

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

(WT/DS268)

**Opening Statement of the United States at the First Meeting
of the Panel with the Parties**

December 9, 2003

Mr. Chairman, members of the Panel:

1. On behalf of the United States delegation, I would like to thank you for agreeing to serve on this Panel.
2. Today, it is our pleasure to present the views of the United States concerning the issues in this dispute. Organizationally, we will first talk about some of the substantive issues, and then turn to the procedural issues.
3. With respect to the substantive issues, in our first written submission, we fully addressed the Argentine arguments made to date. Today, we will focus on what we consider to be the central issues. We will begin with a discussion of some of the issues concerning “dumping,” and then turn to some of the issues relating to “injury.”

Issues Concerning the Likelihood of Continuation or Recurrence of Dumping

4. Mr. Chairman, for anyone who follows WTO dispute settlement, most of the issues in this dispute should sound very familiar. Indeed, Argentina’s “as such” claims largely raise issues that either have been directly addressed in other disputes or that are closely related to those addressed in other disputes. In either case, the Panel faces a straightforward task. It should apply the WTO obligations in question based on the approaches taken in recent panel and Appellate Body reports.

5. For example, Argentina claims that an “irrefutable presumption” exists simply because Commerce has found likelihood in a particular number of sunset reviews. However, as a series of panels have found – including those in *US - Export Restraints*, *US - India Plate*, and *US - Japan Sunset* – the frequency of a particular outcome does not transform that outcome into a “measure” that may be challenged independently for its alleged WTO inconsistency.

6. With respect to Commerce’s expedited sunset review regulations, Argentina has not demonstrated how these regulations breach Article 11.3 or any other obligation of the AD Agreement. This is not surprising given that, as the *US - Japan Sunset* panel observed, Article 11.3 does not prescribe how a Member should go about making a likelihood determination in a sunset review.

7. Argentina’s claim that Commerce’s reported “margin likely to prevail” is WTO-inconsistent rings hollow because Argentina has not demonstrated that any obligation exists to quantify dumping in a sunset review. In *US - German Steel*, the Appellate Body addressed Article 21.3 of the SCM Agreement – the counterpart to Article 11.3 – and found that there is no obligation to apply any *de minimis* threshold in a sunset review because Article 21.3 does not explicitly or implicitly contain such an obligation. The same holds true for Article 11.3 and the obligation to calculate a margin of dumping to determine likelihood. Indeed, given that almost identical language is found in both Article 21.3 of the SCM Agreement and Article 11.3 of the AD Agreement, the analysis applied by the Appellate Body for Article 21.3 is equally persuasive with respect to Article 11.3.

8. In this regard, there is also no basis in the AD Agreement for Argentina's claim that a determination of likelihood of continuation or recurrence of dumping under Article 11.3 of the AD Agreement must be made by determining a current level of dumping in a sunset review. To the contrary, footnote 22 of the AD Agreement makes clear that a current level of dumping determined immediately prior to a sunset review is not determinative of the issue of likelihood in a sunset review.

9. Finally, Commerce's *Sunset Policy Bulletin* is not a legal instrument with independent status under U.S. law – it is not a “measure.” Nor is it “mandatory” within the meaning of the well-established mandatory/discretionary distinction.

10. Turning to Argentina's “as applied” claims, Argentina has based these claims either on an inaccurate understanding of the facts on the record or upon facts that Argentina failed to put in the record.

11. For example, Argentina claims that Siderca was found to have provided an inadequate submission in the sunset review proceeding and that this alleged finding resulted in an expedited review. This statement is disproved by a simple review of the record, and Argentina has not cited one instance in the administrative record of the OCTG review where Commerce made this alleged finding. In fact, in each of the three separate documents – the *Final Sunset Determination*, the *Decision Memorandum*, and the *Adequacy Memorandum* – Commerce clearly stated that Siderca had fully cooperated in the sunset review and had filed a complete substantive response. Notwithstanding Argentina's claims to the contrary, Commerce also clearly articulated in the *Decision Memorandum* and the *Adequacy Memorandum* that it had determined to expedite

the review because none of the firms that had actually exported Argentine OCTG to the United States were participating in the sunset review proceeding.

12. Similarly, Argentina's claims that the expedited review process denied Siderca a full opportunity for submission of evidence and defense of its interests are belied by a simple examination of the facts. Notwithstanding the expedited nature of the review, Siderca had the right to file a complete substantive response, but chose to comment on only two issues and its treatment of those issues amounted to two pages of text. Siderca also chose not to exercise its right to file a rebuttal response. Siderca did not submit "any additional information" on its own behalf or on the behalf of the Argentine exporters, as permitted by section 351.218(d)(3)(iv) of Commerce's *Sunset Regulations*. In addition, no other Argentine interested party submitted any information or requested to participate in the proceeding. Given that Siderca and the Argentine exporters did not avail themselves of the existing opportunities for participation and defense of their interests, it is disingenuous for Argentina to now claim that the expedited nature of the proceeding resulted in a denial of opportunities to participate in contravention of Article 6. Moreover, the opportunities for defense and participation in an expedited review provide all that is required by Article 6.

13. Finally, Argentina claims that Commerce's report of the "margin likely to prevail" in the absence of the antidumping duty order breaches Articles 2 and 11.3, as applied in this case, because it objects to the calculation methodology used in the original investigation to derive the margin. First, as previously noted, there is no WTO obligation to quantify any margin for the dumping that is likely to continue or recur for purposes of a sunset review under Article 11.3 of

the AD Agreement. Nor is there any WTO obligation to consider particular margins in a sunset injury analysis. Second, the measure at issue in this dispute is the sunset review, not the original investigation. If Argentina intended to make claims concerning that distinct measure, it has failed to properly do so. Finally, we note that Argentina has made no claim that, if the allegedly problematic methodology were modified, the margin likely to prevail would be affected or that there would be any change in the margin that would be meaningful for the U.S. International Trade Commission's ("ITC") analysis.

Issues Concerning the Likelihood of Continuation or Recurrence of Injury

14. Argentina has raised a number of issues regarding the ITC's determination of likelihood of continuation or recurrence of injury in the OCTG sunset review. We will focus today on four of those issues: first, whether the ITC applied the correct standard for determining whether termination of the antidumping duty orders would be *likely* to lead to continuation or recurrence of injury; second, whether the obligations of Article 3 of the AD Agreement apply to sunset reviews; third, whether the ITC's determination was consistent with the evidentiary standards of Article 3.1; and fourth, whether the time frame provided for under U.S. law for the likely recurrence of injury is consistent with Article 11.3 of the AD Agreement.

The ITC Applied the Correct Standard for Determining Whether Termination of the Antidumping Duty Orders Would be Likely to Lead to Continuation or Recurrence of Injury

15. Argentina argues that the ITC misinterpreted the term "likely" in Article 11.3. Essentially, Argentina maintains that "likely" can only mean "probable," and that the ITC

disregarded this meaning and interpreted “likely” to mean “possible.” Both of these arguments are incorrect.

16. Trying to pin down the meaning of “likely” by seeking a synonym for that word – such as “probable” – is not helpful. The drafters did not use a synonym; they used “likely.” Moreover, dictionaries define “likely” in various ways. And even if only one synonym were applicable, this would merely beg the question of how that synonym should be interpreted.

17. To properly define “likely,” one must bear in mind the context in which it is used. In particular, one must consider the fundamental nature of the inquiry called for by sunset reviews. Sunset reviews inherently involve less certainty and precision than original investigations.

18. Contrary to Argentina’s assertion, the ITC did *not* find that the recurrence of injury was merely possible. It examined the likely volume, price effects, and impact of imports if the orders were revoked. It examined each of these factors closely. For example, with respect to likely volume, the ITC found that the significant increases in import volume during the original investigation, substantial excess capacity in several of the subject countries, and a strong incentive on the part of foreign producers to establish a presence in the large, relatively higher-priced U.S. market, supported the conclusion that the likely volume of imports would be significant if the orders were revoked.

Article 3 Does Not Apply to Sunset Reviews

19. Argentina claims that Article 3 of the AD Agreement applies in its entirety to sunset reviews. But, there are numerous textual indications that this is not the case. For example, there are no cross-references in Article 3 to Article 11, or in Article 11 to Article 3.

20. Moreover, a determination of injury under Article 3 and a determination of likely recurrence of injury under Article 11.3 are entirely different animals. This is underscored by the fact that many of the obligations described in Article 3 simply cannot be applied in sunset reviews. For example, Article 3.1 specifies that a determination of injury shall involve an examination of the “volume of the dumped imports and the effect of the dumped imports on prices.” Yet, in a sunset review imports may not even be present in the market at the time of that review, and they may not be sold at dumped prices.

21. Another example of the incompatibility between the provisions of Article 3 and the inquiry involved in a sunset review can be found in Article 3.5. Article 3.5 refers to the “dumped imports” and speaks of such imports in the present tense as “causing injury.” However, in a sunset review there may be no dumped imports. Article 3.5 refers also to existing “injury” and describes an existing causal link between dumped imports and that injury. Again, in a sunset review, with an antidumping order in place, there may be no current injury or causal link. Indeed, it would be surprising if there were given the remedial effect of an antidumping measure.

22. In sum, it is clear from these textual provisions, and others described in our first submission, that the obligations of Article 3 do not extend to sunset reviews.

The ITC’s Sunset Determination Was Consistent with Article 3.1

23. Even though Article 3.1 does not apply to sunset reviews, the ITC’s sunset determination effectively satisfies the Article 3.1 requirements. The ITC’s determination was based on a proper establishment of the relevant facts and an unbiased and objective evaluation of those facts – as required by Article 17.6(i) of the AD Agreement – and was based on positive evidence.

24. As is clear from its report, the ITC carefully reviewed an extensive array of factors and evidence relative to the likely volume, price effect and impact of imports on the domestic industry. We will focus in this statement only on the ITC's findings with regard to the likely volume of imports, as it is representative of the ITC's approach.

25. The ITC first reviewed the volume of imports in its original injury investigation, to see how imports developed in the absence of dumping measures. The original investigation showed that the rate of increase in imports was far greater than the increase in demand at that time, and that the market share of subject imports rose significantly, at the expense of that of the domestic industry. After the antidumping duty orders went into effect, imports fell but remained a factor in the U.S. market.

26. Turning to the likely volume of imports if the dumping orders were revoked, the ITC found that producers in the five countries involved had both the capacity and the incentive to increase their exports to the United States. The ITC gave five reasons for this.

27. First, the ITC found that the Tenaris alliance of OCTG producers (which has members in four of the five countries at issue here) with its global focus would have a strong incentive to gain a significant presence in the U.S. market. Second, the ITC found that the subject producers would have an incentive to devote more of their capacity to shipping casing and tubing to the U.S. market in that casing and tubing were among the highest valued pipe and tube products. Third, the ITC found that prices for casing and tubing on the world market were significantly lower than prices in the United States. Fourth, the ITC found that the subject producers faced import barriers on casing and tubing in other countries or on related products in the United

States. Finally, the ITC found that the OCTG industries in at least some of the subject countries, especially Japan and Korea, were heavily export-dependent.

28. Argentina takes issue with only three of the ITC's reasons. First, it questions whether the Tenaris producers could re-orient to the United States production that was committed under existing contracts. But the evidence before the ITC plainly supports its finding. Tenaris is the dominant supplier of OCTG products and related services to all of the world's major oil and gas drilling regions except the United States. The United States represented the best growth opportunity for the Tenaris producers. The chief executive officer of one of the world's largest distributors of OCTG, in sworn testimony, told the ITC that: "It is simply not imaginable that [Tenaris] or the other subject companies would stay out of the United States which buys as much OCTG as the rest of the world combined and has the highest prices."¹

29. Argentina's second reason for challenging the ITC's volume finding is that there is only one trade barrier in third country markets facing casing and tubing. Argentina quite clearly overlooks the fact that the ITC examined not only import barriers on casing and tubing in third country markets but also barriers on related products in the United States – that is, lower-priced products that were produced in the same facilities as casing and tubing.

30. Finally, Argentina takes issue with the ITC's finding that foreign producers had an incentive to export casing and tubing to the United States because prices in the United States were higher than in other markets. As explained more fully in our first submission, Argentina inaccurately characterizes both the evidence on which the ITC relied and the ITC's analysis of

¹ See Exhibit US-20.

this issue. The evidence shows that the ITC did conduct an independent investigation of this issue by considering the relevant evidence submitted by both parties – and that this evidence demonstrated the existence of a substantial price gap between the United States and the rest of the world.

31. In sum, the ITC had ample evidence to support its finding that subject producers had strong incentives to shift into the U.S. market and that the subject imports were likely to increase in volume.

The Time Frame in Which Injury Would Be Likely to Recur

32. Argentina claims that the provisions of U.S. law regarding the time frame within which injury would be likely to recur are inconsistent with Articles 3 and 11.3 of the AD Agreement. These provisions instruct the ITC to determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" and to "consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time."

33. Argentina misconstrues Article 11.3, which does not specify the time frame relevant to a sunset inquiry. In the absence of any specific provision in Article 11.3, Members remain free to determine under their own laws and procedures the time frame relevant in sunset inquiries. It is inherently reasonable for the United States to consider the likelihood of continuation or recurrence "within a reasonably foreseeable time" and that the "effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time."

Procedural Issues

34. Turning to the procedural issues, in its submission of December 4,² Argentina fails to rebut the U.S. case that portions of Argentina's panel request fail to comply with the requirements of Article 6.2 of the DSU and that certain claims asserted by Argentina in its first submission are not within the Panel's terms of reference. To a large extent, Argentina's submission of December 4 fails to respond to U.S. arguments at all, responding instead to arguments that the United States never made.

35. For example, Argentina asserts that the United States has alleged an inconsistency with the third requirement of Article 6.2 of the DSU – the requirement to “identify the specific measures at issue.” This assertion is simply wrong. Nowhere in the U.S. First Submission is there an allegation that Argentina's panel request is inconsistent with that requirement. Instead, the United States has complained about Argentina's failure to comply with the fourth requirement of Article 6.2 – the requirement to “present the problem clearly.” Thus, paragraphs 25-28 and 33-38 of the December 4 submission contain responses to arguments the United States never made.

36. Similarly, notwithstanding Argentina's assertions to the contrary, the United States has *not* argued that a panel request must include arguments or that it must include narrative descriptions of claims. Thus, the Panel can ignore Argentina's argumentation on these points, as well.

² *Submission from Argentina on the Request by the United States for Preliminary Rulings Under Article 6.2 of the DSU*, 4 December 2003 [hereinafter “December 4 Submission”].

37. What the United States *has* argued is that Article 6.2 requires that a panel request contain a “brief summary of the legal basis of the complaint sufficient to present the problem clearly.” Where, as here, a “measure” is described ambiguously (such as by the phrase “certain aspects”), where the treaty provision in question is described ambiguously (such as by a reference to an entire article with multiple paragraphs and obligations), and where there is no accompanying narrative description or argument, the problem will not be presented clearly.³

Page 4

38. Turning to the specific defects in the panel request, let us begin with what we have called “Page 4.” Regarding Page 4, Argentina’s assertion that the United States did not consider the panel request as a whole is simply wrong. In paragraphs 88-89 of the U.S. First Submission, the United States explained how it looked at Sections A and B of the panel request to try and figure out the nature of the problems set forth on Page 4, and how it concluded – as would any reasonable and objective person – that the problems complained about on Page 4 were different from the problems complained about in Sections A and B. For example, when Argentina makes “as such” claims in Sections A and B regarding section 751(c)(4) and sections 752(a)(1) and (5) of the U.S. Tariff Act of 1930, and then on Page 4 says that it “also” considers certain aspects of sections 751(c) and 752 to be WTO-inconsistent, a reasonable and objective person would conclude that Argentina was asserting new claims and not merely repeating the claims in Sections A and B.

³ See *First Submission by the United States of America*, November 7, 2003, para. 87 [hereinafter “U.S. First Submission”].

39. Argentina's arguments appear now to have switched. Argentina told the DSB that Sections A and B of the panel request contain Argentina's "particular claims." Now, Argentina says "the essence of Argentina's claims" – whatever "essence" means – are contained in Sections A and B.⁴ This is just inaccurate. For example, Page 4 identifies the ITC's sunset regulations as a source of some (unidentified) problem, but where in Sections A or B is the "essence" of Argentina's "claim" set forth? The answer is: nowhere.

40. Finally, Argentina claims to have provided a narrative description in the first part of the panel request that remedies the deficiencies that otherwise exist with respect to Page 4.⁵ However, this narrative is little more than a chronology of events, which concludes, on page 2 of the panel request, with the same ambiguous assertion that appears on Page 4; namely, that "certain aspects of US laws, regulations, policies and procedures related to the administration of sunset reviews are inconsistent with US WTO obligations."

Sections B.1, B.2 and B.3

41. Turning to the defects in Sections B.1, B. 2 and B.3 of the panel request, we recall that these defects involve instances in which Argentina alleges inconsistencies with Articles 3 and 6 of the AD Agreement in their entirety. What is most interesting about Argentina's justification for these defects is what Argentina does *not* argue. Argentina does not take issue with the findings of prior panels that citations to entire articles of the AD Agreement – including Article 6 – can fail to satisfy the requirements of Article 6.2 of the DSU.⁶ Argentina also *never* explains

⁴ December 4 Submission, note 26.

⁵ *Id.*, para. 45.

⁶ U.S. First Submission, para. 105, note 119.

why, in other portions of its panel request, it was able to identify with precision the particular paragraphs of Articles 3 and 6 of concern to it.⁷ Given Argentina's insistence that the entire panel request be considered, this omission on its part is especially curious.

42. With respect to the arguments that Argentina does make, they are unavailing.

Argentina's main argument is that the United States somehow knew from the consultations what Argentina's problems were.⁸ However, as the panel in the *Canada Wheat* dispute found, this type of argument is legally irrelevant for purposes of determining whether a panel request complies with Article 6.2 of the DSU.⁹ Moreover, as a factual matter, Argentina's argument fails, because the United States already has demonstrated how the consultations failed to shed light on the nature of Argentina's problems.¹⁰

43. Interestingly, Argentina seems to object to the U.S. discussion of Argentina's questions at consultations.¹¹ This is a curious objection, given that it was Argentina that first cited these questions, arguing to the DSB that they somehow made up for any deficiencies in Argentina's panel request.

"Certain Matters"

44. Finally, there are the "certain matters" that are not within the Panel's terms of reference, discussed in Section IV.D of the U.S. First Submission. Because these matters are not within the Panel's terms of reference, the United States does not need to demonstrate prejudice as part of its

⁷ *Id.*, para. 106.

⁸ December 4 Submission, paras. 71-77.

⁹ See U.S. First Submission, para. 109, quoting *Canada Wheat*, para. 25.

¹⁰ *Id.*, paras. 107-108.

¹¹ December 4 Submission, para. 75.

analysis in this case. However, to be clear, the United States was, in fact, prejudiced by the inclusion in Argentina's first submission of matters that were not included in Argentina's panel request.

45. In the interests of time, the United States will not comment on Argentina's defense of each one of these "matters," but instead will limit itself to one example that should suffice to demonstrate the fatal flaws in Argentina's arguments.

46. The United States has asserted that the claims set forth in Section VIII.C.2 of the Argentina first submission are not within the Panel's terms of reference.¹² This section contains an "as applied" claim regarding the time period considered by the ITC. However, the only portion of the panel request dealing with the time period considered by the ITC is Section B.3, which clearly is limited to an "as such" claim regarding the relevant statutory provisions.

47. Argentina argues that an "as applied" claim should be read into Section B.3 because the heading of Section B refers to the "Commission's Sunset Determination."¹³ The problem, though, is that Section A of the panel request also has a heading that refers to Commerce's determinations, but the individual paragraphs of Section A clearly distinguish between "as such" and "as applied" claims. Section A.1 makes an "as such" claim with respect to Commerce's expedited review regime, while Sections A.2 and A.3 clearly make "as applied" claims regarding certain aspects of the expedited review regime as applied in the sunset review of OCTG from Argentina.

¹² U.S. First Submission, paras. 123-125.

¹³ December 4 Submission, para. 111.

48. Thus, anyone reading the panel request as a whole – as Argentina says one must – would conclude that Argentina deliberately limited its claims regarding the time period considered by the ITC to an “as such” claim regarding the relevant statutory provisions. If Argentina had intended otherwise, it would have distinguished between the “as such” and the “as applied” claims as it did in Section A with respect to Commerce’s expedited review system.

The United States Has Been Prejudiced

49. Argentina’s attempts to demonstrate compliance with Articles 6.2 and 7 of the DSU simply highlight the deficiencies in its panel request and its first submission. The forced interpretive efforts in which Argentina engages to try to demonstrate the “clarity” of its panel request speak for themselves.

50. Thus, Argentina is really left with nothing other than the baseless assertions that: (1) the United States is afraid to engage on the substantive issues;¹⁴ and (2) the United States has not been prejudiced.

51. Concerning the first argument, the United States simply notes that we could have been spared this debate if Argentina simply had withdrawn its panel request and submitted a proper one after the United States expressed its concerns. Argentina waited over a year before even requesting consultations, so it is difficult to understand why Argentina refused to take approximately one more month for panel establishment in order to comply with the requirements of the DSU.

¹⁴ December 4 Submission, para. 2.

52. On the topic of prejudice, although this should not be relevant where – as here – there is a clear failure by Argentina to comply with the DSU, nonetheless the United States and potential third parties were prejudiced by Argentina’s failure to comply with the requirements of the DSU. Members were unable to know the matter being referred to the Panel until well after panel establishment, and the United States was prejudiced in its ability to prepare its defense.

53. Moreover, it is appropriate to take into account not only the disadvantage experienced by the United States, but the utter lack of any justification by Argentina for the deficiencies in its panel request. For example, Sections A and B of the panel request show that Argentina is capable of drafting claims with precision, but yet Argentina offers no plausible explanation for the ambiguity on Page 4.

54. In summary, this Panel should follow the precedent set by the panel in the *Canada Wheat* dispute. Although in that case the panel found a failure to comply with the third requirement of Article 6.2 of the DSU – the requirement to identify the specific measures at issue – the panel’s reasoning applies with equal force to Argentina’s failure to “present the problem clearly.” As that panel made clear, the due process objective of Article 6.2 requires that a panel request provide the respondent with the information necessary to begin preparing its case. The panel found that the U.S. failure to comply with Article 6.2 “creates significant uncertainty regarding the identity of the precise measures at issue and thus impairs Canada’s ability to ‘begin preparing its defence’ in a meaningful way.”¹⁵

¹⁵ *Canada Wheat*, para. 28.

55. In this case, Argentina's failure to comply with Article 6.2 created significant uncertainty regarding the matters at issue, thereby impairing – *i.e.*, prejudicing – the United States' ability to begin preparing its defense in a meaningful way.

56. Mr. Chairman, that concludes the opening statement of the United States. The U.S. delegation looks forward to your questions and engaging in a constructive dialogue with the Panel.