**United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods From Argentina (WT/DS 268)**

**United States Comments on Argentina's Responses to Questions from the Panel in Connection with the Second Substantive Meeting of the Panel**

**February 20, 2004**

## EXPEDITED REVIEWS/WAIVER PROVISIONS

**1. The Panel notes "Heading A" on page 36 of Argentina's first written submission and Argentina's statements in paragraph 120 of its first written submission and paragraph 51 of its second written submission. Please clarify whether Argentina's claim challenging the US law's waiver provisions under Articles 11.3, 6.1 and 6.2 of the Agreement are limited to "deemed waivers", or, whether they also take issue with "affirmative waivers".**

1. Argentina's response further confuses the question of what precisely Argentina is challenging. According to Argentina's response to this question, both affirmative and deemed waivers "mandate an affirmative determination of likelihood of dumping" and "[i]n Argentina's view, the notion of a statute and regulation mandating an affirmative determination of likelihood of dumping without any analysis is inconsistent with Article 11.3." However, while Argentina expresses its "view," it does not explain precisely what claim it is in fact advancing in this proceeding with respect to Article 11.3. While the United States considers that it has fully addressed both the "deemed" and "affirmative" waiver issues, it notes that Argentina's failure to clearly identify the claims it is making also constitutes a failure to make a prima facie case with respect to either issue.

2. Argentina does explicitly state that its challenge with respect to Articles 6.1 and 6.2 "is limited to the 'deemed waiver.'" The United States therefore understands that Argentina's claims with regard to Articles 6.1 and 6.2 do not relate to "affirmative waivers."

**2. The Panel notes that in sections VII.C.2 and VII.C.3 of its first written submission, Argentina challenges the application of the US waiver provisions to Siderca whereas in the following part of paragraph 6 of its second oral statement it also takes issue with the application of these provisions to Argentina:**

**Indeed, the Department's application of the waiver provisions to Siderca (or, at a minimum, to Argentina) is plainly indicated in the Department's *Issues and Decision Memorandum*.**

**Please clarify the scope of Argentina's claim. More particularly, please explain whether, in the view of Argentina, the alleged application of the US waiver provisions in this sunset review impaired the rights of Argentina or Siderca.**

3. Argentina continues to argue that the waiver provisions were applied to Siderca. The United States has already rebutted this argument. Argentina does not claim that Siderca's rights were impaired as a result but instead states that Argentina's rights under Article 11.3 to termination of the measure were violated. However, as we have already explained, it is simply inaccurate to state that the application of the waiver provisions settle the question of whether an order will be terminated.[1] Inasmuch as Argentina's Article 11.3 claim is premised on this false assumption, Argentina had no "right" to termination in this case.

4. Argentina then argues that application of the waiver provisions to the non-responding respondents violates Articles 11.3, 6.1, and 6.2 but does not explain how its rights to present facts and arguments and otherwise fully defend its interests were impaired in light of Argentina's non-participation in the review and Siderca's minimalist participation. Argentina does argue that the application of the waiver provisions "prevented any type of 'investigation' or 'determination'," deprived Argentina of termination of the measure under Article 11.3, and did not afford what Argentina refers to as its "principal" OCTG producer (as opposed to "the only producer"[2] ) the right to participate. Again, there is no evidence that the waiver provisions prevented termination of the measure or that they resulted in failure to conduct "any type" of investigation or determination. Further, the only party that deprived Siderca of its right to participate was Siderca, through its failure to file a substantive response that addressed the issue of likelihood of continuation or recurrence of dumping, a rebuttal response, or comments on Commerce's adequacy determination.

## OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING

**11. The Panel notes Argentina's allegation in its first written submission that in this sunset review the DOC failed to use the "likely" standard and applied a different standard instead.[3]**

**(a) The Panel notes that Argentina did not mention this claim in its second written submission. Please clarify whether Argentina is still pursuing this claim.**

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[1] *See, e.g.,* Answers of the United States to the First Set of Panel Questions, paras. 3 and 19.

[2] See discussion in First Written Submission of the United States, note 3.

[3] First Written Submission of Argentina, para. 186.

5. Argentina's "clarification" concerning the "likely" standard is nothing more than Argentina's view as to whether there is sufficient evidence on the record to support the affirmative likelihood determination.

**(b) Please refer to the relevant part(s) of the record of this sunset review where this inconsistent standard can be found.**

6. Argentina's discussion of the record evidence in its answer to this question is misleading. First, the cited statutory provision (19 U.S.C. 1677(c)(4)(B)) and its reference to an affirmative likelihood determination are, by their very terms, limited to non-responding interested parties. In other words, section 1677(c)(4)(B) mandates that Commerce shall find that there is a likelihood of continuation or recurrence of dumping "with respect to that interested party" when the interested party waives its participation in a sunset review.

7. Nothing in this provision or anywhere else in the U.S. statute requires an affirmative likelihood determination on an order-wide basis simply because one or all the interested parties waived participation in the sunset review. As the Appellate Body in *Japan Sunset* noted, although "the authorities have a duty to seek out relevant information . . . Company specific data relevant to a likelihood determination under Article 11.3 can often only be provided by the companies themselves."[4] Nothing in Article 11.3 or elsewhere in the AD Agreement requires the administering authority to attempt to coerce information from recalcitrant interested parties in order to meet the obligations of the AD Agreement. Second, Commerce based its affirmative likelihood determination on the existence of dumping and the depressed import levels in the sunset review of OCTG from Argentina. Rather than address the probative nature of this evidence, Argentina simply continues to assert that this evidence is not sufficient to support the likelihood finding. Finally, Argentina again has selectively and incorrectly cited to the Appellate Body report in *Japan Sunset* for the proposition that the existence of dumping and depressed import volumes create a impermissible "presumption." The Appellate Body in *Japan Sunset* ultimately stated that the record evidence relied upon by Commerce in that case, the existence of dumping and depressed import volumes, were not unreasonable indicators of likely future dumping.[5] Like the Japanese respondent interested party in *Japan Sunset*, neither Argentina nor Siderca submitted any evidence to address the evidence of the existence of dumping and depressed import volumes since the imposition of the order on OCTG from Argentina.[6] Rather, the record evidence only demonstrates that neither Siderca nor Argentina raised any issues with

[4] 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 2004, at para.199.

[5] *See id.* at para. 205.

[6] *See id.* at paras. 203-204.

respect to whether dumping was likely to continue or recur,[7] nor did they submit factual evidence to support a conclusion to the contrary.

**12. The Panel notes that, in its second written submission, Argentina did not address its claim under Article 12.2 of the Agreement. Please clarify whether Argentina is still pursuing this claim.**

8. The United States again asserts, as it did in its first written submission in response to this claim by Argentina, that the Commerce Department did provide notice and detailed explanations of its determinations in the *Final Sunset Determination*, the *Decision Memorandum*, and the *Adequacy Memorandum*, all of which were publicly available.[8] In addition, Argentina's assertion that the "United States has also indicated that 'a few key portions' of its underlying decision were 'inartfully drafted'" is misleading, in that the United States never stated that "key portions" were inartfully drafted and never suggested that the drafting of the decision prevented participants in the dispute from fully understanding Commerce's actions.

9. Finally, the United States notes Argentina's contentions about so-called "*ex post facto* justifications." Those are simply U.S. responses to arguments which Argentina is advancing for the first time in this proceeding and which were not advanced during the review. Had Argentina or Siderca made these arguments during the review, as they had the opportunity to do, the United States could have addressed them then. To do so now for the first time and allege that by responding the United States is engaging in "*ex post facto* justifications" ignores the responsibility the Antidumping Agreement places on parties to participate in sunset reviews, a responsibility the panel in *Japan Sunset* emphasized.

## OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF INJURY

**17. What is the supporting evidence in the record of this sunset review for your allegation that the Commission failed to apply the "likely" standard of Article 11.3 of the Agreement in this sunset review?**

10. Argentina claims that two types of evidence support its claim that the ITC did not properly apply the "likely" standard: (1) "admissions by the Commission;" and (2) the record in the sunset reviews. Argentina's arguments are unpersuasive.

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[7] Siderca advanced an argument regarding the application of the *de minimis* standard but nothing to address the issue as to whether dumping was likely to continue or recur.

[8] See First Written Submission of the United States, paras. 238-248.

11. With regard to the so-called admissions by the Commission, the United States draws the Panel's attention to paragraph 30 of the February 13, 2004, U.S. answers to Argentina's questions. As explained there, earlier statements by the ITC (such as in the *Usinor* remand results and the NAFTA panel brief, both of which are cited by Argentina) were based on the understanding of some Commissioners that the term "probable" connoted a very specific and high degree of certainty – a misapprehension which the U.S. courts have since clarified.

12. With regard to the record in the sunset reviews, the United States believes that when considered as a whole, it shows that certain outcomes would be likely (or "probable or more likely than not," as Argentina puts it). The United States has discussed the record in detail in its earlier submission and will not reiterate that discussion here.

**18. The Panel notes Argentina's allegations in paragraphs 183 and 185 of its second written submission that in the OCTG sunset review the Commission failed to carry out the causal link analysis required under Article 3.5 of the Agreement. Please clarify the basis of this claim. More specifically, please indicate whether there were some potential factors, other than likely dumped imports, that could have contributed to the likely injury and were not evaluated by the Commission in its sunset determinations.**

13. Consistent with its arguments throughout this case, Argentina stands one of the key principles of treaty interpretation, reflected in Article 31 of the Vienna Convention, on its head. Argentina asserts that "[t]here is no textual support for the view that the causation requirement was removed from the injury analysis required by Article 11.3." However, it is Argentina that must find textual support for the proposition that a causation requirement of Article 3.5 is required by Article 11.3. There is no such textual support. To the contrary, there are specific textual bases for concluding that the causation requirements of Article 3.5 are not applicable to sunset reviews.[9]

[9] See First Written Submission of the United States, paras. 287-302 and 352-353.