they expressly provided for such application).

[313] *US - German Steel*, para. 87.

299. Five years later, in an Article 11.3 sunset review, the investigating authorities must determine whether "expiry of the duty would be likely to lead to continuation or recurrence of . . . injury." Under U.S. law, the ITC examines the *likely* volume of imports *in the future* that have been restrained for the last five years by the antidumping duty order, the *likely* price effects *in the future* of such imports, and the *likely* impact of the imports *in the future* on the domestic industry that has been operating in a market where the remedial order has been in place.

300. As a result of the order, dumped imports may have decreased or exited the market altogether or, if they have maintained their presence in the market, they may be priced higher than they were during the original investigation, when they were entering the market unencumbered by any additional duties. With the presence of the order, it would not be surprising that no injury or causal link presently exist, a fact recognized by the standard of "continuation or recurrence of injury."

301. Thus, the inquiry contemplated pursuant to Article 11.3 is counterfactual in nature, and entails the application of a decidedly different analysis with respect to the volume, price and impact. Indeed, there may no longer be either any subject imports or material injury once an antidumping order has been in effect for five years. The authority must then decide the likely impact of a prospective change in the status quo; *i.e.,* the revocation of the antidumping duty order and the elimination of its restraining effects on volumes and prices of imports. The differences in the nature and practicalities of the inquiry in an original investigation and in a sunset review demonstrate that the requirements for the two inquiries cannot be identical.

302. Although Article 3 does not apply to sunset reviews, the United States recognizes that some of the provisions of Article 3 may provide guidance as to the type of information that may be relevant to the examination in a sunset review of whether material injury is likely to continue or recur.[314]

[314] *Cf. US – Japan Sunset*, paras. 7.174 and 7.176 (stating that, although Article 2 does not apply to sunset reviews, it "provides guidance" as to, or "may inform," the type of information that may be relevant to a sunset review examination of the presence or absence of dumping since imposition of the order).

H. The Panel Should Reject Argentina's Claims Under Article 3.1 of the AD Agreement

303. In Section VIII.B of its First Submission, Argentina claims that in its sunset review of OCTG from Argentina, the ITC failed to conduct an "objective examination" and failed to base its determination on "positive evidence" as required by Article 3.1 of the AD Agreement. The Panel should reject Argentina's claims, because: (1) Article 3.1 does not apply to sunset review under Article 11.3; and (2) assuming *arguendo* that Article 3.1 does apply to sunset reviews, the ITC did not act inconsistently with Article 3.1.

1. Article 3.1 Does Not Apply to Sunset Reviews

304. Argentina claims concerning Article 3.1 are premised on the notion that Article 3.1 applies to sunset reviews. Article 3.1 provides as follows:

> A determination of injury for purposes of Article VI of the GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of dumped imports and the effect of dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

305. As explained above, the provisions of Article 3 are not applicable to sunset reviews. In addition to the reasons given above, there are further textual indications in Article 3.1 as to why it specifically is not applicable to sunset reviews. In a sunset review, authorities are required to evaluate the likelihood in the future of a continuation or recurrence of injury if the dumping order is lifted. Imports may not even be present in the market at the time of the sunset review, and they may not be sold at dumped prices. How then can investigating authorities comply with Article 3.1 and examine "the volume of dumped imports and the effect of dumped imports on prices?" It is apparent that the requirements of Article 3.1 do not apply to sunset reviews because the dictates of Article 3.1 are potentially incompatible with the nature of the inquiry in a sunset review.

306. The panel and Appellate Body reports that Argentina relies on are either not relevant or not conclusive on the question of whether Article 3.1 applies to sunset reviews. Argentina quotes the Appellate Body report in *Thai Angles* to the effect that "the obligations in Article 3.1 apply to *all* injury determinations undertaken by Members."[315] Argentina takes this statement out of context, however. *Thai Angles* did not involve a sunset review, and thus the applicability of Article 3 to Article 11.3 was not before the Appellate Body. The fact that Article 3.1 applies to all "injury" determinations does not mean that it also applies to all "continuation or recurrence of injury" determinations.

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[315] Argentina First Submission, para. 234, quoting from *Thai Angles (AB)*, para. 114 (emphasis added by Argentina).

307. Argentina relies also on *US - Japan Sunset*, but as Argentina itself acknowledges, the panel made no definite finding in that report concerning the applicability of the provisions of Article 3 to sunset reviews under Article 11.3.[316] Finally, Argentina relies on the Appellate Body report in *Hot-Rolled Steel from Japan.*[317] This report discusses the relevance of Article 3.1 to the more detailed obligations in the rest of Article 3, and it elaborates on the meaning of the terms "positive evidence" and "objective examination," but it does not address the question of the applicability of the provisions of Article 3 to Article 11 (nor could it as the dispute did not involve a sunset review). There is no merit to Argentina's suggestion that any of the cited WTO reports supports the applicability of Article 3 disciplines to sunset reviews.

2. The ITC's Sunset Determination Was Consistent with Article 3.1, Because It Was Based on a Proper Establishment of the Relevant Facts, an Unbiased and Objective Evaluation of Those Facts, and Positive Evidence

308. The United States recognizes that an authority's establishment of the facts in a sunset review must be "proper," that the evaluation of those facts must be "unbiased and objective,"[318] and that the determination of whether expiry of the duty would be likely to lead to continuation or recurrence of injury should be based on positive evidence.[319]

309. Argentina argues that the ITC failed to conduct an "objective examination" based on "positive evidence" in accordance with Article 3.1. As explained above, Article 3.1 does not apply to sunset reviews. Nonetheless, the ITC's sunset determination was based on a proper establishment of the relevant facts and an unbiased and objective evaluation of those facts, was based on positive evidence, and, accordingly, effectively satisfies the requirements of Article 3.1, were that provision applicable.

310. The Appellate Body has explained that an objective examination is one that is made in "an unbiased manner, without favoring the interests of any interested party, or group of interested parties"[320] and that "positive evidence" relates to the "quality of the evidence" such that it must be "of an affirmative, objective and verifiable character, and that it must be credible."[321] As discussed below, the ITC carefully reviewed an extensive array of factors and evidence relative to the likely volume, price effect and impact of dumped imports on the domestic industry. Argentina has failed

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[316] Argentina First Submission, paras. 235 and 239.
[317] Argentina First Submission, paras 234 and 237, discussing *US - Hot-Rolled Steel.*
[318] AD Agreement, Article 17.6(i).
[319] *US–Japan Sunset*, para. 7.177.
[320] *US - Hot-Rolled Steel*, para. 193; *EC – Pipe Fittings*, para. 132.
[321] *US – Hot-Rolled Steel,* para. 192; *EC – Pipe Fittings*, para. 132.

to show that the ITC's determination was biased in favor of any interested party or that the quality of the evidence considered was compromised in any way.[322]

311. Indeed, the Argentine respondent's arguments before the ITC in the sunset proceeding did not involve claims of bias or any flaw in the quality of existing evidence. That the ITC may have attributed a different weight or meaning to record evidence than the Argentine respondent would have preferred, does not go to whether the ITC conducted an "objective" examination based on "positive" evidence.[323]

312. Argentina's claims with regard to the likely volume of imports, likely price effects of imports, and likely adverse impact of imports are discussed in turn below.

a. The ITC's Findings on the Likely Volume of Imports

313. Argentina challenges the ITC's finding that the volume of imports of OCTG casing and tubing would be likely to increase significantly in the event of revocation of the order. Before addressing Argentina's specific arguments, it may be useful to review the basis for the ITC's finding.

314. The ITC first reviewed its findings as to the volume of imports in its original injury determination. In that determination, the ITC found that the rate of increase in the volume of cumulated subject imports was far greater than the overall increase in consumption between 1992 and 1994. The ITC also found that the market share of subject imports by both volume and value rose significantly, nearly doubling from 1992 to 1994, and that domestic producers' market share declined substantially.

315. The ITC noted that after the antidumping duty orders went into effect, subject imports decreased, but remained a factor in the U.S. market. The ITC found that while current import volume and market share of subject imports was substantially below the levels of the original investigation, current levels likely reflected the restraining effects of the orders.

316. The ITC considered foreign producers' operations not just with respect to OCTG casing and tubing, but with respect to all pipe and tube products produced on the same machinery and equipment as casing and tubing.[324] It did so because it had found that pipe and tube producers in

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[322] Indeed, the ITC made a negative likelihood determination with respect to drill pipe, resulting in the partial revocation of the antidumping duty order on OCTG from Argentina.

[323] *Cf. EC – Pipe Fittings*, para. 128 (stating, in the context of whether the panel made an "objective" and "unbiased" review pursuant to AD Agreement Article 17.6(i), that it is "not sufficient for [the complaining party] simply to disagree with the Panel's weighing of the evidence" and that a panel does not err in declining "to accord the evidence the weight that one of the parties sought to have accorded to it") (internal quotations and footnotes omitted).

[324] ITC Report at 17.

the subject countries produced a variety of other tubular products in addition to OCTG (such as standard, line, and pressure pipe, mechanical tubing, pressure tubing, and structural pipe and tubing) on the same equipment in the same production facilities. These producers thus could easily shift production away from other tubular products toward production of OCTG and vice versa. Argentina does not challenge this finding. The ITC also found that of all the tubular products that could be produced in these facilities, OCTG commanded among the highest prices in the market, and producers thus had an incentive to make as much OCTG as possible in relation to other products.[325] Again, Argentina does not challenge this finding.

317. The ITC found there to be substantial available capacity in the subject countries for increasing exports of casing and tubing to the United States.

318. With respect to producers in Japan, the ITC noted that in the original investigations, the import volume, market share, and production capacity of casing and tubing from Japan were the largest of the subject countries. During the original investigation, Japanese producers had reported excess capacity. Only one of the four Japanese producers identified in the original investigation participated in the sunset review. (The ITC noted that another of the four original producers, Nippon, may have closed its OCTG plant). The participating producer, NKK, apparently represented a lesser share of total Japanese production. The ITC noted the reported capacity of NKK, and taking into account the fact that other Japanese producers chose not to provide the ITC with data, concluded that there was significant available capacity among other Japanese producers.[326]

319. With respect to producers in Korea, the ITC took note of their unused capacity and compared it in size to total U.S. consumption.[327]

320. With respect to producers in the other subject countries (Argentina, Italy and Mexico), the ITC recognized that their "recent . . . capacity utilization rates represent a potentially important constraint on the ability of these subject producers to increase shipments of casing and tubing to the United States."[328]

321. Despite the apparently high capacity utilization rates of producers in Argentina, Italy and Mexico, the ITC found that these producers, and the producers in Japan and Korea, would have incentives to devote more of their productive capacity to producing and shipping more casing and tubing to the U.S. market, for the following reasons.

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[325] ITC Report at 16.
[326] ITC Report at 18.
[327] ITC Report at 19.
[328] ITC Report at 19.

322. First, the ITC found that the alliance of five foreign producers known as Tenaris[329] would be likely to have a strong incentive to expand its presence in the United States if the orders were revoked. The ITC's analysis of this issue is worth quoting in full:[330]

> Tenaris is the dominant supplier of OCTG products and related services to all of the world's major oil and gas drilling regions except the United States. Tenaris states that it is the only entity that can serve oil and gas companies on a global basis, and that it seeks worldwide contracts with such companies. Many of Tenaris' existing customers are global oil and gas companies with operations in the United States.[124] While the Tenaris companies seek to downplay the importance of the U.S. market relative to the rest of the world, they acknowledge that it is the largest market for seamless casing and tubing in the world. Given Tenaris' global focus, it likely would have a strong incentive to have a significant presence in the U.S. market, including the supply of its global customers' OCTG requirements in the U.S. market.[126]
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> [124] Tenaris argues that the global oil and gas companies with which it has business outside the United States represent only 12-14 percent of U.S. oil and gas rigs. TAMSA Posthearing Br. Exhibit 3. The domestic industry asserts that these firms have a substantially greater U.S. presence. Domestic Producers' Prehearing Br. at 46. We find that these global companies have a significant U.S. presence using either estimate.
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> [126] As described above, we do not find that Tenaris' preference to sell directly to end users as opposed to distributors is likely to limit significantly its participation in the U.S. market.

323. The second reason that the ITC found that the subject producers would have an incentive to devote more of their capacity to shipping casing and tubing to the U.S. market is that casing and tubing were among the highest valued pipe and tube products, generating among the highest profit margins.[331] The third factor (related to the second) that the ITC relied on is that prices for casing and tubing on the world market were significantly lower than prices in the United States.[332]

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[329] The members of Tenaris are: Siderca in Argentina, Dalmine in Italy, TAMSA in Mexico, NKK in Japan, and Algoma in Canada. The ITC found that the Tenaris companies operate as a unit, submitting a single bid for contracts to supply OCTG products and related services; and that Tenaris' customer base includes large multi-national oil and gas companies, many of which have operations in the United States. ITC Report at 16.

[330] ITC Report at 19.

[331] ITC Report at 19.

[332] ITC Report at 19-20.

324. Fourth, the ITC found that subject country producers also faced import barriers in other countries, or on related products. The ITC noted that: (i) Argentine, Japanese, and Mexican producers were subject to antidumping duty orders in the United States on seamless standard, line, and pressure pipe (which are produced in the same production facilities as OCTG); (ii) Korean producers were subject to import quotas on welded line pipe shipped to the United States and U.S. antidumping duty orders on circular, welded, non-alloy steel pipes; and (iii) Canada imposed an antidumping duty of 67 percent on casing from Korea.[333]

325. The fifth reason that the ITC found that the subject producers would have an incentive to devote more of their capacity to shipping casing and tubing to the U.S. market is that industries in at least some of the subject countries were heavily export-dependent. The ITC noted that Japan and Korea in particular had very small home markets and depended nearly exclusively on exports.[334]

326. Argentina argues that the ITC's analysis of the likely volume of imports is flawed in three respects. None of Argentina's arguments stand up to scrutiny.

327. First, Argentina argues that there was no evidence that Tenaris could re-orient to the United States production that was committed under existing contracts.[335] The record in the OCTG sunset review, however, plainly supports the ITC's finding. As an initial matter, the ITC found – and Argentina does not dispute – that "Tenaris is the dominant supplier of OCTG products and related services to all of the world's major oil and gas drilling regions except the United States."[336] As the only major market not already dominated by Tenaris, the United States represented the best growth opportunity for the Tenaris producers. Given that the United States was by far the largest market for OCTG,[337] Tenaris had a strong incentive to increase its share of the U.S. market.[338]

328. Tenaris's current contracts with its customers also supported this conclusion. Tenaris described itself as the only entity that could serve oil and gas companies on a global basis, and stated that it sought worldwide contracts with such companies.[339] In fact, the Tenaris producers already had contracts with global oil and gas companies that covered all operations outside the

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[333] ITC Report at 20.

[334] ITC Report at 20.

[335] First Submission of Argentina, para. 244.

[336] ITC Report at 19 (emphasis added).

[337] *Id*. The director of one of the largest distributors of OCTG in the United States testified at the ITC hearing that: "[t]he United States is half the world for the purposes of OCTG and I can guarantee you that none of these producers has overlooked that fact." Transcript of U.S. International Trade Commission Hearing (May 8, 2001) ("Hearing Tr.") at 55 (Mr. Stewart, Hunting Vinson) (Exhibit US-20).

[338] The chief executive officer of one of the world's largest distributors of OCTG stated at the ITC hearing: "I know that [Tenaris] had been pushing for more North American business and is especially eager to get into Alaska. It is simply not imaginable that [Tenaris] or the other subject companies would stay out of the United States which buys as much OCTG as the rest of the world combined and has the highest prices." Hearing Tr. at 56 (Mr. Chaddick, Sooner, Inc.) (Exhibit US-20).

[339] ITC Report at 19.

United States.[340] Tenaris's own desire for worldwide contracts with its existing customers – which could be satisfied only by contracts that covered the world's largest market for OCTG – constituted a very strong incentive to increase U.S. shipments.[341] While Argentina claims that the ability of the subject producers to increase shipments was limited by contracts, many of those contracts were with the very end users most eager to see subject imports enter the U.S. market.[342] Indeed, testimony at the hearing indicated that customers already buying OCTG from the subject producers would immediately import the subject product if these orders were revoked.[343]

329. Perhaps most importantly, the record in the ITC's review showed that "prices for casing and tubing on the world market are significantly lower than prices in the United States."[344] Indeed, one major distributor testified that Tenaris "could dramatically undersell the going price in the United States and still get greater returns than they currently do from their international sales."[345] This price gap represents a very strong incentive not only to increase shipments to the United States, but to shift sales from other markets to serve U.S. customers.

330. Second, Argentina argues that the ITC could point to only one trade barrier in third country markets, the 67 percent dumping duty in Canada against imports from Korea.[346] Argentina appears to overlook the fact that the ITC examined import barriers that the producers of casing and tubing faced in other countries and on related products (lower-priced products that were produced in the same facilities as casing and tubing) in the United States. As detailed above, the ITC took into consideration that OCTG producers in four of the five countries subject to the sunset review at issue (Argentina, Japan, Korea, and Mexico) faced import restrictions in the United States on a variety of other pipe and tube products.[347] There was clearly ample "positive evidence" that the existence of

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[340] The president and chief executive officer of one of the largest distributors of OCTG in the United States testified at the ITC hearing that: "[m]any of these end users already have single source deals for international supply and they very much want to extend these arrangements to the United States." Hearing Tr. at 59 (Mr. Ketchum, Red Man Pipe and Supply) (Exhibit US-20).

[341] The director of one of the largest distributors of OCTG in the United States testified at the ITC hearing that: "[t]hey [the Tenaris companies] are already positioning themselves to serve as global suppliers to the major end users and they know that you just cannot do that if you are not in this market."). Hearing Tr. at 55 (Mr. Stewart, Hunting Vinson) (Exhibit US-20).

[342] This director testified that "[m]ost of the major end users already purchase from these subject producers internationally and the end users are unwavering in their desire to see the extremely low priced OCTG that they get internationally extended to the U.S. market." *Id*. (Exhibit US-20).

[343] The president and chief executive officer of one of the largest distributors of OCTG in the United States testified at the ITC hearing that: "I recently spoke with a major end use[r] who told me that he could get a far lower price from his international supplier which happened to be one of the foreign producers subject to the orders here. He also said that if these orders were revoked, he would immediately switch to the same foreign producer to supply his needs." Hearing Tr. at 58 (Mr. Ketchum, Red Man Pipe and Supply) (Exhibit US-20).

[344] ITC Report at 19 (emphasis added).

[345] Hearing Tr. at 56 (Mr. Chaddick) (Exhibit US-20).

[346] Argentina First Submission, para. 245.

[347] ITC Report page 20

import barriers tended to support a conclusion that increased exports would be likely to enter the U.S. market.

331. Third, Argentina attacks the ITC's finding that foreign producers had an incentive to export OCTG casing and tubing to the United States because prices in the United States were significantly higher than in other markets. Specifically, Argentina contends that the ITC's finding of a price differential was based "on anecdotal reports from its hearing and not on any independent investigation."[348] This statement completely misrepresents the ITC's analysis of this issue. In fact, the "anecdotal reports" in question were sworn statements by some of the largest OCTG distributors in the world.[349] (Witnesses who testify at ITC hearings in sunset reviews must swear to the truthfulness of their testimony and are subject to criminal prosecution for perjury.) Furthermore, the ITC specifically stated that it considered – but was not persuaded by – the arguments of foreign producers that these price differences were exaggerated.[350] In short, the evidence shows that the ITC did conduct an independent investigation of this issue by considering the relevant evidence submitted by both parties – and that this evidence demonstrated the existence of a substantial price gap between the United States and the rest of the world.

332. Together, the evidence concerning the import volume trends in the original investigation, the importance of the U.S. market, Tenaris's desire for global contracts, the desire of its end users to purchase imports in this market, the evidence of import barriers on OCTG and related products, and the price gap between world markets and the United States strongly supports the ITC's finding that subject producers had strong incentives to shift into this market and that the subject imports were likely to increase in volume. Argentina's arguments to the contrary are without merit.

b. The ITC's Findings on the Likely Price Effects of Imports

333. Argentina challenges the ITC's finding that revocation of the orders would likely result in negative price effects.[351] Before addressing Argentina's specific arguments, it may be useful to review the basis for the ITC's finding.

334. The ITC determined that "in the absence of the orders, casing and tubing from Argentina, Italy, Japan, Korea, and Mexico likely would compete on the basis of price in order to gain additional market share."[352] The ITC further determined that "such price-based competition by

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[348] Argentina First Submission, para. 246.

[349] *See, e.g.*, Hearing Tr. at 54 (Mr. Stewart) ("International prices are significantly below those prevailing in the United States; in most cases 20 to 25 percent below.") (Exhibit US-20); *id.* at 56 (Mr. Chaddick) ("{Tenaris's} prices in international {markets} have been as much as 40 percent lower than United States prices.").

[350] ITC Report at 20. As noted above, the "positive evidence" standard does not preclude the existence of any evidence that runs counter to an investigating authority's conclusion. If it did, the standard of review for panels in Article 17.6(i) of the AD Agreement would be superfluous.

[351] Argentina First Submission, paras. 247-251.

[352] ITC Report at 21.

subject imports likely would have significant depressing or suppressing effects on the prices of the domestic like product."[353] These conclusions rested on a number of findings, including:

- the likely significant volume of imports;
- the high level of substitutability between the subject imports and the domestic like product;
- the importance of price in purchasing decisions;
- the volatile nature of U.S. demand;
- the underselling by the subject imports in the original investigations and the current review period.[354]

335. Argentina has not seriously challenged any of these findings. As demonstrated above, Argentina's contentions concerning the likely volume of imports are without merit. Argentina has not even challenged the ITC's findings with respect to substitutability. Argentina's remaining arguments are groundless and should be rejected.

336. With respect to the significance of price in purchasing decisions, Argentina contends that "{p}rice is an important, although not determinative, factor to purchasers."[355] The ITC, however, never found that price was a "determinative" factor; it simply held that "price is a very important factor in purchasing decisions."[356] Given that Argentina concedes that price is an "important" factor, it would appear that Argentina has no basis to complain about this finding. In any event, the record plainly showed that purchasers identified "price" as the most important factor in purchasing decisions far more often than any other factor except for "quality," and that price far outstripped quality among purchasers ranking their second and third most important factors.[357] Furthermore, given that all parties agreed that subject casing and tubing was interchangeable with the domestic like product,[358] and that customers would accept any high-quality, API-certified product regardless of origin,[359] the record demonstrates that quality would be less of an issue in purchasing decisions, increasing the importance of price. These facts clearly support the ITC's finding on the importance of price.

337. As for the volatile nature of demand, Argentina contends that the ITC failed to explain why this factor was significant, and that the ITC did not cite any evidence that demand for OCTG was unusually volatile during the period examined.[360] These arguments are unavailing. Certain

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[353] *Id.*
[354] *Id.*
[355] Argentina First Submission, para. 250.
[356] ITC Report at 21.
[357] *Id.* at II-17.
[358] *Id.* at 12.
[359] *Id.*
[360] Argentina First Submission, para. 249.

forecasts showed that demand for OCTG was likely to remain strong in the near future.[361] Nevertheless, all forecasts are by their nature imprecise and such forecasts are inherently suspect given the volatility of the forces affecting oil and gas supply and demand globally.[362] Thus, as it considered the likely effect of revoking these orders, the ITC could not assume that strong levels of demand would insulate domestic producers from the negative price effects of subject imports.[363]

338. As for underselling by imports, Argentina's complaints relate solely to the ITC's discussion of underselling during the current review period.[364] But the ITC itself placed little weight on this point, as it recognized that the orders had significantly reduced the volume of subject imports.[365] What was much more significant to the ITC – and what Argentina completely ignores in its submission – is the fact that underselling by subject imports during the original investigations drove down U.S. prices.[366] This evidence, which Argentina has not refuted or even challenged, strongly supports the ITC's finding on price effects, for it shows the effect of subject imports on U.S. prices in the absence of antidumping and countervailing duty orders.

339. Finally, Argentina maintains that the ITC failed to recognize that domestic prices increased at the end of the period examined, and that it is "completely illogical" to conclude that, where prices are increasing, imports will enter at lower prices and cause injury.[367] The record in the ITC's review refutes these claims. First, the ITC did recognize that domestic prices rose at the end of the period of review – although they remained below 1998 levels.[368] Second, evidence from the original investigation strongly supports a finding that imports can drive down domestic prices even during a period of strong demand.[369] Thus, it was completely logical for the ITC to conclude that whatever current prices may be, imports would drive down or suppress the price of the domestic like product if the orders were revoked.

340. In conclusion, Argentina's criticisms of the ITC's findings with respect to price effects are without merit. Assuming *arguendo* that Article 3.1 applies to sunset reviews under Article 11.3, the ITC's findings on this point should be found to be consistent with the requirements of Article 3.1.

c. The ITC's Findings on the Likely Impact of Imports

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[361] ITC Report at 15.

[362] *Id*.

[363] It should also be noted that there was no need for the ITC to demonstrate that the OCTG market had been "unusually volatile"; the ITC made clear in its discussion of the point that OCTG market is always volatile. Id.

[364] Argentina First Submission, para. 249.

[365] ITC Report at 21.

[366] *Id*. at 20-21.

[367] Argentina First Submission, para. 249..

[368] ITC Report at 21 ("For most products, domestic prices peaked in 1998, fell significantly in 1999, then rebounded in 2000.").

[369] *Id*. at 22 ("{I}n the original investigations, subject imports captured market share and caused price effects despite a significant increase in apparent consumption in 1993 and 1994 as compared to 1992.").

341. Argentina challenges the ITC's finding that revocation of the orders would likely result in an adverse impact on the domestic industry.[370]

342. The ITC found that the condition of the domestic industry had improved since the antidumping duty orders had been imposed, and that the current condition of the domestic industry was "positive."[371] Nonetheless, the ITC found that revocation of the orders likely would lead to a significant increase in the volume of subject imports, which likely would undersell the domestic like product and significantly depress or suppress the domestic industry's prices, leading to a significant adverse impact on the domestic industry. The ITC noted that in the original investigation, a significant increase in demand had not precluded subject imports from gaining market share and having adverse price effects.

343. Argentina argues essentially that the ITC's findings as to the likely impact of imports on the domestic industry are flawed because of the alleged deficiencies in the findings regarding the likely volume and price effects of imports, on which the ITC's impact finding rests. Argentina's arguments concerning volume and price effects are without any merit, for the reasons discussed above, and its claim regarding the adverse impact finding should be rejected for the same reasons.

I. The ITC Sunset Determination on OCTG from Argentina Is Not Inconsistent with Article 3.4 of the AD Agreement

344. Argentina claims that the ITC acted inconsistently with Article 3.4 of the AD Agreement by failing to evaluate all of the economic factors enumerated therein in its OCTG sunset determination.[372] Article 3.4 provides:

> The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not

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[370] Argentina First Submission, paras. 252-254.

[371] ITC Report at 22. Argentina's recitation of the evidence which the ITC reviewed in reaching this conclusion is somewhat selective, and does not reveal the extreme volatility in the domestic industry's performance over the period that the ITC examined. For example, the ITC noted that domestic producers' shipments fluctuated dramatically during the period of review, declining from 1,410,088 short tons in 1998 to 1,055,770 short tons in 1999, and rising again to 2,005,644 short tons in 2000. ITC Report at 22. Financial results were similarly volatile: from 1995 to 1997 operating income increased from a loss of $0.6 million to a profit of $174 million, before declining to a loss of $129 million in 1999, and then rising to a profit of $130 million in 2000. *Id.* Given this volatility in the domestic industry's performance, it is inaccurate to speak of "positive trends," as Argentina does. Argentina First Submission, para. 254.

[372] Argentina First Submission, paras. 255-266.

> exhaustive, nor can one or several of these factors necessarily give decisive guidance.

(Emphasis added).

345. As explained above, the provisions of Article 3 do not govern sunset reviews. Therefore, the ITC sunset determination in OCTG from Argentina cannot be found to be inconsistent with Article 3.4.

346. In addition to the reasons given above regarding Article 3 in general, there are further textual indications in Article 3.4 as to why it specifically is not applicable to sunset reviews. There may be no "dumped imports" at the time of a sunset review, and consequently there may be no "impact" for the investigating authority to examine. There also may not be any "actual and potential" declines evident or reflected in the information before the investigating authority at the time of the sunset review, by virtue of the absence of imports. In short, the obligations described in Article 3.4 cannot practicably be applied to all sunset reviews, and certainly could not be applied to sunset reviews in the same systematic and comprehensive manner that has been required in original dumping investigations.

347. Nevertheless, the United States notes that the report of the ITC staff in the OCTG sunset review, which is appended to the ITC published determination and which the ITC adopted,[373] presented detailed information concerning each of the Article 3.4 factors, as follows:

[373] Transcript of June 15, 2001 ITC Meeting at 5 (Exhibit US-21).

Factor (* indicates that the ITC discussed this factor specifically)	**Location in ITC Report**
Declines (actual or potential) in	
Sales *	p. III-6, Table III-9
Profits *	p. III-6, Table III-9
Output *	p. III-1, Table III-1
Market Share *	p. IV-3, Table IV-1
Productivity	p. III-4, Table III-7
Return on Investments	p. III-6, Table III-9
Capacity Utilization *	p. III-1, Table III-1
Factors Affecting Domestic Prices	Part V
Margin of Dumping	p. V-1
Actual or Potential Negative Effects on:	
Cash Flow	p. III-6, Table III-9
Inventories	p. III-4, Table III-5
Employment	p. III-4, Table III-7
Wages	p. III-4, Table III-7
Growth	p. III-6, Table III-9
Ability to Raise Capital or Investments *	p. III-13, Table III-32

J. The ITC Sunset Determination on OCTG from Argentina Is Not Inconsistent with Article 3.5 of the AD Agreement

348. Argentina argues that the ITC failed to comply with the obligations of Article 3.5 to analyze any causal link between subject imports and injury to the domestic industry, and that it failed to "separate and distinguish the potentially injurious effects of other causal factors from the potential effects of the dumped imports."[374]

349. Article 3.5 provides:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

(Emphasis added).

350. As explained above, the provisions of Article 3 are not applicable to sunset reviews. In addition to the reasons given above, there are further textual indications in Article 3.5 as to why it specifically is not applicable to sunset reviews.

351. First, Article 3.5 refers to the "dumped imports and speaks of such imports in the present tense as "causing injury." However, in a sunset review there may be no dumped imports. As a result of the order, such imports may have decreased or exited the market altogether, or if they have maintained their presence in the market, they may be priced higher than they were during the original investigation, when they were entering the market unencumbered by any additional duties.

352. Second, Article 3.5 refers to existing "injury" and describes an existing causal link between dumped imports and that injury. However, in a sunset review, with an antidumping order in place, there may be no current injury or causal link; indeed, it would be surprising if there were given the

[374] Argentina First Submission, paras. 267-269.

remedial effect of an antidumping duty order. This is implicit in the reference in Article 11.3 to the "continuation or recurrence of injury."

353. Third, Article 3.5 refers to "any known factors other than the dumped imports which at the same time are injuring the domestic industry." (Emphasis added). In a sunset review, where the focus is on evaluating the likely effect of imports upon expiry of the duty (*i.e.*, at some point in the future), other factors "which at the same time are injuring the domestic industry" will not be "known" to the investigating authority.

354. In sum, it is clear from the text of Article 3.5 that the obligations contained in that article does not extend to sunset reviews.

355. Furthermore, the United States notes that even if Article 3.5 were applicable, Argentina has not identified which "other causal factors" the ITC should have considered. Argentina asserts that the ITC failed to consider "other characteristics of the market (*e.g.*, expected changes in demand)" in the section of the determination discussing the likely impact of revocation on the domestic industry.[375] The ITC described a number of conditions of competition that informed its analysis in the sunset review.[376] These included a review of forecasts of future demand, which suggested that demand would remain strong.[377] Strong demand is, of course, not likely to be "another cause" of injury.

K. The Time Frame in Which Injury Would Be Likely to Recur

1. The U.S. Statutory Provisions as to the Time Frame in Which Injury Would Be Likely to Recur Are Not Inconsistent With Articles 11.3 and 3 of the AD Agreement

356. Argentina claims that the U.S. statutory requirements contained in Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930, as amended, are inconsistent "as such" with AD Agreement Articles 11.3 and 3.[378] Sections 752(a)(1) and 752(a)(5) instruct the ITC in a sunset review to determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" and to "consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time."[379]

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[375] Argentina First Submission, para. 269.

[376] ITC Report, pages 14-16.

[377] ITC Report, pages 15-16.

[378] Argentina First Submission, paras. 270-275. In the heading preceding paragraph 270 of its submission (heading "C') and in the Executive Summary of its claims (para. 41) Argentina asserts that these U.S. statutory provisions are also inconsistent with AD Agreement Article 11.1.

[379] 19 U.S.C. §§ 1675a(a)(1), 1675a(a)(5) (Exhibit ARG-1).

357. Argentina misconstrues Article 11.3. Article 11.3 does not specify the time frame relevant to a sunset inquiry. Argentina's suggestion that Members are required to assess the likelihood of recurrence "upon revocation of the order"[380] or "upon expiry of the order"[381] are without any basis in the text of the Agreement. Article 11.3 only requires a determination of whether revocation "would be likely to lead to continuation or recurrence of injury." At most, the words "to lead to" suggest that the recurrence of injury need not be immediate – that it need not occur "upon" revocation of the order.

358. In the absence of any specific provision in Article 11.3, Members remain free to determine under their own laws and procedures the time frame relevant in sunset inquiries. It is inherently reasonable for the United States to consider the likelihood of continuation or recurrence "within a reasonably foreseeable time" and that the "effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time." The legislative history underlying the U.S. statutory provisions provides the ITC with guidance on the factors that it should consider in deciding what the appropriate time-frame should be in any particular case.[382]

359. Argentina also seeks to invoke provisions of Article 3 that do not apply to sunset reviews. Both Article 3.7 and 3.8 by their terms pertain to threat determinations, not to sunset reviews, (notwithstanding Argentina's attempt to extend the application of these provisions to all "cases involving future injury").[383]

360. In sum, the AD Agreement is silent on the question of the relevant time frame within which injury would be likely to recur. This is left to the discretion of Members, and the standard adopted in U.S. law is reasonable. As such, it cannot be found to be inconsistent with Article 11.3 or any provision of Article 3 (assuming *arguendo* that Article 3 applies to sunset reviews).

2. The ITC's Application of the Statutory Provisions as to the Time Frame in Which Injury Would Be Likely to Recur Was Not Inconsistent With Articles 11.3 and 3 of the AD Agreement

361. Argentina claims that the ITC's application of the U.S. statutory requirements contained in Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930, as amended, in the sunset review on OCTG from Argentina was inconsistent with AD Agreement Articles 11.3 and 3.[384]

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[380] Argentina First Submission, para. 271.

[381] Argentina First Submission, para. 272.

[382] The SAA, at 887, explains that the factors that the ITC should consider include "the fungibility or differentiation within the product in question, the level of substitutability between the imported and domestic products, the channels of distribution used, the methods of contracting (such as spot sales or long-term contracts), and lead times for delivery of goods, as well as other factors that may only manifest themselves in the longer term, such as planned investment and the shifting of production facilities." (Exhibit US-11).

[383] Argentina First Submission, para. 275.

[384] Argentina First Submission, paras. 276-277.

362. As discussed above in Section IV, this claim is not with the Panel's terms of reference. Nonetheless, there is no substantive merit to Argentina's claim. Because, as explained in the preceding section, Article 11.3 is silent on the time frame relevant to a sunset review and imposes no obligations in this respect, the ITC cannot be found to have acted inconsistently with Article 11.3 or Article 3 by failing to specify the precise period that it considered relevant.

L. The ITC Did Not Act Inconsistently with Any Provision of the AD Agreement by Conducting a Cumulative Analysis in the OCTG Sunset Review

1. The AD Agreement Does Not Prohibit Cumulation in Sunset Reviews

363. Argentina argues that because cumulation is not expressly permitted in Article 11.3, the ITC is prohibited from engaging in a cumulative analysis in a sunset review.[385] Argentina's position turns elementary principles of treaty interpretation on their head. The treaty interpreter is to interpret the ordinary meaning of the terms of the treaty in their context and in light of its object and purpose.[386] Accordingly, the genesis of any obligation or right arising under the WTO Agreement is the text of the relevant provision.[387] Absent a textual basis, the rights of Members cannot be circumscribed.

364. Even if a prohibition on cumulation could somehow be inferred from the text of Article 11.3, such a prohibition would be illogical and run counter to the overall object and purpose of the AD Agreement (*i.e.*, to provide a remedy to protect domestic industries from injury caused by dumped imports). The Appellate Body explained the rationale behind the practice of cumulation in investigations in its recent report in *EC - Pipe Fittings*:

> A cumulative analysis logically is premised on a recognition that the domestic industry faces the impact of the "dumped imports" as a whole and that it may be injured by the total impact of the dumped imports, even though those imports originate from various countries. If, for example, the dumped imports from some countries are low in volume or are declining, an exclusively country-specific analysis may not identify the causal relationship between the dumped imports from those countries and the injury suffered by the domestic industry. The outcome may then be that, because imports from such countries could not *individually* be

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[385] Argentina First Submission, paras. 278-287.

[386] *Vienna Convention on the Law of Treaties*, art. 31(1); *United States – Standards for Reformulated and Conventional Gasoline,* WT/DS2/AB/R, Report of the Appellate Body adopted 20 May 1996, Sec. III.B.

[387] *See United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Report of the Appellate Body adopted 6 November 1998, para. 114; *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body adopted 1 November 1996, Sec. G.

identified as causing injury, the dumped imports from these countries would not be subject to anti-dumping duties, even though they are in fact causing injury.[388]

365. In light of the recognition that imports from a group of countries may cumulatively cause injury even though imports from individual countries in this group do not, it would be illogical to require that sunset reviews be conducted only on a country-specific basis. Such a requirement would permit antidumping duties to expire even though the expiry of the duty would be likely to lead to continuation or recurrence of injury.

366. Argentina's arguments in support of its contention that cumulation is prohibited in sunset reviews are unpersuasive. The one reference in the text of Article 11.3 to "the duty" in the singular is not conclusive.[389]

367. Argentina claims that cumulation is inconsistent with "the object and purpose of the sunset provision," which Argentina suggests is the expiry of dumping duties.[390] As a preliminary matter, we note that the relevant principle of treaty interpretation goes to the object and purpose of *the treaty*, and not particular treaty provisions.[391] To the extent that the purpose of Article 11.3 is relevant, Argentina simply misconstrues it. If that purpose were simply to rescind antidumping duties, there would be no need to enquire as to whether expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.

368. Argentina seeks to bolster its argument that cumulation is not permitted in sunset reviews by noting that there is no explicit cross-reference to cumulation or to Article 3.3 in the context of Article 11.[392] This argument has no merit. A cross-reference to an obligation is necessary where the drafters seek to assert a broader obligation. However, there is no need to cross-reference to a permissive authority where a right exists absent its limitation in the Agreement.

369. Argentina's reference to *US - German Steel* and its suggestion that the Appellate Body "understands that the injury analysis in a sunset review is not conducted on a cumulated basis"[393] is entirely unconvincing. The question of whether cumulation was permitted in sunset reviews was not before the Appellate Body. In fact, that dispute related entirely to the Commerce role in sunset reviews.

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[388] *EC-Pipe Fittings*, para. 116.

[389] Contrary to Argentina's assertion in paragraph 282 of its First Submission, Article 11.3 does not refer to "an antidumping duty." Nor does Article 11.3 equate a "duty" with a "measure."

[390] First Submission of Argentina, para. 285.

[391] *Vienna Convention on the Law of Treaties*, Art. 31(1).

[392] Argentina First Submission, para. 284.

[393] Argentina First Submission, para. 286.

370. Finally, Argentina overlooks the fact that cumulation in antidumping investigations was a widespread practice among GATT contracting parties prior to the adoption of Article 3.3 in the Uruguay Round, even though the Tokyo Round Antidumping Code was silent on the subject.[394]

371. In sum, because Article 11.3 is silent on the subject of cumulation, a prohibition on cumulation in sunset reviews should not be read into Article 11.3.

2. The ITC Did Not Act Inconsistently with Article 3.3 of the AD Agreement Because Article 3.3 Does Not Apply to Sunset Reviews

372. Argentina argues that if Articles 3.3 and 11.3 do not preclude cumulation in sunset reviews, then the obligations of Article 3.3 apply so as to render the ITC's cumulative analysis in the Argentina OCTG case inconsistent with the terms of that provision.[395] Argentina's attempts to read the requirements of Article 3.3 into Article 11.3 should be rejected.

373. As explained above, the provisions of Article 3 are not applicable to sunset reviews. Moreover, Argentina's position is directly at odds with recent panel and Appellate Body reports construing the meaning of Article 3.3.

374. As the panel in *US – Japan Sunset* concluded, while AD Agreement Article 3.3 establishes certain prerequisites for the conduct of a cumulative injury analysis in antidumping investigations, it does not apply to Article 11.3 reviews.[396] Article 3.3 provides that:

> Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

375. By the plain meaning of Article 3.3's text – "subject to anti-dumping *investigations*" – the limitations on cumulation there imposed apply only to investigations.[397] Article 11 contains no cross-reference to Article 3 that would render it applicable to Article 11 reviews. Moreover, Article 3 does not cross-reference Article 11. The lack of similar cross-references with respect to

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[394] *See, e.g.*, THE GATT URUGUAY ROUND, A NEGOTIATING HISTORY (1986-1992), (T. Stewart, Ed.) at 1475-1478, 1594, and 1598 (Exhibit US-22).

[395] Argentina First Submission, paras. 288-291.

[396] *US – Japan Sunset*, para. 7.102.

[397] *See US – Japan Sunset,* paras. 7.97-7.98.

Articles 3 and 11 provide contextual support that Article 3's negligibility requirement is inapplicable to Article 11 reviews.[398]

376. The reference in Article 3.3 to Article 5.8 likewise makes clear that the requirements of Article 3.3 are inapplicable to Article 11 reviews. The text of Article 5.8 limits its application to antidumping investigations.[399] As the panel recently stated in *US – Japan Sunset*: "There is . . . no textual indication in Article 5.8 that would suggest or require that the obligation in Article 5.8 also applies to sunset reviews. Nor is there any such suggestion or requirement in the other provisions of Article 5."[400]

377. Moreover, there is no reference in Article 11.3 to Article 5 (in contrast to Article 11's reference to Articles 6 and 8). In reversing a panel's determination that the *de minimis* threshold applicable to countervailing duty investigations applied to sunset reviews, the Appellate Body stated:

> [T]he technique of cross-referencing is frequently used in the *SCM Agreement*. ... These cross-references suggest to us that, when the negotiators of the *SCM Agreement* intended that the disciplines set forth in one provision be applied in another context, they did so expressly. In light of the many express cross-references made in the *SCM Agreement*, we attach significance to the absence of any textual link between Article 21.3 reviews and the *de minimis* standard set forth in Article 11.9 [of the SCM Agreement].[401]

378. More recently, the panel in *US – Japan Sunset* rejected Japan's contention that the negligibility standard of Article 5.8 applies to Article 11.3 reviews:

> [A] textual interpretation of Article 3.3 allows an examination consistent with our examination relating to the alleged application to sunset reviews of the *de minimis* standard in Article 5.8. That is, on the basis of our textual analysis of Article 5 made in reaching our finding that the *de minimis* standard of Article 5.8 does not apply to sunset reviews (*supra,* para. 7.70), we consider that the text of Article 5

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[398] *See US – Japan Sunset*, paras. 7.95, 7.98; *cf.*, *id*.. paras. 7.27, 7.68, 7.71 (noting that the lack of cross-reference in AD Agreement Article 11 to the provisions of Article 5 indicate that the drafters did not intend for the provision of Article 5 to apply to sunset reviews); *US – German Steel*, paras. 81 and 105 (noting the same with respect to the parallel provisions in the SCM Agreement).

[399] AD Agreement, Art. 5.8 ("An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible.") (underline added).

[400] *US – Japan Sunset*, paras. 7.70, 7.103.

[401] *US – German Steel,* AB Report, para. 69.

similarly fails to support the proposition that the negligibility standard of Article 5.8 applies to sunset reviews.[402]

379. In addition, the application of Article 5.8's negligibility thresholds would be unworkable in the context of sunset reviews. In sunset reviews, the investigating authorities are tasked with determining *likely* import volumes not only at some point in the future, but also under different conditions, namely a market without the discipline of an antidumping order. Precise numerical thresholds appropriate for characterization of *current* import volumes in investigations of current injury, or immediate threat thereof, are simply not workable for characterizing likely volumes of dumped imports in determinations of whether injury will continue or recur in the future and under different conditions. The predictive nature of sunset reviews suggests a need for a flexible standard for cumulation, rather than the strict numerical negligibility threshold applied in the investigative phase.

380. In sum, because of the express language of both Articles 3.3 and 5.8, the lack of any cross-reference in Article 11.3 to Articles 3.3 or 5.8, findings in recent panel and Appellate Body reports, and the impracticability of applying a strict numerical threshold to likely future import volumes, any restrictions on cumulation contained in Articles 3.3 and 5.8, which might arguably otherwise apply, do not extend to sunset reviews.

[402] *US – Japan Sunset,* Panel Report, para. 7.103.

M. None of the "Measures" Identified by Argentina Is Inconsistent with Article VI of the GATT 1994, Articles 1 or 18 of the AD Agreement, or Article XVI:4 of the WTO Agreement

381. In Section IX of its First Submission, Argentina claims that the measures identified by Argentina in its panel request are inconsistent with Article VI of the GATT 1994, Articles 1, 18.1 and 18.4 of the AD Agreement, and Article XVI:4 of the WTO Agreement.[403] As demonstrated in Section IV.C.5, above, these dependent claims are not within the Panel's terms of reference.

382. In addition, these claims are all dependent claims in that they depend upon a finding of an inconsistency with an obligation contained in some other provision of the AD Agreement. Because, as demonstrated above, none of the "measures" identified by Argentina – either in its panel request or in its First Submission – are inconsistent with provisions of the AD Agreement, they are, by definition, not inconsistent with the provisions making up Argentina's dependent claims. Moreover, with respect to Argentina's "as such" claims, as discussed above, to the extent that the "measures" challenged by Argentina are not "measures" at all or are not "mandatory" measures, there can be no violation of Article 18.4 of the AD Agreement or Article XVI:4 of the WTO Agreement.

383. Finally, to the extent that any of Argentina's dependent claims are based upon claims that, as demonstrated in Section IV, above, are not within the Panel's terms of reference, they must be rejected.

384. Argentina's discussion of its dependent claims, however, raises one additional issue; namely, whether certain Commerce and ITC determinations identified by Argentina as "measures" actually constitute measures for purposes of the AD Agreement and the DSU. One determination which is particularly problematic is what Argentina has referred to as the "Department's Determination to Expedite."[404] During the consultations, the United States explained to Argentina its position that while this determination could be challenged in WTO dispute settlement as part of a challenge to a *bona fide* measure, the Determination to Expedite itself did not constitute a separately challengeable measure. When, in its panel request, Argentina persisted in treating this interlocutory determination as a discrete measure, the United States made its position on this issue clear by means of the following statement to the DSB:[405]

> This Determination to Expedite - which Argentina classified as a "measure" - was in reality nothing more than a preliminary, interlocutory decision made by a

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[403] Specifically, Argentina refers to "[t]he measures identified . . . in its Panel request, including the Department's determination to conduct an expedited review, the Department's Sunset Determination, the Commission's Sunset Determination, the Department's Determination to Continue the Order, and the relevant U.S. laws, regulations, policies and procedures ... ." Argentina First Submission, para. 295.

[404] *See, e.g.*, Argentina First Submission, Section VII.C.1, VII.C.4, and para. 295.

[405] WT/DSB/M/147, para. 33 (Exhibit US-1).

> Department of Commerce official in the course of the sunset review on OCTG from Argentina. Indeed, as indicated in Argentina's panel request, the so-called "measure" was nothing more than an internal Commerce Department memorandum deciding to conduct an expedited review, as opposed to a full sunset review. As such, it was no different than any of the myriad types of decisions made in the course of an anti-dumping investigation or review, such as a decision to conduct onsite verification or not, extend the deadline for a preliminary or final determination, limit the number of exporters involved, etc., etc. Hundreds, perhaps thousands, of discrete preliminary decisions went into what eventually became an anti-dumping measure. However, paragraph 4 of Article 17 of the Anti-Dumping Agreement made clear that only certain specified types of measures could be the subject of a panel proceeding. These did not include preliminary decisions. Accordingly it was clear that Argentina could not challenge this "Determination to Expedite" as a measure in its own right.

385. The United States continues to believe that the Determination to Expedite may be challenged as part of a challenge to a *bona fide* antidumping measure, but that it is not a measure in its own right. In the view of the United States, a contrary position would be a recipe for chaos given the vast number of interlocutory decisions that must be made in the course of an antidumping proceeding. Therefore, in its findings, the Panel should make clear that the Determination to Expedite is not a measure.

VII. CONCLUSION

386. Based on the foregoing, the United States respectfully requests that the Panel reject Argentina's claims in their entirety.

387. In addition, based on the foregoing, the United States respectfully requests that the Panel make the following preliminary rulings:

(a) Because Page 4 of Argentina's panel request fails to conform to the requirements of Article 6.2 of the DSU, the claims set forth on Page 4 are not within the Panel's terms of reference.

(b) Because Sections B.1, B.2 and B.3 of Argentina's panel request do not conform to the requirements of Article 6.2 of the DSU, Argentina's claims in those sections alleging inconsistencies with Article 3 and Article 6 of the AD Agreement are not within the Panel's terms of reference.

(c) Because the following matters were not included in Argentina's panel request, they are not within the Panel's terms of reference:

(i) Argentina's claim that Commerce's sunset review practice, both as such and as applied, is inconsistent with Article 11.3 of the AD Agreement;

(ii) Argentina's claim that 19 U.S.C. §§ 1675(c) and 1675(a)(c), the SAA, and the *Sunset Policy Bulletin*, taken together, establish an irrefutable presumption that is inconsistent with Article 11.3 of the AD Agreement

(iii) Argentina's claim that Commerce's sunset review practice is inconsistent with Article X:3(a) of the GATT 1994

(iv) Argentina's claim that the ITC's application of 19 U.S.C. §§ 1675a(a)(1) and (5) in the sunset review of OCTG from Argentina is inconsistent with Articles 11.3 and 3 of the AD Agreement

(v) Argentina's claim that the U.S. Measures it has identified are inconsistent with Article VI of the GATT 1994, Articles 1 and 18 of the AD Agreement, and Article XVI:4 of the WTO Agreement