ANNEX A-1

FIRST WRITTEN SUBMISSION OF ARGENTINA

15 October 2003

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- In the conduct of the "sunset review" of the anti-dumping measure on Oil Country Tubular

determination, therefore, ended the investigation without the issuance of an anti-dumping order. However, because of transition provisions of US law implementing the Tokyo Round Agreement on Subsidies and Countervailing Measures, the United States did not extend an injury determination to Argentina for the purposes of countervailing duty investigations. The US Department of Commerce (the "Department") determined that Siderca enjoyed a subsidy equal to 0.90 per cent, slightly above the *de minimis* level provided for under US law at the time (0.5 percent). Because the United States did not extend the injury test to Argentina, the Department imposed a countervailing duty ("CVD") order in the amount of 0.90 per cent on exports from Siderca.[6]

13. 1985: After a change in US law regarding the cumulation provision, the US OCTG industry re-filed the anti-

the Department that it was not able to defend the small-

II. FACTUAL BACKGROUND

A. THE ANTI-DUMPING INVESTIGATION GIVING RISE TO THE ANTI-DUMPING DUTY ORDER ON ARGENTINE OCTG

18. The anti-dumping investigation giving rise to the US anti-dumping measure against Argentine OCTG began in 1994 and was completed in 1995. The investigation was initiated prior to the entry into force of the WTO Agreement, but the measure was issued eight months after the entry into force of the WTO Agreement (August 1995). As such, under US law, the investigation was governed by the pre-WTO laws and regulations.

19. The US industry's petition in the original investigation identified Siderca as the on

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United States for consumption in the United States during the review period, and as a result asked that the review be rescinded.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 In all cases, the Department ultimately agreed with Siderca's certification that it made no shipments and therefore rescinded the annual reviews because there were no shipments to review.

B. SUNSET REVIEW OF OCTG FROM ARGENTINA

23. On 3 July 2000, the Department automatically initiated a sunset review of the anti-dumping duty order on OCTG from Argentina, in addition to the sunset reviews of OCTG from Italy, Japan, Korea, and Mexico.[19] The Petitioners responded to the initiation notice and filed substantive responses as well as briefs arguing that revocation of the order would be likely to lead to recurrence or continuation of dumping, and that the anti-dumping duty order should be continued.[20]

24. Siderca also responded to the initiation notice and filed a complete substantive response arguing that revocation of the order would not be vocation of the order woJ substa2j 211 Tj 60.j 297 0 TD -0.

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expedited (120 day) sunset review (as provided for at section 751(c)(3)(B) of the Act and at section 351.218(e)(1)(ii)(C) of the Department's regulations).[23]

26. In its *Issues and Decision Memorandum*, dated 31 October 2000 (and incorporated by

that (1) there were significant differences between US and world-market prices for casing and tubing, with US prices being consistently higher, and (2) foreign producers faced significant import barriers in third-country markets.[39]

36. The Commission made several findings on the issue of the importance of price in purchasing decisions. Responding purchasers ranked quality as their prime purchasing criterion just as frequently as price, and product availability was considered as important to purchasers just as frequently as price.[40] The Commission acknowledged that there was no clear trend in responses to the question of

the future. Speculation about market conditions several years into the future is inconsistent with the requirements of Article 11.3 and Article 3 of the Anti-Dumping Agreement (see section VIII.C.1);

- The principal obligation of Article 11.3 of the Anti-Dumping Agreement requires that anti-dumping measures be terminated after five years of imposition, unless the authorities satisfy the requirements for maintenance of the measure. The Department's consistent practice in sunset review cases demonstrates an irrefutable presumption employed by the Department that dumping is likely to continue or recur in the event of termination. This presumption violates Article 11.3. To date there have been 217 sunset reviews conducted by the Department where the domestic industry has participated in the sunset proceeding. The Statement of Administrative Action ("SAA") and the Department's *Sunset Policy Bulletin* establish the irrefutable presumption employed by the Department in these cases. In 100 per cent of the Department's sunset reviews in which the domestic industry participated the Department determined that dumping would be likely to continue or recur.[49] In these cases no respondent has been able to overcome the criteria prescribed by the SAA and the *Sunset Policy Bulletin* for termination[50] (see section VII.B.);

B. THE DEPARTMENT'S SUNSET REVIEW WAS INCONSISTENT WITH US WTO OBLIGATIONS

- The Department's determination to conduct an expedited sunset review, and its conduct of an expedited review, on the basis that Siderca's OCTG exports to the United States were less than 50 per cent of the total OCTG exports from Argentina to the United States, were inconsistent with the requirements of Articles 11.3, 11.4, 6.1, 6.2, 6.8, and Annex II of the Anti-Dumping Agreement. Notwithstanding Siderca's full cooperation and submission of a complete substantive response consistent with the Department's regulatory requirements, the Department deemed Siderca's response to be inadequate solely on the basis of import data and, hence, denied Siderca the opportunity to defend its interest (see section VII.C.1);

- The Department's determination to conduct an expedited sunset review, and its conduct of an expedited review, were inconsistent with US obligations under the Anti-Dumping Agreement. The Department rendered a determination of likelihood of continuation or recurrence of dumping without any analysis, in violation of Article 11.3 of the Anti-Dumping Agreement, which requires the authority to conduct a review in order to make a determination of whether termination of the duty would be likely to lead to continuation or recurrence of dumping and injury. In the absence of the requisite analysis and a determination based on positive evidence, the anti-dumping measure on OCTG from Argentina should have been terminated (see section VII.C.2);

- The Department's conduct of an expedited sunset review and application of the waiver provisions to Siderca: (1) violated Article 6.1 of the Agreement because the Department precluded the opportunity for Siderca to present evidence; (2) violated Article 6.2 because the Department denied Siderca its ability to defend its interest; and (3) resulted in the application of facts available in violation of the requirements of Article 6.8 (see section VII.C.3);

- The Department's determination to conduct an expedited sunset review, and the Department's Sunset Determination, which incorporated the Department's *Issues and Decision Memorandum* by reference, violated Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement

[49] US Department of Commerce Sunset Reviews (ARG-63).
[50] *Id.*

because the Department failed to provide public notice and explanations in sufficient detail of its findings on all issues of fact and law (see section VII.C.4);

- The Department's Sunset Determination was inconsistent with Article 11.3 of the Anti

"imminent" but rather relates to "a longer period of time" (19 USC. § 1675a(a)(5)), the Commission speculated and conducted an open-ended analysis for possible future injury. The Commission's market forecasting and sheer speculation was inconsistent with WTO requirements to assess whether termination of an anti-dumping duty order would be likely to lead to recurrence of injury at the time of termination – not at some distant, undefined point in the future. Speculation about market conditions several years into the future was inconsistent with the requirements of Articles 11.1, 11.3, 3.1, 3.2, 3.4, 3.5, 3.7, and 3.8 of the Anti-Dumping Agreement (see section VIII.C.2);

- The Commission's application of a cumulative injury analysis of OCTG imports from Korea, Italy, Japan, Mexico, and Argentina to determine whether termination of the anti-dumping duty on Argentine OCTG imports would be likely to lead to continuation or recurrence of injury was inconsistent with Article 11.3 of the Anti-Dumping Agreement, which precludes the use of a cumulative injury analysis in sunset reviews. Alternatively, if cumulation is permitted in sunset reviews, the Commission's decision to cumulate in the instant case violated Article 3.3 of the Anti-Dumping Agreement by failing to comply with the explicit restrictions on cumulation set forth therein. In addition, the Commission's decision to cumulate was inconsistent with the likely standard of Article 11.3 and with the evidentiary standards of Article 3, as interpreted by the Appellate Body in *Steel from Germany* (see sections VIII.D, E, and F).

D. CONSEQUENTIAL VIOLATIONS OF THE ANTI-DUMPING AGREEMENT, THE GATT 1994, AND THE WTO AGREEMENT

- Because the United States violated its obligations under the Anti-Dumping Agreement, it also violated the provisions of Article VI of the GATT 1994, Articles 1 and 18 of the Anti-Dumping Agreement, and Article XVI:4 of the WTO Agreement (see section IX).

V. OVERVIEW OF US SUNSET REVIEW LAW

A. SUNSET REVIEWS UNDER US LAW

1. Introduction

42. Following the Uruguay Round, US anti-dumping law was amended to provide for five-year "sunset" reviews of anti-dumping orders.[51] Among other amendments to the Tariff Act of 1930, the Uruguay Round Agreements Act ("URAA") established a mechanism for the automatic review of certain anti-dumping duty orders, suspended anti-dumping duty investigations, and countervailing duty orders.

43. As with the administration of US trade remedy laws generally, and the conduct of anti-dumping and countervailing duty investigations, the responsibility for the conduct of sunset reviews is bifurcated between the Department and the Commission. The Department determines whether "revocation" of an anti-dumping or countervailing duty order, or termination of a suspended investigation, would be likely to lead to continuation or recurrence of dumping or of a countervailable subsidy. The Commission is required to determine whether revocation of an anti-dumping or countervailing duty order, or termination of a suspended investigation, would be likely to lead to continuation or recurrence of injury.

44. Under US law, sunset reviews are initiated automatically, rather than following substantiation by the authorities, or based upon a request by an interested party. The regulations implementing the

[51] *See* 19 USC. § 1675(c)(ARG-1); 19 USC. § 1675a (ARG-1).

3. Effect of conduct of expedited sunset review

49. The Department conducts an expedited review if a respondent interested party's substantive response is "inadequate," or deemed by the Department to be "inadequate" based solely on the percentage of the company's US exports irrespective of the amount of information actually provided by the defendant. 19 USC. § 1675(c)(3)(B) provides that "if interested parties provide inadequate responses to a notice of initiation, the administering authority, within 120 days after the initiation of the review, or the Commission, within 150 days after such initiation, may issue, without further investigation, a final determination based on the facts available . . . ."

4. Effect of a "waiver" determination by the Department in a sunset review

50. The US statute affords parties the option of not participating in the proceedings before both the Department and the Commission. As indicated by the express terms in the provision, 19 USC. § 1675(c)(4)(A) pertains only to respondent interested parties:

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

51. In addition to an "elective waiver" provided for by statute, the Department sometimes employs a "deemed waiver" in practice. The "deemed waiver" rule also pertains only to respondent interested parties. US parties are not similarly exposed to the jeopardy of a deemed waiver. The effect of a waiver is clear:

> In a review in which an interested party waives its participation pursuant to this paragraph, the administering authority shall conclude that revocation of the order or termination of the investigation would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) with respect to that interested party.[61]

52. As noted, the statutory language is mandatory; the Department "shall" determine likely dumping if it deems a respondent interested party to have waived its participation, whether by failing to submit a response or by failing to have exports to the United States in the amount of 50 per cent or more of the total exports of subject merchandise to the United States.[62]

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53. In addition to the statutory waiver provisions, the Department's regulations equate "waiver of participation in a sunset review before the Department" with "the failure by a respondent interested party to file a complete substantive response to a notice of initiation."[63]

5.

> [The SAA] represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law. Furthermore, the Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretation and commitments set out in this Statement. Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretation of those agreements includes in this statement carry particular authority.[64]

55. US courts have recognized the unique status of the SAA in the legislative scheme. For instance, in *Micron Technology Corp., Inc. v. United States,*[65] the Federal Circuit based its decision on a reading of both the language of the statute and the SAA.[66] While there is nothing unusual about a court looking to the legislative history of a statutory provision to assist in its interpretation, the court in *Micron* evaluated the plain meaning of both the statute and the SAA, in a side-by-side exercise.[67] Indeed, the Court stated that "[t]he SAA, of course, is more than mere legislative history."[68] The Court also cited to the US law that provides that the SAA "'shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application'."[69] Significantly, the Court interpreted the statute based on the mandate of the SAA, and held that the meaning and effect of the statutory provision had changed, notwithstanding statements in the House and Senate reports that the legislation did not change US law on the point.[70]

56. WTO panels such as the one in *United States – Measures Treating Export Restraints as Subsidies*, have recognized this point, noting that:

> The United States acknowledges "the status of the SAA as an authoritative interpretive tool" . . . . While the United States indicates that the SAA cannot change the meaning of, or override, the statute to which it relates, "[a]s a general proposition, [] in terms of legislative history, the SAA ranks supreme" . . . . It is clear to us that the [Uruguay Round Agreements Act] grants to the SAA unique legal status as an authoritative interpretation of the *URAA*, which the US courts must take into account. The text of the SAA confirms this by characterising itself as "an authoritative interpretation . . . both for purposes of US international obligations and domestic law." The SAA went through an approval process in Congress, and was in fact approved by Congress at the same time as the *URAA*. The United States itself acknowledges that 'there is no disagreement between the parties about the status of the SAA as an authoritative interpretive tool." Finally, it is clear that no other form of legislative history has higher authority than the SAA with regard to the meaning of the statute. The United States indicates that "If, hypothetically, on a particular

[64] *US Statement of Administrative Action*, accompanying the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 stat. 4809 (1994), at 656, *nally, it is clear that no other fo*

interpretive issue, the SAA said 'X' and some other document of legislative history (e.g., a committee report) said 'Y,' the interpretation should be 'X.'"[71]

57. The unique authority of the SAA has also been repeatedly recognized by courts in the United States.[72]

6. The Department of Commerce *Sunset Policy Bulletin*

58. The Department's *Sunset Policy Bulletin*[73] adopts the standards of the SAA and states that the Department "normally" will determine that dumping is likely to continue or recur where:

- dumping continued at any level above *de minimis* [(*i.e.*, above 0.5 per cent)] after the issuance of the order or the suspension agreement, as applicable;

- imports of the subject merchandise ceased after the issuance of the order or the suspension agreement, as applicable, <u>or</u>

- dumping was eliminated after the issuance of the order or the suspension agreement, as applicable, and import volumes for the subject merchandise declined significantly.[74]

- In analyzing whether import volumes remained steady or increased, the Department normally will consider companies' relative market share.[75]

7. The Department's "likelihood" determination

59.

would warrant the Department finding that dumping is not likely to continue or recur in a sunset review.

60. As noted above, the Department is required by statute to conduct a review to determine whether revocation of the anti-dumping duty order would be likely to lead to continuation or recurrence of dumping.[77]

61. However, the making of such a determination is highly circumscribed by the SAA. The SAA states that:

> The determination called for in these types of [sunset] reviews is *inherently predictive and speculative.* There may be more than one likely outcome following revocation or termination. The possibility of other likely outcomes does not mean that a determination that revocation or termination is likely to lead to continuation or recurrence of dumping or countervailable subsidies, or injury, is erroneous, as long as the determination of likelihood of continuation or recurrence is reasonable in light of the facts of the case. In such situations, the order or suspended investigation will be continued.[78]

62. In the context of sunset reviews, the SAA outlines the many instances in which, under US law, the Department will determine that dumping is likely to continue or recur:

> [The Bill] establishes standards for determining the likelihood of continuation or recurrence of dumping. Under section 752(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 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. . . .
>
> The Administration believes that existence 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. If companies *continue to dump* with the discipline of an order in place, it is reasonable to assume that dumping would continue if the discipline were removed. . . .
>
> *[T]he existence of zero or de minimis dumping margins at any time while the order was in effect shall not in itself require Commerce to determine that there is no likelihood of continuation or recurrence of dumping.* Exporters may have ceased dumping because of the existence of an order or suspension agreement. Therefore,

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[77] 19 USC. § 1675(c)(1)(ARG-1). 19 USC. §§1675a(c)(1)(A)-(B)(ARG-1) set forth additional requirements with respect to the Department's likelihood determination, including that in conducting the sunset review, the Department "shall consider":

> the weighted average dumping margins determined in the investigation and subsequent reviews, and
>
> the volume of imports of the subject merchandise for the period before and the period after the issuance of the anti-dumping duty order or acceptance of the suspension agreement.

[78] SAA at 883 (ARG-5)(emphasis added).

the present absence of dumping is not necessarily indicative of how exporters would behave in the absence of the order or agreement.[79]

8. The Commission's "likelihood" determination

63.

assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry.

VI. STANDARD OF REVIEW, BURDEN OF PROOF, AND THE SUBSTANTIVE WTO OBLIGATIONS AT ISSUE IN THIS DISPUTE

A. STANDARD OF REVIEW

68. The relevant provisions establishing the standard of review in this case are Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement. As the Appellate Body noted recently, "the two provisions complement each other."[82]

69. Article 11 of the DSU requires a panel to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." Article 17.6 of the Anti-Dumping Agreement sets out a special standard of review that complements Article 11 of the DSU.

70. Article 17.6(i) requires a panel to review the investigating authorities' "establishment" and "evaluation" of the pertinent facts.[83] The Appellate Body has clarified the standard applicable to factual review under the Anti-Dumping Agreement as follows:

> Article 17.6(i) sets forth the appropriate standard to be applied by *panels* in examining the WTO-consistency of the

the anti-dumping measure beyond the five year period prescribed by Article 11.3 of the Anti-Dumping Agreement.

73. The second subparagraph of Article 17.6 applies to a panel's review of whether measures in dispute rest upon a permissible interpretation of the Anti-Dumping Agreement.[86]

74. A panel's objective assessment of whether the US measures identified by Argentina are consistent with the Anti-Dumping Agreement and the GATT 1994 is guided by its interpretation of the relevant provisions of those agreements in accordance with customary rules of interpretation of public international law, as codified in the *Vienna Convention on the Law of Treaties*.[87] The general rules of interpretation of the *Vienna Convention* require a panel to interpret treaty provisions in good faith in accordance with their ordinary meaning, in their context, and in light of the treaty's object and purpose.[88] Thus, the treaty language defines the extent of Members' rights and obligations. One of the corollaries of this general rule is that "interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[89]

75. Article 3.2 of the DSU reaffirms that the role of the WTO dispute settlement system is to preserve the rights and obligation of Members under the covered agreements, and to "clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." Article 17.6(ii) of the Anti-Dumping Agreement similarly provides that panels are to interpret the relevant provisions of the Anti-Dumping Agreement "in accordance with customary rules of interpretation of public international law." In *Hot-Rolled Steel from Japan*, the Appellate Body explained that "a permissible interpretation is one which is found to be appropriate *after* application of the pertinent rules of the *Vienna Convention*."[90]

76. In sum, under the applicable legal standard of review, a panel must make an objective assessment of the legal provisions at issue and their applicability to the dispute. The panel must then interpret the pertinent treaty provisions in accordance with the customary rules of interpretation of public international law and assess whether each measure rests upon a permissible interpretation of the Anti-Dumping Agreement and the GATT 1994.[91]

B. BURDEN OF PROOF

77. In WTO dispute settlement proceedings, the burden of proof rests with the Member asserting the particular claim or defense. As stated by the Appellate Body,

> [T]he burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to

[86] Appellate Body Report,

> the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[92]

78. In the context of this dispute, concerned with WTO compatibility of the decision to continue the definitive anti-dumping measures applicable to OCTG from Argentina imposed by the United States, Argentina bears the burden of presenting a *prima facie* case of violation of provisions of the Anti-Dumping Agreement and the GATT 1994. A *prima facie* case is "one which, in the absence of effective *refutation* by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."[93] Thus, where Argentina presents a *prima facie* case in respect of a claim, the burden then shifts to the United States to provide an "effective refutation" of Argentina's case.

C. Substantive obligations at issue in this dispute

1. The primary obligation of Article 11.3 of the Anti-Dumping Agreement is termination of anti-dumping measures

79. The matter before this Panel concerns the application of definitive anti-dumping measures by the United States pursuant to sunset reviews governed by Article 11.3 of the Anti-Dumping.8892e791 T A
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with the conditions set out in the Agreement. The panel in *Pipe Fittings from Brazil*, recently recognized this point, stating that:

> By virtue of Article 11.1 of the Anti-Dumping Agreement, an anti-dumping duty may only continue to be imposed if it remains "necessary" to counteract injurious dumping. *Article 11.1 contains a general, unambiguous and mandatory requirement that anti-dumping duties "shall remain in force only as long as and to the extent necessary" to counteract injurious dumping*

application of the duty are satisfied. The prescribed conditions are "that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury". If, in a sunset review, a Member makes an affirmative determination that

interpretive approach applies to all WTO provisions, including those under Article 11 of the Anti-Dumping Agreement.

90. Article 11.3 provides that an existing order shall be terminated unless "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury." The panel in *DRAMS From Korea* commented on the ordinary meaning of the word "likely" as used in Article 11.3, noting "that 'likelihood' or 'likely' carries with it the ordinary meaning of 'probable.'"[101] Both the ordinary meaning of the term "likely" and the context of Article 11.3 require the application of a "probability" standard to the question of whether injury will continue or recur. In other words, the continuation or recurrence of dumping and injury must be more likely than not.[102]

91. Indeed, the United States itself has asserted before the WTO that the term "likely" means "probable." In *Steel from Germany*, the United States expressly stated that "[t]he word 'likely' carries with it the ordinary meaning of 'probable.'"[103] The United States declared this interpretation in discussing the parallel provision of Article 11.3 in the SCM Agreement. The US statement thus bears directly on the interpretation of Article 11.3 of the Anti-Dumping Agreement.

92. Both US and WTO jurisprudence make clear that "likely" does not have the same meaning as "possible." In order to make a determination that is consistent with Article 11.3, the Department and the Commission must find that it is "likely" (*i.e.,* more probable than not) that termination of the anti-dumping measure will lead to the continuance or recurrence of dumping and injury, respectively.
As will be demonstrated below, the "likely" standards applied by the Department and the Commission conflict with the ordinary meaning of Article 11.3.

3. The obligations in Articles 2, 3, 6 and 12 of the Anti-Dumping Agreement are applicable to reviews conducted under Article 11.3

94. In clarifying WTO Members' rights and obligations under Article 11.3, the *Vienna Convention* rules of treaty interpretation provide that a panel must give the terms of the provision their ordinary meaning and must interpret them in their context – both the immediate context (*i.e.,* the other paragraphs of Article 11) and the broader context (*i.e.,* the other provisions of the Anti-Dumping Agreement, and the WTO Agreements as a whole),mean2yAc93 .e.,ntvh the ordibjived thepurj 5n.318 a Tj 0 -12.75

- *Article 2 (Dumping)*: Article 2.1 defines "dumping" "for the purposes of the Agreement." Thus, the definition of "dumping" applies for all purposes under the Anti-Dumping Agreement, including sunset reviews under Article 11.

- *Article 3 (Injury)*: Article 3 of the Anti-Dumping Agreement applies to reviews conducted under Article 11. The jurisprudence establishes that the broad scope of the definition of injury in Article 3 ("under this agreement") applies to "injury" for all purposes under the Agreement, including Article 11.3. Footnote 9 to Article 3, "*Determination of Injury*," provides "*Under this Agreement the term 'injury'* shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of injury to a domestic industry or material retardation to the establishment of such an industry and *shall be interpreted in accordance with the provisions of this Article*."[104] The Appellate Body has held that "the obligations in Article 3.1 apply to *all* injury determinations undertaken by Members,"[105] and has reaffirmed this proposition, stating "Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation with respect to the injury determination."[106] Given the broad scope of the definition of injury in Article 3 ("under this agreement"), as recognized by the Appellate Body, Article 3 applies to "injury" under Article 11.3. Moreover, the Panel in the recent *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products From JapD -0.0965 Dum375 u0196 Tw (the A7 0 TD /F2 11.2.5 0 TD -0.4ied,j 6 .0993 j 12a with the 0216 0 T22-00527he*

- *Article 6 (Evidence)*: Article 6 of the Anti-Dumping Agreement applies to reviews conducted under Article 11 as mandated by the explicit terms of Article 11.4: "The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article."

from Argentina to the United States, however, the Department determined Siderca's response to be "inadequate."[109]

99. The Department then determined that because Siderca's response was deemed to be "inadequate," the company was similarly deemed to have "waived" its right to participate in the sunset review.[110] The Department deemed Argentina to have waived its right to participate because of the "inadequate" response to the initiation notice.[111]

100. It is difficult to discern the actual basis for the Department's determination – whether the Department relied on the "waiver" provision, 19 USC. § 1675(c)(4)(B)("In a review in which an interested party waives its participation pursuant to this paragraph, the administering authority shall conclude that revocation of the order. . . . would be likely to lead to continuation or recurrence of dumping . . ."), or the "facts available" provision, 19 USC. § 1675(c)(3)(B) ("If interested parties provide inadequate responses to a notice of initiation, the administering authority . . . may issue, without further investigation, a final determination based on the facts available . . . "). The Department's determination purports to rely on both provisions.[112] However, as explained below, the basis for the simultaneous application of these provisions to a single respondent is unclear.

101. These provisions are mutually exclusive: a respondent either waives its right to participate, or it attempts to participate and the Department determines that the application of facts available is necessary. Argentina submits that the application of either provision to the sunset review of OCTG from Argentina violates the requirements of Article 11.3 of the Anti-Dumping Agreement.

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[109] *Oil Country Tubular Goods From Argentina: Adequacy of Respondent Interested Party Response to the Notice of Initiation*, A-357-810 (Dep't Comm., 22 August 2000)(ARG-50).

[110] *Issues and Decision Memorandum* at 4-5 (ARG-51)("In the instant reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation.").

[111] The Department's *Issues and Decision Memorandum* states:

> As discussed in section II.A.3 of the *Sunset Policy Bulletin*, the SAA at 890, and the House Report at 63-64, if companies continue dumping with the discipline of an order in place, the Department may reasonably infer that dumping would continue if the discipline were removed. We note that there have been above de minimis margins for the **investigated companies throughout the history of the orders**, except for one company covered by the order on Japan. Consistent with section 752(c) of the Act, the Department also considered the volume of imports before and after issuance of the order. According to the import statistics provided by domestic interested parties and, as confirmed by Census IM 145 reports statistics, **imports of subject merchandise** decreased in 1995 and, since 1996, have significantly decreased from their pre-order levels. Based on this analysis, the Department finds that the existence of dumping margins after the issuance of the orders is highly probative of the likelihood of continuation or recurrence of dumping. **Therefore, given that dumping**

102. The operation of the waiver provision in this case precluded the Department from conducting a review and making the determination required by Article 11.3 of the Anti-Dumping Agreement. Instead, the waiver provision mandates a finding of likely dumping without any analysis. Accordingly, Argentina believes that the US waiver provisions and the Department's application of those provisions violate US obligations under the Anti-Dumping Agreement as such and as applied in this case.

103. Whether the Department based its determination on the "waiver" provision – 19 USC. § 1675(c)(4) – or the "facts available" provision – 19 USC. § 1675(c)(3)(B) – the Department failed in either event to conduct a "review" and make a "determination" that expiry of the duty would be likely to lead to continuation or recurrence of dumping, as required by Article 11.3 of the Anti-Dumping Agreement. Furthermore, regardless of whether the waiver provision was actually applied in this case, the provision can be challenged as such. 19 USC. § 1675(c)(4)(B) mandates that the Department forego a "review" and automatically find that dumping would be likely to continue or recur when a company is deemed to have waived its right to participate in the sunset review. Such a finding is required without a review and an analysis under the standard leading to a "determination" as required by Article 11.3 of the Anti-Dumping Agreement.

104. Section A below describes Argentina's challenge to the waiver provisions as being inconsistent "as such" with Article 11.3, and Articles 6.1 and 6.2 of the Anti-Dumping Agreement.

105. Section B sets forth Argentina's argument that US law, the SAA, and the *Sunset Policy Bulletin* establish an irrefutable presumption that dumping is likely to occur, and that this irrefutable presumption is demonstrated by the Department's consistent sunset review practice.

106. Section C below describes Argentina's challenge to the Department's determination to conduct, and its conduct of, an expedited sunset review of OCTG from Argentina, and application of the waiver provisions and/or facts available provisions in violation of Articles 11, 2, 6, and 12 of the Anti-Dumping Agreement.

107. Section D sets forth the Argentina's challenge to the Department's likelihood determination, as applied.

108. Section E demonstrates that, in the alternative, the United States is in violation of GATT Article X:3(a).

A. THE US SUNSET REVIEW WAIVER PROVISIONS, 19 USC. § 1675(C)(4) AND 19 C.F.R. § 351.218(D)(2)(III), ARE INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT: WHEN A RESPONDENT INTERESTED PARTY IS DEEMED TO HAVE "WAIVED" ITS RIGHT TO PARTICIPATE IN A SUNSET REVIEW, THE WAIVER PROVISIONS PRECLUDE THE DE[illegible]RENCE O

"determination" that expiry of the duty would be likely to lead to continuation or recurrence of

authorities or the interested parties."[117] Even though the authorities make a prospective assessment in sunset reviews, their determination nevertheless "must itself have an adequate basis in fact" at the time of the review.[118]

113. In *Steel from Germany,* the panel stated that "one of the components of the likelihood analysis in a sunset review under Article 21.3 is an assessment of the likely rate of subsidization" (or under Article 11.3 of the Anti-Dumping Agreement, the rate of dumping).[119] The panel held as follows:
The facts necessary to assess the likelihood of subsidization in the event of revocation may well be different from those which must be taken into account in an original investigation. Thus, in assessing the likelihood of subsidization in the event of revocation of the CVD, an investigating authority in a sunset review may well consider, *inter alia*, the original level of subsidization, any changes in the original subsidy programmes, any new subsidy programmes introduced after the imposition of the original CVD, any changes in government policy, and any changes in relevant socio-economic and political circumstances.[120]

114. Because the facts in the original investigation may differ from those existing at the time of the sunset review, the investigating authority must gather and evaluate updated facts during the sunset review in order to make the substantive and meaningful determination required under Article 11.3 of the Anti-Dumping Agreement. As the panel in *Steel from Germany* stated:

> Article 21.3 reflects the application of the general rule set out in Article 21.1 – that a CVD shall remain in place only as long as necessary – in the specific instance where five years have elapsed since the imposition of a CVD. Article 21.2 reflects the same general rule in a different circumstance, when a reasonable period has elapsed since the imposition of the duty, and it is deemed necessary to review the need for the continued imposition of the duty. We also note that one of the principal objects of the SCM Agreement is to regulate the imposition of CVD measures. Article 21.3 effectuates that purpose by providing that after five years, a CVD should be terminated unless the investigating authorities determine that there is a likelihood of continuation or recurrence of subsidisation and injury.[121]

115. Unless the administering authority considers all information presented by interested parties, the establishment of the facts cannot be proper and the evaluation of the facts cannot be considered unbiased and objective, as required by Article 17.6(i) of the Anti-Dumping Agreement.[122]

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[117] *Id.* at para. 8.95.
[118] *Id.* at para. 8.96.
[119] *Id.*
[120] *Id.* at para. 8.96.
[121] *Id.* at para. 8.91.
[122] In *Hot-Rolled Steel from Japan*, the Appellate Body explained that Article 17.6(i) of the Anti-Dumping Agreement requires panels to determine:

> [F]irst, whether the investigating authorities' "*establishment* of the facts was *proper"* and, second, whether the authorities' "*evaluation* of those facts was *unbiased and objective"*(emphasis added). Although the text of Article 17.6(i) is couched in terms of an obligation on *panels* – panels "shall" make these determinations – the provision, at the same time, in effect defines when *investigating authorities* can be considered to have acted inconsistently with the Anti-Dumping Agreement in the course of their "establishment" and "evaluation" of the relevant facts. In other words, Article 17.6(i) sets forth the appropriate standard to be applied by *panels* in examining the WTO-consistency of the *investigating authorities'* establishment and evaluation of the facts under other provisions of the Anti-Dumping Agreement. Thus, panels must assess if the establishment of the facts by the investigating authorities was *proper* and if the evaluation of those facts by those authorities

116. In order to comply with Article 11.3 of the Anti-Dumping Agreement, an investigating authority would have to establish a "sufficient factual basis" for the determination required to be made in sunset reviews. The investigating authorities' determination "should rest on the evaluation of the evidence that it has gathered during the original investigation, the intervening reviews and finally the sunset review."[123] The investigating authorities must make a "fresh determination, based on credible evidence."[124]

117. In the case of the US waiver provisions, there simply is no "determination" or "review" and the Article 11.3 requirements for continuation of the anti-dumping measure are not satisfied. To paraphrase the *Section 301* panel, there is no "action of coming to a decision."

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Participated," (5) "Domestic Industry Participation," (6) "Foreign Interested Party Participation," (7) "Type of Proceeding," (8) "Stated Basis for Likelihood Determination," and (9) "Stated Basis for Determination of Likely Margin." Each of these categories is represented as a heading on the table.[129]

127. For each of the sunset reviews in which the Department determined that dumping would be likely to continue or recur, Argentina analyzed and recorded the stated basis (or bases) for the Department's determination, which included potentially overlapping bases for the likelihood determination: (a) the existence of *continued dumping margins*

129. The results of Argentina's analysis demonstrate the irrefutable presumption:

- In 100 per cent of the sunset reviews in which a domestic interested

- In 100 per cent of the sunset reviews for which the Department determined that dumping was likely to continue or recur, the Department relied on the margin from the original investigation or a previous administrative review as the basis for its determination of the "likely" margin.

133. In sum, to date there have been 217 sunset reviews conducted by the Department where the domestic industry has participated in the Department's sunset proceeding.[131] In 100 per cent of these cases the Department determined that dumping would be likely to continue or recur.[132] Furthermore, as the basis for its likelihood determination in these cases, the Department referenced the SAA and *Sunset Policy Bulletin* in 100 per cent of these cases, and cited at least one of the three criteria prescribed by the SAA and *Sunset Policy Bulletin*.[133] Similarly, the Department relied on the SAA and the *Sunset Policy Bulletin* in 100 per cent of the cases in determining the likely margin to prevail.

134. In the four cases (less than 2 per cent) where the Department did not cite one of the three SAA/*Sunset Policy Bulletin* criteria as the sole basis for its likely dumping determination, it seemingly did so only because none of the criteria were present – and therefore the anti-dumping measure should have been terminated in those cases.[134] Nevertheless, in each of those instances, the Department instead found "good cause" to consider other factors pursuant to 19 USC. § 1675a(c)(2) and 19 C.F.R. § 351.218(e)(2)(iii), and found alternative grounds for its determination that dumping would be likely to continue or recur.[135] Consequently, it is clear from a review of the Department's sunset practice that the Department, in fact, does not conduct a review and make a determination of whether expiry of the duty would be likely to lead to continuation or recurrence of dumping as required by Article 11.3.

135. A particularly egregious example of the Department's ritualistic and mechanical recitation of the SAA and *Sunset Policy Bulletin* criteria to the exclusion of substantive analysis of the actual likelihood of continuation or recurrence of dumping is the case involving *Industrial Nitrocellulose from Yugoslavia*. In that sunset review, the Department conducted an expedited review based on the failure of the respondents to submit a response in the proceeding. Following its consistent practice,
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Communities ("*United States – CVDs on EC Products*"),[141] the Appellate Body upheld the Panel's

> 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.[148]

143. In addition to the US statute and the SAA, the *Sunset Policy Bulletin* provides further direction as to the methodology the Department will employ in deciding whether revocation of an anti-dumping duty order would likely lead to continuance or recurrence of dumping. The US courts and federal agencies view the *Sunset Policy Bulletin* as a distillation of, and similar in status to, the SAA. The Department, for example, repeatedly describes the *lletin*

(c) dumping was eliminated after the issuance of the order or the suspension

because the Department did not establish a "sufficient factual basis" for its determination in the sunset reviews. The Department did not rest its determination "on the evaluation of the evidence that it ha[d] gathered during the original investigation, the intervening reviews and finally the sunset review."[161] In fact, the Department did not conduct an administrative review, and denied, by virtue of the waiver, Siderca's right to participate in the sunset review. The Department further violated Article 11.3

> the original CVD, any changes in government policy, and any changes in relevant socio-economic and political circumstances.[170]

163. As noted above, because the facts and circumstances in the original investigation may differ from those existing at the time of the sunset review, the investigating authority must gather and evaluate updated facts and current information during the sunset review in order to make the substantive and meaningful determination required under Article 11.3 of the Anti-Dumping Agreement. The Appellate Body explained the obligations related to sunset provisions (albeit in the context of the SCM Agreement):

> Article 21.3 reflects the application of the general rule set out in Article 21.1 – that a CVD shall remain in place only as long as necessary – in the specific instance where five years have elapsed since the imposition of a CVD. Article 21.2 reflects the same general rule in a different circumstance, when a reasonable period has elapsed since the imposition of the duty, and it is deemed necessary to review the need for the continued imposition of the duty. We also note that one of the principal objects of the SCM Agreement is to regulate the imposition of CVD measures. Article 21.3 effectuates that purpose by providing that after five years, a CVD should be terminated unless the investigating authorities determine that there is a likelihood of continuation or recurrence of subsidisation and injury.[171]

164. The Department's determination to conduct an expedited sunset review, its conduct of an expedited review, and the application of the waiver provisions to Siderca, were inconsistent with US obligations under the Anti-Dumping Agreement. The Department rendered a determination of likelihood of continuation or recurrence of dumping without any analysis, in violation of Article 11.3 of the Anti-Dumping Agreement, which requires the authority to conduct a review in order to make a determination of whether termination of the duty would be likely to lead to continuation or recurrence of dumping and injury. In the absence of the requisite analysis and a determination based on positive evidence, the anti-dumping measure on OCTG from Argentina should have been terminated.

165. Argentina recalls the Appellate Body's statement in *Steel from Germany*: "If [a WTO Member] does not conduct a sunset review, or, having conducted such a review, it does not make such a positive determination, the duties must be terminated."[172]

3. The Department's Expedited Sunset Review and the application of the Waiver Provisions to Siderca were inconsistent with US obligations under Articles 11 and 6

166. Article 6.1 of the Anti-Dumping Agreement mandates that "all interested parties in an anti-dumping investigation shall be given . . . ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question."

167. The conduct of the expedited review and the application of the waiver provisions to Siderca, in the sunset review of OCTG from Argentina violated Article 6.1 because it prevented Siderca from presenting evidence for meaningful consideration by the Department regarding the likelihood of continuation or recurrence of dumping in order to inform its determination under Article 11.3. The Department acknowledged that Siderca both filed a complete substantive response to the notice to initiate a sunset review, and notified its willingness to participate fully in the instant sunset review.[173]

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[170] *Id*.
[171] *Id*. at para. 8.91.
[172] Appellate Body Report, *Steel from Germany*, para. 63.
[173] *Oil Country Tubular Goods from Argentina: Adequacy of Respondent Interested Party Response to the Notice of Initiation*, A-357-810 (Dep't Comm., 22 August 2000)(ARG-50).

Nevertheless, the Department ignored the information presented by Siderca. Thus, the company hardly had an "ample opportunity to present . . . evidence which [it] consider[ed] relevant" when the Department deemed Siderca to have waived its right to participate at all.

168. The conduct of the expedited review and the application of the waiver provisions to Siderca in the sunset review of OCTG from Argentina also violated Article 6.2, because Siderca did not have a full opportunity to defend its interests. In particular, Siderca could not defend its interests because the Department deemed Siderca to have waived its right to participate.

169. Moreover, when the margin of dumping is small – as in the case when the margin is 1.36 per cent – the investigating authority must gather and evaluate "persuasive evidence" in order to justify a determination that the revocation of the duty would lead to injury to the domestic industry, and "mere reliance" by the authorities on determinations made in the original investigation will not be sufficient.[174] The Department's conduct of an expedited review and its application of the waiver provisions vi

178. First, the Department's public notice does not transparently set forth its "conclusions reached on . . . issues of fact and law" in contravention of its obligation under Article 12.2. In particular, the actual basis for the Department's affirmative likelihood determination is not discernible from its public notice. As discussed above, the Department stated in its *Issues and Decision Memorandum* that it considered Siderca's inadequate response to constitute a waiver of participation under 19 C.F.R. § 351.218(d)(2), indicating that it issued a determination of likelihood pursuant to the mandate of 19 USC. § 1675(c)(4)(B). The *Issues and Decision Memorandum* also states, however, that the Department made its likelihood determination on the basis of the facts available pursuant to 19 C.F.R. § 351.218(e)(1)(ii)(C). Thus, the Department's public notice does not transparently explain whether it issued its likelihood determination pursuant to statutory mandate or made a determination based on the facts available.[177] Accordingly, the Department violated Article 12.2 by not clearly setting forth the basis for its likelihood determination in the public notice.

179. Second, the public notice of the sunset review of OCTG from Argentina does not contain "all relevant information on the matters of fact . . . which have led to the imposition of final measures[,]" as required by Article 12.2.2. As discussed previously, Article 11.3 requires the Department to collect and evaluate current information during the sunset review. In its sunset review of OCTG from Argentina, however, the Department relied completely on information obtained during the original investigation. Thus, its public notice of the conclusion of the sunset review did not contain "all relevant information on the matters of fact." For example, as the factual basis for its likely margin determination, the Department noted in its *Issues and Decision Memorandum* that Siderca's dumping margin had not decreased over the life of the anti-dumping order. The Department, however, had not conducted any administrative reviews of OCTG from Argentina since issuance of the order, nor did it gather fresh information during the course of the sunset proceeding in order to calculate a current dumping margin for Siderca. Thus, the Department did not have any positive evidence to support its finding that Siderca's dumping margin had not decreased. Consequently, by not including any relevant information to support its factual determination that Siderca's dumping margin had not decreased in its public notice, the Department acted inconsistently with its obligations under Article 12.2.2.

180. Finally, the Department violated Article 12.2.2 by not including in its public notice the "information described in subparagraph 2.1." Among other information, subparagraph 2.1 of Article 12 requires that public notice of a final determination in a sunset review contain "the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2 [(*Determination of Dumping*).]" As noted above, however, during the course of its sunset review of OCTG from Argentina, the Department did not undertake a fresh analysis based on updated facts of whether Siderca was currently dumping. Instead, as the Department explained in its *Issues and Decision Memorandum*, it simply relied on the dumping margin found for Siderca in the original investigation. As a result, the Department's public notice of conclusion of the sunset review of OCTG from Argentina is completely devoid of any information concerning the calculation of a dumping margin under Article 2, contrary to the United States's obligations under Article 12.2.2.

D. ARTICLE 11.3 ESTABLISHES PARAMETERS FOR THE ARTICLE 11.3

POSITIVE EVIDENCE. THE DEPARTMENT FAILED TO SATISFY THESE OBLIGATIONS IN ITS LIKELIHOOD DETERMINATION AND WITH REGARD TO THE LIKELY MARGIN REPORTED TO THE COMMISSION

181. The Department's reliance on the 1.36 per cent anti-dumping margin established in the original investigation back in 1995 simply cannot serve as a legal basis for the Department's determination that dumping would be likely to continue or recur. Indeed, that rate is less than the 2 per cent *de minimis* rate of the Anti-Dumping Agreement and, therefore, would not support a finding in a new investigation. Furthermore, the 1.36 per cent margin – calculated on the basis of the Department's practice of "zeroing" negative dumping margins – results in a flawed dumping margin that cannot serve as a legal basis for the Department's likelihood determination. Nor can the fact that Siderca stopped shipping to the United States following the imposition of the Antidumping measure – one of the SAA/*Sunset Policy Bulletin* checklist items – be considered positive evidence of likely dumping in the event of termination of the anti-dumping measure, as required by Article 11.3.

1. The Department's likelihood determination is inconsistent with the Anti-Dumping Agreement

182. Article 11.3 establishes parameters for the obligation of WTO Members to conduct a review and make a determination of whether expiry of the duty would be likely to lead to continuation or recurrence of dumping after the measure has been in place five years:

- First, the rules of Article 2 apply to reviews conducted under Article 11.3 because the Article 11.3 analysis entails a determination of whether "dumping" is likely. Article 2 makes clear that its rules regarding determinations of dumping are established "for the purpose of [the Antidumping] Agreement," which includes Article 11.3.

- Second, the Article 11.3 analysis is prospective in nature, which means that the determination cannot be based on stale information, but rather must be

the Department's determination of likelihood of dumping and the likely level of such dumping violated Article 11.3 and Article 2 of the AD Agreement because it was based upon past information not determinative of future dumping. In accordance with US law, the Department did not collect new data to determine whether termination would likely lead to continuation or recurrence of dumping.[178] Only by first requesting and then carefully reviewing current information could the Department reliably assess, in a WTO-consistent manner, the "likelihood" of future dumping and the level of any "likely" margin if the order were terminated. The Department's reliance on stale information necessarily resulted in speculation as to whether or not dumping would be likely to continue or recur were the order to be revoked.

185. As the Panel in *Sunset Review of Steel from Japan* observed:

> Indeed, this textual difference leads us to conclude that evidence relating to the existence (or absence) of dumping that may be examined by an investigating authority under Article 11.3 is not limited to a full-blown determination of dumping made pursuant to Article 2. That Article 2 may inform the *type* of information that an investigating authority may consider relevant for the purposes of an Article 11.3 sunset review likelihood determination does not, in our view, impose an obligation upon an investigating authority in a sunset review that relies upon evidence relating to dumping since the imposition of the order to rely *only* upon a determination of dumping that fully conforms to the dictates of Article 2.
>
> By this, we do not mean to say that the Anti-Dumping Agreement is devoid of any obligation governing the requisite nature of a sunset review likelihood determination. The text of Article 11.3 contains an obligation "to determine" likelihood of continuation or recurrence of dumping. The requirement to make a "determination" concerning likelihood therefore precludes an investigating authority from simply assuming that likelihood exists. In order to continue the imposition of the measure after the expiry of the five-year imposition period, it is clear that the investigating authority has to determine, on the basis of positive evidence, that termination of the duty is likely to lead to continuation or recurrence of dumping. An investigating authority must have a sufficient factual basis to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence.[179]

187. Finally, Article 11.4 states that "[t]he provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article." Any determination under Article 11.3 must be based on positive evidence and be consistent with the evidentiary requirements of Article 6. As set forth above in detail, the Department's determination that Siderca's response was inadequate and therefore the company had waived its participation in the sunset review is inconsistent with the requirements of Article 6.

188. In sum, regarding the Department's likelihood determination, the Department cannot rely on the 1.36 per cent anti-dumping margin established (based on the practice of zeroing) in the original investigation as the basis for a determination that dumping would be likely to continue or recur. How does this determination apply Article 2 disciplines? How is it the result of a prospective analysis? How can it possibly be considered to be "likely"? And where is the evidence to support the Department's determination?

2. The likely margin of dumping of 1.36 per cent determined by the Department and reported to the Commission

189. The Department determined that if the order were revoked, the likely dumping margin to prevail would be 1.36 per cent. This margin was calculated by the Department in the original investigation based on its practice of "zeroing" negative dumping margins.[182] The margin was then reported to the Commission for purposes of the Commission's sunset review and its purposes 1.0679 Tw of the C 6.7

193. The Department failed to respect the disciplines of Article 2 in its determination of a margin of 1.36 per cent to report to the Commission as the likely margin to prevail in the event of termination.

E. THE UNITED STATES FAILED TO ADMINI

199. Because sunset reviews of anti-dumping orders fall within the types of laws and regulations set out in Article X:1, they are subject to the disciplines of Article X:3(a).

200. Recent panel reports have suggested that "for a Member's action to violate Article X:3(a) that action should have a significant impact on the overall administration of that Member's law and not simply on the outcome of the single case in question."[185] For example, the Panel in *Hot-Rolled Steel from Japan*, in dismissing a claim under Article X:3(a), noted that "Japan has not even alleged, much less established, a pattern of decision-making with respect to the specific matters it is raising which would suggest a lack of uniform, impartial and reasonable administration of the US anti-dumping law."[186] By contrast, Argentina will establish a clear and undeniable "pattern of decision making" by US authorities with respect to the participation of the domestic industry. In every instance in which the domestic industry participated in the sunset review, the Department made an affirmative determination of likely dumping.

201. Argentina would recall that the *Bovine Hides* Panel stated:

> Article X:3(a) requires an examination of the *real effect that a measure might have on traders operating in the commercial world*. This, of course, does not require a showing of trade damage, as that is generally not a requirement with respect to violations of the GATT 1994. But it can involve an examination of whether there is a *possible impact on the competitive situation* due to alleged partiality, unreasonableness or lack of uniformity in the application of customs rules, regulations, decisions, etc."[187]

202. The following section will show the "real effect on traders operating in the commercial world" of the conduct of sunset reviews by the Department of Commerce.

2. The Department of Commerce sunset reviews violate GATT Article X:3(a)

203. From the entry into force of the WTO Agreement until the present (September 2003), the Department of Commerce has conducted 291 sunset reviews of anti-dumping duty orders. As discussed in Section VII.B.1. above, Argentina has analyzed all 291 of these sunset reviews and has recorded the Department's findings for each in Argentina's Exhibit ARG-63, entitled, "US Department of Commerce Sunset Reviews."[188]

204. Argentina's comprehensive analysis of all of the sunset reviews conducted by the Department demonstrates a lack of impartiality and reasonableness on the part of the United States in its

- In 100 per cent of the sunset reviews in which a domestic interested party participated in the proceeding, the Department determined that dumping was likely to continue or recur;

- In 100 per cent of the revocations issued by the Department, the domestic industry either did not participate in the sunset proceeding or subsequently withdrew from the sunset proceeding;

- In 100 per cent of the sunset reviews for which the Department determined that dumping was likely to continue or recur, the Department failed to conduct a prospective analysis, as required by Article 11.3 of the Anti-Dumping Agreement.

206. As noted above in Section VII.B.1., the sunset review of *Industrial Nitrocellulose from Yugoslavia* is particularly illustrative of the unreasonable and biased nature of the Department's administration of its sunset review procedures.[189]

207. Moreover, as further evidence of the unreasonable administration of the Department's sunset review laws, regulations, procedures and practices, in 19 sunset proceedings (including the review of the order on OCTG from Argentina), the Department denied a foreign interested party's attempt to participate in the sunset proceeding on the sole basis that respondent's total exports to the United States were less than 50 per cent of the total exports shipped to the United States from the respondent's country during the five calendar years preceding the notice of initiation.

208. Such an arbitrary approach to making a determination as to whether even *to permit* a respondent to defend its interests and participate in a sunset review cannot be regarded as reasonable. That the 50 per cent rule applies only to respondents highlights the failure to apply the rule in an impartial manner.

209. An examination of this record shows the "real effect," in this case the harmful effect, that the Department's sunset reviews have on foreign traders "operating in the commercial world." It is also clear that the Department's consistent violations of U.S obligations under Article X:3(a) impact on the competitive position of such foreign traders, given the clear systemic bias against foreign traders in favor of US industry. This also demonstrates the partiality and unreasonableness in the application by the Department of US sunset review laws.

210. In sum, separate and apart from whether US anti-dumping laws and regulations regarding sunset reviews are deemed to be consistent per se with US WTO obligations, and irrespective of whether the SAA and *Sunset Policy Bulletin* are "measures" that can be subject to challenge, the data drawn from the Department's own records demonstrates that the Department failed to administer in an impartial and reasonable manner US anti-dumping laws, regulations, decisions and rulings with respect to the Department's conduct of sunset reviews of anti-dumping duty orders, in violation of Article X:3(a) of the GATT 1994.

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[189] *Industrial Nitrocellulose from Yugoslavia*, 64 Fed. Reg. 57,852 (Dep't Comm. 1999)(final results sunset reviews)(ARG-42); *Industrial Nitrocellulose from Brazil, China, France, Germany, Japan, Korea, the United Kingdom, and Yugoslavia*, USITC Pub. No. 3342, Inv. Nos. 731-TA-96 and 439-445 (August 2000) at 11 (ARG-53).

VIII. THE COMMISSION'S SUNSET REVIEW WAS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT AND THE GATT 1994

A. IN THE SUNSET REVIEW OF OCTG FROM ARGENTINA, THE COMMISSION APPLIED AN INCORRECT STANDARD FOR DETERMINING WHETHER TERMINATION OF THE ANTI-DUMPING DUTY MEASURE WOULD BE "LIKELY TO LEAD TO CONTINUATION OR RECURRENCE OF . . . INJURY" AND VIOLATED ARTICLES 11.3 AND 3.1 OF THE ANTI-DUMPING AGREEMENT

211. The Commission failed to apply the correct standard for determining whether termination of the anti-dumping measure on OCTG from Argentina would be likely to lead to continuation or recurrence of injury. The standard applied by the Commission led to an affirmative finding of injury based on speculation about "possible" injury[190] or injury based on "a concept that falls in between 'probable' and 'possible' on a continuum of relative certainty."[191] The Commission failed to apply a "likely" standard in the sunset review of OCTG from Argentina basis2568pt5T/F0.9S T8 Tc 0 252 Tc -0.2 TD 0

215. Based on the SAA guidance, the Commission interprets "likely" in this phrase to mean that any determination – negative or affirmative – is permissible because either outcome is "possible." The Commission's equation of "possible" with "likely" cannot be reconciled with Article 11.3. Under the standard articulated in the SAA and applied by the Commission in this case, however, anti-dumping duty measures will be maintained as long as injury is merely "possible" in the absence of an order.

216. In a relatively recent remand determination that the Commission issued pursuant to an order by the United States Court of International Trade, the Commission confirmed that it has followed the approach of not giving the term "likely" its ordinary meaning of "probable" in all of the sunset review decisions that it had considered as of 1 July 2002, which would include the sunset review of OCTG from Argentina. The Commission stated:

> To comply with the Court's remand determination, the Commission must apply a fundamental term in the statute, 'likely,' as it pertains to five-year reviews. We have applied the term "likely" in over 250 sunset reviews. We have looked to the SAA in applying the term and have applied the term in a consistent manner.[196]

217. In that remand determination, the Commission offered the explanation that:

> In our view, the term "likely" captures a concept that falls in between "probable" and "possible" on a continuum of relative certainty.[197]

218. As is evident from the Commission's statement, it concedes that in "over 250 sunset reviews" (including the review of OCTG from Argentina), for purposes of its determination of whether material injury was likely to recur, the Commission "did not equate 'likely' with 'probable." By its own admission, the Commission's consistent practice is not to apply a "probable" standard.

219. Through the SAA, the US Government directed the Commission to apply, and the Commission applied, a standard for determining whether revocation of an order would likely lead to a continuation or recurrence of dumping and injury that is inconsistent with the requirements of Article 11.3 of the Anti-Dumping Agreement.

220. The SAA provides specific guidance on what the Commission should evaluate in sunset review proceedings:

> [T]he Commission must consider whether there has been *any improvement* in the state of the domestic industry that is related to the imposition of the order or the acceptance of a suspension agreement. The Commission should *not* -

221. Based on the above, the Commission failed to apply the correct standard for determining whether termination of the anti

injury is "likely." It is not sufficient that injury is "possible;" injury must be more probable than not to satisfy the Article 11.3 standard. More specifically, the Anti-Dumping Agreement mandates that investigating authorities must resolve whether the evidence affirmatively demonstrates that volume is "likely" to increase, that prices are "likely" to be suppressed or depressed, and that material injury is "likely," in the event of revocation.

227. As noted above, the panel in *DRAMS From Korea* commented on the ordinary meaning of the word "likely" as used in Article 11:

> We also note that "likelihood" or "likely" carries with it the ordinary meaning of "probable". That being so, it seems to us that a "likely standard" amounts to the view that where recurrence of dumping is found to be probable as a consequence of revocation of an anti-dumping duty, this probability would constitute a proper basis for entitlement to maintain that anti-dumping duty in force.[205]

228. In the context of a revocation review pursuant to section 751 of the Act, the *DRAMS from Korea* panel concluded that the word "likely" when used with respect to the continuation or recurrence of injury and dumping should be interpreted in accordance with its normal meaning of "probable." The panel found that "[a] finding that an event is 'likely' implies a greater degree of certainty that the event will occur than a finding that the event is not 'not likely.'" Similarly, in the context of a sunset review, Article 11 requires the Commission to interpret the term "likely" consistent with its ordinary meaning and usage as "probable" rather than merely as "possible."[206]

229. The Commission's interpretation in sunset reviews of the term "likely" as something less than "probable" contradicts the position taken by the United States in *United States – Countervailing Duties on Certain Corrosion Resistant Carbon Steel Flat Products from Germany* where the United States argued before the Panel that 'likely' as used in Article 21.3 of the SCM Agreement "carries with it the ordinary meaning of probable."[207]

230. In applying the standard set forth in the SAA, the Commission ignored or discounted directly relevant evidence as to whether revocation would likely lead to material injury.[208] The Commission's Sunset Determination makes clear that the Commission based its determinations on the mere

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[205] Panel Report, DRAMS from Korea, para. 6.48 n.494. The case involved a dispute as to the appropriateness of the Department's determination regarding whether to terminate an anti-dumping duty order because dumping had not occurred for at least three years and dumping was not likely to recur in the future – the Department invoked the a "not likely" standard (i.e., in its revocation review). Under the Department's regulations in effect at the time, the Department would revoke an order if it concluded, among other things, that exporters or producers had sold the merchandise at not less than fair value for at least three years and it was "not likely" that they would in the future sell the subject merchandise at less than normal value. See 19 C.F.R. § 353.25(a)(2)(ii) (1996)(ARG-4). The panel determined that the Department's use of the term "not likely" in this context was inconsistent with the United States obligations under the AD Agreement because it did not properly enable the Department to determine whether "continued imposition of the duty is necessary to offset dumping," as required under Article 11.2 of the WTO Anti-Dumping Agreement. See Panel Report, *DRAMS From Korea*, paras. 6.52-6.58.

[206] See Appellate Body Report, *United States – Gasoline*, para. 23; Vienna Convention, Art. 31.

[207] Oral Statement of the United States at the First Meeting of the Panel, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213 (29-30 January 2002), para.6.

[208] Indeed, the Commission determined subsequently in a separate OCTG anti-dumping duty investigation that "there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury, or that the establishment of an industry is materially retarded, by reason of imports of oil country tubular goods." *See Oil Country Tubular Goods From Austria, Brazil, China, France, Germany, India, Indonesia, Romania, South Africa, Spain, Turkey, Ukraine, and Venezuela*, Inv. Nos. 701-TA-428, 731-TA-992-994 and 996-1005 (Int'l Trade Comm'n 2002)(prelim. determ.)(ARG-55).

"possibility" that termination of the anti-dumping measure might result in material injury, rather than the "probability" that it would so result.

231. On several occasions, the Commission engaged in the kind of predictive and speculative analysis that is prescribed by the SAA and prohibited by Article 11.3 of the Anti-Dumping Agreement.[209] For example, when discussing the question of whether Tenaris[210] would, in the event the order on OCTG from Argentina were revoked, increase its shipments to the United States market, the Commission noted Tenaris' global focus, then hypothesized that given that focus, it would likely have a strong incentive to increase its shipments to the United States.[211] Such a finding is nothing more than a finding that such shipments were conceivably possible, rather than a determination, based upon hard evidence on the record, that such shipments were probable. The Commission concluded that, inasmuch as many of Tenaris' oil and gas company customers had operations in the United States, it was possible that Tenaris would seek to supply those operations. It did not, however, cite to

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for like products, and (b) the consequent impact of these imports on domestic producers of such products.

237. In *Hot Rolled Steel from Jap*

the subject countries were "export-oriented," and that in particular, those producers would focus on the US market.[226] The Commission emphasized that the "Tenaris Group," with its global focus, would likely have a strong incentive to have a significant present in the US market.[227] Second, the Commission found further that (1) there were significant differences between US and world-market prices for casing and tubing, with US prices being consistently higher, and (2) foreign producers faced significant import barriers in third-country markets.[228]

244. There are significant flaws in the Commission's volume analysis such that its conclusion, that subject imports would be likely to increase in the event of revocation, cannot be said to be the result of an objective examination of the record. First, with regard to the "Tenaris Group," there is simply no evidence in the record that Tenaris could re-orient production that is committed under existing contracts. The only way subject producers could significantly increase shipments would be to shift production away from other pipe and tube products towards casing and tubing.[229] No "positive evidence" demonstrated that the subject producers had an incentive to shift production. The "positive evidence" provided by the subject producers in their questionnaire responses to the Commission showed their existing production was committed by virtue of either long-term contracts or long-standing relationships with customers that required them to supply OCTG and other pipe and tube products. The Commission did not cite any "positive evidence" that the so-called "incentive" to ship to the United States would justify breaking long-term contracts and turning away long-term customers. The subject producers also provided "positive evidence" in their questionnaire responses that they focused on end-users in order to provide those end-users with service-related components for other commodity pipe and tube products. The Commission ignored or summarily dismissed such evidence.[230] Thus, despite the alleged "export-orientation" of foreign producers, the Commission failed to show that exports would enter the United States as opposed to other export markets.

245. Second, with regard to trade barriers in third-country markets, the Commission could point to only one outstanding order on the subject merchandise: an anti-dumping order in Canada against imports from Korea.[231] The Commission could not cite any third-country trade barriers facing producers in the other four countries subject to investigation. This is hardly the "positive evidence" required to support a conclusion that increased exports would be likely to enter the US market.

246. Finally, the Commission alleged that price differentials between the US and world markets meant that foreign producers would seek to ship primarily to the United States. The Commission, however, based its conclusion on anecdotal reports from its hearing and not on any independent investigation.[232] The Commission's reliance on this anecdotal evidence does not constitute the kind of "objective examination" that Article 3 requires.

(b) The Commission's findings on likelihood of negative price effects were not based on an objective examination of the evidence and do not constitute positive evidence of likely injury

247. The Commission's key finding on negative price effects was that "increases in subject import sales volume . . . would be achieved through lower prices."[233] The Commission, however, failed to reference any evidence (let alone "positive evidence") to support this conclusion.

[226] *Id*. at 20.
[227] *Id*. at 19.
[228] *Id*. at 19-20.
[229] *Id*.
[230] *Id.* at 19 n.126.
[231] *Id.* at 20 and at IV-6 to IV-8 (Staff Report).
[232] *Id.* at 19 n.128.
[233] *Id.* at 21.

248. The Commission attempted to support its conclusion by alleging the following: (1) subject imports generally undersold the domestic like product; (2) there was a high level of substitutability between subject imports and the domestic like product; (3) price was an important factor in purchasing decisions; (4) there would likely be a significant volume of subject imports; and (5) US demand for the subject product was volatile.[234] The majority of these findings are unsupported by the evidence on the record.

249. As an initial point, because there were negligible Argentine OCTG exports, the Commission's analysis necessarily focused on the volume of *shipments from Italy, Mexico, Japan, and Korea,* and their prices, in order to determine whether injury would likely continue or recur if the duty on *Argentine imports* were terminated. Two additional points also deserve attention. First, as the Commission acknowledged, its underselling analysis was based on a very limited set of comparisons.[235] Moreover, the Commission failed to note that at the end of the period examined, in 2000, domestic prices increased markedly.[236] It is completely illogical – and in no way objective – for the Commission to conclude that, where prices are increasing toward the end of the period examined, imports will enter at lower prices and cause injury. Second, the Commission points to the volatile nature of US demand but fails to explain how this factor signifies that imports will enter the US market at lower prices. At any rate, the Commission cites no evidence for the proposition that demand for OCTG was unusually volatile during the period examined.

250. The Commission's findings on the issue of the importance of price in purchasing decisions are similarly not based on any "positive evidence." Price is an important, although not determinative, factor to purchasers. Responding purchasers ranked quality as their primary purchasing criterion just as frequently as price, and product availability was considered as important to purchasers just as frequently as price.[237] Commission staff acknowledged that there was no clear trend in responses to the question of whether price differences or differences in factors other than price were significant in competition between US product and subject imports of casing and tubing.[238] The Commission also ignored data that showed that purchasers ranked factors such as delivery time, delivery terms, availability, and product quality as higher than price in importance, and ranked factors such as discounts offered, reliability of supply, and product consistency as equal in importance.[239] The Commission's selective interpretation of the record before it clearly demonstrates that the Commission did not undertake an "objective examination" of this issue.

251. Finally, as noted above, the Commission's finding that, upon revocation, there would likely be a significant increase in import volume, is not supported by the record evidence.

(c) The Commission's findings on likelihood of adverse impact were not based on an objective examination of the evidence and do not constitute positive evidence of likely injury

252. With regard to whether adverse impact on the domestic industry was likely in the event of revocation, the Commission concluded that "a significant increase in subject imports is likely to have negative effects on both the price and volume of the domestic producers' shipments despite strong

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

[235] *Id.* at 21 ("While direct selling comparisons are limited because the subject producers had a limited presence in the US market during the period of review, the few direct comparisons that can be made indicate that subject casing and tubing generally undersold the domestic like product especially in 1999 and 2000") (emphasis added).

[236] *Id.* at V-9 to V-11 (Staff Report).

[237] *Id.* at II-17 (Staff Report).

[238] *Id.* at II-18 n.71 (Staff Report).

[239] *Id.* at II-19 (Staff Report).

demand conditions in the near term.'"[240] The Commission's findings on this score, however, compel the opposite conclusion.

253. The Commission determined that domestic producers' shipments were at their highest level in calendar year 2000, the most recent period the Commission examined.[241] The Commission also found that domestic production capacity increased by 23 per cent, and production quantity by 39 per

257. The requirements imposed by Article 3.4 were recently summarized by the Panel in *EC – Pipe Fittings*:

> The Agreement requires that each listed Article 3.4 factor be addressed . . . . The provision requires *substantive, rather than purely formal, compliance* . . . . The term "evaluate" is defined as: "To work out the value of . . . ; To reckon up, ascertain the amount of; to express in terms of the known; To determine or fix the value of; To determine the significance, worth of condition of usually by careful appraisal or study." *These definitions reveal that an "evaluation" is a process of analysis and assessment requiring the exercise of judgement on the part of the investigating authority. It is not simply a matter of form, and the list of relevant factors to be evaluated is not a mere checklist.* As the relative weight or significance of a given factor may naturally vary from investigation to investigation, the investigating authority must therefore assess the role, relevance and relative weight of each factor in the particular investigation. *Where the authority determines that certain factors are not relevant or do not weigh significantly in the determination, the authority may not simply disregard such factors, but must explain their conclusion as to the lack of relevance or significance of such factors*. The assessment of the relevance or materiality of certain factors, including those factors that are judged to be not central to the decision, must therefore be at least implicitly apparent from the determination. Silence on the relevance or irrelevance of a given factor would not suffice.[248]

258. The Commission's determination did not address several of the mandatory issues, and several were only addressed in conclusory form. Indeed, the Commission's discussion of the majority of the Article 3.4 factors was limited to mere a recitation of them:

> In these reviews, we find that a significant increase in subject imports is likely to have negative effects on both the price and volume of the domestic producers' shipments despite strong demand conditions in the near term. We find that these developments likely would have a significant adverse impact on the production, shipments, sales, market share, and revenues of the domestic industry. This reduction in the domestic industry's production, shipments, sales, market share, and revenues would result in erosion of the domestic industry's profitability as well as its ability to raise capital and make and maintain necessary capital investments.[250]

259. The Commission provided little more than a "mere checklist." As the chart below indicates, the Commission either failed to consider many factors or simply mentioned others. The Commission's approach to the Article 3.4 factors was a "purely formal, rather than substantive compliance" – precisely the approach that the *Pipe Fittings* Panel found did not meet the requirements of Article 3.4. The Commission failed to even identify several of the Article 3.4 factors in its findings, let alone "evaluate" them.

FACTORS CONSIDERED UNDER ARTICLE 3.4

Factor	Referenced	Not Considered
Declines (actual or potential) in:		
Sales	X[1]	
Profits	X[1]	
Output	X[1]	

[248] Panel Report, *Pipe Fittings from Brazil*, paras. 7.310 and 7.314 (footnote omitted; emphasis added).
[249] *Commission's Sunset Determination* at 22 (ARG-54).

Factor	Referenced	Not Considered

entails elements of both Articles 3.4 and Article 3.7 of the Anti-Dumping Agreement. Injury determinations under Article 3.7 must be "based on facts and not merely on allegation, conjecture or remote possibility." Moreover, Article 3.7 requires the circumstances under which injury would

be causing injury to the domestic industry; (2) a determination of whether these factors are operating simultaneously; (3) a determination of whether these factors are having an injurious effect; (4) a distinction between the injurious effects (if any) of dumped imports versus injurious effects of other known factors; and (5) ensuring that domestic injury caused by other factors is not attributed to

law, however, the term "imminent" has been used to describe events potentially occurring several years into the future.[260]

272. The US statutes defining a "reasonably foreseeable time," as longer than an "imminent" time, are inconsistent with the Anti-Dumping Agreement that requires the determination to be based upon injury upon "expiry" of the order.[261] Footnote 9 to Article 3 defines the types of injury recognized under Article 3 for purposes of the Anti-Dumping Agreement: material injury to a domestic industry, threat of material injury to a domestic industry, or material retardation of the establishment of such an industry. The US statutory provisions permit the Commission to find injury without support of "positive evidence," that is based on sheer speculation, and that is far less immediate than the time frame contemplated by "threat of injury" as set forth in Article 3.7.

273. These provisions of US law are inconsistent with the obligations in Articles 3.7 and 3.8 of the Anti-Dumping Agreement. A likelihood of future injury analysis in accordance with Article 11.4 necessary entails elements of both Articles 3.4 and Article 3.7. Injury determinations under Article 3.7 must be "based on facts and not merely on allegation, conjecture or remote possibility." Moreover, Article 3.7 requires the circumstances under which injury would occur to be *imminent*. The Commission's injury determination was not based on "positive evidence" but rather conjecture and speculation. Furthermore, such conjecture and speculation as to the factors causing likely injury were not deemed to be "imminent" but rather might occur "within a reasonably foreseeable time." US law does not define, nor has the Commission articulated, what constitutes "a reasonably foreseeable time."[262] The virtually unbridled discretion of the Commission in making its determinations as to whether injury is likely to continue or recur conflicts with the requirements of the Anti-Dumping Agreement. Speculation by an investigating authority about market conditions several years into the future is inconsistent with Article 11.3 and Article 3.

274. Similarly, US law imposes an obligation on the Commission inconsistent with the mandate of Article 3.8, which provides that

> With respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be considered and decided with special care.

275. These provisions of US law operate to release the Commission from the constraints and safeguards built into Articles 3.7 and 3.8 of the Anti-Dumping Agreement in cases involving future injury. Article 3.8 requires that Members "considered and decided" with "special care" in the application of anti-dumping measures based on future injury findings. By extending the period of time outward (with no limitations) within which the Commission must consider whether domestic producers might be injured, the statutory provisions fail to satisfy the "likely" analysis mandated by Articles 11.3, 3.1, 3.2, 3.4, 3.7, and 3.8 of the Anti-Dumping Agreement.

[260] *See, e.g., Asociacion de Productores de Salmon y Trucha de Chile AG v. United States Int'l Trade Comm'n,* 180 F. Supp. 2d 1360, 1371-72 (CIT 2002)(ARG-13)("Both the dictionary definition and case law from the CIT demonstrate that the statutory term 'imminent' only means impending . . . [and not necessarily immediate]") (ARG-13); *Goss Graphics Systems v. United States*, 33 F. Supp. 2d 1082, 1102-04 (CIT 1998)(ARG-10)(basis for threat of injury finding was a decline in the industry's market share that was projected to manifest itself over two years into the future).

[261] The Commission has never defined what constitutes a "reasonably foreseeable time." The Commission provides no parameters and simply makes such decisions on a case-by-case basis.

[262] *Commission's Sunset Determination* at 7-8 and n.41 (ARG-54).

dumping measure on Argentine OCTG (not all anti-dumping measures on OCTG from other countries) would be likely to lead to a continuation or recurrence of injury.

281. The US position regarding cumulative assessment is inconsistent with the plain meaning of Article 11.3, and the object and purpose of the sunset provision.

282. First, the specific reference in the text of Article 11.3 to "an anti-dumping duty" is singular and not plural, which on its face refers to one measure, and not multiple anti-dumping measures. Indeed, the United States takes the position that sunset reviews must be conducted on an *order-wide* basis.[267]

283. Second, the text of Article 3.3 makes clear that cumulation is permitted only in investigations. Moreover, there is no cross-reference in Article 3.3 to Article 11.3.

284. Third, there is no explicit cross-reference to either cumulation or to Article 3.3 in the immediate context of Article 11 (*i.e.*

E. ASSUMING *ARGUENDO* THAT ARTICLES 3.3 AND 11.3 DO NOT PRECLUDE CUMULATION IN ARTICLE 11.3 REVIEWS, THEN THE TERMS OF ARTICLE 3.3 APPLY TO ANY SUCH CUMULATIVE ANALYSIS IN A SUNSET REVIEW. APPLICATION OF EITHER THE *DE MINIMIS* OR NEGLIGIBILITY REQUIREMENTS (BOTH OF WHICH MUST BE SATISFIED) WOULD HAVE PREVENTED CUMULATION IN THIS CASE. THE COMMISSION'S CUMULATIVE INJURY ANALYSIS IN THE COMMISSION'S SUNSET DETERMINATION FAILED TO SATISFY THE ARTICLE 3.3 REQUIREMENTS

288. Assuming *arguendo* that Articles 3.3 and 11.3 do not preclude cumulation in Article 11.3 reviews, then the terms of Article 3.3 must be applied to any such cumulative analysis in a sunset review. Indeed, the application of either the *de minimis* or negligibility requirements (both of which must be satisfied) would have prevented cumulation in this case. The Commission's cumulative injury analysis in the Commission's Sunset Determination thus failed to satisfy the Article 3.3 requirements.

289. Article 11.3's use of the word "injury" in the mandate that the authorities determine whether termination of the anti-dumping measure "would be likely to lead to continuation or recurrence of dumping and injury" means, as explained above, that the requirements of Article 3 apply to such determination.

290. In any event, as applied in this case, cumulation would have been prevented as a result of the clear language of Article 3.3 of the Agreement. Article 3.3 provides, in relevant part, 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 like domestic product.

291. For Argentina, the margin of dumping found by the Department of Commerce in its sunset determination was only 1.36 per cent, far below the 2 per cent level that the Agreement establishes as *de minimis*.[269] Moreover, the volume of imports from Argentina during the period examined never exceeded 3 per cent of total imports, which is the standard for negligibility under the Anti-Dumping Agreement.[270] Accordingly, it was a clear violation of Articles 11.3 and 3.3 the Anti-Dumping Agreement for the Commission to cumulate imports from Argentina with those from Italy, Japan, Korea, and Mexico in these sunset reviews.

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[269] *Commission's Sunset Determination* at I-14 (Staff Report)(ARG-54)(citing 65 Fed. Reg. 66,701, 7 November 2000). Paragraph 8 of Article 5 of the Agreement provides that "the margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price."

[270] *Commission's Sunset Determination* at IV-3, table IV-1 (Staff Report)(ARG-54). In 2000, by

F. THE COMMISSION'S USE OF A CUMULATED INJURY ANALYSIS IN THIS SUNSET REVIEW WAS INCONSISTENT WITH ARTICLES 11.3 AND 3.1 OF THE ANTI-DUMPING AGREEMENT BECAUSE IT PREVENTED THE COMMISSION FROM APPLYING A "LIKELY" STANDARD, AND WAS NOT BASED ON POSITIVE EVIDENCE

292. The Commission's application in this cas

Commission's Sunset Determination, the Department's Determination to Continue the Order, and the relevant US laws, regulations, policies and procedures, are inconsistent with the obligations of the United States with Article VI of the GATT 1994, Articles 1, 18.1 and 18.4 of the Anti-Dumping Agreement, as well as Article XVI:4 of the WTO Agreement.

A. THE US MEASURES VIOLATE THE BASIC PRINCIPLES OF THE ANTI-DUMPING AGREEMENT, AS PROVIDED IN ARTICLE 1

296. Article 1 of the Anti-Dumping Agreement ("Principles") states that:

> An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations. [footnote omitted]

297. Article 1 thus provides that anti-dumping measures, including those related to sunset reviews, can be applied only under the circumstances provided for in GATT Article VI. The application of GATT Article VI, in turn, is governed by the provisions of the Anti-Dumping Agreement. Therefore, any breach of a provision of the Agreement, by definition, entails a consequential violation of Article 1.

298. As noted by the Panel in the *1916 Anti-Dumping Act* dispute:

> As far as Article 1 is concerned, we note that if we find a violation of other provisions of the Anti-Dumping Agreement, it will be demonstrated that an anti-dumping investigation under the 1916 Act is not "initiated or conducted in accordance with the provisions of this Agreement" and a breach of Article 1 will be established.[276]

299. Argentina has demonstrated in this submission that the identified US measures, both as such as applied, violate the obligations of the United States under the Anti-Dumping Agreement. Therefore, the identified US measures also violate Article 1.

B. THE IDENTIFIED US MEASURES, WHICH CONSTITUTE A "SPECIFIC ACTION AGAINST DUMPING," VIOLATE ARTICLE 18.1 OF THE AGREEMENT

300. Article 18.1 states that:

> No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement. [footnote omitted]

301. The Appellate Body recently explained the two "conditions precedent" that must be met for Article 18.1 to apply:

> The first is that a measure must be "specific" to dumping or subsidization. The second is that a measure must be "against" dumping or subsidization. These two

[276] *United States – Anti-Dumping Act of 1916,* Complaint by the European Communities, Report of the Panel, para. 6.208. The Panel considering the complaint by Japan reached the same conclusion: see *United States – Anti-Dumping Act of 1916,* Complaint by Japan, Report of the Panel, para. 6.264. The Appellate Body upheld these findings regarding the violation of Article 1: Appellate Body Report, *United States – Anti-Dumping Act of 1916*, paras. 134-135.

C. THE UNITED STATES HAS FAILED TO ENSURE CONFORMITY OF ITS MEASURES WITH ITS WTO OBLIGATIONS, IN VIOLATION OF ARTICLE 18.4 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:4 OF THE WTO AGREEMENT

307. Article 18.4 of the Anti-Dumping Agreement provides that:

> Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

308. Any violation of any provision of the Anti-Dumping Agreement therefore triggers a consequential violation of Article 18.4 of the Anti-Dumping Agreement.

309. Article XVI:4 of the WTO Agreement states:

> Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

310. Any violation of any provision of a covered agreement will similarly trigger a consequential violation of Article 18.4 of Article XVI:4.

311. In the *Byrd Amendment* case the Appellate Body found that:

> As a consequence of our finding that the United States has acted inconsistently with Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement, we uphold the Panel's finding that the United States has failed to comply with Article 18.4 of the Anti-Dumping Agreement, Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.[282]

312. Other cases have also followed this approach. For example, the *Hot-Rolled Steel from Japan* Panel concluded that a certain US law was:

> inconsistent with Article 9.4 of the AD Agreement, and . . . therefore the United States has acted inconsistently with its obligations under Article 18.4 of the AD Agreement and Article XVI:4 of the Marrakesh Agreement by failing to bring that provision into conformity with its obligations under the AD Agreement.[283]

313. Therefore, a finding by this Panel that the United States has acted inconsistently with any of its obligations under the Anti-Dumping Agreement will necessitate a finding that it has also acted inconsistently with Article 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement.

Appellate Body Report, *United States – Continued Dumping and Subsidy Act*, para. 304.

[282] *Id*. at para. 302.
[283] Panel Report, *Hot-Rolled Steel from Japan*, para. 8.1.

X. CONCLUSION

314. As demonstrated herein, Argentina respectfully requests that the panel find the following violations by the United States of the Anti-Dumping Agreement, the GATT 1994, and the WTO Agreement:

A. US SUNSET REVIEW STATUTORY, REGULATORY, AND ADMINISTRATIVE PROVISIONS AS SUCH VIOLATE THE ANTI-DUMPING AGREEMENT AND THE WTO AGREEMENT

- By mandating that the Department issue a likelihood of dumping determination, without the conduct of a review, without any substantive analysis, and without making the requisite determination, 19 USC. § 1675(c)(4) and 19 C.F.R. § 218(d)(2)(iii) (the "waiver provisions") violate Article 11.3 of the Anti-Dumping Agreement;

- By precluding respondent interest parties the ability to provide information and to defend their interest in a manner inconsistent with the requirements of the Anti-Dumping Agreement, 19 USC. § 1675(c)(4) and 19 C.F.R. § 218(d)(2)(iii) violate Articles 6.1 and 6.2 of the Anti-Dumping Agreement;

- By requiring that the Commission determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" (19 USC. § 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 USC. § 1675a(a)(5)), these statutory provisions violate Articles 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 11.1, and 11.3 of the Anti-Dumping Agreement;

- By establishing an irrefutable presumption that dumping is likely to continue or recur in the event of termination of the anti-dumping measure, the SAA (pages 888-889) and the Department's *Sunset Policy Bulletin* (section II.A.3), as further demonstrated by the Department's consistent practice, violate Article 11.3 of the Agreement.

B. THE DEPARTMENT'S SUNSET REVIEW DETERMINATION VIOLATES THE ANTI-DUMPING AGREEMENT AND THE GATT 1994

- By conducting an expedited sunset review on the basis of Siderca's OCTG exports to the United States being less than 50 per cent of the total OCTG exports from Argentina to the United States, the Department violated Articles 6.1, 6.2, 6.8, and Annex II of the Anti-Dumping Agreement;

- By conducting an expedited sunset review, the Department rendered a determination of likelihood of continuation or recurrence of dumping without any analysis, in violation of Article 11.3 of the Anti-Dumping Agreement.

- By conducting an expedited review and applying the waiver provisions to Siderca, the Department violated Articles 6.1, 6.2, 6.8, and Annex II of the Anti-Dumping Agreement;

- By failing to provide public notice and explanations in sufficient detail the findings of all issues of fact and law in the Department's determination to conduct an expedited review, and the Department's Sunset Determination, which incorporated the Department's *Issues and Decision Memorandum* by reference, the Department violated Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement;

- By failing to apply the correct standard, by failing to conduct a prospective analysis, by failing to make a determination of likelihood of dumping on the basis of positive evidence, the Department's Sunset Determination is inconsistent with Article 11.3 of the Anti-Dumping Agreement;

- In the alternative, if the Panel finds that the SAA and the *Sunset Policy Bulletin* are not measures which can be challenged under the DSU (the finding requested by the fourth item in Section A, above), then by failing to administer in an impartial and reasonable manner US anti-dumping laws, regulations, decisions and rulings with respect to the Department's conduct of sunset reviews of anti-dumping duty orders, the United States violated Article X:3(a) of the GATT 1994.

C. THE COMMISSION'S SUNSET REVIEW DETERMINATION VIOLATES THE ANTI-DUMPING AGREEMENT

In the alternative, if the Panel finds that the SAA and the [illegible]

- By failing to apply to a "likely" or "probable" standard, the Commission violated Articles 3.1

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- By failing to ensure the conformity with the above noted laws, regulations and administrative procedures with its WTO obligations, the United States has violated Article 18.4 of the Anti-Dumping Agreement; and

- By failing to ensure the conformity with the above noted laws, regulations and administrative procedures with its WTO obligations, the United States has violated Article XVI:4 of the WTO Agreement.

XI. REQUEST FOR SUGGESTIONS FROM THE PANEL ON THE MANNER IN WHICH THE UNITED STATES SHOULD IMPLEMENT THE PANEL'S RECOMMENDATIONS

315. Article 19.1 of the DSU provides that where a panel concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.

316. DSU Article 19.1 also provides that in addition to its recommendations, the panel may suggest ways in which the Member concerned could implement the recommendations. Argentina would request the Panel to make such recommendations in the present case.

317. In light of the pervasive and fundamental violations by the United States of its WTO obligations, as demonstrated in this submission, Argentina respectfully requests that the panel suggest that the United States implement the recommendations by terminating the anti-dumping duties on

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ANNEX A-2

FIRST WRITTEN SUBMISSION OF THE UNITED STATES

7 November 2003

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I. INTRODUCTION

1. A centrepiece of the first submission of Argentina in this dispute is Argentina's purported study of the sunset review practice of the US Department of Commerce ("Commerce"), in which Argentina claims to have exhaustively researched all of Commerce's sunset review determinations

II. PROCEDURAL BACKGROUND

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

8. On 3 April 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

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*);
>
> - 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 cli3ry.75 Te,.aethe cli327 m 0.ommfor ino oSecf FedeA in aB75 Tc guladded).

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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 US 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 US 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 15 April 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 19 May 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,

A. SUNSET REVIEWS UNDER US LAW

1. The Statute[13]

25. In 1995, the United States amended its anti-dumping duty statute to include provisions for the conduct of five-year, or so-called "sunset," reviews of anti-dumping duty measures, including anti-dumping 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 anti-dumping 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 anti-dumping duty order would be likely to lead to continuation or recurrence of material injury.

26. Under section 751(d)(2) of the Act, an anti-dumping 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

27. Under the statute, Commerce automatically initiates a sunset review on its own initiative within five years of the date of publication of an anti-dumping 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]

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[13] This section provides a general overview of the US statutory provisions relating to sunset reviews. To be clear, however, the only provisions of the US 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 US anti-dumping duty and countervailing duty statute is found in title VII of the Tariff Act of 1930, as amended ("the Act"), 19 USC. 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 US 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 US 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 "anti-dumping duty order" is the US 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 US anti-dumping 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).

[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 anti-dumping duties.

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 per cent 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 anti-dumping 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, 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]
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2. The Regulations

(a) Commerce Regulations

35. In 1997, following the enactment of the URAA, Commerce revised its anti-dumping 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 anti-dumping proceedings, as well as procedural provisions applicable to both anti-dumping 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.

36. In 1998, in anticipation of the over 300 pre-URAA orders (referred to as "transition orders")[29] eligible for revocation by 1 January 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

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[28] Where, as in the case of the US anti-dumping 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.

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

[30] *Procedures for Conducting Five-Year ("Sunset") Reviews of Anti-Dumping and Countervailing Duty Orders* ("Sunset Regulations"), 63 FR 13516 (20 March 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).

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 anti-dumping order were revoked. Commerce normally will select the margins from the investigation, because these margins are the only calculated rates that reflect the behaviour 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 Anti-Dumping Duty Investigation Order

46. On 28 June 1995, Commerce published its final affirmative anti-dumping 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 per cent based on Siderca's sales to the United States during the period 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 10 August 1995, the ITC published notice of its final affirmative injury determination involving OCTG from Argentina.[50] On 11 August 1995, Commerce issued an anti-dumping duty order on certain OCTG from Argentina.[51]

48. No administrative reviews of the anti-dumping 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 3 July 2000, Commerce published its notice of initiation of the sunset review of the anti-dumping duty order on certain OCTG from Argentina.[52] In the notice, Commerce, as is its normal

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[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 (28 June 1995) ("Commerce Investigation Final") (Exhibit ARG-26).
[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] Anti-Dumping Duty Order: Certain Oil Country Tubular Goods From Argentina, 60 Fed. Reg. 41055 (11 August 1995) ("Anti-Dumping Duty Order") (Exhibit US-6).

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 2 August 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 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 per cent dumping margin from the investigation was below the 2 per cent *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 OCTG cI3de0.1875f -0.055-12.75nD TwG cI3dnTD ( )q1cAo22tion, Co69entina

54. On 7 November 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]

55. As required under US 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 per cent calculated in the original investigation for Siderca and "all others," because they were the only margins indicative of exporter behaviour 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 3 June 2000, the ITC instituted sunset reviews,[67] and on 25 October 2000, decided to conduct full reviews to determine whether revocation of the anti-dumping 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 10 July 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 anti-dumping 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]

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]

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[62] *Final Results of Expedited Sunset Reviews: Oil Country Tubular Goods From Argentina, et al.* ("*Commerce Sunset Final*"), 65 FR 66701 (7 Nov. 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)

[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.

64. The ITC explained a second incentive for producers of the subject merchandise to devote more capacity to producing casing and tubing for the US 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 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 US 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 US-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 US 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]

[78] ITC Report at 19.
[79] ITC Report at 19-20.
[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.

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]

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 US 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 benefited 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 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]

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

77. On this basis, the ITC determined that revocation of the anti-dumping 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

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.
>
> 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]

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[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*"].

[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*"].

> 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

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

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*

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 defence was delayed because, due to Argentina's failure to comply with Article 6.2, the United States did not "know what case it has to answer." 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 defences 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 Appellate Body has characterized as "fundamental" does not constitute prejudice, then nothing does.

98.

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 defence with respect to 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 defence 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

> 3. The US statutory requirements that the Commission determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" (19 USC. § 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 USC. § 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 US 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.
>
> 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

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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 US 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's 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).

[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).

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* quest

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]

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 USC. §§ 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 USC. §§ 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 US 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.

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[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.

[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,

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.

4. Argentina's claim that the ITC's application of 19 USC. §§ 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 USC. §§ 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 Anti-Dumping 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]

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 US 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 USC. §§ 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 US 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.

[136] Argentina's first submission, para. 277.

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

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.

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 behaviour or preclude WTO-consistent behaviour.

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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.

[142] Argentina's first submission, paras. 114-117.

[143] Argentina's first submission, paras. 121-122.

discussed above, the AD Agreement leaves the conduct of sunset reviews to the discretion of the Member concerned.

1. The Waiver Provisions

Article 11.3. Principally, under section 751(c)(1) of the Act, Commerce remains obligated, five years after an o

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

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

> preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

160. "Expeditious" is defined as "promptly and efficiently."[170] Thus, the AD Agreement should -

(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 US 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

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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

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 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]cludes a series of claimption.

> 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 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," "0.18 Tw highly above Tc 0

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 anti-dumping measure. To the

ARG-63, 74 were reviews in which no domestic industry party participated and in which Commerce revoked the anti-dumping 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 per cent 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 per cent of those reviews were uncontested by respondent interested parties.

185. By the US count, this leaves 35 cases (only 13 per cent) 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 "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 US 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 anti-dumping 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.

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[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's first submission, para. 129, fifth bullet.

[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.

> 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 US 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, the past decisions of the USDOC. ...

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 US 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 US 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 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 ta0.00 0.1361TD 0.0938 tngeiontervailing Measures

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 incons istent 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 Anti-Dumping 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" 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 Anti-Dumping Agreement because it was based on an irrefutable presumption under US law .6 irmping Tj -409.Argent

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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.

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 US 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 per cent."[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 anti-dumping 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 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

[209] Argentina's first submission, paras. 148-155.
[210] Adequacy Memorandum, at 1- No

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

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 Siderca in its substantive response. Commerce determined that dumping continued to exist throughout the history of the order, that US 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 anti-dumping 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 US 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

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

[221] *See generally* [illegible] ARG [illegible] *-46).*

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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 i

review. In particular, the regulations state that Commerce "normally will conclude that 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 per cent, 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

the response[240] and may submit a rebuttal to any other party's substantive response to the notice of initiation.[241]

229.

with Article 2.1 of the AD Agreement in a sunset review.[264] Argentina is wrong, because Article

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 US dumping petitions filed after 1 January 1995, the date of entry into force of the WTO Agreement with respect to the United States. The anti-dumping investigation in this case was initiated on the basis of a petition filed prior to 1 January 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.

3. Commerce fully complied with its obligations under the AD Agreement in making the affirmative likelihood determination

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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 defence 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

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

[271] Argentina's 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, ubstantsf Tc 187.

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 US 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 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 US 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]

shippers and even with respect to the same person at different times and different places.[285-]

F. THE ITC APPLIED THE CORRECT STANDARD FOR DETERMINING WHETHER TERMINATION OF THE ANTI-DUMPING DUTY ORDER WOULD BE LIKELY TO LEAD TO CONTINUATION OR RECURRENCE OF INJURY, AND 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 anti-dumping 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.

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 anti-dumping 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 anti-dumping investigation, authorities examine the current condition of an industry without the benefit of an order in place to

[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's first submissionhe

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.

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 ––

of the inquiry in an original investigation and in a sunset review demonstrate that the requirements for

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.

312. Argentina's claims with regard to the likely volume of imports, likely price effects of imports,

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 US market, for the following reasons.

322. First, the ITC found that the alliance of five foreign producers known as Ten

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 US market.[342]

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 US 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 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 US 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,

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 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 US 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 US prices in the absence of anti-dumping 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.

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[358] *Id.* at 12.

[359] *Id.*

[360] Argentina's first submission, para. 249.

[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's first submission, para. 249.

[365] ITC Report at 21.

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

[367] Argentina's 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.").

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

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

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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

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,

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 US 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]

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 INCONSI

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 anti-dumping 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

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 anti-dumping 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 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 anti-dumping 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, t.4688 Tuo

> [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 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 anti-dumping 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

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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 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* anti-dumping 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 anti-dumping proceeding. Therefore, in its findings, the Panel should make clear that the Determination to Expedite is not a measure.

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[404] *See, e.g.*, Argentina's first submission, Section VII.C.1, VII.C.4, and para. 295.
[405] WT/DSB/M/147, para. 33 (Exhibit US-1).

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 USC. §§ 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 USC. §§ 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 US 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.

ANNEX A-3

SUBMISSION FROM ARGENTINA ON THE REQUEST BY THE UNITED STATES FOR PRELIMINARY RULINGS UNDER ARTICLE 6.2 OF THE DSU

4 December 2003

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I. INTRODUCTION

1. Argentina regrets that the United States has sought to divert the attention of the Panel from the important substantive issues before it by making this unnecessary request for Preliminary Rulings. Argentina's Request for Establishment of a Panel[1] is detailed, specific and clear, and complies fully with Article 6.2 of the DSU.

2. The fact that the United States has put such considerable effort into this procedural challenge speaks volumes about the strength of the US case on the merits. The United States claimed in its first submission that "Argentina has a very weak case."[2] If this were so, the United States would not have put in such extensive – although unavailing – argumentation on the Panel's terms of reference. The United States seeks to eliminate some of Argentina's claims through procedural devices in order to prevent the Panel from adjudicating on the merits. This submission will demonstrate that the US procedural challenge is baseless and that the Panel should decide the case on the merits.

3. Argentina is also surprised that the United States has chosen this route, particularly in light of

> *process* objective of notifying the parties and third parties of the nature of a complainant's case.
>
> . . . .
>
> 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.[6]

12. The jurisprudence has also made clear that the key "attendant circumstance" that must be considered in determining whether the requirements of Article 6.2 have been met is whether the defending party can demonstrate to the panel that it has suffered prejudice during the course of the panel proceedings. This will be discussed in greater detail below.

13. Therefore, before proceeding to the more specific elements of Article 6.2, it is worthwhile to summarize the general principles of Article 6.2 as enunciated by the Appellate Body:

> the terms of reference serve the due process objective of providing notice to the defending party and the third parties of the nature of the complainant's case. Any finding that Article 6.2 has been violated is tantamount to a finding that due process rights have been violated;
>
> compliance with the requirements of Article 6.2 must be determined by considering the panel request as a whole, and not simply on the basis of isolated portions; and
>
> compliance must be assessed in the light of "attendant circumstances," including actual prejudice to the defendant during the course of the panel proceedings.

14. With these general observations in mind, Argentina now turns to the specific arguments raised by the United States in the present case.

III. ARGENTINA'S "PAGE FOUR" CLAIMS ARE WITHIN THE PANEL'S TERMS OF REFERENCE

A. US COMPLAINT

15. The United States first alleges that page four of Argentina's Panel Request ("Page Four") fails (i) to identify the specific measures at issue, (ii) to identify the legal basis for the complaint, and (iii) to provide a narrative description of the legal basis of the complaint.[7] As a result, the United States argues, Page Four does not comply with the requirement under Article 6.2 of the DSU to "present the problem clearly."

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[6] Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, adopted 19 December 2002, paras. 126 and 127 ("*Steel from Germany*ys5 0 Tn Tc 3e6e f BT 216 2he complaint.

> Whether sufficient information is provided on the face of the panel request will depend, as noted above, on whether the information provided serves the purposes of Article 6.2, and in particular its due process objective, as well as the specific circumstances of each case, including the type of measure that is at issue.[9]

18. Thus, in assessing whether Argentina's Panel Request adequately identified the specific measures at issue, the Panel must evaluate the fundamental underlying issue of whether the request satisfies the due process objective of Article 6.2. In this regard, the Panel must consider whether the specific formulation used by Argentina on Page Four of its panel request, when that document is read as a whole, caused actual prejudice to the United States during the course of the Panel proceedings. This issue will be examined in greater detail below.

2. Identification of the legal basis of the complaint

(a) Claims versus Arguments

19. WTO jurisprudence establishes that a request for the establishment of a panel must set out claims, rather than the arguments in support of those claims. In *EC – Bananas*, the Appellate Body upheld this principle in unambiguous terms:

> We accept the Panel's view that it was sufficient for the Complaining Parties to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements. In our view, there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.[10]

20. Thus, to comply with Article 6.2 of the DSU, a complaining party need only "list the provisions of the specific agreements alleged to have been violated." There is no obligation to set out "detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements."[11] Argentina's Panel Request provides the detail required by Article 6.2. As the United States is well aware, there is no need for Argentina to develop the arguments that support the claims identified in its panel request.

(b) Minimum Requirements

21. The Appellate Body in the *Korea – Dairy* case affirmed this principle. Commenting on its earlier ruling on this issue in *EC – Bananas*, the Appellate Body in *Korea – Dairy* noted that it:

> [A]greed with the conclusion of the panel that, in that case, the listing of the articles of the agreements claimed to have been violated satisfied the *minimum* requirements of Article 6.2 of the DSU. In view of all the circumstances surrounding that case, we

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[9] *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain: Preliminary Ruling by the Panel*, WT/DS276/12 (21 July 2003) paras. 17 and 20.

[10] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas,* WT/DS27/AB/R, adopted 25 September 1997, para. 141 ("*EC – Bananas*"). This test has been applied in many subsequent WTO cases.

[11] *Id.*

> concurred with the panel that the European Communities had not been misled as to what claims were in fact being asserted against it as respondent.[12]

22. The Appellate Body added, in a passage also quoted by the United States in its first submission, that:

> 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.[13]

23. The Appellate Body in *Korea – Dairy* concluded that:

> [W]hether the mere listing of the articles claimed to have been violated meets the standard of Article 6.2 must be examined on a case-by-case basis. In resolving that question, *we take into account v3 resolvingcase basie7ver, 1 4Tj 168.7Tj 281.25 viodefstafall sh-12.75 2*

26. The *EC – Bed Linen* panel summarized the WTO case law as follows:

> It seems that even if the panel request is insufficient on its face, *an allegation that the requirements of Article 6.2 of the DSU are not met will not prevail where no prejudice is established.*
>
> In essence, the Appellate Body seems to set a two-stage test to determine the sufficiency of a panel request under Article 6.2 of the DSU: first, examination of the text of the request for establishment itself, in light of the nature of the legal provisions in question; second, an assessment of whether the respondent has been prejudiced by the formulation of claims in the request for establishment, given the actual course of

the Appellate Body found that even although the panel request was inadequate, the responding party had failed to show prejudice, and dismissal was not warranted.[17]

28. Thus, as the United States itself correctly recognizes, a defending party must demonstrate actual prejudice during the course of the panel proceedings as a prerequisite to successfully challenge a panel request under DSU Article 6.2.

29. Moreover, as the Party asserting the DSU Article 6.2 claim, the United States has the burden

32. Thus, the complaining party may point to the existence of a narrative description in a panel request to counter claims that a defending party has been prejudiced.

C. THE CHALLENGED MEASURES AND THE LEGAL BASIS OF ARGENTINA'S COMPLAINT HAVE BEEN ADEQUATELY IDENTIFIED

33. As an initial observation, Argentina notes that the US laws, regulations, policies and procedures identified in its panel request are limited, specific, and identified with precision. Argentina has referred to the provisions of the US statutory, regulatory and administrative regime – including the US practice – that deal with sunset reviews in antidumping cases, which together represent a small subset of US trade remedy laws, regulations and administrative procedures.

34. With respect to the requirement to "identify the specific measure at issue," the *Canada Wheat Board* case is instructive, in that it sets out the standard as to when a measure will not be considered as adequately identified. It is thus useful to consider Argentina's Panel Request in light of the *Canada Wheat Board* standard.

35. In *Canada Wheat Board*, the US panel request used such formulations as "the laws, regulations, and actions of the Government of Canada and the [Canadian Wheat Board] related to exports of wheat."[19] The Panel found that this formulation fell short of the standard set out in Article 6.2, since the US request, "by creating considerable uncertainty as to the identity, number and content of the laws and regulations which it [was] challenging, [did] not provide adequate information on its face to identify the specific measures at issue."[20] Therefore, the US panel request left the defending party "little choice . . . but to undertake legal research and exercise judgement in order to establish the precise identity of the laws and regulations indicated in the panel request."[21] The *Canada Wheat Board* Panel therefore concluded that, "taken as a whole, the United States' panel request [did] not sufficiently establish the identity of the 'laws' and 'regulations' at issue . . ."[22]

36. In contrast to the vague references to "laws and regulations related to exports of wheat" that were found to be insufficient in the *Canada Wheat Board* panel request, Page Four of Argentina's Panel Request precisely identifies the US

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regulations, codified at Title 19 of the United States Code of Federal Regulations §§ 207.60-69 (Subpart F).[23]

37. Given this degree of precision, one may safely conclude that the United States has no need to "undertake legal research" or "exercise judgment" to establish the "precise identity of the laws and regulations implicated by the panel request."

> Canada asked the Panel to rule on the consistency of Brazil's request for establishment with Article 6.2 of the DSU prior to the deadline for the parties' first written submissions. We recall our finding that there is no requirement in the DSU for panels to rule on preliminary issues prior to the parties' first written submissions. Nor is there any established practice to this effect, for there are numerous panel reports where rulings on preliminary issues have been reserved until the final report. Furthermore, we have stated above that we *will decide this preliminary issue by determining whether any alleged imprecision in Brazil's request for establishment prejudiced Canada's due process right of defence during the panel process. We can necessarily only undertake such an analysis at the end of the panel process*.[31]

50. A similar ruling was made by the Panel in *Thailand H-Beams*. In that case, Thailand raised its Article 6.2 claim in its first written submission, just at the United States did in the present case. As in *Canada Aircraft*, the *Thailand H-Beams* Panel said that it was too soon to determine whether the defending party had suffered prejudice during the panel proceedings:

> At the first substantive meeting, we denied Thailand's request for an *immediate* preliminary ruling . . . and indicated that we would issue our ruling and supporting reasons in the Panel report. Referring to the Appellate Body report in *Korea – Dairy*, we informed the parties that we would evaluate whether, *given the actin*

to the level of a *violation of due process rights*, as the Appellate Body in *EC – Computer Equipment* made clear.[35]

56. Moreover, a review of the US first submission confirms that in no way have the "due process rights" of the United States been violated. The United States has provided detailed (albeit unc

65. The inability of the United States to prove actual prejudice during the course of the panel proceedings vitiates the legal basis for all of the claims made by the United States under Article 6.2.

IV.

Argentina's references to Article 11, or even to Article 11.4.[43] In addition, to provide even greater precision, Argentina listed Article 6 itself in sections B.1 and B.2. Thus, Argentina has stated its Article 6 claim clearly and unambiguously.

70. With respect to Article 3, Argentina's claim B.3 challenges specific provisions of US sunset

the United States declined to provide substantive responses during consultations. Nor did the United States provide notice to Argentina that it did not understand the nature of the questions posed by

> interlinked nature of the obligations in Article 5, we are of the view that, in the facts and circumstances of this case, Poland's reference to "the procedural . . . requirements" of Article 5 was sufficient to meet the minimum requirements of Article 6.2 of the DSU.[48]

81. As with Article 5, Article 3 also has "interlinked obligations." Article 3.1 provides that a determination of injury must be based on "positive evidence" and involve an "objective examination" of the volume of the dumped imports, the effect of dumped imports on prices, and the consequent impact of the dumped imports on the domestic industry. Article 3.2 provides greater precision

- a panel request must be read "as a whole," i.e., in its entirety.

92. Turning to the specific US allegations:

(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

93. The United States is apparently alleging here that Argentina's Panel Request does not present a claim challenging the Department's sunset review practice as being inconsistent with Article 11.3, either "as such" or "as applied." Although the United States focuses on Section A.4 of Argentina's Panel Request in making this claim, the US arguments are undermined by the very paragraph they reference.

94. Section A.4 of Argentina's Panel Request states:

> 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 under US law as such that termination of the anti-dumping duty measure would be likely to lead to continuation or recurrence of dumping. This unlawful presumption is

portions other than Section A.4 of the panel request also refer to Argentina's "as applied" challenge to US sunset review practice under Article 11.3. For example, the first sentence of Section A.2 refers to "[t]he Department's application of the expedited sunset review procedures in the sunset review of OCTG from Argentina" as being inconsistent with, inter alia, Article 11. (Emphasis added.) Additionally, the first sentence of Section A.5 states, "The Department's application of the standard for determining whether termination of anti-dumping measure would be 'likely to lead to continuation or recurrence of dumping' is inconsistent" with, inter alia, Article 11.3. (Emphasis added.)

99. The United States thus cannot credibly assert that from the terms of the panel request it had no notice that Argentina was challenging the Department's practice.

100. Moreover, as explained above, during the consultations Argentina presented written questions to the United States on a broad set of issues being raised by Argentina, including issues related to the Department's general sunset practice and the irrefutable presumption established by US law.[53] For example, in question 13, Argentina asked, "Is there a presumption under US law or practice that revocation of an antidumping order would likely lead to a continuation or recurrence of dumping?"[54] It is clear that even before Argentina submitted its panel request, the United States had notice that Argentina was challenging the Department's consistent practice. Consequently, the United States cannot credibly assert that it suffered actual prejudice during the course of the panel proceedings.

(ii) Argentina's claim that 19 USC. §§ 1675(c) and 1675a(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

101. The United States argues that Argentina's Panel Request does not present the problem clearly with respect to the irrefutable presumption established by 19 USC. §§ 1675(c) and 1675a(c), the SAA, and the Sunset Policy Bulletin, taken together. In making this argument, the United States again limits its focus to Section A.4, rather than considering the panel request as a whole.

102. Read as a whole, Argentina's Panel Request presents the problem clearly. First, as noted above, Section A.4 states 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 under US law as such that termination of the anti-dumping duty measure would be likely to lead to continuation or recurrence of dumping." (Emphasis added.) Accordingly, Argentina's claim that the Department's Sunset Determination was inconsistent with Article 11.3 relies on the premise that US law as such establishes an irrefutable presumption of likely dumping. Consequently, Section A.4 makes clear that Argentina is alleging that US law establishes an irrefutable presumption of likely dumping that is inconsistent with Article 11.3. Meanwhile, Page Four of the panel request (on which Argentina has already provided argumentation) indicates that "US law" in this context comprises 19 USC. §§ 1675(c), 1675a, the SAA, and the *Sunset Policy Bulletin*, and that these

with Article 11.3.[55] For example, question 28 states, "Does the United States consider that the US

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hoped to resolve this dispute without the need to resort to the panel process. As noted above, Argentina provided 86 written questions to the United States (to which it received no written responses), participated in two rounds of consultations, and has always acted in good faith in these proceedings. For the United States to assert otherwise is perplexing and completely inconsistent with the record of this proceeding. Argentina rejects these accusations by the United States.

VI. CONCLUSION

117. The US request for preliminary rulings fails both prongs of the two-part test set out by the Appellate Body for determining whether a panel request meets the requirements of Article 6.2 of the DSU. First, an examination of Argentina's Panel Request, read as a whole, indicates that it is detailed, clear and specific, fully setting out Argentina's claims. Second, the United States has utterly failed to substantiate its claim that it was allegedly prejudiced during the course of the Panel proceedings. In any event, as indicated above, the United States has been well aware of the full nature and extent of Argentina's claims for over a year.

118. In light of the attendant circumstances in this case, the United States cannot credibly assert that it was not aware of Argentina's claims, "sufficient to allow it to defend itself."

119. Accordingly, Argentina respectfully requests the Panel to dismiss the US request for preliminary rulings in their entirety.

Geneva, 4 December 2003