ANNEX E

QUESTIONS AND ANSWERS

ANNEX E-1

ANSWERS OF ARGENTINA TO QUESTIONS OF THE PANEL

WAIVER PROVISIONS

BOTH PARTIES

Q1. The Panel notes that Argentina argues, and the United States does not contest, that the US law requires the USDOC to make its ultimate sunset determinations on an order-wide basis. Please explain whether this is the case and, if so, cite the relevant provisions of the US law (including regulations and/or policy provisions) which require the US investigating authorities to make their sunset determinations on an order-wide basis and provide copies thereof.

Argentina's Response to Question 1

1. The Appellate Body has clarified in a previous dispute that the United States could render a sunset determination on an "order-wide" basis and that the mere fact of doing so would not be inconsistent with US obligations under Articles 6.10 or 11.3 of the Anti-Dumping Agreement.[1] However, the "as such" violation of the US statutory and regulatory waiver provisions exist independently of, and irrespective of, whether US law requires that US sunset review determinations be made on an "order-wide" (or "country-wide") basis or not. The violation comes from the fact that the waiver provisions continue to provide for a statutorily-mandated finding of likelihood for any company that becomes subject to the statutory waiver provision, either where there is an "affirmative waiver" (as contemplated by the modified regulation) or where a party "elects not to participate" (as provided for in Section 751(c)(4)(A) of the Tariff Act), but also does not file an affirmative statement of waiver and a statement that it would be likely to dump.

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

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

[1] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Reviews*, DS244, paras. 162 and 212(c)(i).

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

3. Thus, the problem identified by the Appellate Body has not been remedied. In a USDOC sunset review, it is the mere application of Section 751(c)(4)(B), which *mandates* a certain outcome – and divests the USDOC of discretion as to what result to reach – at least as to any company that is subject to the statutory waiver provision, that gives rise to the violation of Article 11.3. In this way, the mere application of the statutory waiver provision, Section 751(c)(4)(B), in a USDOC sunset review will always taint an order-wide determination, irrespective of the number of companies that are subject to the waiver provision or that are involved in the review.

4. As the Appellate Body found, "certain *order-wide* likelihood determinations made by the USDOC will be based, at least in part, on statutorily-mandated *assumptions* about a company's likelihood of dumping. In our view, this result is inconsistent with the obligation of an investigating authority under Article 11.3 to 'arrive at a reasoned conclusion' on the basis of 'positive evidence'."

ARGENTINA

Q2. The Panel notes Argentina's assertion, in paragraph 156 of its Second Written Submission, that the current US law directs the USDOC to find likelihood for companies that "elect not to participate in USDOC's sunset review, but also does not file an affirmative statement of waiver and an admission that it is likely to dump". The Panel also notes Argentina's statement in paragraph 83 of its oral submission that the Tariff Act directs the USDOC to find likelihood for exporters that do not participate and that do not file a statement of waiver either. Finally, the Panel notes the US' statement in paragraphs 5 and 8 of its oral submission that "deemed waivers" have now disappeared following the deletion of Section 351.218(d)(2)(iii) of the Regulations.

(a) Is Argentina challenging the US implementation of recommendations and rulings relating to "deemed waivers"? Should the Panel understand Argentina's assertion to be that the so-called "deemed waiver" provisions of the US law have not been repealed, or properly amended, by the United States in the context of implementing the DSB's recommendations and rulings in this case? Please elaborate.

Argentina's Answers to Question 2(a)

5. Argentina would initially reiterate that the Panel should determine how the US regulatory and statutory waiver provision will operate in order to determine whether the United States has complied with its obligations.[3] Argentina's position is that the United States has failed to implement the rulings and recommendations of the DSB. Argentina's arguments demonstrate that both the statutory and regulatory waiver provisions remain inconsistent with US obligations under Article 11.3.

6. While the United States eliminated section 351.218(d)(2)(iii) of USDOC's regulation, and while now there is no specific USDOC regulation providing for so-called "deemed waivers," the violation has not been remedied because the United States has failed to amend or modify Section 751(c)(4) of the Tariff Act.

7. Pursuant to the express terms of Section 751(c)(4)(A) of the Tariff Act, a respondent party "may elect not to participate in a review conducted by [USDOC]". Accordingly, where a party does not participate in a sunset review (even in cases in which it does not provide an "affirmative" statement of waiver and "admission" that it will likely dump in the future), such a circumstance would constitute a case where that party has "elect[ed] not to participate" in a USDOC sunset review – pursuant to the express language of the statute in Section 751(c)(4)(A).

[3] Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by the European Communities*, WT/DS136/R and Corr.1, adopted 26 September 2000, as upheld by Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4593, para. 6.51.

8. In these circumstances, the United States argues that USDOC would not invoke Section 751(c)(4)(B), the statutory wavier provision. In support of its view, the United States argues that it eliminated so-called "deemed waivers".[4] The implementing Federal Register notice explains that "the Department will no longer make company-specific findings for companies that fail to file a statement of waiver and fail to file a substantive response to the notice of initiation".[5] The implementing notice further indicates that "Section 751(c)(4)(B) of the Act only mandates an affirmative company-specific likelihood finding as a consequence of a party electing to waive its participation in the sunset review."[6] Comparing the modified regulation to the express wording of the statute, however, shows that this is not correct.

9. Notwithstanding USDOC's stated intention as to how it would implement the revised regulation, the express terms of the statute demonstrate that USDOC's interpretation of Section 751(c)(4)(A) is inconsistent with its plain language. The statute mandates a company-specific likelihood determination for any company that "*elect[s] not to participate*" in a USDOC sunset review. Subsection (A) of Section 741(c)(4) of the Tariff Act establishes an option that is available for USDOC sunset reviews (i.e., that a party may "elect not to participate"). This subsection also establishes who can make such an election (i.e., respondent interested parties).[7] Subsection (B) explains the "effect" or consequence of a waiver (i.e., non-participation) by a respondent interested party. The consequence is a statutorily-mandated finding of likely dumping for that company. The terms of the statute thus direct a company-specific finding of likelihood for any respondent interested party that elects not to participate in the USDOC sunset review.

10. Consequently, in the circumstance where a respondent party does not participate in a sunset review, but also does not provide an "affirmative" statement of waiver, the terms of Section 751(c)(4) mandate that USDOC make a finding that dumping would be likely for that party. The fact that Section 751(c)(4)(A) refers to an "elect[ion] not to participate" and does not use the same phrase as in Section 751(c)(4)(B) ("a review in which an interested party waives its participation"), does not change the analysis. The title of the Section 751(c)(4) is "Waiver of participation by certain interested parties". Subsections (A) and (B) are both integral to the operation of Section 751(c)(4) and these subsections must be read together in determining how Section 751(c)(4) operates. Subsection (A) must be read so as to have some meaning.[8]

11. As Argentina has argued, under US law, a US statute will prevail over a US regulation where the two measures are inconsistent.[9] In addition, although an agency such as the USDOC may promulgate regulations pursuant to authority granted by Congress, that agency cannot through the promulgation of a regulation confer on itself any greater authority than that conferred under the governing statute.[10] Accordingly, where the statute mandates a specific action (making an affirmative likelihood determination), the statute cannot be overridden by USDOC's modification of the corresponding regulation.

12. Consequently, notwithstanding an expression of how USDOC would implement the waiver provisions or regulatory text to the contrary, the operation of the statute nonetheless continues to operate in a manner inconsistent with US WTO obligations. Section 751(c)(4)(B) directs a company-specific finding of likelihood for any respondent interested party that elects not to participate in the

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[4] US First Submission, para. 14.

[5] *Procedures for Conducting Five-Year ("Sunset") Reviews for Antidumping and Countervailing Duty Orders: Final Rule*, 70 Fed. Reg. 62,061, 62,062 (28 Oct. 2005) (ARG-12).

[6] 70 Fed. Reg. at 62,063 (ARG-12).

[7] This is the meaning of the phrase to "An interested party described in section 1677(9)(A) or (B)."

[8] See Argentina's Second Submission, para. 163 and note 160.

[9] See Argentina's Second Submission, para. 164 and note 161.

[10] See Argentina's Second Submission, para. 164 and note 162.

USDOC sunset review, and is therefore inconsistent with Article 11.3 of the Anti-Dumping Agreement.

13. In addition, there continues to be a violation of Article 11.3 even in the case of an "explicit waiver" (which includes the exporter's admission that it would be likely to dump upon revocation), the statutorily-mandated finding for the exporter continues to violate the Agreement. The statute permits no weighing of other evidence: once the waiver provision of the statute (Section 751(c)(4)(B)) is triggered, the USDOC "shall" make an affirmative determination with respect to that exporter. Because the obligation to arrive at a "reasoned conclusion" will always require the authority to consider all of the evidence, and because any evidence inconsistent with the exporter's admission would be disregarded under the statute, the waiver provision remains inconsistent with Article 11.3.

(b) If not, would it be an accurate characterization of Argentina's claim to stipulate that Argentina is only taking issue with the so-called "explicit waiver" provisions of the US law in these Article 21.5 DSU proceedings? If so, would Argentina agree that the current US law does not contain any provision that deems exporters to have waived their right to participate in sunset reviews for failure to provide a full substantive response to the USDOC's questionnaire or for any other reason? Please elaborate.

Argentina's Answers to Question 2(b)

14. Argentina's claim is that the United States failed to bring the statutory and regulatory waiver provisions into conformity with the rulings and recommendations of the DSB, and with US WTO obligations. As Argentina has argued, the violation comes from the application of the statutory waiver provision, Section 751(c)(4)(B), in a sunset review. Argentina has argued that this provision is triggered whenever a party "elect[s] not to participate" in a USDOC sunset review, as provided for in Section 751(c)(4)(A). This "election," as contemplated by the statute, can happen in at least two ways.

15. First, a party may "elect not to participate" by filing an affirmative waiver and making a statement that it would be likely to dump. This is the route envisioned by the USDOC and as provided for in its revised waiver regulation. Argentina's position is that application of the waiver statute, Section 751(c)(4)(B), even in this instance, is a violation of Article 11.3 because once the statute is triggered, the USDOC loses all discretion as to that company. The Department is required to base its likelihood determination, at least in part (for a company is subject to the waiver provision), pursuant to statutory mandate rather than pursuant to a reasoned-decision making process as to what would be likely for that company. This statutorily-mandated finding renders the order-wide determination inconsistent with Article 11.3.

16. Second, a party may "elect not to participate" and it may not file an affirmative statement or a statement that it would be likely to dump. The United States argues that USDOC would not invoke Section 751(c)(4)(B), the statutory wavier provision because it has eliminated the so-called "deemed waiver" regulation.[11] However, as Argentina has argued, the US interpretation of Section 751(c)(4)(A) is inconsistent with the plain language of the statute. The statute mandates a company-specific likelihood determination for any company that "*elect[s] not to participate*" in a USDOC sunset review. Subsection (A) of Section 741(c)(4) of the Tariff Act establishes an option that is available for USDOC sunset reviews (i.e., that a party may "elect not to participate"). This subsection also establishes who can make such an election (i.e., respondent interested parties).[12] Subsection (B) explains the "effect" or consequence of a waiver (i.e., non-participation) by a respondent interested party. The consequence is a statutorily-mandated finding of likely dumping for that company. The terms of the statute thus direct a company-specific finding of likelihood for any

[11] US First Submission, para. 14.

[12] This is the meaning of the phrase to "An interested party described in section 1677(9)(A) or (B)."

respondent interested party that elects not to participate in the USDOC sunset review. Again, this statutorily-mandated finding renders the order-wide determination inconsistent with Article 11.3.

17. Consequently, because Section 751(c)(4)(B) directs a company-specific finding of likelihood for any respondent interested party that "elect[s] not to participate" in the USDOC sunset review (whether by virtue of an affirmative statement of waiver or simply by takings no action in the review), the waiver provisions remain inconsistent with Article 11.3 of the Anti-Dumping Agreement.

UNITED STATES

Q3. The Panel notes that Section 751 (c)(4)(B) of the Tariff Act of 1930 requires the USDOC to find likelihood with respect to companies which waive their right to participate. The Panel also notes that Section 218(d)(2)(ii) of the Regulations stipulate that "every statement of waiver must include a statement indicating that the respondent interested party waives participation in the sunset review before the Department; a statement that the respondent interested party is likely to dump".

Please explain, in light of the above-referenced provisions of the US law and its other provisions that may also be relevant, what the US law stipulates with respect to respondents that do not respond at all to the USDOC's questionnaire and those that provide incomplete responses. Specifically, please explain whether and how the US law also directs the USDOC to find likelihood for these exporters.

Q4.

(a) Please explain generally the relevance of the company-specific finding of likelihood under Section 751 (c)(4)(B) to the USDOC's order-wide determination.

(b) Given the mandate of Section 751 (c)(4)(B) of the Tariff Act to find likelihood for companies that waive participation, would it be accurate to say that the USDOC has to find likelihood in its ultimate order-wide determination in every sunset review where the USDOC finds likelihood for individual companies that waive participation?

Q5. Please explain whether there has been any sunset review where the USDOC found likelihood for individual exporters by virtue of Section 751 (c)(4)(B) of the Tariff Act and found no likelihood on an order-wide basis. If so, please provide a copy of the USDOC's final determination in such reviews.

Q6. The Panel notes that Section 751(c)(4) of the Tariff Act of 1930 provides, in relevant part:

> **(4) Waiver of participation by certain interested parties**
>
> **(A) In general**
>
> **An interested party described in section 1677(9)(A) or (B) of this title may elect not to participate in a review conducted by the administering authority under this subsection and to participate only in the review conducted by the Commission under this subsection.**
>
> **(B) Effect of waiver**
>
> **In a review in which an interested party waives its participation pursuant to this paragraph, the administering authority shall conclude that revocation of the order**

or termination of the investigation would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) with respect to that interested party.[13] (emphasis added)

(a) Please explain whether electing not to participate within the meaning of subparagraph (A) constitutes a waiver within the meaning of subparagraph B.

(b) How does an exporter elect not to participate within the meaning of subparagraph A? Does remaining silent, i.e. not submitting any response to the USDOC's questionnaire, constitute an election not to participate within the meaning of subparagraph (A)? If so, does this constitute a waiver for the purposes of subparagraph B?

BOTH PARTIES

Q7. Under what circumstances would a signed waiver statement constitute a sufficient evidentiary basis for an affirmative likelihood determination? Would your response depend on the circumstances of a given sunset review? For example, would your response differ in relation to: (i) a review in which the only exporter submits a signed waiver statement; (ii) a review in which, of the 20 exporters involved, 10 submit a signed waiver statement and 10 participate cooperatively; (iii) a review in which, of the 20 exporters involved, 1 submits a signed waiver statement and 19 remain silent? How would the company-specific conclusions of likelihood with respect to exporters that waive their right to participate (by signing a statement of waiver) in these scenarios be reflected in an ultimate order-wide determination?

Argentina's Answer to Question 7

18. Argentina would initially observe that the Panel's question itself highlights the problem attendant with the loss of US discretion – by operation of the statutory mandate to make – to assess the probative value of evidence – whether an "admission" of likely dumping or the inference to draw from a company that elects not to participate but also does not file an affirmative statement of waiver.

19. The fact is, depending upon the particular facts of a given case, a signed waiver statement may or may not be probative for a particular company, and its probative value on the overall order-wide determination can vary. Yet, in any case in which the statutory waiver provision applies, the USDOC must – pursuant to the mandate of the statute – find that dumping would be likely to continue or recur for that company. Again, the terms of the statute mandate a likely dumping finding for a company either where there is an "affirmative waiver" by that company (as contemplated by USDOC's modified waiver regulation), or where a company "elects not to participate," as provided for in 751(c)(4)(A), but also does not file an affirmative statement of waiver.

20. Thus, the problem in all of the scenarios outlined by the Panel's question, is that the USDOC must find that dumping would be likely for a company once the statutory waiver provision is triggered. At that point, the USDOC has zero discretion for that particular company to reach any result other than a affirmative determination for that company. As the Appellate Body stated, it is the substitution of a statutorily-mandated finding for reasoned analysis and decision making by the authority that would taint the order-wide determination in such a case.[14]

Q8. The Panel notes that Section 751(c)(4) of the Tariff Act does not define the term "waiver". The Panel also notes that Section 351.218(2)(ii) of the Regulations states that a statement of waiver "must include a statement indicating that the respondent is likely to dump."

[13] Exhibit ARG-33 at 1152.
[14] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 234-235.

Can this, in your view, be interpreted to mean that the Regulations nullify, or limit the scope of, the Statute in so far as the Statute refers to waiver.

Argentina's Answer to Question 8

21. Under US law, the USDOC cannot issue a regulation that is inconsistent with a US statute. Nor is it permissible under US law for the USDOC to issue a regulation that attempts to limit the scope of application of a US statute.

22. The terms of Section 751(c)(4)(B) require the USDOC to make a company-specific likelihood determination for any company that "may elect not to participate" in a USDOC sunset review. As Argentina has argued, under US law, a US statute will prevail over a US regulation where the two measures are inconsistent.[15] In addition, although an agency such as the USDOC may promulgate regulations pursuant to authority granted by Congress, that agency cannot through promulgation of a regulation modify or repeal a statute.[16]

23. Thus, under US law, USDOC cannot evade the statutory requirement (which mandates a company-specific likelihood determination for any company that elects not to participate in a USDOC sunset review), by modifying the implementing regulation in a manner that reduces the reach 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).

24. Finally, and in order to be very clear, Argentina reiterates that the violation comes from the operation of Section 751(c)(4)(B) in a USDOC sunset review. When that provision is triggered – either where there is an "affirmative waiver" by that company (as contemplated by USDOC's modified waiver regulation) or where a company "elects not to participate" (as provided for in 751(c)(4)(A)) (irrespective of whether it files an affirmative statement of waiver) – the terms of Section 751(c)(4)(B) mandate a likely dumping finding for a company. A statutorily-mandated finding (which divests the authority of all discretion), even if for only one company and even if triggered by a purported admission, is inconsistent with Article 11.3 because of the authority's obligation in an Article 11.3 review to arrive at a "reasoned conclusion" based on a consideration and weighing of all the evidence.[17]

FACTUAL BASIS OF THE USDOC's SECTION 129 DETERMINATION

ARGENTINA

Q9. The Panel notes Argentina's arguments regarding the new factual basis developed by the USDOC in its Section 129 Determination. Is it Argentina's view that Article 11.3 of the Anti-dumping Agreement ("Agreement") precludes an investigating authority from developing new facts in order to comply with the DSB recommendations and rulings regarding the inadequacy of the factual basis of its sunset determinations? Please elaborate on the temporal and substantive considerations involved in gathering "new facts" in light of the notion of implementation of the DSB recommendations and rulings embodied, among others, in Articles 19, 21, and 22 of the Dispute Settlement Understanding ("DSU"). How should an investigating authority accommodate the "prospective nature" of sunset reviews under Article 11.3 in the process of gathering "new facts" in the course of implementation?

[15] See Argentina's Second Submission, para. 164 and note 161.
[16] See Argentina's Second Submission, para. 164 and note 162.
[17] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 234-235.

Argentina's Answer to Question 9

25. Articles 11.3 and 11.4 of the Anti-Dumping Agreement preclude an investigating authority, in a domestic proceeding seeking to comply with the rulings and recommendations of the DSB arising out of an finding that it violated Article 11.3 of the Anti-Dumping Agreement, from developing a new factual basis to support its Article 11.3 determination, where the evidence required to support its original Article 11.3 determination was not developed at the time of the original Article 11.3 review. The investigating authority is obliged to initiate the requisite "review" and gather the necessary positive evidence in order to make the requisite "determination" required by Article 11.3 of the Anti-Dumping Agreement prior to the expiry of five years following the imposition of the antidumping measure. For example, assume that an authority continues the measure beyond five years, but does nothing more than initiate an Article 11.3 review in a timely manner. In that review, the authority develops no evidence at all. In such a case, the obligations of Articles 11.3 and 11.4 to conduct a "review" and make a "determination" prior to continuing the measure cannot be satisfied by the Member – it has missed its opportunity to make a "determination" in the review initiated at that time.

26. The "review" and "determination" under Article 11.3 in this regard must have had several characteristics. The determination needed to be a "prospective determination," requiring a "forward-looking analysis".[18] USDOC needed to take an "active" rather than a "passive" role in developing and assessing the information.[19] The USDOC was required to "act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination".[20] The requirement to make a "determination" concerning likelihood precluded USDOC from simply assuming that likelihood exists.[21] Finally, USDOC was required to assess the information before it objectively and to have a sufficient factual basis to allow it to draw reasoned and adequate conclusions concerning such likelihood.[22]

27. Because the anti-dumping duty order on OCTG from Argentina was imposed in August 1995, the United States had an obligation to terminate the measure before August 2000 unless it adhered to the requirements for invoking the exception (continuation of the measure), as set forth in Articles 11.3 and 11.4. Thus, in order to invoke the exception and to extend the measure beyond August 2000, the US authorities were required to initiate a "review" before "that date", (i.e., August 2000) and to "determine" that "expiry of the duty would be likely to lead to continuation or recurrence of dumping".

28. This is fully consistent with the Appellate Body's clarification of the Article 11.3 obligation. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body provided authoritative guidance on the obligations imposed on Members during a sunset review by Article 11.3. It began by noting that:

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

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

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

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

[21] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 104-105, 111.

[22] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 104-105, 111.

> review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of *dumping*; and third, that in the review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of *injury*. If any one of these conditions is not satisfied, the duty must be terminated.[23]

29. Article 11.4 of the Anti-Dumping Agreement provides that the review conducted under Article 11.3 "shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review". In clarifying Article 11.4 of the Agreement, the Appellate Body expressly recognized that the "duty" may "continue while the review is underway" constitutes an "additional exception" – and in effect, the sole exception – to the requirement that anti-dumping duties will be terminated after five years, in the absence of compliance with the requirements of Article 11.3:

> Article 11.3 states that, notwithstanding the provisions of Articles 11.1 and 11.2, Members "shall" terminate an anti-dumping duty "unless" the authorities make an affirmative likelihood determination in a sunset review. This confirms that the mandatory rule in Article 11.3 applies in addition to, and irrespective of, the obligations set out in the first two paragraphs of Article 11. This also suggests to us that authorities must conduct a rigorous examination in a sunset review before the exception (namely, the continuation of the duty) can apply. In addition, our view of the exacting nature of the obligations imposed on authorities under Article 11.3 is supported by a consideration of the implications of initiating a sunset review. The last sentence of Article 11.3 allows the relevant duty to continue while the review is underway, and Article 11.4 contemplates that the review process may take up to one year. These provisions create an additional exception to the requirement that anti-dumping duties will be terminated after five years, permitting a Member to maintain the duty for the period during which the review is ongoing, regardless of the outcome of that review. This, too, suggests that the drafters of the Anti-Dumping Agreement saw the sunset review as a rigorous process that can take up to one year, involving a number of procedural steps, and requiring an appropriate degree of diligence on the part of the national authorities.[24]

30. The Appellate Body's reaffirmation of the temporal obligations in Article 11.3 identified in the preceding paragraphs is not inconsistent with the Appellate Body's pronouncements in *OCTG from Mexico*, where the Appellate Body stated that a WTO-inconsistent determination under Article 11.3 would not *necessarily* lead to termination *immediately*:

> 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.[25]

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

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

[25] Appellate Body Report, *US – OCTG from Mexico*, para. 187 (emphasis added).

31. 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. The Appellate Body explicitly recognized, once again, the temporal requirements of Article 11.3.

32. Regarding the provisions of the DSU, as the Appellate Body also recognized, its clarifications of the obligation of Article 11.3 did not affect the other provisions of the DSU governing the implementation of the recommendations and rulings of the DSB, including the provisions identified in the Panel's question – Articles 19, 21, and 22. At the same time, it must be emphasised that a Member's substantive obligations under the covered agreements do not change merely because that Member is involved in a WTO dispute, and certain rights and obligations of the DSU are implicated by virtue of the WTO dispute settlement process. 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.

33. Article 19 of the DSU provides:

> 1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with the agreement. In addition to its recommendations, the Panel or the Appellate Body may suggest ways in which the Member concerned could implement the recommendations.
>
> 2. In accordance with paragraph 2 of Article 3, in their findings and recommendations, the Panel and the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

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

35. First, any such ruling would serve only to further erode Argentina's already impaired rights under Article 11.3 to termination of the measure after five years in the absence of compliance with the requirements of Articles 11.3 and 11.4. Second, finding that Article 11.3 permits the United States with an opportunity to establish the requisite factual basis during the RPT in order to support the WTO-inconsistent determination from 2000 would constitute an addition to the *limited US right* under Article 11.3 *to invoke the provision's exception to the principal obligation to terminate the measure* (and thereby continue anti-dumping duties on OCTG from Argentina) *only if it had first complied with the substantive obligations of Articles 11.3 and 11.4 of the Anti-Dumping Agreement*.

36. The provisions of Article 21 of the DSU are not inconsistent with Argentina's view of the substantive and temporal obligations of Article 11.3 and 11.4 of the Anti-Dumping Agreement. Article 21.1 states that "prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". This provision is fully consistent with Argentina's position, as "prompt compliance" in this case is "essential" in order to ensure that Argentina's rights under Article 11.3 are not wholly diminished in light of the US further to demonstrate at the end of the RPT that it satisfied the requirements for invoking the limited exception in Article 11.3.

37. Further, DSU Article 21.3 provides, inter alia, that "[i]f it is impracticable to comply immediately with the recommendations and rulings [of the DSB], the Member concerned shall have a reasonable period of time in which to do so". This provision recognizes that it is the right of the Member to determine how best to bring itself into conformity. At the same time, however, as Argentina has argued during this proceeding, the manner in which USDOC conducted the 2000 review necessarily affects what the United States could do during the RPT to bring itself into compliance with its obligations in 2005. Argentina has observed that if USDOC had been active, had properly established a sufficient evidentiary basis, but had failed to explain adequately its decision, it might have been able to bring itself into compliance with its obligations in 2005 by clarifying that information, or further explaining its reasoning. In such a case, the authority would have satisfied its obligation to be active rather than passive, and its obligation to develop a sufficient evidentiary basis in the review that preceded the continuation of the measure. In other words, the subsequent act of clarifying the evidence or the reasoning that formed the basis of the determination might not affect the substance of the authority's obligation.

38. Put simply, during the RPT, United States was permitted to clarify, based on the evidence established in the original sunset review, why its 2000 sunset determination is consistent with US obligations under Article 11.3. It was required to do this, however, within the RPT.

39. Argentina would again reiterate that paragraph 187 of the decision of the Appellate Body in *US – OCTG from Mexico* is not inconsistent with Argentina's interpretation of the obligations of Article 11.3, and can be fully reconciled with the rights a Member has under the DSU.

40. 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[26]

41. In the present case, however, the United States has already exercised certain of its right under the DSU. It has exercised its right to an RPT, and it has 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 United States already has exercised its rights under the DSU. Therefore, if this Panel finds that the United States is not in compliance, the consequences are – and should be – that the United States must terminate the measure – or risk being in perpetual non-compliance. There will be no new RPT and there is no basis for it to conduct another Article 11.3 determination. In fact, the United States itself recognized this very point:

> It would be unfair for the United States, which was under no obligation to take an action with respect to the volume analysis, to find out for the first time in an Article 21.5 proceeding that the Panel considers that analysis deficient. The United States could then be faced with a request for authorization to suspend

[26] 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.

concessions, with no reasonable period of time to bring the measure into compliance.[27]

42. In these circumstances, the obligation under Article 11.3 requires that the United States immediately revoke the illegal order, in the absence of a WTO-consistent determination, is the obligation with which the United States must comply.

43. Such a result would be in complete accord with Article 22 of the DSU, which recognizes that "full implementation of a recommendation to bring a measure into conformity with the covered agreements" is preferred to both compensation and suspension of concessions. Article 22 reinforces a fundamental principle of WTO dispute settlement, which is enshrined in DSU Article 3.7, which states that "the first objective of the dispute settlement mechanism is to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements".

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

45. Finally, as to the last part of the question regarding the prospective nature of the Article 11.3 review, this further supports Argentina's view. The Article 11.3 review must be prospective, which means that a decision must be made at a specific time as to what is likely to occur in the future. This is directly contrary to how the USDOC proceeded in rendering its determination to bring itself into compliance with its Article 11.3 obligations. Essentially, the USDOC undertook to conduct a retrospective review of the period 1995-2000, while selectively using information and knowledge it gained subsequent to the sunset review, i.e., after 2000. Therefore, not only did the USDOC develop a different evidentiary basis than had been established in the 2000 review, the USDOC also selectively used information and knowledge it obtained after that sunset review, and which information related to the period after 2000, to take positions and to draw inferences in the Section 129 proceeding that were predisposed against the Argentine exporters.

46. If the authority does not develop a sufficient evidentiary basis in order to make its prospective determination in the review initiated "at that time," it will violate its Article 11.3 obligation, as the United States has done here. If the Member then tries to achieve compliance by developing, for the first time, a different evidentiary basis in order to justify its previous decision to continue the measure, it is no longer making a prospective determination of what is likely to occur. Rather, it is, at best, offering a new factual basis to justify a decision that it made in the past on the basis of different evidence. This is not consistent with the prospective nature of the Article 11.3 review and determination.

USDOC's LIKELIHOOD DETERMINATION

UNITED STATES

Q10.

(a) The Panel notes that the USDOC asked the Argentine exporters to submit their consolidated and unconsolidated financial statements for the 1996-2000 period, as well

[27] US Second Submission, para. 31.

as to provide information relating to their costs and the volume of their shipments to the United States in the period of review.[28]

Please explain for what purpose the USDOC sought the mentioned information. More specifically, please explain whether the USDOC intended to, and the extent to which it did, determine whether these exporters actually dumped in the period of review, and how this relates to the obligations under Articles 11.3 and/or 2.1 of the Agreement. Please explain how exactly the USDOC intended to, and the extent to which it did, base its determination regarding the existence of dumping on the costs of the exporters, citing any record evidence supporting your response.

(b) If the USDOC intended to determine whether the Argentine exports to the United States were dumped during the period of review, please explain why the USDOC did not seek information relating to these companies domestic sales prices and their export prices to the United States. Please explain how the USDOC intended to, and the extent to which it did, determine whether these companies dumped in the past on the basis of information that it sought from them, i.e. their costs and the volume of their shipments to the United States, citing any record evidence supporting your response. Please explain how this relates to the obligations under Articles 11.3 and/or 2.1 of the Agreement.

Q11.

(a) Please explain to what extent, if at all, an investigating authority is bound by the definition of dumping found in Article 2.1 of the Agreement in a determination regarding the existence of dumping in the period of review in a sunset review under Article 11.3 of the Agreement. In other words, in your view, can an investigating authority determine the existence of dumping without having regard to the normal value and export price of the exporter(s) under review?

(b) In your view, is there a difference between calculating the margin of dumping for an exporter and determining the existence of dumping for that exporter? In other words, can an investigating authority determine that an exporter dumped in a given period in the past without calculating a margin of dumping or relying on a margin already calculated in the past? If your response is in the affirmative, please explain whether such a determination can be made without having regard to the two components of dumping, i.e. normal value and export price, set out in Article 2.1 of the Agreement.

(c) On what basis could an investigating authority properly find affirmative likelihood of continuation or recurrence of dumping *other than* with regard to the existence of dumping?

Please elaborate on the basis of the relevant provisions of the Agreement.

Q12. The Panel notes Argentina's claim regarding the comparison the USDOC made between Acindar's export prices and the average transaction price (by weighted average value) that prevailed in the US market for the subject product. The Panel also notes that the USDOC inferred from this comparison the conclusion that Acindar was likely dumping in the period of review.

(a) Please explain the legal basis under the Agreement for basing a determination of dumping, be it likely or actual, on a comparison of an exporter's export price with the

[28] USDOC's questionnaire (Exhibit ARG-13).

average transaction price (by weighted average value) that prevails in the country of imports for the subject product.

BOTH PARTIES

(b) The Panel notes Argentina's assertion that the USDOC ignored certain factors that affected this comparison, such as differences in the physical characteristics of the products compared, the levels of trade at which the comparison was made, as well as differences relating to transportation costs.

Please explain in detail and by referring to the relevant parts of the record, whether any of these factors were known to the USDOC in the Section 129 proceedings at issue and, if so, whether this was taken into account.

Argentina's Answer to Question 12(b)

47. These factors were known to the USDOC in Section 129 proceedings. The Panel can confirm this by reviewing the following portions of the record:

- In its initial response to the Department's questionnaire (the 30 November 2005 response appearing as ARG-15), Siderca explained the effect of physical characteristics on the costs and prices of OCTG. On page 4, Siderca explained:

> While Siderca has reported the cost data for product categories defined by the Department, Siderca would like to stress that the data for such broad product groupings is of limited value from a cost and commercial point of view. As the Department knows, unit product costs for carbon and alloy OCTG depends upon the precise physical characteristics of each specific product (outside diameter, wall thickness, length), the precise type of steel used, the precise type of threading used, and other customer requirements (such as testing, markings, coatings, etc.). To illustrate the point, Siderca includes in Attachment 6 a listing of production capabilities at its production facilities and the corresponding product characteristics. As the list demonstrates, the number of possible combinations of specific product characteristics is extremely large. This is true even within the ten product categories defined by the Department, as there are literally thousands of possible product combinations within each of the ten categories. The production cost and commercial values for the different products differ, although not always in the same proportion, as some products can be sold at a higher profit than others.

- Attachment 6 referenced in the passage quoted above contained a list of the physical characteristics within Siderca's OCTG production range. (*See* the final pages of ARG-15.) The outside diameters range from 1.315 inches to 10¾ inches, and the steel grades range from the most basic J and K grades to numerous highly specialized alloy grades. In addition, a number of specific connections are identified in the attachment, as well as different range lengths and special customer requirements that can be requested.

- In Attachment 2 of Siderca's response (ARG-15), Tenaris' Regional CFO explained:

> 6. Even if we had the data or were able to reconstruct it, the data would be of limited value because of the product (or product category) definition. The questionnaire does not request product-

> specific data. Rather, the Department has identified what can best be described as large categories of products without any specification of the essential dimensions that define tubular products for cost purposes, such as outside diameter, wall thickness, range, and steel grade.
>
> . . .
>
> 7. Even if Siderca had the information, the information would not be meaningful from a cost perspective. For example, the first category defined in the questionnaire is defined as "carbon casing, plain end." In the cost accounting system that Siderca maintains today, there are many products that would have to be grouped into this general category. The commercial values of the different products would also vary, although not necessarily in the same proportion as the cost. Therefore, an average cost of a product category such as "carbon casing, plain end" is nearly meaningless from a cost accounting point of view. The same is true of the other nine product categories identified in the questionnaire.

- In Siderca's 7 December 2005 letter (ARG-19), Siderca addressed the issue again, this time in response to a proposed comparison of Siderca's cost to Argentine export statistics which identified the products at the HTS level. Siderca stated:

> 1. As Siderca pointed out in its 30 November 2005 response, the ten product categories identified in the Department's questionnaire are so broad that they make any conclusions drawn from the data highly doubtful, and certainly not sufficient to support the conclusion of whether "dumping" is likely to continue or recur. As Siderca stated, there are literally thousands of possible different products within each of the ten categories, with many different costs and selling prices, depending on the unique combination of physical characteristics and customer demands defining the product.

- Neither the parties nor the Department ever responded to Siderca's statements regarding this issue. The next mention of the issue was in the Section 129 determination (ARG-16). On page 4, the Department summarizes Siderca's argument in its first paragraph under the heading, "Comments from Respondent Interested Parties." In the "Analysis" section beginning on page 6, the Department does not specifically address Siderca's comments. However, in the context of discussing the alleged "inconsistencies" in Siderca's cost data, the Department states:

> > The categories which defined our product groupings in this determination were, of necessity, broad. They do, however, reflect three significant characteristics that serve to determine price in the market (i.e., seamless v. welded, carbon v. alloy, and casing v. tubing v. drill pipe). Furthermore, we made our comparison of Acindar's sales, discussed above, based on identical matches of these characteristics. Available information does not enable us to make comparisons on a more specific basis; nor are we obligated to perform a product-specific dumping analysis *de novo* in reaching our likelihood determination….

48. The Panel should take note of two important aspects of the development of this issue in the Section 129 proceeding. First, the Department asserts that its comparison of Acindar's sales to the Preston Pipe data was "based on identical matches of these characteristics".[29] At this point in the proceeding, it should be clear that this statement is factually incorrect. It is clear that the Preston Pipe Report used as the basis for the comparison did not distinguish between plain end OCTG and OCTG with other types of end finishing. In other words, the Department compared specific types of OCTG sold by Acindar, presumably identified at the HTS level[30], which distinguishes OCTG by end finish, with Preston Pipe categories that mix together OCTG with different end finishes in each category. As established at the hearing and in ARG-34, the difference in end finishing can be significant, at times reaching $250 per ton.

49. Second, the comparison also is flawed because the USDOC apparently had no idea of the product characteristics on either side of its comparison. Within each Preston Pipe category there is an unknown mix of products of different diameters, steel grades, wall-thicknesses, ranges, and end finishes. Also, it appears that USDOC did not know – and made no attempt to learn – the physical characteristics of the products exported by Acindar.

50. In conclusion, while these factors were known to USDOC, USDOC did not take them into account in the Section 129 determination. USDOC never attempted to develop information that would control these parameters. Nor did the USDOC ever respond to the concerns Siderca expressed about the potential comparisons. USDOC in fact never revealed what comparison it was performing until it released its final determination.

51. Finally, it should also be noted that the USDOC did rely on the physical characteristics of the products whenever doing so served to discredit the Argentine exporters' information. For example, to support its theory that Siderca's cost information was "inconsistent," USDOC calculated a weighted average cost for OCTG with different end finishes, explaining in its Second Submission to this Panel that it did so "because the available public information grouped the products in that manner".[31] Inexplicably, USDOC was concerned about the physical characteristics of the products being compared when evaluating Siderca's cost information, but not when performing the price comparison for Acindar.

Q13. The Panel notes that the USDOC's Section 129 Determination states that the USDOC did not use the cost data in Acindar's financial statements because those data related to a product category that included products other than the subject product. The USDOC stated that "the inclusion of costs related to the merchandise not subject to review would distort [the USDOC's] analysis".[32] Yet the USDOC relied on these financial statements with respect to its determination that the OCTG market was depressed in the period of review.[33]

(a) Please explain, by referring to the relevant parts of the record, the relevance of the financial statements of Siderca and Acindar for both the company-specific and order-wide phases of the USDOC's sunset determination in these proceedings. More

[29] ARG-16, page 4.

[30] For the Panel's convenience, Argentina attaches as **Annex 1** to this response a copy of the HTS in force in 1998, 1999, and 2000, the years that Acindar indicated that it had shipped a minimal quantity of OCTG to the United States during the sunset period. These were obtained from the USITC's website. For example, Argentina obtained the 2000 version of the HTS from the following URL: http://www.usitc.gov/tata/hts/archive/0000/000C73.pdf. The document shows that the HTS does distinguish by type of OCTG (casing v. tubing), form (welded v. seamless), and general category of steel grade (alloy v. carbon, with no specification of the specific steel used), and end finish (plain end v. threaded and coupled). No other distinctions are made.

[31] US Second Written Submission at 50.

[32] Section 129 Determination (Exhibit ARG-16 at 7).

[33] Section 129 Determination (Exhibit ARG-16 at 7).

specifically, please explain whether the USDOC used these statements in support of its order-wide determination that dumping was likely to continue or recur should the order be revoked and where such use is reflected on the record.

Argentina's Answer to Question 13(a)

52. Before reviewing each of USDOC's references to the financial statements in the Section 129 Determination and responding to the Panel's specific question, Argentina would like to make a preliminary comment regarding the "order-wide" nature of the Article 11.3 determination. Even though the Appellate Body has acknowledged that the review contemplated by Article 11.3 can be "order-wide," this does not mean that company-specific information is not relevant. Companies export, countries do not. In order to determine what is "likely" to occur on an "order-wide" or "country-wide" basis within the meaning of Article 11.3, the authority will have to develop a sufficient factual basis regarding the likely actions of the specific companies. The Appellate Body has recognized this in its explanation of why the authority must always review the reasons for a volume decline:

> The cessation of imports in the second scenario and the decline in import volumes in the third scenario could well have been caused or reinforced by changes in the competitive conditions of the market-place or strategies of exporters, rather than by the imposition of the duty alone. Therefore, a case-specific analysis of the factors behind a cessation of imports or a decline in import volumes (when dumping is eliminated) will be necessary to determine that dumping will recur if the duty is terminated.[34]

The Appellate Body is clearly referencing company strategies, not general notions of order-wide trends.

53. Argentina addresses below each of the references to the company's financial statements in USDOC's Section 129 determination below. In order to be responsive to the question, Argentina reproduces each reference to financial statements in the Section 129 Determination in the left column, and responds to the Panel's question in the right column.

References to Financial Statement	Observations
"The Department did, however, have access to Acindar's financial statements, which included some summary cost data. . . . These data were for category "tubes, pipes, and structural products.". . . Although this category includes the merchandise under review, it also includes other merchandise which is not subject to the review. We are unable to segregate subject from non-subject merchandise. Hence, we find this category to be too broad for calculating a meaningful cost/price trend analysis for purpose of this sunset review. The inclusion of costs related to merchandise not subject to review would distort our analysis."[35]	This passage refers most directly to the company-specific determination for Acindar. The USDOC considered that the inclusion of non-OCTG products rendered the data not useful. However, USDOC then used data from Acindar's overall financial statement, in which the effect of OCTG is even less relevant. The United States Second Submission contradicts USDOC's statement that the data is not useful. See paras. 43-47 of Argentina's Oral Statement. In other words, the USDOC rejected the more specific information which showed that the division producing OCTG was profitable, and

[34] Appellate Body Report, *US - Corrosion-Resistant Steel Sunset Review*, para. 177.
[35] ARG-16 at 7.

References to Financial Statement	Observations
	instead relied on information showing the loss that had been generated from the general operations.
"Based upon the foregoing, and in the absence of usable cost data from Acindar, we find that Acindar likely was dumping subject OCTG during the original sunset review period. Moreover, these Acindar sales occurred at a time when Acindar was showing losses on its financial statement; the financial statements of other significant OCTG products, such as Siderca, Lone Star, Maverick, and North Star, also were showing losses. . . . These losses are an indication that the OCTG market was depressed. The combination of Acindar selling in the United States at below market prices at the end of the sunset period and the depressed OCTG market indicates that Acindar likely was dumping significantly into the US market."[36]	The financial statement data for Acindar's overall operations are used to corroborate USDOC's conclusion that the company was likely dumping during the sunset review period. Thus, this reference is used to establish dumping in the past, rather than likely dumping in the future at either the company or order level.
"Moreover, as discussed below, Acindar's marketing strategy suggests that it would continue to sell in the United States after the end of the original sunset review period."[37]	USDOC uses a narrative statement in Acindar's financial statement as evidence that Acindar is likely to sell OCTG in the United States. No mention is made of likely dumping.
"However, for both Siderca and Acindar, we have financial statements from the original sunset review period that provide information on the financial statuses of these companies. This information establishes that the global OCTG market was depressed during a significant portion of the original sunset review period which suggests that prices would continue to be low after the sunset period."[38]	USDOC uses the financial statements to support the notion that the companies would likely "continue" to sell at low prices after the period. This seems to be a reference to Acindar; Siderca did not ship during the period, so the reference to "continuing" to sell at low prices makes no sense with respect to Siderca.
"We disagree with Siderca's assertion that the company financial statements of Siderca and Acindar are not relevant for our likelihood analysis. Financial statements provide a good understanding of the status of the entire company, and reflect the company's overall selling practices. Taken together, these data are relevant indicators of likely future pricing trends. For example, [discussion of data from Siderca financial statement]. Given the weakened	Siderca never asserted that financial statements are not relevant, only that they have limited value in a multi-product company. USDOC refers to "likely future pricing trends," suggesting that the data are used to predict each company's likely future prices of OCTG. If properly established, it could be relevant to a "company-specific" finding and an "order-wide" finding.

[36] *Id.* at 7-8.

[37] *See* Acindar 2000 Financial Statement found in Petitioners' 30 November 2005 Submission at Exhibit 5, page 12.

[38] ARG-16 at 9.

References to Financial Statement	Observations
condition of Siderca at the end of the original sunset review period, we consider that there was no valid indication that a sudden turn-around in the OCTG market was likely."[39]	
"In addition, Acindar's fiscal 2000 statement indicates: [data from Acindar's financial statement]. Given the weakened condition during the original sunset review period, including substantial losses during fiscal 1999 and 2000, we find it likely that Acindar's US sales of OCTG during the original sunset review were at dumped prices. As discussed above, we find that Acindar's US AUVs were far below market prices when most producers were losing money. Even if, as Siderca now alleges, Acindar's production of OCTG during the sunset period represented only a short-lived experiment, Acindar was, in fact, shipping and selling OCTG in the United States during the original sunset review period, 1995-2000. Thus, its shipments and pricing of merchandise subject to the dumping order, and the implications for likelihood of continued shipping and selling at dumped prices if the order were revoked subsequent to the original sunset review, are relevant to the Section 129 determination. . . . Accepting arguendo Siderca's argument that Acindar's OCTG production was a very small portion of its overall production, nothing on the record indicates any intention on the part of Acindar to absent itself from the world OCTG market during the sunset review period. Given this, combined with the high likelihood that Acindar dumped at the end of the sunset period, we find (contrary to the implications of Siderca's argument) that Acindar was likely to continue selling in the United States at dumped prices if the order were revoked."[40]	USDOC uses the losses and weakened condition of Acindar to find that Acindar likely was dumping during the sunset review period. That is, the financial statement is used to establish past dumping. USDOC implies that a finding of likely dumping in the past by Acindar is sufficient for an order-wide likelihood finding.
"We find additional support for this conclusion from a statement in Acindar's financial statement regarding its marketing strategy. Acindar states 'Acindar's strategy has been and will continue to be to focus on the US market while using the export market to stabilize its overall sales volume during periods of slowdown in domestic economic activity.'. . . . In other words, Acindar	USDOC relies on the narrative statement in Acindar's financial statement, plus information from the USITC's analysis, to support its view that Acindar would export OCTG to the US after the sunset period. No specific mention is made of "likely" dumping either on a company- or order-wide basis.

[39] ARG-16 at 9-10.
[40] ARG-16 at 10.

References to Financial Statement	Observations
planned to continue export sales in order to maintain its sales volume. The United States is the world's largest market for OCTG. . . . We have no evidence from Acindar itself that it planned to exit the US market after the original sunset review period. We also note that the ITC finding that OCTG producers had incentive to devote more of their productive capacity to producing and shipping more to the US market was sustained by the Appellate Body."[41]	

54. As can be seen from the chart above, the financial statements were used by USDOC, for various purposes in its Section 129 Determination, in an effort to demonstrate: 1) the "likely past dumping" of Acindar; 2) that the Argentine producers would likely sell in the US market in the future; and 3) future pricing trends in the US market. These findings then purported to serve, along with the inference based on the volume decline, as the basis for the USDOC's order-wide likelihood determination in the Section 129 Determination.

(b) Please explain, by referring to the relevant parts of the record, whether the financial statements of these two companies reflected the overall production operations of these companies or whether the data relating to the subject product, i.e. OCTG, could be separately identified.

Argentina's Answer to Question 13(b)

55. The financial statements reflect the overall operations of the companies unless otherwise specified. For example, Acindar's financial statement contained disaggregated information in the notes to its consolidated financial statement for different product divisions of its operation (referred to as "segment" information in the financial statement). (*See* Argentina's First Written Submission, para. 120, citing ARG-27 at F-75.) No similar disaggregation appears in Siderca's financial statements.

56. Both companies provided USDOC with information regarding the relative significance of its OCTG production to its overall operations. Acindar explained that it produced OCTG only from 1998 to 2001, and that OCTG in those years accounted for less than 0.5 per cent of its total production. (*See* ARG-14 and ARG-28.) Siderca's cost data provided the relative volume of OCTG and non-OCTG products, which showed that non-OCTG ranged from 46.51 per cent to 52.87 per cent of Siderca's operations during the period. (*See* ARG-21 (confidential) summarizing the volume of OCTG and non-OCTG in each year from the data reported by Siderca. *See also* ARG-19 at page 6 and note 9.)

(c) Please explain whether the share of OCTG in these two companies' overall production operations was taken into account in making the inference on the basis of these statements that the OCTG market was depressed.

Argentina's Answer to Question 13(c)

57. Argentina believes that USDOC did not properly consider this fact. Acindar's OCTG production accounted for less than 0.5 per cent of the company's total production. Accordingly, the

[41] ARG-16 at 11.

losses associated with Acindar's overall operations would not be an appropriate basis for drawing an inference about whether the OCTG market was depressed. As for Siderca, the USDOC made no findings on the relationship of the company's overall production operations to the issue of whether the OCTG market was depressed.

UNITED STATES

(d) Please explain why the USDOC made inferences regarding the state of the OCTG industry from Acindar's financial statements when it had found the information contained in those statements to be too broad for calculating a meaningful cost/price trend analysis.

Q14.

(a) Please state your reaction to Argentina's proposition, in paragraph 42 of its Oral Submission, that past events are not susceptible to prediction and that an investigating authority can determine that either dumping occurred in the past or it did not or one does not know.

(b) In your view, what is, if any, the difference between determining past dumping and past likely dumping?

Q15. The Panel notes the following parts the USDOC's Section 129 Determination regarding the state of the OCTG industry:

> **We note that Acindar's US sales of OCTG occurred shortly before the end of the original sunset review period. Absent evidence that Acindar intended to cease selling in the United States, and absent evidence that prevailing market conditions were likely to improve in the near future, we consider such sales indicative of Acindar's likely future pricing behaviour were the order to be revoked.[42] (emphasis added)**
>
> **Given the weakened condition of Siderca at the end of the original sunset review period, we consider that there was no valid indication that a sudden turn-around in the OCTG market was likely.[43] (emphasis added)**

The Panel also notes Argentina's statement in paragraph 99 of its First Written Submission that "USDOC's conclusion that there is "no valid indication that a sudden turn-around in the OCTG market was likely" is demonstrably contrary to the evidence." In this regard, Argentina refers to Siderca's letter dated 7 December 2005 (Exhibit ARG-19). That letter states:

> **Also, Siderca's Financial Statement for the period ending 30 June 2000 shows profitability increasing and links this increase with the recovery in the oil and gas sector that was already underway.[44] (footnote omitted)**

This letter in turn refers to Siderca's letter dated 30 November 2005, found in Exhibit ARG-15. Financial statement of Siderca as at 30 June 2000, attached to the mentioned letter, reads in relevant parts:

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[42] ARG-16 at 8.
[43] ARG-16 at 10.
[44] ARG-19 at 7.

> **Improved crude and gas prices have been responsible for a steady recovery in the petroleum and steel markets. In this context, the level of business of the Company during the first quarter of the year recorded a significant improvement, based on a recovery of sales volumes and a gradual rise in prices on the international steel tube market.[45] (emphasis added)**
>
> **Business in the first quarter measured by sales volume totalled 185,882 tons and output reached 195,132 tons, more than in the same period for the previous year, when volumes totalled 124,921 tons and 117,250 tons, respectively. These figures are an indication of the recovery experienced in the sector, and exports in particular.[46] (emphasis added)**

The Panel notes that financial statements of Siderca for the fiscal year ending 31 March 2000, found in Exhibit ARG-36, reads in relevant parts:

> **In the middle of the fiscal year oil prices began to record a significant recovers-hitting US$ 30 per barrel in March- generating an increase in drilling and investment activity by oil companies. This recovery came too late to have a significant effect on the volume of sales for the year.[47] (emphasis added)**
>
> **The recovery in crude prices and the good level of gas prices will influence a steady recovery ion 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.**
>
> **The international market for seamless tubes has seen a profound globalization in recent years.[48] (emphasis added)**

The Panel also notes that the Preston Publishing data contained in Exhibit ARG-18 Attachment 3 indicates that the prices of all subject products showed an increasing trend towards the end of the period of review of the Section 129 Determination at issue, specifically from September 1999 through July 2000.

(a) Please indicate the period of review in this Section 129 sunset review. Please explain which parts of that review period the above-referenced financial statements covered.

(b) Did the USDOC consider the above-quoted information in the financial statements and the Preston Publishing data in its Section 129 Determination, in particular with regard to its proposition that the OCTG industry was depressed and that there was no indication of recovery in the near future?

Please elaborate by referring to the relevant parts of the record.

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[45] ARG-15, Attachment 1 at 1.
[46] ARG-15, Attachment 1 at 2.
[47] ARG-36 at 2.
[48] ARG-36 at 15.

BOTH PARTIES

Q16. The Panel notes Argentina's assertion in paragraph 30 of its Oral Statement that in the period of review of the Section 129 Sunset Determination at issue, the prices of the subject product in the United States were significantly higher than other markets. Please elaborate by referring to the relevant parts of the record of the measure at issue.

Argentina's Answer to Question 16

58. Central to the USDOC's determination that Acindar was "likely" dumping during the sunset review period was based on a comparison of Acindar's US sales to the prevailing prices in the US market. The Section 129 Determination provides that "Our analysis indicates that Acindar's US selling prices during the sunset review period were substantially lower than prevailing US market prices for the corresponding OCTG products."[49]

59. As Argentina explained in its Opening Oral Statement to the Panel, it should not have been surprising to the USDOC that the US domestic prices relied upon by USDOC were "substantially" higher than Acindar's prices. As Argentina noted, the USITC found that US market prices were significantly higher than world market prices. 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.[50]

60. This point is also reflected in the Section 129 Determination (ARG-16) at 11, where the USDOC states:

> We also note that the ITC's finding that OCTG producers had incentive to devote more of their productive capacity to producing and shipping more to the US market was sustained by the Appellate Body.

61. The fact that the observed prices of Acindar were less than significantly elevated US prices, however, does not support the view that Acindar was dumping. A company presumably can sell below a significantly elevated price in the consuming market (the highest in the world) without "dumping" within the meaning of Article 2. In this regard, such a comparison is further suspect particularly in light of the recognition by the United States that Acindar's tube division was profitable.[51] The USITC's finding, already accepted by the Panel, thus further weakens the flawed reasoning relied upon by the USDOC.

62. Argentina notes that these arguments were not advanced during the Section 129 proceeding and that the findings of the ITC are not part of the record of the Section 129 proceeding. This demonstrates the very point that Argentina wishes to make.

63. The problem stems from the failure of USDOC to disclose the basis of its comparison in sufficient time so that the Argentine exporters could explain why such a comparison was flawed. As Argentina's written submissions demonstrate, the USDOC's likely past dumping analysis suffers from a host of substantive flaws and is inconsistent with numerous US WTO obligations. The record does not reveal any attempt by USDOC to ensure that the prices it reviewed related to the same products within the specific categories, or that basic differences in points of sale and transportation were the same. The USDOC never even asked Acindar any questions about the observed prices, either of its exports or the average US prices of the OCTG product groupings. The Argentine exporters certainly would have pointed out the deficiencies with USDOC's methodology had they known that this was

[49] USDOC Section 129 Determination at 7 (ARG-16).
[50] *See* Panel Report, paras. 7.291, 7.297.
[51] US Second Submission, 43.

the comparison upon which USDOC intended to conclude that Acindar likely dumped during the sunset period.

64. The Panel's question thus highlights USDOC's failure to inform the interested parties of the essential facts under consideration that formed the basis for its decision, given that five USDOC file memoranda are dated 16 December 2005, were disclosed contemporaneously with the Section 129 Determination itself and they were not provided to the interested parties before a final determination was made in the Section 129 proceeding.

USDOC's VOLUME ANALYSIS

Q17.

(a) How, if at all, *did* the original panel address the parties' claims and arguments relating to the USDOC's volume analysis? Did it exercise "judicial economy"?

Argentina's Answer to Question 17(a)

65. The Panel addressed the issue of volume and made the relevant factual findings, but decided to exercise judicial economy and declined to make a legal finding on the consistency of the USDOC's inference that dumping would be likely based on the volume decline.

66. The United States seeks to take advantage of this Panel's decision to leave the WTO-consistency of USDOC's volume based inference of likelihood. In failing to conduct any analysis of the volume issue, the USDOC has sent an unequivocal message to Argentina and to this Panel: USDOC can rely on the inference arising from declining import volumes without an analysis of the cause for the decrease.[52] Clearly, the United States has taken advantage of this Panel's decision to leave this issue unresolved.

67. Paragraph 6.11 of the Panel Report is clear that:

> We note that in paragraphs 7.201 – 7.206 below, we made the relevant factual findings regarding Argentina's claim challenging the USDOC's determinations in the OCTG sunset review. In particular, in paragraph 7.202, we observed as a matter of fact that the USDOC had based its likelihood determination on the facts that dumping had continued over the life of the measure and that import volumes of the subject product had declined. It is, therefore, clear that we have made relevant factual findings in this regard. As far as legal findings are concerned, we note that we have decided Argentina's claim regarding the USDOC's likelihood determinations in the OCTG sunset review. We have found that the USDOC's reliance on the existence of the original dumping margin was inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. We therefore did not need to address whether the USDOC's reliance on declined import volumes was yet another action inconsistent with that article. Argentina argues that we should make a finding in this regard in case our decision is appealed and the Appellate Body finds that the USDOC's reliance on the original dumping margin was in fact consistent with Article 11.3. We do not consider, however, that it would be appropriate to make an additional legal finding based on the hypothetical situation Argentina posits. We therefore decline to make additional findings in this regard.

68. Paragraph 7.221 of the Panel Report states:

[52] ARG-16 at 2 n.4 and 6 n.12.

> We recall that the USDOC's likelihood determination in this sunset review was based on two factual findings, i.e. first dumping continued over the life of the measure and second import volumes declined following the imposition. We have found that the factual basis of the first one is not proper. We therefore conclude that the USDOC's likelihood determination in the instant sunset review was inconsistent with Article 11.3 of the Anti-Dumping Agreement.[53]

(b) What considerations should guide this Panel in addressing the parties' claims and arguments in these 21.5 DSU proceedings? Would any prejudice arise to any party in the event the Panel did, or did not, address the volume analysis?

Argentina's Answer to Question 17(b)

69. The considerations that should guide the panel are: 1) the rights and obligations of Article 11.3 of the ADA; and 2) the rights and obligations under Articles 3.2, 3.7, and 11 of the DSU.

70. In this compliance proceeding, the United States must bring itself into compliance with Article 11.3 of the Anti-Dumping Agreement. The United States chose to attempt to achieve compliance with Article 11.3 through a Section 129 proceeding. In that proceeding, USDOC could have either: 1) revoked the anti-dumping measure; or 2) continued the measure. USDOC chose the latter, and it expressly based its decision, in part, on the inference that it drew from the fact that import volumes declined. In order to determine whether the USDOC decision brought the United States into compliance with its obligations under Article 11.3 of the Anti-Dumping Agreement, the Panel must conduct a searching review of the USDOC's reasoning, which includes, expressly, the inference drawn from the declining volumes.

71. DSU Articles 3.2, 3.7, and 11 compel the same conclusion. Article 3.2 states that the dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements". The purpose of this compliance proceeding is to determine whether the United States has complied with its Article 11.3 obligation. If the Panel tries to resolve that issue without examining the stated basis of that decision, it will fail to adjudicate this matter in a way that preserves the rights and obligations of the Members.

72. Further, DSU Article 3.7 states that, absent a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the covered agreements". The continuation of the anti-dumping measure was found to violate Article 11.3, and the United States has chosen not to withdraw the measure, despite DSU Article 3.7 and despite the fact that termination of the anti-dumping measure is the "rule" established by Article 11.3. A decision not to review one of the stated bases for the decision not to withdraw the measure would undermine Article 11.3 of the Anti-dumping Agreement and Article 3.7 of the DSU.

73. Finally, the Panel has an obligation under Article 11 of the DSU to "make an objective assessment of the matter before it …". The "matter before" the Panel in the context of this Article 21.5 proceeding is the US compliance with Article 11.3, which the United States claims to have achieved, in part, by the inference it drew from decreased import volumes.

74. The Panel can also consider the prejudice that would flow from its decision, although Argentina believes that consideration of prejudice cannot prevail over the Panel's obligations to resolve the matter before it, which includes an obligation to make an objective assessment of the matter. In this case, the evaluation of relative prejudice leads to the same conclusion as the

[53] Panel Report, para. 7.221.

application of Article 11.3 of the Anti-dumping Agreement and Articles 3.2, 3.7 and 11 of the DSU. A decision not to address the USDOC's reliance on the volume inference would cause prejudice to Argentina, which has consistently alleged that USDOC's volume inference is inconsistent with Article 11.3. In contrast, the United States can claim no prejudice from the Panel's assessment of the issue. The United States chose to rely on the volume inference as a basis of its determination, and it therefore subjected that analysis to scrutiny. In other words, the volume inference was one of the "means of implementation" that the USDOC chose, and it cannot be prejudiced by the Panel's assessment of the issue. Complying with one's obligations is not "prejudice".

(c) Is the USDOC's volume analysis part of the measure taken to comply with the DSB recommendations and rulings for the purposes of Article 21.5 DSU? Why or why not? Would it have been possible for the original panel to address the USDOC's volume analysis? Please indicate the relevance, if any, of the Appellate Body Reports in *EC – Bed Linen (Article 21.5 – India)* and *US – Softwood Lumber IV (Article 21.5 – Canada)* in your responses to the above questions.

Argentina's Answer to Question 17(c)

75. Argentina would respectfully refer the Panel to paragraphs 81–98 of Argentina's Second Written Submission in which Argentina provided extensive argumentation that demonstrated that the USDOC's volume analysis was part of the US "measure taken to comply." Argentina urges the Panel to review these paragraphs carefully as they are fully responsive to the first two subsidiary questions of 17(c).

76. As for whether "it have been possible for the original panel to address the USDOC's volume analysis", Argentina would again refer the Panel to paragraph 6.11 of its original Report, which unambiguously provides the answer: "It is, therefore, clear that we have made relevant factual findings in this regard. As far as legal findings are concerned, we note that we have decided Argentina's claim regarding the USDOC's likelihood determinations in the OCTG sunset review. We have found that the USDOC's reliance on the existence of the original dumping margin was inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. We therefore ***did not need to address*** whether the USDOC's reliance on declined import volumes was yet another action inconsistent with that article." [Emphasis added].

77. It is clear from this passage that the Panel could have resolved the issue, but that it chose not to do so because it found that the measure in question violated Article 11.3 for other reasons.

78. Argentina also notes that the record of the Section 129 determination demonstrates that the volume inference was part of the Section 129 proceeding. Representatives of the US domestic industry urged the USDOC to use the volume inference to support its decision to continue the measure. They argued that

> In addition to showing that Siderca dumped OCTG on a global basis during the POR, other available evidence clearly shows that Siderca could not ship OCTG to the United States with the discipline of the order in place. Indeed, Siderca ceased shipping OCTG to the United States altogether after the imposition of the order. As indicated above, in each of the four administrative reviews concluded during the POR for this proceeding, the Department determined that Siderca did not have a single shipment of subject merchandise to the United States. [FN] Fourth Administrative Review, 65 Fed. Reg. at 8949; Third Administrative Review, 64 Fed. Reg. at 4070; Second Administrative Review, 63 Fed. Reg. at 49090; First Administrative Review, 62 Fed. Reg. at 18748.

> Siderca's complete cessation of imports following the issuance of the order shows that it could not sell in the United States without dumping and that, to re-enter the US market, it would have to resume dumping. For this reason as well, the Department should not revoke the order in this case.[54]

79. This line of argument was reflected in the Section 129 determination when the USDOC stated that "Declining import volumes after, and apparently resulting from, imposition of an antidumping order indicate that exporters would need to dump to sell at pre-order levels." ARG-16 at page 11. Also, as the Panel has already recognized in question 18, Siderca provided information directly relevant to the volume inference. It also rebutted the argument by the US industry. *See* ARG-19 at pages 7-8. Thus, the record of the Section 129 proceeding tells a different story than the argument that the United States offers this panel. The volume inference was part of the proceeding, it was explicitly part of the Section 129 Determination, and there is no basis to remove it from the Panel's assessment of the measure taken to comply.

UNITED STATES

Q18. The Panel notes Argentina's argument that the USDOC disregarded the comments made by the Argentine exporters with regard to the decline in the volume of imports. The Panel also notes the US' argument that these comments were not germane to the issue. Siderca's response to the questionnaire to which Argentina refers in this regard, reads in relevant part:

> **Whatever the significance of a decline in export volume may be as a general matter, Siderca knows that, with respect to Siderca, it does not mean that the product could not be shipped without dumping. The cost data (even with the limitations explained above) supports Siderca's position: Siderca is a cost-efficient producer of OCTG and could have shipped OCTG products profitably to the United States.[55]**

(a) Please explain why the USDOC found these comments not to be germane to the issue of the decline in the volume of imports.

ARGENTINA

(b) Is there any other reference on the record that contains Argentine exporters' comments with regard to the decline in the volume of imports?

Argentina's Answer to Question 18(b)

80. As Argentina explained in its First Submission, Siderca offered evidence and arguments to explain that the volume decline was not related to the company's ability to participate in the US market without dumping.[56]

81. With respect to this evidence, which was probative of the absence of a likelihood of dumping, there was no analysis by USDOC. Indeed, there is no discussion of this evidence in the Section 129 Determination.

82. In the Section 129 proceeding, Siderca offered evidence regarding the diversification of its OCTG export markets following the imposition of the US order.[57] Siderca demonstrated that the

[54] ARG-27 at pages 7, 8.
[55] Response of Siderca to the USDOC's Questionnaire (Exhibit ARG-15 at 10).
[56] See Argentina's First Submission, paras. 102-107.
[57] Siderca's Response to Questionnaire (30 Nov. 2005) at 7-10 (ARG-15).

company had diversified its export markets and that it was not subject to any other anti-dumping measures, and that if the US order were revoked, dumping would not be likely to recur in the United States. Siderca noted that its "sales processes underwent significant changes during the 1995 – 2000 period, reflecting the further diversification of Siderca's export markets and its strategy of providing higher-value products and services to its customers throughout the world".[58] Siderca explained that the company had "developed an extensive network of international sales offices, and implemented a strategy to strengthen and maintain its international presence" and this included "a distribution network with more than 20 offices around the world".[59] Siderca further substantiated its position with reference to the establishment of a series of long-term agreements with customers and international finishing plants" from around the world.[60]

83. Regarding the diversification of its export markets, Siderca explained that it had consolidated the company's strategic positioning in international markets during subsequent years, including by expanding from its traditional base in Latin America, and increasing significantly its shipments to Africa and Russia, in 1996 in particular.[61] Siderca also noted how it "reacted to the economic and financial crises in the emerging markets of Southeast Asia and Latin America by introducing flexible production programs and the development of made-to-order products and services for its international clients," and identified the new stocking programs that the company had entered into in Venezuela, Nigeria, Canada, Bolivia, Thailand, Azerbaijan, Malaysia, and Ecuador.[62]

84. Siderca also commented on the Argentine market, explaining that the company had introduced regional stocking programs and "just-in-time" inventory management agreements with several of its Argentine customers, developing regional storage facilities in Las Heras, Barranquilla and Desfiladero Bayo.[63] The effect of these measures was to reduce order and transport time for local customers, and to increase Siderca's ability to provide value added services at the site of the oil and gas production. Siderca explained that these agreements "proved to be important to Siderca and its customers during the crisis in the oil market in 1998/99, allowing customers to increase efficiency and reduce costs."[64]

85. Siderca summarized its evidence as follows:

> As can be seen through this summary (and the discussion in the cited annual reports), Siderca continued and intensified the process of diversifying products, services, and markets during the 1995-2000 period. By the end of the period under analysis, Siderca exported its OCTG to approximately 60 countries. In some regions, such as Canada and Africa, the increase in OCTG exports over this period was significant. During this period, no other countries maintained anti-dumping measures against Siderca, nor has Siderca been accused of dumping or other unfair trade practice during or after this period.[65]

86. This evidence is clearly probative of whether dumping would be likely to continue or recur. Yet, there was no analysis by USDOC of this evidence. Indeed, these issues are not mentioned anywhere in the 2005 likelihood determination. This is all the more striking given the Appellate Body's admonishment that "a case-specific analysis of the factors behind a cessation of imports or a

[58] Siderca's Response to Questionnaire (30 Nov. 2005) at 7 (ARG-15).
[59] Siderca's Response to Questionnaire (30 Nov. 2005) at 7 (ARG-15).
[60] Siderca's Response to Questionnaire (30 Nov. 2005) at 7-8 (ARG-15).
[61] Siderca's Response to Questionnaire (30 Nov. 2005) at 8 (ARG-15).
[62] Siderca's Response to Questionnaire (30 Nov. 2005) at 8 (ARG-15).
[63] Siderca's Response to Questionnaire (30 Nov. 2005) at 8 (ARG-15).
[64] Siderca's Response to Questionnaire (30 Nov. 2005) at 8-9 (ARG-15).
[65] Siderca's Response to Questionnaire (30 Nov. 2005) at 9 (ARG-15).

decline in import volumes (when dumping is eliminated) will be necessary to determine that dumping will recur if the duty is terminated".[66]

CLAIMS UNDER ARTICLE 6

ARTICLES 6.1 AND 6.2

Q19.

(a) The Panel notes Argentina's allegation that the USDOC failed to give the Argentine exporters an ample opportunity to submit evidence, inconsistently with Article 6.1 because it:

- **failed to issue supplemental questionnaires, despite the fact that it had some questions about the information submitted;**
- **failed to issue a preliminary redetermination;**
- **failed to establish a schedule to allow interested parties to submit comments, including rebuttal comments, to USDOC;**
- **failed to request clarification or additional documentation from the responding parties; and**
- **failed to hold a hearing.**[67]

The Panel also notes Argentina's assertion that these defects also violated Article 6.2 of the Agreement.

Please explain more specifically how exactly these alleged defects violated these two provisions.

Argentina's Answer to Question 19(a)

87. As a preliminary remark, Argentina believes it is important to be clear that Argentina is not asking this Panel to be prescriptive, *i.e.*, Argentina is not asking the Panel to tell the United States what specific measures it should have taken in order to have fulfilled its obligations under Article 6.1. Instead, Argentina simply seeks a ruling on whether the measures the United States *did take* met the high standards of this provision.

88. Indeed, Argentina made this clear in paragraph 107 of its Second Submission: "This Panel need not provide an exhaustive listing of the measures that are, or are not, required by Article 6.1. Instead, it has to address one core issue: whether the USDOC actions in this case fell short of the requirements of Article 6.1."

89. In assessing whether the United States fulfilled the requirements of Article 6.1, it is important to recall that the Appellate Body has ruled that Articles 6.1 and 6.2 set out "the *fundamental due process rights*" to which interested parties are entitled. This is the benchmark against which the USDOC actions must be judged – whether the "fundamental due process rights" of the Argentine interested parties were respected or not. Argentina's First and Second Submissions set out in some detail why the USDOC breached the fundamental due process rights of the respondent interested

[66] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 177.
[67] First Written Submission of Argentina, para. 144.

parties by failing to provide them with "ample opportunity" to present in writing all evidence that they considered relevant in respect of the investigation in question.

90. Argentina recognizes that the US statements to the Article 21.3(c) Arbitrator do not technically "bind" the United States. But they serve to illustrate the wide gap between what the United States claimed was required under Article 6 of the Anti-Dumping Agreement, and what the USDOC actually did in this case. Thus, the US statements help to illustrate the violations of Article 6. The Arbitrator's report recorded the US position as follows: "…the USDOC also *needs sufficient time to ensure that it complies with its obligations of transparency and due process under Articles 6* and 12" of the Agreement. Arbitrator's Award, para. 10.

91. The United States set out a long list of procedural steps that it would be required to undertake, including supplemental questionnaires, a preliminary redetermination, a schedule to allow interested parties to submit comments, and a hearing. Despite these assertions to the Arbitrator, none of these procedural steps were ever fulfilled.

92. The US statements thus highlight the failure of the United States to fulfil the "obligations of transparency and due process" that it had earlier recognized expressly.

93. Moreover, as the Appellate Body has made clear, the right of respondents to present relevant evidence concomitantly requires the investigating authority to take into account the information submitted.[68] Yet the USDOC simply ignored the letter from Siderca that explained that the allegations by the Petitioners regarding Siderca's cost data were wrong. The United States argues that "there is no obligation under Article 6.1 for a Member to respond to a letter". Yet, as the Appellate Body has made clear, the USDOC was obligated to take account of the information submitted by Siderca.

94. Far from "taking account" of the Siderca's information, the Department rejected it and issued its final determination.

(b) Did the Argentine exporters request a hearing in these Section 129 proceedings?

Argentina's Answer to Question 19(b)

95. Initially Argentina believes it is important to recognize that a hearing is not exhaustive of the requirements of Article 6.2. The first sentence of Article 6.2 is stated in very broad terms: "Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests." The provision goes on to state that interested parties are entitled to a hearing, but other measures, unrelated to hearings, could breach this provision as well. As noted in our prior pleadings, in *EC – Tube or Pipe Fittings*, the Appellate Body found that the EC breached its obligations under Article 6.2 for failing to disclose to the interested parties during an anti-dumping investigation certain information on injury factors.

96. Thus, the test is not simply whether there was a hearing but rather, more generally, whether the responding parties had a "full opportunity" to defend their interests.

97. As for the hearing in this case: as argued in Argentina's Second Submission, the United States had told Argentina and the Article 21.3(c) Arbitrator that it intended to follow specific procedures, which included a hearing. Siderca specifically asked the USDOC to provide more information regarding the "timing of any hearing, and how the parties will be permitted to have access to and comment on the essential facts being used by the Department to make its determination".[69]

[68] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 292.
[69] 7 December 2005 Letter from Siderca to USDOC at 3 (ARG-19).

The USDOC simply ignored the question. Argentina recalls that the original Panel found that the USDOC breached Article 6.2 because of the lack of a hearing (paras. 7.235, 8.1(d)(i)). Following the express USDOC statements to the Arbitrator, if the USDOC subsequently decided it would not be holding a hearing, it should have advised the parties.

Q20.

(a) The Panel notes Argentina's allegation that by failing to respond to Siderca's letter dated 7 December 2005, the USDOC acted inconsistently with Articles 6.1 and 6.2.[70] Please explain how exactly failure to reply to this letter violated the USDOC's obligations under Articles 6.1 and 6.2.

Argentina's Answer to Question 20(a)

98. Argentina would initially observe that its claim does not simply stem from the USDOC's failure to respond to a particular letter. While the 7 December 2005 letter from Siderca to the USDOC provided a detailed review of the problems with the Petitioners' approach and use of facts, as well as challenging the Petitioners' conclusions,[71] Siderca's letter also, and equally important, pointed out that the Section 129 proceeding suffered from a severe lack of transparency. In this regard, Siderca advised that there had been no communication from the USDOC as to how it would use the information it solicited from the parties, what procedures would be used to analyze the information, the timing of any hearing, or how the parties would be permitted to have access to and comment on the essential facts being used by the USDOC to make its determination.[72] Siderca also pointed out that the allegations by the Petitioners regarding Acindar were wrong, and did not form an adequate basis for a country-wide determination.[73]

99. It is in this context, then, that the Panel should consider USDOC's failure to respond to Siderca's 7 December letter and, more importantly, to address the lack of transparency and due process concerns that were raised by Siderca. Indeed, the parties to the Section 129 proceeding only found out on 16 December that there would be no additional procedures, and that the final results had been issued. This falls far short of the US obligation to provide "liberal opportunities" to the responding parties to defend their interests.

100. Referring to Articles 6.1 and 6.2 in the context of the present dispute, the Appellate Body stated that:

> (a) These provisions set out the fundamental due process rights to which interested parties are entitled in anti-dumping investigations and reviews. Articles 6.1 and 6.2 require that the opportunities afforded interested parties for presentation of evidence and defence of their interests be "ample" and "full", respectively. In the context of these provisions, these two adjectives suggest there should be liberal opportunities for respondents to defend their interests. [74]

101. The interested parties thus had little opportunity – let alone "ample" or "full" opportunity – to present in writing all evidence that they considered to be relevant for the Section 129 Determination. The United States represented to Argentina in the Article 21.3 arbitration that it would engage in a multi-stage process in which information would be developed, refined, and debated through written and oral argument. Instead, the USDOC provided a "black box" – information entered, and a decision

[70] Second Written Submission of Argentina, para. 105.
[71] Letter from Siderca to USDOC, 7 December 2005 at 4-8 (public version) (ARG-19).
[72] Letter from Siderca to USDOC, 7 December 2005 at 3 (public version) (ARG-19).
[73] Letter from Siderca to USDOC, 7 December 2005 at 8 (public version) (ARG-19).
[74] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 241.

came out. No argument; not even notice that its plans had changed and that parties would not have an opportunity to provide written and oral argument. The failure of the United States to accord basic due process rights to the interested parties fell far short of the requirements of Article 6.1.

(b) Could, in your view, the fact that Siderca sent this letter and that it became part of the record mean that Articles 6.1 and 6.2 were satisfied?

Argentina's Answer to Question 20(b)

102. No. In fact, it highlights just the opposite point – that the USDOC failed to discharge US due process and transparency obligations that are at the heart of Articles 6.1 and 6.2 and which ensure that interested parties are in a position to defend their interests by having "full" and "ample" opportunity to defend their interests.

103. During the *Mexico – Rice* dispute, the United States argued before the Panel that:

> The right of exporters to know the allegations made against them and the "essential facts" under consideration by the investigating authority lie at the heart of many provisions within the AD Agreement. Article 6.1, for example, requires that "all interested parties" be given "notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question." See US First Submission in Mexico – Rice (WT/DS295), 22 Mar. 2004

104. Argentina agrees fully with this US assertion that that right of exporters to know the allegations against them indeed lies at the heart of many provisions in the Anti-Dumping Agreement, and regrets that such rights were denied to the affected Argentine respondents in the present case. Siderca's 7 December 2005 Letter to the USDOC expressed such concerns and indicated that there was significant uncertainty as to the procedures for comment and precisely what information the Department would be relying on for purposes of its determination. USDOC did not respond thus precluding the Argentine companies from knowing what the essential facts and information that would serve as the basis for DOC's analysis and, hence, prevented the Argentine respondents from being in a position "to present in writing all evidence which they consider relevant in respect of the investigation in question," as required by Article 6.1, and also deprived them of a "full opportunity for the defence of their interests" as required by Article 6.2.

UNITED STATES

(c) How did the USDOC consider the views expressed in this letter?

ARTICLE 6.4

ARGENTINA

Q21. The Panel notes Argentina's argument that the USDOC failed to make six memoranda available to the Argentine exporters.

(a) With respect to each one of these memoranda, please describe what information they contained as relevant to the obligation in Article 6.4. Please explain whether they also contained the USDOC's reasoning. Does Article 6.4 require disclosure of an investigating authority's internal analysis and reasoning ? Did the information have a confidential status in these Section 129 proceedings, and, if so, how does this relate to the obligation in Article 6.4? On what date was the information made available to the Argentine exporters?

Argentina's Answer to Question 21(a)

105. Article 6.4 obligated the USDOC to provide to the Argentine respondents "all information" relevant to the presentation of their cases that was not confidential, and was used by the Department. The USDOC memoranda identified in Argentina's claim meet the criteria for "information" that the responding parties in this case had a right to see. The Department denied them this right.

106. The Panel should reject the repeated assertions by the United States that, in its view, the information was "not relevant to the presentation of the respondent interested party's case".[75] The Appellate Body made clear that whether or not the information is "relevant" is to be determined *from the perspective of the interested parties, not the investigating authority*.[76] Moreover, as such information was "used by the authorities in an anti-dumping investigation" within the meaning of Article 6.4, it clearly was "relevant".

107. The Appellate Body made clear in *EC – Tube or Pipe Fittings*, that Article 6.4 requires that, whenever practicable, investigating authorities must provide timely opportunities for all interested parties to see and prepare presentations on the basis of "all information" that (a) is relevant to the presentation of the cases of the interested parties; (b) is not confidential as defined in Article 6.5; and (c) is used by the authorities in an anti-dumping investigation. The Section 129 Determination included six memoranda to file, five of which are dated 16 December 2005, the day of the release of the Section 129 Determination, satisfy these criteria. Indeed, there was a *public version* for each of the confidential versions of the memoranda. The USDOC was obligated to provide a reasonable summary of these documents. At a minimum, disclosure of these documents during the course of the Section 129 proceeding would have at least alerted the Argentine respondents as to there existence, and that USDOC was intending to use the documents to support its analysis for purposes of the Section 129 Determination.

108. Because five of the six memoranda are dated 16 December 2005, the day of the release of the Section 129 Determination, there can be no dispute that the respondent parties did not have access to any of these memoranda in advance of USDOC's issuance of USDOC's Section 129 Determination. As is explained further below, these memoranda provided information that the USDOC relied on for purposes of its Section 129 Determination. This is confirmed by several references in the Section 129 Determination to these memoranda.

109. The USDOC memoranda were provided as Exhibits by Argentina:

- Exhibit ARG-18 (22 November 2005 USDOC Memorandum to file from Fred Baker (public version))
    - This memorandum contained three attachments, including: 1) the response from the Embassy of Argentina to the USDOC's 14 October 2005 request for information ("Appendix I"); 2) a listing of all entries of subject merchandise during the period August 1995 through July 2000, obtained from by USDOC from US Customs and Border Protection ("Appendix II") (Note, however, that in the public version of ARG-18, there is nothing in Appendix II – simply a slip sheet that states "Appendix Not Susceptible to Public Summary); and 3) Average unit prices for ten product groups for the sunset period, obtained from Preston Publishing, Inc. ("Appendix III").

[75] US Second Submission, para. 70.
[76] Appellate Body Report, *EC - Pipe Fittings*, para. 145.

- Exhibit ARG-21 (16 December 2005 USDOC Memorandum to file from Mark Flessner regarding "Inconsistencies in data reported by Siderca" (public version)).

    - The chart in this document purports to be the "complete discussion of the discrepancies" cited by USDOC to justify its decision to disregard Siderca's cost data. In this document, the USDOC makes observations regarding certain of the average costs reported by Siderca, reveals that it had certain expectations about the cost relationships (alloy versus carbon; OCTG versus non-OCTG), reveals that its expectations were not met, and states that it is "convinced" that the reporting must be wrong based on its understanding of what it supposes the cost relationship should be between these product groupings.

- Exhibit ARG-22 (16 December 2005 USDOC Memorandum to file from Mark Flessner regarding "Information from Preston Publishing Company").

    - Public document describing basic background information regarding Preston Publishing.

- Exhibit ARG-23 (16 December 2005 USDOC Memorandum to file from Mark Flessner) (public version)

    - Public version of a proprietary document describing "Inconsistencies in data reported by Acindar" (public version)). Very little can be discerned from the public version of this document.

- Exhibit ARG-24 (16 December 2005 USDOC Memorandum to file from Mark Flessner)

    - Containing certain "Securities and Exchange Commission Filings of Domestic OCTG Producers".

- Exhibit ARG-25 (16 December 2005 USDOC Memorandum to file from Fred Baker)

    - Providing other "Information for the Record" consisting of several documents from the 2000 sunset review, including: 1) 2 Aug. 2000 Submission from Siderca (Appendix I); 2) 2 Aug. 2000 Submission from Petitioners (Appendix II); 3) 2 Aug. 2000 Submission from North Star Steel Ohio (Appendix III); 4) 7 Aug. 2000 rebuttal comments from North Star Steel Ohio (Appendix IV);.

110. In USDOC's Section 129 Determination, there are several references to these USDOC memoranda to the file, where the USDOC cites to the memoranda to support various conclusions or findings that are part of the Section 129 Determination. For example,

- Section 129 Determination at 4-5, n. 10 (referencing Memorandum to File, dated 16 December 2005)

- Section 129 Determination at 7 ("This comparison, which includes Acindar's business proprietary information, is set forth in the memorandum to the file dated 16 December 2005")

- Section 129 Determination at 8 ("A complete discussion of these discrepancies necessitates discussion of Siderca's business proprietary information; for specific examples, *see*, the Department's Memorandum to the File dates 16 December 2005)

- Section 129 Determination at 11 (referencing financial statements of Lone Star, Maverick, and North Star as set forth in the memorandum to the file dated 16 December 2005)

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

112. In evaluating this claim, the Panel must also consider the absolute lack of information about what the USDOC was doing. In a typical anti-dumping investigation or review, the parties know what comparisons will be made. In contrast in this case, the USDOC never explained its "expectations" that it would apply in evaluating Siderca's costs, nor did USDOC reveal that it would compare Acindar's export prices to US market prices of general product groupings. When Siderca asked the USDOC to explain what it was doing (ARG-19, pages 2-3), the USDOC did not even respond. The responses came with the final determination.

113. Finally, the Panel should not be confused by the issue of confidentiality and the obligations of Article 6.4 as they apply in this case. The fact that a party submits confidential information in no way limits the authority's obligation to inform that party of critical information related to the authority's evaluation of that information. For example, USDOC cannot possibly claim that the confidential nature of Siderca's cost information prevented the USDOC from advising Siderca of its concerns over the consistency of the company's own cost information. Yet, the failure to do so prevented Siderca from presenting its case.

BOTH PARTIES

(b) Please explain whether it was "practicable" within the meaning of Article 6.4 of the Agreement for the USDOC to make these memoranda available to the Argentine exporters in these Section 129 proceedings.

Argentina's Answer to Question 21(b)

114. It was clearly "practicable" within the meaning of Article 6.4 of the Agreement for the USDOC to have made these memoranda available to the Argentine exporters during the Section 129 proceeding.

115. In general terms, what is "practicable" for the purposes of Article 6.4 will need to be determined on a case-by-case basis. However, for the specific purpose of this case, the Panel can readily reject any argument that any reduced time frames (e.g., based on the RPT set by the Arbitrator) would render US compliance with Article 6.4 somehow "impracticable." The word "practicable" simply does not require this Panel to take into account the fact that the United States purportedly conducted its Section 129 determination under a shorter time frame than it ordinarily conducts a sunset review.

116. First, Article 11.4 provides that Article 6 – including Article 6.4 - applies to sunset review proceedings. There is no notion that this requirement should be excused in the present context. The plain text of the Agreement contradicts any argument that a reduced period of time rendered the obligations of Article 6.4 somehow inapplicable in an Article 11.3 proceeding. Second, as Argentina has argued, all WTO obligations apply on a concurrent and overlapping basis. The United States was

required to comply with its obligations under Article 6.4 while concurrently complying with its obligation under Article 21.3(c) to bring its measures into conformity with its WTO obligations in the shortest period of time possible - which the Arbitrator determined to be twelve months. Twelve months – a full year – is a significant period of time. Indeed, that is enough time for the United States to have conducted an entire review under Article 11.3. The United States clearly could have undertaken various aspects of the review concurrently with its revision of the waiver regulation. The fact is that the United States simply chose not to do so. It cannot complain now for its failure in this regard. Third, the obligations of Article 6.4 must be read in context. This context includes other provisions of the Anti-Dumping Agreement, most notably Article 11.3.

117. Regarding the particular memoranda at issue, the United States has failed to provide any explanation as to why these USDOC memoranda to file could not have been provided to the interested parties in some form in advance of the release of the Section 129 Determination. Obviously, these documents must have been produced before 16 December and the United States has not claimed otherwise. Indeed, it is reasonable for the Panel to assume that these memoranda had been drafted, reviewed and modified concurrently with the preparation of the Section 129 Determination. This point is reinforced by the references in the memoranda to matters such as "inconsistencies in data". Yet while the USDOC conducted this analysis, and drafted its Determination, the interested parties were unaware of the analysis that was being performed, and were not provided with any opportunity to comment. There was never any attempt by USDOC to reconcile such alleged "inconsistencies in data". The Argentine respondents were not provided with any opportunity, let alone a timely opportunity, to see such information which was clearly being used by the USDOC for purposes of the Section 129 Determination.

ARGENTINA

Q22. The Panel notes Argentina's argument that the USDOC violated Article 6.4 by accepting unsolicited comments from the petitioners on 30 November 2005. The Panel also notes Argentina's acknowledgement[77] that Siderca responded to these comments in its letter dated 7 December 2005.[78] Please explain how exactly the admission of these comments violated Article 6.4 of the Agreement.

Argentina's Answer to Question 22

118. Argentina argued that the unsolicited comments filed by the Petitioners during the course of the Section 129 proceeding further compounded the impact of the US breach of Article 6.4. Although the USDOC did not issue a questionnaire to Petitioners, the Petitioners filed a letter dated 30 November 2005 (the same response date as the deadline for the responses of the Argentine exporters who were responding to the USDOC questionnaire that was directed to them) in which they supplied data and suggested for price comparisons that would then be used to support a conclusion regarding likely dumping. As Argentina explained, the Petitioners' letter concludes – without ever seeing the cost data that was being filed the same day – that "it is almost a certitude that a comparison of the AUVs with Siderca's costs will show that Siderca was engaging in dumping OCTG on a global basis during the POR".[79] Furthermore, the Petitioner's letter references confidential data provided to them by the USDOC; the same confidential data that was made available to Siderca only on 28 November, two days before the Petitioners letter in which its conclusions are stated so emphatically.

[77] First Written Submission of Argentina, para. 163.

[78] This letter is found in Exhibit ARG-19.

[79] Letter from Skadden, Arps, Slate, Meagher & Flom LLP to the USDOC, 2 Dec. 2005 (Public Version) at (ARG-27).

119. The problem with the sequence of events outlined above is that it occurred without any communication or clarification from the USDOC as to how it would use the information solicited by Siderca, what procedures will be followed to analyze the information, and how the parties will be permitted to have access to and comment on the essential facts being used by the USDOC to make its determination. Thus, in the midst of this uncertainty, Siderca provided comments to demonstrate that Petitioners' analysis was without merit and did not establish any positive evidence that dumping would be likely to continue or recur.[80] The Department did not advise the Parties as to what information or what methodology it intended to follow. In this respect, the Petitioners comments and provision of additional information only served to create further uncertainties in an already uncertain proceeding.

ARTICLE 6.5.1

Q23. With respect to your claim under article 6.5.1 of the Agreement, please specify clearly:

(a) which confidential information you refer to,

(b) whether you argue that the USDOC failed to seek non-confidential versions of this information or that non-confidential versions were submitted, but that they did not conform to the requirements of Article 6.5.1.

Argentina's Answer to Question 23(a) and (b)

120. As for the confidential information to which Argentina refers, it is the confidential information that was treated as such in petitioners' submissions during the course of the Section 129 proceeding. Because there was either no public summary or an inadequate public summary, the Argentine respondents could not discern the nature of the arguments or evidence in support of those arguments. That is precisely the reason why the United States has violated Article 6.5.1 Indeed, USDOC acknowledged that "Siderca and Acindar also argue that US Steel and IPSCO's treatment of information as business proprietary information hindered their ability to respond effectively".[81]

121. With respect to Article 6.5.1, in particular, the Panel in *Guatemala-Cement II* found a violation of that provision because there was no evidence demonstrating either that petitioner provided a statement of reasons as to why summarization was not possible or that the Ministry even requested such a statement.[82] During the Section 129 proceeding, Argentine exporter Acindar explained that:

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

[80] Letter from Siderca to USDOC, 7 December 2005 (ARG-19).
[81] USDOC Section 129 Determination at 6 (ARG-16).
[82] Panel Report, *Guatemala - Cement II*, paras. 8.207-223.

> after all, relates to information that is now more than 5 – 6 years old. Therefore, the Department must require US Steel to re-submit its letter in a form that is consistent with the regulations, and which will allow Acindar to at least understand the nature of the allegation being made so that it can defend itself.[83]

122. There was no response by USDOC to Acindar's request. Because USDOC did not require the Petitioners to resubmit the public version of the letter with an appropriate summary, Acindar necessarily had to confine its arguments to the public versions of the US industry's comments. Petitioners' comments did not provide, in the words of Article 6.5.1, "sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence."

123. In addition, Siderca's 14 December 2005 Letter raises a similar concern:

> It is unclear why IPSCO is claiming that the information in the brackets is confidential. Most of the information is a narrative description of information that Siderca provided as public information. In addition, the paragraph in IPSCO's letter contains general arguments relating to the sufficiency of the data. There does not seem to be any reason to claim proprietary treatment for this passage. IPSCO should refile its letter so that Siderca officials can review the substance and provide additional comments if necessary.[84]

124. Finally, Argentina asks the Panel to review ARG-26, Siderca's 21 December 2005 letter to the USDOC. Siderca advised the USDOC, for example, that

> [B]ased on our review of the public versions in the public file, it appears that the Department's bracketing of confidential information in the two memoranda is broad and the information is not summarized, such that the public versions convey very little substance. As these are the versions that Siderca and the Argentine Government officials will be able to review, we respectfully request that the Department revise its bracketing and reissue the public versions.[85]

125. Thus, just as USDOC failed to require the Petitioners to provide proper summaries of confidential submissions, the USDOC itself failed to do so regarding its memoranda to the file. In order to determine whether the summaries were in "sufficient detail" to permit a "reasonable understanding" of the confidential information, the Panel should be guided by the principle of whether the *due process objectives* of this provision have been fulfilled. The Panel need not provide any definitive ruling in the abstract as to the level of detail required under Article 6.5.1. It need only decide that the non-confidential information released in this case fell short of the requirements of this provision.

UNITED STATES

Q24. Please explain whether the APO system under the US law also allows interested parties themselves, in addition to counsel for such parties, to see all confidential information submitted by other parties in a sunset review.

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

[84] Siderca's 15 December 2005 Letter to the USDOC at 4, note 7 (ARG-29).

[85] Siderca's 21 December 2005 Letter to the USDOC at 2 (ARG-26).

ARTICLE 6.8

ARGENTINA

Q25. Please respond to the US' argument that because no company-specific determination was made for Siderca, facts available were not used for this company.

Argentina's Response to Question 25

126. Argentina responded to this argument in its Second Submission (see paragraphs 137-140).

127. Argentina would emphasize strongly, as reflected in its Second Submission, that this issue must be decided by the substance, and not the form, of the actions of the investigating authority. If the avoidance of the term "facts available" were conclusive, investigating authorities could shield themselves from the disciplines of Article 6.8 and Annex II by simply not having recourse to that specific term. This would permit widespread circumvention of these provisions.

128. It is important to separate the findings applicable to Siderca into two parts. First, the USDOC stated that it made no specific findings that Siderca was dumping during the sunset review period (1995-2000). The United States indicated in its Second Submission that this was not surprising given that the company made no US shipments during this time. Second, the USDOC purported to make an order-wide likelihood determination, which, by definition, encompasses Siderca, the major Argentine OCTG producer. In addition, the USDOC made findings about and drew conclusions regarding Siderca's financial statements which clearly contributed to its order-wide determination.

129. As for the first aspect of USDOC's analysis of Siderca, the Panel should reject the argument that the USDOC did not resort to facts available with respect to Siderca because "the result of Commerce's analysis of Siderca's estimated cost information was *no* company-specific finding regarding Siderca".[86] As Argentina has explained, the US position rests on the flawed assumption that Article 6.8 and Annex II obligations apply only to information that is used to support conclusions of the investigating authority. The US position is not supported by the provisions of Article 6.8. If the USDOC is going to reject information – information that the exporter contends is probative and favourable – then the authority has an obligation to comply with the requirements of Article 6.8 and Annex II.

130. The United States argues that it "did not use *other* facts in lieu of the data provided by Siderca; the United States simply made no finding with respect to Siderca. Thus, USDOC did not use the "facts available" but rather declined to make any finding with respect to Siderca and used no facts in that respect".[87]

131. The obligations of Article 6.8 and Annex II apply to all information, including what the investigating authority may consider – or what an objective evaluation of that information would lead an authority to consider – to be exculpatory information. Consequently, the test is not whether the USDOC used the magic words "facts available". Such a test would permit investigating authorities to avoid the disciplines of Article 6.8 and Annex II by simply avoiding that term. Accordingly, although the USDOC did not use the term "facts available" in the Section 129 Determination, this fact alone cannot control whether Article 6.8 applies. The Panel should avoid a result that would elevate form over substance and would permit investigating authorities, not WTO Panels, to determine when Article 6.8 and Annex II applied, and when it had been breached.

[86] US First Submission, para. 82.
[87] US Second Sumbission, para. 87.

132. In the present case, the USDOC asked both Acindar and Siderca for information that they did not have.[88] Siderca explained that the company was unable to provide the information in the form requested by USDOC because it did not retain product-specific costs from the period requested.[89] Acindar explained that it no longer produces OCTG, that it did not have the product-specific cost information in the form requested by the Department, and that it was not required to have retained such information under Argentine law.[90] When the companies indicated that they did not have it, the USDOC resorted to other information, without complying with Article 6.8 and Annex II. This is recourse to "facts available", whether the USDOC used that term or not.

133. There is no textual support for such a narrow reading of the Agreement to apply only to information that supports the conclusions of the investigating authorities, but not to information that contradicts or detracts from its conclusions. Article 6.8 does not apply at all unless an interested party "refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation". There is no evidence on the record of the Section 129 proceeding that these essential preconditions had been met, and the United States has never claimed that either company behaved in this recalcitrant manner. This fact was confirmed by the United States in its opening oral statement during the Panel's meeting with the Parties. The USDOC Section 129 Determination itself found that Siderca "attempted to cooperate with the Department's request for information".[91]

UNITED STATES

Q26.

(a) The Panel's understanding of the method used by the USDOC with regard to product groupings the USDOC made for purposes of examining the reliability of Siderca's cost data is that the USDOC took the weighted average costs of, for example, carbon casing PE and carbon casing T&C, and compared that with the weighted average cost of alloy casing PE and alloy casing T&C. In other words, the USDOC took as the starting point of its product grouping for comparison the material used without taking into account the finishing.

Is this a correct characterization of the USDOC's methodology? Please explain by referring to the relevant parts of the record.

ARGENTINA

(b) The Panel notes Argentina's assertion, among others, in paragraph 55 of its Oral Submission, that the data submitted by Siderca indicated higher costs for alloy products compared with casing products throughout the period of review, with the exception of the year 2000. The Panel understands Argentina's argument to be that the USDOC should have compared the costs of, for example, carbon casing PE with that of alloy casing PE and carbon casing T&C with that of alloy casing T&C.[92]

Is the Panel's understanding correct regarding Argentina's assertion?

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[88] USDOC Questionnaire to Acindar, Tubhier and Siderca (31 Oct. 2005) (ARG-13).
[89] Siderca's Response to Questionnaire (30 Nov. 2005) at 2 and Attachment 2 (ARG-15).
[90] Acindar's Response to Questionnaire (30 Nov. 2005) (ARG-14).
[91] USDOC Section 129 Determination at 8 (ARG-16); *see also* Argentina's First Submission, para. 182.
[92] First Written Submission of Argentina, para. 79.

Argentina's Answer to Question 26 (b)

134. Yes, the Panel's understanding is correct. Because the only difference between the two product groupings in such an alternative comparison becomes the type of steel (i.e., alloy versus carbon), it is logically a better indicator of whether Siderca's reported costs showed that alloy products were more costly to produce than carbon products. Economists refer to this process of controlling all other factors in order to isolate the factor one seeks to observe as "*ceteris paribus*" or "all other things being the same".

135. Of course, Argentina repeats that this entire line of inquiry by USDOC was of speculative value. Any comparison at the product group level is potentially misleading because of the number of different products – with different costs – that could be contained in the two groupings being compared. But, of the two comparisons (carbon plain end to alloy plain end; or carbon all ends to alloy all ends), the comparison that reduces the number of other differences and focuses on the type of steel is objectively better for determining the cost effect of producing with different steel.

(c) Please explain why, in your view, it was not proper for the USDOC to rely on the same grouping that Preston Publishing used for the subject product.

Argentina's Answer to Question 26(c)

136. Please see the response to question 26(b) above.

137. Argentina considers it important for the Panel to distinguish the two different comparison that USDOC performed in the Section 129 determination. These are:

	Comparison	Purpose
1	Alloy versus carbon production costs	To determine whether Siderca's reported costs are reliable
2	Acindar's export prices to Preston Pipe data on US market selling prices	To determine whether Acindar was likely dumping in the past

USDOC conducted the first comparison because it decided that the cost of alloy products must be higher than the cost of carbon products; if they were not, the costs would be unreliable according to USDOC. This was a type of "reasonableness" test that USDOC used for the purpose of testing Siderca's cost. Argentina submits, as explained in response to question 26(b) above, that a reasonableness test attempting to determine the cost of producing carbon or alloy OCTG should, if possible, be based on a comparison of products in which steel type is the only difference. It was possible in this case; in fact, it was the way that USDOC requested the costs, and the way that Siderca reported the cost. In contrast, the Preston Pipe groupings were more general because they failed to distinguish between end finishes. Therefore, any difference resulting from a comparison at the more general level used in the Preston Pipe report could be attributable to the different steel type, or to the mix of end finishes on the OCTG in each grouping, or to some combination of the two.

138. Comparison 2 is the only comparison relating to the Preston Pipe categories. This comparison is done for a different purpose: to determine likely dumping in the past. But USDOC never used Siderca's data at this stage because it was deemed to suffer from "inconsistencies," partly because of comparison 1. As explained, comparison 1 was not an appropriate comparison to determine how steel type (alloy or carbon) affected the cost, because USDOC averaged the costs of products with different end finishes. This averaging changed the result of comparison 1; it took reported costs in which the alloy product was more costly than the carbon product, and changed the

result so that the carbon product (with all end finishes) became more costly than the alloy product (with all end finishes). Without this averaging, no "inconsistency" would have arisen.

UNITED STATES

(d) The Panel notes the US' argument that the USDOC made this product grouping in accordance with the public information available.[93] The Panel also notes that the memo to which the United States refers in this regard, found in Exhibit ARG-18, contains a product grouping by Preston Publishing.

Please demonstrate, by referring to the relevant parts of this memo, how exactly the Preston product grouping formed the basis of the USDOC's grouping.

(e) Please explain whether the USDOC informed Siderca of the methodology that it was considering to use for the grouping of products.

(f) Please explain why the USDOC did not use the methodology proposed by Argentina.

Q27. Please explain for what purpose the USDOC requested the cost information from the Argentine exporters in these proceedings. More specifically, please explain whether the USDOC intended to use that information exclusively for its company-specific determinations or for its order-wide determination as well.

Q28. Please explain whether the USDOC initially intended to make a company-specific determination for Siderca as it did for Acindar, citing any evidence on record. In other words, would the USDOC have made a company-specific determination for Siderca had that company's cost data been found to be reliable?

Q29. The Panel notes that the USDOC's Section 129 Determination reads in relevant parts:

> **We disagree with Siderca's assertion that the company financial statements of Siderca and Acindar are not relevant for our likelihood analysis. Financial statements provide a good understanding of the status of the entire company, and reflect the company's overall selling practices. Taken together, these data are relevant indicators of likely future pricing trends.[94]**

(a) Would the United States agree that the USDOC's Section 129 Determination demonstrates that some information pertaining to Siderca, namely this company's financial statements, were used by the USDOC in the context of its order-wide determination?

(b) Were Siderca's financial statements used as facts available or as Siderca's response to the USDOC's questionnaire?

Please elaborate.

BOTH PARTIES

Q30. Please explain in detail whether, in your view, paragraph 3 of Annex II justified the rejection of Siderca's cost data. In particular, please explain whether the cost information

[93] Second Written Submission of the United States, para. 50.
[94] Section 129 Determination (Exhibit ARG-16 at 9).

submitted by Siderca was verifiable within the meaning of paragraph 3. Did the USDOC take any steps to verify such information?

Argentina's Answer to Question 30

139. Paragraph 3 of Annex II did not justify USDOC's rejection of Siderca's cost data. Paragraph 3 provides in pertinent part as follows:

> All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, [and] which is supplied in a timely fashion … should be taken into account when determinations are made….

140. The cost information was verifiable within the meaning of paragraph 3. The information provided by Siderca was verifiable, and was appropriately submitted. Indeed, this is made crystal clear in Siderca's letter to the USDOC, dated 14 December 2006, page 4, (ARG-29), in which Siderca responded to petitioner IPSCO's criticism of Siderca's data, stating:

> Siderca stands by the analysis and emphasizes, as explained in the 30 November submission, that the data has been reconstructed using cost reports from the same production lines and cost centres used to produce OCTG during the period. Information on the cost of operating the lines during the 1995-2000 period is available, was used by Siderca, and would be available for verification if the Department so chose. The Department indicated in its questionnaire that Siderca should use verifiable data, and Siderca confirms that it heeded this advice.

141. It could readily have been used by the USDOC in the Section 129 proceeding without "undue difficulties". The Department was therefore required under paragraph 3 of Annex II to take such information into account in its Section 129 determination, but it failed to do so. As the Panel clarified in *US – Steel Plate from India*, a decision by an administering authority to reject information provided by an exporter, where that decision "lacks a valid basis under paragraph 3 of Annex II of the AD Agreement", will result in an violation of the requirements of Article 6.8 and paragraph 3 of Annex II.[95] The Panel reasoned as follows:

> The second criterion of paragraph 3 requires that the information be "appropriately submitted so that it can be used in the investigation without undue difficulties." In our view, "appropriately" in this context has the sense of "suitable for, proper, fitting". That is, the information is suitable for the use of the investigating authority in terms of its form, is submitted to the correct authorities, etc. More difficult is the requirement that the information can be "used without undue difficulties". "Undue" is defined as "going beyond what is warranted or natural, excessive, disproportionate". Thus, "undue difficulties" are difficulties beyond what is otherwise the norm in an anti-dumping investigation. This recognizes that difficulties in using the information submitted in an anti-dumping investigation are not, in fact, unusual. This conclusion is hardly surprising, given that enterprises that become interested parties in an anti-dumping investigation and are asked to provide information are not likely to maintain their internal books and records in exactly the format and with precisely the items of information that are eventually requested in the course of an anti-dumping investigation. Thus, it is frequently necessary for parties submitting information to collect and organize raw data in a form that responds to the information request of the investigating authorities. Similarly, it is frequently necessary for the investigating authority to make adjustments of its own in order to be able to take into account

[95] Panel Report, *US – Steel Plate from India*, WT/DS206/R, para. 7.79.

> information that does not fully comply with its request. This is part of the obligation on both sides to cooperate, recognized by the Appellate Body….[96]

142. In fact, in this case, USDOC recognized Siderca's cooperation, stating that Siderca "attempted to cooperate with the Department's request for information".[97] However, USDOC claimed to have "significant problems with [Siderca's] allocation of costs, with respect to both OCTG production and all tubular production" as well as "methodological discrepancies with the estimates submitted by Siderca".[98]

143. The USDOC decided not to use any of Siderca's cost information in its likelihood analysis, stating "Given the unreliability of the cost information provided by Siderca and the fact that Siderca made no US sales of OCTG during the original sunset review period, we make no findings regarding specific instances of likely dumping by Siderca during the original sunset review."[99] The USDOC determined that Siderca's data was "unreliable" based on three subsidiary findings: (1) that the OCTG cost data was "inconsistent with other product cost data for steel products" and "counter-intuitive";[100] (2) that "Siderca's cost calculations for non-OCTG products are problematic because their costs significantly exceed OCTG costs"[101], and (3) that "methodological discrepancies" make it "unclear exactly how broad a product category Siderca has used in estimating its costs data".[102]

144. Argentina has demonstrated in its written and oral submissions to the Panel that the USDOC's reasoning on each of these counts is seriously flawed. Equally important, however, the USDOC never raised any of its concerns during the Section 129 proceeding. Consequently, there was no opportunity for Siderca to address any of the Department's concerns or to clarify why the data submitted by Siderca could be used for purposes of the USDOC's likelihood analysis. The United States did not take any steps to verify Siderca's cost information. In fact, the USDOC asked no questions and sought no clarification.

Q31. The Panel notes the following part of the USDOC's Section 129 Determination:

> **Although Siderca attempted to cooperate with the Department's request for information, upon analysis of Siderca's calculations, we have identified significant problems with its allocation of costs, with respect to both OCTG production and all tubular production.[103]**

(a) Please explain your views about the relevance of this determination to the issue of whether or not Siderca acted to the best of its ability in submitting its cost information to the USDOC within the meaning of paragraph 5 of Annex II to the Agreement.

(b) Please explain how ideal the cost information submitted by Siderca was within the meaning of paragraph 5 of Annex II to the Agreement.

Argentina's Answer to Questions 31(a) and (b)

145. Paragraph 5 of Annex II provides:

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[96] Panel Report, *US – Steel Plate from India*, WT/DS206/R, para. 7.72.
[97] USDOC Section 129 Determination at 8 (ARG-16).
[98] *Id.* at 8-9.
[99] USDOC Section 129 Determination at 9 (ARG-16).
[100] USDOC Section 129 Determination at 8 (ARG-16).
[101] *Id.*
[102] *Id.* at 9.
[103] Section 129 Determination (Exhibit ARG-16 at 8).

> Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

146. Argentina acted to the best of its ability in submitting the cost information. As the Panel in *Egypt – Rebar from Turkey* stated, the phrase "to the best of one's ability" indicates a high level of effort. The Panel found that "an unbiased and objective investigating authority could have found that [the respondent exporters] failed to provide necessary information in the sense of Article 6.8," and therefore Egypt did not violate Article 6.8 or Annex II(5) in resorting to "facts available" for these respondents.[104] Here, however, there is no basis in the record of the Section 129 proceeding for the USDOC to assert that Siderca did not act to the best of its ability. To the contrary, the record demonstrates that USDOC recognized that Siderca attempted to cooperate. The USDOC simply concluded that the information was not useable and did not offer Siderca any opportunity to clarify the data or attempt to correct any of the purported problems with that data.

147. This is especially true in this case, where the USDOC did not even attempt to ask questions or to seek any clarification. Rather, it simply concluded, based on a series of flawed premises, that Siderca's data was unusable. In this case, there is not basis under paragraph 5 of Annex II that would "justify" USDOC "from disregarding" Siderca's cost information, especially in light of the fact that Siderca "has acted to the best of its ability".

148. Regarding the quality of the cost information (within the meaning of paragraph 5 of Annex II to the Agreement) submitted by Siderca, as Siderca has demonstrated in its written submissions and during its opening statement to the Panel, the cost information provided by Siderca was far preferable that the data ultimately relied on by USDOC.

149. Even if, *arguendo*, the information provided by Siderca was not "ideal in all respects", paragraph 5 of Annex II makes clear that this did not justify disregarding it, provided the interested parties acted to the best of their ability. The USDOC has not claimed that either company failed to act to the best of its ability. Indeed, as noted above, the Department expressly recognized that Siderca "attempted to cooperate with the Department's request for information".[105]

150. Finally, Argentina has explained in this proceeding why, even though the cost data submitted by Siderca may not have been "ideal", that data was still more probative for purposes of the USDOC's likelihood analysis and was preferable to use than the alternative of rejecting this probative data and simply speculating and relying on assumptions based on selective reliance on Siderca's financial statements.

Q32.

(a) In your view, was the USDOC under an obligation to inform Siderca of the fact that its cost information would not be used as well as to give Siderca a chance to make comments as to why the information had to be used by the USDOC pursuant to paragraph 6 of Annex II? If so, was the USDOC under an obligation to do it prior to the issuance of its Section 129 Determination?

(b) Did the USDOC actually inform Siderca of this fact and give Siderca a chance to make comments? If so, when? Did Siderca know that its cost data were not going to be used by the USDOC in its determinations?

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[104] *See* Panel Report, *Egypt – Rebar from Turkey*, WT/DS211, paras. 7.241-7.248.
[105] USDOC Section 129 Determination at 8 (ARG-16).

Argentina's Answer to Questions 32(a) and (b)

151. Paragraph 6 of Annex II provides:

> If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefore, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.

152. The obligation provided for in paragraph 6 of Annex II is clear. In *Egypt – Rebar from Turkey*, the Panel concluded that "Egypt violated Article 6.8 and Annex II, paragraph 6, in respect of [the respondent exporters], because the [investigating authority], having identified to these respondents the information "necessary" to verify their cost data, and having received that information, nevertheless found that the respondents had failed to provide "necessary information".[106] The Panel faulted the investigating authority because it did not "inform these companies of this finding and did not give them an opportunity to provide further explanations."

153. Similarly, USDOC clearly was under an obligation to inform Siderca of the fact that its cost information would not be used by the USDOC for purposes of the Section 129 Determination. This is especially so given that Siderca attempted to provide the data as it was requested by the USDOC. In addition, if USDOC had concerns regarding the information submitted by Siderca, USDOC was required to provide Siderca with an opportunity to provide comments as to why the information should not de disregarded by the USDOC. Moreover, USDOC was under an obligation to provide Siderca with the opportunity to provide comments and any needed clarifications prior to the issuance of its Section 129 Determination.

154. Finally, the record reflects that USDOC did not "actually inform Siderca of this fact" nor did it "give Siderca a chance to make comments." The record of the Section 129 proceeding on this point cannot be refuted. As for whether Siderca knew that its cost data were not going to be used by the USDOC in its determinations, part of Siderca's frustration was that it did not know what information the USDOC was going to use or what procedures it intended to follow. In the end, Siderca had no knowledge of the "essential facts" upon which the USDOC would rely. Nor was there any opportunity for Siderca to address the supposed "inconsistencies" with the company's data.

ARGENTINA

Q33. The Panel notes Argentina's assertion that the USDOC violated paragraph 7 of Annex II by failing to apply special circumspection with regard to the information it took from secondary sources instead of the information submitted by the Argentine companies. Please explain clearly which company Argentina refers to in this regard. Please also explain what secondary source, in Argentina's view, was used instead of the information submitted by the Argentine companies. Also, please explain how exactly the USDOC failed to use the most appropriate information instead of the information submitted by the Argentine companies.

Argentina's Answer to Question 33

155. This claim relates to Acindar. The secondary sources consist of US Customs and Border Protection (CBP) data and information reported in a publication known as the Preston Pipe & Tube Report. The specific import prices of Acindar's OCTG were based on the CBP data. These prices were considered by the USDOC to be too low when compared to observed selling prices in the US

[106] Panel Report, *Egypt – Rebar from Turkey*, WT/DS211, para. 7.266.

market, as reported in a publication known as Preston Pipe & Tube Report.[107] As Argentina has argued, there are several flaws with this approach for which Argentina has provided extensive arguments.

156. First, the USDOC's comparison of pricing data based on a commercial publication does not constitute an objective examination of information and is not positive evidence to support a WTO-consistent determination that dumping would be likely to continue or recur. This comparison was inconsistent with the basic requirements of Article 2. Second, USDOC's comparison of Acindar's US shipments to prevailing US market prices did not involve any product-specific comparison. Rather, the USDOC compared prices for specific Acindar transactions to prices of "carbon casing, welded" as reported by Preston Pipe & Tube Reports, without regard to the specific size of pipe, and to the type of end finishing. As Siderca explained in its responses, these variables affect cost and price, and any comparison that does not account for these differences is suspect.[108] Finally, the prices reported in Preston Pipe & Tube Report are prices to the final customers in the United States, reported on the basis of a specified delivery point in the United States. The prices that USDOC obtained from USCBP presumably are stated on a FOB port of export, which in the case of Acindar would be Argentina. The record of the Section 129 proceeding contains no indication that USDOC exercised any care to eliminate the obvious distortion that would be implicit in any such comparison.

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

158. There is no indication whatsoever that the USDOC acted with "special circumspection" within the meaning of paragraph 7 of Annex II. In this regard, the Appellate Body adopted the views of the Panel in *Mexico – Rice*, where it said

> when culling necessary information from secondary sources, the agency should ascertain for itself the reliability and accuracy of such information by checking it, where practicable, against information contained in other independent sources at its disposal, including material submitted by interested parties. Such an active approach is compelled by the obligation to treat data obtained from secondary sources "with special circumspection".[109]

159. There is nothing in the Section 129 Determination demonstrating that the USDOC took "such an active approach" or "check[ed] the information from other independent sources at [its] disposal". USDOC never even asked Acindar to explain the general reference in its 2000 financial statement. Instead, it assumed that it must be consistent with the notion that Acindar was likely to dump OCTG in the US in the event of expiry of the measure.

160. Finally, as for what information might have been appropriate, the USDOC might reasonably have asked Acindar to provide information about the actual OCTG products that Acindar sold to the United States, the prices for those products, the terms of sale, and it could have developed information that could have been used for a more appropriate comparison to determine whether Acindar was "dumping" during the sunset period as defined by the Anti-Dumping Agreement.

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[107] USDOC Section 129 Determination at 7 (ARG-16).

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

[109] Appellate Body Report, *Mexico – Rice*, paras. 288-289 (footnote omitted).

ANNEX 1*

Harmonized Tariff Schedule of the United States (2000)**
Annotated for Statistical Reporting Purposes

CHAPTER 73

ARTICLES OF IRON OR STEEL

XV
73-1

Notes

1. In this chapter the expression "cast iron" applies to products obtained by casting in which iron predominates by weight over each of the other elements and which do not comply with the chemical composition of steel as defined in Note 1(d) to chapter 72.

2. In this chapter the word "wire" means hot- or cold-formed products of any cross-sectional shape, of which no cross-sectional dimension exceeds 16 mm.

Additional U.S. Notes

1. For the purposes of heading 7304 or 7306, the rate of duty "Free (C)" appearing in the "Special" subcolumn applies only to tubes and pipes with attached fittings, suitable for conducting gases or liquids.

2. For the purposes of subheading 7307.19.30, the expression "ductile fittings" refers to fittings which contain over 2.5 percent carbon and over 0.02 percent of magnesium or of magnesium and cerium, by weight.

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* Argentina submitted to the Panel a scanned version of this Annex. For technical reasons concerning the reproduction of the report, however, the Annex has been reproduced and then incorporated into the report. Certain manual additions as well as emphasis in the form of circling found in the original version of the Annex submitted by Argentina have been identified through footnotes.

** The year "(2000)" manually circled in the original version submitted by Argentina.

Harmonized Tariff Schedule of the United States (2000)
Annotated for Statistical Reporting Purposes

Heading/ subheading	Stat. Suf fix	Article Description	Unit of Quantity	Rates of Duty 1 General	Rates of Duty 1 Special	Rates of Duty 2
7306		Other tubes, pipes and hollow profiles (for example, open seamed or welded, riveted or similarly closed), of iron or steel:				
7306.10		Line pipe of a kind used for oil or gas pipelines:				
7306.10.10		Of iron or nonalloy steel	.....	0.8%	Free (A+,CA,E,IL, J) 0.5% (MX)	5.5%
	10	With an outside diameter not exceeding 114.3 mm	kg			
	50	With an outside diameter exceeding 114.3 mm.....	kg			
7306.10.50		Of alloy steel.....	.....	2%	Free (A+,CA,E,IL, J) 1.4% (MX)	10%
	10	With an outside diameter not exceeding 114.3 mm.....	kg			
	50	With an outside diameter not exceeding 114.3 mm.....	kg			
7306.20		Casting and tubing of a kind used in drilling for oil or gas: Casing:*				
		Of iron or nonalloy steel:				
7306.20.10		Threaded or coupled.....	.....	2.4%	Free (A+,CA,E,IL, J) 1.8% (MX)	20%
	30	Imported with coupling.....	kg			
	90	Other.....	kg			
7306.20.20	00	Other.....	kg.....	0.2%	Free (A+,CA,E,IL, J) 0.1% (MX)	1%
		Of alloy steel:				
7306.20.30	00	Threaded or coupled.....	kg.....	2.5%	Free (A+,CA,E,IL, J) 1.8% (MX)	28%
7306.20.40	00	Other.....	kg.....	1.3%	Free (A+,CA,E,IL, J) 0.9% (MX)	8.5%
		Tubing:**				
7306.20.60		Of iron or nonalloy steel	.....	0.8%	Free (A+,CA,E,IL, J) 0.5% (MX)	5.5%
	10	Imported with coupling.....	kg			
	50	Other.....	kg			
7306.20.80		Of alloy steel.....	.....	2%	Free (A+,CA,E,IL, J) 1.4% (MX)	10%
	10	Imported with coupling.....	kg			
	50	Other.....	kg			

* The word "Casing" manually circled in the original version submitted by Argentina.
** The word "Tubing" manually circled in the original version submitted by Argentina.

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CHAPTER 73

ARTICLES OF IRON OR STEEL

XV
73-1

Notes

1. In this chapter the expression "cast iron" applies to products obtained by casting in which iron predominates by weight over each of the other elements and which do not comply with the chemical composition of steel as defined in Note 1(d) to chapter 72.

2. In this chapter the word "wire" means hot- or cold-formed products of any cross-sectional shape, of which no cross-sectional dimension exceeds 16 mm.

Additional U.S. Notes

1. For the purposes of heading 7304 or 7306, the rate of duty "Free (C)" appearing in the "Special" subcolumn applies only to tubes and pipes with attached fittings, suitable for conducting gases or liquids.

2. For the purposes of subheading 7307.19.30, the expression "ductile fittings" refers to fittings which contain over 2.5 percent carbon and over 0.02 percent of magnesium or of magnesium and cerium, by weight.

* The indication of year manually added in the original version submitted by Argentina.

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7306 (con.)		Other tubes, pipes and hollow profiles (for example, open seamed or welded, riveted or similarly closed), of iron or steel (con.):						
7306.20		Casing and tubing of a kind used in drilling for oil or gas:						
		Casing:*			Free	(A+,CA,E,IL, J)		
		Of iron or nonalloy steel:						
7306.20.10		Threaded or coupled.....	.....	3.6%	3%	(MX)		20%
	30	Imported with coupling.....	kg					
	90	Other.....	kg					
7306.20.20	00	Other.....	kg.....	0.3%	Free	(A+,CA,E,IL, J)		1%
					0.2%	(MX)		
		Of alloy steel:						
7306.20.30	00	Threaded or coupled.....	kg.....	3.7%	Free	(A+,CA,E,IL, J)		28%
					3.1%	(MX)		
7306.20.40	00	Other.....	kg.....	2%	Free	(A+,CA,E,IL, J)		8.5%
					1.6%	(MX)		
		Tubing:**						
7306.20.60		Of iron or nonalloy steel	.....	1.1%	Free	(A+,CA,E,IL, J)		5.5%
					0.9%	(MX)		
	10	Imported with coupling.....	kg					
	50	Other.....	kg					
7306.20.80		Of alloy steel.....	.....	2.9%	Free	(A+,CA,E,IL, J)		10%
					2.4%	(MX)		
	10	Imported with coupling.....	kg					
	50	Other.....	kg					
7306.30		Other, welded, or circular cross section, of iron or nonalloy steel:						
7306.30.10	00	Having a wall thickness of less than 1.65 mm.....	kg.....	4.8%	Free	(A+,C 1/,CA, E,IL,J)		25%
					4%	(MX)		
		Having a wall thickness of 1.65 mm or more:	.....					
7306.30.30	00	Tapered steel pipes and tubes principally used as parts of illuminating articles	kg.....	4.6%	Free	(A+,CA,E,IL,J, MX)		45%
7306.30.50		Other.....	.....	1.1%	Free	(A+,C 1/,CA, E,IL,J)		5.5%
					0.9%	(MX)		
	10	Suitable for use in boilers, superheaters, heat exchangers, condensers, refining furnaces and feedwater heaters, whether or not cold drawn.....	kg					
	15	Other, cold-drawn.....	kg					
	20	Other, cold-rolled (cold-reduced) with a wall thickness not exceeding 2.54 mm	kg					

1/ See additional U.S. note 1 to this chapter.
* The word "Casing" manually circled in the original version submitted by Argentina.
** The word "Tubing" manually circled in the original version submitted by Argentina.

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CHAPTER 73

ARTICLES OF IRON OR STEEL

XV
73-1

Notes

1. In this chapter the expression "cast iron" applies to products obtained by casting in which iron predominates by weight over each of the other elements and which do not comply with the chemical composition of steel as defined in Note 1(d) to chapter 72.

2. In this chapter the word "wire" means hot- or cold-formed products of any cross-sectional shape, of which no cross-sectional dimension exceeds 16 mm.

Additional U.S. Notes

1. For the purposes of heading 7304 or 7306, the rate of duty "Free (C)" appearing in the "Special" subcolumn applies only to tubes and pipes with attached fittings, suitable for conducting gases or liquids.

2. For the purposes of subheading 7307.19.30, the expression "ductile fittings" refers to fittings which contain over 2.5 percent carbon and over 0.02 percent of magnesium or of magnesium and cerium, by weight.

* The indication of year manually added in the original version submitted by Argentina.

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7306 (con.)		Other tubes, pipes and hollow profiles (for example, open seamed or welded, riveted or similarly closed), of iron or steel (con.):						
7306.20		Casing and tubing of a kind used in drilling for oil or gas:						
		Casing:*			Free	(A+,CA,E,IL, J)		
		Of iron or nonalloy steel:						
7306.20.10		Threaded or coupled	.....	3%	2.4%	(MX)		20%
	30	Imported with coupling	kg					
	90	Other	kg					
7306.20.20	00	Other	kg.....	0.2%	Free	(A+,CA,E,IL, J)		1%
					0.2%	(MX) (s) 1/		
		Of alloy steel:						
7306.20.30	00	Threaded or coupled	kg.....	3.1%	Free	(A+,CA,E,IL, J)		28%
					2.4%	(MX)		
7306.20.40	00	Other	kg.....	1.6%	Free	(A+,CA,E,IL, J)		8.5%
					1.3%	(MX)		
		Tubing:**						
7306.20.60		Of iron or nonalloy steel	.....	1%	Free	(A+,CA,E,IL, J)		5.5%
					0.7%	(MX)		
	10	Imported with coupling	kg					
	50	Other	kg					
7306.20.80		Of alloy steel	.....	2.4%	Free	(A+,CA,E,IL, J)		10%
					1.9%	(MX)		
	10	Imported with coupling	kg					
	50	Other	kg					
7306.30		Other, welded, of circular cross section, of iron or nonalloy steel:						
7306.30.10	00	Having a wall thickness of less than 1.65 mm	kg.....	4%	Free	(A+,C 2/,CA, E,IL,J)		25%
					3.2%	(MX)		
		Having a wall thickness of 1.65 mm or more:						
7306.30.30	00	Tapered steel pipes and tubes principally used as parts of illuminating articles	kg.....	3.8%	Free	(A,CA,E,IL,J, MX)		45%
7306.30.50		Other	.....	1%	Free	(A+,C, 2/, CA, E,IL,J)		5.5%
					0.7%	(MX)		
	10	Suitable for use in boilers, superheaters, heat exchangers, condensers, refining furnaces and feedwater heaters, whether or not cold drawn	kg					
	15	Other, cold-drawn	kg					
	20	Other, cold-rolled (cold-reduced) with a wall thickness not exceeding 2.54 mm	kg					

1/ Rate suspended. See general Note 3(c) (iv).
2/ See additional U.S. note 1 to this chapter.
* The word "Casing" manually circled in the original version submitted by Argentina.
** The word "Tubing" manually circled in the original version submitted by Argentina.

ANNEX E-2

ANSWERS OF THE UNITED STATES TO QUESTIONS OF THE PANEL

Q1. The Panel notes that Argentina argues, and the United States does not contest, that the US law requires the USDOC to make its ultimate sunset determinations on an order-wide basis. Please explain whether this is the case and, if so, cite the relevant provisions of the US law (including regulations and/or policy provisions) which require the US investigating authorities to make their sunset determinations on an order-wide basis and provide copies thereof.

1. Section 751(c)(1)(A) of the Tariff Act provides that Commerce shall conduct a sunset review of an anti-dumping duty order five years after publication of the anti-dumping duty order.[1] The Statement of Administrative Action ("SAA") – an authoritative interpretive tool for the statute – confirms that section 751(c)(1) requires Commerce to make a sunset determination on an order-wide, rather than a company-specific, basis.[2]

Q3 through 8

2. Questions 3 through 8 relate to "Waiver Provisions". The following discussion of the general statutory and regulatory scheme regarding waivers, as well as US actions taken to address the DSB rulings on this issue, provides background for the responses to these questions.

3. Section 751(c)(4) of the Tariff Act permits a respondent interested party to waive its participation in a Commerce sunset review.

4. Subparagraph (A) of section 751(c)(4) – "[i]n general" – permits a party to "elect not to participate" in a Commerce sunset review, without prejudice to the party's right to participate in the injury-related sunset review conducted by the US International Trade Commission. By using the verb "elect", the statute contemplates that a party will "elect not to participate" by taking affirmative action to signal that it has voluntarily chosen to waive its participation, *i.e.*, by submitting a waiver to Commerce.

5. The "Effect of Waiver" is set forth in subparagraph (B) of section 751(c)(4). Subparagraph (B) provides that, where an interested party "waives its participation pursuant to this paragraph [*i.e.*, paragraph (4) of section 751(c)]", Commerce shall conclude that revocation of the order would be likely to lead to continuation or recurrence of dumping "with respect to that interested party".

6. Thus, the only action required by section 751(c)(4) of the Tariff Act is that Commerce make an affirmative company-specific likelihood finding *as a consequence of a party choosing to submit a statement of waiver* in a sunset review. The Statement of Administrative Action – an authoritative

[1] 19 USC. 1675(c)(1) (Exhibit ARG-33).

[2] SAA at 879 ("Commerce and the [US International Trade] Commission will make their sunset determinations on an order-wide, rather than a company-specific basis.") (Exhibit US-12). The SAA is a type of legislative history. In the United States, legislative history is often considered for purposes of ascertaining the meaning of a statute. The function of the SAA is set forth in the SAA itself. *See* US Answers to First Set of Panel Questions (8 January 2004), paras. 97-98, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods From Argentina* (WT/DS268).

interpretive tool for the statute – confirms this plain reading of the statutory provisions. Specifically, the SAA states,

> To reduce the burden on all parties involved, new section 751(c)(4) permits foreign interested parties ... to waive their participation in a Commerce sunset review. *If Commerce receives such a waiver*, Commerce will conclude that revocation ... would be likely to lead to continuation or recurrence of dumping ... with respect to *the submitter*.[3]

7. In other words, the statute permits parties to avoid incurring the time and expense of participating in the Commerce side of a sunset review when they wish only to contest the likelihood of continuation or recurrence of injury before the US International Trade Commission. A party may do so by submitting a waiver statement to Commerce.

8. Commerce implemented the statutory waiver provision in its 1998 Sunset Regulations by setting forth the timing and contents of a statement of waiver.[4] The Panel referred to this category of waiver as "affirmative waiver."[5] At the same time, Commerce indicated that it also would treat failure to file a complete substantive response to the sunset review initiation notice as a waiver of participation.[6] As Commerce clarified in the Preamble to its 1998 Sunset Regulations, "failure to file a complete substantive response ... *also* will be treated as a waiver of participation".[7] The Panel referred to this category of waiver as "deemed waiver" and correctly found that the deemed waiver category was "create[d]" by section 351.218(d)(2)(iii) of Commerce's 1998 Sunset Regulations.[8]

9. As discussed in the US submissions, to address the adverse findings of the DSB concerning both categories of waiver, Commerce amended its sunset regulations in October 2005 to eliminate the possibility that Commerce's order-wide likelihood determinations would be based on assumptions about likelihood. Specifically, Commerce revised the so-called "affirmative waiver" provisions so that a party electing not to participate in the Commerce sunset review would include in its waiver a statement that it would be likely to dump if the order were revoked.[9] Commerce also removed section 351.218(d)(2)(iii) from its sunset regulations, thus eliminating the provision that created the so-called "deemed waiver" category.[10] As explained in the Preamble to the amended sunset regulations, Commerce "will no longer make company-specific likelihood findings for companies that fail to file a statement of waiver and fail to file a substantive response to the notice of initiation".[11]

Q3. The Panel notes that Section 751 (c)(4)(B) of the Tariff Act of 1930 requires the USDOC to find likelihood with respect to companies which waive their right to participate. The Panel also notes that Section 218(d)(2)(ii) of the Regulations stipulate that "every statement of waiver must include a statement indicating that the respondent interested party waives participation in the sunset review before the Department; a statement that the respondent interested party is likely to dump".

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[3] SAA at 881 (Exhibit US-12).

[4] *See* 19 C.F.R. 351.218(d)(2)(i) and (ii) (1998) (Exhibit US-13). Subparagraph (i) sets forth the timing for filing a statement of waiver, and subparagraph (ii) indicates the contents of a statement of waiver.

[5] Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods From Argentina*, WT/DS268/R, para. 7.83 ("Panel Report").

[6] 19 C.F.R. 351.218(d)(2)(iii) (1998) (Exhibit US-13).

[7] Preamble to Commerce 1998 Sunset Regulations, 63 FR at 13518 (emphasis added) (Exhibit US-14).

[8] Panel Report, paras. 7.83 and 7.85.

[9] *See* 19 C.F.R. 351.218(d)(2)(ii) (2005), 2005 Sunset Regulations, 70 FR at 62064 (Exhibit ARG-12).

[10] *See* 2005 Sunset Regulations, 70 FR at 62064 ("Section 351.218 is amended by ... removing and reserving paragraph (d)(2)(iii) ....") (Exhibit ARG-12).

[11] Preamble to 2005 Sunset Regulations, 70 FR at 62062 (Exhibit ARG-12).

Please explain, in light of the above-referenced provisions of the US law and its other provisions that may also be relevant, what the US law stipulates with respect to respondents that do not respond at all to the USDOC's questionnaire and those that provide incomplete responses. Specifically, please explain whether and how the US law also directs the USDOC to find likelihood for these exporters.

10. United States law does ***not*** direct Commerce to find likelihood with respect to a respondent that does not respond at all to a Commerce questionnaire or that provides an incomplete response to a Commerce questionnaire. As discussed above, and as the original Panel found, Commerce's 1998 Sunset Regulations provided for the treatment of failure to file a complete substantive response to the sunset review initiation notice as a waiver of participation. Such treatment, *i.e.*, deemed waiver, was not required by the statute, but rather was created by section 351.218(d)(2)(iii) of the regulations. Commerce removed section 351.218(d)(2)(iii) from its sunset regulations, thereby eliminating the concept and consequences of a deemed waiver.[12]

11. Thus, US law does ***not*** stipulate any specific finding with respect to a respondent that does not respond at all to a Commerce questionnaire or that provides an incomplete response to a Commerce questionnaire. Rather, where a respondent does not respond to a questionnaire or provides an incomplete response, section 776 of the Tariff Act provides for Commerce's use of "facts otherwise available" in reaching its determination,[13] subject to certain conditions.[14] Commerce regulations concerning use of facts available in a sunset review also provide for reliance on, e.g., evidence of dumping from prior Commerce determinations and information contained in parties' substantive responses to the sunset notice of initiation.[15] That is the approach identified by the original Panel in explaining the options available to an investigating authority when an exporter fails to participate in a proceeding.[16] As Commerce explained in its amended sunset regulations, in response to commenters who noted that the regulations no longer specify how Commerce will address the situation where a respondent interested party does not participate in a sunset review,

> As a general matter, the Department will make its order-wide, likelihood determination on the basis of the facts and information available on the record of the sunset review which may include, where appropriate, use of facts available as provided for in the statute and regulations.[17]

12. As previously stated, US law does ***not*** require Commerce to make company-specific likelihood findings with respect to a respondent interested party that fails to participate in the sunset review. Commerce's sunset determinations supports this fact. Since the 2005 Sunset Regulations went into effect, Commerce has conducted and completed multiple sunset review proceedings. In several of the sunset proceedings, there was no respondent interested party participation. Under these circumstances, and as is evident from analyses in the decision memoranda, Commerce based its likelihood determination on the facts and information on the record of the sunset review; Commerce did ***not*** find that a company had elected to waive participation or make a company-specific likelihood determination with respect to the companies that failed to participate.[18]

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[12] *See* 2005 Sunset Regulations, 70 FR at 62064 ("Section 351.218 is amended by ... removing and reserving paragraph (d)(2)(iii) ....") (Exhibit ARG-12).

[13] 19 USC. 1677e (Exhibit US-15).

[14] *See* 19 USC. 1677m(e) ("Use of Certain Information") (*e.g.*, the information is submitted by the established deadline, and the information can be verified) (Exhibit US-16).

[15] *See* 19 C.F.R. 351.308(f) (1998) (Exhibit US-17).

[16] Panel Report, para. 7.95.

[17] Preamble to 2005 Sunset Regulations, 70 FR at 62063 (Exhibit ARG-12) .

[18] *See, e.g., Final Results of the Expedited Sunset Review of the Anti-Dumping Duty Order on Fresh Garlic from the People's Republic of China, Issues and Decision Memorandum* (1 June 2006) (Exhibit US-18).

Q4.

(a) Please explain generally the relevance of the company-specific finding of likelihood under Section 751 (c)(4)(B) to the USDOC's order-wide determination.

13. As discussed in response to Question 1, under US law Commerce is required to make its ultimate sunset determination on an order-wide basis. In making its order-wide determination, Commerce must consider all information and argument on the record of the sunset proceeding. Thus, while Commerce would consider a company-specific likelihood finding in making its order-wide likelihood determination, the relevance of such a company-specific finding to the ultimate likelihood determination always would depend on the facts on the administrative record in that sunset review. Although Argentina has failed to provide any support for its vague assertion that probative evidence contradicting an exporter's admission of likely dumping could even exist, Commerce would nevertheless take such as-yet-hypothetical information into account when making its order-wide likelihood determination. In such a situation, the weight given to a company-specific finding would be adjusted accordingly.

(b) Given the mandate of Section 751 (c)(4)(B) of the Tariff Act to find likelihood for companies that waive participation, would it be accurate to say that the USDOC has to find likelihood in its ultimate order-wide determination in every sunset review where the USDOC finds likelihood for individual companies that waive participation?

14. No. The only action mandated by section 751(c)(4) of the Tariff Act is that Commerce make an affirmative *company-specific* likelihood finding as a consequence of a party submitting a statement of waiver in a sunset review. As discussed above, the relevance of a company-specific finding always would depend on the facts on the administrative record in that sunset review. Commerce is *not* required to find likelihood in its ultimate order-wide determination just because a company elects not to participate in the sunset review.

Q5. Please explain whether there has been any sunset review where the USDOC found likelihood for individual exporters by virtue of Section 751 (c)(4)(B) of the Tariff Act and found no likelihood on an order-wide basis. If so, please provide a copy of the USDOC's final determination in such reviews.

15. Commerce amended its sunset regulations in October 2005 to address the DSB recommendations and rulings concerning the "waiver provisions." As discussed above, Commerce eliminated the so-called "deemed waiver" provision and revised the so-called "affirmative waiver" provisions so that a party electing not to participate in the Commerce sunset review would include a statement that it would be likely to dump if the order were revoked. The amended regulations were effective for sunset reviews initiated on or after 31 October 2005. Commerce has made no company-specific likelihood findings pursuant to section 751(c)(4)(B) of the Tariff Act in sunset reviews initiated on or after 31 October 2005, because no company has filed a waiver statement in any of these reviews. In other words, the condition precedent for application of section 751(c)(4)(B) of the Tariff Act has not been implicated in any sunset reviews conducted since Commerce amended its sunset regulations in October 2005.

Q6. The Panel notes that Section 751(c)(4) of the Tariff Act of 1930 provides, in relevant part:

> **(4) Waiver of participation by certain interested parties**
>
> **(A) In general**
>
> **An interested party described in section 1677(9)(A) or (B) of this title may elect not to participate in a review conducted by the administering authority under this subsection and to participate**

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

(a) Please explain whether electing not to participate within the meaning of subparagraph (A) constitutes a waiver within the meaning of subparagraph B.

16. Yes, electing not to participate within the meaning of subparagraph (A) does constitute a waiver within the meaning of subparagraph (B). Sections 351.218(d)(2)(i) and (ii) of Commerce's 2005 Sunset Regulations prescribe the timing and contents of the waiver statement to be filed by a party electing not to participate in a sunset review.

(b) How does an exporter elect not to participate within the meaning of subparagraph A? Does remaining silent, i.e. not submitting any response to the USDOC's questionnaire, constitute an election not to participate within the meaning of subparagraph (A)? If so, does this constitute a waiver for the purposes of subparagraph B?

17. As discussed above, section 751(c)(4)(A) of the Tariff Act contemplates that a party will "elect not to participate" by taking affirmative action to signal its waiver of participation, *i.e.*, by submitting a waiver to Commerce. The Statement of Administrative Action – an authoritative interpretive tool for the statute – confirms this reading of the statute.[19] Commerce implemented the statutory waiver provision in its 1998 Sunset Regulations by specifying the timing and contents of a waiver statement. In October 2005, Commerce revised its regulations so that a party electing not to participate in the Commerce sunset review would include in its waiver a statement that it would be likely to dump if the order were revoked. Commerce's revised sunset regulations, at 19 C.F.R. 351.218(d)(2)(i) and (ii), prescribe how an exporter may elect not to participate within the meaning of subparagraph (A) of section 751(c)(4) of the Tariff Act.

18. Remaining silent, *i.e.*, not submitting any response, does not constitute an election not to participate within the meaning of subparagraph (A) and does not constitute a waiver for purposes of subparagraph (B). As discussed above, in October 2005 Commerce removed section 351.218(d)(2)(iii) from its sunset regulations, thus eliminating the provision that created the so-called "deemed waiver" category.[20] As a result, Commerce "will no longer make company-specific likelihood findings for companies that fail to file a statement of waiver and fail to file a substantive response to the notice of initiation."[21] As discussed above, since the 2005 Sunset Regulations went into effect, Commerce has conducted and completed multiple sunset review proceedings. In several of the sunset proceedings, respondent interested parties failed to file a substantive response to the notice of initiation. Under these circumstances, Commerce based its likelihood determination on the facts and information on the record of the sunset review; Commerce did ***not*** conclude that these

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[19] SAA at 881 ("*If Commerce receives such a waiver*, Commerce will conclude that revocation ... would be likely to lead to continuation or recurrence of dumping ... with respect to *the submitter*") (emphasis added) (Exhibit US-12).

[20] *See* 2005 Sunset Regulations, 70 FR at 62064 ("Section 351.218 is amended by ... removing and reserving paragraph (d)(2)(iii) ....") (Exhibit ARG-12) .

[21] Preamble to 2005 Sunset Regulations, 70 FR at 62062 (Exhibit ARG-12) .

parties had elected to waive participation, nor did Commerce make a company-specific likelihood determination with respect to the companies that failed to participate.[22]

Q7. Under what circumstances would a signed waiver statement constitute a sufficient evidentiary basis for an affirmative likelihood determination? Would your response depend on the circumstances of a given sunset review? For example, would your response differ in relation to: (i) a review in which the only exporter submits a signed waiver statement; (ii) a review in which, of the 20 exporters involved, 10 submit a signed waiver statement and 10 participate cooperatively; (iii) a review in which, of the 20 exporters involved, 1 submits a signed waiver statement and 19 remain silent? How would the company-specific conclusions of likelihood with respect to exporters that waive their right to participate (by signing a statement of waiver) in these scenarios be reflected in an ultimate order-wide determination?

19. Commerce is required to make its ultimate sunset determination on an order-wide basis. In making its order-wide determination, Commerce must consider all information and argument on the record of the sunset proceeding. Commerce would consider a company's waiver statement, including the company's statement that it would be likely to dump if the order were revoked, in making its order-wide likelihood determination. However, whether such a statement could constitute a sufficient evidentiary basis for an affirmative likelihood determination would depend on the specific facts and circumstances of a given sunset review. However, as discussed above in response to Question 5, Commerce has made no company-specific likelihood findings in sunset reviews subject to the amended sunset regulations because no company has filed a waiver statement in any of these reviews. Because no company has filed a waiver statement, there are no examples of how Commerce has reflected a company-specific likelihood determination(s) in the ultimate order-wide determination, and the question is a purely hypothetical one. The fact that no company has filed a waiver statement is not surprising. Waiver statements were rare in sunset reviews under the 1998 Sunset Regulations. Waiver statements in sunset reviews under the 2005 Sunset Regulations likely also will continue to be, as Argentina itself concedes, "rarely ... forthcoming".[23]

20. The facts the Panel has identified in its question would form part of the record and by regulation would be taken into account in making the order-wide determination. The probative value of any particular fact would depend on the other facts on the record.

Q8. The Panel notes that Section 751 (c)(4) of the Tariff Act does not define the term "waiver". The Panel also notes that Section 351.218(2)(ii) of the Regulations states that a statement of waiver "must include a statement indicating that the respondent is likely to dump."

Can this, in your view, be interpreted to mean that the Regulations nullify, or limit the scope of, the Statute in so far as the Statute refers to waiver.

21. The regulations neither nullify nor limit the scope of section 751(c)(4) of the Tariff Act, rather, as provided under US administrative law, the regulations implement the statute and help define the conditions under which a party will "elect not to participate."

22. As discussed above, subparagraph (A) of section 751(c)(4) – "[i]n general" – permits a party to "elect not to participate" in a Commerce sunset review without prejudice to the party's right to participate in the injury-related sunset review conducted by the US International Trade Commission. By using the verb "elect", the statute contemplates that a party will "elect not to participate" by taking

[22] *See, e.g., See, e.g., Final Results of the Expedited Sunset Review of the Anti-Dumping Duty Order on Fresh Garlic from the People's Republic of China, Issues and Decision Memorandum* (1 June 2006) (Exhibit US-18).

[23] Argentina First Written Submission, para. 208.

affirmative action to signal its waiver of participation, *i.e.*, by submitting a waiver to Commerce. The Statement of Administrative Action – an authoritative interpretive tool for the statute – confirms this reading of the statute. Specifically, the SAA states,

> To reduce the burden on all parties involved, new section 751(c)(4) permits foreign interested parties ... to waive their participation in a Commerce sunset review. *If Commerce receives such a waiver*, Commerce will conclude that revocation ... would be likely to lead to continuation or recurrence of dumping ... with respect to *the submitter*.[24]

23. Sections 351.218(d)(2)(i) and (ii) of Commerce's sunset regulations implement the statutory waiver provision by prescribing how an exporter may elect not to participate, *i.e.*, waive participation, in a sunset review.

24. Prior to the October 2005 amendments to the sunset regulations, Commerce also treated failure to file a complete substantive response to the sunset review initiation notice as a waiver of participation. As the Panel correctly found, such "deemed waivers" were "create[d]" by section 351.218(d)(2)(iii) of Commerce's 1998 Sunset Regulations.[25] There is no dispute that the regulatory provision pertaining to the deemed waiver category has been removed from Commerce's sunset regulations. The scope of the waiver provisions in the regulations is now simply coterminous with the statute.

Q10.

(a) The Panel notes that the USDOC asked the Argentine exporters to submit their consolidated and unconsolidated financial statements for the 1996-2000 period, as well as to provide information relating to their costs and the volume of their shipments to the United States in the period of review.

Please explain for what purpose the USDOC sought the mentioned information. More specifically, please explain whether the USDOC intended to, and the extent to which it did, determine whether these exporters actually dumped in the period of review, and how this relates to the obligations under Articles 11.3 and/or 2.1 of the Agreement. Please explain how exactly the USDOC intended to, and the extent to which it did, base its determination regarding the existence of dumping on the costs of the exporters, citing any record evidence supporting your response.

25. Bearing in mind the obligation to make a determination as to whether dumping was likely to continue or recur if the order were revoked, and bearing in mind that there were no administrative reviews of Argentine companies during the sunset period of review (and that Siderca had ceased shipping), Commerce sought information that would permit it to make a determination as to whether dumping would likely continue or recur if the order were revoked, including evaluating the overall financial health of the Argentine OCTG industry. Aware that Acindar, the only exporter, had no home market or third country sales, Commerce drafted the questionnaire with the intention of asking questions that respondents could actually answer, and therefore requested the product-specific cost data to provide an estimate of the normal value.[26] Had the Argentine producers been able to report their actual product-specific cost information, it could have been verified by tying the costs back to

[24] SAA at 881 (Exhibit US-12).

[25] Panel Report, paras. 7.83 and 7.85.

[26] Counsel for US Steel noted that respondents would not have a viable home market. (Letter from Skadden, Arps, Exhibit ARG-27, pp. 5, 9.) In response, Siderca did not assert that its home market *was* viable (Exhibit ARG-19, p. 7); Acindar did not file any comments in response to petitioners' letter.

the financial statements. Commerce did not seek to perform a calculation of a margin of dumping, nor was it obliged to perform such a calculation.

26. As the United States has noted, Article 11.3 does not require that a likelihood determination be based on a determination of the existence of dumping. Nor did Commerce seek to establish the existence of dumping. Instead, Commerce examined the available evidence on the exporters' behaviour in order to ascertain whether dumping was likely to continue or recur if the order were revoked. To do so, Commerce sought to compare Acindar's product-specific costs with the importer data providing the prices of its US sales. However, none of the Argentine producers maintained their product-specific cost data. Therefore, Commerce could not examine these costs to ascertain the companies' past behaviour. Acindar provided its financial statements as requested, but provided no other information that could assist Commerce in making its determination for the period 1995-2000.

27. Therefore, Commerce used the other information available on the record of the proceeding with respect to Acindar – the US average prices (which included goods exported to the United States) – and compared them with Acindar's sales prices. Acindar's sales prices were lower than the US average prices. Commerce also reviewed Acindar's financial statements, which reflected its weakened financial position. Based on the totality of the evidence, Commerce concluded that it was likely that dumping would continue or recur if the order were revoked.[27]

(b) If the USDOC intended to determine whether the Argentine exports to the United States were dumped during the period of review, please explain why the USDOC did not seek information relating to these companies' domestic sales prices and their export prices to the United States. Please explain how the USDOC intended to, and the extent to which it did, determine whether these companies dumped in the past on the basis of information that it sought from them, i.e. their costs and the volume of their shipments to the United States, citing any record evidence supporting your response. Please explain how this relates to the obligations under Articles 11.3 and/or 2.1 of the Agreement.

28. Commerce did not intend to determine whether the Argentine exports to the United States were dumped during the period of review. Rather, Commerce sought to collect information about past behaviour to facilitate its evaluation of what would be likely to happen in the future. Commerce did not seek Argentine producers' export prices to the United States because it was aware of the brevity of the time available to conduct the proceeding. Commerce considered that, in the context of the limited amount of time available to conduct the proceeding, it could place the US price information based on Acindar's importers' data on the record prior to the due date for the respondents' answers to the questionnaires and, having given the respondents the opportunity to comment on that data, instead have the respondents focus on gathering data Commerce could not access – cost data. Therefore, respondents were free to discuss the relevance of the data on the record as early as 22 November 2005, and to provide alternative data should they consider the existing price data inappropriate.

29. Siderca actually proposed comparing its costs to the Preston price data, in lieu of the comparison methodology proposed by petitioners' counsel.[28] Petitioners' counsel had proposed using Argentine average unit values based on Argentina's export classification system, but Siderca argued that such data did not form the most appropriate basis for comparison. Siderca then suggested that comparing its costs to the Preston price data, rather than the Argentine average unit values supplied by petitioners was more appropriate.

[27] Section 129 Determination, at 10 (Exhibit ARG-16).
[28] 7 December Letter from Siderca, p. 5 (Exhibit ARG-19).

Q11.

(a) Please explain to what extent, if at all, an investigating authority is bound by the definition of dumping found in Article 2.1 of the Agreement in a determination regarding the existence of dumping in the period of review in a sunset review under Article 11.3 of the Agreement. In other words, in your view, can an investigating authority determine the existence of dumping without having regard to the normal value and export price of the exporter(s) under review?

30. The Appellate Body in *US – Corrosion Resistant Steel Sunset Review* explained the relationship between Article 2.1 and Article 11.3, noting that Article 2.1 "describes the circumstances in which a product is to be considered as being dumped for purposes of the entire *Anti-Dumping Agreement*, including Article 11.3".[29] The Appellate Body went on to state that "the question for investigating authorities, in making a likelihood determination in a sunset review pursuant to Article 11.3, is whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping . . . (that is, to the introduction of that product into the commerce of the importing country at less than its normal value)".[30] Notably, however, the Appellate Body ultimately concluded that – even though the definition of dumping applies in sunset reviews, investigating authorities are nevertheless not obligated to calculate a margin of dumping.[31] Nor did the Appellate Body conclude that an investigating authority must calculate a future normal value and a future export price, or a past normal value and a past export price. Rather, the Appellate Body noted that Article 11.3 does not prescribe a methodology, nor identify particular factors to be examined.

31. The question for Commerce in the Section 129 proceeding was whether dumping would be likely to continue or recur if the order were revoked; in other words, would normal value likely exceed export price. To make that forward-looking determination, Commerce examined the past behaviour of the two identified Argentine exporters. Commerce was aware that Acindar did not have a viable home market or third country sales.[32] Rather than asking respondents to provide information that Commerce knew the lone exporter could not provide, Commerce instead asked respondents to provide product-specific cost data. Commerce did so for the purpose of examining respondents' past behaviour over the life of the order. Respondents were unable to provide actual product-specific cost data. Commerce therefore used "other independent sources" of information as set out in paragraph 7 of Annex II (*i.e.*, "published price lists, official import statistics and customs returns"). On the basis of Acindar's pricing behaviour, as evidenced by the importer data, Commerce concluded that it was likely that Acindar had dumped during the life of the order. Acindar offered no contrary evidence. As a result, Commerce relied on the importer data and price lists as one basis to support its ultimate conclusion that dumping would be likely to continue or recur if the order were revoked.

(b) In your view, is there a difference between calculating the margin of dumping for an exporter and determining the existence of dumping for that exporter? In other words, can an investigating authority determine that an exporter dumped in a given period in the past without calculating a margin of dumping or relying on a margin already calculated in the past? If your response is in the affirmative, please explain whether such a determination can be made without having regard to the two components of dumping, i.e. normal value and export price, set out in Article 2.1 of the Agreement.

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[29] 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. 109 (adopted 9 January 2004) ("*US – Corrosion-Resistant Steel Sunset Review (AB)*").

[30] *See US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 109.

[31] *See US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 127.

[32] *Oil Country Tubular Goods Other than Drill Pipe*, 68 Fed. Reg. 13,262 and Issues and Decision Memorandum, at Comment 1 (Exhibit US-3).

32. Article 5.1 provides for an investigation to determine the "existence, degree and effect" of any alleged dumping. Therefore, the Anti-Dumping Agreement itself contemplates a distinction between the existence of dumping and the degree of dumping. For example, an exporter could stipulate that its normal value exceeded export price in a particular period. In that case, dumping would exist, but it would not be possible to calculate a margin of dumping.

33. Commerce did not determine the existence or degree of dumping during the sunset period of review, nor was it obliged to do so. Instead, Commerce examined the past behaviour of Acindar, including Acindar's prices as reflected on the importers' customs entries, as well as the prevailing price in the United States, and concluded that it was likely that Acindar had dumped during the sunset period of review. There was no evidence to the contrary on the record of the proceeding.

34. Notably, Acindar did not even attempt to argue that it had not dumped, or that it would not dump if the order were revoked; rather, Acindar argued that it had not been a significant producer of OCTG during the sunset period of review.[33] However, Acindar was, of course, the *only* Argentine exporter of OCTG during the sunset period of review. Based on an examination of all of the facts, Commerce concluded that Acindar was likely to dump if the order were revoked – in other words, Commerce concluded that Acindar's export price would likely be lower than normal value.

(c) On what basis could an investigating authority properly find affirmative likelihood of continuation or recurrence of dumping other than with regard to the existence of dumping?

35. A determination of likelihood of continuation or recurrence of dumping is made on the basis of the facts before the investigating authority. Given the forward-looking nature of the inquiry, which must presume a fact not in existence (termination of the order), there is no one methodology, no single factor, that must be taken into account in reaching any conclusion about what is likely to happen in the future. At a minimum, no determination of the existence of dumping is necessary; Article 11.3 does not require it.[34] Indeed, the Agreement itself recognizes that a finding of *no* dumping is not dispositive of the question of whether dumping is likely to continue or recur.[35] The probative value of other factors would depend on the facts of each determination.

Q12. The Panel notes Argentina's claim regarding the comparison the USDOC made between Acindar's export prices and the average transaction price (by weighted average value) that prevailed in the US market for the subject product. The Panel also notes that the USDOC inferred from this comparison the conclusion that Acindar was likely dumping in the period of review.

(a) Please explain the legal basis under the Agreement for basing a determination of dumping, be it likely or actual, on a comparison of an exporter's export price with the average transaction price (by weighted average value) that prevails in the country of imports for the subject product.

36. The United States considers that the circumstances of this sunset review must be kept in mind. First, the sole known exporter of Argentine OCTG to the United States *prior* to the sunset review stopped shipping to the United States after the imposition of the order. Therefore, there were no administrative reviews of that shipper and no dumping margins calculated pursuant to any such review. Second, a new entrant into the US market appeared anonymously during the sunset period of

[33] Acindar Questionnaire Response (Exhibit ARG-14).

[34] Article 11.3 does not require separate determinations as to whether dumping is likely to continue, versus whether dumping is likely to recur.

[35] *See* Article 11.3 (dumping may *recur*) and Footnote 22 (absence of dumping in the most recent review does not require a negative determination in a sunset review).

review and was not subject to administrative review until after the sunset period of review. There was, therefore, for the sunset period of review, a limited amount of information, attributable entirely to the respondents' own choices (to stop shipping and to decline to participate in the sunset review). The answer cannot be the one advocated by Argentina – that a lack of shipping activity, or a failure to make oneself known, necessarily requires a negative determination as to what would happen if the order were revoked. It would be odd indeed for the Agreement to contemplate that the order may be continued even if a respondent has obtained a zero margin in its most recent administrative review, but that the order must be revoked if respondents manage to avoid having their transactions examined. The investigating authority must do what it can with the information it has, including the information submitted – or not submitted – by the respondents.

37. Article 11.3 does not prescribe any particular methodology to be used by an investigating authority in making a likelihood determination in a sunset review.[36] Commerce did not examine the existence of dumping, nor did it calculate a dumping margin; nor is an investigating authority obliged to do so under Article 11.3. As the Appellate Body has recognized, "a broad range of factors other than import volumes and dumping margins is potentially relevant to the authorities' likelihood determination".[37] Therefore, the legal basis for Commerce's analysis of the facts before it is Article 11.3, which does not prescribe the methodology or the factors to be examined.

38. The United States notes that the information Commerce examined is precisely the information identified in paragraph 7 of Annex II – customs returns and price lists. As the United States noted in its closing statement, if the Argentine respondents considered that there was a more suitable price list to be considered, the respondents were free to place such a list on the record. Commerce placed the Preston price list on the record on 22 November 2005, over a week before the respondents' questionnaire responses were due

39. Finally, as discussed below, in addition to comparing Acindar's export prices to contemporaneous prices in the United States for the same category of merchandise, Commerce also considered the condition of the OCTG market at the end of the sunset review period.

(b) The Panel notes Argentina's assertion that the USDOC ignored certain factors that affected this comparison, such as differences in the physical characteristics of the products compared, the levels of trade at which the comparison was made, as well as differences relating to transportation costs.

Please explain in detail and by referring to the relevant parts of the record, whether any of these factors were known to the USDOC in the Section 129 proceedings at issue and, if so, whether this was taken into account.

40. The United States considers that, in keeping with the scope of the Panel's review as provided under Article 17.5(ii) of the Anti-Dumping Agreement, it is important to recall the facts and arguments before the investigating authority. In response to Commerce's request for data on ten product categories, Siderca argued that there were "literally thousands" of product combinations within Commerce's categories[38], suggesting that no comparison at all was possible. In response to comments from petitioners' counsel, Siderca then argued that Commerce should make an even *broader* comparison than the one Commerce had proposed in the questionnaire, and Siderca, in fact, used the Preston Pipe and Tube data as the basis for comparison.[39] Moreover, Argentina neglects to provide a method for making such adjustments given that the data is not that specific. Had Argentine

[36] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 149.
[37] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 186.
[38] Siderca's Questionnaire Response, p. 4 (Exhibit ARG-15).
[39] Siderca's 7 December Letter, p. 5 (Exhibit ARG-19).

producers maintained their product-specific cost data from the period, Commerce would have been able to conduct its analysis on a more specific level.

41. Recalling that Commerce was not calculating a dumping margin pursuant to Articles 2.2 *et seq*, Commerce nevertheless took into account characteristics that would have the greatest effect on price.[40] The Preston Pipe & Tube Report separated products by type of OCTG, whether welded or seamless, and whether carbon or alloy. Its segregation of tubing from casing also addressed much of the size concern Argentina now raises, as tubing is a small tubular product in limited sizes, and casing is larger size material. Even in the comparison Argentina raised during the panel hearing, Argentina conceded that there is minimal overlap in sizes between tubing and casing. Additionally, though the Preston Pipe & Tube Report does not distinguish between end finish (e.g. plain vs. threaded and coupled), the universe of material included in the carbon welded tubing and carbon welded casing groups does include both plain and threaded and coupled material, diminishing any impact this may have on price comparisons. With respect to transportation costs, we note that not all of the Preston Publishing selling prices included transportation costs. The Preston Pipe data included both domestic and import shipments. The terms of the latter were FOB mill.[41] Even had Commerce been able to adjust for these factors, Acindar's sales prices were so far below the US average prices that the end result would likely have not changed.

42. The United States recalls that two of the exhibits Argentina presented during its oral argument, Exhibit ARG-34 And Exhibit ARG-35, were not on the record of the Section 129 proceeding. Therefore, Commerce did not have this information before it when making its determination. Consideration of such information cannot be reconciled with Article 17.5 (ii) of the Agreement.

43. Even if the Panel were to consider the facts introduced here, and not in the Section 129 determination, the price lists included therein are for seamless OCTG, yet Acindar sold only welded OCTG – a product with a very different cost and price structure. Furthermore, a price list is not the actual price arrived at for the sale. In fact, discounting of list prices was common practice during the period because of the depressed condition of the OCTG market.

44. Argentina asserted that the carbon versus alloy comparison shows a difference of less than 10 per cent.[42] This comparison fails to accurately reflect the parameters of carbon and alloy products sold in the marketplace. Whereas there are a limited number of carbon grades, there are a multitude of alloy grades. Alloy market prices of OCTG will reflect a composite of these alloy grades. In fact, following the same logic of Argentina, if we were to compare non-normalized J55 carbon tubing to alloy P grade material, there would be a price difference of 35 per cent. Commerce made every effort to take physical characteristics and other differences into account when making its comparisons. However, it was limited by the available information on the record – information that was limited because Argentine respondents failed to retain their product-specific cost data.

45. In short, Commerce analyzed the evidence on the record before it, which was sufficiently specific to enable a basic comparison of Acindar's prices to the prevailing prices in the market. Commerce was not calculating a margin of dumping, nor was it obliged to. Rather, Commerce engaged in an examination of Acindar's past behaviour as a basis for evaluating what Acindar would be likely to do in the future.

Q13. The Panel notes that the USDOC's Section 129 Determination states that the USDOC did not use the cost data in Acindar's financial statements because those data related to a product category that included products other than the subject product. The USDOC stated

[40] US Second Written Submission, at 12.
[41] Information for the Record, app. III (Exhibit ARG-18).
[42] Argentina Opening Statement at Panel Meeting, at para. 33 (12 July 2006).

that "the inclusion of costs related to the merchandise not subject to review would distort [the USDOC's] analysis." Yet the USDOC relied on these financial statements with respect to its determination that the OCTG market was depressed in the period of review.

(a) Please explain, by referring to the relevant parts of the record, the relevance of the financial statements of Siderca and Acindar for both the company-specific and order-wide phases of the USDOC's sunset determination in these proceedings. More specifically, please explain whether the USDOC used these statements in support of its order-wide determination that dumping was likely to continue or recur should the order be revoked and where such use is reflected on the record.

46. With respect to the company-specific determination for Acindar, Commerce found that the weakened condition of Acindar, as reflected in its financial statements, supported Commerce's finding that Acindar had likely dumped during the period and would likely continue to do so if the order were revoked.[43]

47. With respect to the order-wide determination, Commerce used Siderca and Acindar's financial statements in conjunction with SEC filings from US producers to establish that there was a depressed OCTG market.[44] Specifically, Siderca's financial statement explained that, "[s]ales for the year were $486 million (25 per cent less than the $645 million in the previous year) reflecting the effects of the drastic fall *in world demand for tubes in the oil industry*, caused by the fall in oil prices and shrinking steel markets".[45] The United States notes that Siderca stated on the record of the Section 129 proceeding that "1999/2000 was, by all accounts, a period in which the global OCTG market was depressed . . . ".[46]

48. In addition to Siderca's own statement on the record of the Section 129 proceeding, information from the financial statements of the other US producers supported a finding of a depressed OCTG market. For example, Maverick Tube Corporation's 1999 10K report explains:

> Although drilling activity has been recovering from the recently depressed levels, no assurance can be given regarding the timing and extent of such recovery.[47]

49. The NS Group similarly explains that:

> Demand for our OCTG products began to decline in the second half of fiscal 1998 and continued to decline significantly in fiscal 1999. Significant declines in oil and natural gas prices lead to a decline in drilling activity in the United States throughout most of 1999. This decline resulted in extensive industry-wide tubular inventories, which further negatively affected our OCTG business . .
>
> > The market conditions described above negatively affected our business during the latter half of fiscal 1998 and fiscal 1999. Our business experience indicates that oil and natural gas prices are volatile and can have a substantial effect upon drilling levels and resulting demand for our energy related products. Oil and gas prices and drilling activity began to improve in the fourth quarter of fiscal 1999, and have continued to improve into fiscal 2000. However, the timing and extent of such recovery is uncertain and we expect

[43] Section 129 Determination, at 10 (Exhibit ARG-16).
[44] Section 129 Determination, at 7 (Exhibit ARG-16).
[45] Siderca's Questionnaire Resp., at page 13 of Siderca's 2000 Financial Statement (emphasis added) (Exhibit ARG-15).
[46] Exhibit ARG-19 (p. 7).
[47] OCTG Filings of Domestic Producers, at Maverick's 1999 10K, p. 47 (Exhibit US-19).

> to incur operating losses in the energy products segment during the first half of fiscal 2000.[48]

50. These statements confirmed the weakness of the OCTG market during the period as well as the uncertainty facing the industry at the end of the period.

(b) Please explain, by referring to the relevant parts of the record, whether the financial statements of these two companies reflected the overall production operations of these companies or whether the data relating to the subject product, i.e. OCTG, could be separately identified.

51. The financial statements reflected the overall production operations of the companies. Because both companies produce OCTG and non-OCTG products, the subject merchandise could be identified only in those parts of the financial statements that specifically reference OCTG production or sales, as opposed to non-OCTG production or sales. For example, even though the financial statements did not break out sales or costs for OCTG specifically, sometimes OCTG was mentioned in the text. One such example is when Siderca explained that "the international trade in tubes for the oil industry (OCTG – Oil Country Tubular Goods) was down 38 per cent."[49]

(c) Please explain whether the share of OCTG in these two companies' overall production operations was taken into account in making the inference on the basis of these statements that the OCTG market was depressed

52. Siderca's financial statement stated that there was a "drastic fall in world demand for the *oil* industry," which, as a matter of logic, meant there was a similar fall in the demand for OCTG.[50] Though the statements regarding Acindar's financial condition were more general, as explained above, Commerce referred to the SEC filings of US OCTG producers to confirm the depressed situation of the OCTG market. The United States recalls that even Siderca asserted that the OCTG market was depressed in "1999/2000".[51]

(d) Please explain why the USDOC made inferences regarding the state of the OCTG industry from Acindar's financial statements when it had found the information contained in those statements to be too broad for calculating a meaningful cost/price trend analysis.

53. Financial statements contain information that can be relevant to different aspects of a determination. While the financial statements did not contain sufficient information to calculate a trend analysis, they did provide one of many sources of support for the fact that the OCTG industry was depressed. Therefore, while there were several sources in support of the fact that the OCTG industry was depressed, there were no alternate sources to confirm whether the overall cost/price trend analysis reflected the reality of Acindar's OCTG production and sales.

Q14.

(a) Please state your reaction to Argentina's proposition, in paragraph 42 of its Oral Submission, that past events are not susceptible to prediction and that an investigating authority can determine that either dumping occurred in the past or it did not or one does not know.

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[48] OCTG Filings of Domestic Producers, at NS Group's 1998-99 10K, pp. 7-9 (Exhibit US-19).
[49] *See, e.g.*, Siderca's fiscal year ending 31 March 2000, at 3.
[50] Section 129 Determination, at 9 (Exhibit ARG-16) (emphasis added).
[51] Siderca 7 December Letter, p. 7 (Exhibit ARG-19).

54. Commerce did not "predict" past events, because a prediction is foretelling of something that has not yet occurred. Instead, Commerce looked at record evidence, including Acindar's actual sales prices to the United States and prevailing average prices in the United States. It then concluded that, based on the depressed OCTG market and significant underselling, Acindar had likely dumped during the period. Argentina seems to assume that inferences cannot be drawn about the past. However, Argentina does not explain why that is true.

55. Nothing in the text of Article 11.3 requires an investigating authority to determine that dumping occurred in the past or to conclude that it does not know whether dumping occurred in the past. Argentina's position would, not surprisingly, permit companies to manipulate proceedings to deprive the record of certain kinds of evidence in order to require a negative determination. That is not what Article 11.3 provides, nor is it consistent with the responsibility that each company bears when participating in an anti-dumping proceeding.

(b) In your view, what is, if any, the difference between determining past dumping and past likely dumping?

56. Please also refer to the answers to question 11, above. The meaning of "dumping" is defined in Article 2.1 of the Agreement, *i.e.*, selling a product in another country at less than its normal value. To calculate a dumping margin, the remainder of Article 2 provides a specific methodology to take into account a variety of factors. In contrast, an Article 11.3 determination is a prediction of what is likely to occur if the order is revoked. There is no obligation to determine the existence of dumping, nor to calculate a margin.

57. Simply because Commerce used the term "likely dumping" to describe its findings concerning the comparison of Acindar's export prices to prevailing prices in the US market does not mean that Commerce determined the existence of dumping, nor that the obligations with respect to calculation of a dumping margin under Article 2 apply. Rather, given the nature and constraints of the proceeding, Commerce sought to examine each company's behaviour during the life of the order.

58. Commerce's determination that Acindar had likely dumped was based on Acindar's export sales to the United States and US average unit values. Commerce had to rely upon US average unit values as a type of surrogate for normal value out of necessity because there were no other reliable data.

59. Acindar had no viable home market, no third country sales, and did not keep its costs. Siderca also failed to keep its product-specific costs. As provided in Annex II, Commerce used a price list as a surrogate for normal value, and that price list was Preston Pipe & Tube.

60. These pricing data were not the only information underlying Commerce's likely past dumping finding as to Acindar. In addition to making the price comparison, Commerce concluded from information gathered from Acindar's financial statements that Acindar was in a weakened financial condition, also supporting Commerce's conclusion that Acindar had likely dumped during the period.[52]

Q15. The Panel notes the following parts the USDOC's Section 129 Determination regarding the state of the OCTG industry:

> **We note that Acindar's US sales of OCTG occurred shortly before the end of the original sunset review period. Absent evidence that Acindar intended to cease selling in the United States, and <u>absent evidence that prevailing market conditions were likely to improve in the near future</u>, we consider such sales**

[52] Section 129 Determination, at 10 (Exhibit ARG-16).

> **indicative of Acindar's likely future pricing behaviour were the order to be revoked. (emphasis added)**
>
> **Given the weakened condition of Siderca at the end of the original sunset review period, we consider that there was no valid indication that a sudden turn-around in the OCTG market was likely. (emphasis added)**

The Panel also notes Argentina's statement in paragraph 99 of its First Written Submission that "USDOC's conclusion that there is "no valid indication that a sudden turn-around in the OCTG market was likely" is demonstrably contrary to the evidence." In this regard, Argentina refers to Siderca's letter dated 7 December 2005 (Exhibit ARG-19). That letter states:

> **Also, Siderca's Financial Statement for the period ending 30 June 2000 shows profitability increasing and links this increase with the recovery in the oil and gas sector that was already underway. (footnote omitted)**

This letter in turn refers to Siderca's letter dated 30 November 2005, found in Exhibit ARG-15. Financial statement of Siderca as at 30 June 2000, attached to the mentioned letter, reads in relevant parts:

> **Improved crude and gas prices have been responsible for a steady recovery in the petroleum and steel markets. In this context, the level of business of the Company during the first quarter of the year recorded a significant improvement, based on a recovery of sales volumes and a gradual rise in prices on the international steel tube market. (emphasis added)**

Business in the first quarter measured by sales volume totalled 185,882 tons and output reached 195,132 tons, more than in the same period for the previous year, when volumes totalled 124,921 tons and117,250 tons, respectively. These figures are an indication of the recovery experienced in the sector, and exports in particular. (emphasis added)

The Panel notes that financial statements of Siderca for the fiscal year ending 31 March 2000, found in Exhibit ARG-36, reads in relevant parts:

> **In the middle of the fiscal year oil prices began to record a significant recovers- hitting US$30 per barrel in March- generating an increase in drilling and investment activity by oil companies.**
>
> **This recovery came too late to have a significant effect on the volume of sales for the year. (emphasis added)**
>
> **The recovery in crude prices and the good level of gas prices will influence a steady recovery ion 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.**
>
> **The international market for seamless tubes has seen a profound globalization in recent years. (emphasis added)**

The Panel also notes that the Preston Publishing data contained in Exhibit ARG-18 Attachment 3 indicates that the prices of all subject products showed an increasing trend towards the end of the period of review of the Section 129 Determination at issue, specifically from September 1999 through July 2000.

(a) Please indicate the period of review in this Section 129 sunset review. Please explain which parts of that review period the above-referenced financial statements covered.

61. The period of review for the Section 129 Determination covered the same period as the original sunset review – 1 August 1995 through 31 July 2000.[53] The United States recalls that in response to the arbitrator's questions in the Article 21.3(c) proceeding, Commerce clarified that its collection of information would be limited to the original sunset review period. Commerce relied upon Acindar's yearly financial statements that covered the beginning of the period through June 2000, and Siderca's yearly financial statements that covered from the beginning of the period through March 2000.

(b) Did the USDOC consider the above-quoted information in the financial statements and the Preston Publishing data in its Section 129 Determination, in particular with regard to its proposition that the OCTG industry was depressed and that there was no indication of recovery in the near future?

62. Commerce considered all record evidence in its assessment of the OCTG industry and its determination that there was no indication of recovery in the near future. However, the statements from Siderca's financial statement relating to the future state of the OCTG market were only predictions that were contradicted by statements in the US producers' US Securities and Exchange Commission ("SEC") filings. The United States notes that it did not place significant weight on Siderca's last quarterly statement as it represented only a quarter and was unaudited, while Commerce did rely on the full-year audited financial statements.[54]

63. As an initial matter, it should be noted that while a trend toward upward prices is discernable beginning in September 1999 and continuing through the end of the sunset period, the trend is not without setbacks. Specifically, the Preston data show that prices for five of the eight product categories dropped at least once during the period September 1999 through July 2000, and some dropped twice. For example, the Preston data show the following pricing data for the year 2000:

Carbon ERW Tubing:	January: $762; February: $759. April: $788; May: $781
Carbon Seamless Casing:	April: $684; May: $671
Alloy ERW Tubing:	February: $957; March: $948; April: $944
Alloy Seamless Tubing:	February: $1,035; March: $1,014; June: $1,050; July: $1,048
Alloy Seamless Casing:	April: $829; May: $822[55]

64. These data confirm the statements found in US producers' SEC filings that repeatedly point toward the continuing volatility of market prices and uncertainty facing the industry at the end of the period. In addition to the cites above in 13(a), the following also confirms the volatility of the OCTG market. Lone Star explained that:

> Historically, over 60% of Lone Star's revenues have been generated through the sale of oilfield products. As a result, Lone Star's revenues are largely dependent on the state of the oil and gas industry, which has historically been volatile.[56]

[53] Questionnaire, at 1 (Exhibit ARG-13).
[54] *See* US Second Written Submission, at 16.
[55] Information for the Record, at app. III (Exhibit ARG-18).
[56] OCTG Filings of Domestic Producers, at Lone Star's 1999 10K, pp. 20 (Exhibit US-19).

65. Also, Maverick Tube Corporation's 1999 10K report explains that:

> As our recent experience indicates, oil and gas prices are volatile and can have a substantial effect on drilling levels and resulting demand for our energy related products . . . [57]

66. Because of price volatility, price trends alone, in this particular industry, are not necessarily reliable, or sufficient, to indicate true market recovery. Commerce did not consider a slight increase in prices at the end of the period a sufficient indicator of a lasting shift in the demand for OCTG that had been depressed for the majority of the period.

Q16. The Panel notes Argentina's assertion in paragraph 30 of its Oral Statement that in the period of review of the Section 129 Sunset Determination at issue, the prices of the subject product in the United States were significantly higher than other markets. Please elaborate by referring to the relevant parts of the record of the measure at issue.

67. Commerce made no such finding, and Argentina has not identified the information on the record to which it was referring.

Q17.

(a) How, if at all, did the original panel address the parties' claims and arguments relating to the USDOC's volume analysis? Did it exercise "judicial economy"?

68. According to the Appellate Body:

> The practice of judicial economy . . . allows a panel to refrain from making multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute.[58]

69. In this dispute, the original Panel in its interim report did not address the WTO-consistency of the volume analysis. The United States considered that in doing so, the original Panel exercised judicial economy.[59] In response to a request from Argentina to make factual and legal findings, the original Panel in its final report made factual findings but declined to make any legal findings.[60] The original Panel concluded that, in view of the finding that reliance on the dumping margin was inconsistent with Article 11.3, there was no need to address whether the volume analysis was also inconsistent with Article 11.3, and the original Panel declined to make a legal finding in that regard. Argentina argued that such a finding could be necessary for purposes of appeal, but the original Panel considered that argument "hypothetical" and rejected it.[61] However, the original Panel did agree to make factual findings to permit Argentina to appeal.[62] Argentina did not appeal the original Panel's conclusion that it did not need to address the volume analysis, nor did Argentina appeal the original Panel's exercise of judicial economy.

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[57] OCTG Filings of Domestic Producers, at Maverick's 1999 10K, p. 47 (Exhibit US-19).

[58] Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, para. 133 (adopted 27 September 2004) ("*Canada – Wheat Exports and Grain Imports*").

[59] US Comments on Argentina's Comments on the Interim Report, para. 3.

[60] Panel Report, para. 6.11.

[61] Panel Report, para. 6.11.

[62] Panel Report, para. 6.11.

(b) What considerations should guide this Panel in addressing the parties' claims and arguments in these 21.5 DSU proceedings? Would any prejudice arise to any party in the event the Panel did, or did not, address the volume analysis?

70. The United States considers that it is important to recall that this proceeding is a compliance proceeding. The question for this Panel is to assess the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB. As the United States noted in its opening statement, Argentina disregards the recommendations and rulings and appears to be asking the Panel to treat this proceeding as if it were an original proceeding. That approach is manifest in the lack of reference in Argentina's submissions to the recommendations and rulings of the DSB, and Argentina's insistence that the volume analysis is within the scope of this Article 21.5 proceeding. But this is not an original proceeding – it is a compliance proceeding.

71. The redetermination in this dispute, and the volume analysis, are analogous to the EC's redetermination, and the "other factors" analysis, in *EC – Bed Linen (21.5)*, and the considerations identified in that dispute are equally applicable here. The Appellate Body in *Bed Linen* explained that the part of a redetermination that merely incorporates elements of the original determination, and which the responding Member did not have to change in order to comply with the recommendations and rulings of the DSB, is not part of a measure taken to comply.[63] The panel in that dispute articulated the important differences between an original proceeding and a compliance proceeding, and particularly the prejudice that would inure to a responding Member if the two were confused:

> the defending Member would have no opportunity to bring its measure into conformity with the AD Agreement . . . . Moreover, the defending Member would be subject to potential suspension of concessions as a result of a finding of violation . . . which, because it was not the subject to any finding of violation in the original report, the Member was entitled to assume was consistent with its obligations under the relevant agreement. Such an outcome would not seem to be consistent with the overall object and purpose of the DSU to achieve satisfactory resolution of disputes, effective functioning of the WTO, to maintain a proper balance between the rights and obligations of Members, and to ensure that benefits accruing to any Member under covered agreements are not nullified or impaired.[64]

72. The panel went on to note:

> [T]he dispute settlement system provides Members with time to bring inconsistent measures into conformity, prefers mutually acceptable solutions, and provides for suspension of concessions only as a last resort.[65]

73. These considerations apply in this instance as well. The original Panel did not make any recommendation or finding regarding the volume analysis. Therefore, the volume analysis was not part of the recommendations and rulings of the DSB, and the United States did not fail to implement the recommendations and rulings by not reconsidering the volume analysis. If this Panel were to make an adverse finding now, the United States would have no reasonable period of time to bring its measure into conformity with the Anti-Dumping Agreement and would be subject to potential suspension of concessions as a result of a finding of breach that was not in the original report.

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[63] See US First Submission, para. 34, citing *EC – Bed Linen (21.5) (AB)*, paras. 86-87.

[64] Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, para. 6.40 (adopted 24 April 2003, as modified by the Appellate Body Report, WT/DS141/AB/RW) ("*EC – Bed Linen (21.5) (Panel)*").

[65] *EC – Bed Linen (21.5) (Panel)*, para. 6.45.

74. Argentina attempts to distinguish *EC – Bed Linen (21.5)*, arguing that in this dispute there was no finding that Argentina had failed to make a *prima facie* case.[66] Argentina misses the point. The reasoning in *EC – Bed Linen (21.5)* is not limited to circumstances in which a panel finds that a complaining party has failed to make a *prima facie* case, particularly in terms of the prejudice a responding party would suffer. The reasoning is applicable to circumstances in which an issue was litigated, but no finding of inconsistency was made. Under those circumstances, a Member has no reasonable period of time to bring its measure into compliance and faces a potential suspension of concessions. As the panel in *EC – Bed Linen (21.5)* noted, suspension of concessions, without the reasonable period of time to bring the measure into compliance, would not seem to be consistent with the balance of rights provided for under the DSU.

75. The United States notes that had Argentina considered a finding on the volume analysis to be "necessary" to resolve the dispute, Argentina could have appealed the original Panel's conclusion that such a finding was *not* necessary, and Argentina could have likewise appealed the original Panel's exercise of judicial economy as false.[67] This is particularly true because the original Panel, in response to a request from Argentina, made factual findings to *enable* the Appellate Body to "complete the analysis" regarding the volume finding had Argentina appealed.[68] However, Argentina declined to appeal and accepted the original Panel's conclusion – that a finding of inconsistency regarding the volume analysis was not necessary to resolve the dispute. Having litigated the exact same issue in the original proceeding, and having accepted the original Panel's exercise of judicial economy, Argentina is now precluded from relitigating that issue as part of an Article 21.5 proceeding.

76. Argentina appears to be aware that it is precluded from relitigating the *same* issue for which no finding of inconsistency was made, and instead attempts to characterize the volume finding as a new element of the measure taken to comply, analogizing the volume analysis to *Australia – Automotive Leather II, Australia – Salmon,* and *US – Softwood Lumber (CVD) (21.5)*. None of those disputes involves the factual posture here, which is the *absence* of a finding of WTO-inconsistency with respect to the issue in question in the original proceeding. The United States does not dispute that the *new* analysis undertaken in the Section 129 determination is within the scope of the Article 21.5 proceeding. The United States has not argued, for example, that Commerce's analysis of Acindar's likely dumping is not part of the measure taken to comply, because that issue was not litigated in the original proceeding, nor could it have been.

77. In response to the Panel's specific reference to *US – Softwood Lumber IV (21.5)*, the reasoning in that report is not applicable to the facts of this dispute. The United States recalls that in *Softwood Lumber*, the recommendations and rulings of the DSB pertained to the "pass through" analysis conducted in the countervailing duty investigation.[69] The question for the panel, and the Appellate Body, was whether the pass through analysis in an *administrative review* – an entirely separate measure – was within the scope of the Article 21.5 proceeding.[70] There was no question but that the recommendations and rulings pertained to the pass through analysis; the question was whether that analysis, as found in an additional measure, fell within the scope of Article 21.5. By contrast, the volume analysis in this dispute was *not* part of the recommendations and rulings of the DSB.

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[66] Argentina Opening Statement at Panel Meeting, para. 70.

[67] *See* Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, para. 335 (adopted 19 May 2005) ("In this case, the Panel's findings . . . were not sufficient to 'fully resolve' the dispute. . . . This constitutes false judicial economy and legal error.") ("*EC – Sugar (AB)*").

[68] Panel Report, para. 6.11.

[69] 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*, WT/DS257/AB/RW, para. 50 (adopted 20 December 2005) ("*US – Softwood Lumber (CVD) (21.5) (AB)*").

[70] *US – Softwood Lumber (CVD) (21.5) (AB)*, para. 54.

(c) Is the USDOC's volume analysis part of the measure taken to comply with the DSB recommendations and rulings for the purposes of Article 21.5 DSU? Why or why not? Would it have been possible for the original panel to address the USDOC's volume analysis?

78. USDOC's volume analysis is analogous to the EC's "other factors" analysis in *EC – Bed Linen (21.5)*. Both analyses were part of the original determination and were simply reincorporated into the redetermination. (Indeed, the EC had revised its other factors analysis to take into account different data on domestic industry sales,[71] whereas Commerce made no changes to its volume analysis but rather incorporated it by reference.) The United States was not obligated to reconsider that analysis to implement the recommendations and rulings of the DSB. Therefore, as in *EC – Bed Linen (21.5)*, the volume analysis is "part of the redetermination that merely incorporates elements of the original determination" and is "an aspect of the original measure",[72] rather than part of the measure taken to comply.

Please indicate the relevance, if any, of the Appellate Body Reports in EC - Bed Linen (Article 21.5 - India) and US - Softwood Lumber IV (Article 21.5 - Canada) in your responses to the above questions.

UNITED STATES

Q18. The Panel notes Argentina's argument that the USDOC disregarded the comments made by the Argentine exporters with regard to the decline in the volume of imports. The Panel also notes the US' argument that these comments were not germane to the issue. Siderca's response to the questionnaire to which Argentina refers in this regard, reads in relevant part:

> **Whatever the significance of a decline in export volume may be as a general matter, Siderca knows that, with respect to Siderca, it does not mean that the product could not be shipped without dumping. The cost data (even with the limitations explained above) supports Siderca's position: Siderca is a cost-efficient producer of OCTG and could have shipped OCTG products profitably to the United States.**

(a) Please explain why the USDOC found these comments not to be germane to the issue of the decline in the volume of imports?

79. The United States has not contended that Siderca's comments regarding likely past dumping were not germane to the *volume analysis*. Rather, the United States has noted that Siderca's comments explaining the decline in import volumes were not germane to the *US implementation of the recommendations and rulings of the DSB*, which pertained to Commerce's reliance on the dumping margin from the original investigation, and not to Commerce's volume analysis.[73]

80. The United States notes that the comments identified in the question were based on Siderca's cost data. Far from ignoring Siderca's assertions about its cost data, Commerce in fact addressed the reliability of the cost data at length in the Section 129 determination and ultimately declined to make any finding as to whether Siderca had likely dumped, in part based on the lack of US sales during the sunset period of review.[74]

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[71] *EC – Bed Linen (21.5) (Panel)*, n. 75.
[72] *EC – Bed Linen (21.5) (AB)*, paras. 86-87.
[73] *See* US Second Submission, para. 33.
[74] Section 129 Determination, at 9 (Exhibit ARG-16).

81. The United States also notes that Siderca's comments were not responsive to the question asked. The question was not whether there had been a decline in imports resulting from the imposition of the order; rather, the question was a request for raw data concerning shipments *during the sunset period of review alone*. That information formed part of the basis for Commerce's decision not to make any finding regarding Siderca. Notably, in the Section 129 proceeding, Commerce did not ask for shipment data from any period *prior* to the sunset period of review, and the question afforded no basis for Siderca's discussion of declining import volumes.[75] Siderca's comments addressed a question that was not relevant to the Section 129 proceeding.

Q20. The Panel notes Argentina's allegation that by failing to respond to Siderca's letter dated 7 December 2005, the USDOC acted inconsistently with Articles 6.1 and 6.2.

(c) How did the USDOC consider the views expressed in this letter?

82. Articles 6.1 and 6.2 pertain to an interested party's right to present evidence. Nothing in Articles 6.1 or 6.2 requires a Member to "respond" to each submission of any such evidence.[76]

83. In reaching its final determination Commerce considered all comments submitted by the interested parties. Pages four through five of the Section 129 Determination provide a summary of Siderca's comments from its 7 December letter, which were offered in rebuttal to a letter from counsel for petitioners. Commerce took these into consideration in its analysis. For example, in response to Siderca's comment that Commerce use Preston Pipe and Tube data on an "all OCTG" level, Commerce found that it would be "even less specific and overly broad."[77] In addition, as noted above, counsel for petitioners had proposed using average unit values based on the Argentine export classification system, an approach Siderca opposed in its 7 December letter. Commerce did not use the approach suggested by petitioners' counsel.

Q21. The Panel notes Argentina's argument that the USDOC failed to make six memoranda available to the Argentine exporters.

(b) Please explain whether it was "practicable" within the meaning of Article 6.4 of the Agreement for the USDOC to make these memoranda available to the Argentine exporters in these Section 129 proceedings.

84. Notwithstanding the limited time available, Commerce made available to all parties participating in the proceeding all the information submitted to or obtained by it in the Section 129 proceeding to the extent "practicable", as required by Article 6.4. First, Commerce placed the Preston Pipe and Tube data and Acindar-specific importer data regarding Acindar's sales on the record on 22 November 2005 – before Argentine respondents' questionnaires were even due.[78]

85. Second, the 16 December 2005, memorandum regarding "Information for the Record", consisted of respondent and domestic interested parties' submissions in the original sunset review.[79] Argentina has had access to the public file containing the same information since the *original* sunset review.

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[75] By contrast, Commerce asks for data on *pre*- and post-order volumes in its standard sunset review questionnaire.

[76] *See* US Second Written Submission, para. 57.

[77] *Compare* Siderca's Response to US Steel's Comments, at 5-6 (Exhibit ARG-19), *with* Section 129 Determination, at 8-9 (Exhibit ARG-16).

[78] This discussion only concerns the public versions of the memoranda as Article 6.4 only relates to public information. *See* Exhibit ARG-18.

[79] Exhibit ARG-25.

86. Third, Commerce's memoranda regarding the inconsistencies in Siderca's and Acindar's data were part of the reasoning used in making the determination. Assuming *arguendo* that such reasoning is even contemplated by Article 6.4, Commerce disclosed the reasoning as soon as practicable. Commerce received Siderca's rebuttal of IPSCO's arguments on the cost data as on 14 December 2005. The memoranda on the deficiencies in the cost data were released just two days later, on 16 December 2005.

87. A more detailed discussion of whether it was "practicable" to make certain memoranda available earlier is provided in the US first and second written submissions.[80]

Q24. Please explain whether the APO system under the US law also allows interested parties themselves, in addition to counsel for such parties, to see all confidential information submitted by other parties in a sunset review.

88. Interested parties themselves are not allowed access to business proprietary information submitted under the APO. Instead, their independent representative can receive access to that information. This ensures the protection of interested parties' confidential information, pursuant to Article 6.5 of the Agreement.

Q26.

(a) The Panel's understanding of the method used by the USDOC with regard to product groupings the USDOC made for purposes of examining the reliability of Siderca's cost data is that the USDOC took the weighted average costs of, for example, carbon casing PE and carbon casing T&C, and compared that with the weighted average cost of alloy casing PE and alloy casing T&C. In other words, the USDOC took as the starting point of its product grouping for comparison the material used without taking into account the finishing.

Is this a correct characterization of the USDOC's methodology? Please explain by referring to the relevant parts of the record.

89. It is a correct characterization of *part* of Commerce's methodology for assessing the reliability of Siderca's submitted cost data.[81] This was only one of the items Commerce considered when assessing the reliability of data resulting from Siderca's cost extrapolation. Commerce looked at the data on a more specific basis as well.

90. Commerce considered the fact that the non-OCTG costs were significantly higher than for OCTG products.[82] This was an unexpected result because Siderca had been a large producer of standard line pipe – a lower value-added product – and thus these non-OCTG costs should have been lower. Commerce also found that Siderca had reported lower costs for [BCI]. That is a result that should not occur.[83] The cost of producing an alloy is significant. In addition to the expensive costs of the alloying elements, working with an alloyed steel is more difficult – driving up the costs of production. The Preston Pipe and Tube data demonstrates the typical price differential between carbon and alloy. For example, in March 1998, carbon seamless casing was priced at $725/ton, while alloy seamless casing was priced at $917/ton – a difference of $192/ton. Regardless of whether the

[80] US First Written Submission, para. 67; and US Second Written Submission, paras. 62-69.

[81] Section 129 Determination, at 8; and Inconsistencies in Siderca's Data, at 1 (Exhibit ARG-21). The entire Siderca memorandum is attached as an exhibit because Argentina only provided a portion of it in Exhibit ARG-37.

[82] Inconsistencies in Siderca's Data, at 2-7 (Exhibit ARG-21).

[83] Inconsistencies in Siderca's Data, at 6 (Exhibit ARG-21). The costs for [BCI].

data is reviewed on a broader level or a more specific level, the costs did not reflect the reality of OCTG production.

91. With regard to Siderca's data, even when the costs for [BCI] did not reflect the reality of the cost of production for OCTG. For example, Siderca reported that for the year ending March 1998, it only cost a little over [BCI].

(d) The Panel notes the US' argument that the USDOC made this product grouping in accordance with the public information available. The Panel also notes that the memo to which the United States refers in this regard, found in Exhibit ARG-18, contains a product grouping by Preston Publishing.

Please demonstrate, by referring to the relevant parts of this memo, how exactly the Preston product grouping formed the basis of the USDOC's grouping.

92. The Preston Publishing data are found in the form of a chart in appendix III of Commerce's 22 November 2005 memorandum to the file.[84] The chart indicates a sales price for each month of the sunset review period for ten product categories. Those product categories are:

- CARBON ERW TUBING;
- CARBON SMLS, TUBING;
- CARBON ERW CASING;
- CARBON SMLS,CASING;
- CARBON DRILL PIPE;
- ALLOY ERW TUBING;
- ALLOY SMLS,TUBING;
- ALLOY ERW CASING;
- ALLOY SMLS, CASING;
- ALLOY DRILL PIPE.

93. The characteristics that constitute these product categories were the only physical characteristics available to Commerce. The categories break down the price differences between carbon and alloy; seamless (SMLS) and welded (ERW); and tubing, casing, and drill pipe.[85] Commerce then compared each Acindar sale with the Preston Pipe and Tube price for that month and within the appropriate category. Thus, the comparison was both contemporaneous and product-specific. Siderca filed comments with Commerce concerning the Preston data arguing, for example, that Commerce should compare the Preston Pipe data on an aggregate basis with Siderca's cost data.[86]

(e) Please explain whether the USDOC informed Siderca of the methodology that it was considering to use for the grouping of products.

94. Commerce informed Siderca of the product categories it was considering in an attachment to its 31 October 2005 questionnaire to Siderca.[87] The list of categories were based on carbon/alloy, and plain-end (PE)/threaded and coupled (T&C). Because Siderca produces only seamless OCTG, and Acindar produces only welded OCTG, the category of seamless/welded was also implicitly included in the product grouping. However, because Commerce later found that the Preston data did not create discrete categories for plain-end and threaded and coupled, Commerce had to modify those categories when it conducted its analysis.

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[84] *See* Exhibit ARG-18.
[85] Drill pipe was not used in Commerce's analysis because it was previously revoked from the order.
[86] Siderca's 7 December Letter, at 5-6 (Exhibit ARG-19).
[87] Questionnaire, at att. 1 (Exhibit ARG-13).

95. Siderca was aware of the broader product grouping of the Preston Pipe and Tube data on 22 November 2005, when Commerce placed the data on the record. This was prior to Siderca's submission of its questionnaire response and all of its comments.

(f) Please explain why the USDOC did not use the methodology proposed by Argentina.

96. First, the methodology proposed by Argentina before this Panel was not proposed to Commerce during the Section 129 proceeding. Indeed, Argentina's proposal is the *opposite* of what Siderca argued before Commerce during the proceeding. Argentina currently argues that Commerce should have made the comparison between carbon and alloy PE, and carbon and alloy T&C.[88] However, during the underlying proceeding Siderca argued against making such a comparison. Specifically, Siderca claimed that "the ten product categories identified in the Department's questionnaire are so broad they make any conclusions drawn from the data highly doubtful, ..." In rebutting petitioners' counsel's proposed approach, Siderca then argued that Commerce make the comparison on a product-category level (i.e., all OCTG).[89]

97. Nevertheless, Commerce did review all of Siderca's data on the specific level that they were reported – including finishing, casing/tubing, and carbon/alloy. As explained in (a) above, Siderca's extrapolated costs failed to reflect the reality of OCTG production costs whether they were viewed on a specific level or an aggregate level.

Q27. Please explain for what purpose the USDOC requested the cost information from the Argentine exporters in these proceedings. More specifically, please explain whether the USDOC intended to use that information exclusively for its company-specific determinations or for its order-wide determination as well.

98. Commerce sent all Argentine producers questionnaires in order to elicit sufficient information to make an order-wide determination of likelihood. While Commerce is not required to make a company-specific determination in the absence of a waiver, Commerce does examine individual company behaviour in order to ascertain whether dumping is likely to continue or recur if the order is revoked. Commerce requested the cost data to assist it in evaluating the companies' behaviour over the life of the order.

Q28. Please explain whether the USDOC initially intended to make a company-specific determination for Siderca as it did for Acindar, citing any evidence on record. In other words, would the USDOC have made a company-specific determination for Siderca had that company's cost data been found to be reliable?

99. Commerce requested a variety of information from respondent interested parties. Commerce does not necessarily make company-specific determinations; rather, Commerce evaluates the behaviour of respondent interested parties over the life of the order. Commerce requested the information with a view to evaluating Siderca's behaviour. However, as the Section 129 determination notes, the combination of the deficiencies in the cost data *and* Siderca's lack of shipments during the period of review led Commerce to make no specific finding with regard to Siderca.[90] Had Siderca's cost information been reliable, it would remain true that Siderca had no shipments during the sunset period of review. Commerce would have weighed those facts together before deciding whether to make any particular finding regarding Siderca.

Q29. The Panel notes that the USDOC's Section 129 Determination reads in relevant parts:

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[88] Argentina's Opening Statement, at para. 57.
[89] Siderca's Response to US Steel's Comments, at 5-6 (Exhibit ARG-19).
[90] Section 129 Determination, p. 7 (Exhibit ARG-19).

We disagree with Siderca's assertion that the company financial statements of Siderca and Acindar are not relevant for our likelihood analysis. Financial statements provide a good understanding of the status of the entire company, and reflect the company's overall selling practices. Taken together, these data are relevant indicators of likely future pricing trends.

(a) Would the United States agree that the USDOC's Section 129 Determination demonstrates that some information pertaining to Siderca, namely this company's financial statements, were used by the USDOC in the context of its order-wide determination?

100. The United States recalls that the purpose of a sunset review is to ascertain whether dumping and injury are likely to continue or recur if the order is revoked. There can be many aspects to such a determination, including aspects particular to companies – what their likely behaviour may be – and more general elements pertaining to the industry as a whole – is it depressed or is it faring well. Consideration of all aspects results in the ultimate determination.

101. In this regard, the United States would note that a company's financial statements are not exclusively information "pertaining to" that company. Rather, as here, a financial statement can provide evidence as to the condition of the industry *as a whole*. There were multiple sources of information on the record concerning the condition of the OCTG industry, including the SEC filings of domestic producers (and an assertion by Siderca itself on the record of the Section 129 proceeding). These sources of information, taken together, along with other facts on the record, led to Commerce's ultimate conclusion that dumping was likely to continue or recur if the order were revoked.

102. Finally, the United States notes that the passages quoted in the question reflect a general discussion of the potential relevance of a company's financial statements. Commerce disagreed with Siderca's suggestion that the companies' financial statements were not relevant in making the likelihood determination. In that context, Commerce concluded that Siderca's financial statement provided information about the OCTG market *generally*, but Commerce did not use the financial statement to make any company-specific finding about Siderca.

(b) Were Siderca's financial statements used as facts available or as Siderca's response to the USDOC's questionnaire?

Please elaborate.

103. Siderca's financial statements were used as Siderca's response to the questionnaire.

104. The United States notes that Article 6.8 provides that in "cases in which any interested party refuses access to, or otherwise does not provide, necessary information . . . determinations may be made on the basis of the facts available." Siderca provided the financial statement. Therefore, with respect to the financial statement, Article 6.8 is simply not applicable. Siderca did not "refuse access to" or "otherwise not provide" the information in question; to the contrary, Siderca provided it.

Q30. Please explain in detail whether, in your view, paragraph 3 of Annex II justified the rejection of Siderca's cost data. In particular, please explain whether the cost information submitted by Siderca was verifiable within the meaning of paragraph 3. Did the USDOC take any steps to verify such information?

105. As the United States noted in its submissions, Article 6.8 is applicable only if facts available are used. The United States did not make a finding with respect to Siderca, and therefore Annex II is not applicable. The United States made that point in its first submission, and again in its second, and

Argentina has not rebutted the argument. The United States would note further that the question appears to presume that Siderca's cost information was "rejected" within the meaning of paragraph 3 of Annex II. However, Commerce made its order-wide likelihood determination on the basis of its company-specific finding regarding Acindar as well as evidence about the condition of the OCTG industry, and a company-specific finding concerning Siderca was ultimately not necessary. Therefore, Siderca's cost information was not "necessary" within the meaning of Article 6.8, and Commerce's decision not to use the cost data was not a "rejection" of that information within the meaning of paragraph 3 of Annex II. Rather, Commerce weighed all the information on the record, and accorded greater weight to other information on the record.

106. In any event, the information was, by Siderca's own characterization, not verifiable within the meaning of paragraph 3 of Annex II. Siderca stated that it did not maintain its product-specific cost data and that the data provided were extrapolated based on 2005 data. The problem with Siderca's data is not that it could not be verified – Commerce did not contend that Siderca applied its methodology incorrectly; however, Commerce did consider that the methodology itself was flawed, resulting in costs that did not reflect the reality of OCTG production. While Commerce could have verified the 2005 data, verification would not have changed the end result: Siderca's extrapolation did not accurately reflect costs from 1995 to 2000.

Q31. The Panel notes the following part of the USDOC's Section 129 Determination:

> **Although Siderca attempted to cooperate with the Department's request for information, upon analysis of Siderca's calculations, we have identified significant problems with its allocation of costs, with respect to both OCTG production and all tubular production.**

(a) Please explain your views about the relevance of this determination to the issue of whether or not Siderca acted to the best of its ability in submitting its cost information to the USDOC within the meaning of paragraph 5 of Annex II to the Agreement.

(b) Please explain how ideal the cost information submitted by Siderca was within the meaning of paragraph 5 of Annex II to the Agreement.

107. The following answers both (a) and (b):

108. As noted above, Annex II is not relevant to Commerce's Section 129 Determination because Commerce did not use "facts available" with respect to Siderca – it made no determination with respect to Siderca. As a result, the issue of whether Siderca acted to the best of its ability was not implicated.

109. The United States further notes even when an interested party has acted to the best of its ability in submitting certain information, this does not mean that the investigating authority is obliged to use the information.[91] In the case at hand, Siderca's submitted cost information was estimated cost information based on data from October 2005, while the period considered was 1995 through 2000.

110. The cost information Siderca provided was far from ideal. For example, the contention that alloy costs were *lower* than carbon costs did not make sense. Furthermore, Siderca elected to extrapolate data based on October 2005 data – the most recent period available (the questionnaire was issued 31 October 2005, and responses were due 30 November 2005). However, as Argentina noted at the meeting of the Parties, Siderca maintains its data for 18 months. Thus, the use of information

[91] Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R and Corr.1, para. 7.64 (adopted 29 July 2002).

the *most* removed from the sunset period of review further rendered that information even less than ideal.

Q32.

(a) In your view, was the USDOC under an obligation to inform Siderca of the fact that its cost information would not be used as well as to give Siderca a chance to make comments as to why the information had to be used by the USDOC pursuant to paragraph 6 of Annex II? If so, was the USDOC under an obligation to do it prior to the issuance of its Section 129 Determination?

(b) Did the USDOC actually inform Siderca of this fact and give Siderca a chance to make comments? If so, when? Did Siderca know that its cost data were not going to be used by the USDOC in its determinations?

111. The following answers both (a) and (b):

112. As detailed in its submissions, Commerce did not make a finding regarding Siderca, and therefore Commerce did not make a finding regarding Siderca on the basis of "facts available". Therefore, Annex II is not applicable. For that reason, Commerce was not under an obligation to inform Siderca that its information was not being used, or to provide an opportunity to provide further explanations.

ANNEX E-3

COMMENTS OF ARGENTINA ON THE UNITED STATES' WRITTEN ANSWERS TO QUESTIONS FROM THE PANEL TO THE PARTIES

Argentina's Comments on US Answers to Questions 1-8

1. Argentina provides comments on the two points raised by the United States that underpin all of the US answers to the Panel's questions on the waiver provisions. The US arguments display a fundamental misunderstanding of the WTO violation which the United States was supposed to address in implementing the rulings and recommendations of the DSB. Consequently, it is not surprising that the US arguments are misguided, unsubstantiated, or irrelevant, and that the US measure taken to comply regarding the waiver provisions has failed to bring the United States into compliance with US WTO obligations.

2. First, the United States argues that it has eliminated the so called "deemed waiver" regulation, and that the phrase in Section 751(c)(4)(A) of the Tariff Act referring to a respondent interested party's discretion to "elect not to participate" in a USDOC sunset review only refers to the affirmative action of filing an explicit statement of waiver by a company along with an admission that it would likely dump in the future.[1] This position is inconsistent with the plain language of the statute, its purpose, and the meaning that USDOC previously attached to the provision, as evidenced by USDOC's former "deemed waiver" regulation itself.

3. Second, on the broader question of the WTO-consistency of the continued operation in certain circumstances of the statutory-mandate of Section 751(c)(4)(B) of the Tariff Act, the United States argues that because the USDOC conducts the review on an order-wide basis, it can consider other evidence and, therefore, it is of no consequence that the statute continues to mandate a company-specific finding in certain instances.[2] This argument must be rejected as it fails to recognize the basic problem with the waiver provision that was identified by the Appellate Body, which already has determined that a statutorily-mandated company-specific affirmative determination will necessarily taint any country-wide determination.[3]

4. Argentina's comments are elaborated below.

Meaning and Effect of "May Elect Not to Participate" in Section 751(c)(4)(A)

5. The United States argues that "electing not to participate within the meaning of subparagraph (A) does constitute a waiver within the meaning of subsection (B)."[4] The United States then explains that subsection (B) of the statute is now, in the wake of the revision of the waiver regulation, triggered only by an affirmative act of participation – the filing of statement of waiver and the submission of a statement by the waiving company that it would be likely to dump. The US position should be rejected by the Panel for several reasons.

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[1] *See* US Answers to Panel Questions, 24 July 2006, paras. 2-12, 14-19, 21-27.
[2] *See* US Answers to Panel Questions, 24 July 2006, paras. 13-15, 19-20.
[3] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 234-235.
[4] US Answers to Panel Questions, 24 July 2006, para. 16.

6. First, United States offers no textual support from the statute. The US argument that purportedly interprets Section 751(c)(4)(A) to ***only*** refer to parties that file an affirmative statement of waiver and an admission that they would be likely to dump is a new argument and it is inconsistent with the positions taken by the United States in the underlying proceedings. The United States cites no authority for the proposition that the verb "elect" in a US statute requires an affirmative statement of waiver. The Panel should be highly suspicious of this unsupported statement and assertion. If the United States wants this Panel to accept this new explanation of its law, the United States needs to provide evidence in support of its assertion.

7. In fact, the very existence of the "deemed waiver" regulation , 351.218(d)(2)(iii), which has since been eliminated by the United States, constitutes proof of the plain meaning of the phrase "may elect not to participate" in Section 751(c)(4)(A) of the Tariff Act. Indeed, the only statutory authority that the USDOC could have relied on to issue the "deemed waiver" regulation is Section 751(c)(4)(A). This is because Section 751(c)(4)(B) addresses only the effect or consequence of a "waiver" i.e., circumstances where a party "elect[s] not participate," as the United States has admitted in its response to this question: "electing not to participate within the meaning of subparagraph (A) does constitute a waiver within the meaning of subparagraph (B)."

8. Citing to certain language of the SAA, however, the United States offers for the first time in the history of this proceeding the argument that Section 751(c)(4)(A) contemplates only an explicit statement of waiver. This is nothing more than a post-hoc rationalization, and should be recognized as such. Significantly, before this Panel during the original panel proceeding, and before the Appellate Body, the United States did not draw any distinction between the consequences that a party would face if that party became subject to Section 751(c)(4)(B) – whether by virtue of an explicit waiver or by virtue of that party's failure to provide a complete substantive response to a notice of initiation. For example, the US position was clearly stated in the US Appellant Submission to the Appellate Body:

> Should a respondent interested party explicitly choose to waive participation in Commerce's sunset review proceeding or should a respondent waive participation by failing to submit a complete substantive response, then pursuant to section 751(c)(4)(B), Commerce concludes that revocation of the order would be likely to lead to continuation or recurrence of dumping f*or that respondent.* [citing 19 USC. § 1675(c)(4)(B)] The United States also explained that this company-specific finding does not determine, in and of itself, the final outcome of a sunset review.[5]

9. This passage is illustrative of the US position throughout the underlying proceedings, in which it never distinguished between "deemed waivers" and "affirmative waivers" for purposes of the application of Section 751(c)(4)(B). This is because the United States clearly believed that whether a respondent filed an affirmative waiver or failed to file a complete substantive response that that respondent party was in the class defined by Section 751(c)(4)(A) – those parties that "elect not to participate" in a USDOC sunset review.

10. The approach of the USDOC in interpreting the statutory phrase in this manner is further demonstrated by USDOC's application of Section 751(c)(4)(A) in sunset reviews. An example is USDOC's sunset review of the antidumping duty order on *Brake Rotors from the People's Republic of China*. In this review, no respondent interested parties participated in the proceeding and none filed

[5] *United States – Sunset Reviews of Antidumping Measures on Oil Country Tubular Goods*, DS268, AB-2004-4, US Appellant's Submission, 13 September 2004, para. 41 (emphasis in the original).

an affirmative statement of waiver.[6] Citing only the statute, USDOC then proceeded to find that the respondents had waived participation in the review, even though the respondents did not file affirmative statements of waiver:

> [S]ection 751(c)(4)(B) of the Act provides that the Department shall determine that revocation of the order would be likely to lead to continuation or recurrence of dumping where a respondent interested party waives its participation in the sunset review. In this review, the Department did not receive a substantive response from any respondent interested party.
>
> . . . .
>
> Given that dumping margins continued to exist after the issuance of the order, *respondent interested parties waived participation in the sunset review*, and absent argument and evidence to the contrary, we find that revocation of the antidumping order on brake rotors from the PRC would be likely to lead to the continuation or recurrence of dumping.[7]

11. In other words, contrary to the position the United States now takes before the Panel, USDOC interpreted the statutory language – "may elect not to participate in a review" – in the conduct of sunset reviews to apply to respondents that did not file affirmative statements of waiver and that instead simply remained silent. That statutory language remains unchanged today.

12. The United States cites the language in the SAA to supports its new position. But, notably, the same language in the SAA was used previously by the Commerce Department as its support for the "deemed waiver" provisions of the regulations. In other words, USDOC's consistent position has been that through this same language in the SAA, Congress and the Administration intended to allow USDOC to interpret silence from an exporter to trigger the provisions of the statute regarding the "election" not to participate. The United States cannot credibly argue now that this same passage – with no change to the statute and no further indication of Congressional intent – supports the view that the statutory term "elect" requires an affirmative statement of waiver and an admission of likely dumping by the foreign exporter. The US position is simply not serious.

13. Finally, it should be noted that the United States has offered no rebuttal to the fact that under US law, the terms of a statute will be controlling in the event of a conflict with an inconsistent implementing regulation. As Argentina has argued, under US law, a US statute will prevail over a US regulation where the two measures are inconsistent.[8] In addition, although an agency such as the USDOC may promulgate regulations pursuant to authority granted by Congress, that agency cannot through the promulgation of a regulation confer on itself any greater authority than that conferred under the governing statute.[9] Accordingly, where the statute mandates a specific action (e.g., making an affirmative company-specific likelihood determination), the statute cannot be overridden by USDOC's modification of an implementing regulation. Consequently, notwithstanding an expression of how USDOC would implement the waiver provisions or regulatory text to the contrary, the operation of the statute nonetheless continues to operate in a manner inconsistent with US WTO obligations. Section 751(c)(4)(B) directs a company-specific finding of likelihood for any respondent

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[6] *Brake Rotors from the People's Republic of China*, 67 Fed. Reg. 45458, 45459 (9 July 2002) (attached as Exhibit ARG-38) USDOC noted that it "did not receive a substantive response from any respondent interested party in the proceeding[,]" and did not reference any affirmative statements of waiver. *Id.*

[7] *Brake Rotors from the People's Republic of China; Final Results Issues and Decision Memorandum* at 6-7 (ARG-38).

[8] *See* Argentina's Second Submission, para. 164 and note 161.

[9] *See* Argentina's Second Submission, para. 164 and note 162.

interested party that "elect[s] not to participate" in the USDOC sunset review, and is therefore inconsistent with Article 11.3 of the Anti-Dumping Agreement.

Operation of Section 751(c)(4)(B) and Tainting of Order-Wide Determination

14. It is undisputed that, once the waiver provision of the statute is triggered, the USDOC must make a company-specific determination that the waiving respondent is likely to dump. The responses from the United States do not disagree with this assertion.[10]

15. Also, the Appellate Body already has determined that a company-specific affirmative determination taints the country-wide determination. The Appellate Body found that Section 751(c)(4)(B) and its implementing regulation were inconsistent, as such, with US obligations under Article 11.3 of the Anti-Dumping Agreement:

> Because the waiver provisions require the USDOC to arrive at affirmative company-specific determinations without regard to any evidence on record, these determinations are merely assumptions made by the agency, rather than findings supported by evidence…. [E]ven assuming that the USDOC takes into account the totality of record evidence in making its order-wide determination, it is clear that, as a result of the operation of the waiver provisions, certain order-wide likelihood determinations made by the USDOC will be based, at least in part, on statutorily-mandated assumptions about a company's likelihood of dumping. In our view, this result is inconsistent with the obligation of an investigating authority under Article 11.3 to "arrive at a reasoned conclusion" on the basis of "positive evidence".
>
> Therefore, we uphold the Panel's findings...that Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(iii) of the USDOC Regulations are inconsistent, as such, with Article 11.3 of the Anti-Dumping Agreement.[11]

16. In fact, the passage above is the Appellate Body's rejection of the same arguments that the United States recycles for this Panel. As is evident from the above, the US position that a country-wide determination is made on the basis of the totality of the circumstances and all the evidence gathered already has been considered and rejected by the Appellate Body. The Appellate Body was not persuaded that this explanation removes the illegal tainting of the country-wide determination. This Panel need not revisit that conclusion nor accept the United States' second attempt to avoid the consequences of the statutorily mandated findings.

Argentina's Comments on US Answer to Questions 10(a), (b)

17. In Questions 10(a) and (b) the Panel asks the United States specifically "whether the USDOC intended to, and the extent to which it did, determine whether these exporters actually dumped in the period of review …." In response the United States answers that: (1) it did not ***intend*** to determine whether these exporters actually dumped in the period of review,[12] but (2) that it ***did*** in fact make a determination that Acindar likely had dumped.[13]

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[10] *See* US Answers to Panel Questions, 24 July 2006, paras. 13-15, 19-20.

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

[12] *See* US Answers to Panel Questions, 24 July 2006, para. 26 (the United States, referring to the Section 129 proceeding, states: "Nor did Commerce seek to establish the existence of dumping") and para. 28 ("Commerce did not intend to determine whether the Argentine exports to the United States were dumped during the period of review").

[13] *See* US Answers to Panel Questions, 24 July 2006, para. 31 ("Commerce concluded that it was likely that Acindar had dumped during the life of the order").

18. The answer by the United States is puzzling, contradictory, and unnecessarily ambiguous given the clear statements USDOC made in the Section 129 Determination, and the United States made in its written submissions to this Panel. For example:

- In the Section 129 Determination, the United States explains: "Based upon the foregoing, and in the absence of usable cost date from Acindar, we find that Acindar likely was dumping subject OCTG during the original Sunset review period." (ARG-16, page 7).

- In the US First Submission to this Panel, the United States explains: "The Panel found that the fact that dumping duties continued to be collected on imports over the life of the order did not represent 'an adequate factual basis for the proposition ***that dumping continued***' during the period 1995-2000."[14] ***Therefore, Commerce collected additional evidence on this matter.***

- In paragraph 38 of the US First Submission, the United States is even clearer in its contradiction of its current position: "Commerce sought to evaluate whether dumping continued over the life of the order."

19. The position that the United States explains in its answer to the Panel's direct question is not the position that it took previously. The Panel must make its assessment based on the Department's actions and statements in the Section 129 determination, not the post hoc rationalizations provided now.

20. The answers offered by the United States to this question contain other contradiction and inaccurate statements that Argentina would like to correct. First, the United States indicates that "… none of the Argentine producers maintained their product-specific cost data," and that "had the Argentine producers been able to report their actual product-specific cost information, it could have been verified by tying the cost back to the financial statements."[15] The companies obviously retained product-specific costs. The problem was that USDOC requested the product-specific costs ***for a period extending 5-10 years prior to the request.*** Therefore, the problem is not a failure to maintain product-specific costs, it is a problem of the USDOC's failure to request the information in 2000, when it was required to make its prospective determination at that time.

21. Also, the suggestion that the information could not be "verified by tying the costs back to the financial statements" is wrong and unsupported. In fact, in the Questionnaire, the Department required a reconciliation of the cost information to the financial statements. Siderca provided such a reconciliation. The USDOC did not verify the information, which is a result of its own decisions regarding the substance and procedure of the Section 129 Determination. The USDOC cannot choose to forego a verification, and then simply assert that the information could not be verified. As Siderca explains in its comments to the response of the United States to Question 30, the Questionnaire instructions indicated that the information had to be verifiable, and Siderca prepared and presented the information consistent with those instructions.

22. Second, the United States makes a series of contradictory and, in the end, unsupportable references to the notion of home market viability and how it affected the USDOC's decisions about what questions to ask the exporters. In the substantive meeting of the parties, the United States indicated that it decided not to request home market or third country sales information from the exporters because it knew from a subsequent, post-sunset review that Acindar had no sales in the

[14] US First Submission, para. 35 (footnote omitted).
[15] US Answers to Panel Questions, 24 July 2006, paras. 25, 26.

Argentine market. In its response to the Panel's questions, the United States echoes this explanation in one portion by saying, "Aware that Acindar, the only exporter, had no home market or third country sales, Commerce drafted the questionnaire with the intention of asking questions that Respondents could actually answer, and therefore requested the product-specific cost data to provide an estimate of the normal value."[16]

23. There are a few problems with this explanation. First, it makes clear that the Department relied on information that did not exist at the time of the sunset review, and that it did not learn until after the sunset review. This information could not possibly support a 2000 decision to continue the measure; the information did not even exist then.

24. Second, If USDOC wanted information regarding any Acindar home market sales during the sunset review period, it should have asked for that information in the Section 129 proceeding, rather than relying on "knowledge" or "awareness" that it gained about Acindar after the sunset period. Notwithstanding this important point, the Government of Argentina also understands that the post-sunset "awareness" that the United States has described to this Panel is factually inaccurate. In the verification report from the USDOC's first review of Acindar (a document dated 27 August 2002; that is, two years after the close of the sunset period), the USDOC explains that Acindar did have some home market sales of OCTG during the 2000/01 period reviewed in that case, and the USDOC reviewed the specific invoices related to those sales.

25. Finally, the United States creates more contradictions when it tries to explain its decision making at the time of issuing its Questionnaire. The United Stares explains that "Commerce drafted the Questionnaire with the intention of asking questions that the Respondents could actually answer ...."[17] The United States further adds that counsel for US Steel asserted that the Argentine exporters did not have a viable home market, and implies that this was an additional basis for the Department's decision not to request home market sales information.[18] The obvious problem with this explanation is the timing. USDOC sent its questionnaire to the Argentine exporters on 31 October 2005 (ARG- 13), while the letter from counsel for US Steel was filed on 2 December 2005 (ARG-27). Obviously, assertions by counsel for US Steel, and Siderca's rebuttal of those assertions, could not possibly explain the decision that the Department made when it "drafted the Questionnaire" several weeks earlier.

26. The responses by the United States to questions 10(a) and 10(b) seem to reflect the answers that the United States believes that the Panel wants to hear, rather than the answers that reflect the reality of USDOC's conduct of the Section 129 proceeding. As a result, the United States enters into contradictions of explanations it has provided to this Panel and, more importantly, of the explanations it provided in the Section 129 Determination, which is the measure taken to comply.

Argentina's Comments on US Answer to Questions 11(a), (b), (c)

27. The Panel asks a series of questions regarding the definition of dumping found in Article 2.1 as it relates to the obligations of Article 11.3. The answers by the United States to these questions are unsatisfactory.

28. The answers begin with more contradictions. The United States indicates that "Commerce concluded that it was likely that Acindar had dumped during the life of the order."[19] It should be recalled that the United States explained that USDOC did not intend to make any such finding.

[16] US Answers to Panel Questions, 24 July 2006, para. 25.
[17] US Answers to Panel Questions, 24 July 2006, para. 25.
[18] *See* US Answers to Panel Questions, 24 July 2006, para. 25, note 26.
[19] US Answers to Panel Questions, 24 July 2006, para. 31.

(See response to Questions 10(a) and (b) above). The Department then states in response to Question 11(b), that "Commerce did not determine the existence of or degree of dumping during the Sunset period of review ….".[20]

29. Argentina submits that these two statements cannot both be correct. The United States clearly indicates in its Section 129 Determination that it concluded that the existence of dumping by Acindar was "likely" during the review period. Therefore, it is simply wrong for the United States to contend in paragraph 33 that it made no determination as to the existence of "dumping" during the sunset period. It did make such a determination, but unable to show that "dumping" existed, it stated that "dumping" likely existed.

30. The United States also introduces a new argument and a new justification for its actions in the Section 129 Determination, explaining that USDOC acted consistently with paragraph 7 of Annex II to the Anti-dumping Agreement, because that provision refers to "other independent sources" as including "published price lists, official import statistics and Customs returns."[21] However, the United States seems to forget that the intent of paragraph 7 of Annex II is to explain what "other independent sources" can be used ***when an exporter is asked specific questions and fails to respond***. Notably, these other sources of information could be used by an authority if it asks the exporter for normal value and export price information, and the exporter does not provide that information. As is well established in this case, ***the USDOC never even asked for that information.***

31. It is also evident from the reference that the United States is grasping for straws at this point. To suggest that the "published price lists" referred to in paragraph 7 of Annex II provides support for USDOC's use of average pricing data in the ***importing country as a surrogate for normal value*** is not serious. The references have a much clearer, logical meaning. For example, if an exporter does not provide its export prices or its home market prices, then it would be acceptable for the authority to rely on the published price lists that would tend to show what the exporters prices are in its export or home market. Similarly, the reference to "official import statistics and Customs returns" are logical when one considers that they could be used as a surrogate for export price if the exporter does not provide transaction-specific information regarding its exports, or, potentially as a surrogate for third country price where the exporter does not provide that information. No reasonable interpretation of paragraph 7 of Annex II would justify the use of Customs data when the authority never even asked the exporter for this information, or US market data as a surrogate for the exporter's normal value.

Argentina's Comments on US Answer to Question 12 (a)

32. In paragraph 36, the United States includes a statement that is fundamental to the disagreement between the United States and Argentina in this dispute. Explaining that Siderca had stopped shipping after imposition of the order and that a new entrant into the United States "had appeared anonymously" during the sunset review period without participating in USDOC's sunset review proceeding, the United States describes that it was in a difficult position and looking for answers. According to the United States: "The answer cannot be the one advocated by Argentina – that a lack of shipping activity, or a failure to make oneself known, necessarily requires a negative determination as to what would happen if the order were revoked."[22]

33. Argentina submits that the answer for which the United States was searching lies in the text of Article 11.3. The answer provided by Article 11.3 is that the Member ***must terminate*** the antidumping measure after five years, ***unless*** a determination of likely dumping and injury can be made based on positive evidence. What is absolutely clear from the United States' answer to

[20] US Answers to Panel Questions, 24 July 2006, para. 33.
[21] US Answers to Panel Questions, 24 July 2006, para. 31.
[22] US Answers to Panel Questions, 24 July 2006, para. 36.

Question 12 is that it never considered the possibility of termination. In fact, it is adamant that "the answer cannot be the one advocated by Argentina."

34. Argentina also notes that it is not, of course, arguing that a negative determination is "necessarily required." But, Argentina would agree that in cases where there is no evidence that revocation of the order would likely lead to continuation or recurrence of dumping, the answer must be termination. Article 11.3 says so.

35. The United States makes the statement that "the investigating authority must do what it can with the information it has, including the information submitted – or not submitted – by the Respondents."[23] Argentina asks that the Panel be diligent in evaluating this and other statements made by the United States in this Article 21.5 proceeding. The United States obviously is trying to blur the line between what occurred in the original sunset review in 2000 and what occurred in the Section 129 proceeding. The latter is the proceeding leading to the Section 129 determination, which is the measure taken to comply. There is simply no basis to suggest that the Argentine exporters failed to provide information or failed to cooperate in any manner in the Section 129 proceeding. Argentina asked the United States to clarify these in questions in 13 and 14, but the United States declined to respond. As to the requested cost information, both exporters explained, and no one has disputed, that the exporters could have provided this information to the USDOC had USDOC requested it in the original sunset review proceeding. Thus, when the United States complains of the "limited amount of information, attributable entirely to the Respondent's own choices,"[24] the Panel must be careful not to be fooled into thinking that USDOC's hands were tied in the Section 129 proceeding and that USDOC could do nothing more than what it did. It clearly could have done more, but it made choices, and a lot of assumptions, in order to find a way to justify continuing the measure. As the United States made clear the "answer cannot be the one advocated by Argentina."

Argentina's Comments on US Answer to Question 12(b)

36. In Question 12(b), the Panel asks the United States to address the differences in physical characteristics of the products compared and whether these factors were known to the USDOC and taken into account in the Section 129 proceeding. The answer, particularly in paragraph 41, is a series of unsupported statements that prove that Commerce knew, but chose to ignore, that these differences affected the comparison of OCTG products. Also, the United States continues to make assertions that have been proven through this proceeding to be incorrect. We address each of these below:

37. The following sets forth US statements in paragraph 41 of its answers, followed by Argentina's comments:

- Referring to the Preston Pipe & Tube Report, the United States asserts: "Its segregation of tubing from casing also addressed much of the size concern Argentina now raises as tubing is a small tubular product in limited sizes and casing is larger size material. Even in the comparison Argentina raised during the Panel hearing, Argentina conceded that there is minimal overlap in sizes between tubing and casing."

    - The statement that the distinction between tubing and casing sufficiently addresses the effect of size on the cost of producing OCTG is absolutely unsupported. Further, Argentina made no such concession in the hearing. To the contrary, Argentina provided one example which disproves the point made by the United States. It was an example of a 4 ½ inch outside diameter OCTG,

[23] US Answers to Panel Questions, 24 July 2006, para. 36.
[24] US Answers to Panel Questions, 24 July 2006, para. 36.

which the evidence established could be sold as either casing or tubing. That one example shows that the tubing/casing classification cannot be relied upon to sufficiently account for the difference in cost caused by the size of the OCTG products. There are many other examples in which certain sizes of tubing are more similar to casing than to other tubing, and also many examples of casing that is more similar to tubing than other casing.[25] It is simply wrong for the United States to continue to assert these factually incorrect statements. In addition to being unsupported and wrong, it is also clear that ***none of this analysis that the United States offers now was done during the Section 129 Determination***. USDOC simply assumed these facts (which, in fact, are wrong) and went forward with its improper comparisons (both the comparison of alloy to carbon costs, and the comparison of Acindar's exports compared to Preston Pipe categories).

- The United States also states that "Additionally, though the Preston Pipe & Tube Report does not distinguish between end finish (e.g., plain end vs. threaded and coupled), the universe of material included in the carbon welded tubing and carbon welded casing groups does include both plain end and threaded and coupled material, diminishing any impact this may have on the price comparisons."

    - This, too, is completely unsupported, and was never part of the Section 129 Determination. And the statements are illogical. The problem is that both types of end finish pipe are included in the Preston Pipe & Tube Report, but no one knows the relative volume of each end finish within the category. Given that plain end and threaded and coupled OCTG have different costs,[26] the inclusion of both end finishes in no way can be said to "diminish [] any impact this may have on price comparisons." Rather than diminishing the impact, it simply blurs the picture so that the comparisons are less reliable.

- The United States next addresses the problem of transportation costs: "With respect to transportation costs, we note that not all of the Preston Publishing selling prices included transportation costs. The Preston Pipe data included both domestic and import shipments. The terms of the latter were fob mill."

    - The United States is finally conceding the issue that it does not know what is included in the prices reported in Preston Pipe & Tube Reports. Even with respect to transportation costs, it has to concede that the Preston Pipe & Tube Report prices contain some unknown blend of domestic and imported prices, some with and some without the transportation costs included, and with no idea of the amount of any transportation costs. Added to the inability to control the physical characteristics, this concession regarding the terms of sale associated with the average product grouping prices further undermines the reliability of the comparison the Department performed to determine that Acindar likely was dumping during the period.

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[25] *See* ARG-34 (4 ½ inch case (page 6) are more similar to 3 ½ and 4 ½ inch tubing (page 11) than the larger casing. Such as all the casing produced at US Steel Lorain Ohio plant (10 ¾ inch and higher) (page 9)**.** Please note that the page number references are to the hand-written page numbers in the upper right hand corner of ARG-34.

[26] This has been adequately established on the record of this proceeding: Argentina showed that in some cases the differences in price for a plain end and T&C OCTG can be $250 per ton; Siderca's cost information also shows, at the product group level, the differences in cost for end finishing.

- The United States then adds: "Even had Commerce been able to adjust for these factors, Acindar's sales prices were so far below the US average prices that the end result would likely have not changed."

    - There is no factual support for this statement. In fact, the United States has claimed confidential treatment for the import prices used in its comparison, and the Panel indicated in the substantive meeting of the parties that it was not inclined to investigate the degree to which the AUVs from the Customs data were lower than the Preston Pipe Report data. Without this information, the Panel can give no weight to this unsupported statement by the United States that Acindar's prices were "so far below" the average market prices. Also, despite the statements by the United States to the contrary, this statement seems to demonstrate that it is making a determination regarding the existence of dumping.

38. In paragraph 42, the United States notes that Exhibit ARG-34 and Exhibit ARG-35 "were not on the record of the Section 129 proceeding," and suggests that the Panel therefore cannot consider this information. The United States misses the obvious fact ***USDOC*** bears the responsibility for the failure of this information to be on the record of the Section 129 proceeding. In fact, one of Argentina's Article 6 claims is that the United States had an obligation to disclose to the parties the types of comparisons it was making, and the assumptions it was applying to the cost data that it ultimately rejected. Had the Department made these disclosures, the Argentine exporters could have disproved all of these statements in the Section 129 proceeding, just as Argentina is doing before this Panel. As Argentina explained in its submissions and in its Oral Statement, the Article 6 claims are inextricably linked to the substantive Article 11.3 claims: USDOC had an obligation to develop positive evidence that dumping was likely to continue or recur if it sought to continue the measure. It failed to do this in the Section 129 Determination, and the United States complaint in paragraph 42 is additional proof of this failure.

39. In paragraph 43, the United States moves to its alternative argument and introduces more new facts. It states: "Even if the Panel were to consider the facts introduced here, and not in the Section 129 Determination, the price lists included therein are for seamless OCTG yet Acindar sold only welded OCTG – a product with a very different cost and price structure. Furthermore, a price list is not the actual price arrived at for the sale. In fact, discounting of price lists was common practice during the period because of the depressed condition of the OCTG market." The comment misses the point and again shows the deficiencies of the review conducted by the USDOC. The price list was referred to during the Oral Statement for two purposes; to show the **price difference** of a plain end and threaded and coupled OCTG, and as evidence of the **cost difference** of the pipe. Thus, it is easy to see that the evidence relates to the cost of producing a particular end finish on a pipe (compared to no end finish, or plain end), and the commercial value that is added by that processing. Therefore, whether the pipe itself is welded or seamless is does not bear on the issue. Also, there is obviously no factual basis for the statement that "discounting of price lists was common practice during the period."

40. In paragraph 44 the United States offers its own analysis of the data and purports to show that Argentina has understated the price difference between carbon and alloy OCTG. In doing so, the United States seeks to rebut an argument that Argentina did not make. Argentina never said that the cost of producing **all carbon OCTG** is within 10 per cent of **all alloy OCTG**. In fact, Argentina was very precise with respect to its statement, quoting specific prices from the price list. But, in attempting to rebut the point, the United States only serves to highlight the deficiencies of its comparisons. It states, correctly, that "there are a multitude of alloying grades …" which "will reflect a composite of these alloy grades." The "multitude" and "composite" nature of these comparisons

goes precisely to the point Argentina has made since the beginning of the Section 129 proceeding. By relying on comparisons at such a general level, the USDOC could not reach the specific conclusions that it made during the Section 129 proceeding.

41. The United States ends with the conclusory statement that "Commerce analyzed the evidence on the record before it, which was sufficiently specific to enable a basic comparison on Acindar's prices to the prevailing market prices." Obviously, it was not sufficiently specific, which is precisely the point of many of Argentina's concerns and the Panel's questions.

Argentina's Comments on US Answer to Questions 13 and 15

42. Questions 13 and 15 address several issues regarding the USDOC's use of financial statements in the Section 129 proceeding. In general, the answers provided by the United States as to the use of the financial statements are consistent with Argentina's understanding, as described in Argentina's response to the Questions 13 (a) and (b) of Argentina's response to the Panel's questions.

43. However, Argentina would like to draw the Panel's attention to two particular aspects of the US response. First, in response to Question 13, the United States points to a number of excerpts to the financial statements of several parties (the Argentine exporters and US producers) to support its statement that the OCTG was depressed at certain points in time. Argentina agrees that the statements support this assertion. However, the Panel should not forget that the United States made a specific finding that there was no indication of improvement in the OCTG market. USDOC referred to this finding in two specific contexts: (1) as an additional reason why Acindar was likely to dump in the future;[27] and (2) in interpreting the condition of the OCTG market.[28]

44. The financial statements quoted by the United States in response to Question 13(a) **all** contradict the Department's findings. All of them reference, to one degree or another, the "recovery" that began to appear at the end of 1999 and had continued into 2000. The United States tries to save the situation by pointing to the cautious language in the financial statements indicating that no assurance can be given regarding the "timing and extent of such recovery," which are normal, prudent statements through which management indicates to investors that they should not rush to judgment. However, the financial statements are unanimous in reporting the beginning of the recovery that the USDOC indicated was nowhere on the horizon.

45. The United States tries to reconcile all of this in its response to Question 15, indicating that "because of price volatility, price trends alone, in this particular industry, are not necessarily reliable or sufficient to indicate **true market recovery**. Commerce did not consider a slight increase in prices at the end of the period a sufficient indicator of a **lasting shift in the demand for OCTG** that had been depressed for the majority of the period."[29] While this language is more measured and perhaps more prudent, it is not the language that was used in the Section 129 Determination, in which the USDOC stated that there was an absence of evidence that "prevailing market conditions were likely to improve in the near future."[30] Also, injecting the new terms "true market recovery" and the requirement for a "lasting shift in the demand for OCTG" does little to help reconcile the difference

[27] USDOC stated: "absent evidence that Acindar intended to cease selling in the United States, and ***absent evidence that prevailing market conditions were likely to improve in the near future,*** we consider such sales indicative of Acindar's likely pricing behaviour were the order to be revoked." ARG-16, page 8.

[28] USDOC stated: "given the weakened condition of Siderca at the end of the original Sunset review period, ***we consider that there was no valid indication that a sudden turn-around in the OCTG was likely.***" ARG-16, page 10.

[29] US Answers to Panel Questions, 24 July 2006, para. 66.

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

between the Department's findings in the Section 129 Determination and the evidence from all the financial statements -- all of which concur that a recovery was underway.

46. In its response to Question 15 (b), the United States provides a new analysis to support its notion that the recovery that appeared at the end of the period was not reliable. It should be obvious to the Panel that the new analysis cannot possibly justify the decision in the Section 129 Determination because it was not, by definition, part of that analysis. Also, the analysis using selected prices from the general Preston Pipe categories suffers from the same problems that have been explained several times: each product category contains an unknown mix of products, and the mix may be different from month to month. Therefore, the fact that the average price for the group carbon ERW tubing in January was $762 and fell in February to $759, as reported in the new analysis done by the United States in paragraph 63, does not mean that the recovery is faltering. It could just mean that there was a different mix of products within the carbon ERW tubing category sold in January and February. The same can be said for all of the small differences in the comparisons that the United States introduces in paragraph 63 of its answers.

Argentina's Comments on US Answer to Question 14(a) and (b)

47. The Panel asks the United States to react to Argentina's statement that, with respect to whether "dumping" occurred in the past, the authority can either determine that it did, determine that it did not, or concede that it does not know. Rather than give a direct answer, the United States once again returns to the concept of "likely past dumping" and contends that "Argentina seems to assume that inferences cannot be drawn about the past. However, Argentina does not explain why that is true."[31]

48. Argentina has repeatedly offered explanations, grounded in the text of the Anti-Dumping Agreement, why it is impermissible to base on Article 11.3 determination on an inference, that itself is based on yet another inference of likely past dumping.

49. The US answer ignores these explanations and repeats the refrain that the provisions of Article 2 of the Anti-Dumping Agreement and the definition of "dumping" are not relevant to Article 11.3 determinations. According to the United States "nothing in the text of Article 11.3 requires an investigating authority to determine that dumping occurred in the past or to conclude that it does not know whether dumping occurred in the past."[32]

50. While the United States preference is for Article 11.3 to be free from disciplines, it is not. The word "dumping" has a specific meaning in Article VI of the GATT 1994 and in the Anti-dumping Agreement, and the Appellate Body already has clarified that the meaning of "dumping" in Article 11.3 is the same as the meaning of the term in Article 2:

> [T]he words "[f]or the purpose of this Agreement" in Article 2.1 indicate that this provision describes the circumstances in which a product is to be considered as being dumped for purposes of the entire Anti-Dumping Agreement, including Article 11.3. This interpretation is supported by the fact that Article 11.3 does not indicate, either expressly or by implication, that "dumping" has a different meaning in the context of sunset reviews than in the rest of the Anti-Dumping Agreement. Therefore, Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 suggest that the question for investigating authorities, in making a likelihood determination in a sunset review pursuant to Article 11.3, is whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping of the product

[31] US Answers to Panel Questions, 24 July 2006, para. 54.
[32] US Answers to Panel Questions, 24 July 2006, para. 55.

> subject to the duty (that is, to the introduction of that product into the commerce of the importing country at less than its normal value).[33]

51. Consequently, if USDOC is going to infer likely "dumping" from some past action, that past action must be probative of "dumping." "Dumping" has a specific meaning under the Anti-Dumping Agreement, and that meaning is contained in Article 2. Even though the USDOC is not required to calculate a dumping margin in an Article 11.3 review, the requisite likelihood of dumping determination must be related to the concept of "dumping" that is defined in Article 2.

52. As explained above in its comments to the US responses to question 11, the United States tries to straddle two different positions regarding its finding of "likely past dumping": "Commerce concluded that it was likely that Acindar had dumped during the life of the order,"[34] and "Commerce did not determine the existence of . . . dumping during the Sunset period of review …."[35] The United States tries to maintain this dubious distinction in its response to Question 14 (b), where it states in different places of the same answer that: "Simply because Commerce used the term 'likely dumping' to describe its findings … does not mean that Commerce determined the existence of dumping…" and that Commerce concluded that "Acindar had likely dumped during the period."[36] These two statements are irreconcilable, especially in the same answer.

53. Also, repeating a theme that appears often in the responses, the United States explains that "Commerce had to rely upon US average unit values as a type of surrogate for normal value out of necessity because there were no other reliable data."[37] But, as should be clear at this point in this proceeding (and the United States does not dispute), ***Commerce never asked for any other such data, and the Argentine exporters did not know that Commerce was planning to use US average unit values as a "type of surrogate for normal value."***

54. As a result of these flaws with the USDOC's approach on two key points that form the basis for its decision – 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.

Argentina's Comments on US Answer to Question 16

55. In this question, the Panel asks the United States to comment on Argentina's assertion that OCTG prices were significantly higher in the United States than in other markets. In response to the question, the United States asserts that "Commerce made no such finding, and Argentina has not identified the information on the record to which it was referring."[38] The United States is wrong on both counts.

56. First, the US statement is contradicted by the Section 129 Determination (ARG-16) at 11, where the USDOC states:

> We also note that the ITC's finding that OCTG producers had incentive to devote more of their productive capacity to producing and shipping more to the US market was sustained by the Appellate Body.

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[33] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 109.
[34] US Answers to Panel Questions, 24 July 2006, para. 30.
[35] US Answers to Panel Questions, 24 July 2006, para. 33.
[36] *See* US Answers to Panel Questions, 24 July 2006, paras. 57, 60.
[37] US Answers to Panel Questions, 24 July 2006, para. 58.
[38] US Answers to Panel Questions, 24 July 2006, para. 67.

57. Thus, USDOC specifically refers to the ITC's finding in its Section 129 determination, and also to the Appellate Body's approval of the reasons why the USITC believed that OCTG producers had an incentive to increase shipment quantities to the United States. The USITC found that US market prices were significantly higher than world market prices and 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.[39] The passage in the Section 129 Determination indicates that USDOC was also aware of this fact and "noted" the fact in rendering its decision.

Argentina's Comments on US Answer to Questions 17(a) and (b)

58. Argentina agrees with the United States that the Panel exercised judicial economy with respect to the volume issue. (See also Argentina's answer to this question). However, the United States is incorrect when it asserts that Argentina was required to appeal the Panel's exercise of discretion as "false judicial economy," or abandon its right to have the issue considered on the merits.

59. The flaw in the argument put forward by the United States is its refusal to acknowledge that the Panel already had found that USDOC's 2000 sunset determination violated Article 11.3. Therefore, in order to bring itself into compliance with the rulings and recommendations of the DSB, the United States would either have to revoke the measure or justify the continuation based on some further determination. Any further determination would be subject to review under Article 21.5, and the Panel would be required to review all stated bases of that decision in order to determine whether it was consistent with Article 11.3. Thus, the exercise of discretion by the Panel was not false judicial economy because the Panel had already disposed of the matter by finding a violation of Article 11.3, and any future determination seeking to justify continuation of the measure would have to comply with Article 11.3.

60. The Panel should reject the US assertion that Argentina "disregards the rulings and recommendations [of the DSB] and appears to be asking the Panel to treat this proceeding as if it were an original proceeding… this is not an original proceeding – it is a compliance proceeding."[40] The continued reliance by the United States on the *EC – Bed Linen (Art. 21.5 – India)* decision is misguided. In addition to the explanation previously provided by Argentina, Argentina agrees with the points raised by the European Communities that the *EC – Bed Linen (Art. 21.5 – India)* case was factually and legally very different from the present case. As the EC noted:

> In the present case… the focus of the judicial review is on one specific determination – that of likelihood of continuation 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 redetermination can only have been based on a 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.[41]

61. As for the jurisprudence related to the exercise of judicial economy, the Panel in the *US – Steel Safeguard* summarized key principles as follows:

> The principle of judicial economy is recognized in WTO law. In *US – Wool Shirt and Blouses*, the Appellate Body made clear that panels are not required to address all the claims made by a complaining party. The Appellate Body relied on the explicit aim of

[39] *See* Panel Report, paras. 7.291, 7.297.
[40] US Answers to Panel Questions, 24 July 2006, para. 70.
[41] EC Third Party Oral Statement, 13 July 2006, para. 20.

> the dispute settlement mechanism which is to secure a positive solution to a dispute (Article 3.7) or a satisfactory settlement of the matter (Article 3.4). Thus, the basic aim of dispute settlement in the WTO is to settle disputes and not to develop jurisprudence. The Appellate Body stated:
>
> > "[G]iven the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."[42]

62. The Panel in *US – Steel Safeguards* had exercised judicial economy with respect to a number of claims, reasoning that because it had found the safeguard measures to inconsistent under other provisions, there was no need for the Panel to examine the measures under other cited provisions. The Panel found that that it had "effectively resolved the dispute" since the measures were "deprived of a legal basis."[43]

63. Similarly, the effect of the Panel's findings in this case was that USDOC's 2000 sunset determination was inconsistent with Article 11.3. Accordingly, Argentina believed then, as it continues to believe now, that the United States would either have to revoke the measure or make a new determination, and any new determination would be subject to the same temporal and substantive obligations of Article 11.3.

64. Finally, the Panel should dismiss the US contention that were the Panel "to make an adverse finding now" on the USDOC's volume analysis, "the United States would have no reasonable period of time to bring its measure into conformity with the Antidumping Agreement and would be subject to potential suspension of concessions as a result of a finding of breach that was not in the original report."[44] As to the possibility of facing suspension of concessions, this is a consequence of the WTO dispute settlement system. The United States has been on notice since the original Panel finding that its continuation of the antidumping measure did not comply with US obligations under Article 11.3. The United States was further aware that, if it wanted to continue the measure, it would need to make a new determination that is fully consistent with Article 11.3. By choosing continue the measure, and by choosing to rely on volume as one of the findings supporting the new determination supporting continuation, the United States placed itself in the position that it describes. Also, the United States also clearly had the option of not relying on volume. The United States does not even assert this position before this Panel, but this surely would have been the easiest way for the United States to have avoided the purported "inequity" that would arise by any adverse ruling on the volume analysis.

65. Also, the United States response fails to recognize any inequity for Argentina. Argentina explained the inequities that it would suffer in its response.[45]

66. The inequities that would be suffered by Argentina are in no way abstract or hypothetical. In fact, they are already starting to materialize. Just last week, the USDOC released its adequacy determination in the second sunset review, which is attached as Exhibit ARG-39. In that decision, and despite a response by Siderca and facts on the record that the only other producer, Acindar,

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[42] Panel Report, *US – Steel Safeguards*, para. 10.701 (quoting Appellate Body Report, *US – Wool Shirt and Blouses*).

[43] Panel Report, *US – Steel Safeguards*, para. 10.705.

[44] US Answers to Panel Questions, 24 July 2006, para. 73.

[45] *See* Argentina's Answers to the Panel's Questions, paras. 69-74.

stopped producing OCTG in 2001, USDOC found Siderca's response "inadequate" and determined to expedite the sunset proceeding. The reason? Volume.[46]

67. The newly-released decision proves the inequities that Argentina will suffer if this Panel decides not to resolve the matter before it, in all its aspects, including the volume inference that USDOC expressly relied upon to make its Section 129 determination. It also is more compelling evidence as to why this Panel should exercise its discretion to "suggest" that the United States should terminate the measure, if the Panel finds that the United States has not brought itself into compliance. Any other decision by this Panel will not help resolve the matter, as the USDOC seems intent on repeatedly invoking the "exception" of Article 11.3, despite a lack of evidence of likely dumping.

Argentina's Comments on US Answer to Questions 17(c)

68. The Panel should reject the US response that USDOC's "volume analysis" was "part of the original determination" and was "simply reincorporated into the redetermination" and therefore "the United States was not obliged to reconsider that analysis to implement the recommendations and rulings of the DSB."[47]

69. First, the United States has not disputed that the Section 129 Determination is a "measure taken to comply" for the purposes of this DSU Article 21.5 proceeding. 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. Finally, *EC – Bed Linen (Art. 21.5 – India)* does not support the US position.

70. 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.[48] The Section 129 Determination is clear that USDOC

[46] The USDOC document alleges an apparent contradiction in Siderca's position. There is no contradiction at all. Siderca's substantive response explained that: 1) Acindar stopped producing OCTG in 2001, the first year of the second sunset period; and 2) that Siderca's affiliate, SIAT, purchased Acindar's tubular production assets in 2005, so that Siderca and its affiliates were the only known OCTG producers in Argentina at this time. In a pattern that will be familiar to this Panel, USDOC made no attempts to clarify any doubts that it had, assumed the worst, and issued a decision adverse to Siderca. The action demonstrates a continuation of the lack of objectivity USDOC displayed in the 2000 sunset proceeding and in the Section 129 determination. Siderca did not export, therefore its response could not be adequate.

[47] US Answers to Panel Questions, 24 July 2006, para. 78.

[48] *See* USDOC Section 129 Determination at 1 (ARG-16) ("[W]e solicited and considered information and argument from domestic and respondent 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 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); 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); 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).

"relied on our previous finding regarding the volume of imports" as a basis for the Section 129 Determination.[49]

71. It is well established that it is not up to the implementing party to decide the scope of jurisdiction of an Article 21.5 panel.[50] In *Canada – Aircraft*, the Appellate Body stated that:

> [I]n carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the "measures taken to comply" from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. In addition, the relevant facts bearing upon the "measure taken to comply" may be different from the relevant facts relating to the measure at issue in the original proceedings. It is natural, therefore, that the claims, arguments and factual circumstances which are pertinent to the "measure taken to comply" will not, necessarily, be the same as those which were pertinent in the original dispute. Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the "consistency with a covered agreement of the measures taken to comply", as required by Article 21.5 of the DSU.[51]

72. By expressly relying on its original finding on volume, the USDOC placed these findings within the scope of the "measures taken to comply" for the purposes of this Section 21.5 proceeding. 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." This Panel cannot permit the United States to determine unilaterally which parts of the measures taken to comply can be examined in the course of this proceeding.

73. Furthermore, to permit the United States to set the Panel's scope of review would prevent the Panel from determining the WTO-consistency of one of the US implementing measures. The USDOC did not simply confirm its "original consideration" of the finding on volume. Rather, the USDOC *relied on this finding for the separate and independent purpose of further supporting 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.

74. *EC – Bed Linen (Art. 21.5 – India)* does not support the US position, and the facts of that case differ in a key respect. India's claim that the EC violated Article 3.5 of the Anti-Dumping Agreement

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[49] 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).

[50] *See, e.g.*, Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 73 ("A Member's designation of a measure as one taken 'to comply', or not, is relevant to this inquiry, but it cannot be conclusive. Conversely, nor is it up to the complaining Member alone to determine what constitutes the measure taken to comply. It is rather for the Panel itself to determine the ambit of its jurisdiction.").

[51] Appellate Body Report, *Canada – Aircraft*, para. 41.

by failing to ensure that injuries caused by "other factors" was not attributed to the dumped imports was dismissed because India failed to make a *prima facie* case. India did not appeal that finding. When the EC implemented the DSB rulings, it did not revise the analysis of "other factors" made in the original determination. As the Panel noted, "[t]he EC did not … undertake a reconsideration of the "other factors' identified by India. Rather, it referred to and confirmed its *original consideration* of these factors."[52] Also, as the EC noted in its Third Party Oral Submission:

> In the present case… the focus of the judicial review is on one specific determination – that of likelihood of continuation 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 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.[53]

75. EC implementing regulation in *Bed Linen* demonstrates that the Council indeed simply confirmed its initial determination, rather than rely on such findings for the purpose of its "measure taken to comply." Each of the sections dealing with "effects of other factors" consist of a single sentence. The section on "Imports from third countries" states simply that: "[t]he findings in recitals 100 and 101 of the provisional Regulation remain unaffected."[54]

76. 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.[55]

77. As Argentina has argued throughout this proceeding, 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.

Argentina's Comments on the US, Answer to Question 18

78. The United States contends that "Siderca's comments explaining the decline in import volumes were not germane to the *US implementation of the recommendations and rulings of the DSB*, which pertained to Commerce's reliance on the dumping margin from the original investigation, and not to Commerce's volume analysis."[56]

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[52] Panel Report, *EC – Bed Linen (Art. 21.5 – India)*, para. 72.
[53] EC Third Party Oral Statement, para. 20 (footnote omitted).
[54] See Argentina's Second Submission, paras. 94-98.
[55] Appellate Body Report, *US – Lumber ITC Investigation (Article 21.5 – Canada)*, para. 102, n. 150 (citations omitted).
[56] US Answers to Panel Questions, 24 July 2006, para. 79 (original emphasis).

79. The US position on what was necessary for the United States to achieve compliance in this case is directly at odds with its obligations under Article 11.3. The US view is also explicit in the USDOC Section 129 Determination, in which the United States seeks to insulate the volume inference from review in the compliance proceeding based on this Panel's decision to refrain from deciding the issue in its first review.[57]

80. In 2005, as in 2000, the USDOC has again failed to go behind the volume decline and examine further the reasons for the reduction in OCTG import volume after the imposition of the order. The fact that the Panel may have exercised judicial economy on the propriety of USDOC's volume inference does not mean that the USDOC's finding was WTO-consistent. The Appellate Body has clearly articulated that it would be legally insufficient under Article 11.3 for the administering authority to simply presume likelihood based on a post-order volume decline.[58] With respect to the probative value of declining import volumes for the purposes of an Article 11.3 determination, the Appellate Body has clarified that the authority must undertake "a case specific analysis of the factors behind a cessation of imports or a decline in import volumes… will always be necessary to determine that dumping will recur if the duty is terminated."[59] In *US - OCTG from Mexico* the Appellate Body confirmed that it would violate Article 11.3 for an authority to rely on presumptions or conjecture as to a company's ability to ship to the US market without dumping.[60]

81. The Panel's question highlights a portion of Siderca's response:

> Whatever the significance of a decline in export volume may be as a general matter, Siderca knows that, with respect to Siderca, it does not mean that the product could not be shipped without dumping. The cost data (even with the limitations explained above) supports Siderca's position: Siderca is a cost-efficient producer of OCTG and could have shipped OCTG products profitably to the United States.[61]

82. As the passage highlighted by the Panel makes clear, Siderca's information clearly was an attempt to demonstrate that the decline in volume was not related to the inability of the company to participate in the US market without dumping. The Argentine exporters explained the reason for the volume decline during the sunset period of review, established that Acindar was only a minor producer, and demonstrated that Siderca had diversified its export markets after the imposition of the order and that the company performed quite well without exporting to the US market.[62]

83. The USDOC's 2005 likelihood determination does not even address these arguments, which explained the reason for the reduction in Argentine OCTG imports into the United States. Nor does the United States even attempt to offer a response that addresses the specific language identified in the Panel's question. Instead, the United States retreats to the familiar refrain that "Siderca's comments [on volume] were not responsive to the question asked."[63] Siderca's information relating to the volume decline, however, was unquestionably "responsive" to the questions that USDOC had to analyze to bring the United States into compliance with its obligations under Article 11.3.

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[57] USDOC Section 129 Determination at 2 n.4 and 6 n.12 (ARG-16).

[58] Appellate Body Report, *US - Corrosion-Resistant Steel Sunset Review*, para. 177.

[59] Appellate Body Report, *US - Corrosion-Resistant Steel Sunset Review*, para. 177.

[60] Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R. adopted 28 November 2005, para. 199 ("*US – OCTG from Mexico*").

[61] Panel Question 18 (quoting Siderca's 30 November 2005 Response).

[62] See Siderca's Response to Questionnaire (30 Nov. 2005) at 7-10 (ARG-15).

[63] US Answers to Panel Questions, 24 July 2006, para. 79.

84. Thus, the USDOC's failure to consider Siderca's information and arguments regarding the reasons for the volume decline cannot be reconciled with the Appellate Body's admonishment that "a case-specific analysis of the factors behind a cessation of imports or a decline in import volumes (when dumping is eliminated) will be necessary to determine that dumping will recur if the duty is terminated."[64] The Appellate Body in *Mexico OCTG* reaffirmed this obligation expressly and again cautioned against the "mechanistic" use of presumptions in relying on volume declines, noting that a "company's strategy and ability to increase or decrease its exports to particular markets depend on a variety of market conditions, such as, in particular, the opportunities available in different markets and the competitive conditions in the market place. Therefore, unless all relevant factors are taken into account, there may not be an objective evaluation in such cases of the causes of the variations in import volumes in the importing Member's market."[65]

85. The USDOC Section 129 Determination states: "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] The statement shows that the USDOC is still making assumptions rather than reasoned decisions based on positive evidence. There is no factual basis for the US assumption, either in the 2000 Sunset Determination or in the 2005 Section 129 Determination. Instead, the USDOC relies on what *"apparently"* is the case, and what an exporter *"would need"* to do. This type of conjecture, without factual basis, does not satisfy the requirements of Article 11.3.

Argentina's Comments on the US, Answer to Question 20

86. Despite the US assertion that "Commerce took [Siderca's comments from its 7 December letter] into consideration in its analysis,"[67] the USDOC did not address the basic due process concerns that Siderca had raised.

87. Siderca's 7 December 2005 Letter to the USDOC expressed key concerns and indicated that there was significant uncertainty as to the procedures for comment and precisely what information the Department would be relying on for purposes of its Section 129 determination. Because the USDOC did not respond, the Argentine companies were precluded from knowing the essential facts and information that would serve as the basis for DOC's analysis and, hence, also were prevented from being in a position "to present in writing all evidence which they consider relevant in respect of the investigation in question," as required by Article 6.1. In failing to respond to the due process concerns raised by the Argentine companies, and to identify the information that would be used by USDOC in its decision making, the USDOC also deprived the Argentine respondents of a "full opportunity for the defence of their interests" as required by Article 6.2.

88. The failure of USDOC to respond to these concerns demonstrates that the United States failed to discharge the due process and transparency obligations that are central to Articles 6.1 and 6.2 and which ensure that interested parties are in a position to defend their interests by having "full" and "ample" opportunity to defend their interests.

Argentina's Comments on the US, Answer to Question 21(b)

89. Argentina notes that the United States qualifies its answer with the phrase "notwithstanding the limited time available."[68] Argentina does not agree that the word "practicable" requires this Panel

[64] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 177.
[65] Appellate Body Report, *US - OCTG from Mexico*, paras. 200-201.
[66] USDOC Section 129 Determination at 11 (ARG-16) (emphasis added).
[67] US Answers to Panel Questions, 24 July 2006, para. 83.
[68] US Answers to Panel Questions, 24 July 2006, para. 84.

to take into account the fact that the United States conducted its Section 129 determination under a shorter time frame. In general terms, what is "practicable" for the purposes of Article 6.4 will need to be determined on a case-by-case basis. However, for the specific purpose of this case, the Panel can readily reject the argument that reduced time frames renders compliance with Article 6.4 somehow "impracticable." As Argentina has argued, all WTO obligations apply on a concurrent and overlapping basis. The United States was required to comply with its obligations under Article 6.4 while concurrently complying with its obligation under Article 21.3(c) to bring its measures into conformity with its WTO obligations in the shortest period of time possible - which the Arbitrator determined to be twelve months.

90. Also, the obligations of Article 6.4 must be read in context. This context includes other provisions of the Anti-Dumping Agreement, most notably Articles 11.3 and 11.4.

91. The United States reference to the fact that *one* of the five memoranda dated 16 December 2005 "consisted of respondent and domestic interested parties' submissions in the original sunset review"[69] completely misses the point. By virtue of being issued contemporaneously with USDOC's Section 129 Determination, the USDOC failed to "provide timely opportunities for all interested parties to see" any of the five memoranda, which were clearly "relevant to the presentation of their claims."

92. Finally, supporting the contention that USDOC "disclosed the reasoning as soon as practicable," the United States asserts that "Commerce received Siderca's rebuttal of IPSCO's arguments on the cost data as on 14 December 2005. The memoranda on the deficiencies in the cost data were released just two days later, on 16 December 2005."[70] This is disingenuous. The United States picked the date the last comments were submitted on Siderca's cost data. Yet, as early as 30 November 2005, the USDOC was aware that there could be a problem, and could have at this time to advise the parties of information that was "relevant to the presentation of their claims."

Argentina's Comments on the US, Answer to Question 24

93. Argentina would note that access by a foreign respondent's legal counsel to confidential documents under an APO does not discharge US obligations under Article 6.5.1. Article 6.5.1 uses plain language: "The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof." If the drafters of the Agreement wanted to provide that access by counsel would excuse a Member from complying with this clear obligation, they could easily have provided for that. They did not do so.

94. Moreover, even assuming *arguendo* that access by counsel could constitute a form of compliance with Article 6.5.1, this access would have to be granted in a manner that fulfils the due process purpose of this provision. Indeed, the very next sentence of Article 6.5.1 states that: "These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence."

95. That "reasonable understanding," in turn, is required to enable the responding parties to assert their due process rights under the Agreement. In the present case, Siderca's legal counsel obtained copies of the proprietary documents identified in the Section 129 Determination, only *after* the Determination had been issued. Providing counsel access to confidential information in this *ex post facto* manner serves no purpose, and obviously renders meaningless the due process intent of Article 6.5.1.

[69] US Answers to Panel Questions, 24 July 2006, para. 85.
[70] US Answers to Panel Questions, 24 July 2006, para. 86.

Argentina's Comments on US Answer to Question 26(a)

96. The response by the United States in 26(a) is, again, filled with inaccurate statements and factual assertions that simply have no basis in the Section 129 proceeding. For example:

- The United States correctly states that it considered the fact that non-OCTG costs were significantly higher for OCTG products.[71] The United States then indicates: "this was an unexpected result because Siderca had been a large producer of standard line pipe – a lower value-added product – and thus these non-OCTG costs should have been lower."[72] This statement again confirms that the Department was acting on assumptions and intuition about what Siderca's costs should show, without any factual basis. As Siderca has explained in its written submissions to the Panel and in the substantive meeting of the parties, ***there is nothing wrong with the notion that non-OCTG products have a higher cost than OCTG***. To the extent that the USDOC expected that it should always be the case, it was simply wrong.

- The United States adds to the mistake by asserting now new facts which also were not developed during the Section 129 proceeding. Siderca is not ***a large producer of standard line pipe***,[73] and there is no support in the record of the Section 129 proceeding that it is. As the Department must know, Siderca is a producer of ***seamless*** *tubular products*, and the market for ***seamless standard pipe*** is extremely small. As Argentina pointed out in its first written submission, seamless standard pipe is not a high-demand product, and it is inconceivable that anyone who knows the tubular products market would assert that Siderca produces a high volume of this product. In any event, there is no factual basis whatsoever for this statement, and the United States continues to disregard Argentina's rebuttal of this specific point.[74]

- The United States also asserts that USDOC found that "Siderca had reported lower costs for [an alloy product than for the corresponding carbon product]. That is a result that should not occur."[75] Again, the comment demonstrates what the Department believes "should" occur, without any factual basis whatsoever. Argentina has explained before to this Panel in its written submissions that making decisions on the basis of these untested assumptions is directly contrary to the Article 11.3 obligation, and to the due process requirements of Article 6. The Argentine exporters never knew that USDOC expected that alloy products would always be more expensive to produce than carbon products. In fact, as Argentina has argued, and as Siderca could have explained in the course of the proceeding had it known this comparison was being contemplated, much depends on the product mix. For example, within the ten categories, OCTG with a small outside diameter would generally require more machine time than OCTG with a large outside diameter. Therefore, the per ton processing costs of the smaller product would generally be much higher than the per ton processing costs of the larger product. If the small product is carbon, while the larger product is alloy, the smaller carbon product may have a higher per ton production cost than the larger alloy product because the

[71] US Answers to Panel Questions, 24 July 2006, para. 90, first sentence.
[72] US Answers to Panel Questions, 24 July 2006, para. 90, second sentence.
[73] The reference to "standard line pipe" is ambiguous. There is "standard pipe" and there is "line pipe", but Argentina and Siderca are unaware of which the United States means when it says "standard line pipe." Again, there are no facts on the record to support the proposition, regardless of what the United States meant by this statement.
[74] *See* Argentina's First Submission, para. 91 and note 71.
[75] US Answers to Panel Questions, 24 July 2006, para. 90.

additional processing costs per ton due to the size of the product might offset the higher material cost resulting from the use of the alloys in the larger product. Again, this explanation should have occurred in the Section 129 proceeding; it did not because Siderca did not know that the USDOC was performing these comparisons and measuring the costs against certain unexplained, unrevealed "assumptions."

- The United States then offers its own price comparison, selecting March 1998, and concluding that the price of carbon seamless casing reported in Preston Pipe that month was $192 per ton less than then alloy seamless casing during the same month. But, we already know that the Preston Pipe does not distinguish between end finishes, and that end finishes affect the price and cost of a product. And, the United States also has admitted that the USDOC could not know the effect of transportation costs in these prices, as that would depend on the mix of imported and domestic mill shipments in the averages at any particular time. Therefore, the price difference that the United States calculates establishes nothing more than the following: In the month of March 1998, for the mix of products sold as carbon seamless casing and alloy seamless casing, both with various, unknown end finishings, sizes, weights, lengths, and freight costs, the average price difference of the two groupings was $192/ton. Attempting to infer from observation that alloying products will always be more expensive than carbon products to produce is highly suspect and would lead to inaccurate conclusions.

- The Department concludes with a statement, "Regardless of whether the data is reviewed on a broader level or a more specific level, the costs did not reflect the reality of OCTG production." This conclusory statement reveals the problems with the two comparisons performed by the Department of Commerce. The Department considered itself to be in a better position to know the "reality of OCTG production" than the producers. Therefore, it made assumptions (some demonstrably incorrect) and made decisions about the reliability of data based on those assumptions. That is not consistent with the obligation of Article 11.3 or the due process obligations of Article 6.

97. Finally, in paragraph 91, the United States observes that in some months the difference between the costs of alloy and carbon products are very small, even when compared with the same end finishing. Again, there is no evidence from the Section 129 Determination that USDOC ever performed this comparison. In fact, the documents show that it did not: the Department calculated weighted averages of the threaded and plain end products before performing the comparisons. In any event, the size of the difference in any particular month will depend on the precise product mix within the groupings. End finishes and the steel grade used are two of the factors, but as Argentina has consistently explained, other factors, such as outside diameter, wall thickness, range, all affect the specific costs. In the end, it is the Department that is making the assumption that alloy products are always more expensive than carbon products; it cannot criticize exporters for showing that, in any given month, the cost of the products being reported do not conform to USDOC's untested assumptions.

Argentina's Comments on US Answer to Questions 26(d)-(f)

98. In subparts (d)-(f), the Panel asks specific questions to the United States regarding the comparisons performed in the Section 129 Determination. Argentina refers the Panel to Argentina's 24 July answer to Question 26(c). In Argentina's answer to this question, Argentina explains that USDOC performed two different comparisons for two different purposes: (1) a comparison intended to test the theory that the alloy should be more expensive than the carbon product, and (2) to

determine whether Acindar was likely dumping in the past.[76] Comparison 2 is the only comparison involving the Preston Pipe categories.

99. In its responses to Subparts (d)-(f), the United States continues to blur the distinction between these two comparisons in the hope of making its actions sound reasonable. For example, the United States explains that it requested that the producers provide costs and that they distinguishing between plain and threaded and coupled OCTG, but "because Commerce later found that the Preston data did not create discrete categories for plain-end and threaded and coupled, Commerce had to modify those categories when it conducted its analysis."[77] This is clearly wrong, and a mixture of the two comparisons. The Preston data was ***irrelevant*** to comparison number 1 -- i.e., whether Siderca's costs were reliable, which USDOC tested by using only Siderca data. The Preston data has nothing to do with comparison 1. Clearly, the United States is mixing up the comparisons here.

100. The United States does the same thing later when it claims that Siderca has been taking different positions. According to the United States: "Argentina currently argues that Commerce should have made the comparison between carbon and alloy PE, and carbon and alloy T&C. However, during the underlying proceeding, Siderca argued against making such a comparison…. In rebutting Petitioners' counsel's proposed approach, Siderca then argued that Commerce make the comparison on a product-category level, (i.e., all OCTG)."[78] The following should be obvious at this point:

- Argentina's position has been that, for comparison 1 (to determine the cost relationship of producing carbon and alloy products), the comparison should have been made between product groupings with the same end finish so as to attempt to isolate the effect of the steel grade factor (to use the example in the quotation, carbon and alloy PE should have been compared to carbon and alloy T&C). Siderca's position in the Section 129 proceeding could not possibly have contradicted this position because USDOC never informed any of the parties that it was performing comparison 1, so that Siderca never knew that this comparison was underway.

- Siderca's arguments in the Section 129 Determination against "making such a comparison" refer to comparison 2 – that is, trying to determine dumping by comparison at a broad product category level.

- The United States is distorting the record when it states that Siderca was arguing for Commerce to make comparisons on a product-category level. It makes this statement several times in its responses to answers, evidently trying to create the impression that it is true. When the Panel examines the source document for this claim (ARG-19), it will see that Siderca was not ***arguing for*** this particular comparison; it was merely pointing out the deficiencies of the doing comparisons along the lines of the ten product categories, and **arguing against** any comparisons on such a general level.

Argentina's Comments on the US, Answer to Questions 27 and 28

101. The US answers to the questions 27 and 28 highlight the inconsistency in the US position on Siderca's cost information, and reveal a results oriented approach to the Section 129 Determination. The United States asserts that the USDOC "requested the cost data" from the Argentine producers "to assist it in evaluating the companies' behaviour over the life of the order."[79] Once Siderca provided

[76] Argentina's Answers to Panel Questions, 24 July 2006, para. 137.
[77] US Answers to Panel Questions, 24 July 2006, para. 94.
[78] US Answers to Panel Questions, 24 July 2006, para. 96.
[79] US Answers to Panel Questions, 24 July 2006, para. 98.

cost information, however, and that cost information generated results that USDOC did not expect, the USDOC rejected or (to use the US phrase, "did not consider") Siderca's information because, the United States asserts, "the combination of deficiencies in the cost data and Siderca's lack of shipments during the period of review led Commerce to make no specific finding with regard to Siderca."[80]

102. The US position that USDOC could properly reject/not consider Siderca's information is based on two factors. First, that USDOC made no findings regarding Siderca. Second, because an Article 11.3 determination is made on "an order-wide basis," the United States implies that it already had a sufficient basis for its "country-wide" determination (the finding regarding Acindar's likely past dumping, and the inference arising from the volume decline) so that it was free to disregard Siderca's information.[81]

103. Argentina has provided extensive rebuttal as to the evidentiary sufficiency and WTO-consistency of these bases for the Section 129 Determination. The information provided by Siderca certainly was relevant to USDOC's Article 11.3 determination. Information provided by the major producer in the country is, by definition, relevant to a "country-wide" determination of whether future exports are likely to be dumped.

104. Siderca provided both cost information in response to the USDOC's questions, and information regarding its commercial and production operations from its financial statements.[82] The cost data was germane because it is the information that the USDOC chose to develop. That information was necessarily part of the evidentiary basis that the USDOC chose to develop to make its Section 129 Determination. The cost data is the information requested by the USDOC and Siderca provided information to the best of its ability, a fact which has not been disputed. In addition, Siderca explained to the USDOC that the data supported the view that Siderca would not be likely to dump in the future, as it showed that Siderca had achieved certain efficiencies even in difficult market times and was able to sell its products at above its cost of production.[83] In other words, this was positive evidence that the major Argentine producer was able to sell at prices that exceeded its costs, and that its production efficiency had increased throughout the sunset period.

105. Simply because Siderca's information is not what USDOC expected does not mean that it can be disregarded, or that it is not germane to the authority's determination. Of course, if the information is inaccurate, an authority could be excused from considering the information. But, inaccuracy of the data is something that needs to be demonstrated, which did not occur in this case for the reasons explained. Similarly also relevant was the other information that Siderca provided (commercial and production information based on its financial statements). This information provided the context for understanding the volume decrease (which was not related to an inability to ship without dumping), and also contained information that contradicted the USDOC's finding that the record contained no information of a turnaround in the OCTG market.[84]

106. In the end, as demonstrated by the US answers and the bases underlying the Section 129 Determination, the US position can be reduced to the following point: there is no positive evidence that Siderca, the major Argentine OCTG producer, was dumping or would be likely to dump. In the event that the authority can find no positive evidence with respect to the major producer, the obligation of Article 11.3 is not satisfied when the authority simply asserts that it will make "no finding." In such a case, Article 11.3 requires termination of the measure because the conditions

[80] US Answers to Panel Questions, 24 July 2006, para. 99.
[81] US First Submission, para. 44.
[82] Siderca's Response to Questionnaire (ARG-15).
[83] Siderca's Response to Questionnaire at pages 2-10 (ARG-15).
[84] Argentina's First Submission, para. 99 (referring to USDOC Section 129 Determination (ARG-16) at 9-10).

necessary for continuing the measure on the basis of a determination supported by positive evidence have not been satisfied.

Argentina's Comments on US Answer to Question 30

107. The United States makes the incredible assertion that Siderca's cost information "was, by Siderca's own characterization, not verifiable within the meaning of paragraph 3 of Annex II."[85] Argentina has already explained that Siderca was instructed to provide verifiable data, and that Siderca did so. In fact, the Department requested a reconciliation of the cost data to the financial statements, and Siderca reconciled that cost data to the financial statements of each year during the period of review.[86] Siderca also explained in its response to criticisms by one of the representatives of the US industry that the reconciliation had been prepared so that it would tie to the financial statements of the company for each year.[87] Thus, it is simply wrong for the Department to say that this information was not verifiable, or that Siderca had characterized it as such.

108. The United States also repeats its statement that the costs "did not reflect the reality of OCTG production."[88] This is essentially an admission that the United States continues to rely on assumptions about the "reality of OCTG production" rather than develop information that could be debated by the parties, who are the experts in OCTG production. Finally, the United States ends with the incredible statement that "while Commerce could have verified the 2005 data, verification would not have changed the end result: Siderca's extrapolation did not accurately reflect the cost for 1995 to 2000." It is hard to imagine a statement more revealing of pre-judgment. In fact, all of the cost data was verifiable. A statement by the United States that verification would not have mattered because it would not have changed USDOC's preconceived notions is not an objective assessment of the record. In fact, the verification could have shown that the USDOC was incorrect in its assumptions.

Argentina's Comments on the US, Answer to Questions 31 (a) and (b)

109. The United States continues to assert that "Annex II is not relevant to Commerce's Section 129 Determination because Commerce did not use 'facts available' with respect to Siderca – it made no determination with respect to Siderca."[89] The Panel should reject the US position.

110. The United States seeks to elevate form over substance in an effort to avoid the disciplines of Article 6.8 and Annex II. However, the fact that the United States did not use the phrase "facts available" cannot be dispositive in this case. Similarly unavailing are US statements that USDOC simply did "not consider" Siderca's, or Siderca's information was not "germane" or that USDOC "made no determination with respect to Siderca." None of these efforts to cloak USDOC's failure to apply the disciplines of Article 6.8 and Annex II should convince the Panel otherwise.

111. There is no textual support for a narrow reading of the Agreement where Article 6.8 and Annex II would apply only to information that supports the conclusions of the investigating authorities, but not to information that contradicts or detracts from its conclusions.

112. In this case, there is no basis to debate the applicability of paragraph 3 of Annex II. This provision requires the administering authority "take into account" for purposes of its determination "all information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties." The cost information submitted by Siderca was "verifiable"

[85] US Answers to Panel Questions, 24 July 2006, para. 106.
[86] *See* ARG-15, Annex 5.
[87] *See* ARG-29, pages 4-5.
[88] US Answers to Panel Questions, 24 July 2006, para. 106.
[89] US Answers to Panel Questions, 24 July 2006, para. 108.

within the meaning of paragraph 3. The information provided by Siderca was verifiable, and was appropriately submitted. Siderca's letter to the USDOC, dated 14 December 2006, page 4, (ARG-29), confirms that Siderca was fully prepared to have its cost data verified and that the "data has been reconstructed using cost reports from the same production lines and cost centres used to produce OCTG during the period. Information on the cost of operating the lines during the 1995-2000 period is available, was used by Siderca, and would be available for verification if the Department so chose. The Department indicated in its questionnaire that Siderca should use verifiable data, and Siderca confirms that it heeded this advice."

113. The USDOC did not use Siderca's information on the basis of purported "inconsistencies" and "methodological discrepancies." USDOC did so without asking Siderca to clarify these purported problems or without giving Siderca an opportunity to remedy the purported deficiencies. Moreover, Argentina has demonstrated that the Department's purported substantive rationale for rejecting the cost data is flawed and that USDOC could have readily used Siderca's cost information in the Section 129 proceeding without "undue difficulties." Consequently, the USDOC was therefore required under paragraph 3 of Annex II to take such information into account in its Section 129 determination, but it failed to do so. As the Panel clarified in *US – Steel Plate from India*, a decision by an administering authority to reject information provided by an exporter, where that decision "lacks a valid basis under paragraph 3 of Annex II of the AD Agreement," will result in an violation of the requirements of Article 6.8 and paragraph 3 of Annex II.[90]

Argentina's Comments on the US, Answer to Questions 32(a) and (b)

114. The US response to this question follows the same pattern that "Annex II is not applicable," that USDOC "did not make any finding regarding Siderca on the basis of 'facts available'" and that USDOC was under "no obligation to inform Siderca" that its cost information would not be used.[91]

115. Argentina invites the Panel to review Argentina's comments above regarding the US answer to Question 31, which are equally relevant for purposes of the US answers to question 32.

116. In addition, Argentina would address specifically the obligations of paragraph 6 of Annex II, which was the subject of the Panel's question and which the United States did not address. In the circumstances of this case, the USDOC acted inconsistently with US obligations under the provisions of paragraph 6 of Annex II.

117. Central to the Panel's finding of a violation of Article 6.8 and Annex II, paragraph 6 in *Egypt – Rebar from* Turkey, was the investigating authority's failure to inform the respondent parties of certain deficiencies and provide them with a chance to provide clarification or further explanations. The Panel concluded that "Egypt violated Article 6.8 and Annex II, paragraph 6, in respect of [the respondent exporters], because the [investigating authority], having identified to these respondents the information "necessary" to verify their cost data, and having received that information, nevertheless found that the respondents had failed to provide "necessary information."[92] The Panel in that case faulted the investigating authority because it did not "inform these companies of this finding and did not give them an opportunity to provide further explanations."

118. The circumstances of USDOC's Section 129 proceeding and its treatment of Siderca's cost information are no different. USDOC clearly was under an obligation to inform Siderca of the fact that its cost information would not be used by the USDOC for purposes of the Section 129 Determination.

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[90] Panel Report, *US – Steel Plate from India*, WT/DS206/R, para. 7.79.
[91] US Answers to Panel Questions, 24 July 2006, para. 112.
[92] Panel Report, *Egypt – Rebar from Turkey*, WT/DS211, para. 7.266.

119. The conduct of USDOC is especially troubling given that Siderca attempted to provide the data as it was requested by the USDOC. If USDOC had concerns regarding the information submitted by Siderca, USDOC was required to provide Siderca with an opportunity to provide comments as to why the information should not de disregarded by the USDOC. This opportunity should have been available to Siderca prior to the issuance of its Section 129 Determination, and the USDOC file memoranda that contained the analysis and information regarding the purported "inconsistencies" and "methodological discrepancies.

ANNEX E-4

COMMENTS OF THE UNTIED STATES ON ARGENTINA'S ANSWERS TO THE QUESTIONS FROM THE PANEL TO THE PARTIES

WAIVER PROVISIONS

Q1. The Panel notes that Argentina argues, and the United States does not contest, that the US law requires the USDOC to make its ultimate sunset determinations on an order-wide basis. Please explain whether this is the case and, if so, cite the relevant provisions of the US law (including regulations and/or policy provisions) which require the US investigating authorities to make their sunset determinations on an order-wide basis and provide copies thereof.

1. Rather than answer the question posed by the Panel, Argentina argues that the United States has failed to bring its statutory and regulatory waiver provisions into conformity with the DSB's recommendations and rulings. As the United States has previously explained, Commerce's modification of its sunset regulations eliminates the possibility that Commerce's order-wide likelihood determinations would be based on assumptions about likelihood of continuation or recurrence of dumping due to respondent interested parties' waiver of participation in sunset reviews.[1]

2. Argentina's interpretation of section 751(c)(4)(B) of the Tariff Act – that the statute "*mandates* a certain outcome" – is simply incorrect.[2] The only action required by section 751(c)(4) of the Tariff Act is that Commerce make an affirmative company-specific likelihood finding *as a consequence of* a party choosing to submit a waiver – the contents of which are prescribed by the sunset regulations. Specifically, section 351.218(d)(2)(ii) of the sunset regulations provides that a party choosing to submit a waiver must include a statement that it would be likely to dump if the order were revoked. Thus, a company-specific likelihood finding under section 751(c)(4)(B) of the Tariff Act would only be a consequence of a party's admission that it is likely to dump if the order were revoked.

3. Contrary to Argentina's assertions, failure of respondent interested parties to participate in a sunset review would not trigger section 751(c)(4)(B) of the Tariff Act. As the United States previously noted, since the 2005 Sunset Regulations went into effect Commerce has ***not*** made findings of waiver or company-specific likelihood in cases where respondent interested parties failed to participate in a sunset review.[3]

4. Finally, Argentina's arguments concerning the interpretation of section 751(c)(4) of the Tariff Act are contrary to the findings of the Panel in the original proceeding with respect to the operation of the statutory and regulatory waiver provisions.[4] Argentina is asking the Panel in this Article 21.5 proceeding to make a factual finding that would contradict factual findings made in the original phase of this dispute. That is not the Panel's role in this Article 21.5 compliance proceeding. Argentina has

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[1] *See* US First Written Submission, paras. 16-21; US Second Written Submission, paras. 12-19; US Answers to Questions from the Panel, paras. 2-24; and 2005 Sunset Regulations, 70 FR at 62062-62063 (Exhibit ARG-12)

[2] Argentina Answers to Questions from the Panel, para. 3 (emphasis in original).

[3] US Answers to Questions from the Panel, paras. 12 and 18.

[4] *See, e.g.,* US Second Written Submission, para. 17, quoting the Panel Report, paras. 7.84-7.85.

failed to demonstrate that amendment of the regulatory waiver provisions fails to bring the US measure into conformity with the DSB's recommendations and rulings.

Q2. The Panel notes Argentina's assertion, in paragraph 156 of its Second Written Submission, that the current US law directs the USDOC to find likelihood for companies that "elect not to participate in USDOC's sunset review, but also does not file an affirmative statement of waiver and an admission that it is likely to dump". The Panel also notes Argentina's statement in paragraph 83 of its oral submission that the Tariff Act directs the USDOC to find likelihood for exporters that do not participate and that do not file a statement of waiver either. Finally, the Panel notes the US' statement in paragraphs 5 and 8 of its oral submission that "deemed waivers" have now disappeared following the deletion of Section 351.218(d)(2)(iii) of the Regulations.

(a) Is Argentina challenging the US implementation of recommendations and rulings relating to "deemed waivers"? Should the Panel understand Argentina's assertion to be that the so-called "deemed waiver" provisions of the US law have not been repealed, or properly amended, by the United States in the context of implementing the DSB's recommendations and rulings in this case? Please elaborate.

5. Argentina argues that the Panel should consider how the US statutory and regulatory waiver provisions operate in order to determine whether the United States has brought its measure into conformity with the DSB's recommendations and rulings. In its original report, the Panel already addressed how the US statutory and regulatory waiver provisions operate.

6. Rather than demonstrate how the United States has failed to bring its measure into conformity with the DSB's recommendations and rulings – presumably because it is unable to do so – Argentina chooses to mischaracterize the terms and operation of section 751(c)(4) of the Tariff Act. The terms of the statute simply do not direct a company-specific finding of likelihood for any respondent interested party that fails to participate in a sunset review.[5] Moreover, the scope of the waiver provisions in the regulations is now simply coterminous with the scope of the statute.[6] Argentina's suggestion to the contrary is fallacious and premised upon its incorrect interpretation of the plain meaning of the statute.[7]

7. Finally, the fact that the statute directs Commerce to make a company-specific likelihood finding for a company that files a waiver statement does not mean, *ipso facto* as Argentina contends,[8] that Commerce would disregard other, contrary record evidence in reaching its ultimate order-wide likelihood determination. As previously explained, while Commerce would consider a company-specific likelihood finding in making its order-wide likelihood determination, the relevance of such a company-specific finding to the ultimate sunset determination always would depend on the facts on the administrative record in that sunset review.[9] The statute does not require Commerce to find likelihood in its ultimate order-wide determination just because a company elects not to participate in the sunset review.

(b) If not, would it be an accurate characterization of Argentina's claim to stipulate that Argentina is only taking issue with the so-called "explicit waiver"

[5] *See, e.g.,* US Answers to Questions from the Panel, paras. 10-12.

[6] *See* US Answers to Questions from the Panel, paras. 2-9, 21-24.

[7] *See* Argentina Answers to Questions from the Panel, para. 11 (implying that Commerce is attempting to "override" the statute through modification of its regulations).

[8] Argentina Answers to Questions from the Panel, para. 13.

[9] *See* US Answers to Questions from the Panel, paras. 13-14, 19-20.

provisions of the US law in these Article 21.5 DSU proceedings? If so, would Argentina agree that the current US law does not contain any provision that deems exporters to have waived their right to participate in sunset reviews for failure to provide a full substantive response to the USDOC's questionnaire or for any other reason? Please elaborate.

8. Argentina's interpretation of the terms of section 751(c)(4) of the Tariff Act – including the phrase "elect not to participate" in subparagraph "(A)" is incorrect. "Election," as contemplated by the statute, means taking affirmative action to signal that a party is voluntarily choosing to waive its participation, *i.e.*, by submitting a waiver to Commerce. The Statement of Administrative Action – an authoritative interpretive tool for the statute – confirms this reading of the statute:

> *If Commerce receives such a waiver*, Commerce will conclude that revocation ... would be likely to lead to continuation or recurrence of dumping ... with respect to *the submitter*.[10]

Therefore, contrary to Argentina's contention, the terms of the statute do not direct a company-specific finding of likelihood for respondent interested parties that fail to participate at all in a sunset review.[11]

9. Argentina also is wrong that application of section 751(c)(4)(B) of the Tariff Act, triggered by filing a waiver statement and resulting in a *company-specific* finding of likelihood, is inconsistent with Article 11.3 of the AD Agreement.[12] As the Appellate Body recognized,

> [I]t [is] neither necessary nor relevant ... to draw a conclusion as to the WTO-consistency of the *company-specific* determinations resulting from the waiver provisions. As we have observed, the relevant inquiry in this dispute is whether the *order-wide* likelihood determination would be rendered inconsistent with Article 11.3 by virtue of the operation of the waiver provisions.[13]

10. Thus, contrary to Argentina's assertion, a company-specific finding of likelihood in and of itself cannot violate Article 11.3. Moreover, Argentina has failed to demonstrate how Commerce's ultimate order-wide likelihood determination is rendered inconsistent with Article 11.3 because there is a possibility it might, in part, be based on a company-specific likelihood determination premised upon a party's own statement that it is likely to dump if the order were revoked. As previously explained, in reaching its ultimate order-wide likelihood determination Commerce would consider all evidence and argument on the administrative record. The relevance of a company-specific finding to the ultimate sunset determination always would depend on the facts on the record in that sunset review.[14] The statute does not require Commerce to find likelihood in its ultimate order-wide determination just because a company elects not to participate in the sunset review.

11. Argentina's interpretation of section 751(c)(4) of the Tariff Act is contrary to the original findings of the Panel with respect to the operation of the statutory and regulatory waiver provisions.[15] The Panel in this Article 21.5 compliance proceeding need not, and should not, revisit this finding.

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[10] SAA at 881 (emphasis added) (Exhibit US-12).
[11] Argentina Answers to Questions from the Panel, para. 16.
[12] Argentina Answers to Questions from the Panel, para. 15.
[13] Appellate Body Report, para. 232 (emphasis in original).
[14] *See* US Answers to Questions from the Panel, paras. 13-14, 19-20.
[15] *See, e.g.*, US Second Written Submission, para. 17, quoting the Panel Report, paras. 7.84-7.85.

Q7. Under what circumstances would a signed waiver statement constitute a sufficient evidentiary basis for an affirmative likelihood determination? Would your response depend on the circumstances of a given sunset review? For example, would your response differ in relation to: (i) a review in which the only exporter submits a signed waiver statement; (ii) a review in which, of the 20 exporters involved, 10 submit a signed waiver statement and 10 participate cooperatively; (iii) a review in which, of the 20 exporters involved, 1 submits a signed waiver statement and 19 remain silent? How would the company-specific conclusions of likelihood with respect to exporters that waive their right to participate (by signing a statement of waiver) in these scenarios be reflected in an ultimate order-wide determination?

12. As Argentina recognizes, Commerce will make a company-specific likelihood finding *as a consequence of* a party choosing to submit a waiver – the contents of which are prescribed by the sunset regulations. Specifically, section 351.218(d)(2)(ii) of the sunset regulations provides that a party choosing to submit a waiver must include a statement that it would be likely to dump if the order were revoked. We also agree with Argentina that the probative value of a company-specific finding relative to the ultimate sunset determination can vary and would depend on the particular facts on the record in that sunset review.[16]

13. In the underlying proceeding, the Appellate Body recognized that the relevant question with regard to Commerce's sunset review is whether the *order-wide* likelihood determination is consistent with Article 11.3 of the AD Agreement. A company-specific likelihood finding would be relevant only to the extent that it "tainted" the ultimate order-wide determination. As the Appellate Body stated,

> [I]t [is] neither necessary nor relevant ... to draw a conclusion as to the WTO-consistency of the *company-specific* determinations resulting from the waiver provisions. As we have observed, the relevant inquiry in this dispute is whether the *order-wide* likelihood determination would be rendered inconsistent with Article 11.3 by virtue of the operation of the waiver provisions.[17]

Thus, contrary to Argentina's assertion, a company-specific finding of likelihood in and of itself cannot breach Article 11.3.

14. Moreover, the adverse finding in the underlying dispute was that company-specific likelihood findings were based on an *assumption*, rather than on record evidence. Commerce's amended sunset regulations eliminate the possibility that a company-specific likelihood finding will be based on an assumption.

15. Argentina's arguments in this compliance proceeding fail to consider or address the changes to Commerce's sunset regulations. Specifically, Argentina has failed to demonstrate how Commerce's ultimate order-wide likelihood determination is rendered inconsistent with Article 11.3 because there is a possibility it might, in part, be based on a company-specific likelihood determination premised upon a party's own statement that it is likely to dump if the order were revoked. As previously explained, in reaching its ultimate order-wide likelihood determination Commerce would consider all evidence and argument on the administrative record. Therefore, the relevance of a company-specific finding to the ultimate sunset determination always would depend on the facts on the record in that sunset review.[18] No assumption is implicated.

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[16] Argentina Answers to Questions from the Panel, para. 19.
[17] Appellate Body Report, para. 232 (emphasis in original).
[18] *See* US Answers to Questions from the Panel, paras. 13-14, 19-20.

Q8. The Panel notes that Section 751 (c)(4) of the Tariff Act does not define the term "waiver". The Panel also notes that Section 351.218(2)(ii) of the Regulations states that a statement of waiver "must include a statement indicating that the respondent is likely to dump."

Can this, in your view, be interpreted to mean that the Regulations nullify, or limit the scope of, the Statute in so far as the Statute refers to waiver.

16. Again, Argentina's interpretation of the terms and operation of section 751(c)(4) of the Tariff Act is incorrect. Commerce has not issued a regulation that is inconsistent with the statute. Rather, as previously demonstrated, the scope of the 2005 regulatory waiver provisions now is coterminous with the scope of the statute.[19] Specifically, section 751(c)(4) of the Tariff Act directs Commerce to make an affirmative company-specific likelihood finding as a consequence of a party choosing *to submit* a waiver. The regulations prescribe the content of such waivers. Contrary to Argentina's contention, the terms of the statute do ***not*** direct a company-specific finding of likelihood for a respondent interested party that fails to participate in a sunset review.[20] As previously noted, since the 2005 Sunset Regulations went into effect Commerce has ***not*** made findings of waiver or company-specific likelihood in cases where respondent interested parties failed to participate in a sunset review.[21]

Q9. The Panel notes Argentina's arguments regarding the new factual basis developed by the USDOC in its Section 129 Determination. Is it Argentina's view that Article 11.3 of the Anti-dumping Agreement ("Agreement") precludes an investigating authority from developing new facts in order to comply with the DSB recommendations and rulings regarding the inadequacy of the factual basis of its sunset determinations? Please elaborate on the temporal and substantive considerations involved in gathering "new facts" in light of the notion of implementation of the DSB recommendations and rulings embodied, among others, in Articles 19, 21, and 22 of the Dispute Settlement Understanding ("DSU"). How should an investigating authority accommodate the "prospective nature" of sunset reviews under Article 11.3 in the process of gathering "new facts" in the course of implementation?

17. Argentina reiterates its assertion that Articles 11.3 and 11.4 somehow limit an investigating authority from collecting new facts in the course of implementing the recommendations and rulings of the DSB. Indeed, Argentina now argues that an investigating authority need not only initiate its review prior the expiry of the five-year anniversary of the imposition of the order, but that the investigating authority must also "gather the necessary positive evidence" prior to the expiry of the five-year period.[22] Articles 11.3 and 11.4 plainly state that an investigating authority must *initiate* a review prior to the expiry of the five-year period and that such a review should "normally" be completed within 12 months. Neither article addresses the issue of "gathering facts".

18. Argentina also misunderstands the relevance of the provisions of the DSU identified in the question. These provisions highlight that there are many possible means to implement the recommendations and rulings of the DSB, and, the means of implementation are left to the discretion of the implementing Member. Thus, Article 19.1 requires a panel to recommend that a Member bring its measure into conformity with the agreement in question, but a panel *may suggest* ways in which the Member *could* implement the recommendations. Article 21.3 recognizes that it may be impracticable for a Member to comply immediately with the recommendations and rulings and thus

[19] *See* US Answers to Questions from the Panel, paras. 2-9, 21-24.
[20] *See, e.g.*, US Answers to Questions from the Panel, paras. 10-12.
[21] US Answers to Questions from the Panel, paras. 12 and 18.
[22] Argentina Answers to Panel Questions, para. 25.

affords a Member a reasonable period of time in which to do so. These provisions do not restrict a Member's ability to collect new factual information.

19. The text of Articles 11.3 and 11.4 does not provide for sunset reviews to be treated any differently than any other measure found to be WTO-inconsistent – in other words, Argentina's attempt to read the "temporal restrictions" in Articles 11.3 and 11.4 as restricting a Member's means of implementation is without merit.

Q12. The Panel notes Argentina's claim regarding the comparison the USDOC made between Acindar's export prices and the average transaction price (by weighted average value) that prevailed in the US market for the subject product. The Panel also notes that the USDOC inferred from this comparison the conclusion that Acindar was likely dumping in the period of review.

> **(b) The Panel notes Argentina's assertion that the USDOC ignored certain factors that affected this comparison, such as differences in the physical characteristics of the products compared, the levels of trade at which the comparison was made, as well as differences relating to transportation costs.**
>
> **Please explain in detail and by referring to the relevant parts of the record, whether any of these factors were known to the USDOC in the Section 129 proceedings at issue and, if so, whether this was taken into account.**

20. Argentina complains that the comparisons Commerce made between the CBP data and Preston Pipe & Tube data did not take certain product characteristics into account.[23] However, Argentina has uniformly failed to explain how these comparisons could have been made on a more specific level given the fact that there was no record information to do so. Acindar never provided its costs – data that would have allowed Commerce to make comparisons on a more specific level. Foreign producers are in control of their own information – Commerce cannot be penalized for the foreign producers' failure to retain their own cost information.

21. Argentina asserts that Commerce's statement in the Section 129 Determination that the comparisons of the CBP data to the Preston Pipe & Tube data were "based on identical matches of these characteristics" is "factually incorrect."[24] Argentina suggests that Commerce's statement implies that Commerce based its matches on end finishing.[25] However, Argentina fails to inform this Panel that Commerce was explicitly referring to three characteristics:

> The categories which defined our product groupings in this determination were, of necessity, broad. They do, however, reflect three significant characteristics that serve to determine price in the market (*i.e.* seamless v. welded, carbon v. alloy, and casing v. tubing v. drill pipe). Furthermore, we made our comparison of Acindar's sales, discussed above, based on identical matches of these characteristics.[26]

Argentina is simply quoting part of a sentence out of context.

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[23] Argentina Answers to Questions from the Panel, para. 49.

[24] Argentina Answers to Questions from the Panel, para. 48. We note that this quote is taken from page 8 of the Section 129 determination – not page 4, as indicated by Argentina.

[25] *Id*.

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

22. Argentina also would like this panel to believe that end finishing results in a price difference of $250/ton.[27] However, a closer inspection of the US Steel price list, which was never placed on the record of the Section 129 proceeding, demonstrates that end finishing plays a much smaller role in pricing than Argentina asserts. First, the example Argentina points to on page 11 relates to plain end, non-upset tubing. Upsetting alone accounts for $150 of the price difference; and most of the market is casing, not tubing, and casing is mostly non-upset. In contrast, the price difference between PE and T&C for casing is only $70.[28] Thus, Argentina's example is not indicative of the normal pricing differences. Conversely, the price for carbon casing USS 50 is $755/ton, and that for H40/K55 is $785/ton, yet the lowest grade alloy for that same size is N80 at $955/ton and a higher grade alloy, P110, is $1110/ton. Thus, the price difference between alloy and carbon for one size of casing can range from $170/ton to $355/ton. Whether the OCTG is alloy or carbon has a more significant impact on the price than whether it is PE or T&C.

23. By comparing only contemporaneous identical matches for seamless v. welded, carbon v. alloy, and casing v. tubing for Acindar's sales, Commerce controlled for the factors that had the largest impact on the price. As previously explained, had respondents been able to provide reliable cost data, Commerce would have been able to make these comparisons on an even more precise basis.

Q13. The Panel notes that the USDOC's Section 129 Determination states that the USDOC did not use the cost data in Acindar's financial statements because those data related to a product category that included products other than the subject product. The USDOC stated that "the inclusion of costs related to the merchandise not subject to review would distort [the USDOC's] analysis." Yet the USDOC relied on these financial statements with respect to its determination that the OCTG market was depressed in the period of review.

(a) Please explain, by referring to the relevant parts of the record, the relevance of the financial statements of Siderca and Acindar for both the company-specific and order-wide phases of the USDOC's sunset determination in these proceedings. More specifically, please explain whether the USDOC used these statements in support of its order-wide determination that dumping was likely to continue or recur should the order be revoked and where such use is reflected on the record.

24. As a preliminary matter, Argentina argues that an order-wide likelihood determination in a sunset review requires the Member "to develop a sufficient factual basis regarding the likely actions of the specific companies."[29] This is not accurate. The Appellate Body has recognized that "a broad range of factors other than import volumes and dumping margins is potentially relevant to the authorities' likelihood determination."[30] Company-specific determinations are not necessary for an order-wide determination.

25. Argentina alleges that Commerce "rejected the more specific information which showed that the division producing OCTG was profitable," instead relying on information showing the loss that had been generated from the general operations.[31] This is not an accurate characterization of Commerce's finding. First, Commerce never "rejected" information in Acindar's financial statement. In fact, no party ever argued during the Section 129 proceeding that Acindar's OCTG production was profitable.

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[27] Argentina Answers to Questions from the Panel, para. 48.
[28] US Steel price list, at 6 (Exhibit ARG-34).
[29] Argentina Answers to Questions from the Panel, para. 52.
[30] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 186.
[31] Argentina Answers to Questions from the Panel, para. 53.

26. Second, Commerce explained that the cost data was too broad because it failed to break out OCTG products from the broad category of "tubes, pipes and structural products."[32] It would not have been a meaningful comparison to compare that broad of a category with the very specific importer data. Further, Acindar's financial statement never showed that OCTG was profitable. It only reported data on a broad product-basis and there is no way to measure the profitability of OCTG within that broader grouping.

27. In contrast, some broader conclusions regarding likelihood could be gathered from Acindar's financial statement. For instance, Acindar's overall operations were showing losses. When a company is experiencing such losses, it is reasonable to conclude that the company will continue to sell at below market prices in the United States rather than hold onto the inventory. In fact, Acindar confirmed that this was its sales plan, by explaining that "Acindar's strategy has been and will continue to be to focus on the Argentine market *while using the export market to stabilize its overall sales volume during periods of slowdown in domestic economic activity.*"[33] This is exactly what Acindar did during the following administrative review and was found to be dumping at a margin of 60.73 per cent. Therefore, even though the financial statements could not be used to make specific price comparisons, they did provide some information on the overall financial condition of Acindar and the likelihood determination as to Acindar.

28. Argentina argues in its comments in the table associated with paragraph 53 of its response that Commerce did not rely upon Acindar's financial statements to demonstrate Acindar's likelihood to dump if the order were revoked, but instead only relied upon them to demonstrate Acindar's likely past dumping. This is incorrect. In its Section 129 Determination, Commerce explained that its conclusion that "Acindar was likely to continue selling to the United States at dumped prices if the order were revoked" was supported by the above statement regarding Acindar's use of the export market to stabilize its overall sales volume.[34] Thus, information from the financial statement was used to demonstrate Acindar's likelihood to dump if the order were revoked.

29. Further, in its chart, Argentina suggests that Commerce relied on Siderca's financial statement to conclude that both companies would continue to sell at low prices after the period. However, that is incorrect; the determination plainly states that Siderca's financial statement supported Commerce's conclusion about the OCTG market generally – that it would be depressed – and not that Siderca would continue to sell at low prices.

(b) Please explain, by referring to the relevant parts of the record, whether the financial statements of these two companies reflected the overall production operations of these companies or whether the data relating to the subject product, i.e. OCTG, could be separately identified.

30. Contrary to Argentina's assertion, neither Siderca's nor Acindar's financial statements provided cost or sales data relating specifically to OCTG. Though Argentina concedes that Siderca's financial statements have no "disaggregation," it argues that Acindar's do.[35] However, on page F-75, it is clear that the information is only provided on broad terms – *e.g.*, foreign trade; tubes, pipes, and

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

[33] Section 129 Determination, at 10-11 (Exhibit ARG-16).

[34] Section 129 Determination, at 10-11 (Exhibit ARG-16).

[35] Argentina Answers to Questions from the Panel, para. 55. Though not asked about the extrapolated cost data, Siderca offers that its cost data provided the "relative volume." As previously explained, the cost data Siderca provided was only an estimate and failed to factor product-mix into account. Thus, there was no accurate information regarding Siderca's costs of OCTG production or the "relative volume of OCTG and non-OCTG products."

structural products; and steel and rolled products.[36] OCTG cannot be separately identified in either Acindar's or Siderca's financial statements. It should be noted Argentina has not identified any argumentation by respondents on the record of the Section 129 proceeding suggesting that Acindar's OCTG division was profitable.

(c) Please explain whether the share of OCTG in these two companies' overall production operations was taken into account in making the inference on the basis of these statements that the OCTG market was depressed.

31. Argentina argues that Commerce did not properly consider the overall share of OCTG production in these companies' operations in determining whether the OCTG market was depressed.[37] This statement ignores the fact that Commerce reviewed the experiences of US producers to confirm that the OCTG market was depressed.[38] Even Siderca asserted that the OCTG market was depressed in "1999/2000."[39]

Q16. The Panel notes Argentina's assertion in paragraph 30 of its Oral Statement that in the period of review of the Section 129 Sunset Determination at issue, the prices of the subject product in the United States were significantly higher than other markets. Please elaborate by referring to the relevant parts of the record of the measure at issue.

32. The United States noted in its response to this question that this information was not on the record of the Section 129 proceeding, and Argentina in its answer agrees.[40]

Q17. (a) How, if at all, did the original panel address the parties' claims and arguments relating to the USDOC's volume analysis? Did it exercise "judicial economy"?

33. The United States would simply note that it does not seek to "take advantage" of the original Panel's exercise of judicial economy. Rather, in order to comply with the recommendations and rulings of the DSB in this dispute, the United States was not required to reconsider its volume analysis, given that there were no findings that the US volume analysis was inconsistent with US WTO obligations. If Argentina considered that reconsideration of the volume analysis had been necessary to "resolve the dispute," as it apparently now does[41], then Argentina should have appealed the original Panel's exercise of judicial economy as having been false.[42]

(b) What considerations should guide this Panel in addressing the parties' claims and arguments in these 21.5 DSU proceedings? Would any prejudice arise to any party in the even the Panel did, or did not, address the volume analysis?

34. In its answers, Argentina once again fails to recognize that the question before the Panel is whether the United States implemented the recommendations and rulings of the DSB, and Argentina continues to avoid referring to the recommendations and rulings of the DSB. Instead, Argentina states that "[i]n this compliance proceeding, the United States must bring itself into compliance with Article 11.3 of the Anti-Dumping Agreement."[43] In fact, the question in this compliance proceeding

[36] Letter from US Steel, at F-75 (Exhibit ARG-27).
[37] Argentina Answers to Questions from the Panel, para. 57.
[38] US Answers to Questions from the Panel, paras. 46-50.
[39] Siderca 7 December Letter, at 7 (Exhibit ARG-19).
[40] Argentina states that this information is "not part of the record of the Section 129 proceeding." Argentina Answers to Questions from the Panel, para. 62.
[41] Argentina Answers to Panel Questions, para. 70.
[42] *See, e.g.*, US Answers to Panel Questions, para. 75.
[43] Argentina Answers to Panel Questions, para. 70.

concerns the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB. As the United States has repeatedly noted, the Appellate Body in *EC – Bed Linen (21.5)* clarified that not all aspects of a redetermination are "inseparable elements" of the measure taken to comply.[44]

35. As noted above, Argentina states that the Panel has an obligation to "resolve the matter before it,"[45] implying that a finding on the volume analysis is necessary for purposes of such resolution. If so, then Argentina is implicitly asserting that the original Panel exercised false judicial economy – by definition, failing to make findings sufficient to resolve a dispute.[46] Argentina did not appeal that issue, despite the fact that it had an opportunity to do so. Insofar as the DSB recommendations and rulings therefore included no finding regarding the volume analysis, Argentina is not now in a position to assert that the United States failed to implement any recommendation and ruling related to the volume analysis. The matter before this Panel simply does not include the volume analysis.

36. Argentina asserts that it would suffer prejudice because it has "consistently alleged" that the volume inference is inconsistent with Article 11.3.[47] It is unclear just what Argentina means. Argentina does not explain why making an allegation, consistently or otherwise, entitles a Member to a finding on an issue for which a panel exercised judicial economy.

37. Argentina also contends that the United States can claim no prejudice because it chose to rely on the volume inference as a basis of its determination.[48] That approach cannot be reconciled with the reasoning and facts of *EC – Bed Linen (21.5)*. In *Bed Linen*, the panel and the Appellate Body considered that the EC's injury analysis was flawed, and to come into compliance, the EC conducted a new analysis of the impact of dumped imports under Article 3.4. In addition, however, the EC incorporated its original "other factors" analysis into its redetermination. The EC of necessity "relied" on that analysis – under Article 3.5, it is impossible to make an affirmative injury determination without conducting a causation analysis, including an "other factors" analysis. Yet the "other factors" analysis was not considered part of the measure taken to comply because it was an aspect of the original determination that the EC did not change, and did not have to change, to comply with the recommendations and rulings of the DSB. Therefore, whether a Member "relies" on an aspect of the original determination in its redetermination is not the question; the question is whether the Member had to change that aspect of the original determination to comply with the recommendations and rulings of the DSB. Just as the EC did not have to reconsider its "other factors" analysis, so Commerce did not have to reconsider the "volume analysis."

(c) Is the USDOC's volume analysis part of the measure taken to comply with the DSB recommendations and rulings for the purposes of Article 21.5 DSU? Why or why not? Would it have been possible for the original panel to address the USDOC's volume analysis?

38. The United States agrees that the volume analysis was part of the Section 129 proceeding.[49] That does not, however, answer the question in this Article 21.5 proceeding of whether the volume

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[44] *See, e.g.*, US Answers to Panel Questions, para. 71; US First Submission, para. 34; US Second Submission, para. 28.

[45] Argentina Answers to Panel Questions, para. 74.

[46] *See* Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, para. 335 (adopted 19 May 2005) ("In this case, the Panel's findings . . . were not sufficient to 'fully resolve' the dispute. . . . This constitutes false judicial economy and legal error.") ("*EC – Sugar (AB)*").

[47] Argentina Answers to Panel Questions, para. 74.

[48] Argentina Answers to Panel Questions, para. 74.

[49] Argentina Answers to Panel Questions, para. 78.

analysis was an inseparable element of the measure taken to comply. If the entire redetermination were necessarily equivalent to the measure taken to comply, then *Bed Linen (21.5)* would have been decided differently.

39. Argentina considers that it addressed, in its Second Submission, the question of whether the volume analysis is part of the measure taken to comply.[50] However, Argentina's analysis rests on the erroneous premise that the volume analysis in this dispute can be distinguished from the EC's "other factors" analysis in *Bed Linen (21.5)* on the basis that Commerce "relied" on its analysis, whereas the EC merely "confirmed" its analysis. As noted above, the EC of necessity relied on its "other factors" analysis for purposes of reconsidering its injury determination.

Please indicate the relevance, if any, of the Appellate Body Reports in EC - Bed Linen (Article 21.5 - India) and US - Softwood Lumber IV (Article 21.5 - Canada) in your responses to the above questions.

Q18. The Panel notes Argentina's argument that the USDOC disregarded the comments made by the Argentine exporters with regard to the decline in the volume of imports. The Panel also notes the US' argument that these comments were not germane to the issue. Siderca's response to the questionnaire to which Argentina refers in this regard, reads in relevant part:

Whatever the significance of a decline in export volume may be as a general matter, Siderca knows that, with respect to Siderca, it does not mean that the product could not be shipped without dumping. The cost data (even with the limitations explained above) supports Siderca's position: Siderca is a cost-efficient producer of OCTG and could have shipped OCTG products profitably to the United States.

(b) Is there any other reference on the record that contains Argentine exporters' comments with regard to the decline in the volume of imports?

40. Argentina's characterization that Siderca's submission presented "evidence" to explain the decline in import volumes is strained, at best. At the outset, it bears repeating that Siderca's shipments *ceased* after the order was imposed. Siderca provided no reasoned explanation as to why it *stopped shipping entirely* after the order was imposed.

41. Siderca's explanation that it had "diversified" its exports was, to be generous, weakly supported,[51] and does not, in any event, explain why Siderca stopped shipping entirely. Diversification does not explain why a company that had been a significant exporter to the United States before the order would suddenly stop shipping once the order was in place – especially when the United States is a prime export market for OCTG.

Q25. Please respond to the US' argument that because no company-specific determination was made for Siderca, facts available were not used for this company.

42. Argentina has failed to demonstrate how Articles 6.8 or 11.3 require a company-specific finding of likelihood as to each exporter or producer. No such requirement exists. The Appellate

[50] Argentina Answers to Panel Questions, para. 75.

[51] Siderca's "evidence" of diversification consisted of nothing more than references to joint ventures in various countries. For example, Siderca cited a Canadian joint venture with Algoma, but emphasized that the joint venture would use existing production facilities in Canada, rather than importing from Argentina. Siderca's Questionnaire Resp., Attachment 1, at 3-4 (Exhibit Arg-15).

Body also has recognized that, with respect to Article 11.3, the relevant issue is the order-wide determination – and not the company-specific ones.[52]

43. Argentina has failed to explain how no finding as to Siderca is actually a finding on the basis of facts available. No finding is simply that – no decision was reached as to Siderca's likelihood. Argentina claims Commerce used "facts available" but did not label it as such with those "magic words."[53] However, Argentina has never explained how Commerce supposedly used "facts available."

44. Argentina implies that the US position is that "the avoidance of the term 'facts available'" is conclusive, and that simply because Commerce did not use the term in its determination neither Article 6.8 or Annex II apply.[54] This is not the US position. Again, Commerce did not make a finding with respect to Siderca on the basis of facts available because it made *no* finding with respect to Siderca. Further, the United States has not hesitated to acknowledge in this proceeding that, even though Commerce did not use the words "facts available" when using the Preston Pipe & Tube data for Acindar, it used alternate information from secondary sources, as provided for in Article 6.8 and paragraph 7 of Annex II.[55]

45. Argentina argues that the "US position rests on the flawed assumption that Article 6.8 and Annex II obligations apply only to information that is used to support conclusions of the investigating authority."[56] The United States has not taken that position. Rather, the US position is based on the language of Article 6.8, which provides that an investigating authority may resort to the use of facts available when an interested party does not provide necessary information. It is, by its own terms, simply not applicable to information that is not *necessary*. In this instance, Commerce considered the totality of the evidence on the record and concluded that Siderca's cost information was not "necessary information" within the meaning of Article 6.8 because other evidence on the record supported the order-wide determination without having to make a company-specific finding regarding Siderca. To interpret Article 6.8 as including all information, whether necessary or not, would read the word "necessary" out of that provision, and such an approach cannot be reconciled with principles of treaty interpretation.

46, Indeed, that the information was not "necessary" is confirmed by the fact that Commerce did not use other facts in lieu of the information Siderca provided.

47. Argentina then asserts that if "the USDOC is going to reject information . . . then the authority has an obligation to comply with the requirements of Article 6.8 and Annex II."[57] Article 6.8 says nothing about rejecting information. Article 6.8 only applies when a determination is made on the basis of facts available. Annex II only applies if the criteria of Article 6.8 have been met. Because no facts available were used for Siderca, there was no obligation to inform Siderca that its cost information would not be used.

48. Argentina similarly gets the standard backward when it argues that Article 6.8 does not apply unless a party is recalcitrant – and implying that it does apply if a party participates.[58] It does not matter how recalcitrant the parties are in a proceeding – Article 6.8 only applies when a decision is

[52] Appellate Body Report, para. 232.
[53] Argentina Answers to Questions from the Panel, para. 131.
[54] Argentina Answers to Questions from the Panel, para. 127.
[55] US Second Written Submission, para. 92.
[56] Argentina Answers to Questions from the Panel, para. 129.
[57] Argentina Answers to Questions from the Panel, para. 129.
[58] Argentina Answers to Questions from the Panel, para. 133.

"made on the basis of facts available." Thus, because there was no company-specific finding as to Siderca, no decision was made on the basis of facts available and Article 6.8 does not apply.

49. Argentina suggests that an order-wide determination necessarily means that Commerce used "facts available" with regard to Siderca. Argentina ignores that the fact that in making its determination, an investigating authority engages in a weighing of the evidence, some provided by respondents, some provided by petitioners. The mere fact that a respondent submits information and that information is not ultimately used in making the determination does not mean that facts available have been used with respect to that respondent. In this regard, the United States notes that Article 6.8 refers not to respondent interested parties, but *interested parties* more generally, including domestic interested parties. Under Argentina's approach, the mere weighing of evidence would necessarily result in the application of facts available to *someone* in every determination – either petitioner if respondent's information is more probative, or respondent if petitioner's information is more probative.

Q26. (b) The Panel notes Argentina's assertion, among others, in paragraph 55 of its Oral Submission, that the data submitted by Siderca indicated higher costs for alloy products compared with casing products throughout the period of review, with the exception of the year 2000. The Panel understands Argentina's argument to be that the USDOC should have compared the costs of, for example, carbon casing PE with that of alloy casing PE and carbon casing T&C with that of alloy casing T&C.

Is the Panel's understanding correct regarding Argentina's assertion?

50. The United States recalls that Commerce had asked for respondents' costs on the level of T&C and PE. The costs Siderca provided were not reliable, for the reasons already detailed, and Acindar declined to provide any cost information. Therefore, Commerce had to make the comparison on a broader level using Preston data – which does not report PE and T&C separately.

51. The United States notes that Argentina argues for a more specific comparison of its costs, yet fails to point out that these costs were allocated based on an index from October 2005 that never factored in the product-mix during the period.[59] Thus, Argentina is arguing for a comparison on a more specific level, when its own allocation methodology could not provide accurate costs on that same level.

52. Furthermore, as explained in the US response to question 26(a) from the Panel, Commerce reviewed Siderca's costs on both a specific and aggregate level. Because of the inherent flaws in the methodology used to allocate costs, the costs failed to reflect the reality of OCTG production, regardless of how they were reviewed.

(c) Please explain why, in your view, it was not proper for the USDOC to rely on the same grouping that Preston Publishing used for the subject product.

53. Argentina argues that Commerce only performed one comparison for Siderca's data – carbon vs. alloy products.[60] As we have previously explained, the comparison between carbon and alloy was not the only comparison Commerce performed when assessing Siderca's data.[61] Commerce looked at the data on a more specific level that held end-finishing constant, as well as comparing non-OCTG

[59] Argentina Answers to Questions from the Panel, paras. 134-135.
[60] Argentina Answers to Questions from the Panel, para. 137.
[61] US Answers to Questions from the Panel, paras. 89-91.

costs to OCTG costs. The data failed to reflect the reality of OCTG production in each of the various comparisons.

Q30. Please explain in detail whether, in your view, paragraph 3 of Annex II justified the rejection of Siderca's cost data. In particular, please explain whether the cost information submitted by Siderca was verifiable within the meaning of paragraph 3. Did the USDOC take any steps to verify such information?

54. Argentina argues that because its data was verifiable, it could have been used without "undue difficulties."[62] However, Article 6.8 and Annex II are applicable only if "facts available" are used. The United States did not make a finding with respect to Siderca, and therefore, Annex II is not applicable.

55. The United States explained in its answer to this question that the problem with Siderca's data is not that the application of the allocation methodology could not be verified.[63] Commerce never contended that Siderca applied its methodology incorrectly; however, Commerce did consider that the methodology itself was flawed, resulting in costs that did not reflect the reality of OCTG production.

56. Paragraph 3 contemplates a Member verifying whether the information provided by the party accurately reflects its period sales and costs. Siderca stated that it did not maintain its product-specific cost data and that the data provided were extrapolated based on 2005 data. Thus, the data were not verifiable within the meaning of paragraph 3 of Annex II as it would be impossible to verify whether Siderca's reported costs reflected its actual period costs.

Q31. The Panel notes the following part of the USDOC's Section 129 Determination:

> **Although Siderca attempted to cooperate with the Department's request for information, upon analysis of Siderca's calculations, we have identified significant problems with its allocation of costs, with respect to both OCTG production and all tubular production.**
>
> **(a) Please explain your views about the relevance of this determination to the issue of whether or not Siderca acted to the best of its ability in submitting its cost information to the USDOC within the meaning of paragraph 5 of Annex II to the Agreement.**

57. Argentina argues that because Argentina acted to the "best of its ability" its data should have been used because it was "far preferable that {sic} the data ultimately relied on by USDOC."[64] The United States considers that Argentina must have meant that *Siderca*, not *Argentina*, is the party that acted to the best of its ability, in view of the fact that Siderca, not Argentina, was a respondent interested party in the Section 129 proceeding. In any event, as noted above, Annex II is not relevant to Commerce's Section 129 Determination with respect to Siderca because Commerce did not use "facts available" with respect to Siderca – it made no determination with respect to Siderca, nor was it required to make a finding. As a result, the issue of whether Siderca acted to the best of its ability was not implicated.

58. Moreover, whether or not Siderca acted to the best of its ability is irrelevant with respect to Commerce's company-specific determination as to *Acindar*. Acindar provided no cost information

[62] Argentina Answers to Questions from the Panel, paras. 140-141.
[63] US Answers to Questions from the Panel, para. 106.
[64] Argentina Answers to Questions from the Panel, para. 148.

and so Commerce relied on the best available information to use as a surrogate for Acindar's normal value – actual US average unit values from Preston Pipe and Tube.

59. Finally, as discussed below, the fact that a party may have acted to the best of its ability does not necessarily mean that the information it has provided is of sufficient quality that the investigating authority is obliged to use it.

(b) Please explain how ideal the cost information submitted by Siderca was within the meaning of paragraph 5 of Annex II to the Agreement.

60. Argentina concedes that "though the cost data submitted by Siderca may have not been 'ideal,'" it was preferable to relying on statements in Siderca's financial statements.[65] First, Siderca's cost data was far from "ideal" because it was only an estimate, based on an extrapolation from October 2005 data that did not even control for factors such as product mix. Even had Commerce made a company-specific determination as to Siderca, it could not have relied upon the extrapolated cost data to do so. As explained in our answer to question 26(a), the cost data was not reliable and did not reflect the reality of OCTG production.

61. The United States notes that Argentina erroneously presumes that Commerce rejected Siderca's cost information and used its financial statements instead, *i.e.*, to draw a conclusion about what Siderca would be likely to do if the order were revoked. However, the cost data and the financial statements were considered for different purposes. Commerce had asked for the cost information in its consideration of whether it could make a company-specific finding about Siderca. However, Commerce relied upon the financial statements for the order-wide determination, buttressing Siderca's own argument that the OCTG market was depressed during the period. Therefore, the United States does not agree that Commerce rejected "probative data" and instead "speculated" and "relied" on "assumptions based on selective reliance on Siderca's financial statements."

Q32. (a) In your view, was the USDOC under an obligation to inform Siderca of the fact that its cost information would not be used as well as to give Siderca a chance to make comments as to why the information had to be used by the USDOC pursuant to paragraph 6 of Annex II? If so, was the USDOC under an obligation to do it prior to the issuance of its Section 129 Determination?

(b) Did the USDOC actually inform Siderca of this fact and give Siderca a chance to make comments? If so, when? Did Siderca know that its cost data were not going to be used by the USDOC in its determinations?

62. The following addresses both (a) and (b):

63. As detailed in its submissions, Commerce did not make a finding regarding Siderca, and therefore, Commerce did not make a finding regarding Siderca on the basis of "facts available." Annex II is not applicable. For that reason, Commerce was not under an obligation to inform Siderca that its information was not being used, or to provide an opportunity to provide further explanations.

64. The Panel's report in *Egypt – Rebar from Turkey* is inapposite as it relates to a situation where a Member requests information that is necessary because it is calculating a company-specific margin, and thus, Article 6.8 is relevant.[66] In contrast, though Commerce requested Siderca's cost data, it

[65]Argentina Answers to Questions from the Panel, para. 150.
[66] Argentina Answers to Questions from the Panel, para. 152.

ultimately found it not reliable and made no company-specific determination as to Siderca. Therefore, the information was not necessary for Commerce's order-wide likelihood determination.

65. Argentina's citation in footnote 104 of its answers to the Panel's questions references the following insightful discussion in *Egypt – Rebar from Turkey* regarding data that is not sufficient even if the interested party has acted to the best of its ability.[67] Specifically, the *Rebar* panel explained that:

> [A]n interested party's level of effort to submit certain information does not necessarily have anything to do with the substantive *quality* of the information submitted, and in any case is not the *only* determinant thereof. We recall that the Appellate Body, in *US – Hot Rolled Steel*, recognized this principle (although in a slightly different context), stating that "parties may very well 'cooperate' to a high degree, even though the requested information is, ultimately, not obtained. This is because the fact of 'cooperating' is in itself not determinative of the end result of the cooperation.[68]

Simply because Siderca may have acted to the best of its ability does not require that Commerce utilize its cost data when that cost data was proven unreliable.

Q33. The Panel notes Argentina's assertion that the USDOC violated paragraph 7 of Annex II by failing to apply special circumspection with regard to the information it took from secondary sources instead of the information submitted by the Argentine companies. Please explain clearly which company Argentina refers to in this regard. Please also explain what secondary source, in Argentina's view, was used instead of the information submitted by the Argentine companies. Also, please explain how exactly the USDOC failed to use the most appropriate information instead of the information submitted by the Argentine companies.

66. Argentina failed to address the Panel's question as to what Commerce used "*instead* of the information submitted by Argentine companies."[69] This is because no information was used "instead" of the information submitted by Siderca, and Acindar did not *submit* any cost data, so no information was used "instead."

67. The United States also notes that paragraph 7 of Annex II does not contemplate requesting further information from interested parties. Rather, paragraph 7 contemplates that investigating authorities have already requested information from the parties and are now turning to *secondary* sources, not *primary* sources. Thus, paragraph 7 expressly notes that information in the petition may be used, and information from secondary sources may be checked against information from *other* interested parties.

68. Argentina argues that requesting information from Acindar would provide for a "more appropriate comparison." The United States would note that paragraph 7 does not provide for "appropriate comparisons." Rather, it provides that an investigating authority may have recourse to *secondary sources* if the interested party does not provide necessary information. In any event, the Preston Pipe and Tube data – the secondary information of the kind provided for in paragraph 7 – was reported on a broader basis than the Acindar importer data. The only way a "more appropriate comparison" could have been made would have been if Acindar had retained and reported its costs for the period. Acindar did not do so – hence the recourse to secondary sources.

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[67] Argentina's footnote appears to refer to a different section of *Egypt – Rebar* than the section referenced in the body of Argentina's answers.

[68] *Egypt – Rebar from Turkey*, para. 7.242.

[69] Emphasis added.

69. Argentina contends that use of pricing data based on a commercial publication does not constitute an objective examination of information.[70] Argentina's position implies that a Member complying with the authorization under paragraph 7 of Annex II to use secondary sources is *per se* failing to comply with its obligations under Article 11.3. Paragraph 7 does not specify that the price lists must be "private," nor does it prohibit use of "commercial" price lists. Paragraph 7 provides that secondary sources include information supplied by *petitioners*; it is odd indeed to suggest that an investigating authority may rely on information supplied by petitioners, but not on an independent source of information – a commercial price list.

[70] Argentina Answers to Questions from the Panel, para. 156.

ANNEX E-5

ANSWERS OF THE UNITED STATES TO ARGENTINA'S WRITTEN QUESTIONS

Measure Taken to Comply

Q1. If USDOC only incorporated the volume inference from its original sunset review, why did USDOC ask question 8 of its questionnaire ("Did you ship any merchandise under consideration to the United States during the period 1 August 1995 through 31 July 2000? If so, indicate the shipment volumes.")

1. *See* US Answer to Panel Question 18(a).

Q2. The United States indicates that the volume inference from the original sunset review was incorporated into the Section 129 determination.

(a) Was the inference in the original sunset review based on the Sunset Policy Bulletin ("SPB")?

(b) If yes, does the United States agree that USDOC relied on the SPB in the Section 129 Determination? If not, please explain.

Q3. Is the inference that USDOC draws from the volume decline a necessary part of the USDOC's conclusion in the Section 129 determination that expiry of the measure would be likely to lead to a continuation or recurrence of dumping?

Q4. Does the affirmative "likelihood" determination stand without inference of likelihood based on the volume findings?

Regarding the Volume Inference

Q5. Page 11 of the 129 Determination states: "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."

(a) What is the textual support in Article 11.3 for an investigating authority to make a finding based on an "apparent" link between the declining volumes and the dumping order?

(b) Please explain how the USDOC's reliance on an "apparent" link is consistent with the Appellate Body's statement in this dispute that "the investigating authority must arrive at a reasoned determination resting on a sufficient factual basis; it may not rely on assumptions or conjecture."

(c) Please explain how the USDOC's reliance on an "apparent" link is consistent with the Appellate Body's statement that: "The cessation of imports in the second scenario and the decline in import volumes in the third scenario could well have been caused or reinforced by changes in the competitive conditions of the market-place or strategies of exporters, rather than by the imposition of the

duty alone. Therefore, a case-specific analysis of the factors behind a cessation of imports or a decline in import volumes (when dumping is eliminated) will be necessary to determine that dumping will recur if the duty is terminated." (*US - Corrosion Resistant Sunset Review, DS244, AB Report*, para. 177).

(d) Why does the USDOC believe that declining import volumes apparently caused by the imposition of the order necessarily "indicate that exporters would need to dump"?

(e) The quoted statement in the chapeau to this question suggests to Argentina that USDOC found that declining import volumes were conclusive of whether revocation of the order would lead to continuation or recurrence of dumping. Does the United States agree? If not, please explain.

(f) Why does USDOC focus on the exporter's ability to "sell at pre-order levels"? Is this required in order to obtain termination under Article 11.3? Is the authority's obligation to establish "likely" dumping different if the exporters do not ship at pre-order volumes?

(g) Can you identify the portion of the Issues and Decision Memorandum from the original sunset determination (ARG- 8) that specifically states that:

(i) USDOC could draw inferences from "declining import volumes after, and apparently resulting from, imposition of an antidumping duty order";

(ii) the Argentine exporters "would need to dump" upon expiry.

Q6. We note that the exporter, Siderca, provided factual information in its 30 November 2005 response (ARG-15) regarding the decline in its volume (pages 7 - 10).

(a) Did USDOC consider this information?

(b) Did it influence USDOC's statement that the declining import volumes "apparently resulted from the imposition of the antidumping duty?" If no, please explain why not.

Regarding Article 11.3 and Article 11.4 Obligations

2. The volume analysis is not within the scope of these proceedings.

Q7. The United States has claimed that it is now in compliance with Article 11.3. But, assuming that the DSB ultimately adopts rulings and recommendations that it is not, will the United States terminate the measure?

3. As the United States is in compliance with the DSB recommendations and rulings, there is no basis for the assumption in the question. In any event, the question is not relevant to the matter before the Panel, whether the measure taken to comply by the United States is consistent with the covered agreements.

Q8. In light of the time-frames established by Articles 11.3 and 11.4 (the window of opportunity for the administering authority to collect information to establish the evidentiary basis in order to make the substantive determination), how can these requirements be

reconciled with the collection of new information by the USDOC five years later in a compliance proceeding?

4. *See* US First Written Submission, paras. 28-31, and US Second Written Submission, paras. 20-27.

Q9. If the United States believes that it can conduct more Section 129 determinations in the event of a Panel finding in this case that the United States is not in compliance, is there a limit on the number of such determinations that the USDOC can make? Please explain your answer.

5. The question is premised on a position not expressed by the United States in this proceeding.

Q10. Is there a limit on the number of times that the USDOC can collect, in subsequent proceedings, additional evidence in order to support its original decision to continue the measure? Please explain your answer.

6. This question is speculative.

Q11. Assuming arguendo, that an administering authority can use new information that was gathered during the RPT in order to bring a WTO-inconsistent Article 11.3 determination into conformity with its WTO obligations, what are the consequences of the new determination being found to be inconsistent in an Article 21.5 proceeding?

7. It is not clear what is meant by "consequences." The United States and Argentina have reached agreement on some potential procedural consequences in that event. *See* WT/DS268/14.

Q12. In this case, under what authority could the Member keep in place AD duties that are based on an Article 11.3 determination that has been found by a compliance panel to be an inconsistent determination, following the expiration of the RPT?

8. The question is speculative.

Regarding Acindar's Information --"Likely Past Dumping"

Q13. Can you identify any circumstance in the original sunset proceeding in which the USDOC or the USITC asked a specific question to Acindar and Acindar did not respond? Please consider in your answer that the USITC stated in its 2001 determination that: "In these reviews, the Commission received responses from Argentine producers Siderca and Acindar (a producer of welded OCTG)." (USITC Sunset Determination, footnote 113).

9. As Argentina may recall, the United States prevailed on all of its claims regarding the USITC, and questions regarding the USITC are therefore beyond the scope of this proceeding.

Q14. Can you identify any circumstance in the Section 129 proceeding in which the USDOC asked Acindar a specific question and Acindar did not respond?

10. It is unclear what Argentina means by "specific question." However, Acindar did submit a questionnaire response. *See*, e.g., US First Written Submission, para. 39.

Q15. Why does the USITC identify and send questionnaires to the exporters, while the USDOC does not?

11. As Argentina may recall, the United States prevailed on all of its claims regarding the USITC, and questions regarding the USITC proceeding are therefore beyond the scope of this proceeding.

Q16. Does the investigating authority's obligation under Article 11.3 change depending upon the level of participation by the exporter?

12. See, e.g., *US – Japan Corrosion (AB)*, para. 199; *US – Argentina OCTG (AB*), para. 234.

Q17. The waiver provisions were applied by USDOC in the original sunset proceeding. The Panel determined that the application of the waiver provisions invalidated the factual basis of USDOC's determination and rendered it inconsistent with Article 11.3.

13. Argentina provides no reference in support of its proposition that the original Panel concluded that the waiver provisions "invalidated the factual basis" of the determination. *See* US First Written Submission, para. 22.

(a) Does the United States agree that the effect of Acindar's non-participation in the original sunset proceeding led to the USDOC's waiver determination, which has already been adjudicated in this Panel's review of the original 2000 sunset determination?

14. Commerce was not aware in 2000 that Acindar had failed to participate; Acindar declined to identify itself at that time.

(b) Does the United States agree that the Section 129 Determination is a different measure than the original 2000 USDOC sunset determination?

15. The relevance of the question is unclear, but the Section 129 Determination is a measure taken to comply with the DSB recommendations and rulings in the original dispute.

(c) Does the United States agree that Acindar cooperated with the USDOC Section 129 proceeding?

16. Argentina does not identify a provision of the Antidumping Agreement that requires an investigating authority to establish "cooperation." Therefore, the relevance of this question is unclear.

(d) To what extent did Acindar's non-participation in the original 2000 USDOC sunset determination affect USDOC's Section 129 determination?

17. As Argentina may be aware, Commerce permitted Acindar to participate in the Section 129 proceeding, notwithstanding Acindar's failure to participate in the original sunset proceeding.

Q18. USDOC found that "Acindar likely was dumping subject OCTG during the original sunset review period". The USDOC then inferred that Acindar "was likely to continue selling in the United States at dumped prices if the order were revoked". As a basis for the inference of "likely future dumping":

(a) Is evidence of actual past dumping sufficient to support the inference of "likely future dumping?"

(b) Is evidence of "likely" past dumping a weaker basis for the inference than evidence of "actual" past dumping?

(c) Would "possible" past dumping be a sufficient basis for the inference of likely future dumping?

18. Article 11.3 does not specify any particular factors that must be considered in a sunset review. *See, e.g., US – Corrosion Resistant (AB)*, para. 123.

Q19. What level of certainty does the notion of likely past dumping provide?

19. It is not clear by Argentina means by "level of certainty."

Q20. If as stated by the US in its Second Written Submission, during the Section 129 Determination proceedings, USDOC sought to evaluate "what the respondent's dumping profile had been over the life of the order" (emphasis added), why didn't the USDOC ask information regarding export price and normal value?

20. The United States addressed this issue in response to the Panel's questions.

Q21. At what level of specificity have you identified the products exported by Acindar during the sunset period? Do you know:

a. the steel grade;
b. the physical dimensions (wall thickness and outside diameter);
c. whether they are plain end or threaded and coupled;

21. The United States addressed this issue in response to the Panel's questions.

Q22. The same question as above with respect to the products in the Preston Pipe Reports.

22. The United States addressed this issue in response to the Panel's questions.

Q23. USDOC took the view that it had the right to develop a new evidentiary basis to support its 2001 decision to continue the measure, provided that the information pertained to the sunset period. Why didn't USDOC ask Acindar to identify the specific products that it shipped to the United States during the review period?

23. Argentina has failed to identify any provision in the covered agreement that requires such a question.

Q24. The United States explained during the hearing that it constructed its 31 October 2005 questionnaire (ARG-13) with knowledge that Acindar had no viable home or third market, knowledge which the United States claimed that USDOC obtained in an administrative review of a period subsequent to the sunset review period.

(a) Did USDOC establish on the record of the Section 129 determination prior to issuance of its questionnaire that Acindar did not have a "viable" home market or third country market?

24. The United States addressed the issue of viability in response to Panel Question 10.

(b) Would you agree that "viability" is an Article 2 concept?

25. Article 2 does not provide "concepts" just as it does not provide "notions." *See* US First Written Submission, para. 46.

(c) Article 2 indicates a standard test for viability, and also indicates that "any" sales in the home or third country market can be used to establish a viable market in certain circumstances. Article 2 also indicates that viability can be determined on a country-wide basis. Did the USDOC consider all options provided for by Article 2 before concluding that there was not a viable home or third country market for all of the years included in the sunset review period?

26. The United States addressed the issue of viability in response to Panel Question 10.

(d) Would you agree that "export price" and "normal value" are Article 2 concepts?

27. Article 2 does not provide "concepts" just as it does not provide "notions." *See* US First Written Submission, para. 46.

(e) Can the United States indicate whether it believes that market prices in the importing country can be used as "normal value"?

28. The appropriate surrogate for normal value depends on the facts on the record.

(f) In light of the statement by the United States that the Acindar division encompassing OCTG production was profitable, and USDOC's apparent belief that all of Acindar's OCTG production was shipped to the United States, why was it necessary to request product-specific OCTG costs? Why did USDOC not conclude from the profitability of Acindar's OCTG production that Acindar was selling above normal value and was not likely to dump in the United States?

29. The United States is unable to locate, on the record of the proceeding, an argument that Acindar's OCTG production was profitable, nor any argument as to the relevance of that fact.

Q25. The United States indicated in the hearing that it would not compare a welded OCTG product with a seamless OCTG product because of the difference in the two products. Do the same concerns permit the comparison of plain end OCTG with threaded and coupled OCTG? If not, why not?

30. Production of welded OCTG entails a significantly different production process than for seamless OCTG and thus, it has a significantly different cost and price structure. PE and T&C go through the same production process that only differ in the end finishing stages. The differences between welded and seamless OCTG are more relevant than the differences between PE and T&C. This is exhibited by the fact that Preston Publishing collects and reports prices for OCTG by distinguishing between seamless and welded, but it does not do so for end finishing.

Q26. During the hearing and in its Second Submission, the United States explained that it calculated a weighted average of Siderca's plain end and threaded and coupled products in order to ensure that the comparison with the Preston Pipe Report data was on a consistent basis. However, when comparing each of Acindar's US sales (which, by definition, were either plain end or threaded and coupled) to the Preston Pipe Report data (which, by definition, did not distinguish between plain end and threaded and coupled), the Department appears not to have been concerned with any possible distortion that could arise from comparing products with different end finishes. Is this reasonable? If yes, please explain why.

31. Commerce used a weighted average approach to reviewing Siderca's data because it was analyzing the data on an aggregate level. In contrast, when doing its analysis as to Acindar, it did a sale-by-sale analysis so as to compare the sales with contemporaneous price data, and weight averaging was not relevant. Had Acindar been able to provide its cost data, then Commerce would have been able to compare the sales to the costs on a more specific level.

Siderca's Information

Q27. Did USDOC ever advise Siderca, before the final determination, that it considered Siderca's cost information to be internally inconsistent?

32. *See* US First Written Submission, para. 82.

Q28. Did USDOC give Siderca the opportunity to clarify the inconsistencies?

33. *See* US First Written Submission, para. 82.

Regarding Waiver

Q29. Once a company files an affirmative waiver and a statement that it is likely to dump, does the USDOC have any discretion under the statute to determine on a company-specific basis that the waiving company would not be likely to dump?

34. *See* US First Written Submission, para. 14.

Q30. If the answer to the above question is yes, then please explain how a company-specific finding that dumping would not be likely in this circumstance could be consistent with the mandate of Section 751(c)(4)(B) of the Tariff Act?

35. Section 751(c)(4)(B) does not speak to order-wide determinations.

Q31. Does the United States agree that under US law, in the event of a conflict between a federal statute and an agency's implementing regulation, that the terms of the statute would prevail in the event of a conflict? If not, please explain why not.

36. Argentina has not established that, as a matter of US municipal law, any such conflict exists.

Q32. To illustrate the operation of the statutory mandate, please consider the following situation. USDOC maintains an antidumping order on a steel product from country A. There are 3 exporters in A, one of which is a subsidiary of the US company that petitioned for the AD duties. In the sunset determination, that company invokes the waiver provision, admitting that it is likely to dump in the United States upon revocation. The other 2 exporters participate by filing a substantive response.

(a) Would DOC make an affirmative likelihood determination with respect to the waiving exporter?

(b) Would DOC have any discretion not to make an affirmative likelihood determination with respect to the waiving exporter?

(c) If the other two exporters later protested that the "admission" was false, and done in order to increase the chances of continuing the measure, could USDOC

weigh the evidence to decide not to make an affirmative determination with respect to the waiving exporter?

37. *See* US Answer to Panel Question 7.

Q33. Has any party ever used the new waiver provision and submitted a the requisite "admission" that it is likely to dump upon revocation?

38. The United States is unaware of any such waiver at this time.

Others

Q34. Has USDOC ever issued a negative sunset determination in reviews in which the US industry requests continuation of the measure?

39. The United States is unable to relate this question to any of Argentina's claims in this proceeding.

ANNEX E-6

COMMENTS OF ARGENTINA ON THE UNITED STATES' RESPONSES TO THE WRITTEN QUESTIONS FROM ARGENTINA

Argentina's General Comment on US Response to Argentina's Questions

1. In response to the express invitation of the Panel, Argentina prepared a series of written questions that addressed several critical issues that are at the heart of this dispute. In recognition of the fact that the US positions had changed or were evolving during the course of the proceeding, and reflecting on some of the exchanges that took place during the Panel's meetings with the Parties and the Third Parties, Argentina believed that there was merit in taking the Panel up on its offer to present written questions to the United States.

2. Argentina's written questions were presented as a means to help clarify issues and to permit the Panel to assess the US position, or to attempt to have the United States take a position on certain issues. In this way, Argentina hoped to facilitate this Panel's analysis of the dispute before it. In response to Argentina's effort, the United States submitted a document entitled "US Answers to Argentina's Questions, 24 July 2006." Yet, the substance of the document does not in any way reflect its title, as the US submission is essentially non-responsive. In fact, the tenor and approach of the submission is wholly dismissive of Argentina's questions. Evidently, the United States believes that it is simply unimportant for the United States to respond to Argentina's written questions. Argentina would respectfully urge the Panel to review the written questions of Argentina and to note the stunning lack of substance in the US responses. The US decision to be largely non-responsive, vague, and flippant serves only to highlight that the United States could not formulate substantive answers to Argentina's questions.

Measure Taken to Comply and USDOC's Volume Inference

3. The United States refers to the US answer to panel question 18(a) and then ignores questions 2(a)-(b), 3, 4, 5(a)-(g), and 6(a)-(b) based on the assertion that "The volume analysis is not within the scope of these proceedings."[1]

4. Argentina recalls that it is well established in WTO jurisprudence that it is not up to the implementing party to decide the scope of jurisdiction of an Article 21.5 panel.[2] In addition, by expressly relying on its original finding on volume, the USDOC placed these findings within the scope of the "measures taken to comply" for the purposes of this Section 21.5 proceeding. In *Canada – Aircraft*, the Appellate Body confirmed that "in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of

[1] US Answers to Argentina's Questions, 24 July 2006, para. 2.

[2] *See, e.g.,* Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 73 ("A Member's designation of a measure as one taken 'to comply', or not, is relevant to this inquiry, but it cannot be conclusive. Conversely, nor is it up to the complaining Member alone to determine what constitutes the measure taken to comply. It is rather for the Panel itself to determine the ambit of its jurisdiction.").

the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel."[3]

"Likely Past Dumping"

5. In response to Argentina's questions regarding USDOC's determination that Acindar was "likely dumping" during the sunset period and the consistency of that determination with certain Article 2 concepts such as "viability" "normal value" and "export prices," the United States offers responses such as "Article 2 does not provide 'concepts' just as it does not provide 'notions'"[4] or that an "issue was addressed in response to the Panel questions."[5] These latter statements are offered without citation, specific references or any elaboration.

6. Argentina disagrees with the United States on whether the disciplines of Article 2 speak directly to the concepts of viability, normal value, and export price. Argentina reads the text of Article 2 to address these concepts expressly. The US responses simply reaffirm that the United States was unconcerned with the requirements of the Antidumping Agreement, believing that because the Appellate Body clarified that Article 11.3 does not require the authority to calculate a dumping margin for purposes of an Article 11.3 determination, that the exercise is completely free from discipline. Argentina urges the Panel to reject the US position, and would invite the Panel to review Argentina's arguments regarding the fundamental flaws with the USDOC's inference of likely past dumping as the basis for its inference that dumping would be likely to continue or recur.[6]

7. Consistent with the US view of the non-applicability of the Article 2 disciplines and that it was appropriate to use observed US market prices for USDOC's determination of Acindar's "likely past dumping," the United States contends that "the appropriate surrogate for normal value depends on the facts of the record."[7]

8. Argentina sees no basis for the US position that "dumping," as defined in Article 2, and Article VI of the GATT 1994, permits a "surrogate for normal value" based on average prices in the importing country. Also, in this case, Argentina has demonstrated the serious flaws with the USDOC's comparison of the observed US market prices with certain of Acindar's US sales.

9. As the Appellate Body has clarified, Article 2 is the only source in the Agreement for making conclusions regarding "dumping."[8] 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 USDOC did. Rather, USDOC compared prices obtained from the US Customs authorities to local US selling prices.

10. In question 24, Argentina asked the United States a series of questions related to the statements by the United States at the substantive meeting that it "knew" that Acindar had no viable home or third market. Specifically, Argentina asked whether USDOC had established this fact on the record of the Section 129 proceeding prior to the issuance of the questionnaire.

11. The United States does not respond directly, but instead says "The United States addressed the issue of viability in response to Panel Question 10."[9] That is the entire response. Yet, the US response to Panel Question 10 does not address this important question directly. The closest that

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[3] Appellate Body Report, *Canada – Aircraft*, para. 41.
[4] *See* US Answers to Argentina's Questions, 24 July 2006, paras. 25, 27.
[5] *See* US Answers to Argentina's Questions, 24 July 2006, paras. 20, 21, 22.
[6] *See* Argentina's First Submission, paras. 68-132; Argentina's Second Submission, paras. 35-68
[7] US Answers to Argentina's Questions, 24 July 2006, para. 28.
[8] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.

the United States comes to answering Argentina's question is the statement in paragraph 25 of the US Answers to the Panel's Questions:

> "Aware that Acindar, the only exporter, had no home market or third country sales, Commerce drafted the questionnaire with the intention of asking questions that the respondents could actually answer, and therefore requested the product-specific cost data to provide an estimate of normal value."

12. If this is the only US answer, then Argentina submits that the Panel has to conclude that the answer to Argentina's question 24 is: "no, USDOC did not establish on the record of the Section 129 determination prior to issuance of the questionnaire that Acindar did not have a 'viable' home or third country market."

13. Argentina also asks that the Panel refer to Argentina's other comments on the United States response to question 10. As demonstrated there, the answers of the United States are problematic for a number of reasons, including the fact that tangible evidence of what USDOC "knew" from the post-sunset review of Acindar directly contradicts USDOC's statement in paragraph 25. The USDOC in fact verified that Acindar did have home market sales of OCTG.

14. In question 25, Argentina asked the United States to reconcile different statements relating to the degree of diligence it applied in comparing Acindar's sales to the Preston Pipe report average category prices. In its response, the United States explains that there is no inconsistency: the differences between welded and seamless pipe is "more relevant" than the differences in end finishing, and then adds as proof the fact that Preston Publishing separates the former, but not the latter.[10]

15. Argentina offers two observations. First, the response shows that the United States is trying to have it both ways. It cannot deny that the difference in end finishes can account to up to 25 per cent of the value of some OCTG products, so it simply asserts that the difference between welded and seamless OCTG is "more" relevant. The point is not what is "more relevant;" the point is that USDOC is conducting a comparison in which it is has not even tried to control for a factor that could cause a significant variance in the price. Also, given the concession by the United States that it does not know the effect of freight costs on the Preston Publishing data,[11] it is clear that the comparison performed suffers from the same problem that the Panel identified with the explanations used to try to justify the 2000 sunset determinations: it does not provide a sufficient basis to conclude that dumping had (likely) occurred during the period, let alone that dumping would be likely to occur in the event of expiry.

16. Second, the form in which Preston Publishing publishes the data provides no help to the US argument. It is unlikely that Preston Publishing is concerned with its data being used to determine dumping. The form in which this publication presents the data adds nothing.

<u>Siderca's Information</u>

17. In response to Argentina's questions regarding whether USDOC advised Siderca before the issuance of the Section 129 Determination that USDOC considered Siderca's cost information to be deficient or whether Siderca was given the opportunity to respond to any of the alleged deficiencies,[12]

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[9] US Answers to Argentina's Questions, 24 July 2006, para. 24.

[10] US Answers to Argentina's Questions, 24 July 2006, para. 30.

[11] *See* Argentina's Comments on the US Written Answers to the Panel's Questions (Argentina's comments on US answer to panel question 26(a)).

[12] *See* Argentina's Written Questions to the United States, questions US

the United States refers to paragraph 82 of the US First Submission. Therein lies the familiar US defence that USDOC made "no company-specific finding regarding Siderca" and that the "The Section 129 Determination was based on the findings of likely dumping by Acindar and the decreased volumes."[13]

18. Argentina has responded to this argument in detail. The record is clear that Siderca was not informed, and that the USDOC's reasons for rejecting Siderca's cost information were seriously flawed. Argentina refers the Panel to its submissions on these points that the United States has failed to rebut.[14]

Waiver

19. The United States has not rebutted two key points. First, the statute continues to mandate a company-specific finding in certain instances.[15] Thus, all of the US arguments are misplaced, as the United States failed to remedy the basic problem with the waiver provision that was identified by the Appellate Body, which already has determined that a statutorily-mandated company-specific affirmative determination will necessarily taint any country-wide determination.[16]

20. Second, as for the scope of subparagraph (A) of Section 751(c)(4) – the United States and Argentina disagree that the US revised waiver regulation can change the meaning of the phrase "may elect not to participate."

21. In connection with this latter point, the United States has not rebutted and, therefore must agree with Argentina, that under US law, a US statute will prevail over a US regulation where the two measures are inconsistent.[17] In addition, although an agency such as the USDOC may promulgate regulations pursuant to authority granted by Congress, that agency cannot through the promulgation of a regulation confer on itself any greater authority than that conferred under the governing statute.[18] Accordingly, where the statute mandates a specific action (i.e., making an affirmative company-specific likelihood determination), the statute cannot be overridden by USDOC's modification of an implementing regulation.

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[13] US First Submission, para. 82.

[14] *See* Argentina's First Submission, paras. 73-107, 130-132, 171-185; Argentina's Second Submission, paras. 61-68, 78-80, 137-140; Argentina's Opening Oral Statement, paras. 51-61; Argentina's Answers to Questions from the Panel, paras. 126-133.

[15] *See* US Answers to Panel Questions, 24 July 2006, paras. 13-15, 19-20.

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

[17] *See Argentina's Second Submission,* para. 164 and note 161.

[18] *See Argentina's Second Submission,* para. 164 and note 162.

ANNEX E-7

ADDITIONAL COMMENTS OF THE UNITED STATES ON ARGENTINA'S ANSWERS TO QUESTIONS 20, 21 AND 22 FROM THE PANEL TO THE PARTIES

4 August 2006

Q20. (a) The Panel notes Argentina's allegation that by failing to respond to Siderca's letter dated 7 December 2005, the USDOC acted inconsistently with Articles 6.1 and 6.2. Please explain how exactly failure to reply to this letter violated the USDOC's obligations under Articles 6.1 and 6.2.

Argentina states that respondents did not find out until 16 December that there would be no further procedures.[1] Yet the expiry of the reasonable period of time was 17 December. The very point the United States made to the arbitrator, and which Argentina opposed, is that 15 months would be necessary to ensure provision of many of the due process considerations that are not obligatory, but that Argentina now considers to be the basis of its Articles 6.1 and 6.2 claims. If respondents, on 15 December (the day after their most recent filing), were expecting further procedures, then Argentina might have considered offering to extend the reasonable period of time to permit such additional procedures.

Q21. The Panel notes Argentina's argument that the USDOC failed to make six memoranda available to the Argentine exporters.

(b) Please explain whether it was "practicable" within the meaning of Article 6.4 of the Agreement for the USDOC to make these memoranda available to the Argentine exporters in these Section 129 proceedings.

Argentina concedes that what is "practicable" for purposes of Article 6.4 "will need to be determined on a case-by-case basis."[2] Yet, it then argues that the Panel should disregard the severest limiting factor for what is practicable in this case – the timeframe. Specifically, Commerce had only six weeks to conduct its Section 129 Determination. Four of those weeks were given to the Argentine respondents to allow them to respond to the questionnaire – leaving only two weeks for Commerce to review all of the record evidence and comments by the parties, and then make its decision. What is practicable for purposes of Article 6.4 must be viewed in light of the time constraints.

Argentina argues that the United States should have conducted the Section 129 proceeding concurrently with the revision of the waiver regulation, but "chose not to do so".[3] However, as the United States explained to the arbitrator, that approach was not possible because of the particular findings in this dispute, *i.e.*, that a WTO-inconsistent finding based on a company's waiver of participation "tainted" the overall determination.[4] Until the regulations were amended to eliminate the

[1] Argentina's Answers to Panel Questions, para. 98.
[2] Argentina's Answers to Questions, para. 115.
[3] Argentina's Answers to Panel Questions, para. 116.
[4] *See* Appellate Body Report, at para. 233 (quoting the Panel, the Appellate Body explained that "'[t]o the extent' that the company-specific determinations [which are a result of the US provisions found to be "as such" WTO inconsistent] were taken into account in the order-wide determination, the order-wide determination

possibility of a WTO-inconsistent waiver, Commerce could not begin the Section 129 proceeding, lest a company "waive" participation (for example, by not filing a response) under the as-yet unamended regulations.

Argentina also asserts that it should have been informed of the "analysis that was being performed".[5] However, Argentina has failed to demonstrate that Article 6.4 requires a Member to release its *reasoning.*[6]

Finally, Argentina argues that the United States has failed to provide any explanation as to why the memoranda could not have been provided earlier.[7] Argentina seeks to reverse the burden of proof in this dispute by arguing that the United States should prove compliance with a provision, when Argentina has in fact failed even to make a *prima facie* case of non-compliance.

Q22. The Panel notes Argentina's argument that the USDOC violated Article 6.4 by accepting unsolicited comments from the petitioners on 30 November 2005. The Panel also notes Argentina's acknowledgement that Siderca responded to these comments in its letter dated 7 December 2005.

Please explain how exactly the admission of these comments violated Article 6.4 of the Agreement.

Argentina appears to be suggesting that there was something unusual in how "emphatically" the petitioners in their 30 November letter stated conclusions with respect to data released by Commerce to *both* parties on 28 November.[8] Argentina states that the data was released to Siderca, "only on November 28", neglecting to mention that this is precisely the date on which petitioners also received the data.[9] Argentina fails to explain why two days were insufficient for the petitioners (or, for that matter Siderca) to develop "emphatic" conclusions. To the extent that Argentina is implying that Commerce released the data to petitioners earlier than the 28th, this suggestion is entirely unfounded, unsupported and false.

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could not 'be supported by reasoned and adequate conclusions based on the facts before the investigating authority.'").

[5] Argentina's Response to Panel's Questions, para. 117.

[6] See, EC Pipe Fitting (AB), para. 140.

[7] Argentina's Answers to Panel Questions, para. 117.

[8] Argentina's Answers to Panel Questions, para. 118.

[9] Argentina's Answers to Panel Questions, para. 118.

ANNEX E-8

ADDITIONAL COMMENTS OF ARGENTINA ON THE UNITED STATES' RESPONSES TO THE PANEL'S QUESTIONS TO THE PARTIES

11 August 2006

Argentina recalls its 31 July Comments on the US Answer to Question 17 of the Panel's Questions. On the issue of the judicial economy exercised by the Panel on the volume issue, Argentina stated in part that:

> Argentina agrees with the United States that the Panel exercised judicial economy with respect to the volume issue…. However, the United States is incorrect when it asserts that Argentina was required to appeal the Panel's exercise of discretion as "false judicial economy," or abandon its right to have the issue considered on the merits.
>
> The flaw in the argument put forward by the United States is its refusal to acknowledge that the Panel already had found that USDOC's 2000 sunset determination violated Article 11.3. Therefore, in order to bring itself into compliance with the rulings and recommendations of the DSB, the United States would either have to revoke the measure or justify the continuation based on some further determination. Any further determination would be subject to review under Article 21.5, and the Panel would be required to review all stated bases of that decision in order to determine whether it was consistent with Article 11.3. Thus, the exercise of discretion by the Panel was not false judicial economy because the Panel had already disposed of the matter by finding a violation of Article 11.3, and any future determination seeking to justify continuation of the measure would have to comply with Article 11.3.[1]

Argentina affirms its 31 July Comment, and would simply note that its position is fully consistent with the Appellate Body decision in *US – Anti-Dumping Measures on Oil Country Tubular Goods*.[2] The Appellate Body in that case stated that:

> In our view, the Panel did not commit an error of law in deciding to exercise judicial economy with regard to the issue of whether the USDOC determination was consistent with Article 2, as it had already found that determination to be inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. In *Canada – Wheat Exports and Grain Imports*, the Appellate Body found that the practice of judicial economy "allows a panel to refrain from making multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute." Mexico has not explained why

[1] Argentina's July 31 Comments on the US Written Answers to Questions from the Panel, paras. 58 and 59.

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

> an additional finding on Mexico's claim under Article 2 of the *Anti-Dumping Agreement* is necessary to resolve the dispute. And we find no such need.[3]

Thus, the Appellate Body ruling in *US – Anti-Dumping Measures on Oil Country Tubular Goods* simply reinforces Argentina's position that it was not required to appeal the Panel's exercise of discretion as "false judicial economy" in order to preserve its right to challenge the volume issue if it were relied upon in the measure taken to comply. As in *US – Anti-Dumping Measures on Oil Country Tubular Goods*, the Panel in the present case "had already found [the] determination to be inconsistent with Article 11.3 of the *Anti-Dumping Agreement*" and therefore concluded that an additional finding on volume was not necessary to resolve the dispute.

[3] *Id*., para. 178. Footnotes deleted.