

*United States - Sunset Review of Anti-dumping Measures on
Oil Country Tubular Goods from Argentina*

(WT/DS268)

**Closing Statement of the United States at the Second Substantive Meeting
of the Panel with the Parties**

February 3, 2004

1. Thank you very much. We have a few points to make in closing, touching on a few key issues.

Issues Concerning the Likelihood of Continuation or Recurrence of Dumping

2. The United States is still of the view that the Sunset Policy Bulletin is not a mandatory measure that can be challenged in WTO dispute settlement. Although the Appellate Body reversed the panel on this issue in *Japan Sunset* because it believed that the panel had not fully considered the relevant arguments, we are confident that this Panel, in properly considering all the relevant factors, would reach the same conclusion as the *Japan Sunset* panel. Under U.S. law, the Sunset Policy Bulletin has no independent legal status; it is not a measure challengeable under WTO dispute settlement. Nor does the Bulletin mandate any behavior whatsoever. This is true as a matter of fact, and any conclusion to the contrary would simply mischaracterize U.S. law.

3. Also, contrary to Argentina's arguments, the statute, SAA, and the Sunset Policy Bulletin - whether considered individually or on their own - do not presume an affirmative likelihood determination in every sunset review. As explained in significant detail in the U.S. First Submission, paras. 173-186, as the party asserting this fact, Argentina bears the burden of proving it; Argentina has failed to do so.

4. With respect to the Sunset Policy Bulletin and Section III.A.3, in particular, Argentina has failed to demonstrate that Commerce's consideration of dumping and import volumes is determinative - as opposed to probative - with respect to likelihood. In *Japan Sunset*, the Appellate Body itself recognized that Section III.A.3 does not necessarily instruct Commerce to treat these two factors as conclusive in every case (para. 181). Nor do Argentina's Exhibits 63 or 64 shed any light on the nature of the Policy Bulletin. These charts contain no information concerning WHAT evidence was on the record in the sunset review and how Commerce considered that evidence. In *Japan Sunset*, the Appellate Body stated that the "probative value of the two factors for a likelihood determination in a sunset review will necessarily vary from case to case." (Para. 176.) Argentina's Exhibits 63 and 64 provide no insights into the facts of those cases with respect to information on dumping and import volumes; nor do they indicate whether interested parties - domestic or respondent - provided any other information for Commerce's consideration. These charts, therefore, are meaningless.

5. In contrast, the facts in this case are enlightening. Siderca knew about the initiation of the sunset review and the required content of the substantive response, but did not take advantage of its opportunities to submit explanatory information on its likely dumping behavior or its import volumes. As the Appellate Body stated in *Japan Sunset*, "The Anti-dumping Agreement assigns a prominent role to interested parties ... and contemplates that they will be a primary source of information Company-specific data relevant to a likelihood determination under Article 11.3 can often be provided only by the companies themselves. . . . [I]t is the exporters or producers themselves who often possess the best evidence of their likely future pricing behavior - a key element in the likelihood of future dumping." (Para. 199) Neither Siderca, nor any other

Argentine exporter or producer, provided such data. The evidence that was provided led to Commerce's affirmative likelihood determination, not any "irrefutable presumption" allegedly contained in the Sunset Policy Bulletin.

6. In presenting questions on the dumping methodology, Argentina characterized the *Japan Sunset* report as interpreting the AD Agreement to require administering authorities to ensure that any margin on which they rely was calculated consistent with Article 2. We note again that Commerce did not rely on the magnitude of the dumping margin, but rather just the existence of continued dumping throughout the existence of the order. We also note that nothing in the *Japan Sunset* report shifts the burden of proof for making a *prima facie* case of a claim from the complainant to the respondent, as suggested by Argentina.

7. We further note that *Japan Sunset* found that there was no obligation to calculate a dumping margin in a sunset review and, in this case, the United States did not calculate a dumping margin. While *Japan Sunset* did allow that claims under Article 2 could be reached in a sunset review, that finding does not alter the application of Article 17 of the AD Agreement – that a panel examine a matter based upon the facts made available in conformity with appropriate domestic procedures and whether the establishment of the facts was proper and whether the evaluation of the facts was proper, unbiased, and objective.

8. While Argentina is not barred from raising its Article 2 claims before this Panel, the factual basis for that claim must be the Commerce record and here, Argentina has failed to establish that the record facts provide a basis for its claims. As we noted in response to questions, and as Argentina agreed in paragraph 21 of its statement this morning, the Panel must limit its review to the record that was before the administering authority. The Commerce record

does not contain any calculation methodology – rather, it contains the final determination of Commerce from the investigation. Argentina’s Exhibits 52 and 66A and B were not part of the record before Commerce and are not properly before this Panel. In addition, even if the Panel were to consider Argentina’s exhibits, those exhibits, if anything, only confirm that the United States used a calculation methodology distinct from that considered in *EC - Bed Linen*.

Argentina has advanced no independent legal theory to support its Article 2 claim. Thus, even if the principles of *EC - Bed Linen* were applicable as *stare decisis*, which they are not, Argentina’s claim would fail.

9. Argentina also argues that Commerce does not seek out relevant information in sunset reviews or evaluate information in an objective manner. Even a cursory review of the facts of this case belies Argentina’s view. Commerce takes an active role in every sunset review, whether full or expedited. Commerce informs the foreign government of an impending initiation of a sunset review and encourages that government’s participation in the sunset review. Commerce publishes a notice of initiation of the sunset review. Commerce has published its Sunset Regulations containing the questionnaire. These same regulations invite interested parties to submit any factual information or argument they wish Commerce to consider in the sunset review. Far from being passive, Commerce actively seeks factual information and argument relevant to the likelihood dumping determination.

10. As we noted earlier, Argentina fails to fully acknowledge the prominent role the AD Agreement assigns to interested parties. In this case, neither Siderca nor any other foreign interested party provided any additional factual information in the sunset review of OCTG from Argentina.

11. For those foreign interested parties who failed to respond to the notice of initiation, they were deemed to have waived their rights to participation. Argentina faults Commerce for not identifying the recalcitrant interested parties, rather than these parties themselves, despite the observation in *Japan Sunset* that company-specific data relevant to a likelihood determination can often be provided only by the companies themselves. Nothing in Article 11.3 or the AD Agreement requires the investigating authority to extract or divine information that an interested party does not wish to submit. Thus, any fault for the absence of information on the administrative record of the sunset review of OCTG from Argentina can only be assigned to Siderca and the non-responding respondents themselves.

Issues Concerning the Likelihood of Continuation or Recurrence of Injury

12. We would also like to respond to just two points that Argentina made this morning concerning the injury part of this case.

13. Our first point relates to Argentina's statement that "when more future 'variables' are relied upon to support the likelihood of a particular occurrence happening . . . this actually leads one to the conclusion that such an occurrence is less likely to happen." (Argentina oral statement, para. 101.) What is Argentina suggesting? That the United States should simplify its sunset review analysis, and consider fewer "future variables"? Surely, this would run counter to the Appellate Body's finding that authorities should conduct a "rigorous examination" in sunset reviews.

14. Second, Argentina questions how an exporter can ever meet the ITC's standard, given that the ITC will consider evidence of adverse impact from the original injury investigation. (Argentina oral statement, para. 89.) The answer to this question lies close at hand – in the same

ITC report that we are considering, the ITC made a negative likelihood-of-injury determination for drill pipe from Argentina and Mexico, leading to the revocation of those antidumping measures. The answer also lies in the more than one third of the reviews in which the ITC made negative likelihood of injury determinations. We ask the Panel to reject Argentina's suggestion that the ITC imposes a standard that cannot be met.

Procedural Issues

15. With respect to Argentina's request that the Panel suggest "that the only way for the United States to comply with" any adverse "recommendations is through the immediate termination of the antidumping measure on OCTG from Argentina," in addition to our statements at the first Panel meeting and in our opening statement this morning, the United States notes that Article 19.1 of the DSU provides first and foremost that, "[w]here 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 that agreement." This facilitates the goal of encouraging parties to reach mutually satisfactory solutions. It also recognizes that a Member generally has many options available to it to bring a measure into compliance. And although Article 19.1 also provides that, "[i]n addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations," most panels appropriately exercise their discretion to not provide such suggestions. We believe that, since the U.S. measures at issue already conform to the WTO agreements, there is no need for either a recommendation or a suggestion. Nonetheless, should the Panel determine otherwise, we believe that the Panel in this dispute should also decline to make any suggestions in this regard.

16. With respect to prejudice, the United States has already responded to this issue in our first submission (paras. 96-99) and our answers to the Panel's first set of questions (paras. 93-94).

While Argentina may not agree with our responses, we nevertheless believe that our showing of prejudice is sufficient and valid. Indeed, previous panels such as the panel in the *Canada Wheat Board* dispute have relied on these very reasons, and we believe that this Panel should also follow suit.

17. Further, the United States has not abandoned its claims concerning the preliminary rulings by failing to address them in its second substantive response. For the record, parties only abandon claims by doing so affirmatively. In this instance, having made its case, and having reviewed Argentina's detailed but unconvincing response to the U.S.' claims, the United States made the decision to devote its resources to answering the panel's questions and rebutting erroneous and misleading assertions in Argentina's oral presentation to the Panel in the first substantive meeting. Had Argentina's claims not been continually evolving and had Argentina presented the problem clearly at the beginning of this process, the United States could have afforded to devote the time and energy to rebutting each line of Argentina's response. If Argentina believes the United States has "abandoned" its due process claims as a result of this supposed omission, then Argentina has itself provided evidence of the prejudice the United States has suffered in these proceedings.

18. Regardless, Argentina's argument that it may rely on the headings in the panel request to establish the claims in its panel request only confuses the issues further. There are two headings in the panel request. There are apparently three sets of claims (including Page Four, if those are claims). The two headings refer to "the" determination. Neither refers to the "as such" claims.

Therefore, the headings do not clarify the claims within them.

19. In some cases, Argentina refers to the factual background portion of the request to expand the claims contained therein. Yet the last sentence of that section states that the “*specific claims*” are set forth below.

20. This concludes our closing statement. We would of course be happy to elaborate further on any of the issues raised today, should the Panel wish to ask additional questions. Thank you again for your time and attention.