ANNEX D

ORAL STATEMENTS, SUBSTANTIVE MEETING OF THE PANEL WITH PARTIES AND THIRD PARTIES

ANNEX D-1

OPENING ORAL STATEMENT OF ARGENTINA

12 July 2006

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I. INTRODUCTION

Mr. Chairman, members of the Panel:

1. The failure of the United States to comply with its obligations under Article 11.3 has led to the absurdity of the United States initiating last month a *second* sunset review of the 1995 antidumping duty order on OCTG from Argentina. This is absurd because the USDOC's *first sunset determination – from November 2000* – was found to be inconsistent with the Anti-Dumping Agreement. Articles 11.3 and 11.4 required the United States to make a WTO-consistent likelihood of dumping finding in that review as a *condition precedent* to invoking the exception of Article 11.3 and continuing the anti-dumping measure beyond five years. The United States unquestionably has *never* fulfilled that condition precedent, and yet it maintains the measure, and even seeks to continue it for five more years.

2. Argentina comes before this Panel for the second time with the hope that the DSU system can "preserve the rights and obligations of Members under the covered agreements," without the need for "a potentially 'never ending cycle' of dispute settlement proceedings and inordinate delays in the implementation…".[1]

[1]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.

3. As explained in Argentina's written submissions, the United States not only has failed to remedy those aspects of USDOC's 2000 decision found to be inconsistent with the Anti-Dumping Agreement, it has issued a new decision that once again fails to comply with the requirements of Articles 11.3 and 11.4. Accordingly, it also failed to bring itself into compliance by not revoking the antidumping order, in the absence of a WTO-consistent determination, as required by Article 11.3. Finally, in the process, the United States has also acted inconsistently with its obligations under Article 6.

4. Argentina will not repeat all of its arguments today, but rather will focus its comments on the issue of whether USDOC's Section 129 Determination brought the United States into compliance with its obligations, both substantive and procedural. Argentina will address the "as such" violations at the end of its presentation. Throughout its presentation today, Argentina will address several of the points raised by the United States in its Second Submission.

II. THE DEPARTMENT'S SECTION 129 DETERMINATION

5. We believe, it is appropriate to begin a discussion of the purported US "compliance" in this case by recalling the US violations that led to the need for a compliance proceeding. The Panel found that the Department's 2000 sunset determination was inconsistent with Articles 11.3 and 6.2 of the Anti-Dumping Agreement. The Panel noted that the USDOC based its 2000 determination on its conclusion that dumping had continued during the life of the order, a conclusion it reached by 1) relying on the existence of the original dumping margin; and 2) inferring continued dumping from the payment of minimal dumping duty deposits. The Panel found both facts to be insufficient to establish that dumping had continued during the life of the order, and, therefore, insufficient to establish that dumping was likely to continue or recur upon expiry of the order.[2]

6. In purporting to bring itself into compliance in 2005, the USDOC essentially followed the same methodology: it made certain inferences regarding the continuation of dumping during the sunset period, and on the basis of these inferences, it inferred that dumping would likely continue upon expiry of the measure. As it did in 2000, the USDOC once again in 2005 relies on the post-order volume decline to infer that dumping would be likely, and this is an additional basis for the Section 129 Determination.

7. Regarding whether dumping continued during the sunset period, the substance of the 2005 Section 129 Determination is quite different, and the USDOC has strayed *even farther away* from the requirements of the Anti-Dumping Agreement than it did in the 2000 determination. Rather than clarifying the evidentiary deficiencies found by the Panel with its conclusion that dumping had continued in the past, the USDOC simply lowered the standard and changed its finding from "past dumping" to "likely past dumping" by the company Acindar. And, it did so by way of a comparison that has no basis in the Anti-Dumping Agreement - a comparison done with so little diligence that its conclusions are meaningless, and cannot serve as a basis for the finding required by Article 11.3.[3]

8. Argentina has set forth in its written submissions the reasons why the 2005 Section 129 Determination did not bring the United States into compliance with the Agreement.[4] Today, Argentina would like to focus on three of those reasons: first, that the development of a new evidentiary basis in 2005 does not comply with the obligation that the United States owed Argentina as of August 2000; second, assuming *arguendo* that USDOC can rely on an evidentiary basis first developed in 2005 to satisfy the Article 11.3 obligation, the findings with respect to both Argentine

[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. 7.219 ("Panel Report").

[3] *See* USDOC Section 129 Determination at 7-10.

[4] *See* Argentina's First Submission, paras. 38-143; Argentina's Second Submission, paras. 8-144.

exporters are not based on an objective assessment of the evidence, and do not support a conclusion that "dumping" is "likely" to continue or recur; and third, that the Department's reliance on the volume inference is inconsistent with the requirements of Article 11.3 of the Agreement.

A. THE DEVELOPMENT OF NEW EVIDENCE

9. The Department developed very little evidence in the 2000 proceeding. The evidentiary basis of its continued dumping finding, and therefore likely future dumping, was razor thin and legally insufficient. However, this was the evidentiary basis that the Department developed, and it was on this basis that the Department sought to justify the continuation of the 1995 measure beyond its presumptive expiration date.

10. Under the explicit wording of Article 11.3, the requisite "review" and "determination" are a *condition precedent* to continuing the measure. In this case, the Department made choices about the type of review it would conduct in 2000, and the manner in which it reached its 2000 determination. If the United States cannot show now, based on the evidence developed in USDOC's 2000 review, that the United States was justified in invoking the limited exception in Article 11.3, then the United States could not have invoked that exception, and was instead required to have terminated the measure.

11. In the present context, the Panel need only find that the evidence relied upon now, in the 2005 determination, cannot justify the USDOC's 2000 decision to continue the measure beyond August 2000, when it was never developed at that time as required by Articles 11.3 and 11.4. The relevant question is, how could it, when the evidence was never developed at the time? USDOC could not possibly claim to have relied on this information when it considered the case in 2000.

12. The best illustration of this key point is the information in Exhibits ARG-18 and ARG-23, which is part of the evidence that the Department used to find that the exporter, Acindar, was "likely dumping" in the past. All of this evidence was developed, independently, by the USDOC in 2005, just as the Department could have done in 2000. The Department merely asked the United States Customs Service to provide the data, and it easily determined the origin of the exports that had triggered the deemed waiver and statutorily-mandated likely dumping determination for the "non-responding" respondents in the original review. Why was the information not developed in 2000? Simply because the Department believed, erroneously, that it did not need to do so. It was not conducting that type of "review," and it had, according to the USDOC Sunset Policy Bulletin, plenty of presumptions to make a determination. Argentina would again recall the nature of Article 11.3 obligations, *i.e.*, a mandatory rule requiring termination of the measure with a limited exception which, by definition, must be interpreted narrowly.

13. If a Member can invoke the exception of Article 11.3 without conducting the type of review required, and then simply conduct a different review later, including new and different evidence, the requirement (or "rule") of termination loses its meaning. The United States recognizes this. It is no small statement that the United States makes in paragraph 23 of its Second Submission: "The only 'temporal limitation' in Article 11.3 is that the review must be *initiated* before the five year anniversary of the imposition of the order." Is timely initiation of the review all it takes to comply with Article 11.3? The Agreement makes clear that Members committed to more than this in Article 1.3, and the Appellate Body agrees. The "review" conducted at that specific time is highly substantive, and the Appellate Body has clarified that it is a rigorous process that entails both adjudicatory and investigatory aspects. It is, in fact, so substantive that Article 11.4 contemplates that the review can take a substantial amount of time in order to satisfy the rigorous requirements imposed by Article 11.3.[5]

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

14. As Argentina has explained since the inception of this proceeding, the nature of the sunset obligations in the Article 11.3 are unique. In *this case*, given the manner in which USDOC conducted the 2000 sunset review, the USDOC could not, for the first time in 2005, comply with its obligations by developing a new factual basis to support its 2000 determination to continue the measure.

15. In attempting to discredit Argentina's argument, the United States refers to Article 5.10 of the Agreement and asserts that "[a]ccording to Argentina's theory, a Member that has to bring an investigation into compliance with WTO obligations would not be permitted to collect new information."[6] But the example that the United States chooses supports Argentina's position that the nature of the obligations and the actions of the authority at the time affect whether and how compliance can be achieved. If an administering authority failed to render a final determination within 18 months, but imposed duties in any event, could the Member be allowed more time to bring itself into compliance with the 18-month obligation? Or, suppose that during the 18-month investigation, the authority never collected (or even attempted to collect) data regarding export prices or normal value, could that authority permissibly do so several years later in a subsequent WTO proceeding so as to justify the continued imposition of anti-dumping duties? This clearly would be inconsistent with the Anti-Dumping Agreement, and the United States cannot credibly assert otherwise. The facts of the dispute now before the Panel are very similar to these examples.

16. Finally, the suggestion by the United States of some "general understanding… shared by the arbitrator"[7] in the DSU Article 21.3 proceeding that USDOC would collect new evidence and come up with a wholly-new factual basis in 2005 to support the 2000 determination must be rejected. The assertion that USDOC's actions were somehow "approved" by the Arbitrator in the DSU Article 21.3 proceeding is wrong. In fact, the Arbitrator's Report expressly notes that "[t]he United States emphasizes that this does not, however, mean that the USDOC would engage in a *de novo* sunset review determination."[8]

B. THE FINDINGS WITH RESPECT TO BOTH ARGENTINE EXPORTERS

17. 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.

18. Regarding the USDOC's findings with respect to both Argentine exporters, those findings are not based on an objective assessment of the evidence, and do not support a conclusion that "dumping" is "likely" to continue or recur.

1. Acindar

19. USDOC states clearly the basis for its determination with respect to Acindar: "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, absent evidence that prevailing market conditions were likely to improve in the near future, indicates that Acindar likely was dumping significantly in the US market."[9] In addition, Commerce asserted that the weakened condition of Acindar during the original sunset review period was also indicative that Acindar was likely dumping during this period.

[6] US Second Submission, para. 23.
[7] US Second Submission, para. 26.
[8] Award of the Arbitrator, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/12, ARB-2005-1/18, 7 June 2005, para. 38.
[9] USDOC Section 129 Determination at 7-8 (ARG-16).

Commerce then inferred that Acindar was likely to continue selling in the United States at dumped prices if the order were revoked.

20. In evaluating the Department's findings, it is important to keep in mind the standard of review to be applied by an Article 21.5 Panel, which, in turn, clarify what is expected from the investigating authorities rendering a determination intended to bring the Member into compliance. The Appellate Body recently clarified that, in the context of an Article 21.5 proceeding, the Panel's examination of the authority's conclusions must be critical and searching,[10] and the Panel must ensure that the authority's conclusions reached are reasoned and adequate. The Panel's assessment must include an analysis of whether an unbiased and objective authority would have reached this conclusions with the facts established in the record.[11]

21. Accordingly, the Panel must, with a critical and searching approach, assess whether the following conclusions are reasoned and adequate in light of the evidence of the record and the obligations of Article 11.3:

- Acindar was likely dumping during the period of the sunset review;
- Acindar was likely to continue selling at dumped prices if the order were revoked;
- Acindar's overall financial condition was positive evidence that Acindar was dumping OCTG; and
- There was no evidence of improvements in the future market conditions.

Argentina believes that *none* of the USDOC's conclusions can withstand a proper review by the Panel.

22. There is no legitimate factual basis for the first two points – i.e. "likely" dumping in the past, and, in turn, likely continued dumping in the future. In examining the 2000 sunset determination, the Panel found that, 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. Rather than explain the factual basis supporting its decision, the United States instead claims that the "existence of dumping is not a prerequisite to continuation of an order: Footnote 22 of the Anti-Dumping Agreement expressly provides that even if dumping has ceased over the life of the order, the order need not necessarily be terminated."[12]

23. This could be correct in cases in which, unlike the current one, the determination is not based on "continuation" of selling at dumped prices. But it is inconceivable that a finding of a "continuation" of "dumping" – even if it is only "likely" – can be made without positive evidence that "dumping" ever occurred.

24. The United States clearly is trying to have it both ways: it wants to maintain the notion of past dumping as the basis of its inference of likely future dumping, but it does not want to be required to establish a sufficient factual basis that dumping actually occurred in the past. The problem is apparent in the US First Submission, in which the United States recognizes that it was not possible "for Commerce to evaluate whether dumping had in fact continued over the life of the order"[13] yet nonetheless stated in the Section 129 Determination that "Acindar was likely to continue selling in the United States at dumped prices if the order were revoked."[14]

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[10] Appellate Body Report, *US – Lumber ITC Investigation (Article 21.5 – Canada)*, para. 93.
[11] Appellate Body Report, *US – Lumber ITC Investigation (Article 21.5 – Canada)*, para. 93.
[12] US Second Submission, para. 35.
[13] US First Submission, para. 40.
[14] USDOC Section 129 Determination at 10.

25. In order for the Department to conclude, as it has, that Acindar is likely "to continue" to sell at dumped prices in the future, it must have made some finding that Acindar in fact sold at dumped prices during the sunset review period (1995-2000). Otherwise, the determination of "continuation" of dumping under the Agreement would be rendered meaningless. The United States acknowledges that the Department could not find that Acindar was dumping in the past, so it concludes that it *likely* was doing so, and it reaches that conclusion through a strange comparison not provided for in Article 2. The result is a decision that is based on impermissible speculation, and an insufficient basis for determining what is likely to occur upon expiry.

26. Article 11.3 of the Agreement provides no basis for the Department's approach. A Member can maintain an anti-dumping measure beyond five years only if it determines that "dumping" would be likely to continue or recur were the measure to be revoked. Article 11.3 does not contemplate a review to determine the likelihood of continuation of dumping based on a finding of "likely past dumping."

27. The United States stresses several times in its written submissions that it is not required to perform an Article 2 calculation. But, as the Appellate Body has clarified, Article 2 is the only source in the Agreement for making conclusions regarding "dumping."[15] Therefore, the "dumping" in Article 11.3 is the "dumping" in Article 2, and Article 2 explains that "dumping" must arise from a comparison of "export price" to "normal value." That is not what the United States did; rather, it compared prices obtained from the US Customs authorities to local US selling prices.

28. Argentina would like to highlight today three points regarding the USDOC's actions: **First**, the developments in this case highlight the importance of requiring authorities to conduct a WTO-consistent review at the time specified in Article 11.3. In this case, the Department sought cost information that was 5 to 10 years old, and both companies explained that they did not retain product-specific cost information this long, but that they could have provided it if USDOC had made the request in 2000.[16] While the USDOC did not expressly state that it was drawing adverse inferences from the fact that the companies no longer had the product-specific cost information, it is clear that the inability to produce the information was used against the companies. USDOC made no attempt to seek other information; it simply issued a final determination, revealing at the time of the Section 129 Determination the new comparisons that demonstrated the purported "likely past dumping."

29. **Second**, US domestic prices are no substitute for normal value. Nowhere do Articles 11.3 or Article 2 of the Anti-Dumping Agreement, or Article VI of the GATT 1994, mention prevailing market prices in the importing country in the context of "dumping". If USDOC wants to make a determination of past "dumping", it must refer to the elements of "dumping", which do not include prevailing market prices in the importing country.

30. The US domestic prices relied upon by USDOC have even less meaning when one considers the findings of the USITC in the same sunset review. This Panel upheld USITC's affirmative determination noting, among other things, that the US price of OCTG during the review period was significantly higher than the price of OCTG in other markets.[17] The fact that the observed prices of Acindar were less than these elevated US prices does not support the view that Acindar was dumping: a company presumably can sell below a significantly elevated price in the consuming market without "dumping" within the meaning of Article 2. This is especially so now that the United States

[15] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.

[16] *See* Acindar's Response to Questionnaire (30 November 2005) (ARG-14); Siderca's Response to Questionnaire (30 November 2005) (ARG-15).

[17] *See* Panel Report, paras. 7.291, 7.297.

recognizes that Acindar's tube division was profitable.[18] The USITC's finding, already accepted by the Panel, weakens further the tenuous reasoning relied upon by the USDOC.

31. **Third**, the Department's comparison is, to put it mildly, a very "rough comparison." This characterization cannot be denied, and the US Second Written Submission does not really attempt to deny it. Argentina asks that the Panel pay particular attention to paragraphs 39 and 40 of the US Second Written Submission. After acknowledging that many factors affect the price of different OCTG products, the US claims that distinguishing seamless from welded OCTG, and carbon from alloy OCTG, addresses the issues that "are the most critical for price comparisons." This is simply wrong, and it further undermines the factual basis for USDOC's conclusion that Acindar "likely" was dumping in the past, and the inference that Acindar was likely to dump upon expiry of the order.

32. To demonstrate the inaccuracy of the US position, I would like you to turn your attention to the additional Exhibits which have been distributed, and which are labelled ARG-34 (1997 Price List of US Steel) and ARG-35 (Diagrams and Photographs: Physical Characteristics of OCTG). These Exhibits allow us to see clearly the fallacy of the US position.

33. First, ARG-34 shows the manner in which many of the physical characteristics of OCTG affect a price comparison. The Exhibit is a 1997 price list from US Steel, a significant US OCTG producer. Through the price list, US Steel informs its potential buyers of the price of different types of OCTG (different steel grades, sizes, wall thicknesses, end finishes, and outside diameters), and then instructs the buyer to "add" or "deduct" value from the standard price based on the physical characteristics desired by the purchaser. For example, the last page of Exhibit ARG-34 contains the prices for carbon and alloy tubing shipped from US Steel's production plant in Lorrain, Ohio. As shown at the top of the chart, the prices appearing in the chart are in US dollars per short ton for tubing produced to API Grades, with "external upset ends" ("EUE"), threaded and coupled ("T&C"), in range 2 lengths. However, if a customer does not want this product, but instead wants a non-upset, plain end pipe, the price list instructs the purchaser to ***deduct $250 per ton***. This is marked with an arrow on the Exhibit. This significant deduction alone – ***more than 25 per cent of the price of some of the listed OCTG items*** – demonstrates that the USDOC's statements about its comparison are wrong. The difference is more significant than whether the pipe is "carbon" or "alloy," which the US Steel price list for the Lorrain facility shows to account for less than 10 per cent for some size ranges.[19] The price list also shows difference for other characteristics, such as outside diameter and wall thickness.

34. These differences cannot be explained away as some anomaly in US Steel's pricing. Rather, they reflect the reality of the costing and pricing of the many different OCTG products, a reality which USDOC's comparison completely ignores. To demonstrate this further, we ask the Panel to review ARG-35, which includes diagrams and pictures of some of the different physical characteristics of the different OCTG products. Turning first to the diagram on page 1 of ARG-35, one can see that, even within the class of OCTG products known as "tubing," the diameter range is significant, ranging from 26.67 mm to 114.3 mm. Page 2 shows the wall thickness range for just one of these sizes, the 4 ½ inch (114.3 mm) product that we observed in US Steel's price list: the thickness ranges from 6.88 mm to 16 mm. Keep in mind that both of these diagrams only show a cross section of the OCTG, and that these significant differences continue for the length of the tubing, which, using the US Steel price list quoting prices for "range 2," would be 7.62 to 10.36 meters, or 25 to 34 feet.

[18] US Second Submission, 43.

[19] For example, compare the price difference for 4 ½ inch carbon grade J55 Normalized to the same tubing of an alloy grade N80, yielding a difference of $100, which is 8.7 per cent of the carbon grade price of $1150. This comparison is circled on the Exhibit.

35. Finally, pages 3 through 6 of ARG-35 show photographs and diagrams of the possible end finishes. One can readily see from the diagrams why US Steel tells the customer to deduct $250 per ton if the customer only wants a plain end product: some of these end finishes are highly-engineered, precision connections that represent significant costs and commercial value. The diagram on page 3 shows the difference between a "plain end" finish (the drawing on top) and different types of threaded and coupled welded OCTG. Pages 4-6 of the Exhibit contain pictures that demonstrate these differences on actual tubular products. Also, at this point I would like to call to the Panel's attention to this sample of a threaded and coupled joint, which demonstrates vividly what appears in the drawings and photographs of ARG-35. The sample shows the ends of two upset and threaded pieces of the 60 mm (2 and 3/8 inches) tubing, and coupling that joins the two pieces. A "plain end" tube would have none of this: no upsetting, no coupling, no threads on the coupling, and therefore none of the costs associated with achieving such precision.

36. It is obvious that the costs and prices for OCTG products differ depending on the particular combination of physical characteristics. It is equally obvious that the USDOC "comparison" ignored the differences, and its explanation that the differences were sufficiently taken into account by separating the products into "tubing" and "casing", and "carbon" and "alloy", is wrong and misleading. Even with OCTG separated into tubing and casing and carbon and alloy, as the Preston Pipe Report does, USDOC ***could not even know which OCTG specific products were included in the average prices.*** Also depending on what is contained in the confidential versions of ARG-18 and ARG-23, USDOC may not even have known what specific products Acindar exported to the United States.

37. These shortcomings highlight additional reasons why the United States has not brought itself into compliance with its obligations. By using a comparison that is so general and unspecified, it has not created a sufficient evidentiary basis to draw any WTO-consistent conclusions about dumping, either in the past or in the future. Also, it conducted its proceeding in a way that it did not even ask the parties for information to improve the comparison. USDOC disclosed the results of the comparison in its final determination, without even attempting to ask the parties for information that might have led to a more meaningful comparison.

38. As should be clear, the USDOC's comparison – which is much of the basis for its determination of "likely past dumping," which in turn is the basis for its inference that dumping will likely continue or recur in the future – is more than rough. It is so general that it cannot be positive evidence of anything, and certainly not "likely dumping" in the future.

39. Even if USDOC's comparison had established past dumping by Acindar – which it did not – USDOC's jump from likely past dumping to likely dumping in the future would not comply with Article 11.3. The USDOC merely presumed that "likely past dumping" is sufficient to show likely dumping in the future. In fact, criticizing Argentina for mentioning other factors to be considered, the United States says "The only relevant facts are that Acindar exported subject OCTG to the United States during the period and was the only Argentine exporter, since the other exporter, Siderca, diverted its shipments to other export markets after the imposition of the order. The size of Acindar's exports or its production mix is irrelevant."[20] This reasoning is directly contrary to the Appellate Body's authoritative rulings on the obligation of Article 11.3. It is clear that even in the case of continued dumping during the period – which, as Argentina has established, rests on a highly flawed analysis – the magnitude of the dumping margin and the volume of dumped imports must be taken into account in the analysis. Indeed, the Appellate Body stated:

> 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

[20] US Second Submission, para. 41.

> 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. 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***.[21]

40. The United States is simply wrong when it says that import volumes are irrelevant if it is established that dumping continued, which, of course, the United States has not done here. Furthermore, in this case, nobody knows what dumping margin is associated with these imports, and the volume of the imports was insignificant.

41. Moreover, an unbiased and objective authority could not have drawn any conclusion about *dumping* in the *past* on the basis of observed import prices, and unadjusted, average prices of groups of products in what was determined to be the highest price market in the world. Nor can USDOC uphold its determination by saying that it was not finding actual dumping, but rather "likely" dumping. It would indeed be absurd in this case if the Panel permitted the Department's use of the word "likely" – which clearly was intended to account for the prospective, counterfactual aspects of the Article 11.3 determination of what would occur in the *future* – to serve as an excuse for not being able to develop the factual basis about what occurred in the *past.*

42. It is important to distinguish an analysis of likelihood in the future, as a predictive analysis, from an analysis of likelihood about past episodes. Prediction only involves the future, whether an event or action will happen as a result of knowledge or experience. The idea is based on the fact of a lack of certainty about the future, and this is the core of Article 11.3. But there is no need to predict past events, at least not under the Anti-Dumping Agreement. Either dumping existed, or it did not, or one does not know. While the United States can attempt to concoct a multitude of theories, the record simply does not support any of its theories, and, most importantly, there is no evidence that dumping had continued during the sunset review period in this case. On these two key points – the "likely past dumping" and the inference of likely continued dumping in the future – the Department failed to establish a sufficient factual basis, and did not reach a reasoned conclusion.¨

43. The USDOC did no better in its assessment of Acindar's financial statements. In its Section 129 determination, the USDOC concluded that the loss shown on Acindar's financial statements indicates that OCTG was sold at dumped prices. The finding does not withstand scrutiny. USDOC has taken Acindar's overall results notwithstanding the fact that Acindar's OCTG production never accounted for more than one-half of one per cent of its production. No valid conclusion *regarding OCTG* can be drawn from Acindar's financial statements, and especially not one based on USDOC's superficial analysis.

44. Independently, the US position regarding Acindar's financial statements continues to evolve through the US written submissions to this Panel. When Argentina pointed out in its written submissions before this Panel that USDOC overlooked the fact that financial statement actually showed that Acindar's pipe and tube division was profitable, *the United States completely contradicts the position it took in the Section 129 Determination.* The United States now embraces the profitability of Acindar's OCTG production, stating that "the fact that its tube and structural division, of which OCTG is included, was profitable supports the conclusion that Acindar will continue to rely on this division to improve its overall situation, so the statement about using the export market to stabilize its situation during periods of slowdown is supported by the profitable sales of the pipes division."[22]

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[21] Appellate Body Report, *US – Corrosion Resistant Carbon Steel Sunset Review*, para. 177.
[22] US Second Submission, para. 43.

45. There are obvious problems with the statement. First, it was not the position taken in the Section 129 Determination, where USDOC emphasized the Acindar losses. The latest explanation that Acindar would use the profitable OCTG exports to stabilize the company is nothing more that a post hoc rationalization.

46. The "stabilization" theory is illogical. How could exports of a product accounting for 0.5 per cent of a company's production stabilize the overall financial situation? It is impossible and it cannot be accepted as the basis for a WTO-consistent decision.

47. Finally, there is no basis for USDOC to have disregarded evidence that the OCTG market was beginning to improve at the end of the sunset period. As this Panel will remember, the USITC had already made a similar finding, and had concluded in the same sunset review that the forecasts for the industry were positive and that the US industry was not currently vulnerable.[23] In the Section 129 proceeding, Siderca provided its April – June 2000 financial statement to the USDOC as evidence of the turnaround in the sector. In its Second Written Submission, the United States tried to justify ignoring the company's April – June 2000 quarterly statement on the basis that it is a quarterly, unaudited statement. Of course, the narrative portions of financial statements are not "audited;" they are the management's description to shareholders of the market trends affecting their investments.

48. Objectively, they are highly credible, probative evidence. The United States also misses the point that the full year financial statements ending 31 March 2000 also discusses the turnaround. Argentina refers the Panel to Exhibit ARG-36 (Excerpt from Siderca's Financial Statement For Fiscal Year Ending 31 March 2000), which the USDOC had as part of the record of the Section 129 Determination. The section entitled "Outlook," on the last page of Exhibit 36, states that the recovery had already started:

> The recovery in crude prices and the good level of gas prices will influence a steady recovery in the oil and steel markets. This outlook, seen in the context of the introduction of new installations and significant improvements in costs at operating level, leads to an optimistic outlook for the coming year.

In fact, the company's April – June 2000 quarterly statement – which the United States argues is unaudited and therefore not probative – refers to the 31 March 2000 statement, again confirming that the recovery was underway:

> **As mentioned in the summary information report at 31 March 2000**, recovery in crude prices and the good level of gas prices have pointed to a sustained recovery in the oil and steel markets. This was reflected in the increase in sales, mainly exports, which, together with significant cost improvements achieved at operating level, enable optimism regarding the recovery of profit levels during the year.[24]

49. The USDOC's efforts to undermine the credibility of this objectively probative evidence is even less persuasive when compared to the quality of evidence that USDOC used to establish "likely past dumping" and the likelihood of continuation or recurrence of dumping upon expiry.

50. In conclusion, USDOC has not provided a sufficient factual basis for its findings that: a) "dumping" had likely occurred during the sunset period of review; b) dumping was likely to continue upon expiry; c) Acindar's financial statements showed that Acindar would likely dump in the future; and d) OCTG prevailing market conditions were not likely to improve in the near future.

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[23] *See* Panel Report, paras. 7.308-7.311.

[24] *See* Siderca's 30 November 2005 Response (ARG-15) at Attachment 1, page 9.

Furthermore, regarding points c) and d) the record included positive evidence to the contrary, which USDOC ignored.

2. Siderca

51. The United States reaffirms that the USDOC made no findings in the Section 129 Determination regarding Siderca.[25] The insistence by the United States on this point should be an issue of concern for the Panel.

52. It is undisputed that Siderca is the principal Argentine OCTG producer, the only company ever investigated during the sunset period, and the only company for which a dumping margin (the margin from the original investigation) was calculated. USDOC simply could not find any evidence that Siderca was likely to dump if the order were revoked. In fact, Siderca provided information that showed that: 1) the company achieved production efficiencies that made it a low-cost producer; 2) it had successfully diversified its markets throughout the sunset review period; 3) it had not been accused of dumping in any other markets; and 4) it had chosen to avoid the US market for business reasons unrelated to its presumed inability to ship without dumping. An objective examination of these facts would require an assessment of the probative value of this evidence, and an explanation of how the evidence relates to the likelihood of dumping in the event of expiry. Instead, the United States seeks to justify its determination on the basis that USDOC made no findings with respect to Siderca.

53. The United States also asserts that "Siderca did not provide Commerce with actual costs for the period."[26] This statement is incorrect. As Argentina explained in its Second Submission, Siderca provided actual cost data for the 1995-2000 period. Argentina refers the Panel to paragraph 64, footnote 63, of Argentina's Second Submission.

54. As Argentina described in its written submissions, USDOC's treatment of Siderca's information demonstrates that USDOC did not conduct an unbiased assessment of the facts. Now that Argentina and the Panel have received a copy of ARG-21, the Panel can see for itself the lack of objectivity that was required for the USDOC to reach the conclusion that Siderca's cost information was "inconsistent" and "counter-intuitive." I would like to ask you to turn your attention once again to the Exhibits distributed today, this time to ARG-37 (Confidential Version of ARG-21). This is an excerpt (the first, second, and last page) from the confidential version of ARG-21, to which we have added notations to facilitate our discussion today. The details of what this Exhibit shows already have been explained in paragraphs 76-85 of Argentina's First Written Submission. But, now we can see it clearly with the actual document.

55. As can be observed by the bracketed information on the first page in the portion of the Exhibit marked with an arrow, USDOC was troubled by the fact that "Siderca has reported higher costs for carbon casing than for alloy casing," and that USDOC was "convinced" that this was wrong. In fact, we can see from pages 2 and 3 of the ARG-37 that Siderca ***did not*** report the costs in the manner DOC alleged. In fact, the data reported by Siderca, in the 10 categories requested by the USDOC in its questionnaire, showed that the alloy product was almost always higher in cost than the carbon product. Looking at the second page of the ARG-37, which corresponds to the 1995/96 costs, and looking specifically at the columns labelled "Adjusted TCOM" and "Total COP,"[27] item 3 exceeds item 1, item 4 exceeds item 2, item 7 exceeds item 5, and item 8 exceeds item 6. Thus, Siderca's reported costs were consistent with USDOC's expectation, and that remained so even after USDOC adjusted the costs for certain technical adjustments. This can also be seen on page 3 of ARG-37,

[25] *See* US Second Submission, paras. 2, 44, 74, 82.
[26] US Second Submission, para. 46.
[27] TCOM means "total cost of manufacturing. TCOP means "total cost of production."

which summarizes the data for all years in the 10 categories reported by Siderca, and with the technical adjustments made by DOC. There is only one exception relating to carbon and alloy casing in the year 2000; in all other cases, Siderca reported costs for the alloy product that were higher than the costs reported for the carbon product.

56. But, the mischief occurs through the averaging done by USDOC. Returning to page 2 of ARG-37, we can see in the box drawn on the right side of the chart that USDOC averaged together the costs associated with the plain end and the threaded and coupled product of each category, and then compared the averages. In other words, they created a larger, more general category including both plain end and products with special end finishes, compared the costs of the averaged categories, ***and then made conclusions about the cost effect of producing an alloy or carbon product.*** Only then does the data fit their theory.

57. I would ask the panellists to remember the demonstration in ARG-34 and ARG-35 a few moments ago. We observed that OCTG can have many highly-engineered, precision end finishes, or it can have no end finish and simply be sold "plain end." We also observed that a major OCTG producer such as US Steel directed its customers to "deduct" $250 per ton if it wanted a plain end product, an amount that reflects not only the difference in commercial value of the two end finishes, but, we can infer, some cost difference. In fact, Siderca's information shows the obvious: the threaded and coupled end finish is always more expensive than the plain end product (compare the average costs for 2 to 1, 4 to 3, 6 to 5, and 8 to 7 on the third page of ARG-37). There can be no doubt that USDOC's decision to average the costs of the different end finishes ***distorted and even eliminated*** the very cost relationship Siderca consistently reported and that USDOC purportedly was seeking to confirm: that the cost of producing a carbon product is normally lower than the cost of producing an alloy product.

58. The United States denies that USDOC has manipulated the data or has in any way acted with a lack of objectivity. But its explanation raises more questions than it answers. At paragraph 50 of the US Second Written Submission, the United States explains that "Commerce grouped those items in that manner because the available public information grouped the products in that manner." In other words, USDOC took the more specific information provided by Siderca and made it less precise because the information that USDOC chose to use as its benchmark (the Preston Pipe information) was less precise. What was important to USDOC was that the data be expressed in a certain manner, even if that meant that any probative value of the resulting comparison was completely lost. In fact, the comparisons cannot result in any meaningful conclusions, and cannot be considered to be the product of reasoned decision-making.

59. As pointed out in Argentina's First Written Submission at paragraphs 83 – 85, the analysis in ARG-21 and the conclusion drawn from that analysis demonstrates: 1) a lack of objectivity; 2) a failure by USDOC to properly establish the facts necessary to reach reasoned conclusions (including asking follow up questions to Siderca if it had any doubts about the information); and 3) the failure to consider information tending to show that Siderca had competitive costs, and that it was not likely to sell OCTG at dumped prices.

60. In conclusion, USDOC's analysis of the two Argentine exporters in the Section 129 Determination shows that the USDOC has not remedied the violations found by this Panel. In fact, the USDOC followed the same methodology, this time inferring "likely past dumping", from which it further inferred that dumping would be likely to continue or recur upon expiry. Rather than clarifying the evidentiary bases for these inferences, the USDOC changed the standard regarding dumping in the past, thereby increasing the level of speculation. This Panel should make the same finding that it made before: the facts relied on by the United States "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."

C. THE INFERENCE OF LIKELIHOOD BASED ON THE IMPORT VOLUME FINDINGS

61. Let us now turn to the third and final aspect of the Section 129 Determination that we will discuss today: the inference that the USDOC draws from the decrease in volume. As an initial, but important point, the Panel must reject any attempt by the United States to insulate portions of the USDOC Section 129 Determination from the Panel's review of the US measures taken to comply with the rulings and recommendations of the DSB in this case.

62. In its Second Submission, the United States once again contends that "Argentina has not demonstrated that the volume finding is a measure taken to comply."[28] The reason for this US argument is obvious – the US reliance on the volume decline without any analysis to justify such reliance is directly contrary to US WTO obligations, and the interpretation of Article 11.3 by the Appellate Body that a case-specific analysis of the reasons for a volume decline will always be necessary.[29]

63. While Argentina recognizes why the US seeks to place the volume finding beyond the reach of this Panel, there is no basis for the US position. First, the Section 129 Determination is unquestionably a "measure taken to comply" for the purposes of DSU Article 21.5. Second, the USDOC specifically relied on the inference of likelihood of dumping arising from its findings on import volumes from the original sunset review as a basis for the Section 129 Determination. Therefore, the findings on volume are an integral part of the "measures taken to comply" for the purposes of Article 21.5.

64. The USDOC Section 129 Determination is one of the measures taken to comply by the United States in response to this Panel's finding that the USDOC's 2000 likelihood of dumping determination was inconsistent with US WTO obligations. One of the principal bases for the US determination is the USDOC's inference that dumping would be likely to continue or recur based on the post-order decline in OCTG imports to the United States. The USDOC Section 129 Determination states on the first page:

> [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.

65. At page 11, the USDOC Section 129 Determination states:

> 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.

66. Each of these quotations from the Section 129 Determination demonstrate unequivocally that USDOC's inference based on the volume decline is part of the Section 129 Determination. Thus, the US argument that Argentina "fails to explain how Commerce 'relied' on the volume finding" for the

[28] US Second Submission, para. 28; *see also* US First Submission, para. 34.
[29] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 177.

purposes of the US measure taken to comply is contradicted by the very terms of the Section 129 Determination – the US "measure taken to comply."[30] Any possible doubt on this issue is removed by the USDOC's own declarations in the Section 129 Determination that it "relied on our previous finding regarding the volume of imports."[31]

67. In addition, accepting the US argument – that the findings on volume are not part of the "measures taken to comply" – is inconsistent with two important principles established by the jurisprudence. First, it is not up to the implementing party to decide the scope of jurisdiction of an Article 21.5 panel. After having stated expressly in its implementing measure that it relied on its prior findings on volume, the United States cannot now declare that this portion of the Section 129 Determination is somehow excluded from the scope of "measures taken to comply." To permit this would allow the United States to determine unilaterally which parts of the measures taken to comply can be examined by an Article 21.5 panel, which, of course, it is not permitted to do.

68. Second, if the US position on this issue were to prevail, the Panel would be impaired in its ability to determine the WTO-consistency of the US implementing measures, as based on Argentina's panel request. The USDOC did not simply confirm its "original consideration" of the finding on volume. Rather, it *relied on this finding for the separate and independent purpose of its implementing measure*, i.e., the Section 129 Determination. Instead of indicating that a finding in the past "remained unaffected", the USDOC relied on this finding as one of the two bases for its implementing measure.

69. The US reliance on EC – Bed Linen (Art. 21.5 – India) is misplaced. In United States – Investigation of the International Trade Commission in Softwood Lumber from Canada, Recourse to Article 21.5, the Appellate Body clarified that the scope of proceedings under Article 21.5 may be limited by the scope of the original proceedings:

> For example, a party cannot make the same claim of inconsistency against the same measure (or component of a measure) in an Article 21.5 proceeding if the original panel and Appellate Body found the measure to be consistent with the obligation at issue… or if the original panel found that the complaining party had not made out its claim with respect to the measure (or component of a measure)…. Similarly, a party may not , in proceedings under Article 21.5 of the DSU, seek to have the Appellate Body "revisit the original panel report" when that report was not appealed.[32]

70. None of the three scenarios identified by the Appellate Body apply here. There was no finding that Argentina failed to make out a *prima facie* case, and the issue has never been adjudicated in the first instance, unlike the first and third scenarios identified by the Appellate Body and unlike the *EC – Bed-linen* case. In the present case, this Panel decided to exercise judicial economy and not to make any finding regarding this point so it is simply wrong to state that the issue has been decided.

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[30] US Second Submission, para. 29.

[31] USDOC Section 129 Determination at 6 (ARG-16) ("In making our likelihood determination, *we also relied 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*….") (emphasis added); see also USDOC Section 129 Determination at 11 ("Based upon this information and argument, *as well as findings on import volumes during 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.") (emphasis added).

[32] Appellate Body Report, *US – Lumber ITC Investigation (Article 21.5 – Canada)*, para. 102, n. 150 (citations omitted).

71. Argentina asks that the Panel find that the USDOC's reliance on the decreased volume in making its Section 129 determination violates Article 11.3. As explained in Argentina's written submissions, the Appellate Body has clarified in the context of its analysis of the SPB that the authorities must investigate the reasons for the volume decline, and cannot simply presume that it is an indication that the company cannot ship without dumping. The USDOC attempted no such analysis in this case.

III. ARTICLE 6 VIOLATIONS

72. At the outset, Argentina wants to emphasize that our Article 6 claims are inseparably connected with our substantive claim under Article 11.3. As the Appellate Body ruled in *US – Corrosion-Resistant Steel Sunset Review*, Article 11.3 "envisages a process combining *both* investigatory and adjudicatory aspects."[33] The "investigatory aspect" of the Article 11.3 determination requires full compliance with the procedural obligations of Article 6. As the Appellate Body has stated, 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."[34] The "process" of reconsideration and examination requires compliance with Article 6. Any suggestion to the contrary would render a nullity the unambiguous requirement of Article 11.4 that Article 6 applies to Article 11.3 reviews.

73. Thus, the Article 6 claims that have been raised by Argentina are not simply procedural in nature. Rather, the failure of the United States to comply with its Article 6 obligations demonstrates that the United States remains in breach of its substantive obligations under Article 11.3.

74. The US reference to a supposed "avalanche" of claims would seem to suggest that breaches of the procedural violations of Article 6 are somehow trivial.[35] Incredibly, the United States suggested that this Panel should not "indulge" Argentina's requests for a finding of such violations.[36] Yet the Appellate Body has taken a very different approach to that advocated by the United States. As the Appellate Body stated in *EC – Tube or Pipe Fittings:*

> [W]e wish to underscore the importance of the obligations contained in Article 6 of the *Anti-Dumping Agreement*. This Article "establishes a framework of procedural and due process obligations". Its provisions "set out evidentiary rules that apply *throughout* the course of the anti-dumping investigation, and provide also for due process rights that are enjoyed by 'interested parties' *throughout* such an investigation".[37]

75. The assertion by Argentina of such due process rights is thus hardly something to be "indulged." Rather, the violation of these rights will irremediably taint the determination of the investigating authority, as it did in the present case.

76. As demonstrated in the previous portion, the conduct of the Section 129 determination suffered from substantive problems caused, in part, by the violations of Article 6. If the Department had disclosed the essential facts to the parties, it would not have had to rely on the superficial

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

[34] *Id*.

[35] US Second Submission, para. 10.

[36] US Second Submission, para. 10.

[37] 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, DSR 2003:VI, 2613, para. 138. Original emphasis.

comparison that its at the heart of its "likely past dumping" finding. If the USDOC had asked Siderca about the alleged "inconsistencies" in its cost data, rather than assessing the inconsistencies based on "intuition,"[38] it might have found the data to be probative. In both cases, the Argentine exporters did not learn of the alleged deficiencies until the final determination, where all doubts were resolved against the exporters. These are not trivial violations, but rather demonstrate the USDOC's failure to conduct the type of review required by Article 11.3.

IV. THE WAIVER PROVISIONS

77. We recall that the Appellate Body found that as a result of the operation of the waiver provisions, certain order-wide likelihood determinations made by the USDOC will be based on "statutorily-mandated *assumptions* about a company's likelihood of dumping."[39] In the view of the Appellate Body, this result was inconsistent with the obligation of an investigating authority under Article 11.3 to arrive at a reasoned conclusion on the basis of positive evidence.[40]

78. This WTO-inconsistent provision remains in force. Despite the authoritative ruling of the DSB, this provision of the Tariff Act has been neither repealed nor amended.

79. The US defence of this failure to implement hinges on the flawed assumption that an affirmative statement made by a respondent party that it is likely to dump will always have strong probative value – in fact, it will be determinative. In its Second Written Submission, the United States dismisses the notion that other parties, for example, importers, could file statements that they will not import dumped merchandise, reasoning that "the probative value of such a statement ***could not possibly outweigh the exporter's own statement*** that it is likely to dump."[41] Thus, in the view of the United States, nothing could be more probative of likely dumping than the admission by an exporter that it is likely to dump.

80. The United States has evidently taken this position because it has to do so in order to argue that it has brought itself into compliance. The Tariff Act, which the United States chose not to modify, ***requires*** a company-specific determination of likely dumping if a company waives its participation. Once the waiver provision of the statute is triggered, the statute requires a finding that the exporter is likely to dump. In the case of an affirmative waiver, the exporter's "confession" that is now required by the revised regulation, must be correct in all cases; otherwise, the United States will not have achieved compliance, because its statute would require an affirmative likelihood finding even if there is competing evidence in a particular case.

81. The problem for the United States is that "confessions" are not always correct, and they are not always the most probative evidence. When there is competing evidence, the authority has the obligation to weigh the evidence and make a reasoned conclusion as to which evidence is most probative. The unrevised statute ***permits no weighing of the evidence***; it mandates a finding that the company is likely to dump in the event of revocation. As the Appellate Body has already observed, a mandated finding with respect to one exporter necessarily affects the country-wide determination.[42] The waiver provision continues to prejudge the result, and the statutorily-mandated assumptions pre-empt that reasoned weighing of evidence that the Appellate Body has made clear is part of the "investigatory aspect" of the Article 11.3 process.

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[38] *See* USDOC Section 129 Determination at 8 (ARG-16).

[39] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 234. Original emphasis.

[40] *Id*.

[41] US Second Submission, footnote 9. Emphasis added..

[42] Appellate Body Report, para. 234.

82. The United States claims that "Argentina has failed to explain how a respondent's statement that it is likely to dump would not constitute 'positive' evidence."[43] The issue is not whether the respondent's statement is "positive evidence." The issue is that, under the statute and under the explanations provided by the United States, it is statutorily deemed to be the **most probative evidence**, and no consideration of other evidence is permitted.

83. Finally, although the United States asserts that the waiver provision will be triggered only by an affirmative waiver, the statute is clear that when a party "elects not to participate" in a USDOC sunset review, the USDOC shall conclude that dumping is likely for that company. This is so whether the company "elects not to participate" by filing an affirmative waiver or simply decides not to participate. In such a case, the unambiguous requirements of the statute cannot be overridden by USDOC's modification of the regulation so that the statutory mandate becomes less broad. Under US law, USDOC cannot contravene the clear intent of Congress as expressed in the statute (which intent mandates a company-specific likelihood determination for any company that elects not to participate in a USDOC sunset review), by attempting to limit the scope of the statute to include only a subclass of parties that "elect not to participate" in sunset reviews (i.e., those that file affirmative statements of waiver).

84. Accordingly, the United States remains in breach of its Article 11.3 obligations.

V. SUGGESTION FROM THE PANEL THAT THE UNITED STATES TERMINATE THE MEASURE

85. Mr. Chairman, Argentina renews its request that the Panel make a suggestion under DSU Article 19.1 that the United States revoke its WTO-inconsistent order.

86. Earlier this year, in the context of an Article 21.5 proceeding, the Appellate Body strongly cautioned against what it called the "never-ending cycle" of dispute settlement proceedings and "inordinate delays in the implementation of recommendations and ruling of the DSB."[44] Such a concern is only magnified when the issue relates to compliance with the time-bound provision of Article 11.3.

87. In response to Argentina's request for a suggestion, the United States invoked paragraph 187 of the decision of the Appellate Body in *US – OCTG from Mexico*. It is important to note carefully what the Appellate Body actually said in that paragraph.[45] It provides no assistance to the United States at this stage in the dispute. First, and contrary to the position of the United States, the Appellate Body referred to the "fact" that Article 11.3 sets a temporal limit for termination of an anti-dumping duty, in the absence of a review leading to a WTO-consistent determination under that Article for its continuation. Clearly, the Appellate Body does not share the view that the *only* temporal requirement of Article 11.3 is the timely *initiation* of the review.

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[43] US Second Submission, footnote 10.

[44] 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 on 14 March 2006, para. 86.

[45] The Appellate Body stated that:

> 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. The mere fact that Article 11.3 sets a temporal limit for termination of an anti-dumping duty, in the absence of a review leading to a WTO-consistent determination under that Article for its continuation, does not affect the other provisions of the DSU governing the implementation of the recommendations and rulings of the DSB, including, *inter alia*, the means of implementation and the reasonable period of time accorded to the implementing Member for implementation.

88. The Appellate Body also stated, as the United States has emphasized, that this did not affect the other provisions of the DSU governing the implementation of the recommendations and rulings of the DSB. These DSU rights include, most notably, the right of the implementing Member to an RPT, and the right of the Member to chose the means of implementation.

89. In the present case, however, the United States has *already exercised* its right to an RPT. The RPT has expired. The United States has also chosen the "means of implementation." Thus, the part of paragraph 187 of the Appellate Body's Report that referred to DSU rights no longer applies, as the DSU rights of the United States are now spent. What is left? The obligation under Article 11.3 that the United States immediately revoke the illegal order, in the absence of a WTO-consistent determination.

90. A suggestion would help to bring additional legal clarity to this dispute, and to avoid the spectre of the United States remaining in breach of its Article 11.3 obligations long after the time for termination of the order.

91. DSU Article 3.7 provides that the "first objective" of the dispute settlement mechanism is usually to secure the withdrawal of the WTO-inconsistent measures. Given the long history of US non-compliance in this dispute, Argentina asks simply that the Panel exercise its discretion to make a suggestion in favour of the "first objective" of WTO dispute settlement.

VI. CONCLUSIONS

92. Mr. Chairman, members of the Panel: Strictly speaking, this Article 21.5 compliance panel has a narrow mandate. It needs to determine only whether the United States has complied with the DSB rulings in the present case. But, accepting the US position would be to render *inutile* the unambiguous rule of Article 11.3 that anti-dumping measures cannot continue indefinitely, but must expire after five years. To allow the United States to "implement" its WTO obligations by merely timely initiating an Article 11.3 review and then continuously developing a factual basis to support a decision would eviscerate one of the key reforms of the Uruguay Round. Argentina is confident that the panel will reject such an interpretation, and render a clear ruling that the United States remains in breach of its obligations.

93. Argentina would refer the Panel to paragraphs 225 and 226 of its First Submission, in which it set forth in particularity its request for findings and a suggestion from the Panel for revocation.

94. I thank you for your time and attention, and I would be pleased to answer any questions you may have.

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

CLOSING ORAL STATEMENT OF ARGENTINA

13 July 2006

I. INTRODUCTION

Mr. Chairman, members of the Panel:

1. Argentina will only make a few points in closing today:

II. THE SECTION 129 DETERMINATION

2. With respect to the Section 129 Determination, the United States observed in its opening statement that Argentina failed to rebut or challenge the fact that Acindar's prices were lower than the prevailing prices in the US market as reported by the Preston Pipe publication. Argentina would note the following.

3. First, Argentina did not know these prices – indeed still does not know the prices – because Argentina is unaware of the content of the confidential versions of ARG-18 and ARG-23. Neither we nor the Panel even knows the extent to which USDOC identified the specific products being used for the comparison. It may be the case that the USDOC compared "plain end" to a mixture of products in the Preston Pipe categories, that also are not identified. Precisely this situation leads us to support the EC's comments on the confidential information issue this morning.

4. Second, even assuming arguendo that Argentina knew the specific prices, the fact that the prices are lower says nothing about whether Acindar was "dumping" (as defined by the Agreement) during the sunset period. Argentina certainly provided ample evidence and argument to fully rebut any notion that the observation of lower prices was probative of whether it was "likely" that Acindar "dumped" during the sunset review period. Argentina explained that there were problems with using the prevailing US market prices and that the USDOC comparison was one not recognized by Article 2 and did not create a reasonable basis for USDOC to infer that Acindar was likely dumping during the period, let alone that it would be likely to dump in the future, consistent with the requirements of Article 11.3.

5. Third, it is not surprising that Acindar's prices were lower than the prevailing US market prices, as the ITC made a finding, reviewed by this Panel, that US OCTG market prices were significantly higher than other world market prices. Given this fact, Acindar certainly could have sold below US prices, but not at dumped prices.

6. Argentina was also surprised to learn yesterday of USDOC's knowledge of the fact that Acindar's market was not a viable market during any year of the sunset review for purposes of establishing normal value for use in a dumping calculation. USDOC never asked that question in the original review or in the Section 129 proceeding. The US disclosure yesterday that it knows this because of a post-sunset review of Acindar contradicts its own statement that it cannot conduct a de novo review, which it interpreted to mean that it had to use information that existed during the sunset review period. Also, what precisely did the USDOC know about Acindar's home market or export markets in 1998, 1999, and 2000. Presumably, information gathered in a subsequent year, and not each year of the sunset review period.

7. In the field of procedural matters, in response to a question yesterday, the United States professes to have paid "meticulous" attention to Argentina's Article 6 claims, but that it has had difficultly in understanding the basis for Argentina's claims of procedural or due process violations. As meticulous as the United States may have been in its consideration of Argentina's procedural rights, Argentina wonders if the failure of the United States to provide to Argentina the essential facts of the Section 129 Determination before issuing it, and only doing so more than a week later at the request of that party's legal counsel, strikes Argentina as a due process problem that ought not to be overlooked. Argentina would refer the Panel to ARG-26, which answers the simple and straight-forward question of whether the Parties had seen the essential facts serving as the basis for the Section 129 Determination before that decision was issued.

III. THE INFERENCE OF LIKELIHOOD BASED ON THE IMPORT VOLUME FINDINGS

8. During the course of this proceeding, Argentina provided extensive argumentation on two points: First, that the volume findings were integral to supporting the Section 129 Determination and, therefore, clearly part of the US measure taken to comply. Second, Argentina demonstrated that USDOC failed to conduct any substantive analysis to determine the reason for the volume decline and, hence, the mere presumption based on volume could not serve as a basis for determining that dumping would be likely.

9. It is telling that the United States chose not to rebut any of Argentina's arguments from its Second Submission. The reason is obvious – there is no analysis of the volume. Argentina invites the Panel to look at pages 1 and 11 of the Section 129 Determination (ARG-16), and then to look at ARG-8, the Issues and Decision Memorandum from USDOC's 2000 sunset review, to see precisely what was incorporated. Given the lack of any analysis on the question of volume, it is easy to understand why the United States seeks to avoid the Panel's scrutiny on this part of its measure taken to comply.

IV. DEVELOPMENT OF NEW FACTUAL BASIS IN 2005 TO SUPPORT 2000 DETERMINATION

10. The United States continues to offer the conclusory statement that Argentina provides no textual support for its argument that USDOC could not develop new evidence in 2005 to support its 2000 determination. Argentina provided textual support. Argentina invites the Panel to review Argentina's written submissions in which it explains the obligations and temporal limitations of Articles 11.3 and 11.4, based on the text – notably the meaning of "review" and "determination" and the fact that the additional duration of the conduct of the sunset review, as provided for in

Article 11.4, is the only additional exception to maintaining the order beyond the five year presumptive date.

11. Articles 11.3 and 11.4 establish the window of opportunity for the administering authority to collect information to establish the evidentiary basis in order to make the substantive determination. Argentina asks again, how can these requirements can be reconciled with the collection of new information by the USDOC five years later in a compliance proceeding in order to support the determination that was made five years earlier?

12. Argentina's position is consistent with paragraph 187 of the Appellate Body's Report in *OCTG from Mexico*. Simply put, the USDOC could have, during the RPT, clarified its 2000 decision (for instance by clarifying why it could infer likely dumping based on the volume decline), on the basis of the evidence developed in the 2000 review. Something that the United States chose not to do. Following the expiration of the RPT, however, in the absence of a WTO-consistent Article 11.3 determination, it should have terminated the measure.

V. SUGGESTION FROM PANEL THAT THE UNITED STATES REVOKE THE ORDER

13. We believe a suggestion is important in this case because of the mandatory rule of termination and the lapse of rights under the DSU (both the RPT and means of implementation). A suggestion would provide needed clarity for this dispute, and to uphold the meaning of the rights and obligations embodied in the Agreement. If the outcome of this proceeding is that the United States remains in non-compliance, and simply tries yet again, Articles 11.3 and 11.4 are rendered inutile. As our US colleague said yesterday, we are all intelligent people. Eventually, USDOC will write a determination that will be technically sound. But, even at this stage, Argentina's right under Article 11.3 will not be respected. Article 11.3 requires termination unless a proper "review" and "determination" is made "at that time." The United States never conducted a proper "review" "at that time" and cannot do so in the future. It is time to enforce the "rule" of Article 11.3.

ANNEX D-2

OPENING ORAL STATEMENT OF THE UNITED STATES

12 July 2006

Page

I. INTRODUCTION

1. Good morning, Mr. Chairman and members of the Panel. Thank you for the opportunity to appear before you today.

2. We will not repeat the arguments we have already made in our submissions. Rather, we will use this statement to highlight a few of the key issues in this dispute. At the outset, the United States recalls that this is a compliance proceeding. The question for this Panel is whether Argentina has proven that the US measures taken to comply are inconsistent with the provisions of the covered agreements cited by Argentina. We will begin by reviewing what the United States did.

3. The Department of Commerce amended its waiver regulations. Specifically, Commerce eliminated the "deemed waiver" provisions and amended the "affirmative waiver" provisions such that a company-specific likelihood determination would be based on an exporter's own statement about its likely future behaviour. Indeed, Commerce went *beyond* the recommendations and rulings by amending the regulations to clarify that interested parties may request hearings in expedited sunset reviews.

4. After amending the regulations, Commerce immediately commenced the Section 129 proceeding, even issuing questionnaires the same day the regulations became effective. Before the parties' submissions were due, Commerce placed additional information on the record – data from Preston Pipe & Tube and importer data for the period of review – thereby providing interested parties with the opportunity to comment on the data. Respondent interested parties provided some, but not all, of the information requested in the questionnaire. In addition, respondent interested parties submitted comments, domestic interested parties submitted reply rebuttal comments, and respondent interested parties subsequently submitted rebuttal on the domestics' rebuttal. Commerce then issued the revised determination.

5. In response, Argentina pursues an expansive number of claims. While the United States does not dispute Argentina's right to bring claims pursuant to Article 21.5, the United States *is* surprised at the nature of some of the claims in this dispute, as well as some of the arguments offered in support thereof. For example, Argentina alleges a violation of Article 6.4 because Commerce did not put background information about Preston Pipe & Tube on the record of the proceeding until the day the

determination was issued.[1] A second example: Argentina advocates a factual proposition that actually *contradicts* the original Panel report, arguing that the statute provides for deemed waivers, even though the Panel expressly found that those waivers were provided by regulation.[2] This disregard for the recommendations and rulings in the original report is emblematic of Argentina's strategy, which eschews a substantive discussion of the recommendations and rulings from the original proceeding – even though this is a *compliance* proceeding, and those recommendations and rulings form the basis for the evaluation of any claim that the United States has not come into compliance. Argentina's approach is not surprising because an examination of the DSB's recommendations and rulings confirms that the United States has implemented those recommendations and rulings.

II. THE WAIVER PROVISIONS

6. The United States recalls that the original panel and the Appellate Body found that the "waiver" provisions were inconsistent with Article 11.3 because Commerce's order-wide likelihood determination would be based, at least in part, on "assumptions" about a company's likelihood of dumping.[3] Commerce amended its sunset regulations to eliminate the possibility that its order-wide likelihood determinations would be based on "assumptions," and it did so in two ways.

7. First, Commerce eliminated the so-called "deemed waiver" provision. This means that, by law, Commerce will not "assume" likelihood for a company that fails to participate in a sunset review.

8. Second, Commerce revised the so-called "affirmative waiver" provision so that a respondent interested party has the option to "waive" participation in the sunset review, but an integral part of that waiver is that the party affirmatively states that it would be likely to dump if the order were revoked. This ensures that Commerce no longer "assumes" likelihood of dumping for a company electing not to participate in a sunset review. Instead, the company itself states that it is likely to dump. It is worth recalling that, as the United States has previously explained, the purpose of the "affirmative waiver" procedure is to permit respondent interested parties to avoid the expense of participating in the Commerce side of a sunset review when they only wish to contest the likelihood of continuation or recurrence of injury before the US International Trade Commission.[4] The Antidumping Agreement does not require the United States to provide this option. Moreover, we note that the filing of a statement of waiver is, itself, optional. A party could also choose not to participate in the sunset review by simply not responding to the notice of initiation; Commerce no longer considers such inaction a "waiver."

9. Argentina argues that the United States was also obligated to amend the statute, rather than just the regulations, in order to comply with the DSB's recommendations and rulings. Argentina is mistaken. The United States recalls that the problem with the "waiver provisions" – that is, the statute and the regulations collectively – was that they resulted in a company-specific determination based on an "assumption." That "assumption" arose because the regulations were written to provide for such an assumption. The regulations are now written so that no such assumption is permitted: a company-specific determination would be based on the company's own statement of its likely future behaviour. Therefore, the regulations now make it clear that, when read together with the statute, no such assumption exists, and the United States has implemented the DSB's recommendations and rulings.

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[1] *See* US Second Submission, para. 7.

[2] *See* US Second Submission, paras. 16-17.

[3] *See, e.g.*, Panel Report, para. 7.99; Appellate Body Report, para. 234.

[4] *See, e.g.*, US First Written Submission (Panel), para. 31 (7 November 2003).

10. Argentina also suggests that the amended sunset regulations are WTO-inconsistent because they preclude Commerce from arriving at a "reasoned conclusion" on the basis of "positive evidence." Argentina has still failed to explain why the exporter's own statement that it is likely to dump is not "positive evidence;" nor has Argentina explained why such a statement does not provide the basis for drawing a "reasoned conclusion." **As the Appellate Body has noted, the exporter is in the best position to have information as to its likely future pricing behaviour. If the exporter states that it is likely to dump, then it is reasonable for the investigating authority to conclude that the exporter is likely to dump. Argentina apparently would like this Panel to find that a company can go on the record and affirmatively state that it is likely to dump, but then a Member can retract that statement by bringing a WTO dispute.**

III. THE SECTION 129 DETERMINATION

11. Argentina advances both procedural and substantive arguments about the Section 129 Determination – neither is persuasive.

12. As noted above, Commerce placed information on the record in ample time for respondent interested parties to submit comments and rebuttals. Yet Argentina contends that the United States failed to abide by its obligations under various provisions of Article 6. In doing so, Argentina seeks to read into those provisions obligations to take specific actions that are simply not provided for in Article 6. What matters for the purposes of complying with Article 6 is whether the investigating authority met the "substantive obligations" at issue, not whether those obligations were met in a "particular form."[5] As the United States has demonstrated in its submissions, Commerce met its substantive obligations under Article 6.

13. Argentina misrepresents the US position, stating that the United States believes it did not have enough time to comply with its Article 6 obligations.[6] To the contrary, the United States *did* comply with its Article 6 obligations. The United States simply pointed out that the period of time available for conducting a particular determination provides context for evaluating whether a Member has met the substantive obligations in Article 6. For example, what is "timely" and "practicable" under Article 6.4 may depend at least in part on the amount of time the investigating authority has to conduct the proceeding in question.

14. Argentina also contends that the Section 129 Determination was flawed, criticizing Commerce for examining whether dumping "likely" occurred over the life of the order. According to Argentina, Article 11.3 prohibits such an approach. Yet, as the Appellate Body has recognized, Article 11.3 does not specify what factors must be examined, nor does it provide any particular methodology for examining whether dumping is likely to continue or recur if the order is revoked. Commerce examined whether it was likely that dumping had continued over the life of the order because past behaviour can be probative of future behaviour. The totality of information on the record supported the conclusion that Acindar had likely dumped during the life of the order.

15. Argentina seems to be arguing that Commerce erred by not calculating a dumping margin.[7] However, the Appellate Body has made clear that the "silence in the text of Article 11.3 suggests that no obligation is imposed on investigating authorities to calculate or rely on dumping margins in a sunset review."[8] This is because of the "different nature and purpose of original investigations . . . and sunset reviews."[9] Dumping margins "may well be relevant to, but they will not necessarily be

[5] *See* US Second Submission, para. 56 (citing *Guatemala – Cement II (Panel)*, para. 8.119).

[6] Argentina Second Submission, para. 3.

[7] Argentina Second Submission, para. 43.

[8] *United States – Corrosion Resistant Steel Sunset Review (AB)*, para. 123.

[9] *United States – Corrosion Resistant Steel Sunset Review (AB)*, para. 124.

conclusive of"[10] likelihood of dumping if the order were revoked. The Appellate Body has recognized that a sunset review involves a forward-looking analysis, and such an analysis – in contrast to an investigation – does not require the specific calculation of a number, but rather an examination of what is likely to occur in the future. Argentina has yet to impugn the logic that past behaviour can be indicative of future behaviour. Indeed, Argentina does not even argue that Acindar was *not* dumping over the life of the order. Rather, Argentina's position boils down to this: because Siderca stopped shipping during the period of review and Acindar did not participate in the original sunset review, Commerce is prevented from concluding that dumping is likely to continue or recur if the order is revoked. This approach is simply license for respondent interested parties to manipulate proceedings to achieve a particular result, regardless of whether that result is the correct one.

16. In this vein, Argentina also criticizes the information on the record of the proceeding. It is worth recalling that the paucity of evidence on the record of the original sunset review was attributable to respondent interested parties. It is well-established that the *exporter* has access to the best information as to its likely future pricing behaviour. When the exporter declines to provide that information, the exporter must accept responsibility for the nature of the information on the record. In any event, having secured for its companies the opportunity to place information on the record a *second* time, Argentina now argues that Commerce was not allowed to collect that information. Notably, Argentina fails to provide textual support for its analysis, and, while acknowledging our point, nevertheless continues to neglect to identify any textual support for its view.

17. The United States is not aware of another instance in which a Member has argued that there is a prohibition on the collection of new information to come into compliance with DSB recommendations and rulings. Indeed, this argument is little more than a distraction. The United States notes that Argentina does not contend that Commerce's ultimate conclusion about Acindar's likely dumping was *wrong.* Nor does Argentina dispute that Acindar's prices were *lower* than those in the US market during the period of review. Instead, Argentina advances a series of procedural arguments – whether Commerce could look at new information and how Commerce looked at that information – in an effort to obscure what is plain: the evidence on the record supports the conclusion that Acindar likely dumped over the life of the order and that Acindar *would likely dump again* if the order were revoked.

18. Argentina also complains that Commerce should have adjusted the US average price data to compare it better with Acindar's sales price from the importer data. Commerce had to use the price data in question because no such usable data were provided by the respondents. Regardless, Argentina is unable to even explain how Commerce could have made such adjustments given that the data from Preston Pipe & Tube was only available in an aggregate form, nor does Argentina even suggest that, were such adjustments made, Acindar's prices would have exceeded those of the US market.

IV. CONCLUSION

19. In sum, Commerce's Section 129 Determination and its amended sunset regulations comply fully with the recommendations and rulings of the DSB. Argentina's claims to the contrary should be rejected.

20. Thank you, and we look forward to answering any questions you may have.

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[10] *United States – Corrosion Resistant Steel Sunset Review (AB)*, para. 124.

CLOSING ORAL STATEMENT OF THE UNITED STATES

13 July 2006

1. The United States recalls that the Appellate Body report in this dispute explains the relevance of a company-specific finding to an Article 11.3 claim, where the Article 11.3 determination is made on an order-wide basis: the question is whether such a company-specific finding tainted the order-wide determination.[1] Therefore, Argentina must demonstrate that any company-specific finding in this dispute tainted the order-wide determination.

2. The United States also recalls that it is under no obligation to make a company-specific finding. Commerce declined to make such a finding regarding Siderca. Therefore, under the analytical framework set out by the Appellate Body, Commerce cannot have acted inconsistently with Article 11.3 by not making *any* finding regarding Siderca.

3. With respect to Acindar, the United States recalls that Acindar declined to participate in the original review. According to Argentina, Acindar did not know about the review. However, as the Panel may know, the United States initiates sunset reviews automatically and does so via public notice in the Federal Register. We find it difficult to accept a contention that an exporter shipping merchandise subject to a dumping order was unaware of a sunset review of that order. Moreover, having now a second opportunity to provide information, Acindar failed to provide some of the information requested, even to attempt to do so, as Siderca did.

4. In the fact of these facts, Argentina argues that we could not collect new information to come into compliance. Argentina argues that Articles 11.3 and 11.4 prevent the collection of new information. But those provisions are silent on *how* a Member comes into compliance, and they say nothing about the collection of new information. The United States initiated its review prior to the five-year anniversary of the order and completed that review within 12 months. That the review was later found WTO-inconsistent does not change either of those facts.

5. With regard to Commerce's analysis of Acindar's likely past dumping, we recall that a sunset review is a forward-looking analysis. The calculation of a dumping margin is not required, nor does the absence of dumping necessarily require termination. In this proceeding, we were between those extremes because on exporter stopped shipping and the other began shipping during the period of review and was not subject to administrative review until after the sunset review period. It is clear that these facts alone do not mean that dumping is not likely to continue or recur, because we know that it can, and we know that it has. The question is what factors the investigating authority uses to analyze likelihood. The Appellate Body has said that no methodology is prescribed.

6. Commerce did not calculate a dumping margin, nor could it have done so, as Argentina acknowledges, because the companies did not retain those data. There is nothing wrong with that, but Argentina cannot complain that it is Commerce's fault that the data do not exist. Commerce still had to analyze whether dumping was likely to continue or recur. To make the determination, Commerce analyzed whether it was likely that Acindar had dumped in the past. We do not see that the Appellate Body has found Article 2 to be directly applicable in situations other than those involving the

[1] Appellate Body Report, paras. 231-232.

calculation of a margin.[2] Nevertheless, we consider that Article 2 informs the analysis of likely past dumping, and Article 2 does provide, and did provide, guidance in this redetermination.

7. Finally, we note that Argentina has spent much of these proceedings putting new facts before the Panel, including, for example, the US Steel Price List. We cannot reconcile that approach with Article 17.5(ii) of the Antidumping Agreement. Moreover, Commerce placed the Preston price data on the record on 22 November; if Argentine respondents considered that the US Steel prices were more probative, they were free to do so in any of the four submissions they made – Siderca's 30 November comments, 7 December comments, or 14 December comments, or Acindar's 30 November comments, all put on the record after 22 November.

8. This concludes our closing statement. We thank the Panel, the Secretariat, and the interpreters for their hard work.

[2] *See, United States – Corrosion Resistant (AB)*, para. 124.

ANNEX D-3

THIRD PARTY ORAL STATEMENT OF THE PEOPLE'S REPUBLIC OF CHINA

13 July 2006

1. Mr. Chairman, members of the Panel, it is my great honour to appear before you today to present the views of China as a third party to these proceedings. Since China has made detailed explanations of its understandings in its written submission, it is not necessary for me to repeat them during today's third party session. Instead, I would like to brief China's understandings from the following three points.

2. **The first point regards the concept of "dumping" in the context of Article 11.3 of the Antidumping Agreement (the ADA)**. In the Section 129 Determination, USDOC compared the export price of one of the respondent with the prevailing US market price in reaching its finding of likely dumping in the sunset review period. In china's view, such an approach contradicts with the fundamental concept of "dumping" set forth in Article 2.1 of the ADA. Thus, the improper comparison with the prevailing US market price led to a flawed finding of "likely dumping" which may not meet the requirement of making a reasoned and adequate determination on a sufficient factual basis as required by Article 11.3 of the ADA.

3. **The second point regards the import volume finding in the Section 129 Determination.** In making the Section 129 Determination, the USDOC restated and relied on its previous finding on import volume in the 2001 sunset review. China submits that such reliance seems to be inconsistent with Article 11.3 of the ADA. The USDOC should have conducted a case-specific analysis of the factors behind the decline in import volumes. The failure to do so seems to be a breach of the obligations under Article 11.3 of the ADA.

4. **The third point is about the USDOC's overall consideration of the factual factors and conclusion on likelihood of dumping**.

5. Firstly, in China's view, under Article 11.3 of the ADA, the conclusion on likelihood of continuation or recurrence of dumping is one on future events, or say "a prospective determination". Secondly, as articulated by the Appellate Body, under Article 11.3 of the ADA, the authorities bear the treaty obligations to "arrive at a reasoned conclusion" on the basis of "positive evidence". In China's view, nothing in Article 11.3 provides that such treaty obligations are contingent on the cooperation of the respondents in the investigation. The failure by the respondents to provide necessary information cannot discharge the authorities from such duties. Thirdly, in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body effectively held the view that even if dumping has continued with significant margins and import volumes after the imposition of antidumping measure, such facts might only have some validity in forming an affirmative likelihood conclusion. It seems to China, in the current case, the findings made by the USDOC are far from reaching such a level of certainty. Therefore, it seems difficult to accept that such findings are sufficient factual bases for making an affirmative conclusion on likelihood of dumping.

6. Mr. Chairman, this concludes the statement of China. Thank you very much for your attention.

ANNEX D-4

THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

13 July 2006

Page

1. Mr. Chairman, distinguished Members of the Panel.

2. The EC makes this oral statement because of its systemic interest in the correct interpretation of the GATT 1994, the *Anti-Dumping Agreement* and the Dispute Settlement Understanding.

3. There are four points the EC wishes to make at this stage.

I. THE ARTICLE 11.3 DETERMINATION

4. First, as set out in our written submission, we wish to point out that the measure at issue in the present implementation proceedings, that is, the "measure taken to comply", is and can only be a determination within the meaning of Article 11.3 of the *Anti-Dumping Agreement*. The US, in an apparent attempt to obfuscate that fact, insists on referring to the measure taken to comply as a "Section 129 determination".[1] That may be the correct label in US municipal law; but in WTO law the correct label is : a determination that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury, such as is provided for in Article 11.3 of the *Anti-Dumping Agreement* – or, for short, an Article 11.3 determination.

5. That this is so follows from Article 18.1 of the *Anti-Dumping Agreement*, according to which no specific action against dumping from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by the *Anti-Dumping Agreement*. A "measure taken to comply" within the meaning of Article 21.5 DSU that nevertheless provides for the continued imposition of an anti-dumping duty is still a "specific action against dumping" within the meaning of Article 18.1 of the *Anti-Dumping Agreement*. It must therefore be provided for in and consistent with the *Anti-Dumping Agreement*.[2]

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[1] See, for example, US rebuttal, para 20 and following.

[2] Appellate Body Report, *US-1916 Act*, paras 121 to 126 and 137 : "Article VI, and, in particular, Article VI:2 read in conjunction with the *Anti-Dumping Agreement*, **limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings**. Therefore, the 1916 Act is inconsistent with Article VI:2 and the *Anti-Dumping Agreement* to the extent that it provides for

6. The significance of the use of the correct label in WTO law is that it highlights the basic point that the measure taken to comply must be consistent with all the relevant provisions of the *Anti-Dumping Agreement* – notably Articles 11.3 and the relevant provisions of Article 6 ***in exactly the same way as and to no lesser degree than*** any original sunset review determination.[3]

II. NO VALID HISTORICAL DUMPING DETERMINATION

7. That brings us to the second comment we would like to make today, namely that the Article 11.3 re-determination has no valid historical dumping determination as its foundation.

8. In this respect, it seems to us that a remarkably simple point has become remarkably – and unnecessarily, complicated. The truth, as is often the case, is really quite straightforward, and it consists of four simple steps in the reasoning.

9. First, although a sunset review determination is prospective, it must have as a foundation a valid historical determination of dumping. If there is nothing in the past, there is simply nothing that can continue or recur in the future.[4]

10. Second, in this case, the only past "dumping" determination ever made is the 1.36 per cent from the original proceeding, which the US could not lawfully rely on in the Article 11.3 re-determination, not least because it was calculated using an unlawful zeroing methodology.[5]

11. Third, with respect to Acindar, the US has not made any past determination of dumping. It has merely made a past determination of "likely dumping", which is something different – a point to which we shall return shortly.

12. Fourth, absent any valid past determination of dumping, the Article 11.3 sunset review re-determination cannot be consistent with the *Anti-Dumping Agreement*.

13. Obviously, in reaching this conclusion, it is essential to bear in mind the distinction between two things : a determination that dumping is likely to continue or recur in the *future* (one of the requirements of Article 11.3); and a determination that in the *past* an exporter was "likely" dumping (what the US did in the present case). Clearly, these are not the same. The first, driven by the specific requirements of Article 11.3, is prospective in nature, which explains the use of the word "likely". The second is retrospective in nature and is not provided for anywhere in the *Anti-Dumping Agreement*.[6] Its invention by the US in the present case is deeply troubling.

14. A past determination of a dumping margin must be objectively based on the application of the legal rules provided for in the *Anti-Dumping Agreement* to the facts, duly evidenced, and in accordance with the applicable rules of procedure. The insertion by the US of the word "likely" is

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"specific action against dumping" in the form of civil and criminal proceedings and penalties."; Appellate Body Report, *US-Offset Act ("Byrd Amendment")*, paras 224 to 274, particularly para 265 : "As CDSOA offset payments are not definitive anti-dumping duties, provisional measures or price undertakings, we conclude, in the light of our finding in US-1916 Act, that CDSOA is not "in accordance with the provisions of the GATT 1994, as interpreted by" the *Anti-Dumping Agreement*."; Panel Report, *Mexico-Rice*, paras 7.273 to 7.278 ("… by threatening to impose fines on anyone importing the product subject to an anti-dumping investigation, Article 93V of the Act clearly provides for a specific action against dumping or subsidization which is not provided for in the AD or SCM Agreement.").

[3] See, particularly, US rebuttal, para 23, third sentence.

[4] EC written observations, para 14.

[5] EC written observations, paras 12 to 18.

[6] See para. 5 and footnote 2.

destructive to each of these requirements. It suggests that the legal rules themselves be rendered subjective; it suggests that the precise rules governing which facts and evidence an investigating authority may or must take into account could be rendered ineffective; and it suggests that the proper observance of the applicable rules of procedure might not be determinative. In the opinion of the EC, this fundamental and profound watering down of the standards set by the *Anti-Dumping Agreement* is manifestly unlawful and wholly unacceptable.[7]

15. The US assertion that Article 11.3 "provides no methodology for making a sunset determination"[8] is no valid answer to this point. That may be true regarding the prospective part of the determination. But it nevertheless remains the case that Article 11.3 requires a determination about "continuation or recurrence", both of which terms necessarily include some minimum retrospective element, in the absence of which, no valid determination can be made.

16. For precisely the same reason, the US assertion that Article 11.3 does not "require a Member to make an actual determination of dumping"[9] is besides the point, because that relates, at most, to the question of whether or not any *additional* finding of dumping must be made. It has nothing to do with the entirely different situation in which no valid past dumping determination has been made at all.

17. Similarly, the US assertion that Argentina's position would "enable respondents to manipulate the system by first depriving the investigating authority of information and then asserting that the lack of information prevents the investigating authority from continuing the order" [10] must obviously be rejected. Evidently, the procedures set out in the *Anti-Dumping Agreement* amply provide for the investigating authority to pose the necessary questions and, where appropriate, base its determination on the facts available.

III. ARTICLE 21.5 DSU PROCEEDINGS AND THE PRINCIPLE OF RES JUDICATA

18. The third point on which the EC would like to comment relates to the balance between two rules : on the one hand, the rule that *all* aspects of a measure taken to comply can be subject to review for consistency with the covered agreements in implementation proceedings; and, on the other hand, the principle of *res judicata* – that is, the rule that, once a thing is decided by the court, it should not be the subject of further litigation.[11]

19. There are sound and well-known reasons for each of these rules discussed at length in the case law and in the submissions of the parties, which we do not need to re-iterate. We wish only to observe that, in our view, there are important differences between the situation that arose in *EC –- Bed Linen* and the situation in the present case. In the *EC-Bed Linen* case, India's claim on the non-attribution analysis had been rejected by the original Panel and not pursued on appeal, and the re-determination needed to implement the DSB ruling did not have any impact on and thus did not require any revision of the non-attribution analysis. The question in the Article 21.5 proceeding was whether or not certain issues concerning the non-attribution analysis could be re-litigated in the context of a measure taken to comply relating to findings that concerned separate issues.

20. In the present case, on the other hand, the focus of the judicial review is on one specific determination – that of likelihood of continuance or recurrence of dumping – which has been reached on the basis of a certain number of considerations, taken together. In such circumstances, the EC tends to agree with Argentina that the Article 11.3 re-determination can only have been based on a

[7] Argentina rebuttal, paras 37 to 47.
[8] US rebuttal, para 34.
[9] US rebuttal, para 34.
[10] US rebuttal, paras 34 and 35.
[11] US rebuttal, paras 28 to 33.

consideration of all of these factors, taken together, and that, accordingly, all of those factors necessarily fall within the scope of this Panel's review under Article 21.5 of the DSU.[12]

IV. CONFIDENTIAL INFORMATION

21. Mr. Chairman, Members of the Panel, the final point on which the EC would like to comment today relates to the exchanges between the parties concerning confidential information.[13] On this point, the EC has the following observations.

22. First, the EC observes that the US cannot invoke its domestic law. Its position must be justified under WTO law. The US appears to agree, itself making the assertion that it is not, in fact, invoking its domestic law.

23. With respect to WTO law, in the view of the EC, the term "such information" in Article 6.5 of the *Anti-Dumping Agreement* should not be interpreted as meaning "any information". Rather, it refers back to "information which is by nature confidential" or information "which is provided on a confidential basis by parties to an investigation" and which is, "upon good cause shown" treated as confidential by the authorities. If, as appears to be so in the present case, there is no special or particular "good cause shown", the category of confidential information is indicated in the first sentence of Article 6.5, at least by way of example. In the opinion of the EC, the "significantly adverse effect" referred to in that provision cannot include an unfavourable ruling by a panel or the Appellate Body. Consequently, in the present case, the real issue would appear to be the risk of a "significant competitive advantage to a competitor".

24. Turning to the terms "disclosure" and "disclosed" in Article 6.5, the EC does not understand these to refer to any disclosure as between any two natural persons. Obviously, for example, confidential information could be disclosed between two natural persons working within the same investigating authority. Similarly, the EC does not understand these provisions to preclude disclosure as between two investigating authorities within the same Member, such as USDOC and the ITC in the US. Rather, it appears to the EC that Article 6.5 is rather concerned with ensuring that information is not disclosed by one natural person whose functions are imputable to the Member to another natural person whose functions are imputed to a competitor of the party submitting the information. Once again, this appears to the EC to correspond to the true nature of any potential confidentiality issue in the present case.

25. In short, the EC considers that the US invocation of Article 6.5 of the *Anti-Dumping Agreement* does not provide any valid basis for the US to refuse to provide the information to the *Panel*. Nor do we detect any basis on which the information should not be provided to *Argentina*, consistent with Articles 12.6 and 18.2 of the DSU, and noting that Argentina is not a competitor of the undertakings that have provided the information. Furthermore, in our view, Argentina would be precluded by Article 18.2 DSU and para 3 of the Working Procedures in this case from providing the information to any *competitor* of the undertakings that have provided the information. In most cases, and probably in the present case, the Panel would be able to draft a report that sets out the findings of fact, the applicability of the relevant provisions and the basic rationale behind any findings and recommendations that it makes, consistent with Article 12.7 DSU, without disclosing the confidential information in its report, and consistent with Article 17.7 of the *Anti-Dumping Agreement* and Article 14.1 of the DSU. If this proves impossible, it should in most cases be possible to resolve the conflict by finding that, often with the passage of time, and notwithstanding assertions by the party providing the information, information is no longer in fact confidential. Failing that, the Panel can produce a non-confidential version of its report for non-parties. A similar approach would apply to

[12] Argentina rebuttal, paras 69 to 80 and 81 to 98.
[13] Particularly Argentina letters dated 14 and 28 June 2006; US letters dated 22 and 30 June 2006.

the Appellate Body.[14] The EC therefore disagrees with the US assertion that, absent authorisation from the source of the information, it is precluded by Article 6.5 of the *Anti-Dumping Agreement* from releasing the information to the Panel and Argentina.[15]

26. The US is entitled to agree with Argentina or seek from the Panel *additional* safeguards regarding information disclosed to Argentina, for example limiting the natural persons who may access information; limiting the number of copies or the form in which information may be stored; circumscribing the place in which and the manner in which information may be held; limiting the period of time for which such information may be held; and providing for its destruction once panel and eventually appellate procedures have finished. Footnote 17 of the *Anti-Dumping Agreement* provides context to support that view.

27. However, the US is not entitled to rely on a confidentiality concern such as that apparently arising in this case in order to withhold information and/or agreement to additional procedures *indefinitely*. Eventually, the Panel can and should decide on what additional safeguards, if any, are necessary; require the US to produce the information; and provide the parties with adequate opportunity to exchange argument in relation to the information.

28. The EC agrees with the US that the Panel has a discretion under Article 13 of the DSU, but takes the view that this discretion must be exercised on the basis of sound reasons and that, in the interests of settling the dispute, the Panel should tend to exercise that discretion by requiring the relevant information to be produced.

29. With regard to inferences, the EC takes the view that administrative and judicial determinations invariably generally involve more or less inference, depending on the density of factual information, the legal rules to be applied, and the procedures that have been followed. This is so in the present case, as in any other.

30. With regard to the concept of "adverse" inference, the EC considers that the Panel is not entitled to select and prefer one particular inference over another only because it leads to a result that is less favourable or punitive to one party. However, the Panel is entitled to draw inferences, and it is possible that the result is less favourable to the party refusing to disclose the relevant information than the result that would follow if the information would be disclosed, without that vitiating the Panel's analysis. The US would appear to agree.[16]

31. In this particular case the EC finds it notable that the US makes the remarkable and incomprehensible statement that "the actual numbers used are simply not germane to this dispute"[17] – a statement that rather confirms the overwhelming impression that the actual facts in this case were simply considered by USDOC "not germane" to the (pre-determined) conclusion reached in the Article 11.3 re-determination. Indeed, in the view of the EC, the sense of unreality that pervades the measure taken to comply is largely explained by this more or less complete dislocation of fact and outcome.

Mr. Chairman, distinguished Members of the Panel, thank you for your attention.

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[14] Working Procedures for Appellate Review, Article 25 (Transmittal of Record).
[15] US letter dated 22 June 2006, para 8, final sentence; para 11.
[16] US letter dated 22 June 2006, paras 10 and 11.
[17] US letter dated 22 June 2006, page 2, echoing US rebuttal, para 33: "The information was not germane to the question at hand."

32. Mr. Chairman, distinguished Members of the Panel. Listening to the other third party submissions and the comments of Argentina, the EC has one closing remark, and it is this. The EC may claim some paternity for the sunset review provisions, these being new in the Uruguay Round *Anti-Dumping Agreement*, insofar as we supported the insertion of such a provision. We agree with the Appellate Body that termination is the general rule, extension being in the nature of an exception. It is therefore with some dismay that we have observed the manner in which this provision has been applied by the US, in case after case, measures invariably being extended, often on the basis of the most flimsy analysis. The game seems to be to spread the paint as thinly as possible, in the hope that the cracks will not show through. In its wisdom, this Panel was not fooled. It put its finger on one of the cracks, probably the most important, that being that one cannot assume that simply because cash deposits are paid, dumping has occurred. OK says the US, lets get rid of that determination of dumping and replace it with a determination of *likely* dumping – something that actually makes the justification for the measure weaker, not stronger. Thus, behind the fragile edifice of this measure taken to comply, and the sea of words offered by the US by way of *ex-post* rationalisation, there lies, in truth, a direct challenge to the authority and credibility of this Panel.

ANNEX D-5

THIRD PARTY ORAL STATEMENT OF JAPAN

13 July 2006

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I. INTRODUCTION

1. Mr. Chairman and distinguished Members of the panel, on behalf of the Government of Japan, I would first like to express our appreciation for the opportunity to submit our views in this dispute as a third party to the Panel. This morning, we will not repeat our arguments in our written submission. Rather, we would like to focus on certain arguments presented by parties in their second written submissions.

II. BASIC CONCERNS

2. Japan has concerns about the United States' measure taken to comply with the DSB recommendations and rulings, and has a systemic interest in this case from the viewpoint of ensuring the observance of the disciplines of the AD Agreement through dispute settlement procedures.

3. We are concerned in this proceeding that disciplines set forth in the AD Agreement would be rendered *meaningless* if the authorities who acted inconsistently with the AD Agreement may later make a re-determination ignoring disciplines in the AD Agreement. We are also concerned that the amendment to the waiver provisions is not fully consistent with the AD Agreement.

III. SPECIFIC ARGUMENTS

A. THE USDOC'S RE-DETERMINATION OF THE LIKELIHOOD OF DUMPING IS INCONSISTENT WITH ARTICLE 11.3 OF THE AD AGREEMENT

4. Japan is concerned that the URAA Section 129 Determination is not fully consistent with Article 11.3 of the AD Agreement, despite the United States' contention.

5. We agree that, as the United States argues,[1] the authorities do not have to rely on past dumping "margins" in making the "likelihood" determination. However, *once* the authorities decide to "rely upon the existence of dumping over the life of the measure as part of [the likelihood] determination, it has to have *an adequate factual basis* for so concluding,"[2] including changes in the exporters' "export or home market price, or, their cost of production" during the period of review.[3]

6. The United States contends that "there is no reason why it cannot be acceptable to continue an order when the existence of dumping over the life of the order *was* likely."[4] We disagree. The USDOC's finding that dumping *was* likely in the past is speculative and in this case does not serve as an adequate factual basis for the determination whether or not dumping *is* likely in the future.

7. Admittedly, the investigating authorities' conclusion of the likelihood of dumping *in the future* by its nature has a speculative aspect. However, the obligation under Article 11.3 "to 'determine' the likelihood of continuation or recurrence of dumping requires … a *reasoned finding* on the basis of positive evidence that dumping is likely."[5] Japan does not agree that mere speculation regarding the *past* can be an adequate factual basis for further speculation regarding any *future* dumping, unless further reasoning of an adequate factual basis for the likelihood is provided.

8. Therefore, the USDOC's speculation regarding past dumping does not seem to constitute an adequate factual basis to conclude that dumping *is* likely in the future.

B. THE UNITED STATES FAILS TO PROPERLY UNDERSTAND THE SCOPE OF THE TERMS OF REFERENCE OF THE PANEL, AND THE MEANING OF THE RECOMMENDATIONS AND RULINGS BY THE DSB

9. The United States contends that it can continue to rely on the decline of volume as a major factor in determining the likelihood of dumping, because the "original Panel made no finding that the United States had acted inconsistently with its WTO obligations in connection with its volume analysis."[6] We are of the view that further analysis is necessary to determine whether the United States can rely on the decline of volume as a major factor in determining the likelihood of dumping, in light of the original Panel's finding.

10. **Firstly**, the original Panel did not find the USDOC's volume analysis to be valid. It simply did not make a finding. This was because the original Panel had already found the USDOC's determination to be inconsistent with the AD Agreement on another ground.[7] This does not necessarily mean that the volume analysis is not subject to review by this Panel. As the Appellate

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[1] US Second Written Submission, paragraphs 34, 35 and 37.

[2] Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina (US – OCTG Sunset Reviews)*, WT/DS268/R, adopted 17 December 2004, as modified by the Appellate Body Report, para. 7.219 (emphasis added).

[3] *Ibid*.

[4] US Second Written Submission, paragraph 35 (emphasis added).

[5] Panel Report, *supra* note 2, para. 7.211, emphasis added.

[6] US Second Written Submission, paragraph 31.

[7] Panel Report, supra note 2, paragraph 7.221.

Body in *US-Softwood Lumber IV (Article 21.5-Canada)* has stated, "a panel's mandate under Article 21.5 of the DSU is not necessarily limited to … [a] measure declared to be 'taken to comply' … [M]easures with a particularly *close relationship* to the declared 'measure to comply', and to the recommendations and rulings of the DSB, may also be *susceptible to review* by a panel acting under Article 21.5."[8]

11. As we have stated in our written submission, we do not take any specific position on the factual aspect of this issue. However, the United States' argument that the absence of finding on the volume analysis by the original Panel rules it out from the terms of reference of this Panel is questionable. As the original Panel found, "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." [9] Under the circumstances in which the original Panel made a finding on the former, the latter issue seems to have a sufficiently close relationship to the DSB recommendations and rulings regarding the original Panel's findings.

12. Thus we respectfully ask the Panel to determine whether such a close link exists in light of the original Panel's analysis.

13. **Secondly**, we also question the United States' contention that it "was under no obligation to take an action with respect to the volume analysis, [and it would be unfair if the compliance] Panel considers that analysis deficient. The United States could then be faced with a request for authorization to suspend concessions, with no reasonable period of time to bring the measure into compliance."[10] By requesting the United States "to bring its measures ... into conformity with its obligations under the [AD] Agreement,"[11] the DSB requested the United States bring its measures entirely into conformity with the AD Agreement. If the close link exists between the measure subject to the findings of the original Panel and the volume analysis, this would include re-considering whether the volume analysis can serve as an adequate factual basis to bring that measure into compliance.

14. Therefore, to the extent that the relationship between the analysis of the decline in volume, and the United States' measure found to be inconsistent with the AD Agreement in the original Panel, is found to be "close", and that the analysis of the decline in volume is a "measure taken to comply", the United States had more than one year since the DSB's adoption of the Appellate Body Report in December 2004 to adjust the measures to be consistent with the AD Agreement.

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[8] Appellate Body Report, United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada, WTO/DS257/AB/RW, adopted 17 December, 2004, paragraph 77 (emphases added).

[9] Panel Report, Supra note 7 (emphases added).

[10] US Second Written Submission, paragraphs 30-31.

[11] Appellate Body Report, *United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina (US-OCTG Sunset Reviews)*, WT/DS268/AB/R, adopted 17 December 2004, para. 366.

C. THE USDOC'S RE-DETERMINATION OF THE LIKELIHOOD OF DUMPING IS INCONSISTENT WITH ARTICLE 6 OF THE AD AGREEMENT

15. The URAA Section 129 Determination did not comply with Article 6, *inter alia*, Article 6.9. It is apparent that the USDOC did not issue a preliminary determination nor *identify* essential facts which formed the basis of its final determination in any other form. The inaction is inconsistent with the first sentence of Article 6.9, which requires the authorities to "inform all interested parties of the essential facts … which form the basis for the decision" and to provide "sufficient time for the parties to defend their interests." This also contradicts with the argument by the United States in its First Written Submission that "[The DOC] satisfied all of the procedural obligations of Article 6."[12]

16. The authorities at least have to *identify* the facts that were essential for reaching a final determination. The point is that the USDOC seems to have failed to let exporters know what the essential facts were in the first place. It is not an issue of whether the authorities have to disclose facts *not* used for the basis of its final determination or whether they have to provide "reasons" why they are not used. The United States' reference to *Argentina – Poultry*[13] is not relevant in this regard.

17. The panel's finding in *Argentina – Floor Tiles* indicated below is a more apt reference:

> the exp exporters could not be aware in this case, simply by reviewing the complete record of the investigation, [which] evidence form the primary basis for the determination of the existence and extent of dumping [and therefore, the authorities] failed to put the exporters on notice of an essential fact under consideration. As a result, the exporters were unable to defend their interests within the meaning of Article 6.9[14]

18. The USDOC did not, in this case, put the exporters on notice of information they used as a primary basis for the determination of the likelihood of dumping. This failure hindered the exporters from defending their interests. Thus, the USDOC acted inconsistently with Article 6.9.

D. WAIVER PROVISIONS

19. Japan is concerned with the consistency of the United States' waiver provisions with Article 11.3 of the AD Agreement, as Section 751(c)(4)(B), that is inconsistent with the AD Agreement *as such*, remains unchanged.

20. Our point of concern is that *it is the authorities* that bear the burden of proof to establish the likelihood of dumping, either company-specific or order-wide, examining all relevant evidence in a specific case; the authorities may not predetermine the conclusion solely on a piece of evidence without examining any other evidence. By maintaining Section 751(c)(4)(B) as it is, the United States assumes that a company's own admission *alone* is sufficient *in every case*, irrespective of other

[12] US First Written Submission, para. 53.

[13] US Second Written Submission, paras. 79-84. See Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, paras. 7.221-7.230.

[14] Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001, para. 6.129 (emphasis added).

evidence. However, there could be cases where the authorities should consider other factors on the basis of information obtained on their own or from other interested parties.

21. Lacking adequate clarification on why Section 751(c)(4)(B) remains, the United States does not seem to have fully complied with the DSB's recommendations and rulings.

IV. CONCLUSION

22. Again, Japan very much appreciates the opportunity to present its views to this Panel.

ANNEX D-6

THIRD PARTY ORAL STATEMENT OF MEXICO

I. INTRODUCTION

Mr Chairman, Members of the Panel,

1. The Government of Mexico welcomes this opportunity to address the systemic issues that are highly germane to this case. Mexico considers that the United States has failed to implement the recommendations and rulings of the DSB in this dispute. The United States maintains in force an anti-dumping order against Argentine products even though the DSB established that the measure was inconsistent with WTO legislation. It has been more than five years since the United States extended the anti-dumping duties. Although it has had sufficient time and a fresh opportunity to comply, the United States refuses to bring its measure into conformity. Today, Mexico's will put forward comments on the following points:

- First, the terms of Article 11.3 are to be interpreted in such a manner as to be meaningful. This is crucial, because it is the words that create the duties and obligations of Members. The United States Department of Commerce (DOC) issued a decision which does not even come close to meeting the requirement of establishing – on the basis of positive evidence – that dumping would be "likely" to continue or recur if the anti-dumping measure on oil country tubular goods (OCTG) from Argentina were to be revoked. In 2000, the DOC did not conduct the kind of "review" or make the kind of "determination" required under Article 11.3. Mexico's view is that the DOC cannot seek to satisfy these requirements for the first time in 2005. In any event, the determination finally issued by the DOC in 2005 is inconsistent with Article 11.3.

- Second, the Panel should find whether the DOC is empowered under the Anti-Dumping Agreement to infer, without any substantive analysis, that dumping would be likely, by relying on the decline in import volume or the cessation of imports.

The Panel should dismiss the untenable position of the United States that the DOC's inference of likely dumping, based on the decline in imports, is not part of the measure taken to comply by the United States in this case. The Section 129 Determination is the measure taken to comply with the recommendations and rulings of the DSB. WTO precedents have made this clear. Mexico therefore holds that the "measure taken to comply" includes the fact that the DOC relies on the decline in import volume in order to determine that dumping would be likely.

- Third, the DOC did not undertake any analysis of the reasons why the volume of imports diminished. The Section 129 Determination leaves no doubt in this regard. The Appellate Body has confirmed that such an approach is inconsistent with Article 11.3. To assume likelihood of dumping on the basis of volume decline in the absence of any analysis cannot serve as a basis for an Article 11.3-consistent determination. Mexico respectfully requests the Panel to rule on this point.

- Lastly, this case will serve as an important test for determining whether or not Article 11.3 incorporates substantive obligations. According to Mexico, cases such as this one – in which there is insufficient positive evidence for continuation of the anti-dumping duties – should lead to revocation of the measure, in conformity with the Anti-Dumping Agreement itself.

II. THE SECTION 129 DETERMINATION IS INCONSISTENT WITH THE RECOMMENDATIONS AND RULINGS OF THE DSB, AND IS ALSO INCONSISTENT WITH THE WTO OBLIGATIONS OF THE UNITED STATES

A. THE DOC FAILED TO COMPLY WITH THE REQUIREMENTS OF ARTICLE 11.3 OF THE ANTI-DUMPING AGREEMENT

2. Article 3.2 of the DSU reaffirms that one of the objectives of the WTO dispute settlement mechanism is to "to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". One fundamental principle of these rules 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".[1]

3. On the basis of the language of Article 11.3, as clarified by the Appellate Body, the United States is under the obligation to terminate the anti-dumping order on OCTG from Argentina, unless the DOC were to make findings consistent with the requirements under that Article. In order to invoke the exception for extending the measure, the DOC was compelled to undertake a "review" prior to August 2000 and to "determine" that "termination of the duty would lead to continuation or recurrence of injury and dumping".

4. The DOC did not satisfy the requirements of Article 11.3 in 2000, nor did it subsequently revoke the order. As the Section 129 Determination plainly shows, in 2005 the DOC once again failed to comply with the provisions of Article 11.3.

5. Moreover, Mexico concurs with Argentina's position that the United States acted inconsistently with Article 11.3 in basing its 2005 likelihood of dumping determination on factual evidence that the DOC did not develop in the original sunset review.

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[1] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted on 20 May 1996, page 23; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted on 6 November 1998, para. 121.

6. The obligation contained in Article 11.3 is no longer meaningful where a Member is granted multiple opportunities beyond the prescribed five years (plus one for the review) for conducting the sunset review.

B. THE DOC'S LIKELIHOOD OF DUMPING INFERENCE BASED ON THE DECLINE IN IMPORT VOLUME IS A MEASURE TAKEN TO COMPLY

7. Mexico requests that the Panel reject the United States' position that volume findings do not constitute part of the measure taken to comply.[2]

8. First, for the purposes of Article 21.5 of the DSU, a Section 129 determination of the United States is a "measure taken to comply" with WTO obligations, including the rulings and recommendations of the DSB. The object of Section 129 of the "Uruguay Round Agreements Act" is to enable the United States to bring itself into conformity with its WTO obligations, including those under the Anti-Dumping Agreement. The decisions of the Appellate Body in *US – Lumber ITC Investigation (Article 21.5 – Canada)* and of the Panel in *US – Countervailing Measures on Certain Products from the EC (Article 21.5 – EC)* concur that the Section 129 Determination of the United States is the "measure taken to comply".[3]

9. Second, the Section 129 Determination specifically used the DOC's import volume findings from the original sunset review; these findings constitute an inseparable element of the "measures taken to comply". A reading of the Section 129 Determination leaves no room for uncertainty in this respect.

10. At page 11 of the Section 129 Determination, the DOC confirms that it relied on the volume finding:

> *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.* (Emphasis added.)

11. The last sentence cited is of particular significance. The DOC contends that volume decline is sufficient to show that exporters need to dump, and that the decline in question results – apparently – from the original measure. This is an important aspect of the measure taken to comply, which must be evaluated by the Panel.

12. Thus, the Appellate Body's ruling in *EC – Bed Linen (21.5*) clearly does not apply in the case at issue since – contrary to the United States' argument – the DOC's import volume finding does not constitute a "part of the redetermination that merely incorporates elements of the original determination".[4]

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[2] See Second Submission of the United States, para. 28; see also First Written Submission of the United States, para. 34.

[3] See Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, recourse to Article 21.5 of the DSU, WT/DS277/AB/RW, circulated on 13 April 2006, para. 90; WT/DS212/RW, adopted on 27 September 2005, para. 7.12.

[4] 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.

C. THE DOC FAILED TO CONDUCT A CASE-SPECIFIC ANALYSIS OF THE REASON BEHIND THE DECLINE IN VOLUME

13. The Section 129 Determination confirms that the DOC failed to analyse volume decline. This approach is incorrect and contrary to the obligations of the United States under the WTO. The Appellate Body stated that a case-specific analysis of the reasons behind a decline in volume will always be necessary, and that an authority may not use post-order decline as evidence of likely dumping. Specifically, the Appellate Body established that in making an Article 11.3-consistent determination "a case-specific analysis of the factors behind a cessation of imports or a decline in import volumes [...] will be necessary".[5]

14. The Appellate Body acknowledged that numerous factors can reasonably explain a decline in import volume or the cessation of imports following the imposition of anti-dumping duties. It also noted that diminishing volumes may be caused by changes in the competitive conditions of the market-place or strategies of exporters, rather than by the anti-dumping measure alone. In this case, although Argentina's interested parties sought to present such evidence, the Section 129 Determination does not reflect any analysis of such arguments by the DOC.[6]

15. Mexico recalls that in *US – OCTG from Mexico* the Appellate Body reaffirmed that in the case of diminishing import volumes, the administering authority may not rely on presumptions or conjecture regarding a company's ability to export without dumping.[7] Nevertheless, this is precisely what the DOC did in 2000 and did again in 2005. This clearly emerges from the statement drawn from the Section 129 Determination referred to earlier.

16. Such an approach is entirely inconsistent with the obligations of the United States under Article 11.3 of the Agreement.

D. IN ORDER TO GIVE MEANING TO ARTICLE 11.3 IN THE CASE AT ISSUE, THE ANTI-DUMPING MEASURE SHOULD BE REVOKED

17. Article 11.3 requires a specific outcome (the termination of anti-dumping duties) at a given moment in time, *unless* the importing Member satisfies the requisite conditions for continuing the anti-dumping measure. Clearly, the United States decided in 2000 to extend the order in spite of the fact that it did not satisfy the Article 11.3 conditions. The United States maintains the order to date and recently began the proceeding to extend the anti-dumping duties for another five years.

18. In conclusion, Mexico considers that the DOC's determination once again fails to comply with the requirements laid down in Article 11.3. The United States has disregarded the international commitments it undertook in the WTO by unlawfully maintaining the anti-dumping order over the past six years. That being the case, Mexico requests that the Panel exercise its discretion under Article 19.1 of the DSU, as Argentina has requested, and suggest that the United States revoke the measure in order to come into compliance with its WTO obligations.

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19. The Government of Mexico thanks the Panel for its time and for the opportunity to put forward these comments.

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[5]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. 177.

[6] See First Written Submission of Argentina, paras 69-80; second written submission by Argentina, paras 122-132.

[7] Appellate Body Report, *US – OCTG from Mexico*, para. 199.