UNITED STATES – SUNSET REVIEWS OF ANTI-DUMPING MEASURES ON OIL COUNTRY TUBULAR GOODS FROM ARGENTINA: RECOURSE TO ARTICLE 21.5 OF THE DSU BY ARGENTINA

(WT/DS268)

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I. INTRODUCTION

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

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

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

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

5. With respect to the waiver statute, Argentina insists that the statute had to be amended, as opposed to the regulations alone. First, the Panel, and subsequently the Appellate Body, made it clear that the statute and the regulations operated *together*, and as they operated together, they

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

were inconsistent with Article 11.3 – hence the term "waiver provisions." There is nothing in either report to suggest that correcting the regulations would be insufficient to remedy concerns about the statute. Second, it is well established that the Member charged with implementing a recommendation and ruling is in the best position to decide how to bring its measure into compliance. Here, the United States amended its regulations in such a way that no amendment to the statute was necessary, and in doing so implemented the recommendations and rulings as expeditiously as possible.

6. In that vein, Argentina's arguments to the arbitrator during the Article 21.3(c) proceedings are difficult to reconcile with the arguments it makes here. Before the arbitrator, Argentina argued that the United States could come into compliance in a mere seven months. Given that Argentina is insisting that a statutory change was necessary, that time frame was particularly abbreviated; indeed, it took Argentina more than 15 months simply to come into compliance with DSB recommendations and rulings regarding a single investigation, with *no* statutory or regulatory amendments.[2] Moreover, in spite of requesting such a brief period of time, Argentina now contends that the United States violated a host of procedural obligations under Article 6. Argentina's argument is ironic, given that the United States insisted that 15 months would be necessary in order to come into compliance while observing the procedural obligations found in Article 6, as well as to provide additional procedural steps, including a preliminary determination, that Argentina now wishes its companies had enjoyed. Argentina is trying to have it both ways – first demanding an unreasonable period of time for implementation, and then asserting WTO-inconsistencies relating to a host of procedural steps that would have required even more time. Despite the abbreviated reasonable period of time, the United States has not acted inconsistently with the obligations of Article 6.

II. PROCEDURAL HISTORY

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

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[2] WT/DS189/8

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

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

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

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

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

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

III. THE WAIVER PROVISIONS

12. The Panel considered the affirmative waiver provisions to be inconsistent with Article 11.3 because the "investigating authority can not simply assume, without further inquiry, that dumping is likely to continue or recur because the exporter chose not to participate in the review."[11] With respect to affirmative waivers, the Panel's analysis involved consideration of the

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

[6] *Id.*

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

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

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

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

[11] Panel Report, para. 7.99.

statutory and regulatory provisions collectively, rather than individually.[12] The Panel ultimately concluded that "the provisions of US law relating to affirmative waivers" are inconsistent with Article 11.3.[13]

13. The Appellate Body agreed:

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

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

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

> Every statement of waiver must include a statement indicating that the respondent interested party waives participation in the sunset review before the Department; a statement that the respondent interested party *is likely to dump* or benefit from a countervailable subsidy (as the case may be) if the order is revoked or the investigation is terminated; . . . [17]

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

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[12] Panel Report, para. 7.85.
[13] Panel Report, para. 7.99.
[14] Appellate Body Report, para. 234 (emphasis in original).
[15] Panel Report, para. 7.85.
[16] Panel Report, para. 7.83.
[17] *Id*. (emphasis added).

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

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

18. In addition, Argentina's assertion that the amended regulation prevents Commerce from developing the requisite factual information is simply wrong. First, it should be noted that Argentina fails to specify *what* factual information is not being developed with respect to that

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

[19] Argentina First Submission, para. 207.

[20] Appellate Body Report, para. 234.

company, and why that mystery factual information would be more probative than the company's own admission. It is worth noting that a sunset review is a prospective and counterfactual inquiry, and it is difficult to conceive of evidence that would establish that a company is not likely to dump in the future when the company has itself stated that it will.

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

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

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

IV. THE SECTION 129 DETERMINATION

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

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[21] Argentina First Submission, para. 208.
[22] Panel Report, para. 7.95.
[23] Argentina First Submission, para. 29.
[24] Panel Report, para. 7.219.

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

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

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

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

A. Commerce's Use of "New Factual Information"

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

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[25] Panel Report, para. 7.221.

[26] Panel Report, para. 6.9.

[27] Panel Report, para. 6.11.

[28] Panel Report, para. 7.222.

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

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

[31] Argentina First Submission, para. 52.

that in which "national authorities seek[] to clarify information that it had developed in the 2000 proceeding."[32]

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

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

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

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

31. With regard to this particular sunset review, the Panel rejected Commerce's finding that dumping had continued over the life of the order because it was based on Acindar's payment of

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[32] Argentina First Submission, para. 52.

[33] Argentina First Submission, para. 67.

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

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

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

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

34. The United States also notes that the Appellate Body stated in *EC – Bed Linen (Article 21.5 – India)*, "we do not see why that part of a redetermination that merely incorporates elements of the original determination . . . would constitute an inseparable element of the measure taken to comply with the DSB rulings in the original dispute."[37] Further, in that dispute,"India [sought] to challenge an aspect of the original measure which has not changed, and which the European Communities did not have to change, in order to comply with the DSB recommendations and rulings to make that measure consistent . . . . "[38] Argentina has offered no argument as to why the finding regarding import volumes, which is an incorporation of an element of the original

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[35] Argentina First Submission, para. 54.

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

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

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

determination, is a measure taken to comply.

B. The Finding That Dumping Was Likely to Continue or Recur

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

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

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

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

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

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[39] Panel Report, para. 7.220.

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

40. Given the lack of actual cost information, it was impossible for Commerce to evaluate whether dumping had *in fact* continued over the life of the order. However, it is not necessary in an Article 11.3 review to determine whether dumping continued over the life of the order, or to calculate a particular margin. As noted above, no methodology is prescribed. Therefore, Commerce proceeded to evaluate whether it was *likely* that dumping had continued over the life of the order, as part of its overall assessment of whether it was likely that dumping would continue or recur if the order were revoked.

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

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

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

1. Siderca

44. Argentina contends that Commerce's failure to use Siderca's cost data led to conclusions" "inconsistent with Article 11.3."[44] According to Argentina, "the effect of USDOC's manipulation

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[41] *Decision Memorandum*, 7 (Exhibit ARG-16).

[42] *Oil Country Tubular Goods Other than Drill Pipe*, 68 Fed. Reg. 13,262 (Mar. 19, 2003) (final results and rescission in part of antidumping duty administrative review) (Exhibit US-3).

[43] Argentina First Submission, paras. 74, 108.

[44] Argentina First Submission, para. 76.

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

45. Finally, it is curious that Argentina faults Commerce for undertaking a thorough examination of the data presented. Argentina on the one hand considers that Commerce has been too active – but additionally argues that Commerce has no right to be "passive."[46] Again, Argentina's views seem to be driven by the results it seeks to achieve, rather than an unbiased analysis of the obligations in question.

2. Acindar

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

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

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[45] Argentina First Submission, para. 85.

[46] *See, e.g.*, Argentina First Submission, para. 50.

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

[48] Argentina First Submission, para. 115.

information in making its finding.

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

3. Financial Statements

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

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

C. Evidentiary and Procedural Requirements of Article 11.3 and Article 6

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

52. Commerce provided all interested parties, including the Government of Argentina, Acindar, Siderca, and Tubhier with the notice and opportunity to present evidence, argument, and

[49] Argentina First Submission, para. 115.
[50] Argentina First Submission, paras. 98, 119.
[51] Argentina First Submission, paras. 166-171.

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

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

1. Article 6.1

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

55. On October 31, 2005, Commerce initiated the Section 129 proceeding and sent specific and detailed requests for information to the three Argentine OCTG companies identified by the Government of Argentina as producers of OCTG during the five-year sunset review period (1995-2000).[54] On notice and apprised of the information that Commerce required for the Section 129 proceeding, Acindar and Siderca took the opportunity to present in writing the evidence and

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[52] *Decision Memorandum*, 2-3 (Exhibit ARG-16).

[53] 19 C.F.R. 351.218(f)(3) (an additional 90 day extension is also permitted for sunset reviews that are extraordinarily complicated) (Exhibit US-4). *See also*, Section 751(c)(5) of the Act (Exhibit ARG-33).

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

argument that these interested parties considered relevant regarding the Section 129 proceeding.[55]

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

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

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

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

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

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

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

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

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

[58] Argentina First Submission, para. 144.

[59] Argentina First Submission, para. 144.

in Article 6.1.1 . . . .[60]

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

2. Article 6.2

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

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

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

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

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

(a) Article 6.4

65. Article 6.4 provides that the administering authority will provide interested parties opportunities to see information relevant to the case "whenever practicable." Argentina contends that Commerce failed to provide timely opportunities for interested parties to see all information

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

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

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

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

[64] Argentina First Submission, para. 152.

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

66. With regard to specifics, Argentina's discussion of the information that was purportedly not put on the record is murky. Argentina initially argues that there were six memos (three plus three),[66] then mentions just five,[67] and just four of those five,[68] and then finally just three.[69] In doing so, Argentina simply asserts that "at least three of the memoranda clearly satisfy the criteria established by the *EC – Pipe Fittings* panel."[70] However, Argentina does not identify which three. Therefore, Argentina has not met the burden of making a *prima facie* case with respect to this claim.

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

68. Argentina also argues that Commerce's "violations" of Article 6.4 were "compounded" because the U.S. OCTG industry submitted factual information and comments without any request from Commerce that it do so.[73] Having just argued that Article 6.1 requires administering authorities to provide ample opportunity to present evidence in writing, Argentina then seeks to deny that right to *domestic interested parties.* Article 6.1 does not apply simply to respondent

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[65] Argentina First Submission, para. 156.

[66] Argentina First Submission, para. 157.

[67] Argentina First Submission, para. 158.

[68] Argentina First Submission, para. 158.

[69] Argentina First Submission, para. 160.

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

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

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

[73] Argentina First Submission, para. 162.

interested parties, but to *all* interested parties, including domestic interested parties. Argentina cannot mean to argue that the United States violated its obligations under Article 6.4 by complying with its obligations under Article 6.1. In any event, Argentine respondents obviously saw the letter, inasmuch as Argentina admits that Siderca responded to it.[74] Therefore, Argentina admits there was no violation.

(b) Article 6.5.1

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

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

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

72. Finally, Argentina stated that the panel report in *Guatemela – Cement II* supports the

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[74] Argentina First Submission, para. 163.
[75] Argentina First Submission, para. 169.
[76] Argentina First Submission, para. 169.
[77] *See e.g.* Memo Re: Information for the Record, App. II (CPB entries of ARG OCTG) (Exhibit ARG-18).

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

(c) Article 6.6

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

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

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

(d) Article 6.9

76. Article 6.9 requires authorities, before a final determination is made, to inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Argentina argues that the United States did not comply

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

[79] Argentina First Submission, para. 170.

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

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

with its obligations under this provision. Specifically, Argentina argues that memoranda accompanying the Section 129 Determination "were not made 'in sufficient time for parties to defend their interests.'"[82]

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

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

4. Article 6.8 and Annex II

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

80. The United States recalls that an Article 11.3 determination of likelihood in a sunset proceeding is different from an Article 2 determination of dumping in an investigation or an assessment review. In those latter proceedings, it is necessary to have the respondent's data in order to calculate its individual margin. The rules in Articles 2 and 9 establish a presumption for investigations and assessment reviews that the Member will use that company's data to calculate a margin. For example, Article 2.1.1. states that "costs shall normally be calculated on the basis of

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[82] Argentina First Submission, para. 191.

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

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

[85] Argentina First Submission, para. 192.

[86] Argentina First Submission, para. 183.

records kept by the exporter or producer under investigation . . ." Without the data, substitute data may be necessary to calculate a margin.

81. In contrast, a sunset review has no such requirement to determine likelihood based on the actual data of the foreign producers and exporters. The Appellate Body confirmed that Article 11.3 does not "identify any particular factors that authorities must take into account in making such a determination."[87]

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

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

D. Article 13

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

V. ARGENTINA'S REQUEST FOR A SUGGESTION

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

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

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

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

[90] Argentina First Submission, para. 215.

[91] Argentina First Submission, para. 210.

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

86. Nor is there any basis for making such a suggestion. A Member retains the right to determine the manner of implementing DSB recommendations and rulings. While Argentina may prefer to have the measure terminated, the question in this proceeding is the existence or consistency of the measure taken to comply. In addition, under Article 19.1 of the DSU, any "suggestion" by a panel is "in addition" to any recommendations. It is unclear that Argentina is asking the Panel to make a recommendation in this proceeding. Argentina appears to explicitly request that the Panel make no recommendation[93] but then switches from requesting a "suggestion" to requesting a "recommendation."[94] To the extent Argentina is asking that this be a "recommendation" rather than a "suggestion", Argentina's request is inconsistent with Article 19.1 of the DSU which specifies the content of any "recommendation" by a panel.

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

VI. CONCLUSION

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

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

[93] Argentina First Submission, para. 219.

[94] Argentina First Submission, para. 224.

Exhibit List

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