ANNEX A

FIRST WRITTEN SUBMISSIONS OF PARTIES

ANNEX A-1

FIRST WRITTEN SUBMISSION OF ARGENTINA

5 April 2006

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I. INTRODUCTION

1. This dispute raises fundamental questions about the enforceability of a key discipline of the Anti-Dumping Agreement: the "sunset review" provisions of Articles 11.3 and 11.4.

2. During the Uruguay Round, negotiators agreed that "any definitive anti-dumping duty shall be terminated on a date ***not later than five years from its imposition,***" absent compliance with a number of strict conditions. Investigating authorities seeking to extend the order beyond this expiry date have to conduct a "review" before that date and make a "determination" that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.

3. The original Panel in this dispute found that the United States violated its obligations under Article 11.3 when it extended the anti-dumping duty order on oil country tubular goods (OCTG) from Argentina. The United States did not appeal that finding. The United States now claims to have complied with the DSB rulings, in part by conducting proceedings under Section 129 of the *Uruguay Round Agreements Act*, the statutory authority used by the United States to implement adverse WTO rulings. The resulting Section 129 Determination was issued in December 2005, which is ***more than five years after the date when the order was required to expire in the absence of a WTO-consistent likelihood of dumping determination***.

4. Article 11.3 embodies the carefully calibrated balance that was agreed to during the Uruguay Round. Anti-dumping orders are permitted under the Agreement to remain in force for five years, and can be extended beyond this period only under the exceptional circumstances enumerated in Article 11.3. The explicit temporal limitations of Articles 11.3 and 11.4 would be rendered a nullity if a WTO Member could satisfy those obligations subsequent to the time periods specified in Articles 11.3 and 11.4. Thus, if, as in this case, the likelihood of dumping determination undertaken at the required time was not supported by positive evidence, then the Member has no right to extend the measure.

5. Argentina respectfully submits that to permit the United States to "comply" with its Article 11.3 obligations in this case with a *post hoc* sunset proceeding – nearly eleven years after the imposition of the order, and five years after its scheduled expiration – would render a nullity the temporal limitation on anti-dumping orders, contrary to the unambiguous intent of the drafters. This would be contrary to the clear admonition of the Appellate Body that an interpretation that renders *inutile* a provision of a covered agreement would be "abhorrent to the principles of interpretation we are bound to apply".[1]

6. The facts of this case demonstrate that the Section 129 Determination did not bring the United States into conformity with its obligations under Article 11.3 of the Anti-Dumping Agreement, nor into compliance with the rulings of the DSB. The United States developed, in 2005, a different factual basis to support its 2000 likely dumping determination in a manner inconsistent with the requirements of Article 11.3.

7. Wholly separate and apart from USDOC's illegal development of a new factual basis in 2005 to support the 2000 likelihood of dumping determination, the new factual basis for the Section 129 Determination is itself WTO-inconsistent. In addition, USDOC's conduct of the Section 129 proceeding in developing this new information was also inconsistent with US WTO obligations. The new factual basis developed for the 2005 likelihood of dumping determination falls far short of the positive evidence required under Article 11.3 to support a WTO-consistent determination that dumping was likely to continue or recur, and significant aspects of the procedures employed by

[1] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 121.

USDOC in the Section 129 proceeding were patently inconsistent with the provisions of Article 6 of the Anti-Dumping Agreement.

8. Finally, the United States failed to bring the US statutory and regulatory waiver provisions into conformity with US WTO obligations and with the rulings of the DSB.

II. PROCEDURAL BACKGROUND

9. On 17 December 2004, the DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body, in this dispute. The resulting DSB rulings encompassed both "as applied" violations related to USDOC's November 2000 likelihood of dumping determination in the sunset review for OCTG from Argentina and "as such" violations related to the "waiver" provisions of United States law and regulations.

10. The Panel found that the USDOC likelihood of dumping determination was inconsistent with Articles 11.3 and 6.2 of the Anti-Dumping Agreement.[2] These findings were not appealed by the United States.

11. The Panel determined that the USDOC's likelihood of dumping determination was inconsistent with Article 11.3 of the Anti-Dumping Agreement for two separate and independent reasons. First, the Panel determined that there was no legal or evidentiary basis for USDOC to have considered that dumping had continued over the life of the order, and thus that there was no basis for a determination that dumping would be likely to continue or recur.[3] Second, the Panel determined that the application of the waiver provisions invalidated the factual basis for USDOC's likelihood of dumping determination.[4] The Panel also found that the USDOC's likelihood of dumping determination was inconsistent with Article 6.2 of the Anti-Dumping Agreement because "Siderca was subjected to a procedure that fell short of the requirements of Article 6.2 of the Agreement in respect of hearings."[5]

12. With respect to the "waiver" provisions, the Appellate Body upheld the Panel findings that:

- Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(iii) of the US Department of Commerce (USDOC) Regulations are inconsistent, as such, with Article 11.3; and
- Section 351.218(d)(2)(iii) of the USDOC Regulations is inconsistent, as such, with Articles 6.1 and 6.2 with respect to respondents that file incomplete submissions in response to the USDOC's notice of initiation of a sunset review. [6]

13. The DSB recommended that the United States bring its measures into conformity with US WTO obligations. On 14 January 2005, the United States informed the DSB that it intended to implement the recommendations and rulings of the DSB in a manner that respected US WTO obligations.[7]

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[2] Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/R, adopted 17 December 2004, para. 8.1(d)(i) ("Panel Report").

[3] Panel Report, para. 7.219; *see also* para. 8.1(d)(i).

[4] Panel Report, para. 7.222; *see also* para. 8.1(d)(i).

[5] Panel Report, *US – Oil Country Tubular Goods Steel Sunset Reviews*, paras. 7.235; *see also* para. 8(1)(d)(i).

[6] Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, para. 365(c)(i) and (ii).

[7] Minutes of DSB Meeting, WT/DSB/M/181, 14 January 2005, para. 10.

14. During the subsequent arbitration under DSU Article 21.3(c) to determine the "reasonable period of time" for compliance, the United States argued that it needed 15 months, in part to comply with the extensive due process requirements of Article 6 of the Anti-Dumping Agreement. The Award of the Arbitrator noted the US position as follows:

> The United States argues that the time required to carry out these procedural steps in the two phases of implementation demonstrates the need for a 15-month implementation period in this dispute…. In the second phase, the USDOC also needs sufficient time to ensure that it complies with its obligations of transparency and due process under Articles 6 and 12 of the *Agreement on Implementation of Article IV of the General Agreement on Tariffs and Trade 1994* (the "*Anti-dumping Agreement*"). The United States argues that, in accordance with previous arbitration awards, this should include time to obtain and analyze information from interested parties, even though this is not expressly required by statute or regulation.[8]

15. On 7 June 2005, the Arbitrator determined that the "reasonable period of time" for the United States to implement the DSB recommendations and rulings would be 12 months from the date of adoption of the Panel and Appellate Body Reports, i.e., by 17 December 2005.[9]

16. On 28 October 2005, the United States published in the Federal Register a notice of amendment of section 351.218(d)(2) of the USDOC regulations.[10] The Federal Register notice stated that the USDOC was "amending its regulations relating to sunset reviews to conform the existing regulation to the United States' obligations under Articles 6.1, 6.2, and 11.3" of the Anti-Dumping Agreement.[11] The United States made no changes to Section 751(c)(4)(B) of the Tariff Act of 1930, the section of US law that the DSB ruled to be inconsistent with Article 11.3.

17. On 2 November 2005, the USDOC initiated a Section 129 proceeding to address the Panel's findings concerning the USDOC's likelihood determination. On 31 October 2005, USDOC requested information from Argentine OCTG producers Tubhier, Acindar, and Siderca S.A.I.C. (Siderca).[12] For the period 1995-2000 (the period of the original sunset review), the USDOC requested certain cost of production information for OCTG, as well as production and shipment volumes. Acindar and Siderca submitted their responses on 30 November 2005.[13]

18. The USDOC did not issue any supplemental questionnaires, or provide a briefing schedule as to the timing for written argument or a public hearing. Nor did the USDOC conduct a public hearing. On 16 December 2005, the USDOC issued its Section 129 Determination, finding that "we find there is likelihood of continuation or recurrence of dumping had the antidumping duty order on OCTG from Argentina been revoked in 2000, i.e., at the end of the original sunset period".[14] The Section 129

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[8] Award of the Arbitrator, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, Arbitration under Article 21.3(c) of the DSU, WT/DS268/12, 7 June 2005, para. 10.

[9] Award of the Arbitrator, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, Arbitration under Article 21.3(c) of the DSU, WT/DS268/12, circulated 7 June 2005, para. 53.

[10] *Procedures for Conducting Five-Year ("Sunset") Reviews for Antidumping and Countervailing Duty Orders: Final Rule*, 70 Fed. Reg. 62,061 (28 Oct. 2005) (ARG-12).

[11] *Procedures for Conducting Five-Year ("Sunset") Reviews for Antidumping and Countervailing Duty Orders: Final Rule*, 70 Fed. Reg. 62,061 (28 Oct. 2005) (ARG-12).

[12] USDOC Questionnaire to Acindar, Tubhier and Siderca (31 Oct. 2005) (ARG-12).

[13] Acindar's Response to Questionnaire (30 Nov. 2005) (ARG-14).

[14] *Section 129 Determination: Final Results of Sunset Review, Oil Country Tubular Goods from Argentina*, A-357-810 (16 Dec. 2005) ("USDOC Section 129 Determination") (ARG-16).

Determination references and relies in part on several USDOC internal file memoranda that are dated 16 December 2005 – the same date as the Section 129 Determination.

19. On 20 December 2005, the United States asserted to the DSB that it had "implemented the recommendations and rulings of the DSB in [this] dispute".[15] Argentina does not agree. Accordingly, there is "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB within the meaning of Article 21.5 of the DSU."[16]

20. On 26 January 2006, Argentina requested consultations with the United States. Consultations between the parties were held on 7 February 2006, in Washington, D.C., and by teleconference on 22 February 2006. The consultations failed to settle the dispute. On 6 March 2006, Argentina requested the establishment of a Panel. The Panel was established by the DSB on 17 March 2006, and it was composed on 20 March 2006.

III. FACTUAL BACKGROUND FOR USDOC'S SECTION 129 DETERMINATION OF LIKELIHOOD OF DUMPING

A. USDOC'S ORIGINAL ANTI-DUMPING INVESTIGATION OF OCTG FROM ARGENTINA IN 1994

21. The anti-dumping investigation that gave rise to the US anti-dumping duty order on Argentine OCTG began in 1994 and was completed in 1995. The US industry's petition in the original investigation identified Siderca as the only producer and exporter of OCTG from Argentina. The USDOC justified the initiation of an investigation of Argentine OCTG based on the information related to Siderca that the petitioners provided. Siderca was the only Argentine producer and exporter considered to be a mandatory respondent for the investigation, and was the only party to which USDOC issued a questionnaire. The USDOC conducted a full investigation of Siderca and calculated a dumping margin of 1.36 per cent for Siderca, which was also used as the "all others" rate that would apply to any other Argentine exporter.[17]

22. Siderca had not shipped any OCTG to the United States for consumption during the relevant sunset review period. Siderca was the only Argentine producer/exporter for which annual reviews were requested for the years ending July 1996, 1997, 1998, and 1999, and conducted during the five-year period relevant to sunset proceedings conducted by USDOC and the US International Trade Commission (USITC). USDOC conducted "no-shipment" reviews during the sunset review period and, in each instance, upheld Siderca's claims that the company had not exported OCTG to the United States.[18] In all cases, USDOC ultimately agreed with Siderca's certification that it made no shipments and therefore rescinded the annual reviews because there were no shipments to review.

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[15] *Statements by the United States at the December 20th Meeting of the WTO Dispute Settlement Body*, available at http://www.us-mission.ch/Press2005/1221DSBmeeting.html.

[16] On 5 January 2006, Argentina and the United States concluded an agreement on procedures under Articles 21 and 22 of the DSU that apply to this dispute: *Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding Applicable to the WTO Dispute United States – Sunset Reviews of the Anti-Dumping Duties on Oil Country Tubular Goods from Argentina*, WT/DS268/14, 5 January 2005.

[17] *Oil Country Tubular Goods from Argentina*, 60 Fed. Reg. 33,539 (Dep't Comm. 1995)(final anti-dumping determ.)(ARG-1). Even though this amount was below the 2 per cent *de minimis* level established in Article 5.8 of the Anti-Dumping Agreement, the investigation was governed by pre-WTO legislation, which established a *de minimis* level of 0.5 per cent. Therefore, the 1.36 per cent dumping margin was considered sufficient to justify the issuance of an anti-dumping duty order.

[18] *Oil Country Tubular Goods from Argentina*, 62 Fed. Reg. 18,747 (Dep't Comm. 1997) (rescinded admin. Review) (ARG-2); *Oil Country Tubular Goods from Argentina*, 63 Fed. Reg. 49,089 (Dep't Comm. 1998) (rescinded admin. Review) (ARG-3); *Oil Country Tubular Goods from Argentina*, 64 Fed. Reg. 4,069

B. USDOC'S 2000 LIKELIHOOD OF DUMPING DETERMINATION

23. On 3 July 2000, the USDOC initiated a sunset review of the anti-dumping duty order on OCTG from Argentina.[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 likely to lead to continuation or recurrence of dumping and that USDOC should therefore revoke the order on OCTG from Argentina.[21] In its response, Siderca stated that it did not export OCTG to the United States during the five-year period examined in the sunset review. Siderca also stated that, consequently, there was no finding of dumping other than the 1.36 per cent dumping margin calculated in the original investigation.[22]

25. On 22 August 2000, USDOC determined that Siderca's otherwise complete substantive response to USDOC's notice of initiation of the sunset review was "inadequate" because the company's exports fell below the Department's deemed threshold level:

> During the five-year period from 1995 to 1999, the combined-average annual 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. Because the respondent accounts for significantly less than the 50 per cent threshold that the Department normally will consider to be an adequate foreign response (as provided in section 351.218(e)(1)(ii)(A)), we recommend that you determine Siderca's response to be inadequate and that we should conduct an 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 reference into USDOC's Sunset Determination), USDOC stated:

> Although the Department received a substantive response on behalf of Siderca, the Department explained in its August 22, 2000 adequacy determination that because, during the period 1995 to 1999, the average annual share of Siderca's exports of the subject merchandise vis-a-vis the total Argentine exports of the subject merchandise during the same period was significantly below the fifty-per cent threshold provided

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(Dep't Comm. 1999) (rescinded admin. review) (ARG-4); *Oil Country Tubular Goods from Argentina*, 65 Fed. Reg. 8,948 (Dep't Comm. 2000) (rescinded admin review) (ARG-5).

[19] *See Notice of Initiation of Five-Year ("Sunset") Reviews*, 65 Fed. Reg. 41,053 (Dep't Comm. 2000) (ARG-6). The ITC also initiated its sunset review on 3 July 2000. *Oil Country Tubular Goods From Argentina, Italy, Japan, Korea, and Mexico*, 65 Fed. Reg. 41,088 (Int'l Trade Comm'n 2000)(notice of institution of sunset reviews)(ARG-7).

[20] *Issues and Decision Memorandum for the Sunset Reviews of the AD Orders on Oil Country Tubular Goods from Argentina, Italy, Japan, and Korea* (Dep't Comm., 31 Oct. 2000)(final results) at 3-4 ("*Issues and Decision Memorandum*") (ARG-8).

[21] *See* Substantive Response of Siderca to the Department's Initiation of Sunset Review of the AD Order on OCTG from Argentina (2 Aug. 2000)(ARG-9).

[22] *See* Substantive Response of Siderca to the Department's Initiation of Sunset Review of the AD Order on OCTG from Argentina (2 Aug. 2000) at 3 (ARG-9).

[23] *Oil Country Tubular Goods from Argentina: Adequacy of Respondent Interested Party Response to the Notice of Initiation*, A-357-810 (Dep't Comm., 22 Aug. 2000) at 2 (ARG-10)

> for in section 351.218(e)(1)(ii)(A) of the Sunset Regulations, the Department determined Siderca's substantive response to be inadequate.[24]

27. Based on its determination that Siderca's response was inadequate, USDOC stated "[i]n the instant reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation".[25]

28. In its 7 November 2000 Final Determination in the sunset review (which incorporated USDOC's *Issues and Decision Memorandum*), the Department stated that revocation of the anti-dumping duty on OCTG from Argentina would be likely to lead to continuation or recurrence of dumping. The Department stated that the margin of likely dumping was 1.36 per cent, the same rate as in the original investigation. The Department reported this rate to the USITC as the likely dumping margin to prevail in the event of termination.[26]

C. USDOC'S 2000 LIKELIHOOD OF DUMPING DETERMINATION FOUND TO BE INCONSISTENT WITH ARTICLES 6.2 AND 11.3 OF THE ANTI-DUMPING AGREEMENT

29. The original Panel found that USDOC's likelihood of dumping determination was inconsistent with Article 11.3 because (1) there was no legal or evidentiary basis for the USDOC to have considered that dumping had continued over the life of the order, and thus that there was no basis for a WTO-consistent determination that dumping would be likely to continue or recur[27]; and (2) the application of the waiver provisions invalidated the factual basis for the USDOC's likelihood of dumping determination.[28]

30. Specifically, the original Panel stated:

> USDOC's Issues and Decision Memorandum demonstrate that the USDOC relied on the existence of the original dumping margin when concluding that dumping continued over the life of the order. The issue therefore is whether the existence of a dumping margin from the original investigation can be interpreted to mean that dumping continued over the life of the measure. In our view, it cannot. The original dumping margin reflects the result of the dumping margin calculations in the original investigation, which establish the basis for the anti-dumping measure to be imposed in that investigation. The existence of the original dumping margin cannot be the basis of a factual determination that dumping continued over the life of the measure. Exporters subject to the measure might have changed their export or home market prices, or, their cost of production might have changed. Thus, if an investigating authority relies upon the existence of dumping over the life of the measure as part of its sunset determination, it has to have an adequate factual basis for so concluding … The existence of the original dumping margin cannot be the basis of a factual determination that dumping continued over the life of the measure …. In our view … the original determination of dumping by itself cannot represent a sufficient factual basis for concluding that dumping continued during the life of the measure, let alone representing an adequate factual basis to conclude that dumping is likely to continue or recur after the expiry of the order. The purpose of a sunset review is to examine

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[24] *Issues and Decision Memorandum* at 3 (ARG-8).
[25] *Issues and Decision Memorandum* at 5 (ARG-8).
[26] *Oil Country Tubular Goods from Argentina, Italy, Japan, and Korea*, 65 Fed. Reg. 66,701 (Dep't Comm. 2000)(final results sunset review)(ARG-11).
[27] Panel Report, para. 7.219; *see also* para. 8.1(d)(i).
[28] Panel Report, para. 7.222; *see also* para. 8.1(d)(i).

> whether the facts continue to justify the imposition of an anti-dumping measure. The USDOC, however, did not engage in that inquiry because it simply relied on the existence of the dumping margin from the original investigation.
>
> Assuming *arguendo* that the basis of the USDOC's finding that dumping continued over the life of the measure was, as the United States asserts, the continued shipments of the subject product and the continued collection of the duty, rather than the existence of the original dumping margin per se, our analysis would not change …. In our view, the fact that some imports of the subject product continued to be shipped from Argentina to the United States and that anti-dumping duties continued to be collected on these shipments over the life of the order does not represent an adequate factual basis for the proposition that dumping continued in that period.
>
> We recall that the USDOC's likelihood determination in this sunset review was based on two factual findings, i.e. first dumping continued over the life of the measure and second import volumes declined following the imposition. We have found that the factual basis of the first one is not proper. We therefore conclude that the USDOC's likelihood determination in the instant sunset review was inconsistent with Article 11.3 of the Anti-Dumping Agreement.
>
> … Although the USDOC's final determination does not refer to … company-specific determinations, logically these determinations must be a relevant part of the factual basis of the USDOC's overall country-wide likelihood determination in the OCTG sunset review. In our view, the application of deemed waivers provisions to Argentine exporters other than Siderca invalidated the factual basis of the overall country-wide determination. Therefore, in addition to our above-stated considerations, we also find that the application of these provisions in the OCTG sunset review was inconsistent with Article 11.3 of the Agreement.[29]

31. The Panel also found that USDOC had violated Article 6.2 of the Anti-Dumping Agreement because the USDOC's sunset review had "depriv[ed] cooperating exporters of their procedural rights":

> Given the explicit provision of Article 6.2 that hearings have to be arranged when so requested by interested parties, it becomes clear that in the OCTG sunset review Siderca was subjected to a procedure that fell short of the requirements of Article 6.2 of the Agreement in respect of hearings…. In our view, the fact that certain exporters do not participate in a sunset review cannot justify depriving cooperating exporters of their procedural rights under Article 6.2.[30]

D. USDOC'S 2005 LIKELIHOOD OF DUMPING DETERMINATION

32. Prior to formally commencing the Section 129 proceeding, USDOC requested the Government of Argentina to assist USDOC in identifying all Argentine producers of OCTG within the period 1995-2000, including drill pipe and casing and tubing.[31] The USDOC's 14 October 2005 communication stated in part as follows:

> In that [original] investigation [the USDOC] determined that Argentine producers of OCTG had sold OCTG in the United States at less-than-fair value prices. In this

[29] Panel Report, paras. 7.219-7.222 (footnotes omitted).
[30] Panel Report, para. 7.235.
[31] Letter from USDOC to Embassy of Argentina, Washington, D.C., 14 October 2005 (ARG-17).

> sunset proceeding, the Department seeks to determine whether dumping of OCTG in the United States by Argentina producers (most of whom had ceased exporting OCTG to the United States following imposition of the antidumping duty order) would continue or recur if the antidumping duty order had been revoked in August 2000.[32]

33. In providing the information requested by the USDOC, the Government of Argentina pointed out several inaccuracies in the Department's request, including that "the public documents clearly establish, the 1994/95 investigation did not involve producers; it involved a single producer, Siderca. The Department never identified any other Argentine producer, it never sought to investigate any other producer, and there was no determination that 'Argentine producers' sold OCTG in the United States at less-than-fair value. The only finding was related to Siderca, which was the only producer identified and investigated by the Department."[33]

34. Argentina further explained that there was no factual basis for the USDOC assertion that "most" of the "producers" "had ceased exporting OCTG to the United States following imposition of the antidumping duty order". Argentina then stated that there was no information on the USDOC record establishing that any producer other than Siderca had exported before the order, and so it was meaningless to reference "most" of the producers ceasing their exports after the imposition of the order.[34]

35. After identifying USDOC's factual inaccuracies regarding its description of the original investigation and sunset review, Argentina identified Siderca as a producer of OCTG during the relevant period. The Government of Argentina added that "[b]ased on the information mainly developed by the USITC, it appears that other Argentine steel producers such as Tubhier and Acindar have had, at different points of time, the capability to produce OCTG, although no information available to the Government of Argentina indicates that those companies produced any OCTG during the relevant period".[35]

36. On 31 October 2005, USDOC requested information from Argentine OCTG producers Tubhier, Acindar, and Siderca.[36] For the period 1995-2000, the USDOC requested certain cost of production information for OCTG, as well as production and shipment volumes. As Siderca specifically advised, the USDOC did not explain how it would use the information solicited, "what procedures [would] be followed to analyze the information, the timing of any hearing, and how the parties [would] be permitted to have access to and comment on the essential facts being used by the Department to make its determination".[37] All three Argentine producers – Tubhier, Acindar, and Siderca – responded to USDOC's request for information.[38] USDOC did not issue any supplemental questionnaires to any of the Argentine exporters, or provide a briefing schedule as to the timing, if any, for rebuttal and reply comments. Nor did the USDOC conduct a public hearing.

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[32] Letter from USDOC to Embassy of Argentina, Washington, D.C., 14 October 2005 (ARG-17).

[33] Letter from Embassy of Argentina, Washington, D.C., to USDOC, 28 October 2005, at 2 (Appendix I to USDOC Memorandum to the File from Fred Baker, Analyst, through Robert James, Program Manager, and Mike Heaney, Team Leader, Information for the Record (22 Nov. 2005)) (ARG-18).

[34] *Id.*

[35] Letter from Embassy of Argentina, Washington, D.C. to US Department of Commerce, 28 October 2005, at 3 (Appendix I to USDOC Memorandum to the File from Fred Baker Analyst, through Robert James, Program Manager, and Mike Heaney, Team Leader, Information for the Record (22 Nov. 2005)) (ARG-25).

[36] USDOC Questionnaire to Acindar, Tubhier, and Siderca (31 Oct. 2005) (ARG-13).

[37] Letter from Siderca to USDOC, 7 December 2005, at 3 (ARG-19).

[38] Letter from Embassy of Argentina, Washington, D.C., to USDOC, 30 Nov. 2005 (transmitting Tubhier's Response to Questionnaire (23 Nov. 2005)) (ARG-20); Acindar's Response to Questionnaire (30 Nov. 2005) (ARG-14); Siderca's Response to Questionnaire (30 Nov. 2005) (ARG-15).

37. The USDOC's Section 129 Determination was issued on 16 December 2005. The Department stated "we find there is likelihood of continuation or recurrence of dumping had the antidumping duty order on OCTG from Argentina been revoked in 2000, i.e., at the end of the original sunset period".[39] The USDOC 2005 affirmative likelihood determination was based on: (1) inferences drawn from selected excerpts of the Argentine exporters' financial statements[40]; (2) the use of certain limited pricing data regarding certain of Acindar's shipments and observed market prices in the United States[41]; and (3) the inference that dumping would be likely, based on the decline in volume of Argentine OCTG following the imposition of the anti-dumping order.[42] These inferences are discussed further below.

IV. USDOC'S SECTION 129 DETERMINATION IS INCONSISTENT WITH US WTO OBLIGATIONS AND FAILED TO IMPLEMENT THE RECOMMENDATIONS AND RULINGS OF THE DSB

38. The United States offers as "compliance" with its Article 11.3 obligation a likely dumping determination made in December 2005, ten-and-one-half years after imposition of the duties, and nearly five years after it continued the duties. In Argentina's view, the 2005 likelihood determination did not bring the United States into conformity with US obligations under Article 11.3 of the Anti-Dumping Agreement or into compliance with the recommendations and rulings of the DSB. In this regard, USDOC's 2005 likelihood determination in no way justifies USDOC's continuation of anti-dumping duties on Argentine OCTG in 2001.

39. First, in the 2005 Section 129 proceeding, the USDOC developed a new factual basis to support the WTO-inconsistent determination it made in 2000. The USDOC acted inconsistently with Articles 11.3 and 11.4 of the Anti-Dumping Agreement by developing new factual information to support its 2000 likelihood of dumping determination, where none of the evidence required to support such a determination was developed in 2000, the time when USDOC was obliged to conduct the requisite "review" and gather the necessary positive evidence in order to make the requisite "determination" required by Articles 11.3 and 11.4 of the Anti-Dumping Agreement.

40. At the same time, in its 2005 Section 129 proceeding USDOC chose not to ask the Argentine exporters any questions relating to the causes for the post-order volume decline, which was the only factor for which USDOC developed a factual basis in the review conducted in 2000. Information provided by the Argentine exporters to USDOC regarding the causes for the volume decline was ignored without even being mentioned in USDOC's Section 129 Determination. USDOC simply remained content with its assumption from 2000, despite the admonitions from the Appellate Body. This cannot satisfy the obligations of the United States to conduct a "review" and to make a "determination" prior to continuing the anti-dumping measure beyond five years, which is the unequivocal requirement of Articles 11.3 and 11.4.

41. **Second, and in the alternative**, even assuming *arguendo* that the USDOC were permitted to develop the requisite factual information in 2005 to support its 2000 likelihood determination, the 2005 Section 129 Determination nevertheless failed to satisfy the requirements of Article 11.3 of the Anti-Dumping Agreement and the United States did not bring itself into compliance with the rulings and recommendations of the DSB. The USDOC did not establish a sufficient factual basis of positive evidence necessary to support a WTO-consistent finding of likely dumping. It did not objectively assess the information that it had. The USDOC's conclusions are not reasoned, and the evidence it

[39] USDOC Section 129 Determination at 11 (ARG-16).
[40] USDOC Section 129 Determination at 9-10 (ARG-16).
[41] USDOC Section 129 Determination at 6-8 (ARG-16).
[42] USDOC Section 129 Determination at 11 (ARG-16).

developed does not support a WTO-consistent determination that dumping would be likely. Moreover, USDOC's conduct of the Section 129 proceeding was also inconsistent with several US obligations under the provisions of Article 6 of the Anti-Dumping Agreement. Separately, the United States violated its obligations under Article 13 of the Anti-Dumping Agreement by failing to implement the Section 129 Determination so as to afford judicial review of that determination in a US court.

42. Subsection A describes the requirements of Articles 11.3 and 11.4 of the Anti-Dumping Agreement and the relevant WTO jurisprudence clarifying the Agreement's sunset provisions. Subsection B explains why USDOC acted inconsistently with Article 11.3 by: (i) seeking to develop new factual information in 2005 to support its 2000 likelihood of dumping determination, where none of the evidence that was required to support such a determination was developed in 2000; and (ii) relying in 2005 on its inference from 2000 of likely dumping based on the post-order decline in Argentine OCTG imports, where USDOC made no effort (either in 2000 or 2005) to support its assumption and determine the reason for the decline. Subsections C and D present an **alternative argument**, in which even assuming *arguendo* that the USDOC were permitted to develop the requisite factual information in 2005 to support its 2000 likelihood determination, the 2005 USDOC Section 129 Determination nevertheless failed to satisfy US obligations under Articles 6.1, 6.2, 6.4, 6.5.1, 6.6, 6.8, 6.9, 11.1, 11.3 and Annex II of the Anti-Dumping Agreement, and did not bring the United States into compliance with the rulings and recommendations of the DSB. Finally, subsection E explains that the United States' failure to implement USDOC's Section 129 Determination precluded the opportunity for the Argentine respondents to seek judicial review in a US court, in violation of Article 13 of the Anti-Dumping Agreement.

A. THE REQUIREMENTS OF ARTICLES 11.3 AND 11.4 OF THE ANTI-DUMPING AGREEMENT

43. Article 11.3 provides as follows:

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

44. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body provided authoritative guidance on the obligations imposed on Members during a sunset review by Article 11.3. It began by noting that:

> Article 11.3 imposes a temporal limitation on the maintenance of anti-dumping duties. It lays down a mandatory rule with an exception. Specifically, Members are required to terminate an anti-dumping duty within five years of its imposition "*unless*" the following conditions are satisfied: first, that a review be initiated before the expiry of five years from the date of the imposition of the duty; second, that in the review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of *dumping*; and third, that in the review the authorities determine that the

> expiry of the duty would be likely to lead to continuation or recurrence of *injury*. If any one of these conditions is not satisfied, the duty must be terminated. [43]

45. The Appellate Body explained that "the likelihood determination is a prospective determination. In other words, the authorities must undertake a forward-looking analysis and seek to resolve the issue of what would be likely to occur if the duty were terminated".[44] The Appellate Body went on to stress the diligence and rigor required by the authorities under Article 11.3:

> [The] language in Article 11.3 makes clear that it envisages a process combining *both* investigatory and adjudicatory aspects. In other words, Article 11.3 assigns an active rather than a passive decision-making role to the authorities. The words "review" and "determine" in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination. In view of the use of the word "likely" in Article 11.3, an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be probable if the duty were terminated – and not simply if the evidence suggests that such a result might be possible or plausible.[45]

46. Article 11.4 of the Anti-Dumping Agreement provides that the review conducted under Article 11.3 "shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review." In clarifying Article 11.4 of the Agreement, the Appellate Body expressly recognized that the ability to keep an order in place for up to one more year was an "additional exception" – and in effect, the sole exception – to the requirement that anti-dumping duties will be terminated after five years:

> Article 11.3 states that, notwithstanding the provisions of Articles 11.1 and 11.2, Members "shall" terminate an anti-dumping duty "unless" the authorities make an affirmative likelihood determination in a sunset review. This confirms that the mandatory rule in Article 11.3 applies in addition to, and irrespective of, the obligations set out in the first two paragraphs of Article 11. This also suggests to us that authorities must conduct a rigorous examination in a sunset review before the exception (namely, the continuation of the duty) can apply. In addition, our view of the exacting nature of the obligations imposed on authorities under Article 11.3 is supported by a consideration of the implications of initiating a sunset review. The last sentence of Article 11.3 allows the relevant duty to continue while the review is underway, and Article 11.4 contemplates that the review process may take up to one year. These provisions create an additional exception to the requirement that anti-dumping duties will be terminated after five years, permitting a Member to maintain the duty for the period during which the review is ongoing, regardless of the outcome of that review. This, too, suggests that the drafters of the Anti-Dumping Agreement saw the sunset review as a rigorous process that can take up to one year, involving a number of procedural steps, and requiring an appropriate degree of diligence on the part of the national authorities.[46]

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[43] Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 1994, paras. 104-105 (original emphasis) ("*US – Corrosion-Resistant Steel Sunset Review*").

[44] Appellate Body Report, *US - Corrosion-Resistant Steel Sunset Review*, paras. 104-105 (original emphasis).

[45] Appellate Body Report, *US - Corrosion-Resistant Steel Sunset Review*, para. 111 (original emphasis).

[46] Appellate Body Report, *US - Corrosion-Resistant Steel Sunset Review*, para. 113.

47. As noted above, the Appellate Body then endorsed the view of the Panel in that case on the obligations imposed by Article 11.3 on investigating authorities in a sunset review:

> The text of Article 11.3 contains an obligation "to determine" likelihood of continuation or recurrence of dumping and injury….*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 application 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 and injury. 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*.[47]

48. The Appellate Body in the present dispute reaffirmed the meaning of "review" and "determination" in the obligations imposed by Article 11.3:

> The plain meaning of the terms "review" and "determine" in Article 11.3, therefore, compel an investigating authority in a sunset review to undertake an examination, on the basis of positive evidence, of the likelihood of continuation or recurrence of dumping and injury. In drawing conclusions from that examination, the investigating authority must arrive at a reasoned determination resting on a sufficient factual basis; it may not rely on assumptions or conjecture.[48]

49. In *US – OCTG from Mexico*, the Appellate Body affirmed that:

> …what is essential for an affirmative determination under Article 11.3 is proof of likelihood of continuation or recurrence of dumping and injury, if the duty expires. The nature and extent of the evidence required for such proof will vary with the facts and circumstances of the case under review. Furthermore, as the Appellate Body has emphasized previously, determinations under Article 11.3 must rest on a "sufficient factual basis" that allows the investigating authority to draw "reasoned and adequate conclusions."[49]

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[47] Appellate Body Report, *US - Corrosion-Resistant Steel Sunset Review*, para. 114 (emphasis added). After quoting this passage, the Appellate Body stated that: "The Panel's description of the obligations of investigating authorities in conducting a sunset review closely resembles our own, and we agree with it." *Id.*, para. 115.

[48] Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, para. 180 ("*US - Oil Country Tubular Goods Sunset Reviews*").

[49] Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, adopted 28 November 2005, para. 123 ("*US - OCTG from Mexico*").

B. THE SECTION 129 DETERMINATION DID NOT BRING THE UNITED STATES INTO CONFORMITY WITH US OBLIGATIONS UNDER ARTICLES 11.3 AND 11.4 OF THE ANTI-DUMPING AGREEMENT AND DID NOT ACHIEVE COMPLIANCE WITH THE RULINGS OF THE DSB

50. In considering whether the United States is now in compliance with its Article 11.3 obligation, Argentina asks this panel to apply the terms of Articles 11.3 and 11.4 of the Anti-Dumping Agreement. Applying the text of these provisions, as clarified by the Appellate Body, to the circumstances of this dispute leads to the following requirements, which Argentina considers to be beyond dispute:

> **First**, because the anti-dumping duty order on OCTG from Argentina was imposed in August 1995, the United States had an obligation to terminate the measure before August 2000 unless it adhered to the requirements for invoking the exception (continuation of the measure), as set forth in Articles 11.3 and 11.4;
>
> **Second**, in order to invoke the exception and to extend the measure beyond August 2000, the US authorities were required to initiate a "review" before "that date," (i.e., August 2000) and to "determine" that "expiry of the duty would be likely to lead to continuation or recurrence of dumping";
>
> **Third**, the "review" and "determination" in this regard must have had the following characteristics:
>
> - It needed to be a prospective determination, requiring a forward-looking analysis;
> - USDOC needed to take an active rather than a passive role in developing and assessing the information;
> - USDOC was required to act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination;
> - The requirement to make a "determination" concerning likelihood precluded USDOC from simply assuming that likelihood exists; and
> - USDOC was required to assess the information before it objectively and to have a sufficient factual basis to allow it to draw reasoned and adequate conclusions concerning such likelihood.

51. The USDOC Section 129 Determination does not bring the United States into compliance with the obligation of Articles 11.3 and 11.4 as they apply to this case for several reasons.

52. First, the USDOC chose to develop a new and different factual basis for its Section 129 Determination. This information, first developed in 2005, cannot justify the 2001 decision by USDOC to invoke the exception of Article 11.3 and to extend the measures beyond August 2000. This is not a case of the national authorities seeking to clarify information that it had developed in the 2000 proceeding (that is, in the review initiated "at that time"); rather, it is a case in which the authority takes a second, different approach to the issue, creating a new factual basis in 2005 to justify its 2001 decision to extend the measure.

53. The difference between the factual bases of the 2005 and 2000 proceeding are clear. In the original 2000 proceeding, USDOC sent out no questionnaires and limited itself to a review of the information submitted by the parties. After stating that the issue is "whether the USDOC's likelihood

determination in this sunset review rested on a sufficient factual basis",[50] the Panel went on to state and conclude that:

> The purpose of a sunset review is to examine whether the facts continue to justify the imposition of an anti-dumping measure. The USDOC, however, did not engage in that inquiry because it simply relied on the existence of the dumping margin from the original investigation.[51]

The Panel's finding could not be clearer: the United States continued the anti-dumping measure in 2001 without having "engage[d] in [the] inquiry" required by Article 11.3.

54. In the 2005 Section 129 proceeding, the USDOC takes a different approach, requesting from all the identified potential producers: 1) financial statements for the period 1995-2000; 2) cost information for ten categories of OCTG products; 3) a description of each company's sales and marketing processes; and 4) a statement as to whether the company exported OCTG to the United States during the 1995-2000 period.[52] Only this last question was related to the information that USDOC developed in its 2000 review. All of the other information (and presumably more) was available to the USDOC in 2000, but the USDOC decided to invoke the exception of Article 11.3 and continue the anti-dumping measure without developing any additional information. In fact, USDOC even chose to conduct the 2000 review under the so-called "expedited review" procedures, which, by its nature, limited the development of information and argument in the review. The fact that USDOC had to develop this information for the first time in 2005 demonstrates that this information was never part of the factual basis that the USDOC developed to support its 2001 decision to continue the anti-dumping measure.

55. Second, the newly-developed information apparently played a key role in the Department's affirmative determination in the 2005 Section 129 determination. Specifically, the Department based its 2005 Section 129 determination on: 1) inferences drawn from statements in Siderca's and Acindar's financial statements during the original sunset period; 2) US import prices for Acindar's shipments compared to observed US market prices; and 3) the inference that the decrease in Argentine OCTG exported to the US market after the imposition of the order demonstrated that dumping would be likely to continue or recur in the absence of the order.[53]

56. There can be no dispute that the factual basis for the first two points were developed for the first time in the 2005 Section 129 proceeding:

- Financial Statements: USDOC never requested the companies' financial statements in the original sunset proceeding, even though these documents must have been available to the Department at that time. There is no reference to financial statements in the record developed by the USDOC prior to extending the anti-dumping measure, and DOC's 2000 decision does not mention the producers' financial statement. In fact, USDOC had not even bothered in the 2000 sunset proceeding to take the rudimentary step of identifying the relevant Argentine producers, choosing instead to assume the existence of other producers and invoke the "waiver" provisions of US law. The USDOC sought and obtained financial statements for the first time in 2005.
- Customs data: The customs data relied on by USDOC in the Section 129 proceeding was never developed at the time of the 2000 sunset review. Such information

[50] Panel Decision, para. 7.211.

[51] Panel Decision, paras. 7.219. The Panel also observed that the USDOC relied on a finding "that import volumes declined following the imposition of the order." *Id.* at paras. 7.213, 7.221.

[52] USDOC Questionnaire (31 Oct. 2005) (ARG-13).

[53] USDOC Section 129 Determination at 6-11 (ARG-16).

> certainly could have been developed at the time, but it was not. The fact that USDOC developed this information in conjunction with another US government agency shows that USDOC could have done this had it applied the appropriate degree of diligence and taken an active, not passive, role in the original sunset determination in 2000.

57. In relying on information developed for the first time in 2005, the USDOC did not render a decision that brings the United States into compliance with its obligations under Article 11.3 and 11.4. Those obligations require a substantive, reasoned "determination" in a review initiated "at that time" in order to continue the anti-dumping measure beyond the five-year deadline, which expired in this case in August 2000. There is no possibility that the United States can justify its 2001 decision to continue the anti-dumping measure on the basis of new factual information that developed only in 2005.

58. The only other basis for the 2005 Section 129 Determination is USDOC's restatement of the inference it drew in 2000 from the decrease in Argentine exports after the 1995 imposition of the anti-dumping order. The only references in USDOC's Section 129 Determination with respect to the volume issue are the following:

> [W]e solicited and considered information and argument from domestic and respondent interested parties for the same period at issue in our original sunset review, 1995 – 2000. Based upon this information and argument, as well as findings on import volumes during the 1995 – 2000 from the original sunset review, we continue to find that revocation of the order would be likely to lead to continuation or recurrence of dumping.[54]
>
> . . .
>
> In assessing likelihood, we also rely on our previous finding regarding the volume of imports of subject merchandise for the period before and the period after the issuance of the antidumping duty order. In the original sunset review, we found that after imposition of the order, import volumes significantly decreased from pre-order levels. [citations omitted]. Declining import volumes after, and apparently resulting from, imposition of an antidumping duty order indicate that exporters would need to dump to sell at pre-order levels.[55]

59. This is the sum total of the discussion of the volume issue in the 2005 Section 129 Determination: one reference in the introduction on page 1, and one reference immediately before the conclusion on page 11. Both references specifically state that the USDOC is relying on the "previous finding" (i.e. in the 2000 sunset review), and make clear that the USDOC did not develop further factual basis for its inference.

60. By treating the volume issue in this manner, the USDOC has sent an unequivocal message to Argentina and to this Panel: it can rely on the inference arising from declining import volumes without an analysis of the cause for the decrease. The USDOC even reminds the reader, twice, that this was the position it took initially, and that this Panel decided to refrain from deciding the issue in its first review.[56]

61. Clearly, the United States has taken advantage of this Panel's decision to leave this issue unresolved. As a preliminary, but extraordinarily important matter, Argentina asks that the Panel decide the issue in this Article 21.5 proceeding so that the dispute may now be resolved.

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[54] USDOC Section 129 Determination at 1 (ARG-16).
[55] USDOC Section 129 Determination at 11 (ARG-16).
[56] USDOC Section 129 Determination at 2 n.4 and 6 n.12 (ARG-16).

62. In Argentina's view, the USDOC's treatment of the volume issue in the 2005 Section 129 Determination (which expressly incorporates the treatment of the issue in the 2000 Sunset Determination) is deficient and must be rejected by the Panel. USDOC does nothing more than merely restate its reliance on this factor. Its disinterest in doing anything other than relying on its assumption is clear from its short discussion on page 11: "Declining import volumes after, and *apparently* resulting from, imposition of an antidumping duty order indicate that exporters *would need to dump* to sell at pre-order levels." (Emphasis added). There is no factual basis for this assumption, either in the 2000 Sunset Determination or in the 2005 Section 129 Determination, where the Department is content to say what *"apparently"* is the case, and what an exporter *"would need"* to do. This type of conjecture, without factual basis, does not satisfy the requirements of Article 11.3.

63. Also, it should be recalled that the 2000 Sunset Determination was one that was conducted on an "expedited" basis, a procedure which the Panel found to violate Article 6.2 of the Anti-Dumping Agreement on the facts of this case. USDOC, apparently confident in its inference, continues to rely on the findings made in that proceeding, without even asking any questions or otherwise developing information regarding the causes for the volume decline.

64. The Appellate Body has made clear that assumptions are not enough to support a determination under Article 11.3, and that "a case-specific analysis of the factors behind a cessation of imports or a decline in import volumes (when dumping is eliminated) will be necessary to determine that dumping will recur if the duty is terminated".[57] The Appellate Body stated that it did not believe that historical dumping margins or import volumes could always be presumed to constitute sufficient evidence of likely dumping:

> We would have difficulty accepting that dumping margins and import volumes are always 'highly probative' in a sunset review by USDOC if this means that either or both of these factors are presumed, by themselves, to constitute sufficient evidence that the expiry of the duty would be likely to lead to continuation or recurrence of dumping.[58]

65. The Appellate Body subsequently reaffirmed in *US - OCTG from Mexico* that in the context of declining volumes, it is insufficient to rely on presumptions or conjecture as to a company's ability to ship to the US market without dumping:

> if the dumping had ceased soon after the issuance of the order, and there was no dumping or there were no imports for a substantial period before the sunset review, the investigating authority will need credible evidence to come to the conclusion that dumping will "recur" if the anti-dumping duty order is revoked. A respondent party may have the responsibility to introduce relevant evidence in its favour, but the investigating authority also has a duty to seek information to ensure that its determination rests on a sufficient evidentiary foundation. An affirmative determination cannot rest merely on a presumption, as envisaged under scenario (b) or (c), that the cessation of dumping or of imports was due solely to the anti-dumping duty order.[59]

66. USDOC ignored this requirement in the 2000 Sunset Determination, and then repeated its error by simply relying on its earlier finding in the 2005 Section 129 Determination.

67. In summary, the 2005 Section 129 Determination did not bring the United States into compliance with its Article 11.3 and Article 11.4 obligations. USDOC chose not to develop further any of the information relating to the post-order volume decrease, which was the only factor for which

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[57] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 177.
[58] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 177.
[59] Appellate Body Report, *US - OCTG from Mexico*, para. 199.

it developed a factual basis in the review conducted in 2000 that led to its 2001 decision to continue the measure. It simply remained content with its assumption from 2000, despite the admonitions from the Appellate Body. At the same time, USDOC also chose to develop new and different factual information that demonstrably was not considered in the review conducted prior to the 2001 decision to continue the anti-dumping measure. That information – developed in November and December 2005 – cannot satisfy the obligations of the United States to conduct a "review" and to make a "determination" prior to continuing the anti-dumping measure, which is the unequivocal requirement of Articles 11.3 and 11.4.

C. IN THE ALTERNATIVE, EVEN ASSUMING *ARGUENDO* THAT THE USDOC WERE PERMITTED TO DEVELOP THE REQUISITE FACTUAL INFORMATION IN 2005 TO SUPPORT ITS 2000 LIKELIHOOD DETERMINATION, THE 2005 SECTION 129 DETERMINATION NEVERTHELESS FAILED TO SATISFY THE REQUIREMENTS OF ARTICLE 11.3 OF THE ANTI-DUMPING AGREEMENT

68. Aside from the question whether any review conducted by the United States in 2005 could justify its 2001 decision to continue the duties, or whether a review based on a completely different factual basis can do so, there are other reasons why the 2005 determination does not bring the United States into compliance with its obligations. First, the USDOC 2005 determination does not comply with the requirements of Article 11.3 of the Anti-Dumping Agreement to demonstrate that dumping is likely to continue to recur in the event of expiry of the order. Second, the USDOC 2005 determination violated several provisions of Article 6 of the Anti-Dumping Agreement, which the United States acknowledged as being applicable to its 2005 determination.

1. USDOC's 2005 Determination Does Not Properly Establish that Dumping was Likely to Continue or Recur in 2000

69. For its 2005 determination, the USDOC sought to develop new information related to production costs and the selling process of OCTG from Argentina for the period 1995-2000. Each of the three Argentine companies identified by USDOC responded to USDOC's questionnaire.[60] Each company said that it no longer maintained the requested information because it was outdated, and that Argentine law did not require the retention of this information. Tubhier added that it had never exported OCTG. Tubhier and Acindar advised that they were not relevant OCTG producers. Siderca provided reconstructed cost information to the best of its ability and provided other positive evidence regarding the reasons for its absence from the US market, its exports to other markets, and the evolution of its production and sales processes since the imposition of the order in 1995.

70. In making its affirmative likelihood of dumping determination in December 2005, USDOC relied on the following:

1. Statements from Siderca's and Acindar's financial statements;
2. US import prices for Acindar's shipments compared to US market prices; and
3. The inference made in 2000 that the decrease in Argentine OCTG exported to the US market after the imposition of the order in 1995 demonstrated that dumping would be likely to continue or recur in the absence of the order.

71. In addition, the USDOC stated that it was "convinced" that Siderca's cost information was flawed, and therefore it disregarded the cost information that it had previously requested.

[60] *See* Siderca's Response to Questionnaire (30 Nov. 2005) (ARG-15); Acindar's Response to Questionnaire (30 Nov. 2005) (ARG-14); Letter from Embassy of Argentina, Washington, D.C., to USDOC, 30 Nov. 2005 (transmitting Tubhier's Response to Questionnaire (23 Nov. 2005)) (ARG-20).

72. As demonstrated below, the USDOC did not properly establish a factual basis necessary to support a likely dumping finding, it did not objectively assess the information, its conclusions are not reasoned, and the evidence developed does not show that dumping would be likely.

(a) USDOC's Conclusions Regarding Siderca Are Inconsistent With Article 11.3

73. The USDOC decided not to use any of Siderca's cost information in its likelihood analysis, stating "Given the unreliability of the cost information provided by Siderca and the fact that Siderca made no US sales of OCTG during the original sunset review period, we make no findings regarding specific instances of likely dumping by Siderca during the original sunset review."[61] The conclusion that the data was "unreliable" was based on three subsidiary findings: 1) that the OCTG cost data was "inconsistent with other product cost data for steel products" and "counter-intuitive"[62]; 2) that "Siderca's cost calculations for non-OCTG products are problematic because their costs significantly exceed OCTG costs"[63]; and 3) that "methodological discrepancies" make it "unclear exactly how broad a product category Siderca has used in estimating its costs data".[64]

74. As a preliminary matter, these statements demonstrate a new, and flawed approach by USDOC to its Article 11.3 determination. Nowhere does the Anti-Dumping Agreement discuss the concept of "likely" dumping that occurred in the *past*. Article 11.3 uses the phrase "likely" to describe the prospective, counterfactual determination that must be made if a WTO Member intends to extend an anti-dumping measure beyond five years: it must find "that the expiry of the duty would be *likely* to lead to continuation or recurrence of dumping and injury". The determination of whether dumping existed in a past period is governed by Articles 2 and 9 (Article 9 incorporates the substantive rules of Article 2), neither of which mentions the possibility of a determination of "likely" dumping with respect to past sales. Yet, this apparently is what the USDOC intended to establish by requesting cost information from Siderca: the purported unreliability of that data frustrated the Department's attempts to make "findings regarding specific instances of likely dumping by Siderca during the original sunset review period".[65]

75. In addition, as will be explained in more detail below, there is no basis for USDOC's conclusion that Siderca's data was unreliable. Rather, the three arguments relied on by the Department to support the purported unreliability show that the Department failed to properly establish the fact, did not conduct an objective assessment of the facts, and did not reach reasoned conclusions supported by positive evidence.

(i) USDOC manipulated Siderca's cost data to create the purported "inconsistencies" and counter-intuitive conclusions.

[61] USDOC Section 129 Determination at 9 (ARG-16).
[62] USDOC Section 129 Determination at 8 (ARG-16).
[63] *Id*.
[64] *Id.* at 9.
[65] *Id*. at 9.

76. The USDOC stated that:

> [W]e find that the estimated product cost data Siderca submitted are inconsistent with other product cost data for steel products. Specifically, in comparing similar types of OCTG, Siderca has reported lower costs for certain products that require additional materials, processing, and testing, as compared to costs for products that do not require such additional materials, processing, and testing. A complete discussion of these discrepancies necessitates discussion of Siderca's business proprietary information; for specific examples, see the Department's Memorandum to the File dated 16 December 2005.[66]

77. The "complete discussion of these discrepancies" cited by USDOC to justify its decision to disregard the company's cost data is a four-line chart in a memorandum dated 16 December 2005 (the same date as USDOC's final determination).[67] In this chart, the USDOC makes an observation regarding certain of the average costs reported by Siderca, and states that it is "convinced" that the reporting must be wrong based on its understanding of what it supposes the cost relationship should be between these product groupings. As the chart shows, the perceived problem is in the reporting of the relative costs of carbon and alloy casing.

78. In fact, the chart serves only to demonstrate – clearly and unambiguously – USDOC's lack of an objective assessment of the facts and its result-oriented approach. Contrary to its statement, the data submitted by Siderca did not show the inconsistency claimed by the USDOC; the USDOC created the appearance of a discrepancy by manipulating Siderca's data.

79. To see this clearly, we start with a comparison of the product categories requested in USDOC's questionnaire and Siderca's cost response with the product categories in USDOC's memorandum:

Item #	***Product Groupings Requested by USDOC and reported by Siderca***	***Product Groupings in USDOC's Memorandum***
1	Casing, carbon, plain end	Casing, carbon
2	Casing, carbon, threaded and coupled	
3	Casing, alloy, plain end	Casing, alloy
4	Casing, alloy, threaded and coupled	

As can be seen, USDOC did not compare the data provided in the form requested and provided by Siderca: that is, it did not compare the costs of casing, **carbon**, plain end (item 1 above) with the costs of casing, **alloy,** plain end (item 3), which would have been the reasonable comparison to do if one wanted to compare the cost difference associated with the type of steel used (carbon or alloy). Instead, DOC first calculated a weighted-average of the cost of casing, carbon, plain end (item 1) with the cost of casing, carbon, threaded and coupled (item 2) in order to invent a new, more general category, "casing, carbon". It then calculated a similar weighted average for the cost of the two different alloy product groupings (items 3 and 4), and then compared the two weighted averages.

[66] USDOC Section 129 Determination, at 8 (ARG-16).

[67] USDOC Memorandum to the File from Mark Flessner, Case Analyst, Re: In the Matter of Section 129 Determination With Respect to Oil Country Tubular Goods from Argentina, Inconsistencies in data reported by Siderca, S.A.I.C. (ARG-21).

80. What did the USDOC achieve by this manipulation? Several things. First, it was able to obscure the fact that the direct comparison using Siderca's actual data **disproved** their theory that an inconsistency existed. That is, using Siderca's data for each product grouping requested (item 1 vs. 3; item 2 vs. 4) showed that the cost of the alloy product was **always higher** than the cost of the carbon product, **in each of the five years requested**. The contrary conclusion can **only** be reached by manipulating the data as USDOC did in its memorandum.

81. Second, the manipulation uses two other variables to create the apparent discrepancy: the additional cost of threading and the relative volumes. The first is obvious: it will always cost more to put a specific type of end finishing on a pipe (such as threading and coupling) than to have no end finishing ("plain end"). By averaging together the costs of two product groupings having different end finishing, the cost differences between the other distinguishing factor – steel type (carbon versus alloy) – becomes less apparent. The second factor is more subtle, but equally apparent from Siderca's reported data: most carbon casing is threaded and coupled (implying the additional cost of the end finishing), while alloy casing is more evenly divided between plain end and threaded and coupled. Thus, by calculating a weighted average (using volume as the weighting factor), the results will tend to raise the weighted average cost of carbon casing (reflecting the fact that most products in this grouping are threaded and coupled) relative to alloy casing.

82. Argentina would like to stress that the calculation of the weighted average was unnecessary. The form in which Siderca provided the information to USDOC was consistent with the form in which USDOC requested the information, and **it permitted a direct comparison of the product groupings in order to isolate the impact on costs of using alloy steel instead of carbon steel.** Analyzing the data in this form contradicted USDOC's conclusion. USDOC then manipulated the data by weight-averaging the costs of finished and plain end pipes, skewing the comparisons so that they demonstrated the differences caused by the type of steel **and** the type of end finish. USDOC used the data resulting from these skewed comparisons to reach the conclusion that Siderca's cost information was plagued by "discrepancies," and that USDOC was "convinced" of these problems.

83. USDOC's treatment of Siderca's cost information raises several problems. First, it is a clear example of the USDOC's lack of objective assessment of the facts. The information provided by Siderca in response to the product groupings demonstrated that Siderca's cost information was consistent with USDOC's understanding that alloy products should cost more to produce than carbon products. It is simply not an objective assessment to claim that the data prove the opposite, **a conclusion that can only be reached by manipulating the data so that the cost of the end-finishing raises the cost of the carbon product relative to the alloy product**.

84. Second, DOC did not properly establish the facts necessary to reach reasoned conclusions regarding Siderca's data. If it had any questions about the relative costs of producing carbon and alloy casing, USDOC had an obligation to reveal these concerns to Siderca and ask supplemental questions. USDOC cannot simply remain silent until the day of the final decision and reveal the results of its analysis. As explained in section IV.D below, such an approach also violates several obligations of Article 6.

85. Third, the effect of USDOC's manipulation of the data was to exclude positive evidence submitted by Siderca to show that dumping was not likely to continue or recur. As Siderca explained: "The [cost] data . . . accurately reflect the increasing production efficiencies achieved by Siderca through this period," with significant gains in productivity in its rolling mill (17.8 per cent) and labour (10.5 per cent).[68] Siderca added: "The cost data (even with the limitations explained above) supports Siderca's position: Siderca is a cost-efficient producer of OCTG and could have shipped OCTG

[68] Siderca's Response to Questionnaire (30 Nov. 2005) at 2 (ARG-15).

products profitably to the United States."[69] DOC rejected this evidence without further questions or attempts to clarify any concerns.

(ii) USDOC's analysis does not establish that Siderca's reported costs of non-OCTG are "problematic".

86. As the second reason for its conclusion that Siderca's cost information was unreliable, USDOC stated:

> In addition, Siderca's cost calculations for non-OCTG products are problematic because their costs significantly exceed OCTG costs. The products included in this product grouping are line pipe, standard pipe, structural tubing, mechanical tubing, and pressure pipe. The costs for the specific products in this group can vary greatly but, in aggregate, we would expect that they not exceed the costs for the specific noted OCTG product groupings because the majority of tubular demand is in the lower value products such as line pipe, standard pipe, and structural tubing.[70]

87. On its face, the passage relies on what USDOC "would expect" to be the relative costs of OCTG and non-OCTG. But, nowhere in the record is there any factual basis for these expectations, nor was the USDOC's interest in such comparisons revealed to the parties so that they could provide meaningful comment. In fact, the USDOC's reasoning shows that the failure to develop a factual basis for this conclusion and to solicit comments from the parties precluded the USDOC from reaching a reasoned conclusion.

88. The USDOC conclusion that the costs are problematic depend upon: 1) its assumptions regarding what other products Siderca produces; 2) its implicit assumptions regarding the relative quantities of the different products that Siderca produced ("product mix") during the period; and 3) its assumptions regarding the relative costs of the products, both among OCTG and the non-OCTG groups, and implicitly among the types of non-OCTG. Without these assumptions, USDOC would not have any basis to conclude that Siderca's aggregate cost of OCTG should be higher or lower than non-OCTG. Yet, none of these facts appear on the record. The Department never asked Siderca for this information, and it did not develop these facts on its own and place them on the record.

89. The USDOC's logic also is dubious. Explaining why the cost of non-OCTG should be lower than the cost of OCTG, the USDOC says that this is true "because the majority of tubular demand is in the lower value products such as line pipe, standard pipe, and structural tubing". The statement itself is ambiguous: the logical connection between the relative demand for different types of non-OCTG pipe and the cost of those types of pipe is not immediately clear. A product that is in great demand could have either a high cost or a low cost. Price will reflect demand, but cost may not. It is simply not clear what the USDOC means by its statement.

90. Also, the premise of the statement – that OCTG has a higher cost than non-OCTG – simply is not true. Had the USDOC requested such information, Siderca could have shown that the unit cost of producing certain types of seamless non-OCTG (e.g., some mechanical, pressure, and cold-drawn pipe) significantly exceeds the unit cost of OCTG. The Department did not establish the facts necessary to make these statements, either by asking the parties or by doing its own research and disclosing that research to the parties.

91. Finally, the statement that "the majority of tubular demand is in the lower value products" is also highly suspect, and of questionable relevance, as it applies to Siderca's production. First, again,

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[69] *Id*. at 10.
[70] USDOC Section 129 Determination at 8 (ARG-16).

there is no factual support for the statement in the record. USDOC did not seek or otherwise establish this information. Second, while the statement may be true if one considers all tubular products, both welded and seamless, it is not true with respect to seamless tubular products, which are the products that Siderca produces. The USDOC must know – or could have learned had it asked the question before making the assumption – the demand for seamless pipe (structural and standard) is miniscule compared to the same types of pipe in welded form.[71] The USDOC's failure to distinguish Siderca's production (which is exclusively of seamless tubular products) from general assumptions about the total tubular market (which is primarily a welded products market) significantly undermines the USDOC's attempted analysis. In summary, there is no basis for USDOC's conclusion that the comparison of Siderca's cost of OCTG and non-OCTG was "problematic". USDOC did not establish the factual basis necessary to support such a conclusion, it did not objectively assess the information that was present, and it did not reach a reasoned conclusion from the information.

(iii) USDOC had no factual basis for concluding that there were "methodological discrepancies" that rendered the cost data unreliable.

92. As the third reason for its conclusion that Siderca's cost information was unreliable, USDOC stated:

> We also find methodological discrepancies with the estimates submitted by Siderca. The estimates for all years were based on Siderca's "operational cost reports".... As Siderca acknowledges, these cost reports were not product-specific. Rather, these reports provide only a summary detail of "the operational costs of the major product [sic] lines of the plant on which the production occurs"…. From this statement it is unclear exactly how broad a product category Siderca has used in estimating its cost data. As a result, we are unable to rely on the data for a likelihood analysis regarding OCTG.[72]

93. The statement demonstrates that the USDOC did not understand what Siderca was trying to say: "it is unclear . . . ," the USDOC stated. But, rather than ask a follow-up question to clarify the information, USDOC simply resolved the purported ambiguity against Siderca: "As a result, we are unable to rely on the data for a likelihood analysis regarding OCTG." This language, and the USDOC's failure even to attempt to clarify the information, speaks for itself. It also demonstrates that the USDOC did not engage in the type of active review that the Article 11.3 requires, as the Appellate Body has clarified.

94. In fact, the methodology was not unclear. The description of the methodology appeared in Attachment 4 to Siderca's 30 November 2005 response to USDOC's questionnaire, which appears as ARG-15. The four-page description explains the methodology in narrative form and provides examples to demonstrate each stage of the calculation. USDOC created its own ambiguity by misquoting Siderca's description. While Siderca explained that its operational cost reports "report the operational costs of the major ***production lines*** of the plant on which the production occurs", USDOC confused the phrase "production lines" with "product lines" and stated:

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[71] For example, the Argentine industry informs the Government that the Preston Pipe & Tube Report (a publication the USDOC cited for other purposes in its 129 Determination) from March 2000 shows the dramatic difference: total supply of tubular products is dominated by welded products. For 1999, total supply exceeded 12 million tons, but less than 2 million tons (approximately 15 per cent) were seamless. Standard pipe (one of the lowest-valued tubular products) accounted for approximately 20 per cent of the total supply. But, only 14 per cent of all standard pipe supplied to the US market was seamless, while 86 per cent was the welded product that Siderca does not produce. Seamless standard pipe simply is not a high-demand product and does not fit the USDOC's theory.

[72] USDOC Section 129 Determination at 9 (ARG-16).

> these reports provide only a summary detail of "the operational costs of the major ***product lines*** of the plant on which the production occurs"…. From this statement it is unclear exactly how broad a ***product category*** Siderca has used in estimating its cost data. As a result, we are unable to rely on the data for a likelihood analysis regarding OCTG.[73]

In misquoting Siderca, the USDOC did more than miss a few letters at the end of the word "product", it missed the concept. Siderca reported the actual cost of the production lines used for producing the products for which the USDOC requested information. If there is any ambiguity, then, USDOC's carelessness in interpreting the information provided by the exporter is at least partially to blame.

95. Even if the description of the methodology were somehow unclear – which it was not – USDOC had an obligation to attempt to clarify its doubts rather than simply assume that there is a mistake or that the methodology is otherwise defective. Again, the USDOC did not conduct an active review, did not establish the factual basis necessary to support its conclusion, it did not objectively assess the information that was present, and did not reach a reasoned conclusion from the information.

(iv) USDOC's interpretation of comments from Siderca's financial statements is flawed and does not support a finding of likely dumping.

96. After disregarding Siderca's cost information as not credible, the USDOC then pointed to statements in both Siderca's and Acindar's financial statements reflecting the worldwide depression of the OCTG market in 1999/2000, and asserted that there was no evidence suggesting that this would change. Specifically, the USDOC made the following observations regarding Siderca's financial statements:

- "Sales for fiscal 2000 were 25 per cent lower than during the previous fiscal year, reflecting the effects of the drastic fall in world demand for tubes for the oil industry;"
- "Operating results were a loss of $27 million in fiscal 2000, constituting six per cent of sales revenue for the year. The prior year Siderca had recorded a profit of $28 million"; and
- "During fiscal 2000 Siderca ended with a loss of $39 million, compared to a profit of $86 million the previous year."[74]

Based on these isolated observations, the USDOC concluded that: "Given the weakened condition of Siderca at the end of the original sunset review period, we consider that there was no valid indication that a sudden turn-around in the OCTG market was likely."[75]

97. The USDOC's conclusions regarding Siderca's financial statements are flawed. There are several reasons why the Department's establishment and assessment of this evidence fell short of the Agreement's standard that determinations must be based on the "objective assessment" of "positive evidence."

98. First, the probative value of USDOC's observations is dubious. "Dumping" has a specific meaning under the Anti-Dumping Agreement, and that meaning is contained in Article 2. Even though the USDOC is not required to calculate a dumping margin in an Article 11.3 review, the requisite likelihood of dumping determination must be related to the concept of "dumping" that is

[73] USDOC Section 129 Determination at 9 (ARG-16)(emphasis added).
[74] USDOC Section 129 Determination at 9 (ARG-16).
[75] USDOC Section 129 Determination at 9 (ARG-16).

defined in Article 2. The specific financial statements cited by USDOC, by their nature, relate to the total operations of multi-product companies, and USDOC did not even attempt to tie such statements to OCTG that might be exported to the United States. The USDOC's observations are not related to "dumping", and they certainly do not constitute evidence of likely or probable dumping of OCTG to the United States.

99. Second, USDOC's conclusion that there is "no valid indication that a sudden turn-around in the OCTG market was likely" is demonstrably contrary to the evidence. Siderca specifically provided an interim financial statement for the April–June 2000 period, and brought to USDOC's attention the portions that showed that such a recovery was not only likely, but that it had started to occur.[76] The USDOC ignores this information, and offered no justification for closing its eyes to Siderca's information. Also, the USITC had already documented the recovery in the OCTG market in its likelihood of injury determination. The conditions had improved to the extent that the US industry was not even considered to be vulnerable to injury. The USDOC cites to other findings by the USITC, but conveniently ignores the portions of the USITC record indicating the rebound in the OCTG market that the USDOC says is nowhere on the horizon. This is not characteristic of an objective analysis.

100. Third, positive evidence demonstrated that Siderca had reacted to the lean years within the period by achieving production efficiencies and trimming its costs. As Siderca explained to USDOC, "The [cost] data . . . accurately reflect the increasing production efficiencies achieved by Siderca through this period", with significant gains in productivity in its rolling mill (17.8 per cent) and labour (10.5 per cent).[77] Siderca added: "The cost data (even with the limitations explained above) supports Siderca's position: Siderca is a cost-efficient producer of OCTG and could have shipped OCTG products profitably to the United States".[78] USDOC rejected this evidence without further questions or attempts to clarify any concerns.

101. Fourth, the USDOC's treatment of information from the financial statements is one-sided and not objective. The April–June 2000 financial statements submitted by Siderca showed a profit of $27,413,771 in one quarter, demonstrating the recovery that had already begun and the benefits reaped by Siderca's increasing efficiency.[79] Also, sales volume increased to 185,882 metric tons (a 48 per cent increase over the same period in the previous year) and total production volume increased to 195,132 metric tons (a 66 per cent increase over the same period in the previous year).[80] USDOC does not even mention this information, but instead relies on the data from previous periods as probative information of what is likely to occur in the future.

102. Finally, Siderca provided evidence that was probative of the absence of a likelihood of dumping. But USDOC did not mention this evidence in its 2005 likelihood determination, let alone analyze it. In the Section 129 proceeding, Siderca offered evidence regarding the diversification of its OCTG export markets following the imposition of the US order.[81] This evidence demonstrated that Siderca had diversified its export markets and that the company was not subject to any other anti-dumping measures, and that if the US order were revoked, dumping would not be likely to recur in the United States. Siderca noted that its "sales processes underwent significant changes during the 1995 –

[76] Letter from Siderca to USDOC, 7 December 2005, at 7 (ARG-19).
[77] Siderca's Response to Questionnaire (30 Nov. 2005) at 2 (ARG-15).
[78] *Id*. at 10.
[79] Siderca's Response to Questionnaire (30 Nov. 2005) (Attachment 1, Siderca S.A.I.C., Financial Statements at 30 June 2000, at 1) (ARG-15).
[80] Siderca's Response to Questionnaire (30 Nov. 2005) (Attachment 1, Siderca S.A.I.C., Financial Statements at 30 June 2000, at 2) (ARG-15).
[81] Siderca's Response to Questionnaire (30 Nov. 2005) at 7-10 (ARG-15).

2000 period, reflecting the further diversification of Siderca's export markets and its strategy of providing higher-value products and services to its customers throughout the world."[82]

103. Siderca supported this statement with additional positive evidence, highlighting that the company had "developed an extensive network of international sales offices, and implemented a strategy to strengthen and maintain its international presence" and this included "a distribution network with more than 20 offices around the world".[83] It also informed the USDOC of the establishment of a series of long-term agreements with customers and international finishing plants" from around the world.[84]

104. Siderca further explained that it had consolidated the company's strategic positioning in international markets during subsequent years, including by expanding from its traditional base in Latin America, and increasing significantly its shipments to Africa and Russia, in 1996 in particular.[85] Siderca also noted how it "reacted to the economic and financial crises in the emerging markets of Southeast Asia and Latin America by introducing flexible production programmes and the development of made-to-order products and services for its international clients", and identified the new stocking programs that the company had entered into in Venezuela, Nigeria, Canada, Bolivia, Thailand, Azerbaijan, Malaysia, and Ecuador.[86]

105. With respect to the Argentine market, Siderca explained that the company had introduced regional stocking programs and "just-in-time" inventory management agreements with several of its Argentine customers, developing regional storage facilities in Las Heras, Barranquilla and Desfiladero Bayo.[87] The measures significantly reduced order and transport time for local customers, and increased Siderca's ability to provide value added services at the site of the oil and gas production. Siderca explained that these agreements "proved to be important to Siderca and its customers during the crisis in the oil market in 1998/99, allowing customers to increase efficiency and reduce costs".[88] Siderca summarized its evidence as follows:

> As can be seen through this summary (and the discussion in the cited annual reports), Siderca continued and intensified the process of diversifying products, services, and markets during the 1995-2000 period. By the end of the period under analysis, Siderca exported its OCTG to approximately 60 countries. In some regions, such as Canada and Africa, the increase in OCTG exports over this period was significant. During this period, no other countries maintained anti-dumping measures against Siderca, nor has Siderca been accused of dumping or other unfair trade practice during or after this period.[89]

106. This evidence is clearly probative of whether dumping would be likely to continue or recur. Yet, there was no analysis by USDOC of this evidence. Indeed, these issues are not mentioned anywhere in the 2005 likelihood determination. This is all the more striking given the Appellate Body's admonishment that "a case-specific analysis of the factors behind a cessation of imports or a decline in import volumes (when dumping is eliminated) will be necessary to determine that dumping will recur if the duty is terminated".[90]

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[82] Siderca's Response to Questionnaire (30 Nov. 2005) at 7 (ARG-15).
[83] *Id*. at 7.
[84] Siderca's Response to Questionnaire (30 Nov. 2005) at 7-8 (ARG-15).
[85] *See id*. at 8.
[86] Siderca's Response to Questionnaire (30 Nov. 2005) at 8 (ARG-15).
[87] *See id*. at 8.
[88] Siderca's Response to Questionnaire (30 Nov. 2005) at 8-9 (ARG-15).
[89] Siderca's Response to Questionnaire (30 Nov. 2005) at 9 (ARG-15).
[90] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 177.

107. Thus, the USDOC's analysis fell far short of the standards of the Agreement. In the end, there was nothing in USDOC's 2005 likelihood determination relating to Siderca that constituted positive evidence that revocation would be likely to lead to recurrence of dumping.

(b) USDOC's Conclusion That Acindar Would Be Likely to Dump Was Inconsistent with Article 11.3

108. As a preliminary matter, the USDOC's findings regarding Acindar are completely at odds with the standard established by Article 11.3 of the Anti-Dumping Agreement. The USDOC made **what seems to be a prospective ("likelihood") determination about *past* sales.** That is USDOC made findings about what was "likely" to have happened during the sunset review period (1995 to 2000). This is not the standard that is established by Article 11.3. That USDOC used the wrong standard is plainly evident from the statements in USDOC's Section 129 Determination:

- "…we find that Acindar likely was dumping subject OCTG during the original sunset period."[91]
- "The combination of Acindar selling in the United States at below market prices at the end of the sunset period and the depressed OCTG market indicates that Acindar likely was dumping significantly in the US market."[92]
- "… we find it likely that Acindar's US sales of OCTG during the original sunset review were at dumped prices."[93]

109. These statements demonstrate the flawed approach by USDOC to its Article 11.3 determination. As noted above, nowhere does the Anti-Dumping Agreement discuss the concept of "likely" dumping that occurred in the *past*. Article 11.3 uses the phrase "likely" to describe the prospective, counterfactual determination that must be made if a WTO Member intends to extend an anti-dumping measure beyond five years: it must find "that the expiry of the duty would be *likely* to lead to continuation or recurrence of dumping and injury." The determination of whether dumping existed in a past period is governed by Articles 2 and 9 (which incorporates the substantive rules of Article 2), neither of which mentions the possibility of a determination of "likely" dumping with respect to past sales.

110. The Department noted that Acindar's submission "failed to include any data adequate to calculate costs for the subject merchandise,"[94] and concluded that "it did not have usable cost data for Acindar."[95]

111. The Department thus relied on "usable price data" for Acindar. The specific import prices of Acindar's OCTG were based on US Customs and Border Protection (CBP) data. These prices were considered by the USDOC to be too low when compared to observed selling prices in the US market, as reported in a publication known as Preston Pipe & Tube Report.[96] The Department concluded: "Our analysis indicates that Acindar's US selling prices during the sunset period were substantially lower than prevailing US market prices for the corresponding OCTG products."[97]

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[91] USDOC Section 129 Determination at 7 (ARG-16).
[92] USDOC Section 129 Determination at 7-8 (ARG-16).
[93] USDOC Section 129 Determination at 10 (ARG-16).
[94] USDOC Section 129 Determination at 6 (ARG-16).
[95] USDOC Section 129 Determination at 7 (ARG-16).
[96] USDOC Section 129 Determination at 7 (ARG-16).
[97] USDOC Section 129 Determination at 7 (ARG-16).

112. The USDOC's comparison of pricing data based on a commercial publication does not constitute an objective examination of information and is not positive evidence to support a WTO-consistent determination that dumping would be likely to continue or recur. First, Article 2 does not define dumping in terms of a comparison between export prices and market prices prevailing in the market of the **importing country**. It is a basic principle of Article 2 – and Article VI of GATT 1994 – that dumping is defined by the comparison of the export price to a normal value in the **country of export** (or to another export price, or to a constructed value). The USDOC provides no explanation why it is probative evidence of "likely" dumping.

113. Second, USDOC's comparison of Acindar's US shipments to prevailing US market prices did not involve any product-specific comparison. Rather, the USDOC compared prices for specific Acindar transactions to prices of "carbon casing, welded" as reported by Preston Pipe & Tube Reports. However, that publication does not report prices by specific size of pipe, and it does not discriminate between plain end and casing that is threaded and coupled. As Siderca explained in its responses, these variables affect cost and price, and any comparison that does not account for these differences is suspect. These facts are well known to USDOC. There was no control for any of the physical characteristics of the products being compared which (as explained in submissions by Siderca) affect the price and cost of OCTG products.[98]

114. Also, the prices reported in Preston Pipe & Tube Report are prices to the final customers in the United States; that is, they are prices reported on the basis of a specified delivery point in the United States. The prices that USDOC obtained from USCBP presumably are stated on a different basis; most likely, FOB port of export, which in the case of Acindar would be Argentina. The record of the Section 129 proceeding contains no indication that USDOC exercised any care to eliminate the obvious distortion that would be implicit in any such comparison.

115. In short, the comparison described by the Department as supporting its determination of "likely" dumping does not even resemble the notion of "dumping" under Article 2. The record does not reveal any attempt by USDOC to ensure that the prices it reviewed related to the same products within the specific categories, or that basic differences in points of sale and transportation were the same. The USDOC never even asked Acindar any questions about the observed prices, either of its exports or the average US prices of the OCTG product groupings.

116. Moreover, there was no factual basis for inferring that Acindar was "likely dumping" during the original sunset period. Acindar was never investigated during the original investigation, and the company had no prior history of dumping. As Acindar explained, it is principally a producer of steel long products (e.g., bars, wire rod, structural steels), and the company did not even produce any OCTG until 1998, more than half-way through the sunset review period.[99] Acindar was never a significant producer of OCTG, and its OCTG production was inconsequential in terms of the company's total production, representing less than one per cent of Acindar's total production during this time.

117. The USDOC also relied on the losses shown on Acindar's financial statements, and an ambiguous statement in the financial statements which the USDOC cited as support for the proposition that Acindar was willing to dump its products on export markets in order to stabilize its production. The USDOC quoted the following from Acindar's 2000 financial statement regarding the company's marketing strategy: "Acindar's strategy has been and will continue to be to focus on the Argentine market while using the export market to stabilize its overall sales volume during periods of

[98] *See* Siderca's Response to Questionnaire (30 Nov. 2005) at 4 (ARG-15) ("While Siderca has reported the cost data for the product categories defined by the Department, Siderca would like to stress that the data for such broad product groupings is of limited value from a cost and commercial point of view.").

[99] Acindar's Response to Questionnaire (30 Nov. 2005) at 1 (ARG-14).

slowdown in domestic economic activity."[100] Using export markets to "stabilize overall sales" during periods of slowdown is hardly tantamount to dumping.

118. The USDOC makes the following other points based on Acindar's fiscal year 2000 financial statements:

- "Fiscal 1999 net sales were 16.8 per cent lower than fiscal 1998; sales for fiscal 2000 fell another 11.8 per cent from fiscal 1999;"
- "Cost of sales, administrative and selling expenses, and depreciation and amortization, as a percentage of net sales, all increased in fiscal 1999 compared to fiscal 1998 levels, and increased again in fiscal 2000 from 1999 levels;"
- "Operating income decreased from 12.5 per cent in fiscal 1998 to 3.8 per cent in 1999, and to 0.3 per cent in 2000;" and
- "Acindar suffered losses of Argentine pesos (Ps.) 28.3 million in fiscal 1999, and of Ps. 96.9 million in fiscal 2000. These losses contrast markedly with the Ps. 38 million profit Acindar reported for fiscal 1998."[101]

119. As noted above, Acindar is principally a producer of steel long products. Acindar's OCTG production was inconsequential in terms of the company's total production, representing less than one per cent of Acindar's total production during this time. Therefore, Acindar's financial statements cannot be considered as positive evidence to support USDOC's determination that Acindar would be likely to dump OCTG in the US market in the event of revocation of the order.

120. In addition, the USDOC either missed or chose to ignore information on the record that suggested that the inferences that it drew from the financial statements as a whole were not representative of the pipe and structural division of Acindar. As demonstrated in the financial statements placed in the record, this division posted results that were considerably different from the company as a whole. While the company financial statements showed a loss of $28.3 million in 1999, the tube and structural division showed positive net income of $21.3 million. The same is true for 2000, when the net income of $17.8 million from this division compared favourable to the overall company loss of $96.8 million.[102]

121. In summary, the USDOC's treatment of Acindar's information reveals a rush to judgment rather than an objective assessment of positive evidence and reasoned decision making. The determination of likely dumping is not consistent with the standards set forth in Article 11.3.

[100] USDOC Section 129 Determination at 10-11 (ARG-16) (quoting Acindar's 2000 financial statement at 12).

[101] USDOC Section 129 Determination at 10 (ARG-16).

[102] *See* Letter from Skadden, Arps, Slate, Meagher & Flom LLP to USDOC, 2 Dec. 2005, Exhibit 5 at F-75 and F-75 (Acindar Consolidated Financial Statements) (ARG-27).

2. The USDOC's Inference That Dumping Would Be Likely In the Event of Revocation of the Order Because of the Volume Decline is Inconsistent With Article 11.3

122. As it had in 2000, in 2005 the USDOC again relied on the inference that dumping would be likely to continue based on the decrease of import volumes after the imposition of the order. The USDOC asserted that the original WTO Panel in this dispute never made any finding with respect to USDOC's inference relating to low volume.[103] The Section 129 Determination confirmed the lack of any analysis on the issue of volume, and highlights that the USDOC simply returned to the same inference from its 2000 sunset determination:

> In assessing likelihood, we also rely on our previous finding regarding the volume of imports of subject merchandise for the period before and after the issuance of the antidumping duty order. In the original sunset review, we found that after imposition of the order, import volumes significantly decreased from pre-order levels. Declining import volumes after, and apparently resulting from, imposition of an antidumping duty order, indicate that exporters would need to dump to sell at pre-order levels.[104]

123. The Appellate Body has reaffirmed that the administering authority cannot rely on the cessation of imports or on a volume decline as a basis for a WTO-consistent likelihood determination without "a case-specific analysis of the factors behind a cessation of imports or a decline in import volumes".[105] As the Appellate Body has stated, there are many factors that can reasonably explain a volume decline or the cessation of imports in the wake of anti-dumping measure:

> The cessation of imports in the second scenario and the decline in import volumes in the third scenario could well have been caused or reinforced by changes in the competitive conditions of the market-place or strategies of exporters, rather than by the imposition of the duty alone. Therefore, a case-specific analysis of the factors behind a cessation of imports or a decline in import volumes (when dumping is eliminated) will be necessary to determine that dumping will recur if the duty is terminated.[106]

124. During the Section 129 proceeding, the Argentine exporters (1) explained the reason for the volume decline during the sunset period of review, (2) established that Acindar was only a minor producer, and (3) showed that Siderca had diversified its export markets after the imposition of the order and that the company performed quite well without exporting to the US market.[107] The USDOC's 2005 likelihood determination does not even address these arguments, which explained the reason for the reduction in Argentine OCTG imports into the United States.

125. As stated above, the Appellate Body reaffirmed in *US - OCTG from Mexico* that in the context of declining volumes, it is insufficient to rely on presumptions or conjecture as to a company's ability to ship to the US market without dumping:

> If the dumping had ceased soon after the issuance of the order, and there was no dumping or there were no imports for a substantial period before the sunset review, the investigating authority will need credible evidence to come to the conclusion that dumping will "recur" if the anti-dumping duty order is revoked. A respondent party may have the responsibility to introduce relevant evidence in its favour, but the investigating authority also has a duty to seek information to ensure that its

[103] USDOC Section 129 Determination at 2 n.4 (ARG-16).
[104] USDOC Section 129 Determination at 11 (ARG-16).
[105] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 177.
[106] Appellate Body Report, *US - Corrosion-Resistant Steel Sunset Review*, para. 177.
[107] *See* Siderca's Response to Questionnaire (30 Nov. 2005) at 7-10 (ARG-15)

> determination rests on a sufficient evidentiary foundation. An affirmative determination cannot rest merely on a presumption, as envisaged under scenario (b) or (c), that the cessation of dumping or of imports was due solely to the anti-dumping duty order.[108]

126. Yet, the USDOC did nothing to explore the reason for the volume decline, or to address the Argentine producers' comments regarding volume. Instead, contrary to the rulings of the Appellate Body, the USDOC simply presumed that a volume decline after the imposition of an order is the result of a company's inability to participate in the US market without dumping.

127. As stated earlier, the Appellate Body stated that it did not believe that historical dumping margins or import volumes could always be presumed to constitute sufficient evidence of likely dumping:

> We would have difficulty accepting that dumping margins and import volumes are always 'highly probative' in a sunset review by USDOC if this means that either or both of these factors are presumed, by themselves, to constitute sufficient evidence that the expiry of the duty would be likely to lead to continuation or recurrence of dumping.[109]

128. The Appellate Body distinguished evidence of continued dumping margins – which, it noted, might in certain instances be sufficient evidence of likely dumping – from import volumes:

> Such a presumption might have some validity when dumping has *continued* since the duty was imposed (as in the first scenario identified in Section II.A.3 of the Sunset Policy Bulletin), particularly when such dumping has continued with significant margins and import volumes. However, the second and third scenarios in Section II.A.3 relate to the situation where there is *no dumping* (either because imports ceased or because dumping was eliminated after the duty was imposed). The cessation of imports in the second scenario and the decline in import volumes in the third scenario could well have been caused or reinforced by changes in the competitive conditions of the market-place or strategies of exporters, rather than by the imposition of the duty alone. Therefore, a case-specific analysis of the factors behind a cessation of imports or a decline in import volumes (when dumping is eliminated) will be necessary to determine that dumping will recur if the duty is terminated.[110]

129. The Appellate Body thus confirmed that the cessation or decline of imports alone would not be sufficient to support an affirmative likelihood determination, without an analysis of the causes behind the cessation or decline in imports. Moreover, with respect to continued dumping margins, the Appellate Body's statement is in the context of "significant margins and import volumes".

130. As noted above, however, Siderca provided evidence showing that the company had diversified its markets following the imposition of the order, and that this explained the reduction in Argentine OCTG imports into the United States. Siderca observed that by the end of the sunset period, the company "exported its OCTG to approximately 60 countries. In some regions, such as Canada and Africa, the increase in OCTG exports over this period was significant. During this period, no other countries maintained anti-dumping measures against Siderca, nor has Siderca been accused of dumping or other unfair trade practice during or after this period".[111]

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[108] Appellate Body Report, *US - OCTG from Mexico*, para. 199.
[109] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 177.
[110] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 177.
[111] Siderca's Response to Questionnaire (30 Nov. 2005) at 9 (ARG-15).

131. There is no analysis of this anywhere in the 2005 likelihood determination. This is all the more striking given the Appellate Body's admonishment that "a case-specific analysis of the factors behind a cessation of imports or a decline in import volumes (when dumping is eliminated) will be necessary to determine that dumping will recur if the duty is terminated".[112] As the Appellate Body in *Mexico OCTG* explained:

> Likewise, scenario (c) also could have many variations within it. This scenario deals with situations where imports continue, but without dumping, and an affirmative determination under this scenario is therefore a determination that dumping will "recur" if the anti-dumping duty order is revoked. The underlying presumption in scenario (c) is that, if import volumes had declined significantly, it was due solely to the anti-dumping duty order, and that, if the order were revoked, the company concerned would resort to dumping to increase its import volumes. Such a presumption cannot be the sole basis for a determination of "recurrence" of dumping. A company's strategy and ability to increase or decrease its exports to particular markets depend on a variety of market conditions, such as, in particular, the opportunities available in different markets and the competitive conditions in the market place. Therefore, unless all relevant factors are taken into account, there may not be an objective evaluation in such cases of the causes of the variations in import volumes in the importing Member's market.
>
> Thus, the factual scenarios of the SPB must not be mechanistically applied. The responding parties do have a responsibility to submit information and evidence in their favour, particularly about their pricing behaviour, import volumes, and dumping margins. But the investigating authority has a duty to seek out information on relevant factors and evaluate their probative value in order to ensure that its determination is based not on presumptions, but on a sufficient factual basis.[113]

132. USDOC's reliance on the decline in import volume as a basis for its 2005 likelihood determination violated Article 11.3 of the Anti-Dumping Agreement, and failed to bring the United States into compliance with the rulings and recommendations of the DSB. The USDOC relied on the decline in import volumes to disregard positive evidence and to make its affirmative likelihood determination. In relying on the lower volume to the exclusion of the positive evidence, the USDOC did not conduct a case-specific analysis of the factors behind the decline, did not properly establish the facts relevant to the likelihood determination, and did not objectively evaluate the matter.

D. THE USDOC'S SECTION 129 DETERMINATION WAS INCONSISTENT WITH ARTICLES 6.1, 6.2, 6.4, 6.5.1, 6.6, 6.8, 6.9 AND ANNEX II OF THE ANTI-DUMPING AGREEMENT

133. The conduct of the Section 129 proceeding, and the resulting determination, are inconsistent with the obligations of the United States under the Anti-Dumping Agreement. The USDOC:

- failed to provide to the interested parties ample opportunity to present in writing all evidence which they considered relevant, in violation of US obligations under Article 6.1;
- failed to provide to interested parties a full opportunity for the defence of their interests, in violation of US obligations under Article 6.2;

[112] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 177.
[113] Appellate Body Report, *US - OCTG from Mexico*, paras. 200-201.

- failed to provide timely opportunities for interested parties to see all information that was relevant to the presentation of their cases, in violation of US obligations under Article 6.4;
- failed to satisfy the requirements of Article 6.5.1 regarding the provision of non-confidential summaries of confidential information;
- failed to satisfy the requirements of Article 6.6 by not ensuring the accuracy of information that was relied on to the exclusion of other more probative evidence;
- failed to follow the requirements of Article 6.8 and Annex II; and
- failed to inform interested parties of the essential facts under consideration that formed the basis for the decision, in violation of US obligations under Article 6.9.

134. The obligations of Article 6 apply to sunset reviews. Article 11.4 of the Agreement provides in part that "[t]he provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article." The Appellate Body has also confirmed that "claims under Article 6 may be made in relation to sunset review determinations on the basis of the cross-reference to Article 6 found in Article 11.4."[114]

135. Accordingly, the obligations of Article 6 of the Agreement applied to the USDOC Section 129 Determination in this case.

136. The US violations of Article 6 are particularly egregious in light of the representations made by the United States to the Article 21.3(c) Arbitrator regarding the time it said it required to implement the DSB rulings. The Arbitral Award noted that:

> The United States argues that the time required to carry out these procedural steps in the two phases of implementation demonstrates the need for a 15-month implementation period in this dispute…. In the second phase, the USDOC also needs sufficient time to ensure that it complies with its obligations of transparency and due process under Articles 6 and 12 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*"). The United States argues that, in accordance with previous arbitration awards, this should include time to obtain and analyze information from interested parties, even though this is not expressly required by statute or regulation.[115]

137. Thus, after having represented to a WTO Arbitrator that it needed "sufficient time to ensure that it complies with its obligations of transparency and due process", the United States proceeded to ignore these obligations, as discussed below.

[114] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 239.

[115] Award of the Arbitrator, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, Arbitration under Article 21.3(c) of the DSU, WT/DS268/12, 7 June 2005, para. 10.

1. The USDOC failed to provide to interested parties ample opportunity to present in writing all evidence which they considered relevant, in violation of US obligations under Article 6.1

138. Article 6.1 of the Anti-Dumping Agreement provides that:

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

139. This obligation has been read broadly by the Appellate Body to provide fundamental due process rights to responding parties. Indeed, referring to Articles 6.1 and 6.2 in the context of the present dispute, the Appellate Body stated that:

> (b) These provisions set out the fundamental due process rights to which interested parties are entitled in anti-dumping investigations and reviews. Articles 6.1 and 6.2 require that the opportunities afforded interested parties for presentation of evidence and defence of their interests be "ample" and "full", respectively. In the context of these provisions, these two adjectives suggest there should be liberal opportunities for respondents to defend their interests. [116]

140. In the recent case of *Mexico – Rice*, the Appellate Body interpreted the parallel provision in the SCM Agreement in a similar manner:

> (c) [W]e are of the view that, like Article 6 of the *Anti-Dumping Agreement*, Article 12 of the *SCM Agreement* as a whole "set[s] out evidentiary rules that apply *throughout* the course of the … investigation, and provide[s] also for due process rights that are enjoyed by 'interested parties' *throughout* … an investigation" … This due process obligation—that an interested party be permitted to present all the evidence it considers relevant—concomitantly requires the investigating authority, where appropriate, to take into account the information submitted by an interested party.[117]

141. The Panel in *Guatemala – Cement II* stressed that "Article 6.1…requires that interested parties shall have 'ample' opportunity to present evidence and 'full' opportunity to defend their interests."[118] The Panel in *US – Corrosion-Resistant Steel Sunset Review* summarized the law succinctly: "Articles 6.1 and 6.2 make it clear that interested parties have a broadly-defined right to submit evidence to the investigating authority during a sunset review and are entitled to a full opportunity for the defence of their interests."[119]

142. It is important to note that Article 6.1 must be read in a conjunctive and cumulative manner: all interested parties must be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant. A breach of either of these rights will establish a violation of Article 6.1.

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[116] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 241.

[117] Appellate Body Report, *Mexico - Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295/AB/R, adopted on 20 December 2005, para. 292 ("*Mexico Rice*") (original emphasis).

[118] Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, para. 8.119 ("*Guatemala – Cement II*").

[119] Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, adopted 9 January 2004, para. 7.255 ("*US - Corrosion-Resistant Steel Sunset Review*").

143. During the arbitration under DSU Article 21.3(c) on the reasonable period of time for the United States to implement the DSB rulings in this dispute, the United States enumerated an extensive – and non-exhaustive – list of procedural steps that it would be required to undertake, including the following:

> (d) During this 15-month period, the Office of the United States Trade Representative ("USTR") and Commerce expect to take – and have taken – steps, as detailed below, that include:
>
> (e) … Phase 2 - Issuance by Commerce of a New Determination of Likelihood of Continuation or Recurrence of Dumping
>
> (f) … approximately two months for Commerce to consider what information is needed from parties; draft and send questionnaires, if appropriate; provide for extensions, if requested; draft and send supplemental questionnaires, if necessary; review, analyze, and respond to responses; verify information from respondents, if appropriate; issue a preliminary redetermination;
>
> (g) approximately one month to allow interested parties to submit comments to Commerce, including through a hearing, on preliminary redetermination;
>
> (h) one month for Commerce to review, analyze, and respond to comments and make any appropriate changes to its analysis before issuance of final redetermination….[120]

144. Despite this US assertion to the WTO of the due process rights of the responding parties, none of these steps ever took place except for the initial questionnaire. Specifically, USDOC:

- failed to issue supplemental questionnaires, despite the fact that it had some questions about the information submitted;
- failed to issue a preliminary redetermination;
- failed to establish a schedule to allow interested parties to submit comments, including rebuttal comments, to USDOC;
- failed to request clarification or additional documentation from the responding parties; and
- failed to hold a hearing.

145. The interested parties thus had little opportunity – let alone "ample" or "full" opportunity – to present in writing all evidence that they considered to be relevant for the Section 129 Determination. The United States represented to Argentina in the Article 21.3 arbitration that it would engage in a multi-stage process in which information would be developed, refined, and debated through written and oral argument. Instead, the USDOC provided a "black box" – information entered, and a decision came out. No argument; not even notice that its plans had changed and that parties would not have an opportunity to provide written and oral argument. The failure of the United States to accord basic due process rights to the interested parties fell far short of the requirements of Article 6.1.

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[120] *United States – Sunset Reviews of Anti-dumping Measures on Oil Country Tubular Goods from Argentina (WT/DS268): Arbitration Under Article 21.3(c) of the DSU*, Submission of the United States, 22 April 2005, para. 4. Available from the Web site of the United States Trade Representative: www.ustr.gov.

2. The USDOC failed to provide to interested parties a full opportunity for the defence of their interests, in violation of US obligations under Article 6.2

146. Article 6.2 of the Anti-Dumping Agreement provides in part that:

> (a) Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered…. Interested parties shall also have the right, on justification, to present other information orally.

147. As noted above, the Appellate Body has characterized Article 6.2 as one of the "fundamental due process rights" of the Anti-Dumping Agreement, which requires interested parties to be given a "full" opportunity for the defence of their interests.

148. The lack of a hearing will violate the specific obligation in Article 6.2 to allow interested parties to "meet" parties with adverse interests, and to "present … information orally." Indeed, in the present dispute, the lack of a hearing was one of the bases on which the Appellate Body invalidated the waiver provisions:

> (b) [T]he respondent will … be denied any opportunity to confront parties with adverse interests in a hearing, notwithstanding this respondent's clear expression of interest in participating in the sunset review. As a result, this respondent is denied its rights, pursuant to Article 6.2, to the "full opportunity for the defence of [its] interests.[121]

149. In addition, the original Panel also found that the USDOC's likelihood of dumping determination was inconsistent with Article 6.2 because "Siderca was subjected to a procedure that fell short of the requirements of Article 6.2 of the Agreement in respect of hearings."[122]

150. The Panel in this dispute referred to the "the explicit provision of Article 6.2 that hearings have to be arranged when so requested by interested parties…".[123] Thus, the lack of a hearing in a sunset review will breach Article 6.2.

151. As noted above, the procedural defects in the conduct of the Section 129 proceeding established a violation of Article 6.1. In the context of this case, the defects also establish a violation of Article 6.2, in that the interested parties were by no means provided with a "full" opportunity to defend their interests. The lack of a hearing during the Section 129 proceeding violated the specific obligation in Article 6.2 to allow interested parties to "meet" parties with adverse interests, and to "present … information orally".

152. Thus, USDOC violated both the general and specific obligations of Article 6.2. It breached the general obligation to provide interested parties with a full opportunity to defend their interests, and the specific obligation to provide a hearing.

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[121] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 246.

[122] Panel Report, *US – Oil Country Tubular Goods Steel Sunset Reviews*, paras. 7.235; *see also* para.8(1)(d)(i).

[123] Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.235.

3. USDOC failed to provide timely opportunities for interested parties to see all information that is relevant to the presentation of their cases, in violation of US obligations under Article 6.4

153. Article 6.4 of the Anti-Dumping Agreement provides that:

> (a) The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

154. In *EC – Pipe Fittings*, the Appellate Body discussed the scope of the obligations imposed by Article 6.4:

> (b) Article 6.4 requires that, "whenever practicable", investigating authorities provide timely opportunities for all interested parties to see and prepare presentations on the basis of "all information" that meets the following criteria:
>
> (c) the information is relevant to the presentation of the interested parties' cases;
>
> (d) the information is not confidential as defined in Article 6.5; and
>
> (e) the information is used by the authorities in an anti-dumping investigation.[124]

155. The Appellate Body made clear that whether or not the information is "relevant" is to be determined from the perspective of the interested parties, not the investigating authority. [125] It also stated that:

> One of the stated objectives of the disclosure of information required under Article 6.4 is to allow interested parties "to prepare presentations on the basis of this information". The "presentations" referred to in Article 6.4, whether written or oral, logically are the principal mechanisms through which an exporter subject to an anti-dumping investigation can defend its interests. [126]

156. Yet, the Department did not conduct the Section 129 proceeding in a manner consistent with the requirements of Article 6.4. It clearly was "practicable" for the USDOC to allow the parties to see all the information relevant to the presentation of their case. As discussed above, during the arbitration to establish a reasonable period of time for US implementation, the United States asserted that the requested 15 months was needed, in part, so that the United States could comply with the procedural requirements of Article 6 of the Anti-Dumping Agreement.[127] Yet, the United States failed to "provide timely opportunities for parties to see all information that is relevant to the presentation of their cases." This information was used by USDOC in the Section 129 proceeding. The Argentine exporters were not given a sufficient opportunity "to prepare presentations on the basis of this information."

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[124] Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, para. 142 ("*EC - Pipe Fittings*").

[125] Appellate Body Report, *EC - Pipe Fittings*, para. 145.

[126] Appellate Body Report, *EC - Pipe Fittings*, para. 149.

[127] Award of the Arbitrator, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, Arbitration under 21.3(c) of the DSU, WT/DS268/12, 7 June 2005, para. 10.

157. Indeed, in USDOC's Section 129 Determination, there are several references to additional USDOC memoranda to the file[128], several of which are memoranda dated 16 December 2005 (*i.e.*, the same date as the Section 129 Determination). Three of the memoranda are public documents, and three of these memoranda are proprietary documents with public summaries or redactions. The public versions of the proprietary documents indicate that the vast majority of the content is "not susceptible to bracketing".[129]

158. Four of the five memoranda are styled as "Memorandum to The File From Mark Flessner, Case Analyst, Re: In the Matter of the Section 129 Determination on the Antidumping Duty Determination With Respect to Oil Country Tubular Goods (OCTG) from Argentina, pursuant to WTO Appellate Body Report WT/DS268/ADR (2004) and Section 129(b) of the Uruguay Round Agreements Act" and, specifically, relate to (1) "Information from Preston Publishing Company, Inc."; (ARG-22) (2) "Inconsistencies in data reported by Acindar" (public version of proprietary document) (ARG-23); (3) "Inconsistencies in data reported by Siderca S.A.I.C." (public version of proprietary document) (ARG-21); and (4) "Securities and Exchange Commission Filings of Domestic OCTG Producers (ARG-24)". The fifth memorandum is entitled, Memorandum to The File From Fred Baker, Case Analyst, Through Mike Heaney, Team Leader, Robert James, Program Manager, In the Matter of the Section 129 Determination on the Antidumping Duty Determination With Respect to Oil Country Tubular Goods (OCTG) from Argentina, pursuant to WTO Appellate Body Report WT/DS268/ADR (2004) and Section 129(b) of the Uruguay Round Agreements Act: Information for the Record (ARG-25)".

159. These documents, or the underlying analysis, must have been prepared prior to 16 December, yet the parties were never advised of their existence.[130] Nor did the Department offer any opportunity to the parties during the course of the proceeding to review this information or provide comments on the accuracy or relevance of the information and argument.[131]

160. With respect to the *EC – Pipe Fittings* criteria, each of the five USDOC file memoranda contained information that was used by USDOC in the Section 129 proceeding and that served as the basis for its Section 129 Determination. As indicated above, at least three of the memoranda clearly satisfy the criteria established by the *EC – Pipe Fittings* panel: (a) the information is directly relevant to the presentation of the Argentine interested parties' cases; (b) the information is not confidential as defined in Article 6.5; and (c) the information was used by USDOC in the Section 129 proceeding and was identified in USDOC's Section 129 Determination.

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[128] Section 129 Determination at 4-5, n. 10 (referencing Memorandum to File, dated 16 December 2005); at 7 ("This comparison, which includes Acindar's business proprietary information, is set forth in the memorandum to the file dated 16 December 2005"); at 8 ("A complete discussion of these discrepancies necessitates discussion of Siderca's business proprietary information; for specific examples, *see*, the Department's Memorandum to the File dates 16 December 2005); and at 11 (referencing financial statements of Lone Star, Maverick, and North Star as set forth in the memorandum to the file dated 16 December 2005) (ARG-16).

[129] *See, e.g.*, ARG-18, Appendix II; ARG-21; ARG-23, Appendix I.

[130] Letter from Siderca to USDOC, 21 December 2005 (ARG-26) ("We are dismayed that the Department relied on this information without first disclosing it to the parties. These documents, or the underlying analysis, must have been prepared prior to 16 December, yet the parties were never advised of their existence.").

[131] Under the US system, information classified as "business proprietary" is released to authorized representatives of the parties (typically lawyers or consultants) under the terms of an "Administrative Protective Order" ("APO"). Thus, the US system is not one in which proprietary or confidential information is exempt from disclosure within the terms of Article 6.4 of the Anti-Dumping Agreement. Authorized representatives have a right to, and in fact do, receive confidential information in the US system.

161. Although Siderca's legal counsel ultimately obtained copies of the proprietary documents identified in USDOC's Section 129 Determination, it was only after USDOC issued the determination in December 2005. In accordance with the terms of the administrative protective order ("APO") that was in place for the entire Section 129 proceeding, Siderca's counsel was entitled to access to proprietary documents released under the APO. Nevertheless, prior to its request for disclosure of the proprietary documents that formed the basis for USDOC's 2005 likelihood determination, the information had not been provided to the parties.

162. Moreover, the unsolicited comments filed by the Petitioners in the Section 129 proceeding further compounded the impact of the US breach of Article 6.4. The USDOC did not request any comments or information from Petitioners, yet the Petitioners filed a letter dated 30 November 2005 (the same response date as the deadline for the responses of the Argentine exporters who were responding to the USDOC questionnaire that was directed to them) in which data are suggested for price comparisons that would then be used to support a conclusion regarding likely dumping. Petitioners' letter concludes – without ever seeing the cost data that was being filed the same day – that "it is almost a certitude that a comparison of the AUVs with Siderca's costs will show that Siderca was engaging in dumping OCTG on a global basis during the POR".[132] Furthermore, the Petitioner's letter references confidential data provided to them by the USDOC; the same confidential data that was made available to Siderca only on 28 November, two days before the Petitioners letter in which its conclusions are stated so emphatically. All of this occurs without any communication from the USDOC as to how it will use the information solicited by Siderca, what procedures will be followed to analyze the information, and how the parties will be permitted to have access to and comment on the essential facts being used by the USDOC to make its determination.

163. In the midst of this uncertainty, Siderca provided comments to demonstrate that Petitioners' analysis was without merit and did not establish any positive evidence that dumping would be likely to continue or recur.[133] In the end, however, Petitioners' approach was no different from the approach the Department took in the original sunset review, and the approach that it took in the Section 129 proceeding.

4. The USDOC failed to require certain interested parties to submit non-confidential summaries of their written submissions in the Section 129 proceeding in a manner so as to permit the Argentine exporters to have a reasonable understanding of the substance of the confidential information submitted, in violation of US obligations under Article 6.5, and 6.5.1

164. Article 6.5.1 provides:

> The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that

[132] Letter from Skadden, Arps, Slate, Meagher & Flom LLP to the USDOC, 2 Dec. 2005 (Public Version) at 4 (ARG-27). Despite having a 30 November 2005 date, Petitioner's letter was not served until 1 December, as accurately stated in the certificate of service. US Steel also availed itself of the rule allowing for the public version to be filed and served one day later, so that a public version of the letter was not received until late in the day on Friday, 2 December. Siderca's counsel sent the text of the public version immediately to Siderca for review by company officials, with the entire submission sent by express courier to Argentina. Also, public Annexes 2 and 3 were sent by facsimile on 5 December when it became apparent that the express delivery had not yet arrived. Company officials analyzed the comments, developed and checked the information being provided in this rebuttal, and reviewed this text for accuracy as quickly as possible.

[133] Letter from Siderca to USDOC, 7 December 2005 (ARG-19).

> such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

165. The Panel in *Korea – Paper AD Duties*, concluded that "the KTC acted inconsistently with Article 6.5 in the investigation at issue by not requiring that good cause be shown with respect to the information submitted in the application which was by nature confidential".[134] Similarly, in *Guatemala-Cement II*, the Panel found that Guatemala violated Article 6.5 by granting confidential treatment to submissions by the petitioner even though Guatemala could present no evidence that the petitioner had even requested confidential treatment.[135]

166. Here, the same problems exist. In this regard, the USDOC recognized that the Argentine exporters viewed this as problematic. USDOC acknowledged that "Siderca and Acindar also argue that US Steel and IPSCO's treatment of information as business proprietary information hindered their ability to respond effectively".[136]

167. With respect to Article 6.5.1, in particular, the Panel in *Guatemala-Cement II* found a violation of that provision because there was no evidence demonstrating either that petitioner provided a statement of reasons as to why summarization was not possible or that the Ministry even requested such a statement.[137]

168. During the Section 129 proceeding, Argentine exporter Acindar explained that:

> At the outset, Acindar is concerned that its basic right to defend itself from the allegations being made are being impaired by the manner in which the information is being developed in this proceeding. In US Steel's submission, claims for confidential treatment appear to be so broad (either because of the Department's designation of confidential treatment, or that by US Steel's attorneys) that Acindar cannot even understand the nature of the allegations. For example, on page 9, point B, US Steel's letter states: "First, during 1999 and 2000, [ ]". It is difficult to believe that no other information can be given regarding the allegedly confidential information that follows the comma that would allow Acindar to understand the basic nature of the allegation so that it can defend itself. US Steel provides no non-confidential summary in sufficient detail so as to permit a reasonable understanding of the substance of the information submitted in confidence, nor does it provide any justification for excluding completely this allegedly confidential information, which, after all, relates to information that is now more than 5 – 6 years old. Therefore, the Department must require US Steel to re-submit its letter in a form that is consistent with the regulations, and which will allow Acindar to at least understand the nature of the allegation being made so that it can defend itself.[138]

169. There was no response by USDOC to Acindar's request. Thus, Acindar necessarily had to confine its arguments to the public versions of the US industry's comments. Petitioners' comments did not provide, in the words of Article 6.5.1, "sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence". Moreover, there was no explanation as

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[134] Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 November 2005, paras. 7.329-335, ("*Korea – Paper AD Duties*").

[135] Panel Report, *Guatemala - Cement II*, paras. 8.207-223.

[136] USDOC Section 129 Determination at 6 (ARG-16).

[137] Panel Report, *Guatemala - Cement II*, paras. 8.207-223.

[138] Letter from Acindar to USDOC, 6 December 2005 at 1 (ARG-28); *see also* Letter from Siderca to USDOC, 14 December 2005 at 4 ("As a preliminary matter, IPSCO places its comments in brackets, depriving Siderca officials of the ability to review the substance of the comments.") (ARG-29).

to why greater clarification could not be provided nor was it demonstrated that this was an "exceptional circumstance" where the "information [was] not susceptible of summary".

170. Thus, as the Panel found in *Guatemala-Cement II*, in this case, the USDOC violated Article 6.5.1 because there is no evidence demonstrating either that petitioner provided a statement of reasons as to why summarization was not possible or that the USDOC even requested such a statement.[139]

5. The USDOC did not rely on Siderca's submitted cost information, but USDOC first failed to satisfy itself as to the accuracy of that information for purposes of their findings, in violation of US obligations under Article 6.6

171. Article 6.6 provides:

> Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

172. The obligation in Article 6.6 requires the administering authority to satisfy itself as to the accuracy of the information upon which it relies to make its findings. In this case, USDOC violated this obligation. USDOC erroneously disregarded information supplied by Siderca regarding the company's cost of production for OCTG for the sunset period examined by the Department. USDOC failed to act with a sufficient degree of diligence to satisfy itself that Siderca's information was not probative for the likelihood inquiry. Regarding the cost information submitted by Siderca, USDOC merely offers a conclusory statement that it is "unable to rely on the data for a likelihood analysis for OCTG".[140] An authority acts inconsistently with the requirements of Article 6.6 when it rejects information and does not satisfy itself as to the accuracy of that information – especially when that information has been offered to counter unsubstantiated inferences relied on by the authority, and is otherwise more probative of the likelihood of dumping than the unsubstantiated inferences on which the authority is basing its determination.

173. While the Panel in *US - DRAMS* observed that Article 6.6 does not require verification of all information upon which the authority relies, and that there are many ways to "satisfy" oneself as to the accuracy of information[141], one such way cannot be to simply assert, without sufficient justification, that an authority will not rely on probative information in making a determination. USDOC did not provide sufficient justification for its assertion that Siderca's reported information was unreliable.

6. The USDOC failed to follow the requirements of Article 6.8 and Annex II of the Anti-Dumping Agreement

174. Article 6.8 of the Anti-Dumping Agreement provides that:

> In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may

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[139] *See* Panel Report, *Guatemala - Cement II*, paras. 8.207-223.

[140] USDOC Section 129 Determination at 9 (ARG-16).

[141] Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999, paras. 6.74 – 6.82.

> be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

175. The provisions of Annex II, which must be observed in the application of Article 6.8, include the following:

> All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, [and] which is supplied in a timely fashion … should be taken into account when determinations are made….
>
> ….
>
> [Paragraph 3]
>
> Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.
>
> ….
>
> [Paragraph 5]
>
> If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefore, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.
>
> ….
>
> [Paragraph 6]
>
> If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.
>
> [Paragraph 7]

176. In *Mexico – Rice*, the Appellate Body stressed that recourse to facts available is subject to strict compliance with the conditions set out in Article 6.8 and Annex II. It began by noting that:

> Article 6.8 provides that an investigating authority may base its determinations on the basis of facts available where, *inter alia*, a respondent "does not provide … necessary information within a reasonable period", subject to the conditions set out in Annex II, entitled "Best Information Available in Terms of Paragraph 8 of Article 6". Among these conditions is the obligation in paragraph 1 of Annex II to inform the relevant respondent that, if it fails to provide the necessary information, the agency will resort to use of facts available. Paragraph 3 obliges an investigating authority to "take[] into account" the information supplied by a respondent, even if *other* information requested has not been provided by the respondent and will need to be supplemented by facts available. Similarly, paragraph 5 prevents an investigating authority from rejecting the information supplied by a respondent, even if incomplete, where the respondent "acted to the best of its ability". Finally, paragraph 7 mandates, where an investigating authority relies on data from a secondary source to fill in gaps resulting from a respondent's failure to provide requested information, that the investigating authority examine such data "with special circumspection."[142]

177. The Appellate Body then stressed that:

> From these obligations, we understand that an investigating authority in an anti-dumping investigation may rely on the facts available to calculate margins for a respondent that failed to provide some or all of the necessary information requested by the agency. In so doing, however, the agency must first have made the respondent aware that it may be subject to a margin calculated on the basis of the facts available because of the respondent's failure to provide necessary information. Furthermore, assuming a respondent acted to the best of its ability, an agency must generally use, in the first instance, the information the respondent did provide, if any.
>
> With respect to the facts that an agency may use when faced with missing information, the agency's discretion is not unlimited. First, the facts to be employed are expected to be the "best information available". In this respect, we agree with the Panel's explanation:
>
> > The use of the term "*best* information" means that information has to be not simply correct or useful *per se*, but the most fitting or "most appropriate" information available in the case at hand. Determining that something is "best" inevitably requires, in our view, an evaluative, comparative assessment as the term "best" can only be properly applied where an unambiguously superlative status obtains. It means that, for the conditions of Article 6.8 of the AD Agreement and Annex II to be complied with, there can be no better information available to be used in the particular circumstances. Clearly, an investigating authority can only be in a position to make that judgement correctly if it has made an inherently comparative evaluation of the "evidence available".
> >
> > Secondly, when culling necessary information from secondary sources, the agency should ascertain for itself the reliability and accuracy of such information by checking it, where practicable, against information contained in other independent sources at its disposal, including material submitted by

[142] Appellate Body Report, *Mexico - Rice*, para. 287 (original emphasis).

> interested parties. Such an active approach is compelled by the obligation to treat data obtained from secondary sources "with special circumspection".[143]

178. As noted below, the Section 129 Determination fell far short of these rigorous standards.

179. In its Section 129 Determination, the USDOC disregarded information submitted by Siderca, and used instead "facts available" (although the Section 129 Determination did not use this term).

180. According to the USDOC, Acindar's submission "failed to include any data adequate to calculate costs for the subject merchandise".[144] Therefore, the Department resorted to what it called "usable price data" and compared "Acindar's US selling prices during the original sunset review period with prevailing market prices in the United States during that same period".[145] Based on this comparison, USDOC found that "Acindar likely was dumping subject OCTG during the original sunset review period".[146]

181. This treatment of Acindar is not consistent with the disciplines of Article 6.8 and Annex II of the Agreement. Acindar explained that it did not have the requested information for two reasons. First, it did not have any legal obligation as an Argentine company to retain product-specific cost information for such a long period of time. Second, because it was never a significant producer of OCTG and it was not currently (at the time of USDOC's request) an OCTG producer, it had not retained the product-specific cost information and did not have a basis to reconstruct it. In Argentina's view, these are reasonable explanations in light of the nature of the information requested by USDOC, which, by any objective measure, pushed the limits of reasonableness. Rather than follow up with the company by trying to develop other information, the USDOC resorted to a comparison of questionable legitimacy, and drew conclusions in final form without the benefit of any further comment.

182. With respect to Siderca, the USDOC stated that this company "attempted to cooperate with the Department's request for information".[147] However, the Department claimed to have "significant problems with [Siderca's] allocation of costs, with respect to both OCTG production and all tubular production" as well as "methodological discrepancies with the estimates submitted by Siderca".[148] Therefore, the USDOC stated that:

> [F]or both Siderca and Acindar, we have financial statements from the original sunset review period that provide information on the financial statuses of these companies. This information establishes that the global OCTG market was depressed during a significant portion of the original sunset review period which suggests that prices would continue to be low after the sunset period.
>
> ….
>
> Given the weakened condition of Acindar during the original sunset review period, including substantial losses during fiscal 1999 and 2000, we find it likely that Acindar's US sales of OCTG during the original sunset review period were at dumped prices…. [W]e find (contrary to the implications of Siderca's argument) that Acindar was likely to continue selling in the United States at dumped prices if the order were revoked.

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[143] Appellate Body Report, *Mexico - Rice*, paras. 288-289 (footnote omitted).
[144] USDOC Section 129 Determination at 6 (ARG-16).
[145] *Id*. at 7.
[146] *Id*. at 7.
[147] USDOC Section 129 Determination at 8 (ARG-16).
[148] *Id*. at 8-9.

> We find additional support for this conclusion from a statement in Acindar's 2000 financial statement regarding its marketing strategy. Acindar states, "Acindar's strategy has been and will continue to be to focus on the Argentine market *while using the export market to stabilize its* overall sales volume during periods of slowdown in domestic economic activity".[149] [emphasis added by USDOC]

183. Yet the USDOC did not comply with the conditions set out in Article 6.8 and Annex II for recourse to "facts available". Neither Acindar nor Siderca refused access to necessary information. Moreover, neither company "significantly impeded the investigation," and the USDOC has not claimed otherwise. Both companies explained why they could not provide information requested, and there was no indication from USDOC that it did not accept those explanations. Siderca's and Acindar's explanations are objectively reasonable. In fact, they are consistent with the guidelines national authorities should consider when developing information. As the Committee on Antidumping Practices has stated:

> In establishing the specific periods of data collection in a particular investigation, investigating authorities may, if possible, consider practices of firms from which data will be sought concerning financial reporting and the effect that this may have on the availability of accounting data . . . .[150]

184. Similarly, the USDOC failed to comply with the obligations of Annex II:

- The information provided by Siderca was verifiable, and was appropriately submitted. It could readily have been used by the USDOC in the Section 129 proceeding without "undue difficulties." The Department was therefore required under paragraph 3 of Annex II to take such information into account in its Section 129 determination, but it failed to do so.
- Even if, *arguendo*, the information provided by Siderca was not "ideal in all respects", paragraph 5 of Annex II makes clear that this did not justify disregarding it, provided the interested parties acted to the best of their ability. The USDOC has not claimed that either company failed to act to the best of its ability. Indeed, as noted above, the Department expressly recognized that Siderca "attempted to cooperate with the Department's request for information".[151]
- Some of the information sought by USDOC was 5-10 years old. The USDOC never suggested that it was in any way unreasonable for Siderca not to have all of this data.
- Although some of the information submitted by Siderca was not accepted by the USDOC, neither Siderca nor Acindar was "informed forthwith of the reasons therefore" or given "an opportunity to provide further explanations within a reasonable period…". Instead, the first time that these interested parties ascertained that the USDOC was dissatisfied with the information they provided was in the Section 129 Determination itself, when it was too late to "provide further explanations". The Department therefore breached its obligations under paragraph 6 of Annex II.

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[149] USDOC Section 129 Determination at 9-10 (ARG-16).

[150] Committee on Anti-dumping Practices, "Recommendation Concerning the Periods of Data Collection for Antidumping Investigations," adopted 5 May 2000, G/ADP/6.

[151] USDOC Section 129 Determination at 8 (ARG-16).

- There is no indication whatsoever that the USDOC acted with "special circumspection" within the meaning of paragraph 7. There is nothing in the Section 129 Determination demonstrating that the USDOC "check[ed] the information from other independent sources at [its] disposal." DOC never even asked Acindar to explain the general reference in its 2000 financial statement. Instead, it assumed that it must be consistent with the notion that Acindar was likely to dump OCTG in the US in the event of expiry of the measure.

185. Finally, the USDOC ignored the requirement to use the "best" information available. The recourse to financial statements – and ambiguous assertions taken out of context in those financial statements – can in no way be considered as the "most fitting" or "most appropriate" information available to the Department.

186. The USDOC therefore breached its obligations under Article 6.8 and Annex II.

7. The USDOC failed to inform interested parties of the essential facts under consideration which formed the basis for the Section 129 determination, in violation of US obligations under Article 6.9 of the Anti-Dumping Agreement

187. Article 6.9 of the Anti-Dumping Agreement provides that:

> The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

188. The importance of this provision was emphasized by the Panel in *Argentina – Ceramic Tiles*:

> Article 6.9 anticipates that a final determination will be made and that the authorities have identified and are considering the essential facts on which that decision is to be made. Under Article 6.9, these facts must be disclosed so that parties can defend their interests, for example by commenting on the completeness of the essential facts under consideration.[152]

189. The Panel in *Korea – Paper AD Duties* stressed that this disclosure had to be made before the investigating authority had made its determination:

> [T]he obligation under Article 6.9 is one that requires the IA to make a one-time disclosure and that is before a final determination is made as to whether or not a definitive measure will be applied.[153]

190. The USDOC did not inform the interested parties of the essential facts under consideration that formed the basis for its decision. The Section 129 Determination refers to additional USDOC memoranda to file, several of which are dated December 16, 2005, the same date as the Determination itself.[154] Two of the memoranda are public versions of proprietary documents, in which it is indicated

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[152] Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001, para. 6.125.

[153] Panel Report, *Korea - Paper AD Duties*, WT/DS312/R, adopted 28 November 2005, para. 7.204.

[154] *See* USDOC Memoranda to the File from Mark Flessner, Case Analyst, Re: In the Matter of the Section 129 Determination on the Antidumping Duty Determination With Respect to OCTG from Argentina (16 Dec. 2005): (1) Inconsistencies in data reported by Siderca, S.A.I.C. (ARG-21); (2) Information from Preston Publishing Company (ARG-22); (3) Inconsistencies in data reported by Acindar (ARG-23); (4)

that the vast majority of the content is "not susceptible to bracketing." Such documents were not disclosed to the interested parties during the Section 129 proceeding.

191. Even if the public versions of these documents could be considered as sufficient to inform the interested parties of the essential facts under consideration, *quod non*, the disclosure of the public versions were not made "in sufficient time for the parties to defend their interests". As noted above, five of these memoranda are dated December 16, 2005, the same date as the Section 129 Determination, even though they obviously must have been prepared in advance of that date. As these documents were disclosed contemporaneously with the Section 129 Determination itself, they were not provided to the interested parties before a final determination was made in the Section 129 proceeding.

192. Also, the USDOC did not issue any draft or preliminary determination, as it routinely does in other Section 129 ***cases and as it said it would do in the arbitration pursuant to Article 21.3 of the DSU***. To apply the test set out in *Korea – Paper AD Duties*, such a preliminary determination would have enabled the United States to "make a one-time disclosure … before a final determination is made…". Instead, the United States made no disclosure before the Section 129 final determination was made. Moreover, the Department provided no indication of what – if any – analysis it performed on Siderca's information.

193. The United States thus violated its obligations under Article 6.9 to inform all interested parties of the essential facts under consideration.

E. THE FAILURE OF THE UNITED STATES TO IMPLEMENT USDOC'S SECTION 129 DETERMINATION PRECLUDED THE OPPORTUNITY FOR THE ARGENTINE RESPONDENTS TO SEEK JUDICIAL REVIEW IN US COURTS, IN VIOLATION OF US OBLIGATIONS UNDER ARTICLE 13 OF THE ANTI-DUMPING AGREEMENT.

194. Article 13 of the Anti-Dumping Agreement provides that:

> Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals shall be independent of the authorities responsible for the determination or review in question.

195. The failure of the United States to implement USDOC's Section 129 Determination precluded the opportunity for the Argentine respondents to seek judicial review in US courts, in violation of US obligations under Article 13 of the Anti-Dumping Agreement.

196. Section 129(b) of the Uruguay Round Agreements Act ("URAA") is the provision of US law that governs US implementation of adverse WTO rulings in cases in which a determination by the USDOC has been found to be WTO-inconsistent.[155] URAA Section 129(b) requires the USDOC, pursuant to a written request from the US Trade Representative ("USTR"), to issue a determination that would render USDOC's earlier action "not inconsistent" with the findings of the WTO Panel or the Appellate Body. Section 129(b)(1) provides that USTR "shall" consult with the USDOC and

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Securities and Exchange Commission Filings of Domestic OCTG Producers (ARG-24); USDOC Memorandum to the File from Fred Baker, Case Analyst, through Mike Heaney, Team Leader, and Robert James, Program Manager, In the Matter of the Section 129 Determination on the Antidumping Duty Determination With Respect to OCTG from Argentina, Information for the Record (16 Dec. 2005) (ARG-25).

[155] *See* 19 U.S.C.. § 3538(b) (ARG-30).

certain Congressional committees "[p]romptly after a report by a dispute settlement panel or the Appellate Body is issued that contains findings that an action by the administering authority in a proceeding under Title VII of the Tariff Act of 1930 is not in conformity with the obligations of the United States under the Anti-Dumping Agreement…".[156]

197. The US Statement of Administrative Action ("SAA") explains that the requirement to promptly consult "is intended to ensure that the Trade Representative benefits from Commerce's administrative and substantive expertise in the evaluation of a panel's findings and the development of implementing action, if any".[157] The SAA continues:

> The Administration expects that Commerce would provide the Trade Representative advice on: (1) whether implementation of the findings is permissible under the antidumping or countervailing duty law; (2) the implications for the administration of the antidumping and countervailing duty laws of implementing the findings; and (3) the most desirable method of implementing the findings and the time required to do so.[158]

198. Thus, the process of "implementing" a Section 129 determination under US law involves two steps. First, USTR must direct USDOC to make a new determination. Once directed, USDOC must issue a new determination. Second, USTR "may" (but is not required to) direct USDOC to implement that determination:

> The Trade Representative may, after consulting with the administering authority and the congressional committees under paragraph (3), direct the administering authority to implement, in whole or in part, the determination made under paragraph (2).[159]

The provisions of Section 129(b) thus vest USTR with discretion as to whether the USDOC's Section 129 determinations will be "implemented" within the meaning of US law. The URAA then provides that the USDOC or USTR "shall publish in the Federal Register notice of the implementation of any determination made under" Section 129.[160] The statute requires that "prior to issuing a determination under this section, the Department or the Commission, as the case may be, shall provide interested parties with an opportunity to submit written comments and, in appropriate cases, may hold a hearing, with respect to the determination".[161]

199. In turn, under the applicable provisions of the Tariff Act of 1930, as amended, governing judicial review of antidumping and countervailing duty determinations, an interested party may challenge a determination issued by the USDOC in accordance with section 129(b) of the URAA only if that determination has been "implemented" as opposed to merely issued.[162] The SAA confirms that Section 129(b) determinations that have not been implemented are not subject to judicial review, "because such determinations will not have any effect under domestic law".[163]

200. The United States did not implement USDOC's Section 129 Determination. By failing to implement the Section 129 Determination, the United States violated its obligations under Article 13

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[156] 19 U.S.C. § 3538(b)(1) (ARG-30).

[157] US Statement of Administrative Action, accompanying the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994), reprinted in H.R. Doc. No. 103-316, Vol. 1 at 1025 ("SAA") (ARG-31).

[158] SAA at 1025 (ARG-31).

[159] 19 U.S.C. § 3538(b)(4) (ARG-30).

[160] 19 U.S.C. § 3538(c)(2)(ARG-30).

[161] 19 U.S.C. § 3538(d) (ARG-30).

[162] *See* 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and § 1516a(a)(2)(B)(vii) (ARG-32).

[163] SAA at 1026 (ARG-31).

of the Agreement, because it precluded the opportunity for the Argentine respondents to seek judicial review in the US courts.

V. THE UNITED STATES HAS FAILED TO IMPLEMENT THE DSB RECOMMENDATIONS AND RULINGS WITH RESPECT TO THE "AS SUCH" VIOLATIONS

A. SECTIONS 751(C)(4)(A) &(B) OF THE TARIFF ACT ARE WTO-INCONSISTENT

1. DSB Rulings on Section 751(c)(4)(B)

201. Section 751(c)(4)(B) of the Tariff Act provides as follows:

> (B) Effect of waiver
>
> In a review in which an interested party waives its participation pursuant to this paragraph, the administering authority shall conclude that revocation of the order or termination of the investigation would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) with respect to that interested party.[164]

202. The Appellate Body found that Section 751(c)(4)(B) and its implementing regulation were inconsistent, as such, with US obligations under Article 11.3 of the Anti-Dumping Agreement:

> Because the waiver provisions require the USDOC to arrive at affirmative company-specific determinations without regard to any evidence on record, these determinations are merely *assumptions* made by the agency, rather than findings supported by evidence…. [E]ven assuming that the USDOC takes into account the totality of record evidence in making its order-wide determination, it is clear that, as a result of the operation of the waiver provisions, certain *order-wide* likelihood determinations made by the USDOC will be based, at least in part, on statutorily-mandated *assumptions* about a company's likelihood of dumping. In our view, this result is inconsistent with the obligation of an investigating authority under Article 11.3 to "arrive at a reasoned conclusion" on the basis of "positive evidence".
>
> Therefore, we *uphold* the Panel's findings...that Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(iii) of the USDOC Regulations are inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*.[165]

2. Section 751(c)(4)(B) of the Tariff Act has not been repealed or amended

203. It is uncontested that Section 751(c)(4)(B) of the Tariff Act has neither been repealed nor amended. Therefore, this measure remains extant, and remains WTO-inconsistent. Furthermore, the amendments to the USDOC Regulations could not eliminate, and have not eliminated, the WTO-inconsistency of this statutory provision operating in conjunction with the revised regulation and Section 751(c)(4)(A) of the Tariff Act. The United States has therefore failed to bring Section 751(c)(4)(B) into conformity with the recommendations and rulings of the DSB and with US obligations under Articles 11.1 and 11.3 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement.

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[164] 19 U.S.C. § 1675(c)(4)(B) (ARG-33).

[165] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 234-235.

204. Moreover, Section 751(c)(4)(B) is a statutory provision enacted by the US Congress. It can only be repealed or amended through an *actus contrarius* of the same authority, the US Congress. It cannot be rendered "inoperative" through regulatory means.[166]

B. SECTION 351.218 OF THE REGULATIONS, AS AMENDED, IS WTO-INCONSISTENT

205. Section 351.218 of the Regulations, as amended, requires respondent interested parties that waive their right to participate in a USDOC sunset review to make an affirmative statement that it is likely to dump if the order is revoked. The amended Regulations provide in part as follows:

> 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 before the Department; a statement that the respondent interested party is likely to dump or benefit from a countervailable subsidy (as the case may be) if the order is revoked or the investigation is terminated; in the case of a foreign government in a CVD sunset review, a statement that the government is likely to provide a countervailable subsidy if the order is revoked or the investigation is terminated; and the following information….[167]

206. Article 11.3 of the Anti-Dumping Agreement permits a WTO Member to continue an anti-dumping duty beyond five years only when certain strict requirements have been satisfied. The administering authority is required to conduct a "review" and to make a "determination" that both dumping and injury would be likely/probable in the event of termination of the duty. The review and determination required to extend the anti-dumping duties beyond five years must be forward-looking, based on positive evidence, and must be the result of a rigorous examination of the evidence adduced by the authorities.[168] Compliance with the strict requirements of Article 11.3, as those obligations have been clarified by the Appellate Body, necessitates that a WTO Member adhere to certain minimum disciplines in making a sunset determination. In the absence of compliance, the duty must be terminated.

207. When a party affirmatively waives its participation, the regulation prevents the USDOC from developing the requisite factual information. The inability of USDOC to gather the necessary information is inconsistent with the obligation of the United States to conduct a sunset "review" and the need to make the requisite "determination" under Article 11.3. The revised regulation is inconsistent with the obligation of the USDOC under Article 11.3 to "arrive at a reasoned conclusion" on the basis of "positive evidence".

208. As noted above, the Appellate Body has stressed that an investigating authority assumes both investigatory and adjudicatory functions under Article 11.3. The provision "assigns an active rather than a passive decision-making role to the authorities" that they must discharge "with an appropriate degree of diligence."[169] By requiring an admission of dumping – which, as argued above, will rarely be forthcoming – the United States has abdicated its responsibilities under Article 11.3. Indeed, the

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[166]In *Lagardère SCA – Canal + SA*, the European Court of First Instance stated that "in accordance with a general principle of law…a body which has power to adopt a particular legal measure also has power to abrogate or amend it by adopting an *actus contrarius*, unless such power is expressly conferred upon another body…." Judgment of the Court of First Instance, Lagardère SCA – Canal + SA, Case T-251/00, 20 November 2002, paras. 128, 130. Obviously, the power of the US Congress to abrogate or amend the Tariff Act has not been conferred on any another body, including the USDOC.

[167] *Procedures for Conducting Five-Year ("Sunset") Reviews for Anti-Dumping and Countervailing Duty Orders: Final Rule*, 70 Fed. Reg. 62,061, 62,064 (28 Oct. 2005) (ARG-12).

[168] Appellate Body Report, *US – Corrosion-Resistant Carbon Steel Sunset Review*, paras. 105, 111-115.

[169] Appellate Body Report, *US - Corrosion-Resistant Steel Sunset Review*, para. 111.

Regulation, as amended, assigns a "passive rather than active" decision-making role to the USDOC, despite the Appellate Body's clear admonitions to the contrary.

209. Section 351.218 of the Regulations, as amended, therefore remains inconsistent with US obligations under Article 11.3.

VI. ARGENTINA REQUESTS THAT THE PANEL SUGGEST THAT THE UNITED STATES REVOKE THE ANTI-DUMPING DUTY ORDER ON OCTG FROM ARGENTINA

210. In this dispute, Argentina requested both the original Panel and the Appellate Body to exercise their discretion under DSU Article 19.1 and to suggest that the United States terminate the anti-dumping measure on OCTG from Argentina. The Panel declined this request, stating "[w]e note that Article 19.1 of the DSU states that WTO panels may suggest ways the Member concerned could implement their recommendations. In the circumstances of the present proceedings, however, we see no particular reason to make such a suggestion and therefore decline Argentina's request".[170] The Appellate Body similarly declined to make any such suggestion.

211. There is now, given the sequence of events, "a particular reason to make such a suggestion". By failing to revoke the anti-dumping duty order on OCTG from Argentina before the expiration of the reasonable period of time for implementation, the United States violated the requirements of Articles 11.3 and 11.4 of the Anti-Dumping Agreement, and thereby failed to implement the rulings and recommendations of the DSB. The US violation continues to nullify and impair the rights of Argentina under these same provisions.

212. The nature of a Member's obligation under Articles 11.3 and 11.4 necessarily limits the infringing WTO Member's options to bring itself into compliance. Argentina's rights under Article 11.3 have been undermined completely by US implementation in this case. Several provisions in the DSU emphasize that the WTO dispute settlement system should not diminish the rights of WTO Members. Allowing a Member repeated attempts to comply with its obligations under Article 11.3 obligations, long after the expiration of the five-year period and on the basis of an ever-changing factual record, would render the provision of Article 11.3 *inutile.* In this case, permitting this would deny Argentina its right under that provision to termination of the measure in the absence of US compliance with the requirements for continuation.

213. In this regard, Article 3.2 of the DSU provides that:

> The dispute settlement system of the WTO is the central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations 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. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

214. Article 3.2 of the DSU reaffirms that the role of the WTO dispute settlement system is to "clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". 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.[171] Thus, the treaty

[170] Panel Report, para. 8.5 (footnote omitted).
[171] Vienna Convention on the Law of Treaties, Art. 31, adopted 22 May 1999, 1555 U.N.T.S. 331.

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".[172]

215. As set out above, the Appellate Body has contributed importantly to clarifying the meaning of the rights and obligations comprised in Article 11.3. Argentina submits that it had a right to termination of this measure and that the United States could continue the measure only by making findings consistent with Article 11.3 of the Anti-Dumping Agreement. The United States failed to do so in 2000, and has again failed in 2005. Thus, the anti-dumping order on Argentine OCTG was not terminated in 2000, as required by Article 11.3, and a WTO-inconsistent determination continues to serve as the US justification for the imposition of anti-dumping duties in violation of US WTO obligations.

216. Article 3.7 of the DSU provides that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute… In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure withdrawal of the measures concerned if they are found to be inconsistent with the provisions of any of the covered agreements." This is particularly relevant when, as is the case here, the nature of the obligation itself requires that the measure "expire" – i.e., be withdrawn at the end of five years in the absence of strict compliance with the substantive requirements. Yet, the United States has not yet withdrawn the measure, despite an obligation to do so in 2000 in the absence of the requisite findings. Nor did the United States revoke the anti-dumping order before the expiration of reasonable period of time for implementation in this case (by 17 December 2005). At a minimum, the United States should have brought itself into conformity with its WTO obligations at this time.

217. As the foregoing demonstrates, the 2005 likelihood determination was the result of USDOC undertaking in 2005 to develop a new factual basis to support its WTO-inconsistent 2000 likelihood determination – conduct that is patently inconsistent with the requirements of Article 11.3 and 11.4 of the Anti-Dumping Agreement. Moreover, even if USDOC could have developed a new factual basis, the Section 129 Determination did not bring the United States into conformity with the rulings of the DSB and it in no way satisfies US obligations under Article 11.3 of the Anti-Dumping Agreement.

218. Article 19.2 of the DSU adds that "[i]n accordance with paragraph 2 of Article 3, in their findings and recommendations, the Panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements." Yet, any rulings by this Panel in this compliance proceeding that would give the United States, now in 2006, the opportunity to conduct yet another Section 129 proceeding in order to comply with the obligations that first attached in 2000, and which the United States once again failed to discharge in 2005, would violate both aspects of DSU Article 19.2.

219. First, any such ruling would serve only to further erode Argentina's already impaired rights under Article 11.3 to termination of the measure after five years in the absence of compliance with the requirements of Articles 11.3 and 11.4. Second, giving the United States yet another opportunity to make a WTO-consistent determination would constitute an addition to the *limited US right* under Article 11.3 *to invoke the provision's exception to the principal obligation to terminate the measure* (and thereby continue anti-dumping duties on OCTG from Argentina) *only if it had first complied with the substantive obligations of Articles 11.3 and 11.4 of the Anti-Dumping Agreement*. The United States cannot now have a <u>third</u> opportunity in 2006 to satisfy the obligations of Article 11.3 that attached in 2000.

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[172] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, at 23.

220. Argentina finds additional support for a suggestion pursuant to DSU Article 19.1 in this case for the following reasons.

221. First, the temporal limitations contained in Articles 11.3 and 11.4 are meaningless if a Member can expect limitless opportunities to satisfy the obligations. This is the context for Argentina in this case. For Argentina, in very real terms, there is no meaningful sunset provision applicable to the US antidumping duty order on Argentine OCTG. The Appellate Body recently recognized the harm to the dispute settlement system that could result from allowing an implementing Member to abuse its implementation rights under the DSU, at the expense of the rights of the complaining Member. The Appellate Body in the second recourse to DSU Article 21.5 in the *FSC* case admonished that Panel rulings in compliance proceedings should not "lead to a potentially 'never-ending cycle' of dispute settlement proceedings and inordinate delays in the implementation…".[173]

222. Here, Argentina has already had its Article 11.3 right **denied twice – in 2001** (following the failure of the United States to terminate the order in the absence of compliance with Article 11.3 requirements) **and in 2005** (at the conclusion of the RPT, where again the United States failed to comply with Article 11.3 and did not bring itself into compliance with the rulings of the DSB). In the absence of a suggestion that the United States revoke the anti-dumping order, Argentina stands on the brink of yet another Section 129 proceeding and a "never-ending cycle" of non-compliance.

223. Second, a suggestion is all the more compelling given the facts of this case, **where the *second* sunset review of the order on OCTG from Argentina is fast approaching, *i.e.*, June 2006**. Thus, Argentina faces the potential absurdity – yet very real prospect – **of facing the second sunset review of the Argentine anti-dumping duty order in this case in June 2006, when the DSB has already ruled that the initial sunset review from August 2000 was inconsistent with US obligations under Article 11.3.**

224. Finally, Argentina recalls Article 21.7 of the DSU, which also recognizes that "[i]f the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate in the circumstances". In this case, such further action would be the recommendation that the United States terminate the anti-dumping duty order on OCTG from Argentina. Consequently, the Panel should make this recommendation so as to prevent the "never-ending cycle" of US violation and subsequent Section 129 proceedings. In such an endless loop, there will never be US implementation of the DSB rulings and recommendations in this case.

VII. CONCLUSION

225. For the foregoing reasons, Argentina respectfully requests the Panel to find that the United States has failed to implement the recommendations and rulings of the DSB, and remains in violation of its WTO obligations. In particular, Argentina requests that the Panel make the following findings:

Section 129 Determination

1. USDOC's Section 129 likelihood of dumping determination is inconsistent with Article 11.3 because:

[173] Appellate Body Report, *United States – Tax Treatment For "Foreign Sales Corporations" Second Recourse To Article 21.5 Of The DSU By The European Communities*, WT/DS108/AB/RW2, adopted 14 March 2006, para. 86.

a. USDOC based its 2005 likelihood determination on factual evidence that USDOC developed in 2005, and which was not developed during the original sunset review in 2000, and therefore, the United States violated the requirements of Articles 11.3 and 11.4 of the Anti-Dumping Agreement.

b. As for the USDOC's statement that it also relied on its position from the original sunset review that the post-order volume decline created a basis for inferring that dumping would be likely to continue or recur, this was an insufficient basis to support the 2000 likelihood determination and also cannot support the 2005 likelihood determination in violation of Article 11.3.

2. Alternatively, assuming that USDOC could, consistently with US WTO obligations, conduct a proceeding in 2005 to justify USDOC's 2001 continuation of the antidumping duty order on Argentine OCTG, then USDOC's Section 129 likelihood of dumping determination is inconsistent with Article 11.3 because:

a. The USDOC did not properly establish a sufficient factual basis, did not objectively assess the facts, and did not reach a reasoned conclusion supported by positive evidence that expiry of the order would be likely to lead to continuation or recurrence of dumping.

i. The USDOC determination with respect to the Argentine exporters is inconsistent with Article 11.3 of the Anti-Dumping Agreement.

ii. As for the USDOC's statement that it also relied on its position from the original sunset review that the post-order volume decline created a basis for inferring that dumping would be likely to continue or recur, this was an insufficient basis to support the 2000 likelihood determination and also cannot support the 2005 likelihood determination in violation of Article 11.3 of the Anti-Dumping Agreement.

b. The USDOC's conduct of the Section 129 proceeding was also inconsistent with Articles 6.1, 6.2, 6.4, 6.5.1, 6.6, 6.8, 6.9, and Annex II of the Anti-Dumping Agreement:

i. The USDOC's failure to provide the parties notice regarding the procedures it would follow to make its determination and to notify the parties of the essential facts under consideration that formed the basis for the Section 129 Determination, including, when necessary, by providing reasonable summaries of confidential information, was inconsistent with US obligations under Articles 6.1, 6.4, 6.5, 6.5.1, and 6.9 of the Anti-Dumping Agreement.

ii. The USDOC's failure to hold a hearing in the Section 129 proceeding and to provide to interested parties a full opportunity for the defence of their interests was inconsistent with US obligations under Article 6.2 of the Anti-Dumping Agreement.

iii. The USDOC's failure to require interested parties to submit non-confidential summaries of their written submissions in the Section 129 proceeding in such a manner as to permit a reasonable understanding of the substance of the confidential information

submitted violated US obligations under Articles 6.1, 6.2, 6.5, 6.5.1 of the Anti-Dumping Agreement.

iv. The USDOC's characterization of Siderca's submitted cost information as unreliable without a reasonable basis for doing so and without following the requirements of the Anti-Dumping Agreement was in violation of US obligations under Articles 6.1, 6.2, 6.4, 6.6, 6.8 and Annex II of the Anti-Dumping Agreement.

3. The failure of the United States to "implement" the Section 129 Determination, pursuant to Section 129(b)(4) of the *Uruguay Round Agreements Act*, was inconsistent with US obligations under Article 13 of the Anti-Dumping Agreement.

Failure of the United States to Repeal or Amend the Tariff Act

4. The failure of the United States either to repeal Section 751(c)(4)(B) of the Tariff Act of 1930, or to amend this provision to remove the WTO-inconsistency, failed to implement the recommendations and rulings of the DSB and was inconsistent with US obligations under Article 11.3 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement.

US Amendment of Section 351.218(d)(2) of USDOC Regulations

5. The amendment by the United States of Section 351.218(d)(2) of the USDOC Regulations failed to implement the recommendations and rulings of the DSB and was inconsistent with US obligations under Articles 6.1, 6.2, 6.6, 11.1, and 11.3 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement.

226. In accordance with DSU Article 19.1, Argentina further requests that the Panel suggest that the United States bring its measures into conformity with its WTO obligations, including through immediate revocation of the order on OCTG from Argentina.

ANNEX A-2

FIRST WRITTEN SUBMISSION OF THE UNITED STATES

19 April 2006

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I. INTRODUCTION

1. Argentina asks the Panel to conclude that Commerce was wrong in determining that dumping was likely to continue or recur if the order on OCTG from Argentina were revoked. Argentina does so, even though Commerce was ultimately proven right: One of the Argentine exporters was found to be dumping after the continuation of the order.

2. The majority of Argentina's grievances are grounded in the flawed assumption that the exporter of a product subject to a sunset review bears no responsibility for supplying an administering authority with sufficient, or accurate, information to make a determination. Indeed, Argentina's position goes even further – an exporter may refrain from participating in a review, deprive the administering authority of information, complain to the WTO about the lack of information, and then complain again about having to supply that information, even as the administering authority undertakes to come into compliance. Neither Argentine respondent provided any actual cost information, and when Siderca provided estimates, coupled with the fact that it was no longer exporting to the United States, Commerce simply declined to make any specific finding as to whether Siderca dumped over the life of the order. Still, Argentina complains.

3. Argentina's grievances extend to the manner in which the US implemented the recommendations and rulings of the Dispute Settlement Body ("DSB") pertaining to the so-called "waiver provisions." Argentina's argument rests on a misguided understanding of the text of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement"), as well as of the recommendations and rulings in this dispute. The United States is not obligated to provide respondents with an option to waive participation in the likelihood of dumping aspect of the sunset review. The Panel made clear that where the United States does so, the waiver must not "taint" the overall determination by requiring an assumption that the waiving respondent is likely to dump *absent evidence that it is, in fact, likely to dump.*

4. Argentina's argument boils down to this: the respondent's own admission that it is likely to dump is somehow not "positive evidence" of what the respondent is likely to do. This is odd indeed, because Argentina's position in the underlying dispute was that the deemed waiver provisions required Commerce to make determinations about likely behaviour without the respondent's participation.[1] Now Argentina is criticizing Commerce for doing just the opposite – relying on the respondent's own admissions made in the course of participating in the proceeding. Still more confusing, Argentina complains that the United States violated Articles 6.6 and 6.8 by *not* relying on the respondent's statement as to costs (which the respondent itself described as "estimated"); yet Commerce is to be faulted for *relying* on a respondent's statement as to its own future behaviour. Argentina's analysis is simply results-driven.

5. With respect to the waiver statute, Argentina insists that the statute had to be amended, as opposed to the regulations alone. First, the Panel, and subsequently the Appellate Body, made it clear that the statute and the regulations operated *together*, and as they operated together, they were inconsistent with Article 11.3 – hence the term "waiver provisions". There is nothing in either report to suggest that correcting the regulations would be insufficient to remedy concerns about the statute. Second, it is well established that the Member charged with implementing a recommendation and ruling is in the best position to decide how to bring its measure into compliance. Here, the United States amended its regulations in such a way that no amendment to the statute was necessary, and in doing so implemented the recommendations and rulings as expeditiously as possible.

6. In that vein, Argentina's arguments to the arbitrator during the Article 21.3(c) proceedings are difficult to reconcile with the arguments it makes here. Before the arbitrator, Argentina argued that

[1] *See, e.g.*, Argentina First Submission in the original proceeding, para. 120.

the United States could come into compliance in a mere seven months. Given that Argentina is insisting that a statutory change was necessary, that time frame was particularly abbreviated; indeed, it took Argentina more than 15 months simply to come into compliance with DSB recommendations and rulings regarding a single investigation, with *no* statutory or regulatory amendments.[2] Moreover, in spite of requesting such a brief period of time, Argentina now contends that the United States violated a host of procedural obligations under Article 6. Argentina's argument is ironic, given that the United States insisted that 15 months would be necessary in order to come into compliance while observing the procedural obligations found in Article 6, as well as to provide additional procedural steps, including a preliminary determination, that Argentina now wishes its companies had enjoyed. Argentina is trying to have it both ways – first demanding an unreasonable period of time for implementation, and then asserting WTO-inconsistencies relating to a host of procedural steps that would have required even more time. Despite the abbreviated reasonable period of time, the United States has not acted inconsistently with the obligations of Article 6.

II. PROCEDURAL HISTORY

7. The DSB adopted the Panel and Appellate Body reports 17 December 2004. On 14 January 2005, the United States notified the DSB of its intention to implement those recommendations and rulings. The United States requested 15 months to bring its measure into compliance with the DSB recommendations and rulings, while Argentina insisted on only seven months.[3] On 7 June 2005 an arbitrator appointed pursuant to Article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") determined that a "reasonable period of time" for the United States to implement the recommendations and rulings of the DSB would be 12 months from the date on which the DSB adopted the Panel and Appellate Body Reports, or 17 December 2005.[4]

8. On 15 August 2005, Commerce published in the *Federal Register* a notice proposing to amend its sunset regulations and soliciting public comment on the proposed amendments.[5] The *Federal Register* notice stated that Commerce was "amending its regulations relating to sunset reviews to conform the existing regulation to the United States' obligations under Articles 6.1, 6.2, and 11.3" of the AD Agreement.[6]

9. On 28 October 2005, the United States published amendments to sections 351.218(d)(2)(iii) and 351.309(c) of Commerce's regulations. These amendments became effective 31 October 2005.[7] That same day, the US Trade Representative ("USTR") transmitted a request for Commerce to issue a determination with respect to the sunset review so as to render that determination not inconsistent with the findings of the DSB in this dispute.

10. On 2 November 2005, Commerce initiated a proceeding pursuant to section 129 of the Uruguay Round Agreements Act to address the Panel findings regarding the likelihood determination in the sunset review of OCTG from Argentina. Commerce requested information from the Government of Argentina, Acindar, Siderca, and Tubhier. No public hearing was requested.

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[2] WT/DS189/8

[3] *See Submission of the United States pursuant to DSU Article 21.3.*

[4] *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina: Award of the Arbitrator*, WT/DS268/12, para. 53 (7 June 2005).

[5] *Procedures for Conducting Five-Year Reviews of Anti-Dumping and Countervailing Duty Orders: Proposed rule*, 70 Fed. Reg. 47738 (15 August 2005) (Exhibit US-1).

[6] *Id.*

[7] *Procedures for Conducting Five-Year ("Sunset") Reviews of Anti-Dumping and Countervailing Duty Orders: Final Rule* (Exhibit ARG-12)

11. On 16 December 2005, Commerce issued its Section 129 Determination.[8] After analysis of all the factual information on the record and arguments made by the interested parties, Commerce found that "there is a likelihood of continuation or recurrence of dumping had the anti-dumping duty order on OCTG from Argentina been revoked in 2000, i.e. at the end of the original sunset period".[9] On 16 March 2006, USTR directed Commerce to implement the Section 129 Determination, and on 18 April 2006, Commerce implemented that determination.[10]

III. THE WAIVER PROVISIONS

12. The Panel considered the affirmative waiver provisions to be inconsistent with Article 11.3 because the "investigating authority can not simply assume, without further enquiry, that dumping is likely to continue or recur because the exporter chose not to participate in the review".[11] With respect to affirmative waivers, the Panel's analysis involved consideration of the statutory and regulatory provisions collectively, rather than individually.[12] The Panel ultimately concluded that "the provisions of US law relating to affirmative waivers" are inconsistent with Article 11.3.[13]

13. The Appellate Body agreed:

> [b]ecause the waiver provisions require the USDOC to arrive at affirmative company-specific determinations without regard to any evidence on record, these determinations are merely *assumptions* made by the agency, rather than findings supported by evidence . . . .[14]

Therefore, the waiver provisions, as they operated together, were found to be in violation of Article 11.3 because they required an assumption without regard to the underlying evidence, if any. As discussed below, Commerce amended the regulations such that a waiver occurs only with respect to a respondent that states that it is likely to dump in the future. Commerce therefore no longer makes its company-specific finding based on an "assumption" but rather on evidence. As a result, the United States has brought its measures into compliance with the DSB rulings and recommendations.

14. With respect to the statute, the Panel noted that it "simply provides that interested parties may choose not to participate in the USDOC part of a sunset review".[15] The requirements for what constitutes a waiver are only found in the regulations. (For example, the Panel recognized in the original proceeding that the regulations went so far as to create an entirely new category of waiver, the "deemed" waiver.)[16] Consistent with the DSB recommendations and rulings, Commerce amended the waiver provisions to delete the "deemed" waiver, and to require the following in the case of what the Panel has referred to as an affirmative waiver:

> **Every statement of waiver must include a statement indicating that the respondent interested party waives participation in the sunset review before the Department; a statement that the respondent interested party *is likely to dump***

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[8] *Decision Memorandum; Section 129 Determination: Final Results of Sunset Review, Oil Country Tubular Goods from Argentina* (16 December 2005) ("*Decision Memorandum*") (Exhibit ARG-16).

[9] *Decision Memorandum* at 11 (Exhibit ARG-16).

[10] *Notice of Implementation under Section 129 of the Uruguay Round Agreements Act; Anti-Dumping Measures Concerning Oil Country Tubular Goods from Argentina*, 71 Fed. Reg. 19873 (18 April 2006) (Exhibit US-2).

[11] Panel Report, para. 7.99.

[12] Panel Report, para. 7.85.

[13] Panel Report, para. 7.99.

[14] Appellate Body Report, para. 234 (emphasis in original).

[15] Panel Report, para. 7.85.

[16] Panel Report, para. 7.83.

> **or benefit from a countervailable subsidy (as the case may be) if the order is revoked or the investigation is terminated; . . .** [17]

15. Therefore, as noted above, because the waiver provisions are triggered only when a respondent provides a statement that it is likely to dump, these provisions also eliminate any "assumptions" about what an individual company waiving participation is likely to do if the order is revoked.

16. Argentina complains that the United States has failed to bring the statute into compliance because it has been neither repealed nor amended; Argentina further complains that the amendments to Commerce's regulations are insufficient.[18] However, Argentina ignores the fact that the Panel and the Appellate Body analyzed the waiver provisions – the statute and the regulations – *collectively*. Thus, the United States never had to amend both the statute and the regulations – rather, it needed to ensure that the collective impact of the two was consistent with the DSB recommendations and rulings. The statute and the regulations now no longer create the inconsistency in question. Therefore, Argentina has failed to substantiate its assertion that the United States was obliged to amend the statute in order to comply with the DSB recommendations and rulings.

17. Argentina also takes issue with the amendment to the regulations. Argentina asserts that when "a party affirmatively waives its participation, the regulation prevents the USDOC from developing the requisite factual information" and that it prevents USDOC from arriving a "reasoned conclusion" on the basis of "positive evidence".[19] Therefore, Argentina takes the counterintuitive position that the respondent's admission is not positive evidence. That argument is plainly inconsistent with the underlying reports. The United States recalls that the Panel expressly noted that in most cases it is the exporter who will be in possession of the "bulk of the information" as to whether that particular exporter is likely to dump. The Appellate Body echoed the Panel's views by noting the negative consequences likely to inure to an exporter who does not participate in a review.[20] Argentina's view is that an exporter may waive participation, provide an admission of likely dumping, and affirmatively decline to provide any other information – yet somehow the administering authority's company-specific affirmative finding is not "reasoned" or based on "positive evidence." In a theme that will be repeated in its discussion of the Section 129 Determination, Argentina's approach deprives the respondent of any responsibility for the record before the administering authority, even though, as the Appellate Body has noted, "the exporters or producers themselves . . . often possess the best evidence of their likely future pricing behaviour – a key element in the likelihood of future dumping."

18. In addition, Argentina's assertion that the amended regulation prevents Commerce from developing the requisite factual information is simply wrong. First, it should be noted that Argentina fails to specify *what* factual information is not being developed with respect to that company, and why that mystery factual information would be more probative than the company's own admission. It is worth noting that a sunset review is a prospective and counterfactual enquiry, and it is difficult to

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[17] *Id*. (emphasis added).

[18] Argentina First Submission, paras. 201-204. At n. 166, Argentina somewhat puzzlingly cites European Community law for the principle that a European statute cannot be rendered "inoperative" through regulatory means. The passage quoted however does not stand for the principle cited by Argentina – the passage quoted states that a body that has the authority to adopt a measure also has authority to repeal or amend it, absent some provision to the contrary. In any event, as the United States is not a member of the European Communities, European Community law has no relevance to the relationship between US statutes and regulations. Argentina's argument also overlooks the fact that to comply with the recommendations and rulings, the United States was not required to make the statute "inoperative," but rather to ensure that the company-specific finding was not based on mere "assumptions".

[19] Argentina First Submission, para. 207.

[20] Appellate Body Report, para. 234.

conceive of evidence that would establish that a company is not likely to dump in the future when the company has itself stated that it will.

19. Second, it is not the *regulation* that "prevents" Commerce from developing factual information; rather, the exporter is providing the statement as to its likely future behaviour *in lieu* of providing other information. Therefore, the absence of further factual information is attributable entirely to the respondent's exercise of choice, rather than to any "requirement" in the regulations.

20. Argentina further states that the regulations require an admission of dumping.[21] That is simply incorrect. No exporter is obliged to make any admission of dumping. However, an exporter who wishes to decline to participate in the Commerce portion of the sunset review may do so by filing a statement of waiver, which includes a statement that it is likely to dump if the order is revoked. Further, given Commerce's deletion of the deemed waiver provision, an exporter may also decline to participate without filing such a waiver, with the potential negative consequences that the Panel identified in its report: "non-cooperation clearly is not without consequences for the exporter. Under these circumstances, the USDOC may, consistent with the terms of Article 6.8 and Annex II of the Agreement, resort to the use of the facts available . . . ."[22]

21. By amending its sunset regulation, Commerce bases its company-specific findings for those waiving participation on "positive" evidence, eliminating reliance on "assumptions". In doing so, Commerce brought both the statute and the regulation into compliance with its WTO obligations. No repeal or amendment of the statute is required, nor are any further amendments of the regulations necessary.

IV. THE SECTION 129 DETERMINATION

22. Argentina asserts that in the original proceeding, the Panel concluded that there was "no basis for a WTO-consistent determination that dumping would be likely to continue or recur".[23] That is incorrect. What the Panel actually stated was that "the original determination of dumping by itself cannot represent a sufficient factual basis for concluding that dumping continued during the life of the measure, let alone representing an adequate factual basis to conclude that dumping is likely to continue or recur after the expiry of the order." [24] Therefore, the Panel did not conclude that there was *no* basis, but rather an inadequate basis.

23. Further, the Panel recognized that there were *two* factual bases for the determination.[25] The Panel did not make any findings with regard to the second basis – Commerce's conclusion that the decline of import volumes was probative of likelihood – as Argentina well knows, because during the interim review Argentina asked the Panel to make such a finding.[26] The Panel declined to do so.[27]

24. Finally, the Panel concluded that application of the "deemed waiver" provisions to Argentine exporters other than Siderca "invalidated' the Department's order-wide likelihood determination.[28] The Appellate Body agreed with the Panel regarding the waiver provisions.

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[21] Argentina First Submission, para. 208.
[22] Panel Report, para. 7.95.
[23] Argentina First Submission, para. 29.
[24] Panel Report, para. 7.219.
[25] Panel Report, para. 7.221.
[26] Panel Report, para. 6.9.
[27] Panel Report, para. 6.11.
[28] Panel Report, para. 7.222.

25. Once the revisions to the regulation to remove "deemed waivers" and to require an affirmative statement of likelihood of dumping for an affirmative waiver were effective, Commerce began its Section 129 proceeding. Commerce responded to the DSB recommendations and rulings by gathering additional information, conducting a thorough analysis, and providing detailed and reasoned explanations for its findings.[29] In addition to using the evidence gathered in the original sunset proceeding, Commerce sent questionnaires to all known Argentine exporters/producers of OCTG. Commerce also gathered statistical import data from US Customs and Border Protection ("CBP"), as well as from other independent sources. Commerce evaluated the accuracy and reliability of the evidence and based its decision on the most reliable information.

26. On the basis of its analysis of the record evidence, Commerce made the determination that dumping was likely to continue or recur if the order were revoked.[30] This determination was based on the Argentine respondents' submissions, their financial statements, and on independent sources of data. Argentina's contention that the Section 129 Determination is inconsistent with the Anti-Dumping Agreement cannot be substantiated.

A. COMMERCE'S USE OF "NEW FACTUAL INFORMATION"

27. Argentina argues that Commerce should be precluded from developing a new factual record in the Section 129 proceeding. Argentina contends that the United States failed to bring its determination into compliance because "USDOC chose to develop a new and different factual basis for its Section 129 Determination".[31] Argentina distinguishes Commerce's approach from that in which "national authorities seek [] to clarify information that it had developed in the 2000 proceeding".[32]

28. As an initial matter, Argentina provides no textual support for the proposition that a Member is prohibited from collecting new information in the course of coming into compliance with DSB recommendations and rulings. Argentina simply offers the conclusory statement that new information cannot satisfy the requirements under Article 11.3 and 11.4 to "conduct a 'review' and to make a 'determination' prior to continuing the anti-dumping measure".[33] Indeed, the panel in *US – Countervailing Measures on Certain EC Products* came to the opposite conclusion in the parallel sunset review provision of the Agreement on Subsidies and Countervailing Measures:

> Regarding the second category of evidence, namely, evidence provided for the first time by the interested parties during the Section 129 proceedings, the Panel notes that Corus and the GOUK provided *new* evidence during the Section 129 proceedings . . . The Panel recalls its previous findings in paragraph 7.238 above that Article 21.3 of the *SCM Agreement* imposes an obligation on the investigating authority during sunset review or revised sunset review proceedings to take into account all the evidence placed on its record in making its determination of likelihood of continuation or recurrence of subsidization.[34]

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[29] *See generally*, *Decision Memorandum* (Exhibit ARG-16).

[30] The evidence in Commerce's Section 129 proceeding incorporates the record in Commerce's original sunset review of OCTG from Argentina, the Panel and Appellate Body reports, and additional information gathered in and comments submitted during Commerce's Section 129 proceeding.

[31] Argentina First Submission, para. 52.

[32] Argentina First Submission, para. 52.

[33] Argentina First Submission, para. 67.

[34] Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/R, paras. 7.252-7.253 (adopted 8 January 2003, as modified by the Appellate Body Report) ("*US – Countervailing Measures on Certain EC Products*").

29. Further, Argentina does not explain what it means by a "new and different factual basis", which is, for Argentina, apparently, impermissible, and how that is to be distinguished from "clarifying information it had developed in the 2000 proceeding", which is, for Argentina, apparently, permissible. It seems that Argentina does not disagree with the collection of new information *per se*, but rather new information that leads to a "new and different factual basis", which is the basis for the Member's coming into compliance. However, Argentina's position cannot be correct – the logical extension of that argument is that a Member could never comply with a narrow DSB recommendation or ruling that the factual basis for a measure is inadequate.

30. Moreover, the question of the collection of new information was discussed during the Article 21.3 arbitration proceeding. The Arbitrator sought to ensure that Commerce would confine its collection of information to the original period of review – not that Commerce would be prevented from collecting new information *about that period.*

31. With regard to this particular sunset review, the Panel rejected Commerce's finding that dumping had continued over the life of the order because it was based on Acindar's payment of cash deposits, which in turn was based on the margin from the original investigation. Acindar did not identify itself during the review proceeding, nor did Siderca identify Acindar as the then-unidentified exporter. In any event, in its Section 129 proceeding, Commerce requested information from the Argentine respondents to ascertain whether dumping had continued over the life of the order. Argentina concedes that all of this additional evidence was specific to the period of review and was available at the time of the original review.[35]

32. Argentina's position would reward Acindar for failing to participate in the original sunset review, and for failing to provide Commerce with the information it would have needed to make a finding, based on positive evidence. Argentina's position finds no basis in the text of the Anti-Dumping Agreement; rather, it is clear that Argentina simply wishes to achieve a particular result by whatever means necessary.

33. Argentina also takes issue with Commerce's finding on the post-order volume decrease. According to Argentina "Commerce chose not to develop further any of the information relating to the post-order volume decrease, which was the only factor for which it developed a factual basis in the review conducted in 2000 . . . .".[36] Argentina's position with respect to the volume issue cannot be reconciled with its position with respect to the continuation of dumping issue – Argentina is criticizing Commerce for *not* developing more information on the volume question while criticizing Commerce for *developing* more information on the dumping question. In any event, the Panel expressly declined to make any findings regarding the decline in volume. Therefore, Commerce was under no obligation to develop further facts, or further justify, the finding it made with regard to the volume decrease.

34. The United States also notes that the Appellate Body stated in *EC – Bed Linen (Article 21.5 – India)*, "we do not see why that part of a redetermination that merely incorporates elements of the original determination . . . would constitute an inseparable element of the measure taken to comply

[35] Argentina First Submission, para. 54.

[36] Argentina First Submission, para. 67. What Argentina means by "factual basis" is unclear, but in any event, that statement is incorrect. In the original sunset determination, Commerce did develop factual information on more than the post-order volume decrease; Commerce developed information as to whether dumping had continued over the life of the order – and did so to the best of its ability, given that the exporter who continued to ship during the period of review declined to identify itself or participate in the proceeding. Simply, the Panel considered that factual basis to be insufficient.

with the DSB rulings in the original dispute."[37] Further, in that dispute, "India [sought] to challenge an aspect of the original measure which has not changed, and which the European Communities did not have to change, in order to comply with the DSB recommendations and rulings to make that measure consistent . . . ".[38] Argentina has offered no argument as to why the finding regarding import volumes, which is an incorporation of an element of the original determination, is a measure taken to comply.

B. THE FINDING THAT DUMPING WAS LIKELY TO OR RECUR

35. The Panel found that the fact that dumping duties continued to be collected on imports over the life of the order did not represent "an adequate factual basis for the proposition that dumping continued" during the period 1995-2000.[39] Therefore, Commerce collected additional evidence on this matter. As discussed below, relying upon Argentine exporters' data and certain independent data, Commerce properly determined in its Section 129 proceeding that revocation of the order was likely to result in continued dumping.

36. As an initial matter, Article 11.3 "does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review".[40] Therefore, it is within the authorities' discretion to decide how to make the determination in question. The only question is whether dumping would be likely to continue or recur if the order were revoked.

37. In this context, Argentina's arguments about the Section 129 Determination lack merit. Argentina takes exception to Commerce's use of the Argentine companies' data, as well as Commerce's effort to evaluate whether dumping likely occurred during the period of review.

38. Commerce sought to evaluate whether dumping continued over the life of the order. To do so, Commerce issued questionnaires to the known Argentine producers of OCTG to gather information on their costs of production for the intervening five years. With a very abbreviated time within which to conduct the Section 129 proceeding, Commerce gathered information from the interested parties and sought additional sources for the information (*e.g.*, CBP data and Preston Publishing data).

39. None of the Argentine respondents provided Commerce with actual cost data for the period of review, stating that they had not retained it. Siderca had provided estimated cost data by using one month's worth of its costs of production for October 2005 and extrapolated what costs during the five year period would have been. However, these data were unusable for several reasons, explained in detail below. The only company that had exported to the United States during the period, Acindar, was unable to provide any cost data. Therefore, Commerce relied on the available information that was reliable (*i.e.*, audited financial statements, CBP data, and Preston Publishing data).

40. Given the lack of actual cost information, it was impossible for Commerce to evaluate whether dumping had *in fact* continued over the life of the order. However, it is not necessary in an Article 11.3 review to determine whether dumping continued over the life of the order, or to calculate a particular margin. As noted above, no methodology is prescribed. Therefore, Commerce proceeded

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[37] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, para. 86 (adopted 24 April 2003) ("*EC – Bed Linen (21.5) (AB)*").

[38] *EC – Bed Linen (21.5) (AB)*, para. 87.

[39] Panel Report, para. 7.220.

[40] Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, para. 123 (adopted 9 January 2004) ("*US – Corrosion-Resistant Steel Sunset Review (AB)*").

to evaluate whether it was *likely* that dumping had continued over the life of the order, as part of its overall assessment of whether it was likely that dumping would continue or recur if the order were revoked.

41. Commerce compared prices of Argentine OCTG imports (CBP data that reflected Acindar's US sales) with US sales data (Preston Publishing data) and found that Acindar's prices "were substantially lower than prevailing US market prices for the corresponding OCTG products".[41] That fact, coupled with the fact that there was a depressed OCTG market, led Commerce to conclude that Acindar was likely dumping during the period. This finding was proved to be accurate: Acindar was reviewed for the 2000-01 period and was found to be dumping at a very high 60.73 per cent margin.[42]

42. Argentina asserts that Commerce applied the wrong standard by assessing whether Argentine respondents were likely dumping during the period instead of determining whether they would likely dump in the future if the order was revoked.[43] Argentina is incorrect. Commerce examined whether they would likely dump in the future using past data as a predictor. Given that Article 11.3 requires Members to make a conclusion about events that have not yet occurred, the only data available are past data. Although Acindar did not retain its actual cost data, Commerce nevertheless sought to determine whether dumping had likely occurred. If Acindar was likely dumping while an order was in place, then, in the absence of evidence to the contrary, it would likely continue to do so if the order were revoked. It should also be noted that Acindar's likely dumping was just one of two findings that supported the determination, the other being the decline in import volumes. Therefore, there was an additional basis for continuing the order.

43. The logical extension of Argentina's argument is that a Member cannot possibly make an affirmative determination if the respondents provide no cost data. That simply is not what Article 11.3 provides. Argentina's arguments specific to Siderca, Acindar, and the use of financial statements are addressed below.

1. Siderca

44. Argentina contends that Commerce's failure to use Siderca's cost data led to conclusions" "inconsistent with Article 11.3".[44] According to Argentina, "the effect of USDOC's manipulation of the data was to exclude positive evidence submitted by Siderca to show that dumping was not likely to continue or recur".[45] First, Commerce made *no* findings regarding Siderca. Second, because Commerce makes its determinations on an order-wide basis, all Siderca might have been able to show was that *it* was not likely to dump. Commerce found that Acindar was likely to dump. Commerce also referenced its finding from the original proceeding that the decline in import volumes was evidence of likelihood of continuation or recurrence of dumping. Therefore, Commerce's treatment of the facts concerning Siderca was simply not germane to the ultimate determination and was not inconsistent with Article 11.3.

45. Finally, it is curious that Argentina faults Commerce for undertaking a thorough examination of the data presented. Argentina on the one hand considers that Commerce has been too active – but additionally argues that Commerce has no right to be "passive".[46] Again, Argentina's views seem to

[41] *Decision Memorandum*, 7 (Exhibit ARG-16).
[42] *Oil Country Tubular Goods Other than Drill Pipe*, 68 Fed. Reg. 13,262 (19 Mar. 2003) (final results and rescission in part of anti-dumping duty administrative review) (Exhibit US-3).
[43] Argentina First Submission, paras. 74, 108.
[44] Argentina First Submission, para. 76.
[45] Argentina First Submission, para. 85.
[46] *See, e.g.*, Argentina First Submission, para. 50.

be driven by the results it seeks to achieve, rather than an unbiased analysis of the obligations in question.

2. Acindar

46. Argentina asserts that Commerce erred in finding that Acindar was likely to dump based on past data.[47] Article 11.3 does not prescribe a particular methodology. Nothing in Article 11.3 prevents authorities from looking at evidence of past behaviour, or past likely behaviour where respondents are unable to provide evidence of actual past behaviour. Argentina argues that "the comparison described by the Department as supporting its determination of 'likely' dumping does not even resemble the notion of 'dumping' under Article 2".[48] Argentina ignores the fact that Commerce was not calculating a dumping margin. Article 2 does not contain a "notion" of dumping but rather a methodology for calculating an actual dumping margin.

47. Had there been administrative reviews of the order, Commerce could have relied upon those findings of dumping during the period as evidence concerning likelihood if the order were revoked. However, there were no administrative reviews conducted, so Commerce had to use available data gathered during the Section 129 proceeding to determine whether dumping likely occurred during the period and thus, is indicative that dumping is likely to continue or recur if the order were revoked. Acindar provided no cost information. Therefore, Commerce used other information in making its finding.

48. Argentina also contends that Commerce had "no factual basis for inferring that Acindar was 'likely dumping'" because it "was never investigated during the original investigation, and the company had no prior history of dumping".[49] It is telling that Argentina never argues that Acindar did not dump its product during the period, only that there had not yet been a review of Acindar to find that it had dumped during the period. Simply because no review had been conducted for Acindar does not mean that Commerce is precluded from considering Acindar in a sunset review. Commerce reviewed the relevant data and determined that Acindar was likely to dump if the order were revoked. Commerce's analysis of Acindar's sales data, as compared to US sales, provided sufficient evidence for its likelihood determination and is consistent with Article 11.3.

3. Financial Statements

49. Argentina argues that Commerce should not have relied upon claims made in either Siderca's or Acindar's financial statements because they are not probative of the state of the OCTG industry.[50] This is a perplexing argument because Argentina wants Commerce to accept Siderca's extrapolated cost data, yet reject financial statements that reflect the companies' actual financial situation during the period. In fact, audited financial statements such as these represent the type of affirmative evidence the Appellate Body said was lacking in the original sunset determination. Relying on these financial statements and other evidence, Commerce determined whether Argentine producers would be likely to dump if the order were revoked.

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[47] Argentina states that "USDOC made what seems to be a prospective ('likelihood') determination about past sales. That is USDOC made findings about what was 'likely' to have happened during the sunset review period . . . ." Argentina First Submission, para. 108. Argentina equates "likely" with "prospective." But that is not so – it is possible for something to have "likely" happened in the past. What makes a sunset review prospective is not the use of the term "likely," but the fact that, under Article 11.3, an administering authority is examining whether the "expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury." The verb "would be" is what makes the determination prospective. Therefore, the premise of Argentina's argument is simply wrong.

[48] Argentina First Submission, para. 115.

[49] Argentina First Submission, para. 116.

[50] Argentina First Submission, paras. 98, 119.

50. The financial statements provided affirmative evidence of the condition of the US industry, the condition of the Argentine OCTG producers, and the likelihood that they would continue to export to the US market. This information provided affirmative evidence to support Commerce's Article 11.3 determination and is consistent with the DSB findings.

C. EVIDENTIARY AND PROCEDURAL REQUIREMENTS OF ARTICLE 11.3 AND ARTICLE 6

51. Article 11.4 of the AD Agreement establishes that for sunset reviews, the "provisions of Article 6 regarding evidence and procedure shall apply ...". Relying on this cross-reference, Argentina claims that Commerce's Section 129 Proceeding was inconsistent with Articles 6.1, 6.2, 6.4, 6.5.1, 6.6, 6.8, 6.9, and Annex II of the AD Agreement.[51]

52. Commerce provided all interested parties, including the Government of Argentina, Acindar, Siderca, and Tubhier with the notice and opportunity to present evidence, argument, and rebuttal required by Articles 6.1 and 6.2.[52] All information was made available to the parties and their lawyers were granted access to business proprietary information under the administrative protective order ("APO") so they could view all information on the record. No party requested a hearing. In addition, Commerce did not apply Article 6.8 or Annex II "facts available" with respect to any aspect of the likelihood determination in the Section 129 Determination with respect to the determination in this dispute. Instead, Commerce objectively examined all the evidence on the record of the Section 129 proceeding and made its likelihood determination based on an analysis of the relevant data submitted to or obtained by Commerce during the proceeding.

53. Commerce satisfied all of its obligations under Article 6 despite the fact that it was only given 12 months to both amend the regulations and conduct the Section 129 proceeding when it had explained 15 months would be required to give all parties, including Commerce, sufficient time to develop the record and submit argument. For example, a full sunset review takes 240 days, and an additional 90 days if it is extraordinarily complicated.[53] Therefore, a full sunset review would take from 240 - 330 days. Yet, Commerce only had 365 days to both amend its regulation and conduct the full sunset proceeding. The 129 proceeding could not commence until the regulation was amended. Amending a regulation is an involved process, requiring notice and comment, as well as approval within many levels of the government. The amended regulation was effective 31 October 2005, and Commerce sent questionnaires to the Argentine respondents on that same day. Even with the short period of time that Commerce was given, it satisfied all of the procedural obligations of Article 6.

1. Article 6.1

54. Article 6.1 requires that interested parties "shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question". All of the interested parties had ample opportunity to present in writing all evidence they considered relevant.

55. On 31 October 2005, Commerce initiated the Section 129 proceeding and sent specific and detailed requests for information to the three Argentine OCTG companies identified by the Government of Argentina as producers of OCTG during the five-year sunset review period (1995-

[51] Argentina First Submission, paras. 166-171.
[52] *Decision Memorandum*, 2-3 (Exhibit ARG-16).
[53] 19 C.F.R. 351.218(f)(3) (an additional 90 day extension is also permitted for sunset reviews that are extraordinarily complicated) (Exhibit US-4). *See also*, Section 751(c)(5) of the Act (Exhibit ARG-33).

2000).[54] On notice and apprised of the information that Commerce required for the Section 129 proceeding, Acindar and Siderca took the opportunity to present in writing the evidence and argument that these interested parties considered relevant regarding the Section 129 proceeding.[55]

56. Both Acindar and Siderca timely filed substantive responses to Commerce's requests for information.[56] In addition, both Acindar and Siderca provided substantive rebuttal comments to submissions made by other interested parties.[57] Therefore, the respondents had not one but two opportunities to present in writing the evidence they considered relevant.

57. Regardless, Argentina contends that the United States acted inconsistently with Article 6.1 in the following ways. First, Argentina argues that Commerce failed to issue supplemental questionnaires. Article 6.1 makes no mention of supplemental questionnaires. Article 6.1 requires only that "notice of the information the authorities require" be given to the interested parties. Commerce sent inquiries to all three Argentine companies and the Government of Argentina regarding the information it believed was necessary to the conduct of the section 129 proceeding.

58. Second, Argentina contends that Commerce failed to issue a preliminary determination.[58] Again, Article 6.1 does not require the issuance of a preliminary determination.

59. Third, Argentina contends that no hearing was held, and therefore the United States acted inconsistently with Article 6.1. Again, Article 6.1 does not require a hearing. Argentina advances the same argument in connection with Article 6.2, which will be addressed below. However, it should be noted that no hearing was requested.

60. Finally, Argentina contends that Commerce failed to issue a schedule for the Section 129 proceeding that would have allowed interested parties to submit comments.[59] Article 6.1 does not require that a schedule be issued, nor has Argentina cited to any specific requirement of Article 6.1 containing such an obligation. Indeed, it is curious that Argentina cites to *Guatemala – Cement II*, because the panel in that dispute expressly concluded:

> Article 6.1 of the AD Agreement does not require investigating authorities to set time-limits for the presentation of arguments and evidence during the final stage of the investigation. The only time-limit provided for in Article 6.1.1 . . . .[60]

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[54] Letter from US Department of Commerce to Embassy of Argentina (14 October 2005) (Exhibit US-5). In anticipation of the limited time available to conduct the Section 129 sunset review proceeding, Commerce requested on 10 October 2005, from the Government of Argentina a comprehensive list of all Argentine OCTG producers who had exports to the United States during the five-year sunset review period. The Argentine Embassy identified Acindar Industria Argentina de Aceros S.A., Siderca SAIC, and Tubhier S.A.

[55] Tubhier responded to Commerce's request for information by explaining that it had never exported OCTG to the United states and had no plans to ever do so, and that its production of OCTG-class goods was irregular and an insignificant portion of it overall production. *See* Embassy/Tubhier Submission (Exhibit ARG-20).

[56] *See* Acindar Substantive Response (Exhibit ARG-14); and Siderca Substantive Response (Exhibit ARG-15).

[57] *See* Acindar Reply (Exhibit US-6); and Siderca Reply (Exhibits ARG-19, 29) .

[58] Argentina First Submission, para. 144.

[59] Argentina First Submission, para. 144.

[60] Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, para. 8.118 (adopted 17 November 2000) ("*Guatemala – Cement II*").

61. The panel's reasoning is correct, and is equally applicable here. As that panel noted, what counts is whether the substantive obligation of Article 6.1 has been met.[61] In this case, Acindar, Siderca, Tubhier, and the Government of Argentina all submitted factual information and comments.[62] Both Acindar and Siderca submitted rebuttal comments to the domestic industry's submission, and in fact, Siderca filed rebuttal comments on two separate occasions.[63] Thus, the substantive obligation contained in Article 6.1 – "ample opportunity" – has been met, and Argentina's argument is without merit.

2. Article 6.2

62. Article 6.2 of the AD Agreement provides for the rights of interested parties to "a full opportunity for the defence of their interests", and, *inter alia*, provides that:

> the authorities shall, *on request*, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. (emphasis added).

63. Argentina argues that the United States acted inconsistently with Article 6.2 because Commerce failed to hold a hearing.[64] However, Article 6.2 does not require a Member to hold a hearing. Article 6.2 requires a Member to hold a hearing *on request.* No interested party requested a hearing.

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

64. Argentina makes a series of claims regarding Commerce's treatment of the information submitted in the course of the Section 129 proceeding.

(a) Article 6.4

65. Article 6.4 provides that the administering authority will provide interested parties opportunities to see information relevant to the case "whenever practicable". Argentina contends that Commerce failed to provide timely opportunities for interested parties to see all information that was relevant in the sunset review in violation of Article 6.4 of the AD Agreement.[65] It should be noted at the outset that this Section 129 proceeding was a measure taken to comply. The usual time frame for conducting a full sunset review – at least 240 days – was not available. While the United States had requested 15 months, in part to ensure that adequate time was available for such procedures as a preliminary determination, Argentina vehemently opposed this time frame, and the United States was given only 12 months. This abbreviated time frame is directly relevant to what is "practicable" under Article 6.4.

66. With regard to specifics, Argentina's discussion of the information that was purportedly not put on the record is murky. Argentina initially argues that there were six memos (three plus three),[66] then mentions just five[67], and just four of those five[68], and then finally just three.[69] In doing so,

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[61] *Guatemala – Cement II*, para. 8.119.

[62] *See* Acindar Substantive Response, p. 1 (Exhibit ARG-14); Siderca Substantive Response, p. 3 (Exhibit ARG-15); and Tubhier Substantive response, p. 1 (Exhibit ARG-20).

[63] *See* Siderca Reply (Exhibits ARG-19, 29).

[64] Argentina First Submission, para. 152.

[65] Argentina First Submission, para. 156.

[66] Argentina First Submission, para. 157.

[67] Argentina First Submission, para. 158.

[68] Argentina First Submission, para. 158.

Argentina simply asserts that "at least three of the memoranda clearly satisfy the criteria established by the *EC – Pipe Fittings* panel".[70] However, Argentina does not identify which three. Therefore, Argentina has not met the burden of making a *prima facie* case with respect to this claim.

67. Regardless, it should be noted that notwithstanding the limited time available, Commerce made available to all parties participating in the proceeding all the information submitted to or obtained by the agency in the Section 129 proceeding to the extent "practicable", as required by Article 6.4. For example, Commerce disclosed to all interested parties information obtained from CBP regarding the entries of Acindar-produced OCTG from Argentina made during the five-year period preceding the original sunset review.[71] In addition, all submissions made during the section 129 proceeding were served on all other interested parties to the proceeding.[72] Therefore, Argentina's assertion that Commerce failed to provide timely opportunities for interested parties to see all relevant information, "whenever practicable", is without basis.

68. Argentina also argues that Commerce's "violations" of Article 6.4 were "compounded" because the US OCTG industry submitted factual information and comments without any request from Commerce that it do so.[73] Having just argued that Article 6.1 requires administering authorities to provide ample opportunity to present evidence in writing, Argentina then seeks to deny that right to *domestic interested parties.* Article 6.1 does not apply simply to respondent interested parties, but to *all* interested parties, including domestic interested parties. Argentina cannot mean to argue that the United States violated its obligations under Article 6.4 by complying with its obligations under Article 6.1. In any event, Argentine respondents obviously saw the letter, inasmuch as Argentina admits that Siderca responded to it.[74] Therefore, Argentina admits there was no violation.

(b) Article 6.5.1

69. Article 6.5.1 provides for administering authorities to require interested parties providing confidential information to furnish non-confidential summaries thereof. Argentina argues that Commerce failed to require interested parties to submit non-confidential summaries in their written submissions in a manner to permit a reasonable understanding of the substance of the confidential information in violation of Article 6.5.1 of the AD Agreement.[75]

70. At the outset, it should be noted that Articles 6.4 and 6.5 contemplate that the parties will not see confidential information provided by other parties. Under those circumstances, the summary of the confidential information is the only basis on which opposing parties can attempt to address the confidential information provided. Commerce, however, has established a system whereby *counsel* for interested parties can have direct access to confidential information and therefore may directly address the evidence provided. Therefore, the Argentine respondents had the option of accessing confidential information through counsel. As a result, the assertion that Acindar "necessarily" had to confine its arguments to the public version of the US Steel letter[76] is simply false. Acindar's counsel had the option of requesting confidential information pursuant to the administrative protective order

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[69] Argentina First Submission, para. 160.

[70] Argentina First Submission, para. 160. The United States does not consider that the *EC – Pipe Fittings* panel established criteria, but rather simply identified the relevant elements of Article 6.4.

[71] Memo Re: Information for the Record (Exhibit ARG-18). This information was disclosed approximately three weeks before the decision was made.

[72] *See e.g.*, Certificates of Service in US Steel Factual Submission (Exhibit ARG-27); and Siderca Questionnaire Response (Exhibit ARG-15).

[73] Argentina First Submission, para. 162.

[74] Argentina First Submission, para. 163.

[75] Argentina First Submission, para. 169.

[76] Argentina First Submission, para. 169.

that seeks to ensure the confidential information will not be released. It was Acindar's choice not to access that information.

71. In any event, it is not clear to what "confidential" information Argentina refers. The comments by the US industry that contained "confidential information" were in reference to information submitted as confidential by Siderca or gathered through CBP, which Commerce released under APO. The domestic interested parties summarized the confidential information in the text of the letter itself; more detailed summaries were not possible because the domestic interested parties risked divulging information designated business proprietary, in violation of the administrative protective order. Therefore, the summaries were as detailed as possible, particularly in light of the fact that respondent interested parties' counsel has direct access to the bracketed information.[77]

72. Finally, Argentina stated that the panel report in *Guatemala – Cement II* supports the argument that the United States acted inconsistently with Article 6.5.1. Not only did that panel expressly state that it was not addressing Article 6.5.1, but that dispute involved a situation in which the administering authority *on its own initiative* classified information as confidential.[78] Therefore, the United States finds no support for Argentina's statement that "as the Panel found in *Guatemala – Cement II*, in this case, the USDOC violated Article 6.5.1 because there is no evidence demonstrating either that petitioner provided a statement of reasons as to why summarization was not possible or that the USDOC even requested such a statement."[79]

(c) Article 6.6

73. Article 6.6 requires administering authorities to satisfy themselves as to the accuracy of the information upon which they rely in making their findings. Argentina asserts that Commerce erroneously disregarded cost information submitted by Siderca without satisfying itself as to the accuracy of that information.

74. First, Commerce requested cost information from the Argentina respondents to examine whether the respondents had dumped during the period of review. Commerce expressly stated that "we make no findings regarding specific instances of likely dumping by Siderca during the original sunset review period".[80] Therefore, the cost information was not information "upon which . . . findings are based," and Article 6.6 is not applicable.

75. Second, Siderca argued that it did not have any of the actual cost information from the period of review and therefore offered extrapolated data based on the month of October 2005 (the period of review was 1995-2000). By its own admission, Siderca was providing *estimated* cost data rather than the actual data requested and therefore the information was, on its face, not what Commerce requested. Commerce did not, however, reject the information on that basis. Rather, although Argentina contends that Commerce "merely offers a conclusory statement that it is 'unable to rely on the data'," Commerce explained, at length, how Siderca's estimated production cost data was inconsistent with other cost data for steel products in the Section 129 Determination.[81] Three paragraphs of discussion do not constitute a conclusory statement. For all of these reasons, the United States did not act inconsistently with Article 6.6.

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[77] *See e.g.* Memo Re: Information for the Record, App. II (CPB entries of ARG OCTG) (Exhibit ARG-18).

[78] *Guatemala – Cement II*, para. 8.221.

[79] Argentina First Submission, para. 170.

[80] *Decision Memorandum*, p. 9 (Exhibit ARG-16).

[81] *Decision Memorandum*, p. 8-9 (Exhibit ARG-16). *See also* Memo Re: Inconsistencies in Siderca's Cost Data (Exhibit ARG-21).

(d) Article 6.9

76. Article 6.9 requires authorities, before a final determination is made, to inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Argentina argues that the United States did not comply with its obligations under this provision. Specifically, Argentina argues that memoranda accompanying the Section 129 Determination "were not made 'in sufficient time for parties to defend their interests'".[82]

77. As with its arguments regarding Article 6.4, Argentina simply asserts that memoranda were placed in the file the same day as the determination was issued, as if that alone satisfies Argentina's burden of proving its claim. Argentina fails even to discuss whether those memoranda contain essential facts forming the basis for the decision, the elemental aspects of proving an Article 6.9 claim.[83] As a result, Argentina has not made a *prima facie* case of a violation of Article 6.9.[84]

78. Argentina also states that the United States did not issue a draft or preliminary determination "as it said it would do in the arbitration pursuant to Article 21.3 of the DSU".[85] Once again, the United States said it would issue a preliminary determination *if it were given 15 months to implement the DSB recommendations and rulings.* That Argentina continues to reference the US submission to the arbitrator simply reinforces the US argument that it needed 15 months to implement the recommendations and rulings in order to provide the additional procedural steps not required by Article 6 but that Commerce routinely offers, such as a preliminary determination, and which Argentina's companies apparently would have preferred.

4. Article 6.8 and Annex II

79. Article 6.8 provides that in cases in which any interested party refuses access to or otherwise does not provide necessary information, the determination may be made on the basis of the facts available. Argentina argues that Commerce "did not comply with the conditions set out in Article 6.8 and Annex II for recourse to 'facts available'".[86]

80. The United States recalls that an Article 11.3 determination of likelihood in a sunset proceeding is different from an Article 2 determination of dumping in an investigation or an assessment review. In those latter proceedings, it is necessary to have the respondent's data in order to calculate its individual margin. The rules in Articles 2 and 9 establish a presumption for investigations and assessment reviews that the Member will use that company's data to calculate a margin. For example, Article 2.1.1. states that "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation . .". Without the data, substitute data may be necessary to calculate a margin.

81. In contrast, a sunset review has no such requirement to determine likelihood based on the actual data of the foreign producers and exporters. The Appellate Body confirmed that Article 11.3

[82] Argentina First Submission, para. 191.

[83] *See, e.g.*, Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, para. 7.223 (adopted 19 May 2003) ("*Argentina – Poultry*").

[84] Indeed, the danger in making such vague and unsubstantiated assertions is revealed by examining just one of the memoranda Argentina identifies in support of its Article 6.9 claim – it consists simply of pages from a website identifying the source of information disclosed earlier, on 22 November 2005. *See* Memo Re: Preston Publishing Website Information (Exhibit ARG-22).

[85] Argentina First Submission, para. 192.

[86] Argentina First Submission, para. 183.

does not "identify any particular factors that authorities must take into account in making such a determination".[87]

82. In this context, Argentina's claim is exposed as being without merit. First, with respect to Siderca, the result of Commerce's analysis of Siderca's estimated cost information was *no* company-specific finding regarding Siderca. The Section 129 Determination was based on the findings of likely dumping by Acindar and the decreased volumes. Therefore, there was no use of "facts available" and no violation of either Article 6.8 or Annex II.

83. With respect to Acindar, Acindar provided *no cost information*, so there was no information to reject.[88] As a result, there is no violation of either Article 6.8 or Annex II.

D. ARTICLE 13

84. As the United States noted at the DSB meeting at which the Panel was established, USTR directed Commerce to implement the Section 129 Determination on 16 March 2006. As Section 129 makes clear, implementation is effective as of the date on which USTR directs implementation.[89] The basis for Argentina's Article 13 claim is the supposed US failure to implement the determination, but that determination had been implemented before the Panel was established. Therefore, there is no basis for Argentina's claim.

V. ARGENTINA'S REQUEST FOR A SUGGESTION

85. Argentina "submits that it had a right to termination of this measure"[90] and asks the Panel to "suggest" that the United States terminate the measure.[91] That assertion is plainly incorrect. No such right is found in the text of the DSU or the Anti-Dumping Agreement, as the Appellate Body has recognized in its reasoning in *US – Mexico OCTG*, where it stated:

> The fact that the USDOC acted inconsistently with the requirements of Article 11.3 in its likelihood-of-dumping determination does not necessarily imply that the underlying anti-dumping duties must be terminated immediately.[92]

86. Nor is there any basis for making such a suggestion. A Member retains the right to determine the manner of implementing DSB recommendations and rulings. While Argentina may prefer to have the measure terminated, the question in this proceeding is the existence or consistency of the measure taken to comply. In addition, under Article 19.1 of the DSU, any "suggestion" by a panel is "in addition" to any recommendations. It is unclear that Argentina is asking the Panel to make a recommendation in this proceeding. Argentina appears to explicitly request that the Panel make no recommendation[93] but then switches from requesting a "suggestion" to requesting a

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[87] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 123.

[88] *Decision Memorandum*, pp. 6-7 ("we find that [Acindar's] submission failed to include any data adequate to calculate costs for the subject merchandise. Acindar claimed that it no longer has the product-specific cost information in the form the Department requested and, therefore, is unable to provide the requested cost data specific to OCTG sales during the period . . . .")

[89] See Uruguay Round Agreements Act, Section 129(c)(B); *see also Notice of Implementation under Section 129 of the Uruguay Round Agreements Act; Anti-Dumping Measures Concerning Oil Country Tubular Goods from Argentina*, 71 Fed. Reg. 19873 (18 April 2006) (Exhibit US-2).

[90] Argentina First Submission, para. 215.

[91] Argentina First Submission, para. 210.

[92] Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods from Mexico*, para. 187, WT/DS282/AB/R (adopted 28 November 2005).

[93] Argentina First Submission, para. 219.

"recommendation".[94] To the extent Argentina is asking that this be a "recommendation" rather than a "suggestion", Argentina's request is inconsistent with Article 19.1 of the DSU which specifies the content of any "recommendation" by a panel.

87. The United States respectfully requests the Panel to decline the request.

VI. CONCLUSION

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

[94] Argentina First Submission, para. 224.

EXHIBIT LIST

Number	**Document**
US-1	*Procedures for Conducting Five-Year Reviews of Anti-Dumping and Countervailing Duty Orders*: Proposed rule, 70 Fed. Reg. 47738 (15 August 2005).
US-2	*Notice of Implementation under Section 129 of the Uruguay Round Agreements Act; Anti-Dumping Measures Concerning Oil Country Tubular Goods from Argentina*, 71 Fed. Reg. 19873 (18 April 2006).
US-3	*Oil Country Tubular Goods Other than Drill Pipe from Argentina*, 68 Fed. Reg. 13262 (19 March 2003) (final results and rescission in part of anti-dumping duty administrative review).
US-4	19 C.F.R. § 351.218(f)(3) (US Department of Commerce regulations).
US-5	Letter from US Department of Commerce to Embassy of Argentina (14 October 2005).
US-6	Letter from Acindar Industria de Aceros S.A. to US Department of Commerce (14 December 2005).