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UNITED STATES – SUNSET REVIEWS OF ANTI-DUMPING MEASURES ON OIL COUNTRY TUBULAR GOODS FROM ARGENTINA

AB-2004-4

Report of the Appellate Body

TABLE OF ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Definition
Anti-Dumping Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
GATT 1994	*General Agreement on Tariffs and Trade 1994*
NAFTA	North American Free Trade Agreement
OCTG	oil country tubular goods
Panel Report	Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/R and Corr.1, 16 July 2004
panel request	Request for the Establishment of a Panel by Argentina, WT/DS268/2, 23 April 2003 (attached as Annex II to this Report)
SAA	Statement of Administrative Action to the Uruguay Round Agreements Act, H.R. Doc. No. 103-316 (1994), reprinted in 1994 USCAAN 3773, 4040 (Exhibit ARG-5 submitted by Argentina to the Panel)
SPB; Sunset Policy Bulletin	Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, *United States Federal Register*, Vol. 63, No. 73 (16 April 1998), p. 18871 (Exhibit ARG-35 submitted by Argentina to the Panel)
USDOC	United States Department of Commerce
USDOC Regulations	Procedures for Conducting Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, *United States Federal Register*, Vol. 63, No. 54 (20 March 1998), p. 13516 (Exhibit US-3 submitted by the United States to the Panel), codified in Title 19, Section 351.218 of the *United States Code of Federal Regulations*
USITC	United States International Trade Commission
USITC Report	Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico, Investigation Nos. 701-TA-364, 731-TA-711, and 713-616, Pub. 3434 (June 2001) (Exhibit ARG-54 submitted by Argentina to the Panel)
Working Procedures	*Working Procedures for Appellate Review*, WT/AB/WP/7, 1 May 2003
WTO	World Trade Organization
WTO Agreement	*Marrakesh Agreement Establishing the World Trade Organization*

TABLE OF GATT AND WTO CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
Canada – Wheat Exports and Grain Imports	Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain* ("*Canada – Wheat Exports and Grain Imports*"), WT/DS276/R, adopted 27 September 2004, as upheld by the Appellate Body Report, WT/DS276/AB/R
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002
EC – Bed Linen (Article 21.5 – India)	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 by India*, WT/DS141/AB/RW, adopted 24 April 2003
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277
Japan – Apples	Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003
Korea – Alcoholic Beverages	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, 3
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
Mexico – Corn Syrup	Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R and Corr.1, adopted 24 February 2000, DSR 2000:III, 1345
Mexico –Anti-Dumping Measures on Beef and Rice	*Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295, panel proceedings ongoing
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701
US – 1916 Act	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793

Short Title	Full Case Title and Citation
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Corrosion-Resistant Steel Sunset Review	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 Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, adopted 9 January 2004, as modified by the Appellate Body Report, WT/DS244/AB/R
US – Countervailing Measures on Certain EC Products	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697 Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001, as modified by the Appellate Body Report, WT/DS184/AB/R, DSR 2001:X, 4769
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051
US – Oil Country Tubular Goods Sunset Reviews	Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/R and Corr.1, 16 July 2004
US – Section 337	GATT Panel Report, *United States Section 337 of the Tariff Act of 1930*, adopted 7 November 1989, BISD 36S/345
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004
US – Superfund	GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances*, adopted 17 June 1987, BISD 34S/136
US – Tobacco	GATT Panel Report, *United States Measures Affecting the Importation, Internal Sale and Use of Tobacco*, adopted 4 October 1994, BISD 41S/I/131
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
US – Wine and Grape Products	GATT Panel Report, *Panel on United States Definition of Industry Concerning Wine and Grape Products*, adopted 28 April 1992, BISD 39S/436
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina

United States, *Appellant/Appellee*
Argentina, *Appellant/Appellee*

European Communities, *Third Participant*
Japan, *Third Participant*
Korea, *Third Participant*
Mexico, *Third Participant*
Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, *Third Participant*

AB-2004-4

Present:

Taniguchi, Presiding Member
Abi-Saab, Member
Ganesan, Member

I. Introduction

1. The United States and Argentina each appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (the "Panel Report").[1] The Panel was established to consider a complaint by Argentina against the United States regarding the continuation of anti-dumping duties on oil country tubular goods ("OCTG") from Argentina following the conduct of a five-year, or "sunset", review of those duties.

2. In June 1995, the United States Department of Commerce (the "USDOC") imposed anti-dumping duties on OCTG from Argentina following an investigation that was initiated by the USDOC in 1994, before the entry into force of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*").[2] The anti-dumping duty order imposed an anti-dumping duty of 1.36 per cent on Siderca, the only exporter from Argentina that had participated in the investigation, and a residual duty at the same rate for all other exporters from Argentina.[3] Following the imposition of the anti-dumping duties, Siderca ceased exporting OCTG to the United States.[4] In the five years following the imposition of these anti-dumping duties, the USDOC initiated

[1]WT/DS268/R and Corr.1, 16 July 2004.

[2]Panel Report, para. 2.1.

[3]*Ibid*., para. 2.2.

[4]*Ibid*., para. 2.3.

four reviews of the anti-dumping duties on Siderca, at the request of the domestic producers in the United States. In each of these reviews, the USDOC determined, on the basis of Siderca's statements, that Siderca "had not made any shipment for consumption in the United States".[5] As Siderca was the sole exporter from Argentina for whom an administrative review had been requested by the domestic producers, the USDOC "rescinded the administrative review" on OCTG from Argentina.[6]

3. In July 2000, the USDOC initiated, on its own initiative, a sunset review of anti-dumping duties on OCTG from Argentina.[7] In its determination of the likelihood of continuation or recurrence of dumping[8], the USDOC concluded that "dumping has continued over the life of the Argentine order and is likely to continue if the order were revoked".[9] In its determination of the likelihood of continuation or recurrence of injury, the United States International Trade Commission (the "USITC") cumulated imports from all sources subject to the sunset review, including countries other than Argentina. Based on its consideration of the likely volumes, price effects, and adverse impact of dumped imports from all sources on the domestic industry, the USITC concluded that expiry of the duty "would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time".[10]

4. Before the Panel, Argentina claimed that certain provisions of the Tariff Act of 1930[11], the Statement of Administrative Action (the "SAA")[12], Section II.A.3 of the Sunset Policy Bulletin (the "SPB")[13], and the USDOC "practice" relating to the conduct of sunset reviews[14], are inconsistent, as

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[5]Panel Report, para. 2.4.

[6]*Ibid*.

[7]*Ibid*., para. 2.5.

[8]In our discussion we refer at times to the USDOC's determination of the likelihood of continuation or recurrence of dumping as the "likelihood-of-dumping determination", and the USITC's determination of the likelihood of continuation or recurrence of injury as the "likelihood-of-injury determination".

[9]Issues and Decision Memorandum for the Expedited Sunset Reviews of the Antidumping Duty Orders on Oil Country Tubular Goods from Argentina, Italy, Japan, and Korea; Final Results, 31 October 2000 (Exhibit ARG-51 submitted by Argentina to the Panel), p. 5.

[10]Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico, Investigation Nos. 701-TA-364, 731-TA-711, and 713-616, Pub. 3434 (June 2001) (Exhibit ARG-54 submitted by Argentina to the Panel) ("USITC Report"), p. 1.

[11]The statutory provisions challenged by Argentina before the Panel are Sections 751(c), 751(c)(4), 752(a)(1), 752(a)(5), and 752(c) of the Tariff Act of 1930. (See Panel Report, para. 3.1(1)-(3)) These provisions correspond to Sections 1675(c), 1675(c)(4), 1675a(a)(1), 1675a(a)(5), and 1675a(c) of Title 19 of the *United States Code*.

[12]Statement of Administrative Action to the Uruguay Round Agreements Act, H.R. Doc. No. 103-316 (1994), reprinted in 1994 USCAAN 3773, 4040 (Exhibit ARG-5 submitted by Argentina to the Panel).

[13]Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin, *United States Federal Register*, Vol. 63, No. 73 (16 April 1998), p. 18871 (Exhibit ARG-35 submitted by Argentina to the Panel).

[14]Panel Report, para. 3.1(3).

such, with Articles 3 and 11 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*"). Argentina also claimed that Section 351.218(d)(2)(iii) of the USDOC Regulations[15] is inconsistent, as such, with Articles 6.1, 6.2, and 11.3 of the *Anti-Dumping Agreement*.[16] Argentina claimed that the United States' sunset review determination on OCTG from Argentina—with respect to the USDOC's likelihood-of-dumping determination and the USITC's likelihood-of-injury determination—is inconsistent with the United States' obligations under Articles 3, 6, 11, and 12 of the *Anti-Dumping Agreement* and Annex II thereto.[17]

5. Argentina also argued that the United States is acting inconsistently with Article X:3(a) of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") because the USDOC fails to administer, in an impartial and reasonable manner, the United States' sunset review laws, regulations, decisions, and rulings.[18] As a consequence of the alleged inconsistencies with the *Anti-Dumping Agreement*, Argentina further claimed that the United States acted inconsistently with Articles 1 and 18 of the *Anti-Dumping Agreement*, Article VI of the GATT 1994, and Article XVI:4 of the *WTO Agreement*.[19]

6. In the Panel Report, circulated to Members of the World Trade Organization (the "WTO") on 16 July 2004, the Panel found that Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(iii) of the USDOC Regulations are inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*, and that Section II.A.3 of the SPB is inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*.[20] The Panel also found that Section 351.218(d)(2)(iii) of the USDOC Regulations is inconsistent, as such, with Articles 6.1 and 6.2 of the *Anti-Dumping Agreement*.[21] As to Argentina's "as applied"[22] claims, the Panel found that the USDOC's likelihood-of-dumping determination underlying this dispute is inconsistent with Articles 11.3 and 6.2 of the

[15]The "USDOC Regulations", as they relate to sunset reviews, are found in Procedures for Conducting Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, *United States Federal Register*, Vol. 63, No. 54 (20 March 1998), p. 13516 (Exhibit US-3 submitted by the United States to the Panel), codified in Title 19, Section 351.218 of the *United States Code of Federal Regulations*.

[16]Panel Report, para. 3.1(1)-(3).

[17]*Ibid*., para. 3.1(4)-(6) and (8)-(11).

[18]*Ibid*., para. 3.1(7).

[19]*Ibid*., para. 3.1(12).

[20]*Ibid*., paras. 8.1(a)(i)-(ii) and 8.1(b).

[21]*Ibid*., para. 8.1(a)(iii).

[22]By "as applied", we refer to the types of claims involving challenges to a Member's application of a general rule to a specific set of facts. The "as applied" claims in this dispute concern the application of United States rules governing sunset reviews in the course of likelihood-of-dumping and likelihood-of-injury determinations made with respect to imports of OCTG from Argentina.

Anti-Dumping Agreement[23], but that it is not inconsistent with Articles 6.1, 6.8, or 12, or with Annex II.[24]

7. The Panel further found that Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930, as well as the USITC's likelihood-of-injury determination, are not inconsistent with Articles 3.3, 3.7, 3.8, or 11.3 of the *Anti-Dumping Agreement*.[25] The Panel exercised judicial economy with respect to the remainder of Argentina's claims, including Argentina's challenges: (1) to the administration by the USDOC of the United States' sunset review laws, regulations, decisions, and rulings[26]; and (2) to the USDOC "practice" relating to the conduct of sunset reviews.[27] The Panel also declined Argentina's request to make a suggestion, pursuant to Article 19.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), that the United States bring its measures into conformity with its WTO obligations "by revoking the anti-dumping order and repealing or amending the laws and regulations at issue".[28]

8. The Panel accordingly recommended that the Dispute Settlement Body (the "DSB") request the United States "to bring its measures mentioned in paragraph 8.1(a)(i), (ii), (iii), 8.1(b) and 8.1(d)(i) [of the Panel Report] into conformity with its obligations under the WTO Agreement".[29]

9. On 31 August 2004, the United States notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a Notice of Appeal[30] pursuant to Rule 20 of the *Working Procedures for Appellate Review*.[31] On 13 September 2004, the United States filed its appellant's submission.[32] On 15 September 2004, Argentina filed an other appellant's submission. On 27 September 2004, the United States and Argentina filed their appellee's submissions.[33] On the same day, the European Communities, Japan, Korea, and Mexico each filed a third participant's submission[34], and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu notified

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[23]Panel Report, para. 8.1(d)(i).

[24]*Ibid*., para. 8.1(d)(ii).

[25]*Ibid*., paras. 7.193, 8.1(c), 8.1(d)(ii), and 8.1(e).

[26]*Ibid*., para. 7.169.

[27]*Ibid*., para. 7.168.

[28]*Ibid*., para. 8.3.

[29]*Ibid*., para. 8.2.

[30]WT/DS268/5, 31 August 2004 (attached as Annex I to this Report).

[31]WT/AB/WP/7, 1 May 2003 (the "*Working Procedures*").

[32]Pursuant to Rule 21 of the *Working Procedures*.

[33]Pursuant to Rule 22 of the *Working Procedures*.

[34]Pursuant to Rule 24(1) of the *Working Procedures*.

the Appellate Body Secretariat of its intention to appear and make an opening statement at the oral hearing as a third participant.[35]

10. On 12 October 2004, Argentina filed a letter requesting the Division hearing the appeal "to let the parties in this appeal know in advance of the hearing the order in which the ... Division plans to address the issues before appeal."[36] Argentina supported its request by reference to a "practice [to this effect that] was followed in some previous appeal proceedings". The United States did not object to Argentina's request. On 13 October 2004, the Division responded to Argentina's request, stating that, although "it is not the practice of the Appellate Body to inform the participants, in advance of the oral hearing, of the issues on which a Division intends to pose questions", the Division, exercising its discretion in the conduct of the oral hearing, had decided to provide and identify in advance the order in which the issues on appeal would be addressed during the questioning. The Division emphasized, however, that "this order of questioning is general in nature, and that it is also subject to change, at the Division's discretion, as the Division's work on this appeal continues."[37]

11. The oral hearing in the appeal was held on 15 and 16 October 2004. The participants and third participants presented oral arguments (with the exception of the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu) and responded to questions by the Members of the Division hearing the appeal.

II. Arguments of the Participants and Third Participants

A. *Claims of Error by the United States – Appellant*

1. The Panel's Terms of Reference

12. The United States appeals the Panel's denial of the United States' request for a preliminary ruling that certain of Argentina's claims elaborated in its first written submission had not been set out in Argentina's request for the establishment of a panel ("panel request")[38], as required by Article 6.2 of the DSU. The United States argues that these claims were not within the Panel's terms of reference and, accordingly, the Panel should not have reached conclusions with respect to these claims.

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[35]Pursuant to Rule 24(2) of the *Working Procedures*.

[36]Letter from Argentina to the Director of the Appellate Body Secretariat, 12 October 2004, copied to the United States and the third participants.

[37]Letter from the Director of the Appellate Body Secretariat to the participants and third participants, 13 October 2004.

[38]WT/DS268/2, 4 April 2003 (attached as Annex II to this Report).

(a) *"As Such" Claims Relating to the United States Department of Commerce's Likelihood-of-Dumping Determination*

13. The United States challenges the Panel's findings that Argentina's panel request includes "as such" claims against Sections 751(c) and 752(c) of the Tariff Act of 1930, the SAA, and the SPB.

14. The United States argues that it did not receive notice of these "as such" claims from Argentina's reference in the panel request to an "irrefutable presumption"[39] under United States law that dumping would be likely to continue or recur after termination of an anti-dumping order. The United States points out that the heading of Section A of the panel request, as well as the sentence in which the phrase "irrefutable presumption" appears, refer to the WTO-inconsistency of the USDOC's "Determination" underlying this dispute and not to United States law as such. The United States notes further that in Section A.4 of the panel request, the "practice" is described as "evidence[]" of the alleged presumption, and the SPB is stated as the "bas[is]" for the practice; neither of these is stated to be the subject of a claim in itself.

15. The United States also observes that the alleged presumption is claimed to be based on "US law" [40], but the law being challenged—namely, the SAA, the SPB, a provision of the Tariff Act of 1930, or a combination of these—is not specified. The United States argues that "page four"[41] of the panel request cannot be used to clarify the claims purportedly set out in Section A.4. The United States emphasizes that "page four", which appears in the panel request following the claims alleged in Sections A and B, states that Argentina "*also*" [42] considers certain provisions of United States law to be inconsistent with the United States' WTO obligations. In the United States' view, this suggests that "whatever is 'claimed' on 'Page Four' is *in addition to* and not a *clarification of* what is claimed in section A.4." [43] The text of the panel request makes clear that "page four" was intended to *add to*, rather than *clarify*, the claims already made in Sections A and B of the panel request. The United States submits that this understanding of "page four" of the panel request was confirmed by Argentina at the DSB meeting establishing the panel, where Argentina indicated to the United States that the claims were set forth in Sections A and B of the panel request rather than in "page four". Having encouraged the United States to read the panel request in this manner, the United States argues,

[39]Argentina's panel request, Section A.4.

[40]*Ibid*.

[41]See *infra*, footnote 217.

[42]United States' appellant's submission, para. 94 (quoting Argentina's panel request, p. 4). (emphasis added by the United States)

[43]*Ibid*., para. 94. (original emphasis)

Argentina may not subsequently rely on "page four" to "expand"[44] the claims set out in Sections A and B.

(b) *"As Such" and "As Applied" Claims Relating to the United States International Trade Commission's Likelihood-of-Injury Determination*

16. If Argentina appeals the Panel's findings, under Articles 3.7 and 3.8, on the United States' laws relating to the timeframe for the evaluation of likely injury by the USITC, and on the application of those laws in the underlying sunset review, the United States appeals the Panel's conclusions regarding the consistency of Argentina's panel request with Article 6.2 of the DSU in respect of those claims.

17. The United States asserts that, although Argentina developed claims under paragraphs 7 and 8 of Article 3 in its written submissions to the Panel, Section B.3 of the panel request cited "Article 3" without reference to any of its paragraphs, thus indicating a challenge brought under the whole of Article 3. According to the United States, such "wholesale references to articles with multiple obligations"[45] are inconsistent with the obligation under Article 6.2 of the DSU to "present the problem clearly". The United States argues that, as Articles 3.7 and 3.8 address "threat of material injury", and as no threat determination was made in the underlying sunset review, it could not have known that those provisions would be the focus of Argentina's claims. The United States also contests the Panel's reasoning that appears to suggest that Section B.3 contains textual similarities with Article 3.7, which should have informed the United States of Argentina's challenge to the timeframe employed by the USITC when evaluating the likelihood of injury to the domestic industry. In the United States' view, the language in Section B.3 does not reflect Article 3.7, but rather, quotes the United States statute being challenged, thereby failing to identify the legal basis of Argentina's complaint.

(c) *Prejudice*

18. Finally, the United States challenges the Panel's finding that the United States did not establish that it had been prejudiced by any lack of clarity in Argentina's panel request. In support of this challenge, the United States first submits that the Panel did not cite any authority for the United States' obligation to establish prejudice as a prerequisite to a successful Article 6.2 challenge.

[44]United States' appellant's submission, para. 87.

[45]*Ibid*., para. 102.

Secondly, the United States argues that, because of the "inherently prejudicial"[46] nature of Argentina's panel request, the United States did not know *which* provision in "US law"[47] was alleged to be inconsistent with *what* WTO law. This lack of clarity, according to the United States, was compounded by Argentina's initial indication to the United States that the entirety of Argentina's claims was to be found in Sections A and B of the panel request, whereas Argentina subsequently identified its claims before the Panel by reference to "page four" of that document.[48] Thirdly, the United States points to its inability to conduct sufficient research and assign adequate personnel to work on the present dispute in the light of uncertainty about Argentina's claim. These difficulties, the United States submits, are further evidenced by the fact that the United States was unable to address, until the first meeting with the Panel, the issue of the specific remedy requested by Argentina. The United States further submits that, instead of having five months from the date of the panel request to prepare its submission, it effectively had only three weeks from the filing of Argentina's submission to do so. In the United States' view, this loss of preparation time is relevant to a finding of prejudice, considering the nature and the number of claims raised in the first submission of Argentina that were not set out in the panel request.

19. For these reasons, the United States requests the Appellate Body to reverse the Panel's finding that Argentina's panel request includes, with respect to the alleged "irrefutable presumption", the "as such" claims against Sections 751(c) and 752(c) of the Tariff Act of 1930, the SAA, and the SPB. The United States also requests the Appellate Body to reverse the Panel's finding that the United States did not demonstrate the requisite prejudice to make out a successful claim under Article 6.2 of the DSU. Should Argentina appeal the Panel's findings, under Articles 3.7 and 3.8, relating to the timeframe employed by the USITC when making its likelihood-of-injury determination, the United States further requests the Appellate Body to reverse the Panel's findings that these claims are within its terms of reference.

2. The Sunset Policy Bulletin

20. The United States contests the Panel's findings that the SPB is a "measure" subject to WTO dispute settlement and that Section II.A.3 of the SPB is inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*.

[46]United States' appellant's submission, para. 108.

[47]Argentina's panel request, Section A.4.

[48]United States' appellant's submission, para. 108.

(a) The Sunset Policy Bulletin as a "Measure"

21. The United States argues that the Panel erred in relying on the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review* because the Appellate Body did not conclude in that report that the SPB is a measure. In that case, according to the United States, the Appellate Body reversed the panel's finding that the SPB is not a measure only because the panel's analysis was insufficient, but the Appellate Body did not complete the analysis, thereby leaving open the question of whether the SPB is a measure.

22. The United States also submits that the Panel erred in concluding that the SPB is a measure because such a conclusion does not result from "an objective assessment" consistent with Article 11 of the DSU. The United States argues that the Panel contravened Article 11 of the DSU because it did not explain why the findings of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, as to whether the SPB is a measure, would be persuasive given the factual record in this dispute. For the United States, because the Panel simply relied on the findings of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* without providing an analysis on the basis of the factual record in this dispute, it made *no* assessment and, therefore, it cannot be said to have made an *objective* assessment. The United States adds that the Panel did not make an "objective assessment" as to whether the SPB is a measure because it failed to consider the United States' explanations that the SPB "has no functional life of its own and has no independent legal status"[49], and because the Panel lacked the factual information necessary to conclude that the SPB is a measure.

23. The United States argues further that the SPB is not a measure because it "is not a legal instrument"[50], and it "does not 'set[] forth rules or norms that are intended to have general and prospective application'".[51] The United States submits that non-binding documents that simply express agency thinking and provide guidance to the public, such as the SPB, should not be found to be measures.

24. For these reasons, the United States requests the Appellate Body to reverse the Panel's finding that the SPB is a "measure" subject to WTO dispute settlement.

[49]United States' appellant's submission, para. 11.

[50]*Ibid*., paras. 11 and 13.

[51]*Ibid*., para. 13 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82).

(b) *Consistency of the Sunset Policy Bulletin with Article 11.3 of the Anti-Dumping Agreement*

25. The United States argues that the Panel erred in concluding that Section II.A.3 of the SPB is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

26. The United States expresses the view that the mandatory/discretionary distinction is well established and has been consistently applied in GATT and WTO dispute settlement proceedings. For the United States, the Panel properly framed the question before it in terms of a mandatory/discretionary analysis when it stated that it had to decide whether Section II.A.3 of the SPB directs the USDOC to treat evidence concerning "dumping margins" and "import volumes" as conclusive in its likelihood determinations. However, according to the United States, the Panel misapplied the test it had set out by conducting an "artificial and incorrect" interpretive analysis based on a "misreading" of the Appellate Body's findings in *US – Corrosion-Resistant Steel Sunset Review*.[52] The United States submits that the SPB is part of United States municipal law, and that the meaning of a WTO Member's municipal law is a question of fact that requires an examination of the status and meaning of the measure at issue within the municipal legal system of the Member concerned. The United States argues that the approach employed by the Panel in reviewing the practice of the USDOC was "superficial"[53], with no basis in the United States legal system. For the United States, the analysis of the meaning of the SPB performed by the Panel did not reflect an "objective assessment" under Article 11 of the DSU because it "neglected"[54] the status of the SPB within the municipal legal system of the United States, and "ignore[d]"[55] the municipal legal principles that define the meaning of the SPB.

27. The United States reiterates that the SPB is "simply a transparency tool" that provides guidance to the public and the private sector and, therefore, it was "inaccurate [for the Panel] to conclude that the SPB requires that [the USDOC] do anything at all".[56] Inasmuch as the SPB does not require the USDOC to "do anything", it cannot be said to breach the obligations at issue in this dispute.

[52]United States' appellant's submission, para. 18.

[53]*Ibid*., para. 23.

[54]*Ibid*., para. 4.

[55]*Ibid*., para. 23.

[56]*Ibid*., para. 25. (original underlining)

28. The United States disagrees with the Panel's analysis of the "consistent application"[57] of the SPB. The United States points out that there is no principle of interpretation in United States law which provides that a previously non-binding document becomes, through repeated application, binding. The United States adds that if the USDOC has discretion to apply a law in a particular manner, the fact that, to date, it has not exercised its discretion in that manner would not change the fact that the USDOC has the discretion to do so. The United States emphasizes that the Panel's conclusion that the three scenarios of Section II.A.3 of the SPB are conclusive is based solely on an analysis of statistics on the application of the SPB in past sunset reviews. The statistical analysis on which the Panel relied does not reflect an "objective assessment" in its own right because the Panel did no more than note a "correlation" between the results in particular sunset reviews and the scenarios set forth in the SPB.[58] According to the United States, the Panel did not ask the question of whether the SPB caused the determinations in question, as it simply assumed a cause and effect relationship.[59]

29. Therefore, the United States requests the Appellate Body to reverse the Panel's finding that Section II.A.3 of the SPB is inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*.

3. Waiver Provisions[60] of United States Laws and Regulations

(a) *Argentina's Prima Facie Case*

30. The United States alleges that Argentina failed to make out a *prima facie* case that Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(iii) of the USDOC Regulations are inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*, and that Section 351.218(d)(2)(iii) of the USDOC Regulations is inconsistent, as such, with Articles 6.1 and 6.2 of the *Anti-Dumping Agreement*.

31. The United States recalls the statement of the Appellate Body, in *US – Carbon Steel*, that "[t]he party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion."[61] The United States argues that Argentina failed to satisfy this burden because it introduced merely one case before the Panel in support of its allegations as to the meaning

[57]Panel Report, heading to paras. 7.158-7.165.

[58]United States' appellant's submission, para. 31.

[59]*Ibid*.

[60]See *infra*, para. 223.

[61]United States' appellant's submission, para. 77 (quoting Appellate Body Report, *US – Carbon Steel*, para. 157).

of the waiver provisions. In addition, the United States contends that Argentina failed to establish that the company-specific [62] determinations made by the USDOC as a result of the operation of the waiver provisions "had an impact" [63] on the agency's order-wide [64] determinations. Nevertheless, according to the United States, the Panel not only decided "to fill in the gaps in Argentina's claim", but it also "willfully ignored" the contradicting evidence introduced by the United States.[65] In the United States' view, by making findings on issues for which Argentina had not made out a *prima facie* case, the Panel failed to meet its obligations under Article 11 of the DSU.

(b) *Consistency of the Waiver Provisions with Article 11.3 of the Anti-Dumping Agreement*

32. The United States claims that the Panel erred in finding that Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(iii) of the USDOC Regulations do not allow the USDOC to make an order-wide likelihood determination consistent with Article 11.3 of the *Anti-Dumping Agreement.*

33. The United States recalls the Appellate Body's finding in *US – Corrosion-Resistant Steel Sunset Review* that Article 11.3 does not prohibit sunset review determinations from being made on an order-wide basis. In the light of this reading, and given that the USDOC makes sunset review determinations on an order-wide basis, the United States submits that the Panel should have evaluated whether the waiver provisions prevent the USDOC from making an *order-wide* determination consistent with Article 11.3. Instead, the Panel examined the WTO-consistency of the waiver provisions as they relate to *company-specific* determinations made by the USDOC. After doing so, according to the United States, the Panel "imputed" to order-wide determinations the alleged WTO-inconsistency of the *company-specific* determinations that result from the operation of the waiver provisions.[66]

34. The United States points out that if a respondent waives its participation in a sunset review, the USDOC makes an affirmative likelihood-of-dumping determination *exclusively* for that respondent. The United States argues that this *company-specific* determination, however, does not influence the *order-wide* determination because the latter is conducted "independently" of individual company-specific determinations.[67] In this regard, the United States emphasizes that under United

[62]See *infra*, footnote 327.

[63]United States' response to questioning at the oral hearing.

[64]See *infra*, footnote 326.

[65]United States' appellant's submission, para. 79.

[66]*Ibid*., para. 38.

[67]*Ibid*., paras. 42 and 48.

States law, the USDOC is required to base its order-wide determination on all the record evidence before the agency, including evidence from incomplete submissions of respondents that are deemed to have waived their participation. Because the order-wide determination is based on such totality of the evidence, in the United States' view, the waiver provisions do not prevent the USDOC from arriving at a likelihood-of-dumping determination consistent with the requirements of Article 11.3.

35. The United States, therefore, requests the Appellate Body to reverse the Panel's finding that Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(iii) of the USDOC Regulations are inconsistent with Article 11.3 of the *Anti-Dumping Agreement.*

(c) *Consistency of the "Deemed" Waiver Provision with Articles 6.1 and 6.2 of the Anti-Dumping Agreement*

36. The United States also appeals the Panel's finding that Section 351.218(d)(2)(iii) of the USDOC Regulations (the "deemed" waiver provision[68]) is inconsistent with Articles 6.1 and 6.2 of the *Anti-dumping Agreement*. The United States claims that Section 351.218(d)(2)(iii), in contrast to Articles 6.1 and 6.2, "does not address the issue of the kind of information that can be provided in a sunset review".[69] Rather, Section 351.218(d)(2)(iii) specifies the consequences of a respondent's failure to file a complete response, namely, that the respondent will be deemed to have waived its right to participation in the dumping phase of the sunset review. The United States points to other USDOC regulations that provide numerous opportunities for respondents to submit information and respond to other parties' arguments during the course of a sunset review proceeding. In the light of these regulations, the United States submits, the Panel erred in concluding that respondents are not given the opportunity provided for in Articles 6.1 and 6.2 of the *Anti-Dumping Agreement* by virtue of Section 351.218(d)(2)(iii) of the USDOC Regulations. In the United States' view, the Panel's interpretation of the deemed waiver provisions provides parties with an "indefinite right" to present evidence and request a hearing during a sunset review.[70]

(d) *Article 11 Claims Relating to the Panel's Findings on Waivers*

37. The United States claims that the Panel acted inconsistently with Article 11 of the DSU in two respects: first, in assessing the relationship between company-specific and order-wide determinations under United States law; and secondly, in assessing how the USDOC determines whether a respondent's submission qualifies as a "complete substantive response" under Section 351.218(d)(2)(iii) of the USDOC Regulations.

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[68]See *infra*, para. 223.

[69]United States' appellant's submission, para. 51.

[70]*Ibid*., para. 55.

38. With regard to the first claim, the United States argues that the Panel erred in concluding that the waiver provisions are inconsistent with Article 11.3 "[t]o the extent" that order-wide likelihood determinations are based on company-specific determinations.[71] According to the United States, the record before the Panel contains several clarifications by the United States that the order-wide determinations are not "based on"[72] company-specific determinations, and that the USDOC is required to consider *all* the record evidence when making an order-wide likelihood determination. The United States claims that, even assuming *arguendo* that the USDOC arrived at an improper company-specific determination, the other record evidence may be sufficient for the USDOC to support a reasoned and adequate order-wide determination. The United States contests the Panel's reliance on one statement by the United States, in response to questioning from the Panel, that a company-specific determination "*may* affect" the order-wide likelihood determination.[73] According to the United States, it does not follow from this statement that the former is "dispositive" of the latter.[74]

39. The United States perceives the "same defective technique" in the Panel's analysis of the consistency of the deemed waiver provision with Articles 6.1 and 6.2 of the *Anti-Dumping Agreement*.[75] The United States observes that the Panel referred to the USDOC "practice" as support for its findings, but cited only one case submitted by Argentina.[76] In addition, the United States alleges a "lack of objectivity" on the part of the Panel because it "ignored" the United States' contrary explanations and examples concerning its own practice[77], which reflected how the incomplete information submitted by a respondent, although not used in the company-specific determination, would be considered on the order-wide level.

40. With regard to its second claim under Article 11 of the DSU, the United States challenges the Panel's conclusion that, in order for a submission to be considered a "complete substantive response" by the USDOC, it must include information on *all* of the items listed in Section 351.218(d)(3) of the USDOC Regulations. The United States alleges that in so concluding, the Panel "ignored"[78] explanations submitted by the United States, although they clearly showed that: determining whether

[71]United States' appellant's submission, para. 58 (quoting Panel Report, para. 7.101).

[72]*Ibid*., paras. 59 and 61-63.

[73]*Ibid*., para. 61 (quoting United States' response to Question 4(b) posed by the Panel at the Second Panel Meeting (Panel Report, Annex E, p. E-93, para. 3)). (original emphasis)

[74]*Ibid*., para. 61.

[75]*Ibid*., para. 65.

[76]*Ibid*., para. 66 (quoting Panel Report, para. 7.126).

[77]*Ibid*., para. 66.

[78]*Ibid*., para. 75.

a submission is incomplete is assessed on a case-by-case basis; the USDOC has the authority under its regulations to waive deadlines for respondents; and, in certain circumstances, a submission containing incomplete information may nevertheless be treated as a "complete substantive response". Moreover, according to the United States, Argentina provided no evidence to the Panel contradicting the United States' explanations as to the discretion afforded the USDOC to accept incomplete submissions as "complete substantive responses".

41. In the light of these arguments, the United States requests the Appellate Body to reverse the Panel's finding that Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(iii) of the USDOC Regulations are inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*. The United States also requests the Appellate Body to reverse the Panel's finding that Section 351.218(d)(2)(iii) of the USDOC Regulations is inconsistent, as such, with Articles 6.1 and 6.2 of the *Anti-Dumping Agreement*.

B. *Arguments of Argentina – Appellee*

1. The Panel's Terms of Reference

42. Argentina agrees with the Panel's conclusion that the claims raised by Argentina in its written submissions, including the "as such" claims relating to the "irrefutable presumption" and the "as such" and "as applied" claims under Articles 3.7 and 3.8 of the *Anti-Dumping Agreement*, fall within the Panel's terms of reference. Argentina therefore requests the Appellate Body to uphold the Panel's findings rejecting the United States' preliminary ruling requests on these issues.

(a) *"As Such" Claims Relating to the United States Department of Commerce's Likelihood-of-Dumping Determination*

43. Argentina argues that its "as such" claims relating to the "irrefutable presumption" under United States law are located in Section A.4 of the panel request, which, by referring to the "irrefutable presumption under US law as such", informed the United States that Argentina would be making an "as such" challenge. Given the references to the alleged presumption in United States law and practice, in addition to the underlying sunset review determination, Argentina claims that "it is axiomatic that in order for the [USDOC's] application of the presumption to be WTO-inconsistent, the U.S. law establishing such a presumption must also be WTO-inconsistent as such".[79] Furthermore, according to Argentina, "page four" of the panel request makes clear which provisions of United

[79]Argentina's appellee's submission, para. 121. (original underlining; italics omitted)

States law are the subject of challenge. In Argentina's view, the United States' arguments ignore the requirement that Article 6.2 claims must be evaluated by looking at the panel request "as a whole".[80]

(b) *"As Such" and "As Applied" Claims Relating to the United States International Trade Commission's Likelihood-of-Injury Determination*

44. With respect to the United States' "contingent"[81] claim that the panel request did not sufficiently specify Argentina's challenge under Articles 3.7 and 3.8, Argentina agrees with the Panel's reasoning. In Argentina's view, the Panel correctly recognized that the reference to Article 3 in Section B.3 of the panel request placed the United States on notice that Argentina's claim about the temporal limitation of a sunset review determination necessarily related, in part, to Articles 3.7 and 3.8. Argentina also argues that a complaining party may satisfy the requirements of Article 6.2 by listing only the treaty articles it considers to have been infringed by the respondent Member.[82] In this regard, Argentina recalls the Appellate Body's decision in *Korea – Dairy* and states that the listing of treaty articles "will be considered to be insufficient only in cases where the defending party is able to demonstrate to the Panel that it has suffered actual prejudice during the course of the panel proceedings".[83]

(c) *Prejudice*

45. Argentina submits that the United States has not demonstrated prejudice resulting from the purported lack of clarity in Argentina's panel request. According to Argentina, a demonstration of prejudice is a "*sine quo non*"[84] of a successful challenge under Article 6.2 of the DSU, and the United States appears to agree with this requirement, as evidenced by the United States' argumentation before the panels in *Canada – Wheat Exports and Grain Imports* and *Mexico – Anti-Dumping Measures on Beef and Rice*.[85] Argentina argues that the "ill-defined complaints about delay" made by the United States are insufficient to satisfy the requirement to demonstrate prejudice.[86] Moreover, Argentina claims, the United States' participation in the panel proceedings belies its complaint about its inability to defend itself because of the alleged vagueness of Argentina's panel request.

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[80]Argentina's appellee's submission, para. 119.

[81]United States' appellant's submission, heading IV.B.2.

[82]Argentina's appellee's submission, para. 142 (quoting United States' appellant's submission, para. 102).

[83]*Ibid*., para. 147.

[84]*Ibid*., para. 148.

[85]*Ibid*., paras. 151-152.

[86]*Ibid*., para. 185.

46. Argentina therefore requests the Appellate Body to find that Argentina's panel request satisfies the requirements of Article 6.2 and to uphold the Panel's findings that the claims raised by Argentina in its written submissions to the Panel fell within the Panel's terms of reference.

2. The Sunset Policy Bulletin

47. Argentina submits that the Panel correctly found that the SPB is a "measure" for purposes of WTO dispute settlement and that Section II.A.3 of the SPB is inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*.

(a) *The Sunset Policy Bulletin as a "Measure"*

48. Argentina argues that the United States' interpretation of the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review* is erroneous. For Argentina, the Appellate Body clarified in that case that a "measure", for the purpose of WTO challenges, includes administrative instruments such as the SPB. Argentina submits that the fact that the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* did not have a sufficient evidentiary basis to complete the analysis with respect to some of Japan's claims, does not cast doubt on its conclusion that the SPB is a measure that could, with an appropriate evidentiary basis, give rise to a finding of inconsistency, as such, with Article 11.3. Argentina points out that the Appellate Body proceeded, as a second step, to complete the analysis with respect to Japan's claim of inconsistency, as such, of Section II.A.3 of the SPB with Article 11.3 of the *Anti-Dumping Agreement*, only after having concluded, as a first step, that the SPB is a measure challengeable, as such, in WTO dispute settlement.

49. Argentina contests the United States' claim that the Panel did not comply with its obligations under Article 11 of the DSU when concluding that the SPB is a measure. Argentina argues that the reasoning of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* was directly relevant to the Panel's analysis of the issue before it, and that the Panel was correct in using the Appellate Body's findings in that case as a tool for its own reasoning. Argentina submits that the USDOC "consistent practice", as set forth in Exhibits ARG-63 and ARG-64[87], demonstrates that the USDOC considers the SPB to be binding.[88] According to Argentina, "[t]he U.S. assertions that the SPB 'does not "do" anything,' that it is 'not a legal instrument,' and that it is 'non-binding' do not survive even routine scrutiny when they are viewed against the text of the sunset determinations, representative of the [USDOC] practice, taken from [Exhibit] ARG-63."[89] Argentina adds that the

[87]See *infra*, para. 203.

[88]Argentina's appellee's submission, para. 20.

[89]*Ibid*., para. 22 (quoting United States' appellant's submission, paras. 11 and 13). (footnotes omitted)

factual record, including the evidence in Exhibit ARG-63 and the Panel's findings, must be evaluated in the light of the standard under Article 11 of the DSU, and that "the bar for DSU Article 11 challenges is quite high" as there must be a deliberate disregard of or refusal to consider the evidence.[90] According to Argentina, the United States did not put forward any credible argument that would suggest that the Panel did not meet the "high" standard of Article 11 of the DSU.

(b) *Consistency of Section II.A.3 of the Sunset Policy Bulletin with Article 11.3 of the Anti-Dumping Agreement*

50. Argentina contends that it submitted extensive evidence to the Panel of the USDOC's "consistent application" of Section II.A.3 of the SPB.[91] Argentina argues that, under the guidance provided by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, the Panel had before it ample evidence to discern the meaning of Section II.A.3 and to find that the three criteria therein are inconsistent, as such, with Article 11.3. According to Argentina, Exhibits ARG-63 and ARG-64 demonstrate that the USDOC follows the instructions of Section II.A.3 in every sunset review, and that each time it finds that at least one of the three criteria is satisfied, the USDOC makes an affirmative finding of likely dumping without considering additional factors. For Argentina, the USDOC's "consistent application" of the provisions of Section II.A.3 of the SPB indicates that the three scenarios of Section II.A.3 are conclusive of the likelihood of continuation or recurrence of dumping.[92] Argentina underscores the Panel's finding that the United States had failed to rebut Argentina's arguments, as well as the evidence in Exhibits ARG-63 and ARG-64 underlying those arguments, that the USDOC always treats as conclusive the fact that the margin and volume data in a given case fall under one of the three scenarios. For Argentina, because Section II.A.3 of the SPB requires the USDOC to apply a mechanistic presumption of likely dumping, Section II.A.3 is inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*.

51. Argentina maintains that the assessment that led the Panel to conclude that the SPB is inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement* was proper under Article 11 of the DSU. According to Argentina, Article 11 of the DSU did not require the Panel to defer to the United States' representations as to the meaning of the SPB. Thus, Argentina rejects the United States' contention that the Panel's analysis of the SPB did not reflect an "objective assessment" under Article 11 of the DSU on the ground that it neglected the status and meaning of the SPB within the

[90]Argentina's appellee's submission, para. 23.

[91]*Ibid*., para. 27.

[92]*Ibid*., para. 32.

municipal legal system of the United States. For Argentina, the assertions made by the United States that the SPB has "no independent legal status" and does not "do" anything are not sufficient to overcome the evidence presented by Argentina on the operation and effect of the SPB.[93]

52. Argentina accordingly requests the Appellate Body to uphold the Panel's findings that the SPB is a "measure" subject to challenge in WTO dispute settlement, and that Section II.A.3 of the SPB is inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*.

3. Waiver Provisions of United States Laws and Regulations

53. Argentina argues that the Panel did not err in concluding that Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(iii) of the USDOC Regulations are inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*. Argentina also agrees with the Panel's conclusion that Section 351.218(d)(2)(iii) of the USDOC Regulations is inconsistent, as such, with Articles 6.1 and 6.2 of the *Anti-Dumping Agreement*.

(a) *Argentina's Prima Facie Case*

54. Argentina contends that, contrary to the United States' claim on appeal, Argentina submitted sufficient evidence to make out its *prima facie* case of inconsistency with Articles 6.1, 6.2, and 11.3. Argentina points to the text of the waiver provisions as evidence of their "mandatory nature" and to show that they require action not permitted by Articles 6.1, 6.2, and 11.3.[94] With respect to the relationship between *company-specific* and *order-wide* likelihood determinations under United States law, Argentina refers to various sections of its written submissions and oral statements before the Panel, wherein Argentina addressed this relationship in connection with particular USDOC sunset review determinations.[95] Argentina also notes that the United States did not rebut the statistics provided by Argentina to the Panel in relation to the USDOC's sunset review determinations contained in Exhibits ARG-63 and ARG-64. As such, Argentina claims that it established the *prima facie* case necessary for the Panel to draw its conclusions as to the WTO-consistency of the waiver provisions.

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[93]Argentina's appellee's submission, para. 44 (quoting United States' closing statement at the Second Panel Meeting, para. 2).

[94]*Ibid*., para. 95.

[95]Argentina's responses to questioning at the oral hearing.

(b) *Consistency of the Waiver Provisions with Article 11.3 of the Anti-Dumping Agreement*

55. Argentina argues that Section 751(c)(4)(B) of the Tariff Act of 1930 requires the USDOC to make an affirmative determination of likely dumping with respect to respondents that waive their right to participation in a sunset review. According to Argentina, this requirement applies to those respondents that submit affirmative waivers, pursuant to Section 751(c)(4)(B), as well as to those respondents that are deemed by the USDOC, pursuant to Section 351.218(d)(2)(iii) of the USDOC Regulations, to have waived their right to participate. Argentina contends that the mandated finding of a likelihood of dumping is inconsistent with Article 11.3, which requires a determination to be based on an investigation and evaluation of the evidence rather than on assumptions. Given this inconsistency, Argentina argues that the United States' characterization of the waiver provisions as a mechanism to permit respondents to focus their resources on the injury phase of the sunset review is not persuasive.

56. In Argentina's view, "[t]hat the waiver provisions affect the order-wide determination cannot be disputed."[96] Argentina posits, in particular, cases where there may be only one respondent, or where all the respondents waive their right to participation, as examples where the order-wide determination could not be made consistently with the obligations under Article 11.3. In addition, Argentina observes that the United States agrees that the company-specific determination "may affect" the order-wide likelihood determination.[97] Therefore, Argentina claims that the waiver provisions prevent the United States' from making order-wide likelihood determinations in the manner required by Article 11.3.

(c) *Consistency of the "Deemed" Waiver Provision with Articles 6.1 and 6.2 of the Anti-Dumping Agreement*

57. According to Argentina, the USDOC, under Section 351.218(d)(2)(iii) of the USDOC Regulations, deems a respondent to have waived its right to participation in the dumping phase of the sunset review where a respondent files no submission or an incomplete submission in response to the notice of initiation of the sunset review. Argentina argues that once the USDOC makes such a finding, it is required to make an affirmative likelihood-of-dumping determination with respect to that respondent, notwithstanding that "respondent's attempts to participate in the sunset proceeding".[98] Thus, Argentina submits, a respondent deemed to have waived its right to participation does not have

[96]Argentina's appellee's submission, para. 64.

[97]*Ibid*. (quoting United States' appellant's submission, para. 61; in turn quoting United States' response to Question 4(b) posed by the Panel at the Second Panel Meeting (Panel Report, Annex E, p. E-93, para. 3)).

[98]*Ibid*., para. 76.

adequate opportunity to defend its interests, as required by Articles 6.1 and 6.2. Argentina states further that the United States fails to identify in its appellant's submission any allegation of legal error with respect to the Panel's analysis of this issue. Consequently, in Argentina's view, the Appellate Body has "no basis" to rule on the United States' claim on appeal.[99]

(d) *Article 11 Claims Relating to the Panel's Findings on Waivers*

58. Argentina argues that a successful claim under Article 11 of the DSU requires a showing of "deliberate disregard of, or refusal to consider" evidence submitted by the Member.[100] The challenges of the United States to the Panel's evaluation of Argentina's claims as to the waiver provisions does not satisfy this requirement. With respect to the relationship between company-specific and order-wide determinations of dumping, Argentina submits that, given the United States' admission that a company-specific determination may affect the order-wide determination, the United States' challenge amounts to a complaint about the Panel's appreciation of the evidence before it. Argentina claims that, even if the mandated affirmative likelihood determination is made only with respect to a particular respondent, the final order-wide determination would not satisfy the "exacting obligations" of Article 11.3.[101]

59. Argentina also contests the United States' argument that the Panel failed to properly evaluate what constitutes a "complete substantive response" under the USDOC Regulations. Argentina argues that the relevant aspect of the Panel's analysis relates to the "*effect* of a deemed waiver in light of the requirements of Articles 6.1 and 6.2".[102] As such, the United States' emphasis on the conditions under which the USDOC deems a respondent to have waived its right to participation is inapposite. Argentina therefore argues that the United States' claims under Article 11 of the DSU do not satisfy the standard established by the Appellate Body for finding that a panel acted inconsistently with its obligations under that provision.

60. Argentina therefore requests the Appellate Body to uphold the Panel's findings that Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(iii) of the USDOC Regulations are inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*. Argentina also requests the Appellate Body to uphold the Panel's finding that Section 351.218(d)(2)(iii) of the USDOC Regulations is inconsistent, as such, with Articles 6.1 and 6.2 of the *Anti-Dumping Agreement*.

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[99]Argentina's appellee's submission, para. 78.

[100]*Ibid*., para. 81 (quoting Appellate Body Report, *EC – Hormones*, para. 133).

[101]*Ibid*., para. 87 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 113).

[102]*Ibid*., para. 91. (original emphasis)

C. *Claims of Error by Argentina – Appellant*

1. Factors to be Evaluated in a Likelihood-of-Injury Determination

61. Argentina argues that the Panel erred in not interpreting Article 11.3 of the *Anti-Dumping Agreement* to encompass certain "substantive disciplines", and in consequently "failing to find" that the USITC's likelihood-of-injury determination in the underlying dispute ("as applied") is inconsistent with Article 11.3 on the ground that it did not apply these disciplines.[103] Argentina submits that, "[i]n the alternative"[104], the Panel erred in finding that the disciplines contained in Article 3 do not apply to sunset reviews conducted pursuant to Article 11.3. Argentina accordingly requests the Appellate Body to "complete the analysis" and to find that the USITC's determination is inconsistent with Articles 3.1, 3.2, 3.4, and 3.5.[105]

62. In Argentina's view, footnote 9 of the *Anti-Dumping Agreement* sets out the definition of "injury", as that term is used *throughout* the Agreement. This is clear from the language of footnote 9, which states that the definition applies "[u]nder this Agreement" and that "the term 'injury' ... shall be interpreted in accordance with the provisions of this Article". As a result, Argentina claims, Article 11.3, which requires an assessment of the likelihood of continuation or recurrence of "injury", must incorporate the definition of "injury" found in footnote 9.

63. Argentina argues that the Panel failed to recognize that Article 11.3 contains certain obligations with which the USITC failed to comply in arriving at its likelihood-of-injury determination. Argentina contends that the obligations of Article 11.3—to undertake a "review" and make a "determin[ation]" before extending anti-dumping duties beyond five years—have been given further meaning in the decisions of the Appellate Body in *US – Carbon Steel* and *US – Corrosion-Resistant Steel Sunset Review*. Argentina submits that, consistent with the aforementioned Appellate Body decisions, a sunset review determination under Article 11.3 "must have a sufficient factual basis to allow it to draw reasoned and adequate conclusions" concerning the likelihood of continuation or recurrence of dumping and injury.[106]

64. Argentina claims that the "review" and "determin[ation]" mandated by Article 11.3 encompass, "at a minimum", the following requirements: (1) an objective examination of the volume of dumped imports and the effect of the dumped imports on prices, as well as the consequent impact of the imports on domestic producers; (2) an evaluation of all relevant economic factors having a

[103]Argentina's other appellant's submission, para. 144.

[104]*Ibid*., para. 146.

[105]*Ibid*., para. 214.

[106]*Ibid*., para. 141.

bearing on the state of the industry; (3) the demonstration of a causal relationship between the dumped imports and the injury to the domestic industry; and (4) a determination based on facts and "not merely on allegation, conjecture or remote possibility".[107] In Argentina's view, an investigating authority that fails to comply with these requirements cannot arrive at a reasoned conclusion supported by a sufficient factual basis, as required by Article 11.3. Because the USITC's likelihood-of-injury determination did not meet these requirements, Argentina argues, the determination is inconsistent with Article 11.3.

65. As an "alternative" to its argument regarding the scope of obligations under Article 11.3, Argentina submits that the steps outlined in Article 3 for a determination of injury apply as well to sunset reviews under Article 11.3.[108] Argentina claims that, by virtue of the definition of "injury" in footnote 9, any determination of injury, including a likelihood-of-injury determination, must be made according to the provisions of Article 3. Argentina argues that the Panel's finding to the contrary with respect to footnote 9 "reduces to redundancy or inutility" the Agreement-wide definition of injury set forth therein.[109]

66. Argentina finds support for the applicability of Article 3 to sunset reviews in Article 3.1, which provides for a "determination of injury for purposes of Article VI of GATT 1994" to be made in accordance with the remaining paragraphs of Article 3. Argentina claims that, because a likelihood-of-injury determination in sunset reviews is "unquestionably"[110] such a "determination of injury", the disciplines of Article 3 apply to sunset reviews. In this regard, Argentina argues that the Panel's distinction between a "determination of injury" and a "determination of the likelihood of continuation or recurrence of injury", is not supported by the text of the *Anti-Dumping Agreement* and is contrary to the definition of "injury" set forth in footnote 9.

67. Argentina additionally claims that the Panel's failure to find Article 3 applicable to sunset reviews is based on a "misinterpretation and misapplication" of the Appellate Body's decision in *US – Corrosion-Resistant Steel Sunset Review*.[111] In that case, Argentina argues, the Appellate Body distinguished "dumping margins" from "dumping determinations", finding that although Article 11.3 does not require investigating authorities to calculate margins, the provision does mandate a determination as to the likelihood of dumping. Argentina contends that the Appellate Body found that if dumping margins are nevertheless relied upon by an investigating authority in sunset reviews, those

[107]Argentina's other appellant's submission, para. 143.

[108]*Ibid*., para. 146.

[109]*Ibid*., para. 148.

[110]*Ibid*., para. 160.

[111]*Ibid*., paras. 167-168.

margins must conform to Article 2.4 in order to render WTO-consistent the sunset review determination. Given this finding with respect to a "*discretionary* act"[112], that is, the reliance on dumping margins, Argentina argues, investigating authorities in sunset reviews must conform to Article 3 when making likelihood-of-injury determinations, which are *required* by Article 11.3.

68. Argentina contends that because the Panel erred in concluding that Article 3 does not apply to sunset reviews, the Panel consequently erred in failing to evaluate Argentina's claims under Articles 3.1, 3.2, 3.4, and 3.5 of the *Anti-Dumping Agreement*. Accordingly, Argentina requests the Appellate Body to "complete the analysis" and find the USITC's likelihood-of-injury determination to be inconsistent with the United States' obligations under these provisions.[113] In this respect, Argentina incorporates on appeal the arguments it made before the Panel on these claims.

69. In sum, Argentina requests the Appellate Body to find that the Panel erred in failing to interpret Article 11.3 to encompass "substantive obligations" governing an investigating authority's likelihood-of-injury determination, and in failing to find that the United States acted inconsistently with these obligations. In the alternative, Argentina requests the Appellate Body to reverse the Panel's finding that Article 3 does not apply to sunset reviews, and to find that the United States acted inconsistently with Articles 3.1, 3.2, 3.4, and 3.5 in its likelihood-of-injury determination in the underlying dispute.

2. Cumulation in Sunset Reviews

70. Argentina argues that the Panel erred in finding that the *Anti-Dumping Agreement* "generally allows the use of cumulation" and that the conditions set out in Article 3.3 for the use of cumulation do not apply to sunset reviews.[114]

71. Argentina argues that the *Anti-Dumping Agreement* permits cumulation *only* in original investigations. Argentina claims that contrary to the Panel's reading, the text of the *Anti-Dumping Agreement* is not silent on this issue. Referring to the use of the term "duty" in the singular in Article 11.3, Argentina submits that the drafters of the *Anti-Dumping Agreement* expected investigating authorities to focus their sunset analysis on one anti-dumping measure, not "multiple antidumping measures".[115] As such, in Argentina's view, Article 11.3 requires an investigating

[112]Argentina's other appellant's submission, para. 176. (original emphasis)

[113]*Ibid*., para. 179.

[114]*Ibid*., para. 251.

[115]*Ibid*., para. 261.

authority to determine whether the expiry of a "duty", as applied to imports from a *single* WTO Member, would be likely to lead to a continuation or recurrence of injury.

72. According to Argentina, the Panel's contrary interpretation is based on its view that the relevance of a cumulative analysis in original investigations applies equally in the context of sunset reviews. Argentina submits that the Panel's reasoning fails to account for "important differences" between injury determinations in original investigations and likelihood-of-injury determinations in sunset reviews.[116] Investigating authorities in original investigations have a "factual foundation" to evaluate the appropriateness of cumulating the effects of imports from multiple sources.[117] However, according to Argentina, such a foundation may not exist for investigating authorities conducting sunset reviews because, for example, imports from a particular Member may no longer be present in the domestic market.

73. Argentina observes that Article 3.3 is limited to original investigations, and that Article 3.3 contains no cross-reference to Article 11. Given this textual limitation, Argentina claims, Article 3.3 serves as a limited authorization for cumulation solely in the context of original investigations. Argentina finds further support for its view in the text of Article VI of the GATT 1994, which refers to injury caused by "products of one country", suggesting that a broad authorization for cumulation was not intended by the treaty drafters. Without such broad authorization, and any specific language permitting cumulation in sunset reviews, Argentina submits that investigating authorities are not permitted to engage in a cumulative analysis when making likelihood-of-injury determinations under Article 11.3.

74. In Argentina's view, if cumulation were permitted in sunset reviews, it follows that the conditions for cumulation in Article 3.3 "must equally apply" because, without such conditions, investigating authorities would be given "*carte blanche*" in their conduct of sunset reviews, contrary to the "disciplines" on cumulation negotiated during the Uruguay Round.[118]

3. The Panel's Interpretation of the Term "Likely"

75. Argentina claims that the Panel erred in applying an incorrect interpretation of the term "likely", as found in Article 11.3, and in refusing to consider as evidence the public acknowledgement of the USITC that it had not applied the proper understanding of the term "likely" when making its sunset review determinations.

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[116]Argentina's other appellant's submission, para. 265.

[117]*Ibid*.

[118]*Ibid*., para. 278.

76. Argentina refers to the Appellate Body's decision in *US – Corrosion-Resistant Steel Sunset Review* to confirm that the ordinary meaning of the term "likely", as used in Article 11.3, is "probable". Argentina argues that, despite this clear interpretation of the Appellate Body, the Panel failed to interpret "likely" to mean "probable". Argentina submits that the Panel emphasized the fact that the United States statute and the USITC's determination used the word "likely". In Argentina's view, the mere use of this term could not establish that the USITC had complied with Article 11.3. Rather, Argentina submits, the Panel should have interpreted "likely" to mean "probable", before engaging in two "separate inquiries": first, whether the USITC applied the proper "likely" standard, and second, whether the USITC applied this standard "in a WTO-consistent manner".[119]

77. Argentina argues that the USITC failed to *apply* the proper interpretation of the term "likely" when conducting its likelihood-of-injury determination. Argentina observes that the SAA, which guides the USITC in its sunset review determinations, states that "[t]here may be more than one likely outcome following revocation or termination [of the anti-dumping order]."[120] According to Argentina, the USITC, based on guidance found in the SAA, has consistently interpreted "likely" to mean *less than* "probable". Argentina submits that the USITC acknowledged before a North American Free Trade Agreement ("NAFTA") dispute settlement panel that "*it did not apply a probable standard* ***in the present case***".[121] Argentina also points to the admission of the USITC before a United States court that the agency had not employed a "probable" standard in several sunset reviews, including that relating to OCTG from Argentina. Argentina argues that the Panel erred in concluding, despite the admissions of the USITC to the use of a WTO-inconsistent standard for evaluating likelihood of injury, that these admissions were not relevant to the Panel's analysis of Argentina's claim.

4. Consistency of the USITC's Determination with the Standard of "Likelihood" in Article 11.3 of the *Anti-Dumping Agreement*

78. Argentina challenges the Panel's conclusion that the various analyses in the USITC's likelihood-of-injury determination do not render that determination inconsistent with Article 11.3. Argentina contests, in particular, the Panel's findings that the USITC did not act inconsistently with Article 11.3 in the following respects: (1) deciding to cumulate the effects of likely imports from Argentina with the effects of likely imports from other sources; (2) determining that volumes of imports would be likely to increase; (3) determining that future imports would be likely to depress or

[119]Argentina's other appellant's submission, para. 50. (Argentina's emphasis omitted)

[120]*Ibid*., para. 27 (quoting SAA, p. 883).

[121]*Ibid*., para. 29. (original italics, underlining, and boldface)

suppress prices of the domestic like product; and (4) determining that future imports would be likely to have an adverse impact on the domestic industry.

79. Citing the Appellate Body's decision in *US – Corrosion-Resistant Steel Sunset Review*, Argentina argues that a sunset review determination under Article 11.3 must be supported by "positive evidence" and be the result of an "objective examination". This requirement of Article 11.3, in Argentina's view, should be understood in the light of the standard of "likelihood" embodied in Article 11.3. Argentina submits that the "likely" standard "directly affects the investigating authority's obligation to establish the facts properly, because the factual basis necessary to support a likely/probable finding is different from the facts necessary to support a finding that is less than probable."[122] Argentina claims that, in evaluating the USITC's likelihood-of-injury determination in the present case, the Panel failed to recognize this relevance of the "likely" standard and, as a result, failed to assess the determination against the proper standard set out in Article 11.3. Instead, Argentina contends, the Panel considered several of the factors cited by the USITC in the light of whether they were *possible*.

(a) *Cumulative Assessment of Dumped Imports*

80. Argentina observes that the USITC's likelihood-of-injury determination is premised on its examination of cumulated imports rather than on imports from Argentina alone. Argentina argues that, although it had raised the issue of the consistency of the USITC's cumulation analysis with Article 11.3, the Panel failed to assess whether the USITC's decision to conduct a cumulative analysis satisfied the requirements of Article 11.3.

81. According to Argentina, the USITC acted inconsistently with Article 11.3 in assessing one of the factors supporting its decision to conduct a cumulative analysis, namely, the "simultaneous presence" of imports from all sources and the domestic like product in the same geographical market.[123] Argentina submits that the USITC's decision on this factor was "based almost exclusively on an inference drawn from the original investigation".[124] In Argentina's view, the USITC referred to the simultaneous presence of imports and the domestic like product at the time of the original investigation and concluded from this observation that imports and the domestic like product are likely to be simultaneously present in the same market in the future. Such an "assumption"[125], Argentina claims, is inconsistent with the requirement under Article 11.3 for investigating authorities

[122]Argentina's other appellant's submission, para. 63.

[123]*Ibid*., para. 71 (quoting USITC Report, pp. 13-14).

[124]*Ibid*., para. 73.

[125]*Ibid*., para. 75.

to make a "fresh determination"[126] in sunset reviews instead of relying solely on the determination made in the original investigation.

(b) *Likely Volume of Dumped Imports*

82. Argentina argues that the Panel erred in concluding that the USITC's analysis of the likely volume of dumped imports was adequately supported to satisfy the requirement of Article 11.3. Argentina identifies several factors relied upon by the USITC in making its conclusion as to the likely volumes of dumped imports, including declining volumes following the issuance of the anti-dumping orders; the consolidation of several foreign producers; the incentives for foreign producers to shift production to the subject merchandise; barriers to the exports of the subject merchandise to other markets; and barriers in the United States market to products made in the same production facilities as the subject merchandise. Argentina alleges that the USITC's conclusion on these factors is not based on positive evidence, but on unreasonable inferences and "ignore[s]"[127] contrary evidence on the record submitted by Argentina. Therefore, in Argentina's view, the USITC's conclusion with respect to likely volumes amounts to "speculation" and cannot constitute a proper establishment of the facts necessary to determine what is *probable* to occur. [128]

(c) *Likely Price Effects of Dumped Imports*

83. Argentina challenges the Panel's conclusion that the USITC's analysis of likely price effects of dumped imports was not inconsistent with Article 11.3. Argentina claims that the USITC erroneously relied solely on information collected during the original investigation when finding that price differences would be likely to cause purchasers to change supply sources, and that importers would be likely to engage in "aggressive pricing practices".[129] In addition, Argentina submits, the USITC's finding that imports in the year preceding the sunset review were generally priced lower than the domestic like product was not adequately supported because the record evidence contained a "limited basis of information from which to draw such conclusions".[130] The finding that foreign producers would seek to increase their market share by lowering prices, in Argentina's view, was also "not objective" because it "contradicted" the theory relied upon by the USITC to support its likely

[126]Argentina's other appellant's submission, para. 74 (quoting Appellate Body Report, *US – Carbon Steel*, para. 88).

[127]*Ibid*., para. 94.

[128]*Ibid*., paras. 83-84, 88, 90, 94, and 98.

[129]*Ibid*., para. 111 (quoting USITC Report, p. 21, footnote 144). (Argentina's emphasis omitted)

[130]*Ibid*., para. 109.

volumes analysis, namely, that higher prices in the United States would provide incentives to foreign producers to ship to that market.[131]

(d) *Likely Impact of Dumped Imports on the United States' Industry*

84. Argentina submits that, having noted that the USITC had found the health of the domestic industry to be positive at the time of the sunset review, "[t]his finding should have led the Panel to conclude that an adverse impact was not probable."[132] According to Argentina, the Panel failed to so conclude and, instead, upheld the USITC's impact finding on the basis that Article 11.3 would be satisfied provided that the agency's determination were based on a sufficient factual basis and an objective examination of the facts. Argentina argues the Panel's reasoning to be in error because an investigating authority "must also demonstrate, among other things, that *injury would be probable* if the order were revoked".[133]

85. In the light of these alleged errors in several aspects of the USITC's likelihood-of-injury analysis, Argentina requests the Appellate Body to reverse the Panel's finding that the United States did not act inconsistently with Article 11.3 in determining that revocation of the anti-dumping order on OCTG from Argentina would be likely to lead to continuation or recurrence of injury.

5. The Timeframe in a Likelihood-of-Injury Determination

86. Argentina claims that the Panel erred in finding that Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930, as such, as well as the application of these provisions in the underlying sunset review, are not inconsistent with Article 11.3.

87. Argentina observes that footnote 9 of the *Anti-Dumping Agreement* requires the term "injury" to be interpreted "in accordance with the provisions of" Article 3. It follows, in Argentina's view, that the injury evaluated by the investigating authority must continue or recur "within the period of time beginning with the 'expiry' of the order but not exceeding circumstances deemed to be 'imminent' within the meaning of Article 3.7".[134] According to Argentina, the investigating authority's failure to specify the time period in which injury is likely to continue or recur, which time period in any event must be less than "imminent", is also inconsistent with the obligation under Article 11.3

[131]Argentina's other appellant's submission, para. 110.

[132]*Ibid*., para. 116.

[133]*Ibid*., para. 118. (original emphasis)

[134]*Ibid*., para. 221. (Argentina's emphasis omitted)

that investigating authorities must base their sunset review determinations on a "firm evidentiary foundation".[135]

88. Argentina alleges that Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930 are inconsistent with Article 11.3 of the *Anti-Dumping Agreement* because they provide for the investigating authority to evaluate the likelihood of injury to the domestic industry occurring within a "reasonably foreseeable time".[136] Argentina points to language in the United States statute and the SAA that requires the USITC to consider injury beyond an "imminent" time period but sets no specific limits on when that injury may occur. Argentina submits that this "unbridled discretion" to evaluate the likelihood of injury recurring at some undetermined point in the future is incompatible with the requirements of Article 11.3.[137] In Argentina's view, the exercise of such discretion in a manner consistent with Article 11.3 requires that an investigating authority articulate the period of time that forms the basis for its likelihood-of-injury determination. In addition, Argentina argues that, by allowing the continued imposition of anti-dumping duties during the time period after expiry of the order—when there may be no present injury or threat of material injury—Sections 752(a)(1) and 752(a)(5) create a "gap"[138], which is contrary to the requirement in Article 11.1 that duties be imposed only when necessary "to counteract dumping which is causing injury".[139]

89. Because Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930 require the USITC to evaluate injury beyond an "imminent" [140] time period, and the USITC employed such an unlimited and unspecified time period in its likelihood-of-injury determination, Argentina requests the Appellate Body to reverse the Panel's finding that these statutory provisions and their application in the underlying sunset review are not inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

6. Conditional Appeals

90. If the Appellate Body were to reverse any of the Panel's conclusions on the basis of the arguments of the United States, Argentina requests the Appellate Body to address two issues that the Panel declined to resolve for reasons of judicial economy: (1) the consistency, as such, of the USDOC "practice" in sunset reviews with Article 11.3 of the *Anti-Dumping Agreement*; and (2) the

[135]Argentina's other appellant's submission, para. 232 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 178).

[136]*Ibid*., para. 220.

[137]*Ibid*., para. 223.

[138]*Ibid*., para. 238.

[139]*Ibid*., para. 237 (quoting *Anti-Dumping Agreement*, Article 11.1). (underlining added by Argentina)

[140]*Ibid*., para. 221 (quoting *Anti-Dumping Agreement*, Article 3.7).

consistency of the USDOC's administration of anti-dumping laws and other measures with Article X:3 of the GATT 1994.

(a) *Challenge to the USDOC "Practice"*

91. Argentina claims that the USDOC "practice" in sunset reviews is inconsistent with Article 11.3 because the "practice" reveals a WTO-inconsistent presumption that dumping would be likely to continue or recur whenever there is a "historical" dumping margin or a decline in import volumes following the imposition of the anti-dumping duties.[141] Argentina points to the 223 USDOC sunset review determinations conducted through September 2003, submitted to the Panel as Exhibits ARG-63 and ARG-64, as evidence in support of its allegation. Argentina argues that the United States has not rebutted its evidence, and thus, the determinations in Exhibits ARG-63 and ARG-64 should be accepted as undisputed facts by the Appellate Body.

92. According to Argentina, this evidence demonstrates that the USDOC has followed the scenarios set out in Section II.A.3 of the Sunset Policy Bulletin to make an affirmative likelihood determination in *every* instance of "historical" dumping margins or declining (or no) import volumes.[142] As such, in Argentina's view, these determinations show that the finding by the USDOC that a case falls under one of the scenarios set out in Section II.A.3 of the SPB is "conclusive" of the likelihood of dumping.[143] Argentina submits that, because the USDOC does not consider additional factors, the USDOC "practice" is inconsistent with the requirement in Article 11.3 to "determine" on the basis of all relevant evidence whether dumping would be likely to continue or recur.

(b) *Challenge under Article X:3(a) of the GATT 1994*

93. Argentina claims that the United States is acting inconsistently with Article X:3 of the GATT 1994 because the USDOC fails to administer anti-dumping laws and other measures in a uniform, impartial and reasonable manner. The measures identified by Argentina in this respect are those contained in Argentina's panel request, including the underlying likelihood determinations by the USDOC and the USITC, as well as certain statutory and regulatory provisions, procedures, and administrative provisions. Referring to the USDOC sunset review determinations contained in Exhibits ARG-63 and ARG-64, Argentina argues that it is "not credible" that an investigating authority, basing its reasoned analysis on positive evidence, could arrive at an affirmative likelihood determination in 100 per cent of the cases where the domestic industry sought to extend the anti-

[141]Argentina's other appellant's submission, para. 285.

[142]*Ibid*., para. 286.

[143]*Ibid*.

dumping measure beyond five years.[144] Such a record, in Argentina's view, reflects a "clear and undeniable pattern of biased and unreasonable decision making".[145]

D. *Arguments of the United States – Appellee*

1. Factors to Be Evaluated in a Likelihood-of-Injury Determination

94. The United States agrees with the Panel's interpretation of "injury" under Article 11.3 of the *Anti-Dumping Agreement*, particularly as it concerns the factors required to be analyzed by an investigating authority conducting a likelihood-of-injury inquiry.

95. The United States submits, first, that the USITC's determination meets the standards of Article 11.3, as set forth by the Appellate Body in previous decisions. In this respect the United States points to the extensive data-gathering completed by the USITC in the underlying sunset review and the evidentiary underpinning of the agency's determination as reflecting the "positive evidence", "rigorous examination", and "reasoned and adequate conclusions" required by Article 11.3.[146]

96. The United States supports the Panel's finding that Article 3 of the *Anti-Dumping Agreement* does not apply generally to sunset reviews. The United States emphasizes the "different nature" of original investigations when compared to sunset reviews.[147] The United States observes that original investigations focus on the *current* condition of the domestic industry in order to ascertain present injury or threat of material injury. However, sunset reviews under Article 11.3 are "counterfactual in nature" and require a "decidedly different analysis", focusing *not* on present injury—which could well no longer exist—but on the "likely impact of a prospective change in the status quo".[148] This distinction between original investigations and sunset reviews, the United States claims, has been recognized by the Appellate Body in *US – Carbon Steel* and *US – Corrosion-Resistant Steel Sunset Review*.[149]

97. The United States further argues that, contrary to Argentina's claim, the Panel properly understood the implications of the Appellate Body's decision in *US – Corrosion Resistant Steel Sunset Review* for the resolution of this issue. In the United States' view, the Appellate Body in that case found that investigating authorities are not required to calculate dumping margins in a likelihood-

[144]Argentina's other appellant's submission, para. 296.

[145]*Ibid*., para. 296.

[146]United States' appellee's submission, para. 87.

[147]*Ibid*., para. 90.

[148]*Ibid*., para. 94.

[149]*Ibid*., para. 95 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 106-107; in turn quoting Appellate Body Report, *US – Carbon Steel*, para. 87).

of-dumping determination, but that if they choose to perform such calculations, they must be done in accordance with Article 2.4. The United States submits that, in the context of likelihood-of-injury determinations, the parallel reasoning would suggest that investigating authorities are not required to make a determination of present injury during a sunset review, but if they choose to make such a determination, they must observe the disciplines of Article 3. In addition, the United States points out, the Appellate Body made it clear in *US – Corrosion-Resistant Steel Sunset Review* that Article 11.3 prescribes no specific methodology for the conduct of sunset reviews, providing additional support for its view that the analyses in Article 3 do not necessarily apply to sunset reviews.

98. The United States argues that the Panel's understanding of the relationship between Article 3 and Article 11.3 accords with the text of the *Anti-Dumping Agreement*. The United States disagrees with Argentina's argument that footnote 9 incorporates the disciplines of Article 3 into Article 11.3. The United States notes that the provisions of Article 3 apply to a "determination of injury for purposes of Article VI of the GATT 1994", as stated in Article 3.1. Article VI provides for dumping to be counteracted where "it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry." Therefore, in the United States' view, the analyses prescribed in Article 3 apply only to the "three bases for an affirmative determination in an original injury investigation", that is, to present injury, threat of injury, and material retardation of the establishment of a domestic industry.[150] The United States additionally claims that the determinations mandated by the paragraphs of Article 3 are "wholly out of place" in a sunset review and would lead to "ludicrous" or "absurd" results.[151]

99. Finally, the United States submits that even if the Appellate Body were to reverse the Panel's finding that Article 3 applies to sunset reviews, it could not complete the analysis because of the limited factual findings by the Panel and the insufficient facts undisputed by the parties.

100. The United States accordingly requests the Appellate Body to uphold the Panel's interpretation of the term "injury" in Article 11.3 of the *Anti-Dumping Agreement* as not incorporating the requirements of Article 3 for sunset reviews.

[150]United States' appellee's submission, para. 109.

[151]*Ibid*., para. 112.

2. Cumulation in Sunset Reviews

101. The United States argues that the Panel did not err in finding that cumulation in sunset reviews is not prohibited by the *Anti-Dumping Agreement*, and that the prerequisites set out in Article 3.3 do not apply to a cumulative analysis conducted in the course of a sunset review.

102. With respect to the permissibility of cumulation in sunset reviews, the United States argues that the text of the *Anti-Dumping Agreement* is "silent" on this issue and that "Members are free to do that which is not prohibited."[152] Contrary to Argentina, the United States does not find instructive the use of the term "duty", in the singular, in Article 11.3. The United States contends that the same term is used in Article VI:6 of the GATT 1994, pursuant to which—prior to the conclusion of the Uruguay Round—cumulation was "widespread" among investigating authorities.[153] The United States also observes that the heading of Article 11 of the *Anti-Dumping Agreement* uses the term "duties" instead of "duty", suggesting that the term "duty" in the singular does not carry the significance ascribed to it by Argentina.

103. The United States argues that prohibiting cumulation in sunset reviews would be "illogical" in the light of the rationale for cumulation recognized by the Appellate Body in *EC – Tube or Pipe Fittings*.[154] According to the United States, just as dumped imports from several sources simultaneously might cause injury collectively in an original investigation, so, too, might the simultaneous termination of anti-dumping duties imposed on products from several sources be likely to cause continuation or recurrence of injury, as determined in a sunset review. In the United States' view, Argentina's attempt to distinguish the rationale for cumulation in original investigations from its use in sunset reviews is unavailing because Argentina's distinction is based on "hypothetical facts [that] are inapposite to this case".[155]

104. With respect to the existence of conditions placed on an investigating authority's resort to cumulation, the United States claims that Article 3.3 is plainly limited to original investigations, and that the *Anti-Dumping Agreement* provides no cross-reference that would render Article 3.3 applicable in sunset reviews. The United States finds significant this lack of cross-reference between the prerequisites in Article 3.3 and the obligation in Article 11.3 to conduct a sunset review, particularly in the light of the relevance attached by the Appellate Body to the technique of cross-referencing in *US – Carbon Steel*. Finally, the United States argues that the "negligibility standard"

[152]United States' appellee's submission, para. 157.

[153]*Ibid*., para. 163.

[154]*Ibid*., para. 165.

[155]*Ibid*., para. 168.

of Article 5.8, incorporated by reference as one of the prerequisites contained in Article 3.3, would be "unworkable" in sunset reviews because such thresholds are premised on *existing* imports, whereas sunset reviews are of a "predictive nature" and address *likely* imports.[156] According to the United States, the inapplicability of this prerequisite to sunset reviews further confirms that Article 3.3 and the conditions contained therein are limited to original investigations.

105. Therefore, the United States requests the Appellate Body to uphold the Panel's finding that cumulation is not prohibited in sunset reviews and that the prerequisites to cumulation set out in Article 3.3 of the *Anti-Dumping Agreement* do not apply in the context of sunset reviews.

3. The Panel's Interpretation of the Term "Likely"

106. The United States requests the Appellate Body to uphold the Panel's findings concerning the Panel's interpretation of the "likely" standard in Article 11.3 of the *Anti-Dumping Agreement*.

107. The United States argues that the fact that the Panel did not discuss synonyms for "likely" does not constitute a legal error. In the United States' view, Argentina seeks to exaggerate the relevance of the Appellate Body's findings in *US – Corrosion-Resistant Steel Sunset Review* in order to claim that the Panel failed to apply the correct standard. The United States underscores that there is no evidence that the Panel did not interpret "likely" as "probable" in the sense that the Appellate Body used that term in *US – Corrosion-Resistant Steel Sunset Review*.

108. The United States adds that the Panel's decision to focus on whether the USITC's sunset determination actually met the "likely" standard was well founded. The United States emphasizes that the only way to determine whether the USITC's sunset determination was consistent with the "likely" standard of Article 11.3 was to examine what the USITC actually did.

109. The United States submits that it was not a legal error for the Panel to discount Argentina's arguments regarding past USITC statements in other fora as to the meaning of "likely". First, the United States contends that the Panel's dismissal of these statements is the result of the Panel's weighing of the evidence. According to the United States, Argentina should have based this claim on appeal on Article 11 of the DSU; as Argentina failed to do so, its claim should be rejected. Secondly, the United States argues that, as a substantive matter, Argentina's claim is without merit. According to the United States, the past USITC statements to which Argentina refers were based on the understanding of some USITC Commissioners that the term "probable" connoted a very high degree of certainty. The United States adds that the courts in the United States eventually clarified that "probable" was synonymous with the statutory term "likely", and that the views of the majority of the

[156]United States' appellee's submission, para. 178.

USITC Commissioners as to the standard applicable in sunset reviews were consistent with the standard articulated by the United States courts.

4. Consistency of the USITC's Determination with the Standard of "Likelihood" in Article 11.3 of the *Anti-Dumping Agreement*

110. The United States submits that the Panel correctly found the USITC's determinations with respect to cumulation, volumes, price effects, and impact of subject imports, to be consistent with Article 11.3 of the *Anti-Dumping Agreement*.

111. For the United States, the "likely" standard of Article 11.3 applies to the overall assessment of future injury by the authorities, based on their consideration of the record as a whole. Article 11.3 does not require each item of information considered by the USITC to satisfy individually the "likely" standard of Article 11.3. The United States submits that the Panel properly evaluated whether the USITC's findings were based on an objective examination of the record and that, by doing so, the Panel addressed Argentina's argument that the USITC applied the wrong standard. According to the United States, "whether Argentina calls it 'evaluating whether the [US]ITC applied the wrong standard' or whether the Panel calls it 'assessing the basis of the evidence,' it amounts to the same thing, and the question is ultimately whether the [US]ITC's establishment and assessment of the facts supported its finding."[157] The United States maintains that the Panel examined that issue and correctly concluded that the USITC's establishment and assessment of the facts did support its conclusion that injury was likely to continue or recur. The United States adds that in the light of the Panel's approach, Argentina's claim amounts to a request to re-weigh the evidence before the Panel, which is beyond the scope of appellate review under Article 17.6 of the DSU.

(a) *Likely Volume of Dumped Imports*

112. The United States submits that, in any event, the Panel did not err in concluding that the USITC's findings on volume were based on a proper establishment of the facts and an objective evaluation of those facts. The United States rejects Argentina's argument that the Panel erred because it allegedly applied a standard less than "likely" in evaluating the evidence. For the United States, the Panel did not act in a manner inconsistent with the "likely" standard of Article 11.3 when it recognized that, as a factual matter, shifting production was physically possible and that producers would have every reason to do so if the orders were revoked as a matter of pure business logic. The United States adds that, overall, the evidence strongly supports the USITC's finding that imports of OCTG were likely to increase in volume if the anti-dumping orders were revoked.

[157]United States' appellee's submission, para. 27.

(b) *Likely Price Effects of Dumped Imports*

113. As regards the USITC's findings on price, the United States submits that the Panel correctly found that the USITC's establishment and evaluation of the facts was proper. The United States underscores that the Panel discussed at length the relevance of the price comparisons that formed the basis for the underselling findings and that it concluded that they were adequate under the circumstances, in the light of the diminished imports into the market after imposition of the order. The United States also points out that the Panel rejected Argentina's argument that the USITC's consideration of price as an important factor in purchasing decisions was flawed. According to the United States, the USITC's findings on likely price effects were correct; Argentina's approach to them is flawed because Argentina focuses on a few isolated factors, and simply asserts that the USITC's findings are WTO-inconsistent. The United States explains that the USITC made an objective examination of the evidence on the record as it "relied on a number of factors in reaching its likely price effects finding, including: the likely significant volume of imports; the high level of substitutability between the subject imports and the domestic like product; the volatile nature of U.S. demand; and underselling by the subject imports in the period examined in the sunset review."[158]

(c) *Likely Impact of Dumped Imports on the United States Industry*

114. With respect to the Panel's findings on the USITC's determination of the likely adverse impact of dumped imports on the domestic industry, the United States maintains that the Panel took the evidence of the current state of the industry into account, as did the USITC, but found that it was not dispositive of the likely outcome if the order were revoked. According to the United States, Argentina's claim is not a claim of legal error by the Panel, but rather, it relates to the weighing of evidence. Moreover, Argentina's view that an order must be terminated if the industry has experienced improvement during the life of the order cannot be reconciled with the plain text of Article 11.3 and the concept underpinning sunset reviews, because it is expected that the condition of the domestic industry will improve under the discipline of the order. In the view of the United States, Article 11.3 anticipates that a domestic industry might not be injured at the time the sunset review is initiated.

(d) *Cumulative Assessment of Dumped Imports*

115. With respect to the USITC's decision to make a cumulative assessment of the imports, the United States argues that "[e]ven if, as Argentina claims, the Panel failed to discuss the factual underpinnings of the [US]ITC's cumulation determination, the DSU does not provide for the

[158]United States' appellee's submission, para. 67.

Appellate Body to make factual findings that the Panel failed to make."[159] Furthermore, the United States submits that Argentina has distorted the evidence and the record. In particular, the United States points out that, as regards the issue of the likely simultaneous presence of imports from each of the subject countries, Argentina omitted any reference to footnote 82 of the USITC Report.[160] According to the United States, this footnote was critical as it explained that the imports from each of the subject countries were simultaneously present in the United States market since 1996.

116. The United States therefore requests the Appellate Body to uphold the Panel's finding that the USITC's likelihood-of-injury determination—in particular, its analysis of cumulation, volume, price effects, and impact of dumped imports—is not inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

5. The Timeframe in a Likelihood-of-Injury Determination

117. According to the United States, the Panel correctly found that the "reasonably foreseeable time" standard of the United States statute is not inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. The United States submits that Article 11.3 does not mention the timeframe on which the investigating authorities should base their sunset review determination, nor does Article 11.3 require them to specify the timeframe on which their likelihood determinations are based. The United States adds that the words "to lead to" in Article 11.3 affirmatively indicate that the *Anti-Dumping Agreement* contemplates the passage of some period of time between the revocation of the order and the continuation or recurrence of injury. For the United States, Article 11.3 contemplates that an order will have been in place for at least five years, and that the consequences of revocation of that order may not be immediate.

118. The United States also contends that "Argentina attempts to inject the 'imminent' and 'special care' terms from Articles 3.7 and 3.8 into an Article 11.3 sunset review."[161] The United States submits that the Panel correctly found that no substantive requirements of Article 3 apply to Article 11.3 sunset reviews. The United States further submits that the Panel's rejection of Argentina's claim is based upon a correct textual analysis of Articles 3.7, 3.8, and 11.3 of the *Anti-Dumping Agreement*, and that the determinations set out in Articles 3.7 and 11.3 are substantively different from one another.

[159]United States' appellee's submission, para. 180. (footnote omitted)

[160]See *supra*, footnote 10.

[161]United States' appellee's submission, para. 126.

119. In the United States' view, Argentina's challenge to the United States statute is largely based on conjecture by Argentina as to how the USITC might apply the statute. The United States adds that, at most, Argentina may have shown that the statute gives the USITC discretion to produce a determination that might create a question of WTO-consistency. For the United States, even if that were so, Argentina has not shown that the statute "*mandates*"[162] the USITC to look beyond a future period of time such that this would be inconsistent with Article 11.3.

120. The United States views as flawed Argentina's contention that the time period on which the investigating authority must focus its likely analysis is as of the time of the expiry of the dumping order. According to the United States, Argentina's position would render meaningless the "*would be likely to lead to*"[163] language of Article 11.3, because the investigating authority would be left with only one option: determining how the lifting of the order will affect the industry at the moment the order is lifted. The United States underscores that Article 11.3 does not state that investigating authorities must determine whether injury would continue or recur upon expiry of the duty. According to the United States, Article 11.1 and the last sentence of Article 11.3 do not support Argentina's position because these provisions address the timing of removal of the duty in the event of a negative determination, not the length of the time period between potential revocation and the consequences of such revocation for the domestic industry.

121. The United States rejects Argentina's argument that the USITC acted in a manner inconsistent with Article 11.3 because it did not explicitly state what the outer limits of the "reasonably foreseeable time" were for the purpose of the underlying sunset review on OCTG from Argentina. For the United States, there is nothing in the *Anti-Dumping Agreement* requiring the investigating authority to specify the temporal context of its likelihood-of-injury determination.

122. The United States therefore requests the Appellate Body to uphold the Panel's finding that Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930, as well as their application in the underlying sunset review, are not inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

6. Conditional Appeals

(a) *Challenge to the USDOC "Practice"*

123. The United States submits that the Appellate Body should decline the conditional appeal of Argentina on the claim that the USDOC "practice" is inconsistent, as such, with Article 11.3 of the

[162]United States' appellee's submission, para. 138. (original emphasis)

[163]*Ibid*., para. 140 (quoting *Anti-Dumping Agreement*, Article 11.3). (emphasis added by the United States)

Anti-Dumping Agreement for three reasons. First, the United States argues that Argentina's claim was not within the terms of reference of this dispute. Secondly, the United States points out that the Panel made no findings regarding whether a "practice" is a measure subject to WTO dispute settlement. According to the United States, the Appellate Body would have to complete the analysis in this respect. The United States submits that the Appellate Body could not do so given the lack of factual findings by the Panel. Thirdly, the United States maintains that the USDOC "practice", in the form of agency precedents, is not a measure subject to WTO dispute settlement. In this respect, the United States underlines that it disputes the probative value and the relevance of the statistics provided in Exhibits ARG-63 and ARG-64. According to the United States, these exhibits do not demonstrate that the USDOC failed to take additional factors into account, nor do they support Argentina's argument that the USDOC "practice" not to consider additional factors exists and is WTO-inconsistent.

(b) *Challenge under Article X:3(a) of the GATT 1994*

124. The United States submits that the Appellate Body also should decline the conditional appeal of Argentina on the claim that the USDOC acted in a manner inconsistent with Article X:3(a) of the GATT 1994 for three reasons. First, the United States argues that the claim is not within the terms of reference of this dispute. Secondly, the United States points out that Argentina never specified in the panel request or before the Panel which laws, regulations, decision, and rulings were administered in a manner inconsistent with Article X:3(a). According to the United States, Argentina, by referring vaguely in its other appellant's submission to all of the measures mentioned in its panel request, seeks to expand, at the appellate stage, the measure alleged to be inconsistent with Article X:3(a). Thirdly, the United States submits that Argentina's claim does not establish a violation of Article X:3(a). For the United States, if the only measure subject to Argentina's claim under Article X:3(a) is the USDOC's sunset determination underlying this dispute, that claim must fail, because Article X:3(a) pertains to the administration of the laws and Argentina has offered no evidence that this specific determination has had a "significant impact"[164] on the United States' administration of its sunset review laws. The United States adds that Argentina's claim under Article X:3(a) must also fail, even if it includes other measures, because Argentina has not attempted to provide evidence that any of the affirmative sunset review determinations, with the exception of the current one, were erroneous or reflected bias or lack of reasonableness.

[164]United States' appellee's submission, para. 197 (quoting Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.307).

E. *Arguments of the Third Participants*

1. European Communities

125. The European Communities agrees with the Panel's conclusions regarding the WTO-consistency of the waiver provisions and of the SPB and therefore contests the United States' appeal as to these issues. The European Communities also supports the Panel's conclusion that cumulation is permitted in the context of sunset reviews. In the European Communities' view, however, the Panel erred in its interpretation of the terms "likely" and "injury" as found in Article 11.3 and, accordingly, the Appellate Body should grant Argentina's request in its cross-appeal to reverse the Panel's interpretation of these terms.

126. The European Communities disagrees with the United States' challenge to the Panel's findings with respect to the waiver provisions. Relying on the fact that the waiver provisions, as a matter of United States law, mandate a company-specific affirmative likelihood determination, the European Communities claims that, in a situation where there is only one exporter in a country subject to a dumping order, the waiver provisions "require[]" the USDOC to make an affirmative likelihood determination with respect to that country, that is, on an order-wide basis.[165] The European Communities argues that, contrary to the understanding of the United States, the Panel found that, in the situation of a sole exporter, the company-specific determination is "*likely to be conclusive*" of the order-wide determination, not that the company-specific determination *is conclusive*.[166] The European Communities submits that this Panel finding is a finding of fact and that the United States failed to rebut the evidence underlying this finding. In the European Communities' view, the United States' "bare assertion before the Panel … carries no evidential weight".[167]

127. In addition, the European Communities contends that the United States incorrectly reads the Panel's findings to mean that company-specific determinations are *determinative* of order-wide determinations, whereas the Panel in fact found merely that the USDOC "consider[s]" country-specific determinations when arriving at an order-wide determination.[168] The European Communities again claims that the United States failed to adduce evidence to rebut the evidence supporting this factual finding of the Panel.

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[165]European Communities' third participant's submission, para. 23.

[166]*Ibid*., para. 27 (quoting Panel Report, para. 7.102). (emphasis added by the European Communities)

[167]*Ibid*., para. 29.

[168]*Ibid*., para. 31 (quoting Panel Report, para. 7.101).

128. The European Communities agrees with the United States that the Panel erred in assessing the WTO-consistency of the *company-specific* determinations made pursuant to the waiver provisions. The European Communities asserts that Article 11.3 does not require an investigating authority to make a company-specific likelihood determination. Therefore, according to the European Communities, the Panel "beg[ged] the question"[169] when it examined whether the USDOC'S company-specific determinations satisfy the obligations of Article 11.3. The European Communities argues that this erroneous approach led the Panel to conclude that company-specific determinations are "improperly established"[170] by virtue of the waiver provisions. The European Communities therefore requests that this finding of the Panel be modified by the Appellate Body.

129. In the European Communities' view, however, the Panel's legal error in evaluating the WTO-consistency of company-specific determinations does not undermine the Panel's conclusion that the waiver provisions are inconsistent, as such, with Article 11.3. The European Communities contends that two elements of the Panel's reasoning remain valid despite the aforementioned analytical error: (1) the "lack of a determination"[171] at the company-specific stage of the sunset review; and (2) the fact that, at least in the situation where there is only one exporter from a given country, the results of the USDOC's analysis at the company-specific stage are "likely to be conclusive"[172] with respect to the order-wide stage, "with the result that there will also be no determination in the second stage".[173] As a result, the European Communities claims, the order-wide determination cannot satisfy the requirements of Article 11.3.

130. The European Communities also contests the United States' appeal of the Panel's conclusion that the deemed waiver provision is inconsistent, as such, with Articles 6.1 and 6.2. With respect to Article 6.1, the European Communities claims that it is insufficient for an investigating authority to provide *an* opportunity to present evidence; rather, Article 6.1 requires that "ample" opportunity be provided, which the European Communities understands to be an opportunity "more tha[n] sufficient, abundant, large in size, extent or amount".[174] The European Communities emphasizes that the obligation under Article 6.2 to provide interested parties "*full* opportunity for the defence of their interests" applies "*throughout* the anti-dumping investigation".[175] In the light of this understanding of

[169]European Communities' third participant's submission, para. 35.

[170]*Ibid*. (quoting Panel Report, para. 7.101).

[171]*Ibid*., para. 36.

[172]*Ibid*. (citing Panel Report, para. 7.102).

[173]*Ibid*., para. 36.

[174]*Ibid*., para. 60 (quoting *Collins Dictionary of the English Language*, G.A. Wilkes (ed.) (Wm. Collins Publishing, 1979), p. 48).

[175]*Ibid*., para. 61 (quoting *Anti-Dumping Agreement*, Article 6.2). (emphasis added by the European Communities)

the obligations in Articles 6.1 and 6.2, the European Communities sees "no reason for the Appellate Body to disturb the Panel's conclusion[s]".[176]

131. The European Communities challenges the United States' appeal of the Panel's findings that the SPB is a "measure" and that it is inconsistent with Article 11.3. The European Communities claims that whether a provision placed before a panel constitutes a "measure" is a "legal characterization".[177] In the European Communities' view, the Panel did not assume the SPB to be a measure, but instead, relied on and incorporated the reasoning of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*. The Appellate Body's attempts to complete the analysis with respect to the WTO-consistency of the SPB, according to the European Communities, could only have been undertaken after the Appellate Body had concluded that the SPB *is* a measure. Furthermore, the European Communities argues that where a municipal provision requires WTO-inconsistent action, the discretion of the investigating authority not to use the provision is "irrelevant".[178] According to the European Communities, whatever may be the more difficult circumstances of other cases, "[t]his [case] is an uncontroversial, 'black and white', almost mathematical example."[179]

132. The European Communities also addresses certain aspects of Argentina's cross-appeal. With respect to Argentina's claims relating to the term "likely" as it is used in Article 11.3, the European Communities submits that the definition of the term "likely" was relevant to the Panel's analysis and that the Panel erred in failing to state its understanding of the term it was applying when evaluating Argentina's claim. The proper meaning of "likely" in this regard, according to the European Communities, is "probable" and not "possible or plausible".[180] The European Communities argues that the Panel further erred in failing to distinguish between the claim that the investigating authority applied the wrong standard and the "qualitatively different" claim that the investigating authority erred in determining that the standard had been met.[181] Finally, the European Communities claims that the Panel erroneously failed to consider as relevant evidence the statements made by the USITC in other fora about how it interpreted the standard in the particular sunset review at issue. Given these errors of the Panel, in the European Communities' view, the Appellate Body should "modif[y]" the

[176]European Communities' third participant's submission, para. 60.

[177]*Ibid*., para. 63.

[178]*Ibid*., para. 69.

[179]*Ibid*.

[180]*Ibid*., para. 73.

[181]*Ibid*., para. 74.

Panel's findings accordingly and "complete the analysis" by evaluating whether the USITC applied the wrong legal standard when conducting its likelihood-of-injury determination.[182]

133. As to the term "injury" used in Article 11.3, the European Communities agrees with Argentina's arguments in support of the view that the provisions of Article 3 set forth part of the Agreement-wide definition of "injury". The European Communities contends that a determination of "past" injury "almost inevitabl[y] ... forms the foundation" for a likelihood-of-injury determination.[183] According to the European Communities, although a likelihood-of-injury determination is based on different facts and evidence from an injury determination in original investigations, this difference does not alter the applicability of the definition of "injury" throughout the *Anti-Dumping Agreement*. Therefore, the European Communities argues, the volume, price, and impact analyses set out in Article 3 should be adapted to apply to the different facts relevant in a likelihood-of injury review.

134. As to cumulation, the European Communities contends that the *Anti-Dumping Agreement* embodies no requirement for investigating authorities to examine the likelihood of continuation or recurrence of injury resulting from dumped imports of a particular exporting country. Thus, the European Communities agrees with the United States that, contrary to Argentina's appeal, the Panel correctly determined cumulation to be permitted in the context of sunset reviews.

2. Japan

135. Japan supports the Panel's conclusions that the waiver provisions and Section II.A.3 of the SPB are inconsistent, as such, with the United States' obligations under the *Anti-Dumping Agreement*. Japan claims that the Panel erred, however, in concluding that Article 3 does not apply to likelihood-of-injury determinations under Article 11.3. As a result, Japan supports Argentina's request for the Appellate Body to reverse the Panel's finding on this issue.

136. Japan submits that the Appellate Body, in *US – Corrosion-Resistant Steel Sunset Review*, concluded that the SPB is a measure before continuing to evaluate the WTO-consistency of the SPB. In Japan's view, the Panel, in this case, examined the text of the SPB, and the application of the SPB by the USDOC, to substantiate its view that the SPB is a measure subject to WTO dispute settlement. Japan argues that the Panel properly concluded that the practice of the USDOC reveals that the USDOC treats the three scenarios in Section II.A.3 as determinative. In support of this view, Japan relies on the fact that the USDOC arrived at an affirmative likelihood determination whenever the facts of a particular case fell under one of the three scenarios. Japan submits that the "mechanistic

[182]European Communities' third participant's submission, para. 76.

[183]*Ibid*., para. 78. (European Communities' emphasis omitted)

application" of the SPB, demonstrated by the evidence submitted by Argentina, is inconsistent with Article 11.3 because it does not permit the USDOC to consider the particular facts of individual cases and cannot constitute, as such, a "rigorous examination".[184]

137. Japan also agrees with the Panel's findings concerning the inconsistency of the affirmative and deemed waiver provisions with Articles 6.1, 6.2, and 11.3 of the *Anti-Dumping Agreement*. First, Japan submits that both waiver provisions mandate an affirmative likelihood determination without reviewing any positive evidence. Japan considers "irrelevant"[185] the United States' claim that order-wide determinations are "made independently of"[186] company-specific determinations because, in Japan's view, the waiver provisions preclude the USDOC from taking into account positive evidence as to *either* determination, inconsistent with the requirements of Article 11.3. Second, Japan argues that, because respondents that file an incomplete submission in response to a notice of initiation are precluded from presenting further evidence or participating in a hearing, the deemed waiver provision is inconsistent with Articles 6.1, 6.2, and 11.3.

138. Finally, Japan requests the Appellate Body to reverse the Panel's finding that Article 3 does not normally apply to sunset reviews. Japan agrees with Argentina that the rationale of *US – Corrosion-Resistant Steel Sunset Review* supports the applicability of Article 3 to sunset reviews under Article 11.3. According to Japan, footnote 9 of the *Anti-Dumping Agreement* provides that, throughout the *Anti-Dumping Agreement*, the provisions of Article 3 define the term "injury" and that, accordingly, an investigating authority examining the likelihood of continuation or recurrence of "injury" under Article 11.3 must conduct its examination in accordance with Article 3. Japan further submits that the reference in Article 11.3 to "continuation or recurrence" of injury requires an analysis of both the *present* state of the domestic industry as well as its *future* state. Japan argues that the term "continuation" requires, in order for injury to continue, a finding that the domestic industry is currently injured, and that the term "recurrence" requires, in order for injury to recur, a finding that the domestic industry is not currently injured. The analyses set out in Article 3, in Japan's view, are therefore required in likelihood-of-injury determinations.

3. Korea

139. Korea requests the Appellate Body to uphold the Panel's findings that Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.281(d)(2)(iii) of the USDOC Regulations are inconsistent, as

[184]Japan's third participant's submission, para. 15 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 113).

[185]*Ibid*., para. 22.

[186]*Ibid*. (quoting United States' appellant's submission, para. 48).

such, with Article 11.3 of the *Anti-Dumping Agreement*. Korea argues that, by virtue of the waiver provisions, the USDOC conducts its likelihood determination on a company-specific basis for those respondents that waive their right to participate in the sunset review. As such, in Korea's view, the relevant question is whether the company-specific determination made by the USDOC is consistent with Article 11.3. Korea agrees with the Panel that a company-specific determination resulting from the waiver provisions cannot satisfy the requirement of Article 11.3 because it is not "supported by reasoned and adequate conclusions based on the facts".[187] Furthermore, Korea submits that because the USDOC's likelihood determination is not made purely on an order-wide basis but, "at least in part"[188], on a company-specific basis, and the latter is not WTO-consistent, the entire USDOC likelihood determination is "contaminated".[189]

140. Korea also requests the Appellate Body to reverse the Panel's finding that the USITC applied the "likely" standard as required under Article 11.3 of the *Anti-Dumping Agreement*. Korea argues that the fact that the USITC nominally applied the "likely" standard, as stated in its determination, does not mean that the agency in fact did apply the correct standard when conducting its likelihood-of-injury determination. Indeed, Korea submits, in the light of the USITC's admissions in other fora that it did not apply the "likely" standard to mean "probable", the Panel should have been aware that the USITC did not apply the standard required by Article 11.3. Korea claims that the Panel misunderstood Argentina to be claiming that the USITC erred in determining that the "likely" standard was met under the facts of this case and, as a result, considered the USITC's admissions as "not relevant".[190] In Korea's view, the failure of the Panel to recognize the significant relevance of these admissions and to find accordingly that the USITC did not apply the proper standard in the underlying sunset review constituted an error that should be reversed by the Appellate Body.

141. Korea claims that the Appellate Body should reverse the Panel's finding that the "reasonably foreseeable time" in which the likelihood of injury should be considered to continue or recur, set out in Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930, is not inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. Korea submits that, by virtue of footnote 9, the provisions of Article 3 apply *mutatis mutandis* to Article 11. In particular, Korea argues, as a result of the reference in footnote 9 to "threat of material injury", the Panel should have interpreted Article 11.3 "in conjunction with"[191] Article 3.7. Furthermore, Korea contends that the requirement in Article 3.7 for injury to be

[187]Korea's third participant's submission, para. 16 (quoting Panel Report, para. 7.102).

[188]*Ibid*., para. 14.

[189]*Ibid*., para. 15.

[190]*Ibid*., para. 22 (quoting Panel Report, para. 7.285).

[191]*Ibid*., para. 29.

"clearly foreseen and imminent" sets a "higher threshold"[192] than the "reasonably foreseeable time" standard provided for in United States law, which grants unduly broad discretion to the USITC. Korea also proposes a "more objective"[193] time period by which an investigating authority should consider the continuation or recurrence of injury, namely, the "near future" standard provided in footnote 10 of the *Anti-Dumping Agreement*.[194]

142. Finally, Korea requests the Appellate Body to find that the Panel erred in finding that cumulation is permitted in sunset reviews. Agreeing with Argentina in this regard, Korea refers to the fact that Article 11.3 uses the word "duty" and not "duties" as reflecting the intent of the treaty drafters that sunset reviews are to be conducted with respect to each particular order, or source of imports. In the light of this specific language in Article 11.3, Korea argues, the Panel erred in considering that the existence of a provision permitting cumulation under certain conditions during an original investigation, reveals no intention to prohibit or limit the use of cumulation in other contexts, including sunset reviews.

4. Mexico

143. Mexico supports Argentina's request for the Appellate Body to uphold the Panel's findings with respect to Article 6.2 of the DSU and to the WTO-consistency of the waiver provisions and the SPB. Mexico also agrees with Argentina's request for the Appellate Body to reverse the Panel's findings with respect to Argentina's injury-related "as such" and "as applied" claims.

144. With respect to the waiver provisions, Mexico agrees with the Panel's findings and with Argentina's arguments in support thereof. As to the SPB, Mexico submits that the Panel properly found that the SPB is a measure subject to challenge in WTO dispute settlement and that the SPB is inconsistent, as such, with Article 11.3. Mexico argues that, contrary to the United States' assertions, the Panel did not rely solely on the finding of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* in order to conclude that the SPB is a "measure". Instead, according to Mexico, the Panel based its conclusion on an evaluation of each of the United States' arguments, in addition to the text of the SPB. Mexico also contests the United States' reading of the Appellate Body's decision in that dispute because, in that decision, the Appellate Body would not have attempted to complete the analysis with respect to the WTO-consistency of the SPB had it not already determined that the SPB was a "measure" that could be challenged in the WTO.

[192]Korea's third participant's submission, para. 30.

[193]*Ibid*., para. 31.

[194]*Ibid*.

145. Mexico agrees with the Panel's finding that Section II.A.3 of the SPB is perceived by the USDOC to be conclusive or determinative. In Mexico's view, the United States failed to submit any evidence that contradicts the meaning ascribed to the SPB by the Panel on the basis of the Panel's analysis of the text and "consistent application" of the SPB. Mexico additionally submits that the "cause and effect" relationship between the SPB and the USDOC's sunset review determinations is clear from a "plain reading" of those determinations, in which the USDOC "systematically" refers to the SPB to justify its conclusions of likelihood.[195]

146. Mexico requests the Appellate Body to reject the United States' claims under Article 6.2 of the DSU. Mexico argues, first, that the United States' challenge to Argentina's "as such" claims relating to the "irrefutable presumption" is based on a "misread[ing]"[196] of the panel request. In Mexico's view, Section A.4 of the panel request cannot be read to contain only an "as applied" challenge to the USDOC's likelihood-of-dumping determination because the "as applied" claim "would be meaningless"[197] without the challenges to the laws on which the determination was based. In addition, Mexico claims that the reference to "US law" in Section A.4 of the panel request does not leave open the question as to the specific source of the "irrefutable presumption" because the last sentence of Section A.4 "clearly and expressly"[198] refers to the SPB.

147. With respect to Section B.3 of the panel request, Mexico claims that nothing in Article 6.2 of the DSU precludes a complainant from citing a whole treaty article as the basis for a claim if that party believes that the respondent Member has acted inconsistently with the multiple provisions of that Article. Finally, Mexico points out that the United States has failed to demonstrate prejudice resulting from the alleged lack of clarity in Argentina's panel request. As such, according to Mexico, the Panel correctly dismissed the United States' objections raised under Article 6.2 of the DSU.

148. Mexico disagrees with several of the Panel's conclusions relating to the likelihood-of-injury analysis performed by the USITC, in general, as well as in this particular case. Mexico submits that the Panel should have taken into account the USITC's admissions, made in the course of a NAFTA proceeding, that the agency had not interpreted "likely" to mean "probable" when conducting the underlying likelihood-of-injury determination on OCTG from various sources. Mexico contends that, because these admissions relate to the same determination challenged in this dispute, the Panel erred in concluding the admissions were "not relevant"[199] to the evaluation of the issue before it. Mexico

[195]Mexico's third participant's submission, para. 40.

[196]*Ibid*., para. 48.

[197]*Ibid*., para. 45.

[198]*Ibid*., para. 46.

[199]*Ibid*., para. 59 (quoting Panel Report, para. 7.285).

additionally argues that the USITC did not apply the "likely" standard correctly in the underlying sunset review determination when analyzing likely volume, price effects, and impact of dumped imports, and that the USITC's conclusions as to these analyses were not supported by positive evidence and a sufficient factual basis.

149. Mexico also claims that the Panel erred in assessing the relationship between Articles 3 and 11.3 of the *Anti-Dumping Agreement*. Mexico alleges that the Panel failed to consider, in the light of the Agreement-wide definition of "injury" set out in footnote 9 and Article 3, whether the term "injury" in Article 11.3 imposes more particular obligations on investigating authorities. Mexico also claims that the Panel's reasoning contains "contradictions".[200] Mexico bases this claim on the Panel's statements that: (1) Article 3 does not apply "normally" to sunset reviews; (2) the provisions of paragraphs of Article 3 "do not necessarily apply" in sunset reviews; and (3) Article 3 applies only in the context of a determination of *present* injury and not in *likelihood*-of-injury determinations.

150. According to Mexico, the Panel also erred in finding that the temporal focus of the USITC's underlying likelihood-of-injury determination and the temporal standard mandated by United States statutes are not inconsistent with Article 11.3. Mexico also finds erroneous the Panel's finding that, under Article 11.3, investigating authorities are permitted to engage in a cumulative analysis and that the *Anti-Dumping Agreement* prescribes no prerequisites for such an analysis.

151. Finally, Mexico asks the Appellate Body to agree to Argentina's request to "suggest" that the United States terminate the anti-dumping measures on OCTG.[201] Mexico alleges that, because of the "exacting nature"[202] of the Article 11.3 obligations found by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* and *US – Carbon Steel*, "to permit a Member to 'cure' a violation of Article 11.3 would conflict directly with [that provision's] intent".[203]

III. Issues Raised in this Appeal

152. The following issues are raised in this appeal:

(a) whether the Panel erred in finding that Argentina's panel request satisfied the requirements of Article 6.2 of the DSU, in identifying claims that Sections 751(c) and 752(c) of the Tariff Act of 1930, the SAA, and the SPB are inconsistent, as such, with

[200]Mexico's third participant's submission, para. 64.

[201]*Ibid*., para. 70.

[202]*Ibid*. (Mexico's emphasis omitted)

[203]*Ibid*., para. 71.

Article 11.3 of the *Anti-Dumping Agreement*, and, therefore, that such claims fell within the Panel's terms of reference;

(b) as regards the SPB:

(i) whether the Panel erred in finding that the SPB is a "measure" subject to WTO dispute settlement; and

(ii) whether the Panel erred in finding that Section II.A.3 of the SPB is inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*;

(c) as regards the waiver provisions of United States laws and regulations:

(i) whether the Panel erred in finding that Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(iii) of the USDOC Regulations are inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*;

(ii) whether the Panel erred in finding that Section 351.218(d)(2)(iii) of the USDOC Regulations is inconsistent, as such, with Articles 6.1 and 6.2 of the *Anti-Dumping Agreement*; and

(iii) whether the Panel failed to satisfy its obligation under Article 11 of the DSU to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case";

(d) whether the Panel erred in its interpretation of the term "injury" in Article 11.3 of the *Anti-Dumping Agreement*, with respect to the factors to be considered by an investigating authority in its likelihood-of-injury determination;

(e) as regards cumulation of the effects of dumped imports:

(i) whether the Panel erred in finding that Article 11.3 of the *Anti-Dumping Agreement* does not preclude investigating authorities from cumulating the effects of likely dumped imports in the course of their likelihood-of-injury determinations; and

(ii) whether the Panel erred by finding that the conditions of Article 3.3 of the *Anti-Dumping Agreement* do not apply in the context of sunset reviews;

(f) whether the Panel erred in its interpretation of the term "likely" in Article 11.3 of the *Anti-Dumping Agreement*, in the course of its analysis of the USITC's likelihood-of-injury determination;

(g) whether the Panel erred in finding that the conclusions of the USITC with respect to cumulation, likely volume, likely price effects, and likely impact of dumped imports, did not render the likelihood-of-injury determination inconsistent with Article 11.3 of the *Anti-Dumping Agreement*; and

(h) as regards the timeframe used by the USITC in its likelihood-of-injury determination:

(i) whether the Panel erred in finding that the standard of continuation or recurrence of injury "within a reasonably foreseeable time", as provided in Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930, is not inconsistent with Article 11.3 of the *Anti-Dumping Agreement*; and

(ii) whether the Panel erred in finding that the application of that standard in the USITC's likelihood-of-injury determination is not inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

153. Argentina also conditionally appeals two issues on which the Panel found that it either did not need to rule because it was an "alternative" claim submitted by Argentina, or declined to rule for reasons of judicial economy. Argentina requests us to address these issues if, based on the arguments of the United States, we reverse any of the Panel's conclusions. The issues are:

(i) whether the "practice" of the USDOC relating to likelihood-of-dumping determinations in sunset reviews is inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*; and

(ii) whether the USDOC, in its administration of United States anti-dumping laws, regulations, decisions, and rulings relating to the conduct of sunset reviews, has acted inconsistently with Article X:3(a) of the GATT 1994.

154. The United States also requests us to rule on the following issues under Article 6.2 of the DSU, provided certain conditions are met:

(i) whether the Panel erred in finding that Argentina's panel request satisfied the requirements of Article 6.2 of the DSU, in identifying claims that Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930 are inconsistent, as such, with Articles 3.7 and

3.8 of the *Anti-Dumping Agreement*, and, therefore, that such claims fell within the Panel's terms of reference;

(ii) whether Argentina's panel request sufficiently identified "the legal basis of the complaint", as required by Article 6.2 of the DSU, with respect to Argentina's claim that the "practice" of the USDOC relating to likelihood-of-dumping determinations in sunset reviews is inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*; and

(iii) whether Argentina's panel request sufficiently identified "the legal basis of the complaint", as required by Article 6.2 of the DSU, with respect to Argentina's claim that the USDOC, in its administration of United States anti-dumping laws, regulations, decisions, and rulings relating to the conduct of sunset reviews, has acted inconsistently with Article X:3(a) of the GATT 1994.

IV. The Panel's Terms of Reference

155. We begin our analysis of the participants' claims in this dispute with the United States' challenge to the Panel's findings relating to its terms of reference. The United States requested the Panel to make preliminary rulings dismissing several claims made by Argentina in its first and second written submissions. The United States argued that these claims were not within the Panel's terms of reference because Argentina's panel request failed to "provide a brief summary of the legal basis of [these claims] sufficient to present the problem clearly", as required by Article 6.2 of the DSU.

156. The Panel denied the United States' request for preliminary rulings.[204] The Panel found that most of the claims contested by the United States were presented in a sufficiently clear manner in Argentina's panel request.[205] The Panel declined to rule on whether the remaining claims contested by the United States were within its terms of reference because the Panel deemed such rulings unnecessary in the light of the fact that it made no findings on the merits of those claims.[206] In particular, the Panel said that it did not need to address the merits of Argentina's "alternative" [207] claim under Article X:3(a) of the GATT 1994.[208] The Panel also exercised judicial economy with respect to

[204]Panel Report, paras. 7.40 and 7.70.

[205]*Ibid*., paras. 7.22, 7.27, 7.32, 7.39, 7.47, 7.60, and 7.66.

[206]*Ibid*., paras. 7.29, 7.34, 7.36, 7.44, 7.55, 7.63, and 7.69.

[207]*Ibid*., para. 7.169.

[208]In paragraph 7.169 of the Panel Report, the Panel decided not to "address Argentina's alternative claim under Article X:3(a) of the GATT 1994" because the Panel had found that Section II.A.3 of the SPB is inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*.

Argentina's challenge under Article 11.3 of the *Anti-Dumping Agreement* to the USDOC "practice".[209]

157. On appeal, the United States argues, first, that the Panel erred in concluding that Argentina's "as such" claims regarding what Argentina termed the "irrefutable presumption"[210] were within the Panel's terms of reference. In this regard, the United States specifically challenges the Panel's findings that Argentina's claims against Sections 751(c) and 752(c) of the Tariff Act of 1930, the SAA, and the SPB, as set out in Argentina's panel request, satisfy the requirements of Article 6.2 of the DSU. In addition, should we decide to address Argentina's claim under Article 11.3 of the *Anti-Dumping Agreement* regarding the USDOC "practice", or Argentina's claim under Article X:3(a) of the GATT 1994, the United States requests us to address its objection that these claims also are not within the Panel's terms of reference.[211] Finally, should Argentina appeal the Panel's findings that Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930 are not inconsistent, as such or as applied, with Articles 3.7 and 3.8 of the *Anti-Dumping Agreement*, the United States requests us to reverse the Panel's finding that Section B.3 of Argentina's panel request clearly sets out a claim under these provisions.[212]

158. We examine first the United States' challenge to Argentina's "as such" claims relating to the alleged "irrefutable presumption". The Panel focused its analysis on Section A.4 of the panel request, which reads:

> The [USDOC's] Sunset Determination is inconsistent with Article 11.3 of the Anti-Dumping Agreement, and Article X:3(a) of the GATT 1994 because it was based on a virtually irrefutable presumption under US law as such that termination of the anti-dumping duty measure would be likely to lead to continuation or recurrence of dumping. This unlawful presumption is evidenced by the consistent practice of the [USDOC] in sunset reviews (which practice is based on US law and the [USDOC's] Sunset Policy Bulletin).

The Panel observed that Section A.4 "takes issue with US law's provisions relating to the likelihood of continuation or recurrence of dumping".[213] The Panel also noted the explicit reference in Section A.4 to the SPB and to the USDOC "practice" in sunset reviews. The Panel concluded that Section A.4

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[209]In paragraph 7.168 of the Panel Report, the Panel stated that it did not consider it "necessary to rule on Argentina's claim" that the USDOC "practice" is inconsistent with Article 11.3 of the *Anti-Dumping Agreement* because the Panel had found that Section II.A.3 of the SPB is inconsistent, as such, with Article 11.3.

[210]Argentina's panel request, Section A.4.

[211]United States' appellant's submission, footnote 104 to para. 100.

[212]*Ibid*., para. 101.

[213]Panel Report, para. 7.27.

informed the United States that Argentina would be making a claim that certain provisions of United States law, relating to determinations on the likelihood of continuation or recurrence of dumping, are inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement* because of an "irrefutable presumption" contained in those provisions.

159. The United States contends that Argentina's claims relating to the alleged "irrefutable presumption" are limited to a challenge to the specific USDOC sunset review determination underlying this dispute, and not to provisions of United States law "as such".[214] Furthermore, nowhere in the panel request does Argentina identify which legal measure or provision—United States statute, the SAA, or the SPB—embodies this "irrefutable presumption".[215] To the extent that Section A.4 of the panel request mentions United States law or the SPB, the United States argues, it does so merely as *evidence* to support the "as applied" challenge to the USDOC's determination in the underlying sunset review.[216] Argentina contends that "page four"[217] of the panel request serves to clarify the claims set out in Sections A and B of the panel request. For Argentina, when read in the light of such clarification, Section A.4 sufficiently identifies an "as such" challenge to certain provisions of United States law that are identified more specifically on "page four". In the view of the United States, "page four" of the panel request cannot sufficiently clarify Argentina's purported "as such" claim because the discussion on "page four" is clearly indicated to be a *supplement to* the previous claims, not a *clarification* thereof.[218] Therefore, the United States argues, it was not made aware of the case it had to answer concerning Argentina's "as such" claims about the alleged "irrefutable presumption".

160. A panel's terms of reference are governed by the claims set out in the complaining party's panel request.[219] Article 6.2 of the DSU provides that a panel request:

> ... shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

As the Appellate Body observed in *US – Carbon Steel*, under Article 6.2, a panel request must meet "two distinct requirements, namely identification of *the specific measures at issue*, and the provision

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[214]United States' appellant's submission, paras. 92 and 95.

[215]*Ibid*., para. 92.

[216]*Ibid*., para. 93.

[217]"Page four" is how the parties and the Panel referred to the section of the panel request following Section B.4, from the paragraph beginning "Argentina also considers ..." through the bullet point referring to Article XVI:4 of the *WTO Agreement*. (See Panel Report, footnote 13 to heading VII.B.1.(a)).

[218]United States' appellant's submission, para. 94.

[219]DSU, Article 7.1.

of a *brief summary of the legal basis of the complaint* (or the *claims*)".[220] The United States claims that Argentina's panel request "failed to provide a brief summary of the legal basis of [the complaint] sufficient to present the problem clearly".[221]

161. The Appellate Body has explained previously the due process objectives behind the requirement for sufficient clarity in a panel request:

> Article 6.2 of the DSU calls for sufficient clarity with respect to the legal basis of the complaint, that is, *with respect to the "claims" that are being asserted by the complaining party*. A defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence. Likewise, those Members of the WTO who intend to participate as third parties in panel proceedings must be informed of the legal basis of the complaint. This requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings.[222] (emphasis added; footnotes omitted)

162. In *Korea – Dairy*, the Appellate Body explained the distinction between the "legal basis of the complaint"—that is, the "claims" being asserted—and the arguments put forth by that party in support of its claims:

> By "*claim*" we mean a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement. Such a *claim of violation* must, as we have already noted, be distinguished from the *arguments* adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision.[223] (original emphasis; footnote omitted)

It follows, therefore, that, in order for a panel request to "present the problem clearly", it must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits. Only by such connection between the measure(s) and the relevant provision(s) can a respondent "know what case it has to answer, and ... begin preparing its defence".[224]

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[220]Appellate Body Report, *US – Carbon Steel*, para. 125. (original emphasis)

[221]Panel Report, footnote 12 to para. 7.7 (citing United States' response to Question 21 posed by the Panel at the Second Panel Meeting (Panel Report, Annex E, p. E-103, para. 37)).

[222]Appellate Body Report, *Thailand – H-Beams*, para. 88.

[223]Appellate Body Report, *Korea – Dairy*, para. 139.

[224]Appellate Body Report, *Thailand – H-Beams*, para. 88.

163. The Appellate Body stated in *US – Carbon Steel* that "compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel".[225]

164. In the light of the above, we look to Argentina's panel request to determine whether, on the basis of the language used to make Argentina's claims therein, the United States should have known that it was to prepare a defence against an "as such" challenge to United States statutes, the SAA, and the SPB, which measures are claimed to contain an "irrefutable presumption" inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

165. The resolution of this issue hinges on the interpretation of Section A.4, which is the only paragraph in the panel request that specifically mentions an "irrefutable presumption". The opening phrase of this paragraph indicates an "as applied" challenge, on the basis of Article 11.3, to the USDOC's likelihood-of-dumping determination on OCTG from Argentina. Argentina then refers to an "irrefutable presumption" as the basis for this challenge, and states that the presumption is "under US law *as such*". (emphasis added) We note, first, that the term "as such" is well understood in WTO dispute settlement parlance. As the Appellate Body observed in *US – 1916 Act*, a long line of cases under the GATT "firmly established"[226] the principle that complaining parties were permitted to challenge measures "as such"—by which it was understood that the challenged measures operate in general, without regard to their application in a specific instance, or at times even without regard to whether the measures were yet in effect.[227] This understanding continues in the WTO.[228] There can thus be little doubt that Argentina's reference to "US law as such" incorporated a challenge to certain provisions of United States law, *as such*, in addition to a challenge to the USDOC's likelihood-of-dumping determination *as applied* in the sunset review at issue.

166. Secondly, the logic of Section A.4 also suggests an "as such" challenge to certain provisions of United States law, in addition to an "as applied" challenge. Argentina's allegation of WTO-inconsistency is founded on what it refers to as an "irrefutable presumption". This presumption is not presented as flowing from the sunset review determination at issue; rather, it is presented as deriving from the "US law" applied by the USDOC in making that determination. Therefore, to establish the WTO-inconsistency of the USDOC's likelihood-of-dumping determination, Argentina could proceed

[225]Appellate Body Report, *US – Carbon Steel*, para. 127.

[226]Appellate Body Report, *US – 1916 Act*, para. 60.

[227]See, for example, GATT Panel Report, *US – Wine and Grape Products*, para. 4.1; GATT Panel Report, *US – Superfund*, paras. 5.2.9-5.2.10; GATT Panel Report, *US – Section 337*, para. 5.1; and GATT Panel Report, *US – Tobacco*, para. 118.

[228]See, for example, Appellate Body Report, *US – Softwood Lumber V*, para. 63; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82; Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, paras. 146-147 and 150; Appellate Body Report, *US – Lamb*, para. 173; and Appellate Body Report, *US – 1916 Act*, paras. 60-61.

by establishing the WTO-inconsistency of the "irrefutable presumption" itself, that is, of the United States legal provision(s) embodying that presumption. In doing so, Argentina would establish, as a consequence, that the ensuing sunset review determination is also inconsistent with the United States' WTO obligations. Given the wording and logic of Section A.4, it is difficult for us to see how the United States could not have been aware of the "as such" claim.

167. The United States emphasizes that the term "Determination" in the heading of Section A of the panel request, under which Section A.4 falls, makes it clear that the claims in Section A are limited to "as applied" challenges. We are unable to agree. Although the heading of Section A refers to "as applied" claims, it is clear on reading the first two sentences of Section A.1 that an "as such" claim is also being advanced. Indeed, the United States appears to have acknowledged before the Panel that an "as such" claim is evident in Section A.1, albeit it addresses other provisions of United States law.[229] Having acknowledged that Section A.1 contains a number of "as such" claims, the United States must have been aware that the term "Determination" in the heading of Section A could not be read to limit Argentina's claims in Section A.4 to "as applied" claims. We are therefore of the view that Section A.4 should have placed the United States on notice that Argentina was alleging certain provisions of United States law to be inconsistent, as such, with Article 11.3, because of an "irrefutable presumption" found in those provisions.

168. We now turn to the question whether Argentina's panel request clearly identifies where in "US law" Argentina finds an "irrefutable presumption". The United States argues that the reference in Section A.4 to "US law" is overly broad because it fails to specify the provisions of United States law that contain the alleged presumption. We agree that such a broad reference to "US law" would not, in and of itself, "present the problem clearly" in order for a respondent party to be able to begin preparing its defence. However, we note that Section A.4 of Argentina's panel request does not refer

[229]In response to one of the Panel's questions, the United States stated:

> The claims identified in Sections A and B of the Panel Request are limited to:
>
> As such claims:
>
> - 19 USC. 1675(c)(4), in violation of Articles 11.1, 11.3, 11.4, 2.1, 2.2, 2.4, 6.1, 6.2, 6.6, 6.8, .69, 6.10, 12.2, 12.3, and Annex II of the Anti-Dumping Agreement;[12]
> - 19 C.F.R. 351.218(e), in violation of Articles 11.1, 11.3, 11.4, 2.1, 2.2, 2.4, 6.1, 6.2, 6.6, 6.8, 6.9, 6.10, 12.2, 12.3, and Annex II of the Anti-Dumping Agreement;[13]
>
> [12] Section A.1.
>
> [13] Section A.1.

(United States' response to Question 22 posed by the Panel at the Second Panel Meeting (Panel Report, Annex E, p. E-103, para. 38 and footnotes 12 and 13 thereto)) The United States cited Section A.1 of the Panel Request as the basis for these two "as such" claims.

to "US law" in isolation.[230] Section A.4 explicitly mentions the "[USDOC's] Sunset Policy Bulletin" in addition to referring to "US law as such". Moreover, Section A.4 makes it clear that the "US law" under challenge is the United States law that relates to the issue whether "termination of the anti-dumping duty measure would be likely to lead to continuation or recurrence of dumping". Based on this language, the challenge to "US law as such" could not be understood to refer to any provisions of United States law other than those governing the substantive determination of the USDOC as to the likelihood of continuation or recurrence of dumping.

169. Recalling the Appellate Body's observation that panel requests must be read "as a whole"[231], we note that "page four" of Argentina's panel request specifically identifies the "US laws, regulations, policies, and procedures" that Argentina claims "are inconsistent with US WTO obligations". These provisions are the following: Sections 751(c) and 752 of the Tariff Act of 1930; the SAA; the SPB; and Section 351.218 of the USDOC Regulations. Not all of these provisions, however, relate to the standards used by the USDOC when examining whether "termination of the anti-dumping duty measure would be likely to lead to continuation or recurrence of dumping".[232] Of the provisions identified by Argentina on "page four" of the panel request, Section 351.218 of the USDOC Regulations clearly addresses the *procedural*—rather than the *substantive*—aspects of USDOC sunset reviews, for example, setting out the contents and deadlines for interested parties' submissions. Therefore, the United States should have been aware that Section 351.218 of the USDOC Regulations was not the subject of Argentina's challenge to an alleged "irrefutable presumption" in "US law".

170. As for the remaining provisions identified by Argentina on "page four" of its panel request, the United States contests that Sections 751(c) and 752(c) of the Tariff Act of 1930, the SAA, and the SPB are within the panel's terms of reference. However, a review of these provisions reveals that they form the basis of Argentina's challenge with respect to the alleged "irrefutable presumption". Section 751(c) of the Tariff Act of 1930 sets forth the general obligation for the USDOC "to determine, in accordance with [Section 752], whether revocation of the … antidumping duty order … would be

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[230]Argentina's panel request contrasts with the complaining party's panel request that was considered by the Appellate Body in *India – Patents (US)*:

> With respect to Article 63 [of the *TRIPS Agreement*], the convenient phrase [in the panel request], "including but not necessarily limited to", is simply not adequate to "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" as required by Article 6.2 of the DSU. If this phrase incorporates Article 63, what Article of the *TRIPS Agreement* does it not incorporate? Therefore, this phrase is not sufficient to bring a claim relating to Article 63 within the terms of reference of the Panel.

(Appellate Body Report, *India – Patents (US)*, para. 90)

[231]Appellate Body Report, *US – Carbon Steel*, para. 127.

[232]Section A.4 of Argentina's panel request.

likely to lead to continuation or recurrence of dumping". Section 752 provides more detailed rules for the determinations required to be made in sunset reviews, and paragraph (c) of this Section is entitled "Determination of likelihood of continuation or recurrence of dumping". The SAA contains a section entitled "Likelihood of Dumping", which explains the basis for Section 752(c) of the Tariff Act of 1930. Finally, the SPB is explicitly mentioned in Section A.4 of Argentina's panel request. Section II.A of the SPB is entitled "Determination of Likelihood of Continuation or Recurrence of Dumping". Section II.A.3 of the SPB provides that the USDOC "normally will determine that revocation of an antidumping order or termination of a suspended dumping investigation is likely to lead to continuation or recurrence of dumping" where one of the three stated scenarios applies.

171. These provisions thus set out the standards employed by the USDOC in the course of making likelihood-of-dumping determinations. As a result, the United States could reasonably have been expected to understand that these provisions were the focus of Argentina's challenge with respect to the alleged "irrefutable presumption". Given the fact that Section A.4 alleges that an "irrefutable presumption" is found in United States law, as detailed above, and that this presumption is inconsistent with Article 11.3, we are of the view that Argentina's panel request, read as a whole, states the legal basis for the alleged WTO-inconsistency and adequately links the challenged measures to the WTO provision claimed to have been infringed.

172. Although we do not disagree with the Panel's conclusion in this regard, we nevertheless recognize that Argentina's panel request could have been drafted with greater precision and clarity. In our view, "as such" challenges against a Member's measures in WTO dispute settlement proceedings are serious challenges. By definition, an "as such" claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct—not only in a particular instance that has occurred, but in future situations as well—will necessarily be inconsistent with that Member's WTO obligations. In essence, complaining parties bringing "as such" challenges seek to prevent Members *ex ante* from engaging in certain conduct. The implications of such challenges are obviously more far-reaching than "as applied" claims.

173. We also expect that measures subject to "as such" challenges would normally have undergone, under municipal law, thorough scrutiny through various deliberative processes to ensure consistency with the Member's international obligations, including those found in the covered agreements, and that the enactment of such a measure would implicitly reflect the conclusion of that Member that the measure is not inconsistent with those obligations. The presumption that WTO Members act in good faith in the implementation of their WTO commitments is particularly apt in the context of measures challenged "as such". We would therefore urge complaining parties to be *especially diligent* in setting out "as such" claims in their panel requests as clearly as possible. In

particular, we would expect that "as such" claims state unambiguously the specific measures of municipal law challenged by the complaining party and the legal basis for the allegation that those measures are not consistent with particular provisions of the covered agreements. Through such straightforward presentations of "as such" claims, panel requests should leave respondent parties in little doubt that, notwithstanding their own considered views on the WTO-consistency of their measures, another Member intends to challenge those measures, as such, in WTO dispute settlement proceedings.

174. We turn now to the Article 6.2 challenges that the United States requests us to address provided that certain conditions obtain. The United States asks us to find that Argentina's claim under Article 11.3 of the *Anti-Dumping Agreement* relating to the USDOC "practice", and the claim under Article X:3(a) of the GATT 1994 relating to the USDOC's administration of the sunset review legal regime, are not within the Panel's terms of reference. These requests of the United States are premised on our deciding to address the merits of these claims, which Argentina has conditionally cross-appealed. We discuss these claims, including the United States' Article 6.2 challenges thereto, following our examination of the SPB below.[233]

175. With respect to the United States' allegation that Section B.3 of Argentina's panel request does not set out "as such" or "as applied" claims under Articles 3.7 and 3.8 of the *Anti-Dumping Agreement*, the United States requests a ruling only if Argentina were to appeal the Panel's findings that the United States did not act inconsistently with these provisions.[234] Argentina has not cross-appealed those findings.[235] We therefore do not need to make a finding on this aspect of the United States' claim under Article 6.2 of the DSU.

176. In the light of the above, we *uphold* the Panel's finding, in paragraph 7.27 of the Panel Report, that Section A.4 of Argentina's panel request, in accordance with Article 6.2 of the DSU, sets out with sufficient clarity Argentina's claims that Sections 751(c) and 752(c) of the Tariff Act of 1930, the SAA, and the SPB, are inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*, by virtue of the alleged "irrefutable presumption" contained in those provisions. We also *do not find it necessary* to make a finding on the United States' contingent challenge under Article 6.2 of the DSU, with respect to Argentina's claims under Articles 3.7 and 3.8 of the *Anti-Dumping Agreement*, because Argentina does not appeal the Panel's findings on those claims.

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[233]*Infra*, paras. 216-221.

[234]United States' appellant's submission, para. 101; United States' response to questioning at the oral hearing.

[235]Argentina's response to questioning at the oral hearing.

V. The Sunset Policy Bulletin

177. We now move to the issues concerning the SPB. We consider it useful to recall briefly, at the outset, the requirements relating to reviews conducted pursuant to Article 11.3 of the *Anti-Dumping Agreement*, generally referred to as "sunset reviews". Article 11.3 provides, in relevant part:

> [A]ny definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition … *unless* the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. (emphasis added; footnote omitted)

178. Thus, the continuation of an anti-dumping duty, which is an "exception"[236] to the otherwise-mandated expiry of the duty after five years, is subject to certain conditions set out in Article 11.3. These conditions were identified by the Appellate Body as follows:

> [F]irst, that a review be initiated before the expiry of five years from the date of the imposition of the duty; second, that in the review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of *dumping*; and third, that in the review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of *injury*.[237] (original emphasis)

If any one of these conditions is not satisfied, the duty must be terminated.

179. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body emphasized the importance of the terms "determine" and "review" in Article 11.3, stating:

> The words "review" and "determine" in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a *reasoned conclusion* on the basis of information gathered as part of a process of *reconsideration and examination*.[238] (emphasis added)

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[236]Appellate Body Report, *US – Carbon Steel*, para. 88.

[237]Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 104.

[238]*Ibid*., para. 111.

The Appellate Body also endorsed that panel's description of the obligation contained in Article 11.3, which description the Appellate Body found "closely resemble[d]" its own understanding:

> The requirement to make a "determination" concerning likelihood therefore precludes an investigating authority from simply assuming that likelihood exists. In order to continue the imposition of the measure after the expiry of the five-year application period, it is clear that the investigating authority has to determine, on the basis of *positive evidence*, that termination of the duty is likely to lead to continuation or recurrence of dumping and injury. An investigating authority must have a *sufficient factual basis* to allow it to draw *reasoned and adequate conclusions* concerning the likelihood of such continuation or recurrence.[239] (emphasis added; original footnotes omitted)

180. The plain meaning of the terms "review" and "determine" in Article 11.3, therefore, compel an investigating authority in a sunset review to undertake an examination, on the basis of positive evidence, of the likelihood of continuation or recurrence of dumping and injury. In drawing conclusions from that examination, the investigating authority must arrive at a reasoned determination resting on a sufficient factual basis; it may not rely on assumptions or conjecture.

181. Having confirmed our understanding of Article 11.3, we turn to the United States' claims on appeal challenging the Panel's findings with respect to the SPB. First, we address the issue of whether the SPB is a "measure" subject to WTO dispute settlement. Secondly, we analyze whether Section II.A.3 of the SPB is consistent with Article 11.3 of the *Anti-Dumping Agreement*.

A. *The Sunset Policy Bulletin as a "Measure"*

182. The Panel considered the SPB to be a measure that can be subject to WTO dispute settlement. The Panel relied on the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review*, which "stated that any legal instrument under a WTO Member's law could also be challenged as a measure before a WTO panel".[240] The Panel observed that the Appellate Body "was addressing precisely the issue of the SPB"[241], and concluded that "there can be no doubt that the Appellate Body considers the SPB to be a measure that can be subject to WTO dispute settlement".[242]

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[239]Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 114 (quoting Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.271).

[240]Panel Report, para. 7.136.

[241]*Ibid*.

[242]*Ibid*.

183. The United States challenges this finding of the Panel, arguing that the Panel erred in relying on the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review* because the Appellate Body did not conclude, in that Report, that the SPB is a measure. The United States argues that:

> [In *US – Corrosion-Resistant Steel Sunset Review*, the] Appellate Body reversed the panel's finding that the SPB was *not* a measure because the panel's analysis was insufficient. However, in doing so, the Appellate Body did not go on to "complete the analysis," thus leaving the question of whether the SPB is a measure open.[243] (original emphasis; footnote omitted)

184. The United States underscores that the SPB is not a legal instrument under United States law[244], but "simply a transparency tool to provide the private sector with guidance".[245] The United States adds that the SPB does not set forth rules or norms that are intended to have general and prospective application; it does not bind the USDOC and the USDOC "is entirely free to depart from [the] SPB at any time".[246] Therefore, according to the United States, the SPB should not be viewed as a measure subject to WTO dispute settlement.[247]

185. In addition, the United States submits that the Panel erred in concluding that the SPB is a measure because such a conclusion does not result from "an objective assessment" consistent with Article 11 of the DSU. The United States argues that the Panel contravened Article 11 of the DSU because it did not explain why the findings of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, as to whether the SPB is a measure, "would be persuasive given the factual record in this dispute".[248] The United States further contends that the Panel failed to consider the United States' explanations that "the SPB has no functional life of its own and has no independent legal status"[249], and that "the Panel lacked the factual information necessary to ... conclude that the SPB is a measure".[250]

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[243]United States' appellant's submission, para. 10.

[244]*Ibid*., paras. 11 and 13.

[245]*Ibid*., para. 11.

[246]*Ibid*., para. 13.

[247]*Ibid*.

[248]*Ibid*., para. 8. See also, *ibid*., para. 9.

[249]*Ibid*., para. 11. (footnote omitted)

[250]*Ibid*., para. 12.

186. We turn first to the United States' understanding of the Appellate Body's finding in *US – Corrosion-Resistant Steel Sunset Review*. We disagree with the United States' assertion that, in that case, the Appellate Body left open the question whether the SPB is a measure.[251] It is clear that by reversing the panel's finding that "the Sunset Policy Bulletin is not a measure that is challengeable, as such, under the *WTO Agreement*"[252], the Appellate Body concluded that the SPB is a measure subject to WTO dispute settlement. A review of the Appellate Body's reasoning in that case confirms this view. It will be recalled that the Appellate Body completed the analysis with respect to Japan's claim that Section II.A.2 of the SPB was inconsistent, as such, with Articles 6.10 and 11.3 of the *Anti-Dumping Agreement*.[253] The Appellate Body would not have done so had it not regarded the SPB to be a measure subject to WTO dispute settlement. We also observe that the Appellate Body declined to complete the analysis as regards Japan's claim that Sections II.A.3 and II.A.4 of the SPB were inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*. However, the Appellate Body did so only "in view of the lack of relevant factual findings by the Panel or uncontested facts on the Panel record".[254] This suggests that the Appellate Body treated the SPB as a measure subject to WTO dispute settlement. In our view, therefore, the Panel was correct in its understanding of the Appellate Body's finding with respect to the SPB and was correct to rely on that finding in coming to the same conclusion in this case, without having to re-examine the very same question all over again.

187. We note the argument of the United States that the SPB is not a legal instrument under United States law. This argument, however, is not relevant to the question before us. The issue is not whether the SPB is a legal instrument within the domestic legal system of the United States, but rather, whether the SPB is a measure that may be challenged within the WTO system. The United States has explained that, within the domestic legal system of the United States, the SPB does not bind the USDOC and that the USDOC "is entirely free to depart from [the] SPB at any time".[255] However, it is not for us to opine on matters of United States domestic law. Our mandate is confined to clarifying the provisions of the *WTO Agreement* and to determining whether the challenged measures are consistent with those provisions. As noted by the United States[256], in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body indicated that "acts setting forth rules or norms that

[251]United States' appellant's submission, para. 10.

[252]Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 100 (referring to Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.195). See also, *ibid*., para. 212(a).

[253]*Ibid*., paras. 147-157. The Appellate Body rejected Japan's claim.

[254]*Ibid*., para. 190.

[255]United States' appellant's submission, para. 13.

[256]*Ibid*.

are intended to have general and prospective application" are measures subject to WTO dispute settlement.[257] We disagree with the United States' application of these criteria to the SPB. In our view, the SPB has normative value, as it provides administrative guidance and creates expectations among the public and among private actors.[258] It is intended to have general application, as it is to apply to all the sunset reviews conducted in the United States. It is also intended to have prospective application, as it is intended to apply to sunset reviews taking place after its issuance. Thus, we confirm—once again—that the SPB, as such, is subject to WTO dispute settlement.

188. Regarding the arguments presented by the United States relating to Article 11 of the DSU, we disagree with the United States that the Panel did not assess objectively whether the SPB is a measure. In our view, such an assessment is a legal characterization and not just a factual one, and the Panel correctly conducted its analysis. The Panel referred first to the SPB, which formed the factual information needed to conduct the exercise of legal characterization. The Panel had before it exactly the same instrument that had been examined by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*; thus, it was appropriate for the Panel, in determining whether the SPB is a measure, to rely on the Appellate Body's conclusion in that case. Indeed, following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same. Although the Panel may have expressed itself in a concise manner, we find no fault in its analysis that could justify ruling that the Panel failed to observe its obligations under Article 11 of the DSU.

189. Accordingly, we *uphold* the Panel's finding, in paragraph 7.136 of the Panel Report, that the SPB is a "measure" subject to WTO dispute settlement.

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[257]Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82. (footnote omitted)

[258]We note, in this regard, the introductory statement of the SPB:

> This policy bulletin proposes guidance regarding the conduct of sunset reviews. As described below, the proposed policies are intended to complement the applicable statutory and regulatory provisions by providing guidance on methodological or analytical issues not explicitly addressed by the statute and regulations.

(SPB, p. 18871) This statement was also referenced by the Appellate Body in *US – Corrosion-Resistant Sunset Review*, at paragraph 74.

B. *Consistency of Section II.A.3 of the Sunset Policy Bulletin with Article 11.3 of the Anti-Dumping Agreement*

190. The United States claims that the Panel erred in finding Section II.A.3 of the SPB to be inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.[259] According to Section II.A.3, the USDOC will "normally" make an affirmative determination of likelihood of continuation or recurrence of dumping where one of three scenarios—centred around dumping margins and import volumes—obtains. The relevant part of Section II.A.3 reads as follows:

> **II. Sunset Reviews in Antidumping Proceedings**
>
> *A. Determination of Likelihood of Continuation or Recurrence of Dumping*
>
> ...
>
> 3. Likelihood of Continuation or Recurrence of Dumping
>
> …
>
> ... the Department normally will determine that revocation of an antidumping order or termination of a suspended dumping investigation is likely to lead to continuation or recurrence of dumping where—
>
> (a) dumping continued at any level above *de minimis* after the issuance of the order or the suspension agreement, as applicable;
>
> (b) imports of the subject merchandise ceased after issuance of the order or the suspension agreement, as applicable; or
>
> (c) dumping was eliminated after the issuance of the order or the suspension agreement, as applicable, and import volumes for the subject merchandise declined significantly.
>
> The Department recognizes that, in the context of a sunset review of a suspended investigation, the data relevant to the criteria under paragraphs (a) through (c), above, may not be conclusive with respect to likelihood. Therefore, the Department may be more likely to entertain good cause arguments under paragraph II.C in a sunset review of a suspended investigation.[260]

191. Sections II.A.4 and II.C of the SPB are also relevant to the United States' claim. Section II.A.4 addresses the situations where the USDOC "normally" will make a determination of *no* likelihood of continuation or recurrence of dumping. For its part, Section II.C provides that the

[259]Panel Report, para. 7.166.

[260]SPB, p. 18872.

USDOC will consider "other price, cost, market or economic factors" in anti-dumping sunset reviews if the USDOC determines that "good cause" to consider such other factors "is shown".[261]

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[261]The relevant parts of Sections II.A.4 and II.C of the SPB provide as follows:

> **II. Sunset Reviews in Antidumping Proceedings**
>
> *A. Determination of Likelihood of Continuation or Recurrence of Dumping*
>
> ...
>
> 4. No Likelihood of Continuation or Recurrence of Dumping
>
> …
>
> ... the Department normally will determine that revocation of an antidumping order or termination of a suspended dumping investigation is not likely to lead to continuation or recurrence of dumping where dumping was eliminated after issuance of the order or the suspension agreement, as applicable, and import volumes remained steady or increased. Declining margins alone normally would not qualify because the legislative history makes clear that continued margins at any level would lead to a finding of likelihood. See section II.A.3, above. In analyzing whether import volumes remained steady or increased, the Department normally will consider companies' relative market share. Such information should be provided to the Department by the parties.
>
> The Department recognizes that, in the context of a sunset review of a suspended investigation, the elimination of dumping coupled with steady or increasing import volumes may not be conclusive with respect to no likelihood. Therefore, the Department may be more likely to entertain good cause arguments under paragraph II.C in a sunset review of a suspended investigation.
>
> ...
>
> C. *Consideration of Other Factors*
>
> Section 752(c)(2) of the Act provides that, if the Department determines that good cause is shown, the Department also will consider other price, cost, market or economic factors in determining the likelihood of continuation or recurrence of dumping. The SAA at 890, states that such other factors might include,
>
> the market share of foreign producers subject to the antidumping proceeding; changes in exchange rates, inventory levels, production capacity, and capacity utilization; any history of sales below cost of production; changes in manufacturing technology in the industry; and prevailing prices in relevant markets.
>
> The SAA at 890, also notes that the list of factors is illustrative, and that the Department should analyze such information on a case-by-case basis.
>
> Therefore, the Department will consider other factors in AD sunset reviews if the Department determines that good cause to consider such other factors exists. The burden is on an interested party to provide information or evidence that would warrant consideration of the other factors in question. With respect to a sunset review of a suspended investigation, where the Department determines that good cause exists, the Department normally will conduct the sunset review consistent with its practice of examining likelihood under section 751(a) of the Act.

(SPB, pp. 18872 and 18874)

192. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body had occasion to examine whether Sections II.A.3 and II.A.4 of the SPB are consistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*. The Appellate Body stated:

> We believe that a firm evidentiary foundation is required in each case for a proper determination under Article 11.3 of the likelihood of continuation or recurrence of dumping. Such a determination cannot be based solely on the mechanistic application of presumptions. We therefore consider that the consistency of Sections II.A.3 and 4 of the Sunset Policy Bulletin with Article 11.3 of the *Anti-Dumping Agreement* hinges upon whether those provisions instruct USDOC to treat dumping margins and/or import volumes as determinative or conclusive, on the one hand, or merely indicative or probative, on the other hand, of the likelihood of future dumping.[262]

193. Relying on these observations of the Appellate Body, the Panel began its analysis by setting out the standard for determining whether Section II.A.3 of the SPB is consistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*. The Panel stated that a scheme that attributes a "determinative"/"conclusive"[263] value to certain factors in sunset determinations—as opposed to only an indicative value—is "likely to violate" Article 11.3 of the *Anti-Dumping Agreement*.[264] The Panel was of the view that if any of the three scenarios described in Section II.A.3 of the SPB is regarded as determinative/conclusive for the purpose of determining the likelihood of continuation or recurrence of dumping, "it will follow that Section II.A.3 of the SPB is inconsistent with Article 11.3".[265] However, if the scenarios are regarded as "simply indicative", Section II.A.3 of the SPB will be found to be consistent with Article 11.3.[266]

194. The United States does not object to the manner in which the Panel framed the issue; the United States considers that the Panel correctly stated that it was charged with the task of evaluating whether the SPB *requires* the USDOC to treat the three scenarios involving dumping margins and import volumes as conclusive of likelihood of continuation or recurrence of dumping.[267] However, the United States is of the view that the Panel misapplied the standard it had set out.[268] For the United

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[262]Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 178.

[263]Panel Report, para. 7.142 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 178). (Panel's emphasis omitted)

[264]*Ibid*., para. 7.143.

[265]*Ibid*., para. 7.155.

[266]*Ibid*.

[267]United States' appellant's submission, paras. 14, 16, and 18.

[268]*Ibid*., para. 18.

States, the SPB is "simply a transparency tool" that provides guidance and, therefore, it was "inaccurate [for the Panel] to conclude that the SPB requires that [the USDOC] do anything at all".[269]

195. The United States' appeal is founded on the Panel's alleged failure to comply with its obligations under Article 11 of the DSU. The United States submits that the SPB is part of United States municipal law. According to the United States, the import of a WTO Member's municipal law is a question of fact that requires an examination of the "status and meaning" of the measure at issue within the municipal legal system itself.[270] The analysis of the meaning of the SPB conducted by the Panel ignored "its actual status and meaning"[271] under United States law; therefore, the United States argues, it cannot reflect an "objective assessment" under Article 11 of the DSU.[272]

196. The United States submits that the Panel's conclusion that the three scenarios in Section II.A.3 of the SPB are regarded as conclusive of likelihood of continuation or recurrence of dumping had for its sole basis "an analysis of statistics on 'the application' of the SPB in past sunset reviews".[273] Such an analysis does not constitute an "objective assessment" because "[t]here is no principle of interpretation of U.S. law which provides that a previously non-binding document becomes, through repeated application, binding."[274] For the United States, "[i]f [the USDOC] has discretion to apply a law in a particular manner, the fact that it has, to date, not exercised its discretion in that manner would not change the fact that [the USDOC] has the discretion to do so."[275] The United States adds that the Panel's analysis is fundamentally flawed as "[t]he Panel [did] no more than note a correlation between the results in particular sunset reviews and the scenarios set forth in the SPB"[276], but it did not "ask the question of whether the SPB *caused* the determinations in question".[277]

197. In our view, the Panel correctly articulated the standard for determining whether Section II.A.3 of the SPB is inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*. We therefore turn to the question whether the Panel erred in applying that standard in the course of its interpretation of the SPB. We note, in this respect, that the task of the Panel was to evaluate whether

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[269]United States' appellant's submission, para. 25. (original underlining)

[270]*Ibid*., para. 19.

[271]*Ibid*.

[272]*Ibid*., paras. 19 and 23.

[273]*Ibid*., para. 14.

[274]*Ibid*., para. 30.

[275]*Ibid*.

[276]*Ibid*., para. 31.

[277]*Ibid*. (original emphasis)

the SPB complies with Article 11.3 of the *Anti-Dumping Agreement*, and that the interpretation of the SPB had to be carried out in *that* light, rather than in the light of United States municipal law.

198. In order to interpret the SPB so as to determine whether the three scenarios described in Section II.A.3 of the SPB are regarded as "determinative"/"conclusive", or "simply indicative", the Panel started its analysis with an examination of the text of the SPB. In so doing, it acted in a manner consistent with the Appellate Body's guidance in *US – Corrosion-Resistant Steel Sunset Review*:

> When a measure is challenged "as such", the starting point for an analysis must be the measure on its face.[278]

199. The textual analysis led the Panel to conclude that the SPB was "not sufficiently clear as to whether the provisions of Section II.A.3 relating to the three factual scenarios are determinative for purposes of the USDOC's likelihood determinations".[279] The Appellate Body arrived at the same conclusion with respect to the SPB in *US – Corrosion-Resistant Steel Sunset Review*, when it stated that "the language of Section II.A.3 is not altogether clear on this point"[280] and that "when read in conjunction with the SAA, it seems that Section II.A.3 might *not* instruct USDOC to treat these two factors [import volumes and historical dumping margins] as 'conclusive' in every case".[281]

200. We also note, as the Panel did, that Section II.A.3 provides that in the context of a sunset review of a suspended investigation, the three scenarios "may not be conclusive with respect to likelihood".[282] One might infer *a contrario* from this language that, in the context of a revocation of an anti-dumping order (as opposed to the context of termination of a suspended anti-dumping investigation), the three scenarios will be regarded as conclusive. Nevertheless, as the Appellate Body indicated in *US – Corrosion-Resistant Steel Sunset Review*, such a reasoning is not sufficient to provide a definitive response to our inquiry. Therefore, we agree with the Panel that the text of the SPB is not dispositive of the question whether the three scenarios set out in the SPB are regarded as determinative/conclusive, or merely indicative in the USDOC's likelihood-of-dumping determinations.

201. Having determined that the text of the SPB does not "resolve[] the issue of whether Section II.A.3 of the SPB envisions that dumping margins and import volumes should be treated as conclusive

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[278]Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168.

[279]Panel Report, para. 7.157.

[280]Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 179.

[281]*Ibid*., para. 181 (quoting Section II.A.3 of the SPB). (original emphasis)

[282]SPB, Section II.A.3. A similar sentence is contained in Section II.A.4 of the SPB.

in sunset reviews" [283], the Panel proceeded to "analyse evidence submitted by Argentina regarding the manner in which [Section II.A.3 had] so far been implemented by the USDOC".[284] In so doing, the Panel followed the Appellate Body's guidance in *US – Carbon Steel*:

> The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by *evidence of the consistent application of such laws*, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case.[285] (emphasis added; footnote omitted)

202. It is well settled that, as a general rule, it rests upon the complaining party to establish the inconsistency of the measure it challenges with a particular provision of a WTO covered agreement.[286] In this case, the burden was therefore on Argentina to establish that the three scenarios in Section II.A.3 of the SPB are regarded by the USDOC as determinative/conclusive of likelihood of continuation or recurrence of dumping and, therefore, that Section II.A.3 is inconsistent with Article 11.3 of the *Anti-Dumping Agreement* because the ensuing determinations are not founded on rigorous examination or a sufficient factual basis. In particular, as the text of the SPB is equivocal in this regard, Argentina had to establish that the consistent application of the SPB revealed that the three scenarios in Section II.A.3 of the SPB are regarded by the USDOC as determinative/conclusive for its likelihood determination.

203. Argentina, as the complaining party, sought to discharge its burden by filing Exhibits ARG-63 and ARG-64. Exhibit ARG-63 is a compilation of documents relating to 291 sunset review determinations made by the USDOC prior to the submission of Argentina's request for consultations.[287] Exhibit ARG-64 is a compilation of documents relating to six sunset determinations made by the USDOC during the period following Argentina's request for consultations, up to December 2003. In addition to the compilation of cases, Exhibits ARG-63 and ARG-64 include a spreadsheet, prepared by Argentina, that presents statistical data, *inter alia*, on the results of the

[283]Panel Report, para. 7.158.

[284]*Ibid*.

[285]Appellate Body Report, *US – Carbon Steel*, para. 157. This statement was also cited and confirmed by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, para. 168.

[286]See, for example, Appellate Body Report, *Japan – Apples*, para. 152; and Appellate Body Report, *EC – Hormones*, para. 98.

[287]WT/DS268/1, G/L/572, G/ADP/D43/1, 10 October 2002.

determinations. Argentina asserted before the Panel that "these statistics demonstrate that the USDOC has relied on one of the three factual scenarios set out in Section II.A.3 of the SPB in every sunset review in which it found likelihood"[288] and that this consistent practice proves that these scenarios contain an irrefutable presumption of likelihood of continuation or recurrence of dumping.

204. Before the Panel, the United States contested Argentina's interpretation of the statistics. It argued that the evidence presented in the individual cases could have dictated the result, rather than any alleged irrefutable presumption, but that "we simply do not know".[289] Responding to the Panel's question as to whether the statistics were factually correct, the United States indicated that it had "not examined each and every sunset review cited by Argentina" but that it had "no reason to believe that the overall total of sunset reviews conducted and the ultimate outcomes in those sunset reviews alleged by Argentina is significantly flawed".[290] The United States also stated that "these statistics can at best indicate a repeated pattern of similar responses to a set of circumstances" and that "the data submitted by Argentina focuses only on the results of individual sunset reviews conducted by the USDOC and ignores the particular circumstances of each review."[291]

205. The Panel concluded that "the evidence submitted by Argentina in exhibit ARG-63 demonstrates that the USDOC does in fact perceive the provisions of Section II.A.3 of the SPB as conclusive regarding the issue of likelihood of continuation or recurrence of dumping in the case of revocation of an order."[292] The Panel said that it "based [its] analysis on the statistics regarding the determinations made before the date of initiation of [the] panel proceedings"[293] (that is, on the data included in Exhibit ARG-63 only and not in Exhibit ARG-64). The Panel justified its conclusion in one sentence:

> An analysis of the statistics provided by Argentina demonstrates that the USDOC applied the contested provisions of the SPB in each sunset review and found likelihood of continuation or recurrence in each one of these sunset reviews on the basis of one of the three scenarios contained in Section II.A.3 of the SPB.[294]

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[288]Panel Report, para. 7.158.

[289]*Ibid*. (quoting United States' first written submission to the Panel, para. 186).

[290]*Ibid*., para. 7.160 (quoting United States' response to Question 14(a) posed by the Panel following the Second Panel Meeting (Panel Report, Annex E, p. E-98, para. 16)). (underlining added by the Panel)

[291]*Ibid*., para. 7.161 (citing United States' response to Question 14(b) posed by the Panel following the Second Panel Meeting (Panel Report, Annex E, p. E-98, paras. 18-19)).

[292]*Ibid*., para. 7.165.

[293]*Ibid*.

[294]*Ibid*.

206. Before we evaluate the Panel's analysis in reaching its conclusion that "the USDOC does in fact perceive the provisions of Section II.A.3 of the SPB as conclusive" [295], we wish to note certain factual information gleaned from the Panel record and through questions posed during the oral hearing, and on which there is no substantive disagreement between Argentina and the United States. Of the 291 sunset review determinations contained in Exhibit ARG-63, domestic interested parties did not participate in 74 cases, with the result that the anti-dumping duty orders were revoked. In the remaining 217 cases, the USDOC made affirmative likelihood determinations. However, foreign respondent parties participated in the review proceedings in only 41 (or 43 [296]) of these 217 cases. Out of these 41 (or 43) cases, foreign respondent parties introduced "other good cause factors" only in a limited number of them.[297]

207. We also note that Section 752(c)(1) of the United States Tariff Act of 1930, which is the statutory provision of the United States law governing sunset review determinations of likelihood of continuation or recurrence of dumping, lays down that, in making such determinations, the administering authority "shall consider":

> (A) the weighted average dumping margins determined in the investigation and subsequent reviews, and
>
> (B) the volume of imports of the subject merchandise for the period before and the period after the issuance of the antidumping duty order or acceptance of the suspension agreement.[298]

Section 752(c)(2) of the Act provides that:

> If good cause is shown, the administering authority shall also consider such other price, cost, market, or economic factors as it deems relevant.[299]

The SAA, which provides an authoritative interpretation of the statute, refers to these statutory provisions and indicates how the above-mentioned statutory provisions are to be followed by the investigating authority. Before the Panel, Argentina argued that Section 752(c) of the Tariff Act of

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[295]Panel Report, para. 7.165.

[296]In response to questioning at the oral hearing, the United States identified 41 sunset review cases where the existence of likelihood of dumping was contested. Argentina referred to 43 cases. Argentina also explained that the difference between the two figures resulted from differences in methodology.

[297]According to the United States, in about 300 sunset review determinations made so far by the USDOC under Article 11.3 of the *Anti-Dumping Agreement*, foreign respondent parties have participated in the proceedings in about 15 per cent of the cases only, and of those cases, "other good cause factors" have been introduced by them only in a limited number of cases.

[298]Exhibit ARG-1 submitted by Argentina to the Panel, p. 1157.

[299]*Ibid*.

1930 and the SAA are inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement* as they are the source of the alleged "irrefutable presumption". The Panel rejected Argentina's claims and found that Section 752(c) of the Tariff Act of 1930 and the SAA are not inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*. Argentina does not challenge these Panel findings on appeal.

208. In our view, "volume of dumped imports" and "dumping margins", before and after the issuance of anti-dumping duty orders, are highly important factors for any determination of likelihood of continuation or recurrence of dumping in sunset reviews, although other factors may also be as important, depending on the circumstances of the case. The three factual scenarios in Section II.A.3 of the SPB, which describe how these two factors will be considered in individual determinations, thus have certain probative value, the degree of which may vary from case to case. For example, if, under scenario (a) of Section II.A.3 of the SPB, dumping *continued* with substantial margins despite the existence of the anti-dumping duty order, this would be highly probative of the likelihood that dumping would continue if the anti-dumping order were revoked. Conversely, if, under scenarios (b) and (c) of Section II.A.3 of the SPB, imports ceased after issuance of the anti-dumping duty order, or imports continued but without dumping margins, the probative value of the scenarios may be much less, and other relevant factors may have to be examined to determine whether imports *with dumping margins* would "recur" if the anti-dumping duty order were revoked. The importance of the two underlying factors (import volumes and dumping margins) for a likelihood-of-dumping determination cannot be questioned; however, our concern here is with the possible mechanistic application of the three scenarios based on these factors, such that other factors that may be of equal importance are disregarded.

209. In our view, therefore, in order to objectively assess, as required by Article 11 of the DSU, whether the three factual scenarios of Section II.A.3 of the SPB are regarded as determinative/conclusive, it is essential to examine concrete examples of cases where the likelihood determination of continuation or recurrence of dumping was based solely on one of the scenarios of Section II.A.3 of the SPB, even though the probative value of other factors might have outweighed that of the identified scenario. Such an examination requires a qualitative assessment of the likelihood determinations in individual cases.

210. We find that, in reaching its conclusion on the USDOC's consistent application of the SPB, the Panel relied solely on the overall statistics or aggregate results. The Panel did not undertake a qualitative analysis of at least some of the individual cases in Exhibit ARG-63 in order to see whether the USDOC's determinations in those cases were objective and rested on a sufficient factual basis.

211. A qualitative analysis of individual cases in all likelihood would have revealed a variety of circumstances. There could well have been cases where affirmative determinations were made objectively, based on one of the three scenarios. There could have been other cases where the affirmative determinations were flawed because the USDOC made its decisions relying solely on one of the scenarios of the SPB, even though the probative value of other factors outweighed it. There could have been yet other cases where the USDOC summarily rejected or ignored other factors introduced by foreign respondent parties, regardless of their probative value.

212. The Panel record does not show that the Panel undertook any such qualitative assessment of at least some of the cases of Exhibit ARG-63 with a view to discerning whether the USDOC regarded the existence of one of the factual scenarios of the SPB as determinative/conclusive for its determinations. The Panel also appears not to have examined in how many cases the foreign respondent parties participated in the proceedings, in how many they introduced other "good cause" factors, and how the USDOC dealt with those factors when they were introduced. Such an inquiry would have enabled the Panel to identify and undertake a qualitative analysis of at least some of those cases to see whether the affirmative determinations were made solely on the basis of one of the scenarios to the exclusion of other factors. The Panel failed to undertake any such qualitative assessment and relied exclusively on the overall statistics or aggregated results of Exhibit ARG-63. The fact that affirmative determinations were made in reliance on one of the three scenarios in all the sunset reviews of anti-dumping duty orders where domestic interested parties took part[300] strongly suggests that these scenarios are mechanistically applied. However, without a qualitative examination of the reasons leading to such determinations, it is not possible to conclude definitively that these determinations were based exclusively on these scenarios in disregard of other factors.

213. In this context, we also note that Section 752(c)(2) of the Tariff Act of 1930, the SAA, and Section II.C of the SPB allow the USDOC to consider "other factors" if "good cause" is shown. The USDOC Regulations also allow foreign respondent parties to introduce other factors in their responses to the notice of initiation of the sunset review proceedings. Although good cause has to be shown by the respondent parties to the satisfaction of the USDOC to admit "other factors", the fact remains that United States law provides for consideration of "other factors". Argentina has not challenged Section II.C of the SPB relating to consideration of "other factors" or "good cause" being shown. Its case is that other factors must be taken into account by the USDOC on its own initiative, and that even where other factors are introduced by foreign respondent parties, the USDOC routinely rejects or ignores

[300]We note that in one case, *Sugar and Syrups From Canada* (Final Results of Full Sunset Review: Sugar and Syrups From Canada, *United States Federal Register*, Vol. 64, No. 171 (3 September 1999), p. 48362 (Tab 261 of Exhibit ARG-63 submitted by Argentina to the Panel)), the USDOC based its determination on other factors. However, in that case, none of the three scenarios in Section II.A.3 of the SPB was present.

them because it applies solely the three scenarios of the SPB in a mechanistic fashion.[301] This line of argument of Argentina, concerning specific cases, again shows the need for qualitative assessment of individual cases on the part of the Panel to see whether the USDOC's consistent application reveals such disregard of other factors.

214. The Panel underscores that "the United States neither challenged nor disproved the factual correctness of [the] statistics" presented in Exhibit ARG-63.[302] It is important to note, however, that although the United States did not question the factual correctness of the spreadsheet included in Exhibit ARG-63, the United States argued, before the Panel, that the statistics provided by Argentina in Exhibits ARG-63 and ARG-64 had no probative value with respect to the question whether the three scenarios in Section II.A.3 of the SPB are determinative/conclusive for purposes of sunset determinations.[303] The United States also contended that the statistics in Exhibits ARG-63 and ARG-64 ignore the factual circumstances of the listed sunset reviews, which underpinned the USDOC's ultimate findings.[304] It is regrettable that the United States did not substantiate these assertions with reference to cases where other factors constituted the basis of the USDOC's determination; it is also unfortunate that the United States did not identify cases where the circumstances were such that the probative value of the identified scenario outweighed that of other factors introduced by interested parties, so as to counter the proposition that the USDOC applies the SPB scenarios in a mechanistic fashion. Had the United States furnished such information, the Panel's task would have been facilitated. Nevertheless, the lack of assistance from the United States cannot excuse the Panel from conducting an "objective assessment of the matter" as required by Article 11 of the DSU.

215. In the light of the above, we *find* that the Panel did not "make an objective assessment of the matter", as required by Article 11 of the DSU. It apparently reached its conclusion—that the three scenarios in Section II.A.3 of the SPB are perceived by the USDOC to be determinative/conclusive of the likelihood of continuation or recurrence of dumping—on the sole basis of the overall statistics in Exhibit ARG-63. The Panel record reveals no qualitative analysis of even some of the cases in Exhibit ARG-63, and the Panel Report contains only a single sentence justifying its conclusion based on the overall statistics.[305] Consequently, we *reverse* the Panel's findings, in paragraphs 7.166

[301]Argentina's appellee's submission, para. 32; Panel Report, para. 7.159.

[302]Panel Report, para. 7.165.

[303]See United States' response to Question 14(b) posed by the Panel at the Second Panel Meeting (Panel Report, Annex E, p. E-98, paras. 17-19). In response to questioning at the oral hearing, the United States confirmed that it took this position before the Panel.

[304]United States' response to Question 14(b) posed by the Panel at the Second Panel Meeting (Panel Report, Annex E, p. E-98, para. 18).

[305]Panel Report, para. 7.165.

and 8.1(b) of the Panel Report, that Section II.A.3 of the SPB is inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement.* We wish to emphasize that we have not thereby concluded that Section II.A.3 of the SPB is consistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*. Rather, we have found that the Panel's conclusion to the contrary must be reversed due to its failure to comply with Article 11 of the DSU. Thus, our reasoning here does not exclude the possibility that, in another case, it could be properly concluded that the three scenarios in Section II.A.3 of the SPB are regarded as determinative/conclusive of the likelihood of continuation or recurrence of dumping. However, such a conclusion would need to be supported by a rigorous analysis of the evidence regarding the manner in which Section II.A.3 of the SPB is applied by the USDOC.

C. *Conditional Appeals of Argentina*

216. Argentina has brought conditional appeals with respect to: (1) Article X:3(a) of the GATT 1994; and (2) the "practice" of the USDOC regarding its likelihood determinations in sunset reviews. These appeals are conditioned on the reversal of either the Panel's conclusion that the SPB is a "measure" for purposes of WTO dispute settlement, or the Panel's conclusion that Section II.A.3 of the SPB is inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*. As we reverse the Panel's conclusion that Section II.A.3 of the SPB is inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*, we examine these two conditional claims of Argentina.

217. Argentina claims that the USDOC has conducted sunset reviews in a biased and unreasonable manner, in violation of Article X:3(a) of the GATT 1994. This provision states that every WTO Member "shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings". We observe, first, that allegations that the conduct of a WTO Member is biased or unreasonable are serious under any circumstances. Such allegations should not be brought lightly, or in a subsidiary fashion. A claim under Article X:3(a) of the GATT 1994 must be supported by solid evidence; the nature and the scope of the claim, and the evidence adduced by the complainant in support of it, should reflect the gravity of the accusations inherent in claims under Article X:3(a) of the GATT 1994.

218. The conditional appeal of Argentina is based on Exhibits ARG-63 and ARG-64. Argentina relies on these exhibits to contend that: "[a] record of 223 wins and 0 losses (or even 35 wins and 0 losses to use the U.S. figures of so-called 'contested' cases) for the U.S. industry demonstrates a lack of impartiality, and the unreasonable administration of national laws, regulations, decisions, and rulings."[306] Argentina submits that "[Exhibits] ARG-63 and ARG-64 demonstrate[] that every time

[306]Argentina's other appellant's submission, para. 296.

(in 100 percent of the cases) where the [USDOC] finds that at least one of the three criteria of the SPB is satisfied, the [USDOC] makes an affirmative finding of likely dumping without considering additional factors."[307]

219. In order to prove its allegation, Argentina had to establish that the SPB had been "administered" by the USDOC in a partial or unreasonable manner. However, as we have explained above, the Panel record does not reveal that there has been any qualitative assessment of individual cases found in Exhibit ARG-63. In the circumstances, it would be impossible to conclude on the basis of the overall statistics alone that the determinations were flawed due to lack of objectivity on the part of the USDOC. We also note that the United States challenges Argentina's "factual demonstration":

> ... the exhibits Argentina supplied to the Panel in no way demonstrated that [the USDOC] failed to take "additional factors" into account. The "evidence" in these exhibits demonstrated at best a *correlation* between the existence of one of the factors in the Sunset Policy Bulletin ("SPB") and the outcome in a given dispute; it demonstrated nothing about [the USDOC's] consideration of additional factors in any of the determinations allegedly illustrating this "practice."[308] (original emphasis)

The factual premise of Argentina's claim under Article X:3(a) is thus not undisputed. We therefore *find* that the record does not allow us to complete the analysis of Argentina's conditional appeal with respect to Article X:3(a) of the GATT 1994.

220. We move now to Argentina's conditional appeal concerning the "practice" of the USDOC. This conditional claim of Argentina is also based on the factual premise that "[Exhibits] ARG-63 and ARG-64 demonstrate[] that every time (in 100 percent of the cases) where the [USDOC] finds that at least one of the three criteria of the SPB is satisfied, the [USDOC] makes an affirmative finding of likely dumping without considering additional factors."[309] Here again, we note that the Panel record reveals no qualitative assessment of individual cases found in Exhibit ARG-63. As we noted above, this factual premise (particularly "without considering additional factors") is challenged by the United States and is not undisputed.[310] Therefore, even assuming *arguendo* that a "practice" may be challenged as a "measure" in WTO dispute settlement—an issue on which we express no view here—we *find* that the record does not allow us to complete the analysis of Argentina's conditional appeal with respect to the "practice" of the USDOC regarding the likelihood determination in sunset reviews.

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[307]Argentina's other appellant's submission, para. 287.

[308]United States' appellee's submission, para. 189.

[309]Argentina's other appellant's submission, para. 287.

[310]United States' appellee's submission, para. 189.

221. As the record does not allow us to complete the analysis with respect to Argentina's claims concerning Article X:3(a) of the GATT 1994 and the "practice" of the USDOC, we *do not need* to make findings on the United States' challenge under Article 6.2 of the DSU to these two conditional claims of Argentina.[311]

VI. Waiver Provisions of United States Laws and Regulations

222. The United States claims that the Panel erred in finding that Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(iii) of the USDOC Regulations are inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*, and that Section 351.218(d)(2)(iii) of the USDOC Regulations is inconsistent, as such, with Articles 6.1 and 6.2 of the *Anti-Dumping Agreement*. The United States also submits claims under Article 11 of the DSU relating to these waiver provisions. We address first the Panel's findings under the *Anti-Dumping Agreement* and then the claim under Article 11 of the DSU.

223. In our discussion, we adopt the Panel's terminology and refer to Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(iii) of the USDOC Regulations, collectively, as the "waiver provisions".[312] The Panel also characterized the waivers resulting from the operation of Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(i) of the USDOC Regulations[313], jointly, as "affirmative waivers", and the waivers resulting from the operation of Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(iii) of the USDOC Regulations, jointly, as "deemed waivers".[314] In addition, we use the term "deemed waiver provision" when referring to Section 351.218(d)(2)(iii) of the USDOC Regulations.

A. *Consistency of the Waiver Provisions with Article 11.3 of the Anti-Dumping Agreement*

224. Before the Panel, Argentina argued that Article 11.3 requires investigating authorities to assume an "active role in sunset reviews" and "to gather and evaluate relevant facts".[315] Because the waiver provisions under United States law—both affirmative and deemed waivers—prevent the USDOC from engaging in this "substantive review", Argentina claimed, they are inconsistent, as

[311]See *supra*, para. 174.

[312]Panel Report, para. 7.72.

[313]Argentina did not challenge before the Panel the consistency of Section 351.218(d)(2)(i) of the USDOC Regulations with the United States' obligations under the *Anti-Dumping Agreement*. (See Panel Report, para. 3.1)

[314]*Ibid*., para. 7.83.

[315]*Ibid*., para. 7.72.

such, with Article 11.3.[316] In addressing this claim, the Panel found it useful to analyze separately the case of deemed waivers from that of affirmative waivers.[317]

225. As to deemed waivers, the Panel observed that Section 351.218(d)(2)(iii) of the USDOC Regulations provides:

> (2) Waiver of response by a respondent interested party to a notice of initiation—
>
> ...
>
> (iii) *No response from an interested party*. The Secretary will consider the failure by a respondent interested party to file a complete substantive response to a notice of initiation under paragraph (d)(3) of this section as a waiver of participation in a sunset review before the Department.

Thus, participation of a respondent in a likelihood-of-dumping inquiry in a sunset review is deemed to have been waived by it where the respondent files either an incomplete submission or no submission at all.[318]

226. Section 751(c)(4)(B) of the Tariff Act of 1930 provides:

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

Thus, any waiver, whether deemed or affirmative, automatically results in an affirmative likelihood finding as to that exporter.[319]

227. The Panel found that, where a respondent files an *incomplete* submission, these two provisions of United States law, taken together—namely, Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(iii) of the USDOC Regulations—require the USDOC to make an affirmative determination of likelihood of continuation or recurrence of dumping, *as to that respondent*, without "taking into consideration, in [that] determination ... , the facts submitted by that exporter (or any other facts before it that might be relevant to its determination), and [without]

[316]Panel Report, para. 7.72.

[317]*Ibid*., para. 7.90.

[318]*Ibid*., para. 7.91.

[319]*Ibid*.

receiving, much less considering, any other facts relevant to this question".[320] In the case where a respondent files *no* submission at all, the Panel found that these United States provisions direct the USDOC to make an affirmative likelihood-of-dumping determination *as to that respondent* solely on the basis that the respondent filed *no* submission, without consideration of other evidence on record.[321] Both of these "deemed waiver" situations, according to the Panel, are inconsistent with the obligation in Article 11.3 for an investigating authority to arrive at a likelihood determination "supported by reasoned and adequate conclusions based on the facts before an investigating authority".[322]

228. As to affirmative waivers, the Panel observed that under Section 751(c)(4)(B) of the Tariff Act of 1930, the USDOC must make an affirmative likelihood determination when a respondent declares its intention not to participate in a sunset review.[323] The Panel was of the view that an 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."[324] Accordingly, the Panel concluded, with respect to affirmative waivers, as it did with respect to deemed waivers, that Section 751(c)(4)(B) is inconsistent with Article 11.3.[325]

229. Finally, the Panel addressed the relevance of the fact that the USDOC's likelihood-of-dumping determinations are made on an "order-wide"[326] rather than "company-specific"[327] basis. The United States argued that, where respondents have waived the right to participate, the USDOC makes company-specific determinations only as a first step in its analysis, but that the ultimate likelihood-of-dumping determination, made as a second step, is on an order-wide basis. The order-wide determination is based on all the evidence in the record. As a result, the United States claimed, "the waiver provisions do not violate Article 11.3 of the Agreement because they do not determine, in and of themselves, the final outcome of a sunset review; they only determine the outcome of the first

[320]Panel Report, para. 7.93.

[321]*Ibid*., para. 7.95.

[322]*Ibid*., paras. 7.93 and 7.95.

[323]*Ibid*., para. 7.96.

[324]*Ibid*., para. 7.99.

[325]*Ibid*.

[326]When speaking of an "order-wide likelihood determination", we understand the United States to refer to the single determination of likelihood of continuation or recurrence of dumping made by the USDOC with respect to all exporters from a country that is the subject of an anti-dumping duty "order" under United States law. The order-wide determination thus applies to an exporting country as a whole.

[327]We use the term "company-specific likelihood determination", in contrast to "order-wide likelihood determination", to refer to the determination of likelihood of continuation or recurrence of dumping made by the USDOC with respect to an individual respondent in a sunset review.

step."[328] The Panel disagreed, finding that, "[t]o the extent that the order-wide determination of likelihood is based in whole or in part upon a company-specific determination that was improperly established", the order-wide determination cannot satisfy the requirements of Article 11.3 that the determination "be supported by reasoned and adequate conclusions based on the facts before the investigating authority".[329]

230. On appeal, the United States challenges the Panel's finding that the waiver provisions are inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*. The United States contends that, as its likelihood-of-dumping determinations are made on an order-wide basis, a proper inquiry into Argentina's claim requires an examination of whether the waiver provisions prevent the USDOC from arriving at an *order-wide* likelihood determination consistent with Article 11.3. In the United States' view, the Panel erred by evaluating whether the *company-specific* determinations resulting from the operation of the waiver provisions were consistent with Article 11.3 and then "imput[ing]" that finding of inconsistency to *order-wide* determinations made by the USDOC.[330] The United States acknowledges that its waiver procedure results in an affirmative likelihood determination for the non-participating respondent, but emphasizes that such a company-specific determination does not automatically lead to a final affirmative order-wide determination under Article 11.3.[331] Instead, the United States submits, its law requires the USDOC to base its order-wide likelihood determination on the totality of record evidence, which satisfies the requirement of a sufficient basis for the final determination, notwithstanding the company-specific determinations made as a result of the waiver provisions. Therefore, the United States argues, the USDOC is not precluded from arriving at a likelihood-of-dumping determination that is consistent with the requirements of Article 11.3.

231. We recall, at the outset, that, in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body found that Members are not required by Article 11.3 to make their likelihood-of-dumping determinations on a company-specific basis, and therefore, that Section II.A.3 of the SPB is not inconsistent with Article 11.3 on the ground that it requires the USDOC to make its sunset review determinations on an order-wide basis.[332] Thus, as the United States[333] and the European Communities[334] correctly observe, because the United States has chosen to make order-wide determinations in sunset reviews, an allegation that a measure prevents the United States from making

[328]Panel Report, para. 7.100. (footnote omitted)

[329]*Ibid*., para. 7.101.

[330]United States' appellant's submission, para. 38.

[331]*Ibid*., para. 41.

[332]Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 149-157.

[333]United States' appellant's submission, para. 38.

[334]European Communities' third participant's submission, para. 35.

a likelihood determination consistent with Article 11.3 must be evaluated by reference to the relevance of that measure for the *order-wide* determination.

232. In this case, the Panel began its analysis of Argentina's claim by focusing on the *company-specific* likelihood determinations.[335] The Panel found that these affirmative *company-specific* determinations are mandated by the waiver provisions without any further inquiry on the part of the USDOC and without regard to the record evidence—whether that evidence is submitted by the respondent or by another interested party.[336] The Panel then concluded, on this basis, that the waiver provisions are inconsistent, as such, with Article 11.3.[337] In our view, it was neither necessary nor relevant for the Panel to draw a conclusion as to the WTO-consistency of the *company-specific* determinations resulting from the waiver provisions. As we have observed, the relevant inquiry in this dispute is whether the *order-wide* likelihood determination would be rendered inconsistent with Article 11.3 by virtue of the operation of the waiver provisions. It appears to us, therefore, that the Panel could not have properly arrived at a finding of consistency or inconsistency with Article 11.3 *until* it had examined how the operation of the waiver provisions could affect the order-wide determination. Had the Panel ceased its inquiry with the finding that the company-specific determinations are not "supported by reasoned and adequate conclusions based on the facts before an investigating authority"[338], the Panel would not have had a basis to conclude that the waiver provisions are inconsistent, as such, with Article 11.3.

233. The Panel, however, did not base its ultimate conclusion of inconsistency with Article 11.3 on its assessment of only the *company-specific* determinations made pursuant to the waiver provisions. Instead, the Panel correctly continued its analysis and examined the impact of the company-specific determinations on the *order-wide* determination. The Panel observed that, in the case where the respondent that waives its right to participate is the sole exporter from a country subject to a dumping order, the company-specific determination "is likely to be conclusive" with respect to the order-wide determination.[339] The Panel also noted that "[t]he United States concedes that company-specific

[335]Panel Report, paras. 7.90-7.99.

[336]*Ibid*., paras. 7.93, 7.95, and 7.99.

[337]*Ibid*., para. 7.93 ("In our view, this can not be a determination supported by reasoned and adequate conclusions based on the facts before an investigating authority"); para. 7.95 ("In our view, an affirmative determination based exclusively upon the fact that the exporter did not respond to a notice of initiation, and which disregards entirely even the possibility that other relevant information might be in the record, is not supported by reasoned and adequate conclusions based on the facts before an investigating authority, inconsistently with Article 11.3"); and para. 7.99 ("In our view, therefore, the provisions of US law relating to affirmative waivers are also inconsistent with the obligation to determine likelihood of continuation or recurrence of dumping under Article 11.3 of the Agreement").

[338]*Ibid*., paras. 7.93, 7.95, and 7.99.

[339]*Ibid*., para. 7.102.

likelihood determinations are 'considered' when making an order-wide likelihood determination".[340] As support for this statement, the Panel quoted the United States' response to one of the Panel's questions.[341] In addition, the Panel recalled that, in response to questioning from the Panel, the United States was unable to cite one example of a sunset review in which the USDOC had arrived at a negative *order-wide* determination after making affirmative *company-specific* determinations with respect to respondents that had waived the right to participate.[342] The Panel concluded that, "[t]o the extent that" the company-specific determinations were taken into account in the order-wide determination, the order-wide determination could not "be supported by reasoned and adequate conclusions based on the facts before the investigating authority".[343]

234. We agree with the Panel's analysis of the impact of the waiver provisions on order-wide determinations.[344] Because the waiver provisions require the USDOC to arrive at affirmative company-specific determinations without regard to any evidence on record, these determinations are merely *assumptions* made by the agency, rather than findings supported by evidence. The United States contends that respondents waiving the right to participate in a sunset review do so "intentionally", with full knowledge that, as a result of their failure to submit evidence, the evidence placed on the record by the domestic industry is likely to result in an unfavourable determination on an order-wide basis.[345] In these circumstances, we see no fault in making an unfavourable order-wide determination by taking into account evidence provided by the domestic industry in support thereof. However, the USDOC also takes into account, in such circumstances, statutorily-mandated *assumptions*. Thus, even assuming that the USDOC takes into account the totality of record evidence

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[340]Panel Report, para. 7.101 (quoting the United States' response to Question 4(b) posed by the Panel at the Second Panel Meeting (Panel Report, Annex E, p. E-93, para. 3)).

[341]In response to questioning by the Panel, the United States said:

> The United States has not argued that a waiver "does not affect" the final order-wide likelihood determination. While the individual affirmative likelihood determinations may affect the order-wide likelihood determination, they do not determine, in and of themselves, the ultimate outcome of the order-wide analysis. [The USDOC] considers all the information on the administrative record, including prior agency determinations and the information submitted by the interested parties or collected by [the USDOC], as well as any individual affirmative likelihood determinations, when making the order-wide likelihood determination.

(Panel Report, footnote 42 to para. 7.101 (quoting the United States' response to Question 4(b) posed by the Panel at the Second Panel Meeting (Panel Report, Annex E, p. E-93, para. 3)))

[342]*Ibid*., para. 7.102.

[343]*Ibid*., para. 7.101.

[344]The United States challenges the Panel's analysis of the relationship between company-specific and order-wide determinations as inconsistent with the Panel's obligation under Article 11 of the DSU. As we discuss below in paragraphs 255-260, we find no error by the Panel in this regard.

[345]United States' appellant's submission, para. 44.

in making its order-wide determination, it is clear that, as a result of the operation of the waiver provisions, certain *order-wide* likelihood determinations made by the USDOC will be based, at least in part, on statutorily-mandated *assumptions* about a company's likelihood of dumping. In our view, this result is inconsistent with the obligation of an investigating authority under Article 11.3 to "arrive at a reasoned conclusion" [346] on the basis of "positive evidence".[347]

235. Therefore, we *uphold* the Panel's findings, in paragraphs 7.103, 8.1(a)(i), and 8.1(a)(ii) of the Panel Report, that Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(iii) of the USDOC Regulations are inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*.

B. *Consistency of the "Deemed" Waiver Provision with Articles 6.1 and 6.2 of the Anti-Dumping Agreement*

236. Argentina claimed before the Panel that Section 351.218(d)(2)(iii) of the USDOC Regulations is inconsistent, as such, with Articles 6.1 and 6.2 of the *Anti-Dumping Agreement*.[348] (Argentina made no claim under Articles 6.1 and 6.2 with respect to affirmative waivers under Section 751(c)(4)(B) of the Tariff Act of 1930.[349]) In examining the deemed waiver provision, the Panel observed that two factual situations might arise through the operation of this regulation: first, a respondent may submit an incomplete response; and second, a respondent may submit nothing at all.[350] The Panel found that a submission by a respondent will not be considered by the USDOC to be "complete" unless it contains *all* of the information set out in Section 351.218(d)(3) of the USDOC Regulations.[351] The Panel then determined that, under the first situation (that is, incomplete response), the USDOC must conclude that, with respect to that respondent, there *is* a likelihood of continuation or recurrence of dumping, and the USDOC must do so without any consideration of the "incomplete" information submitted by the respondent.[352] The Panel also found that, under both situations (that is, incomplete response and no response), the respondent is precluded from submitting evidence at a later date during the sunset review proceeding [353] and is not permitted to participate in hearings or to confront adverse parties in any other manner.[354]

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

[347]*Ibid*., para. 114 (quoting Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.271).

[348]Panel Report, para. 7.104.

[349]*Ibid*., para. 7.106.

[350]*Ibid*., para. 7.119.

[351]*Ibid*., para. 7.84 and footnote 34 to para. 7.93.

[352]*Ibid*., paras. 7.92-7.93 and 7.121.

[353]*Ibid*., para. 7.121.

[354]*Ibid*.

237. The Panel concluded that the deemed waiver provision is inconsistent, as such, with Articles 6.1 and 6.2, because no provision in the *Anti-Dumping Agreement* allows an investigating authority to deny the procedural rights contained in Articles 6.1 and 6.2 solely on the basis that a respondent files an incomplete submission, or no submission at all, in response to a notice of initiation.[355] Finally, the Panel rejected the United States' argument that the USDOC's consideration of the information contained in a respondent's incomplete submission, when making an order-wide determination, satisfies Article 6.1. The Panel found instead that "the violations of Articles 6.1 and 6.2 at the company-specific level would necessarily taint the USDOC's order-wide determination".[356]

238. On appeal, the United States argues that Section 351.218(d)(2)(iii) of the USDOC Regulations does not address "the kind of information that can be provided in a sunset review".[357] It follows, in the view of the United States, that this provision cannot be found to be inconsistent with Articles 6.1 and 6.2.[358] The United States also observes that its regulations provide interested parties with numerous opportunities to provide evidence to the agency.[359] In this regard, the United States submits that an interested party that fails to take advantage of those opportunities should be "accountable for its failure to exercise that right".[360] The United States asserts that the Panel appears to have "*assumed*" that interested parties have an "indefinite right" under Articles 6.1 and 6.2 to present evidence and request a hearing.[361] The right under those provisions is not "indefinite", the United States argues, and an interested party's "failure to exercise that right" cannot alter the fact that the United States provides sufficient opportunity for an interested party to participate.[362]

239. We begin by recalling that the Appellate Body has held previously that claims under Article 6 may be made in relation to sunset review determinations on the basis of the cross-reference to Article 6 found in Article 11.4.[363]

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[355]Panel Report, paras. 7.122-7.123 and 7.127.

[356]*Ibid*., para. 7.125.

[357]United States appellant's submission, para. 51.

[358]*Ibid*.

[359]*Ibid*., paras. 53-54.

[360]*Ibid*., para. 55.

[361]*Ibid*. (original emphasis)

[362]*Ibid*.

[363]Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 152.

240. Article 6.1 of the *Anti-Dumping Agreement* provides:

> All interested parties in an anti-dumping investigation 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. (emphasis added)

Article 6.2 of the *Anti-Dumping Agreement* provides:

> Throughout the anti-dumping investigation all interested parties shall have a *full opportunity for the defence of their interests*. To this end, 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. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally. (emphasis added)

241. These provisions set out the fundamental due process rights to which interested parties are entitled in anti-dumping investigations and reviews.[364] Articles 6.1 and 6.2 require that the opportunities afforded interested parties for presentation of evidence and defence of their interests be "ample" and "full", respectively. In the context of these provisions, these two adjectives suggest there should be liberal opportunities for respondents to defend their interests. Nevertheless, we agree with the United States that Articles 6.1 and 6.2 do not provide for "indefinite" rights[365], so as to enable respondents to submit relevant evidence, attend hearings, or participate in the inquiry as and when they choose. Such an approach would "prevent the authorities of a Member from proceeding expeditiously"[366] in their reviews, contrary to Article 6.14. It would also affect the rights of other interested parties. In this regard, we recall that the Appellate Body has previously recognized the

[364]We are not faced here with the question of the consistency of the deemed waiver provision with Article 6.8 or Annex II of the *Anti-Dumping Agreement*. We therefore limit our discussion to the obligations arising under Articles 6.1 and 6.2 of that Agreement.

[365]United States' appellant's submission, para. 55.

[366]*Anti-Dumping Agreement*, Article 6.14.

importance for investigating authorities of establishing deadlines and controlling the conduct of their investigations.[367]

242. Therefore, the "ample" and "full" opportunities guaranteed by Articles 6.1 and 6.2, respectively, cannot extend indefinitely and must, at some point, legitimately cease to exist.[368] This point must be determined by reference to the right of investigating authorities to rely on deadlines in the conduct of their investigations and reviews. Where the continued granting of opportunities to present evidence and attend hearings would impinge on an investigating authority's ability to "control the conduct" of its inquiry and to "carry out the multiple steps" required to reach a timely completion of the sunset review[369], a respondent will have reached the limit of the "ample" and "full" opportunities provided for in Articles 6.1 and 6.2 of the *Anti-Dumping Agreement*.

243. We now examine the consistency of Section 351.218(d)(2)(iii) of the USDOC Regulations with Articles 6.1 and 6.2, keeping in mind the need to balance respondents' rights and obligations with those of investigating authorities and other interested parties. We set out again, for ease of reference, the text of the deemed waiver provision:

> (2) *Waiver of response by a respondent interested party to a notice of initiation—*
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> ...
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> (iii) *No response from an interested party*. The Secretary will consider the failure by a respondent interested party to file a complete substantive response to a notice of initiation under paragraph (d)(3) of this section as a waiver of participation in a sunset review before the Department.

[367]In *US – Hot-Rolled Steel*, the Appellate Body stated:

> Investigating authorities must be able to control the conduct of their investigation and to carry out the multiple steps in an investigation required to reach a final determination. Indeed, in the absence of time-limits, authorities would effectively cede control of investigations to the interested parties, and could find themselves unable to complete their investigations within the time-limits mandated under the *Anti-Dumping Agreement*. ... We, therefore, agree with the Panel that "in the interest of orderly administration investigating authorities do, and indeed must establish such deadlines."

(Appellate Body Report, *US – Hot-Rolled Steel*, para. 73 (quoting Panel Report, *US – Hot-Rolled Steel*, para. 7.54)) (emphasis added by the Appellate Body)

[368]Argentina and the United States agree that, at some point, an investigating authority may limit the rights set out in Articles 6.1 and 6.2 in order to enforce a deadline. (Argentina's and the United States' responses to questioning at the oral hearing)

[369]Appellate Body Report, *US – Hot-Rolled Steel*, para. 73 (quoting Panel Report, *US – Hot-Rolled Steel*, para. 7.54).

244. When evaluating this claim of Argentina, the Panel divided its analysis in two parts[370], the first addressing deemed waivers resulting from incomplete submissions[371], and the second addressing deemed waivers resulting from the absence of a submission.[372] We find this distinction useful and adopt it for our discussion below.

245. We consider, first, whether the due process rights of Articles 6.1 and 6.2 are denied to those respondents who file *incomplete submissions* in response to the USDOC notice of initiation. We recall that the Panel found that the USDOC considers submissions to be incomplete, for the purposes of Section 351.218(d)(2)(iii) of the USDOC Regulations, where *all* of the requested information is not contained in the respondent's submission.[373] An incomplete submission might contain relevant evidence in support of the respondent's position, yet fall short of the information required by the USDOC Regulations in order to be considered "complete" by the USDOC. The Panel assumed *arguendo* that, as the United States claimed, the USDOC uses this "incomplete" information in making its *order-wide* sunset determination.[374] Nevertheless, the Panel found, and the United States agrees on appeal[375], that "the USDOC is precluded from taking into consideration, in its determination *with respect to a given exporter*, the facts submitted by that exporter [in an incomplete response]".[376] As the United States acknowledges[377], and as discussed above[378], the company-specific determination is "consider[ed]" by the USDOC when making its subsequent order-wide evaluation and is relevant to, even if not determinative of, the outcome of the sunset review.

246. It is clear, therefore, that with respect to at least one part of the USDOC's analysis underlying the order-wide determination, evidence "presented" by a respondent is *disregarded* and an affirmative likelihood determination is made for that respondent. In our view, disregarding a respondent's evidence in this manner is incompatible with the respondent's right, under Article 6.1, to present evidence that it considers relevant in respect of the sunset review. The agency is clearly notified of a respondent's interest in participating in the sunset review by virtue of the respondent

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[370]Panel Report, para. 7.119.

[371]*Ibid*., paras. 7.122-7.126.

[372]*Ibid*., para. 7.127.

[373]*Ibid*., para. 7.84, and footnote 34 to para. 7.93. We note that the United States challenges this finding of the Panel. We address this challenge *infra*, at paragraphs 261-267.

[374]Panel Report, para. 7.125.

[375]United States' response to questioning at the oral hearing.

[376]Panel Report, para. 7.93. (emphasis added)

[377]United States' appellant's submission, para. 61 (quoting United States' response to Question 4(b) posed by the Panel at the Second Panel Meeting (Panel Report, Annex E, p. E-93, para. 3); and citing United States' responses to questions posed by the Panel at the First Panel Meeting (Panel Report, Annex E, pp. E-18 and E-43, paras. 3, 20, 24, and 29)).

[378]*Supra*, paras. 233-234.

having filed a response—albeit an incomplete one. Moreover, the respondent will also be denied any opportunity to confront parties with adverse interests in a hearing, notwithstanding this respondent's clear expression of interest in participating in the sunset review. As a result, this respondent is denied its rights, pursuant to Article 6.2, to the "full opportunity for the defence of [its] interests". The United States claims that the USDOC "takes all record evidence into account, including evidence in incomplete submissions, when making the order-wide determination".[379] This does not alter the fact that evidence in incomplete submissions is disregarded in the course of the USDOC's analysis, namely, when making company-specific determinations, thereby denying respondents their rights under Articles 6.1 and 6.2.

247. We acknowledge the United States' argument before the Panel and on appeal that the USDOC has discretion to treat incomplete submissions as a "complete substantive response".[380] The United States contends that such discretion exists notwithstanding the requirement in Section 351.218(d)(3) of the USDOC Regulations that a respondent's submission contain certain prescribed information.[381] However, as discussed below in our analysis of the United States' claim under Article 11 of the DSU[382], it appears that this discretion may be exercised only in limited circumstances and, therefore, does not permit the USDOC, in all cases, to avoid acting inconsistently with the United States' WTO obligations. We therefore agree with the Panel that Section 351.218(d)(2)(iii) of the USDOC Regulations is inconsistent, as such, with Articles 6.1 and 6.2 of the *Anti-Dumping Agreement*, in respect of the first factual situation, namely, deemed waivers resulting from the filing of an incomplete submission in response to the USDOC notice of initiation.

248. We now turn to evaluate whether those respondents that do not respond *at all* to the USDOC notice of initiation are also denied opportunities guaranteed by Articles 6.1 and 6.2. These respondents will also face automatic affirmative company-specific determinations, be precluded from submitting evidence in the remainder of the sunset proceeding, and not be allowed a hearing with adverse parties. Unlike the case of respondents who file *incomplete submissions*, however, there will be no evidence submitted by that respondent that the USDOC would disregard. Thus, the sole basis on which such respondents may claim a denial of rights under Articles 6.1 and 6.2 is the denial of the opportunity to participate in later stages of the proceeding, including the right to request a hearing and submit evidence subsequent to the filing deadline of the initial submission.

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[379]United States' appellant's submission, para. 60.

[380]*Ibid*., para. 71.

[381]*Ibid*., para. 74.

[382]*Infra*, paras. 265-269.

249. In this case, the claim under Article 6 centres on the *initiation* stage of the proceeding.[383] In our view, an investigating authority may have at the initiation stage particular concerns about enforcing its deadline for receiving notifications of a respondent's interest in participating. The submissions filed by respondents and domestic interested parties frame the scope of the sunset review for the investigating authority. These submissions inform the agency as to the extent of the issues and company-specific data that may need to be investigated and adjudicated upon in the course of the sunset review. To this end, we recall the observation of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*:

> [T]he *Anti-Dumping Agreement* assigns a prominent role to interested parties as well and contemplates that they will be a primary source of information in all proceedings conducted under that agreement. Company-specific data relevant to a likelihood determination under Article 11.3 can often be provided only by the companies themselves. For example, as the United States points out, it is the exporters or producers themselves who often possess the best evidence of their likely future pricing behaviour—a key element in the likelihood of future dumping.[384]

Thus, the initial submissions enable an investigating authority to conduct sunset reviews in a fair and orderly manner.

250. Respondents' initial submissions also serve to inform other interested parties of the critical issues in dispute in the sunset review. Particularly where company-specific behaviour is relevant to the final likelihood-of-dumping determination—for example, in respect of an individual respondent's dumping margins and volume and value of exports—respondents' submissions may provide factual information necessary for other interested parties to defend their interests adequately before the agency. In this regard, we observe that the USDOC Regulations require respondents to include in their initial submissions, *inter alia*, data on the volume and value of exports of the subject merchandise to the United States.[385] Because respondents' initial submissions effectively contribute to establishing the parameters of the sunset review—for the investigating authority as well as for other interested parties—the investigating authority has a significant interest in requiring respondents to comply with the deadline for notification of interest in participating at the initial stage of the proceeding.

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[383]Previous Appellate Body Reports have addressed Article 6 challenges in the context of later stages of the relevant anti-dumping proceeding. See Appellate Body Report, *US – Hot-Rolled Steel*, paras. 64-68; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 116-117 and 134-135; and Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 119 and 142.

[384]Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 199.

[385]USDOC Regulations, Section 351.218(d)(3)(iii).

251. Under the legal regime governing sunset reviews in the United States, the investigating authority, at the beginning of the sunset review, publicly informs all interested parties—including domestic interested parties and respondents—that they must file a submission by a certain date.[386] Argentina has not alleged that the deadline set for these submissions is *per se* unreasonable.[387] Moreover, we note that there is no allegation that respondents are not made aware of the requirement to make an initial submission, of the content of that submission, or of the consequences for failing to file a submission at all.

252. In our view, the rights to present evidence and request a hearing cannot be said to be "denied" to a respondent that is given an opportunity to submit an initial response to the notice of initiation simply because it must do so by a deadline that is conceded to be reasonable. We do not see it as an unreasonable burden on respondents to require them to file a timely submission in order to preserve their rights for the remainder of the sunset review. Indeed, even an incomplete submission will serve to preserve those rights.[388] Accordingly, we are of the view that, if a respondent decides not to undertake the necessary initial steps to avail itself of the "ample" and "full" opportunities available for the defence of its interests, the fault lies with the respondent, and not with the deemed waiver provision.

253. Therefore, with respect to respondents that file *incomplete* submissions in response to the USDOC's notice of initiation of a sunset review, we *uphold* the Panel's findings, in paragraphs 7.128 and 8.1(a)(iii) of the Panel Report, that Section 351.218(d)(2)(iii) of the USDOC Regulations is inconsistent, as such, with Articles 6.1 and 6.2 of the *Anti-Dumping Agreement*. However, with respect to respondents that file *no* submission in response to the USDOC's notice of initiation, we do not agree with the Panel that the failure to accord those respondents the rights detailed in Articles 6.1 and 6.2 renders the deemed waiver provision inconsistent, as such, with those provisions.

C. *Article 11 Claims Relating to the Panel's Findings on Waivers*

254. The United States advances two sets of claims under Article 11 of the DSU with respect to the Panel's evaluation of the United States' waiver provisions. The first relates to the conclusion drawn by the Panel as to the consistency of the USDOC's *order-wide* likelihood determinations with

[386]Panel Report, para. 7.84.

[387]We note that Section 351.218(d)(3)(i) of the USDOC Regulations provides:

> A complete substantive response to a notice of initiation, filed under this section, must be submitted to the Department *not later than 30 days* after the date of publication in the FEDERAL REGISTER of the notice of initiation. (emphasis added)

[388]See *supra*, para. 246.

Article 11.3, based on the Panel's consideration of the USDOC's *company-specific* likelihood determinations. The second relates to the Panel's evaluation of the manner in which the USDOC determines the "completeness" of a respondent's submission under Section 351.218(d)(2)(iii) of the USDOC Regulations.

1. Company-Specific and Order-Wide Likelihood Determinations

255. As to the first set of claims, the United States argues that Argentina failed to establish, as part of its *prima facie* case, that the USDOC relies on *company-specific* likelihood determinations when making its *order-wide* likelihood determination.[389] According to the United States, Argentina's argument before the Panel was limited to the alleged inconsistency of the *company-specific* determinations, resulting from the operation of the waiver provisions, with Article 11.3.[390] Because Argentina did not submit evidence in support of the connection between company-specific and order-wide determinations, the United States argues that the Panel had no basis to draw a conclusion as to the consistency of the *order-wide* determinations with Article 11.3.[391]

256. The United States further submits that, even if a *prima facie* case had been established, "the Panel made erroneous findings of fact regarding the relationship under U.S. law between company-specific and order-wide determinations in sunset reviews."[392] The United States argues that the record evidence does not support the Panel's conclusion that the USDOC's order-wide determinations are "based on"[393] the company-specific determinations. The United States refers to its statements before the Panel that the company-specific determinations are only one factor considered in the final order-wide determination, that is, that company-specific determinations are not determinative of the order-wide determination.[394] Because the Panel erroneously assumed that United States law required the USDOC to base its order-wide determination on a company-specific determination, in the absence of evidence to that effect, the United States claims the Panel failed to fulfil its obligations under Article 11 of the DSU.

257. The Appellate Body has defined a *prima facie* case as "one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the

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[389]United States' response to questioning at the oral hearing.

[390]*Ibid*.

[391]*Ibid*.

[392]United States' appellant's submission, para. 58.

[393]*Ibid*., para. 59.

[394]*Ibid*., para. 60.

complaining party presenting the *prima facie* case".[395] As to what would constitute a *prima facie* case, the Appellate Body has observed that "the nature and scope of evidence required to establish a *prima facie* case 'will necessarily vary from measure to measure, provision to provision, and case to case'".[396] Specifically, as to the nature of the burden placed on complaining parties when challenging measures "as such", the Appellate Body has stated that those parties are required to present evidence as to the scope and meaning of the challenged measure, including, for example, the text of the measure supported by evidence of its consistent application.[397]

258. In this dispute, with respect to the waiver provisions, Argentina was required to make out a *prima facie* case that the operation of Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(iii) of the USDOC Regulations results in *order-wide* determinations that do not satisfy the requirements of Article 11.3.[398] Thus, to the extent that Argentina had shown that company-specific determinations were based on assumptions rather than evidence, as discussed above[399], the burden on Argentina was then to show—with evidence to substantiate its claim—how these affirmative company-specific determinations affected the order-wide determinations of the USDOC.

259. Argentina points to various portions of its written submissions and opening statements before the Panel in support of its assertion that it introduced evidence in support of a *prima facie* case that the waiver provisions preclude the USDOC from arriving at order-wide determinations consistent with Article 11.3.[400] In its second written submission before the Panel, Argentina stated:

> [I]n this case, the ultimate effect is the same whether waiver is applied on a company-specific or order-wide basis. In this case, the Department deemed the Argentina exporters to have waived, and thus issued a determination that dumping was likely to continue or recur pursuant to the waiver provisions. Therefore, waiver on the company-level was equivalent to waiver on an order-wide basis because the Department deemed the companies accounting for 100 percent of the alleged exports to have waived participation.
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> …

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[395]Appellate Body Report, *EC – Hormones*, para. 104. See also Appellate Body Report, *Canada – Aircraft*, para. 192: "A *prima facie* case, it is well to remember, is a case which, in the absence of effective refutation by the defending party ..., requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."

[396]Appellate Body Report, *Japan – Apples*, para. 159 (quoting Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR1997:I, 323 at 335).

[397]Appellate Body Report, *US – Carbon Steel*, para. 157.

[398]*Supra*, para. 231.

[399]*Supra*, para. 234.

[400]Argentina's response to questioning at the oral hearing.

> The sunset review of antifriction bearings from Sweden illustrates the "efficient" use of the waiver provisions and highlights the direct conflict with Article 11.3 – where there is no review, no analysis, and no determination by the Department. In that case the Department stated, "given that … respondent interested parties have waived their right to participate in this review before the Department, we determine that dumping is likely to continue if the orders were revoked."[401]

Thus, the Panel had before it the USDOC's determinations in the underlying sunset review on OCTG from Argentina and in the sunset review on antifriction bearings from Sweden.[402] In our view, this would have permitted the Panel to conclude that Argentina had met its *prima facie* obligation to show that company-specific determinations are considered by the USDOC in the course of making its order-wide determinations.

260. With respect to the Panel's factual finding regarding the relationship between order-wide likelihood determinations and company-specific determinations, the United States alleges that the Panel arrived at the incorrect conclusion that, under United States law, the former are "based on"[403] or "dispositive of"[404] the latter. We do not agree with the United States' characterization of the Panel's reasoning. As noted above[405], in explaining how company-specific determinations may be relevant to order-wide determinations, the Panel accepted the point of United States law that the United States argued before it, which it repeated on appeal, that is, that company-specific determinations are "consider[ed]" by the USDOC in the course of making its order-wide likelihood determinations.[406] We also explained earlier[407] that we found no error in the Panel's finding that company-specific determinations are taken into account when making order-wide determinations—even if the company-specific determinations were not determinative—and that this is sufficient in this case to lead to a conclusion of inconsistency with Article 11.3. It follows, then, that we see no basis for the United States' allegation that the Panel drew its conclusions about company-specific and order-wide

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[401]Argentina's second written submission to the Panel, paras. 43 and 47 (quoting Antifriction Bearings from Sweden, *United States Federal Register*, Vol. 64, No. 213 (4 November 1999), p. 60282 (Tab 6 of Exhibit ARG-63 submitted by Argentina to the Panel), at pp. 60282 and 60284.

[402]See Issues and Decision Memorandum for the Expedited Sunset Reviews of the Antidumping Duty Orders on Oil Country Tubular Goods from Argentina, Italy, Japan, and Korea; Final Results, 31 October 2000 (Exhibit ARG-51 submitted by Argentina to the Panel), p. 6; and Antifriction Bearings from Sweden, *United States Federal Register*, Vol. 64, No. 213 (4 November 1999), p. 60282 (Tab 6 of Exhibit ARG-63 submitted by Argentina to the Panel), at pp. 60282 and 60284.

[403]United States' appellant's submission, paras. 59 and 61.

[404]*Ibid*., para. 61.

[405]*Supra*, para. 233.

[406]See United States' appellant's submission, para. 61 (quoting the United States' response to Question 4(b) posed by the Panel at the Second Panel Meeting (Panel Report, Annex E, p. E-93, para. 3)).

[407]*Supra*, para. 234.

determinations in a manner contrary to evidence on the record. We therefore see no merit in this aspect of the United States' Article 11 claim.

2. The USDOC's Decision as to Whether a Submission Constitutes a "Complete Substantive Response"

261. Turning to the United States' second set of claims under Article 11 of the DSU with respect to the waiver provisions, the United States argues that Argentina failed to make out a *prima facie* case that Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(iii) of the USDOC Regulations are inconsistent, as such, with Article 11.3, and that Section 351.218(d)(2)(iii) of the USDOC Regulations is inconsistent, as such, with Articles 6.1 and 6.2. In the view of the United States, Argentina failed to meet its burden in this case because Argentina offered only one determination of the USDOC as evidence of the meaning of how the USDOC determines whether a respondent's submission constitutes a "complete substantive response" under Section 351.218(d)(2)(iii) of the USDOC Regulations.[408] The United States submits that, by relying on this one determination to derive the meaning of the waiver provisions, the Panel "reliev[ed] Argentina of its burden to make a *prima facie* case".[409]

262. The United States argues further that, even if Argentina made a *prima facie* case as to the meaning of "complete substantive response", the Panel erred in finding that the USDOC considers a submission "complete", for purposes of Section 351.218(d)(2)(iii) of the USDOC Regulations, only when it contains all of the information specified in Section 351.218(d)(3).[410] The United States submits that the Panel came to this understanding on the basis of an alleged "practice" of the USDOC.[411] Argentina provided only one determination as evidence of this point, which is insufficient, according to the United States, to constitute a "practice".[412] The United States submits that the one sunset review determination proffered by Argentina cannot form the basis for the Panel's understanding of what the USDOC considers a "complete" response, because one determination "cannot serve as conclusive evidence of [USDOC] practice, let alone the true meaning of the measures at issue".[413] In addition, the United States argues that the Panel "disregard[ed]" and "willfully ignor[ed]" relevant evidence submitted by the United States on this point, as a result of

[408]United States' appellant's submission, para. 78.

[409]*Ibid*., para. 79.

[410]*Ibid*., para. 67.

[411]*Ibid*., para. 66 (quoting Panel Report, para. 7.126).

[412]*Ibid*.

[413]*Ibid*., para. 78.

which the Panel came to a misunderstanding of United States law and acted inconsistently with Article 11 of the DSU.[414]

263. In our view, the United States mischaracterizes what is required to make out a *prima facie* case. As the Appellate Body indicated in *US – Carbon Steel*, the obligation to make out a *prima facie* case may be satisfied in certain cases simply by submitting the text of the measure or, particularly where the text may be unclear, with supporting materials.[415] Before the Panel, Argentina submitted the text of Section 751 of the Tariff Act of 1930 and Section 351.218 of the USDOC Regulations.[416] Included in these texts is Section 351.218(d)(3)(ii) and (iii) of the USDOC Regulations, which sets out the "[r]equired information to be filed [by respondents in a] substantive response to a notice of initiation". We understand the Panel to have examined the provisions of United States law submitted by Argentina, and to have determined that these provisions speak for themselves and set out with sufficient clarity enough aspects of the waiver provisions for the Panel to have drawn its conclusions as to their operation.

264. In addition to the texts of the challenged provisions, Argentina discussed before the Panel one determination, as the United States acknowledges[417], where the USDOC concluded that the respondent had not filed a "complete substantive response".[418] The USDOC stated the following in that determination:

> *Duferco's and FAFER's responses were incomplete because they did not provide the Department the information required of respondent interested parties in a sunset review.* As such, the Department could not determine whether the respondents' five year average percentage of exports to the U.S. vis-a-vis the total exports of the subject merchandise, during the relevant period, was above or below the normal 50 percent threshold requirement for conduct of a full sunset review. Therefore, [o]n October 21, 1999, pursuant to 19 CFR 351.218(e)(1)(ii)(A), the Department determined to conduct an expedited (120-day) sunset review of this order.
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> ...

[414]United States' appellant's submission, para. 76.

[415]Appellate Body Report, *US – Carbon Steel*, para. 157.

[416]See Sections 751 and 752 of the Tariff Act of 1930 (Exhibit ARG-1 submitted by Argentina to the Panel); and Section 351.218 of the USDOC Regulations (Exhibit ARG-3 submitted by Argentina to the Panel).

[417]United States' appellant's submission, para. 78.

[418]Argentina's second written submission to the Panel, footnote 68 to para. 48 (discussing, *inter alia*, the USDOC's sunset review determination in Cut-to-Length Carbon Steel Plate from Belgium, *United States Federal Register*, Vol. 65, No. 68 (7 April 2000), p. 18292 (Tab 82 of Exhibit ARG-63 submitted by Argentina to the Panel).

> In addition to consideration of the guidance on likelihood cited above, section 751(c)(4)(B) of the Act provides that the Department shall determine that revocation of an order is likely to lead to continuation or recurrence of dumping where a respondent interested party waives its participation in the sunset review. *In the instant review, the Department did not receive an adequate response from any respondent interested party. Pursuant to section 351.21 8(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation*.[419] (emphasis added; footnote omitted)

Together with the text of Section 351.218(d)(2)(iii), this one example provides support for Argentina's understanding of how the USDOC determines whether a response is not "complete" so as to consider the respondent to have waived participation in the sunset review. Therefore, the Panel did not "take it upon itself" to make out Argentina's *prima facie* case by agreeing with Argentina's understanding of the "completeness" standard in Section 351.218(d)(2)(iii) of the USDOC Regulations.[420]

265. The United States' more fundamental claim on this issue appears to be its disagreement with the conclusion the Panel drew from this evidence. The United States refers to answers it provided in response to the Panel's questions, in which the United States explained that the USDOC does not automatically reject incomplete submission, but in fact has the "*flexibility*"[421] to grant respondents more time to complete their submission or to accept a submission that did not contain all the requested information.[422] In these answers, the United States referred to the Preamble to its regulations governing sunset reviews as the basis for this "flexibility". The relevant portion of the Preamble provides:

> A complete substantive response is one which contains all of the information required under [Section 351.218(d)(3)]. The Department may consider a substantive response that does not contain all of the information required under [Section 351.218(d)(3)] to be complete where a party is unable to report certain required information and provides a reasonable explanation as to why it is unable to provide such information.[423]

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[419]Issues and Decision Memo for the Expedited Sunset Review of the Antidumping Order on Cut-to-Length Carbon Steel Plate from Belgium, 29 March 2000 (Tab 82 of Exhibit ARG-63 submitted by Argentina to the Panel), pp. 2-3 and 5.

[420]United States' appellant's submission, para. 79.

[421]*Ibid*., para. 71. (original emphasis)

[422]*Ibid*., paras. 68-74.

[423]Procedures for Conducting Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, *United States Federal Register*, Vol. 63, No. 54 (20 March 1998), p. 13516 (Exhibit US-3 submitted by the United States to the Panel), Preamble, at p. 13518.

The United States also cited Section 351.302(b) of the USDOC Regulations as authorizing the USDOC to extend deadlines "for good cause":

> Unless expressly precluded by statute, the Secretary may, for good cause, extend any time limit established by [Section 351 of the USDOC Regulations].[424]

266. The United States argues on appeal that these explanations were "ignored" by the Panel, which made its decision "contrary to the evidence" before it.[425] As the United States acknowledges, however, the Panel posed a question on this issue in its first set of questions to the United States, and then followed up with a question in the second set of questions to the United States, based explicitly on the response the United States had provided previously.[426]

267. Moreover, we are of the view that the Panel did not find the United States' explanations relevant to its reasoning. As discussed above, the Panel based its conclusion as to the WTO-consistency of the waiver provisions on the fact that they require the USDOC to rely, in part, on unfounded company-specific likelihood determinations[427], and to deny due process rights to respondents that failed to file a "complete substantive response".[428] Thus, although the USDOC may be able to accept incomplete submissions in certain circumstances, thee provisions cited by the United States do not permit the USDOC to avoid, in *all* cases, applying the waiver provisions in a WTO-inconsistent manner.

268. First, as the United States acknowledged before the Panel and on appeal[429], the Preamble to the sunset review regulations allows the USDOC to treat an incomplete submission as "complete" only "where that interested party is unable to report the required information and provides [an] explanation" for such inability.[430] Thus, if a respondent is considered by the USDOC as being *able* to file all the required information, the Preamble does not appear to authorize the USDOC to treat that respondent's incomplete submission as though it were "complete". Second, as the United States again

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[424]USDOC Regulations, Section 351.302(b); cited in United States' appellant's submission, para. 41.

[425]United States' appellant's submission, para. 75.

[426]*Ibid*., paras. 69-73 (quoting United States' responses to questions posed by the Panel at the First Panel Meeting (Panel Report, Annex E, pp. E-18 and E-43, paras. 40-42); and United States' response to Question 9 posed by the Panel at the Second Panel Meeting, (Panel Report, Annex E, pp. 96-97, paras. 12-13)).

[427]*Supra*, para. 233.

[428]*Supra*, paras. 236-237.

[429]United States' appellant's submission, para. 70 (quoting United States' response to Question 8 posed by the Panel's at the First Panel Meeting (Panel Report, Annex E, pp. E-18 and E-43, para. 41 and footnote 33 thereto); in turn citing USDOC Regulations, Section 351.218(d)(3) and Preamble to the USDOC's Sunset Review Regulations, *supra*, footnote 423, p. 13518.

[430]United States' appellant's submission, para. 70 (quoting United States' response to Question 8 posed by the Panel's at the First Panel Meeting (Panel Report, Annex E, pp. E-18 and E-43, footnote 33 to para. 41)).

acknowledged before the Panel and on appeal[431], Section 351.302(b) of the USDOC Regulations only permits the USDOC to *extend the time limit* for submission of substantive responses. The United States does not contend that this provision allows the USDOC to consider a submission as "complete" when it does not contain all of the information prescribed by Section 351.218(d)(3) of the USDOC Regulations. Therefore, the USDOC will still be precluded from treating the incomplete submissions as "complete" when they fall outside the ambit of the Preamble. Nor will the USDOC be entitled to treat incomplete submissions as "complete" by virtue of Section 351.302(b).

269. As a result, in respect of respondents to which those provisions cannot be applied, the USDOC will continue to make automatically an affirmative company-specific determination and to deny the rights afforded by Articles 6.1 and 6.2 of the *Anti-Dumping Agreement*. Viewed in this light, the explanations and citations provided by the United States regarding the "completeness" of a substantive response had no bearing upon the Panel's analysis. Accordingly, we see no error in the Panel's reliance on the evidence submitted by Argentina and in its apparent understanding that the evidence submitted by the United States was not relevant to the Panel's reasoning.

270. In the light of the above, we *find* that the Panel did not fail to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case", as required by Article 11 of the DSU, in ascertaining the relationship between company-specific and order-wide determinations and in examining the basis on which the USDOC concludes that a respondent's submission constitutes a "complete substantive response".

VII. Factors to be Evaluated in a Likelihood-of-Injury Determination

271. We begin our analysis of Argentina's injury-related claims on appeal by addressing Argentina's claim that investigating authorities are required to consider certain specific factors in the course of making likelihood-of-injury determinations.

272. Argentina raised before the Panel several claims of inconsistency with various provisions of Article 3 of the *Anti-Dumping Agreement* with respect to the USITC's likelihood-of-injury determination on OCTG from Argentina. The Panel commenced its analysis of these claims by evaluating "the applicability of Article 3 in sunset reviews".[432] The Panel observed that neither Article 3 nor Article 11.3 contains an explicit cross-reference to the other provision. Nevertheless, the

[431]United States' appellant's submission, para. 70 (quoting United States' response to Question 8 posed by the Panel's at the First Panel Meeting (Panel Report, Annex E, pp. E-18 and E-43, para. 41 and footnote 33 thereto); in turn citing USDOC Regulations, Section 351.320(b)).

[432]Panel Report, para. 7.269.

Panel acknowledged that the text of Article 3, including Article 3.1 and footnote 9, "may suggest" that the provisions of Article 3 "define the scope of injury determinations throughout the Agreement".[433]

273. Referring to the Appellate Body's decision in *US – Corrosion-Resistant Steel Sunset Review*, the Panel noted the differences in the nature of the inquiries in original investigations and in sunset reviews. The Panel distinguished between injury determinations and likelihood-of-injury determinations. The Panel stated: "Just as the Appellate Body stated that an investigating authority is not required to make a dumping determination in a sunset review, we consider that an investigating authority is not required to make an injury determination in a sunset review."[434] Having decided that determinations of existing injury are not required in sunset reviews, the Panel concluded that the obligations contained in the various paragraphs of Article 3 do not "normally" apply to sunset reviews.[435] However, the Panel found that, to the extent that an investigating authority relies on a determination of injury when conducting a sunset review, the obligations of Article 3 would apply to that determination.

274. On appeal, Argentina argues, first, that Article 11.3, *in and of itself*, imposes "substantive obligations"[436] on investigating authorities to make their sunset review determinations in a particular manner, and that the Panel erred in failing to recognize the existence of these obligations. "In the alternative"[437], Argentina argues that the provisions of Article 3 apply to sunset reviews under Article 11.3 because Article 3 deals with injury determinations for the entire *Anti-Dumping Agreement*. We consider it useful to begin our analysis with Argentina's "alternative" argument, before addressing the argument regarding the "substantive obligations" mandated by Article 11.3.

275. Argentina argues that, by virtue of footnote 9 of the *Anti-Dumping Agreement*[438], which sets forth the definition of injury "under this Agreement", the term "injury" must have the same meaning throughout the *Anti-Dumping Agreement*, including in the context of sunset reviews under

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[433]Panel Report, para. 7.270.

[434]*Ibid*., para. 7.273 (citing Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 123).

[435]*Ibid*., para. 7.273.

[436]Argentina's other appellant's submission, p. 35, heading b.

[437]*Ibid*., para. 129.

[438]Footnote 9 of the *Anti-Dumping Agreement* provides:

> Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

Article 11.3.[439] Argentina notes that the definition of "injury" in footnote 9 provides that the term "injury" "shall be interpreted in accordance with the provisions of [Article 3]". Based on this language, Argentina claims that "any reference in the Agreement to 'injury', including a determination of likelihood of continuation or recurrence of injury under Article 11.3, requires that such a determination be made in conformity with the provisions of Article 3."[440] Relying on the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review*, Argentina submits that the terms "review" and "determine" in Article 11.3 contemplate "diligence and rigor" on the part of investigating authorities[441], and preclude those authorities from arriving at a sunset review determination in the absence of a "sufficient factual basis" from which "reasoned and adequate conclusions" may be drawn.[442] According to Argentina, it follows from these requirements that an investigating authority, in its likelihood-of-injury analysis, must consider "at a minimum"[443], the following elements:

> - ... [A]ny determination under Article 11.3 must be based on positive evidence, and involve an objective examination of the volume of dumped imports and the effect of the dumped imports on prices, as well as the consequent impact of the imports on domestic producers.
> - An Article 11.3 review requires an examination of the impact of the dumped imports on the domestic industry concerned, and must include an evaluation of all relevant economic factors having a bearing on the state of the industry….
> - The requirement … to demonstrate a causal relationship between the dumped imports and the injury to the domestic industry.[444]

Argentina therefore requests the Appellate Body to reverse the Panel's finding that Article 3 does not normally apply to a sunset review, and to "complete the analysis" under Article 3 by finding that the USITC's determination is inconsistent with Articles 3.1, 3.2, 3.4, and 3.5 because of its improper examination of "injury".[445]

276. At the outset, we would agree with Argentina that, by virtue of its opening phrase, footnote 9 defines "injury" for the whole of the *Anti-Dumping Agreement*. The United States also agrees that

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[439]Argentina's other appellant's submission, paras. 132-135.

[440]*Ibid*., para. 147.

[441]*Ibid*., para. 138.

[442]*Ibid*., para. 139 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 114).

[443]*Ibid*., para. 143.

[444]*Ibid*.

[445]*Ibid*., paras. 179 and 214.

this definition of "injury" is applicable throughout the Agreement.[446] Therefore, when Article 11.3 requires a determination as to the likelihood of continuation or recurrence of "injury", the investigating authority must consider the continuation or recurrence of "injury" as defined in footnote 9.

277. It does not follow, however, from this single definition of "injury", that all of the provisions of Article 3 are applicable in their entirety to sunset review determinations under Article 11.3. In arguing to the contrary, Argentina incorrectly equates the *definition* of "injury" with the *determination of* "injury". Notwithstanding footnote 9, the paragraphs of Article 3 are not an elaboration of the meaning of "injury". Rather, Article 3 lays down the steps involved and the evidence to be examined for the purposes of making a *determination of* injury. This is evident from the title of the Article ("Determination of Injury"). The focus of Article 3 on the *determination* of injury, rather than on its *definition*, is confirmed in the French and Spanish versions of Article 3.1, which translate "determination of injury", respectively, as "*la détermination de l'existence d'un dommage*" and "*la determinación de la existencia de daño*".[447]

278. Argentina submits that likelihood-of-injury determinations are "determinations of injury" for purposes of the *Anti-Dumping Agreement*. In our view, however, the *Anti-Dumping Agreement* distinguishes between "determination[s] of injury", addressed in Article 3, and determinations of likelihood of "continuation or recurrence ... of injury", addressed in Article 11.3. In addition, Article 11.3 does not contain any cross-reference to Article 3 to the effect that, in making the likelihood-of-injury determination, all the provisions of Article 3—or any particular provisions of Article 3—*must* be followed by investigating authorities. Nor does any provision of Article 3 indicate that, wherever the term "injury" appears in the *Anti-Dumping Agreement*, a determination of injury must be made following the provisions of Article 3.

279. The lack of a sufficient textual basis to apply Article 3 to likelihood-of-injury determinations is not surprising given "the different nature and purpose of original investigations, on the one hand, and sunset reviews, on the other hand", which the Appellate Body emphasized in *US – Corrosion-Resistant Steel Sunset Review*.[448] Original investigations require an investigating authority, in order to *impose* an anti-dumping duty, to make a determination of the existence of dumping in accordance with Article 2, and subsequently to determine, in accordance with Article 3, whether the domestic industry is facing injury or a threat thereof at the time of the original investigation. In contrast, Article 11.3 requires an investigating authority, in order to *maintain* an anti-dumping duty, to review

[446]United States' response to questioning at the oral hearing.

[447]French and Spanish versions of Article 3.1 of the *Anti-Dumping Agreement*. (underlining added)

[448]Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 124.

an anti-dumping duty order that has already been established—following the prerequisite determinations of dumping and injury—so as to determine whether that order should be continued or revoked.

280. Given the absence of textual cross-references, and given the different nature and purpose of these two determinations, we are of the view that, for the "review" of a determination of injury that has already been established in accordance with Article 3, Article 11.3 does not require that injury again be determined in accordance with Article 3. We therefore conclude that investigating authorities are not *mandated* to follow the provisions of Article 3 when making a likelihood-of-injury determination.

281. Turning to the obligations under Article 11.3, we recall the following statement of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*:

> Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review. Nor does Article 11.3 identify any particular factors that authorities must take into account in making such a determination.[449]

Although the Appellate Body made this statement in the context of a likelihood-of-dumping determination, it applies equally with respect to a likelihood-of-injury determination.

282. Argentina does not contest the fact that the additional requirements it posits[450], which are identical to the requirements contained in the paragraphs of Article 3, are not to be found explicitly in the text of Article 11.3. Rather, Argentina derives these requirements from the terms "determination" and "review" in Article 11.3. Argentina argues that, given the implications of these terms discussed above[451], the requirements it finds in Article 11.3 follow "logically" from the "rigorous, diligent examination" to be undertaken by the investigating authority.[452] Argentina submits that permitting an investigating authority to conduct a sunset review without following these requirements would *undermine* the very obligation to make a likelihood-of-injury "determination" in a "review" of the anti-dumping duties.[453]

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[449]Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 123.

[450]*Supra*, para. 275.

[451]*Supra*, paras. 179-180.

[452]Argentina's other appellant's submission, para. 143.

[453]*Ibid*.

283. The Appellate Body has concluded previously that the terms "determine" and "review" are critical to understanding the obligations of an investigating authority in sunset reviews.[454] The ordinary meanings of these terms necessitate a "reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination".[455] As the Appellate Body stated in *US – Corrosion-Resistant Steel Sunset Review*[456], however, the requirement for an investigating authority to arrive at a "reasoned conclusion" as to the likelihood of continuation or recurrence of injury does not have to be satisfied through a specific methodology or the consideration of particular factors in every case. We are not persuaded by the argument of Argentina that a likelihood-of-injury determination can rest on a "sufficient factual basis" and can be regarded as a "reasoned conclusion" *only* after undertaking all the analyses detailed in the paragraphs of Article 3.

284. This is not to say, however, that in a sunset review determination, an investigating authority is never required to examine any of the factors listed in the paragraphs of Article 3. Certain of the analyses mandated by Article 3 and necessarily relevant in an original investigation may prove to be probative, or possibly even required, in order for an investigating authority in a sunset review to arrive at a "reasoned conclusion". In this respect, we are of the view that the fundamental requirement of Article 3.1 that an injury determination be based on "positive evidence" and an "objective examination" would be equally relevant to likelihood determinations under Article 11.3. It seems to us that factors such as the volume, price effects, and the impact on the domestic industry of dumped imports, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury determination. An investigating authority may also, in its own judgement, consider other factors contained in Article 3 when making a likelihood-of-injury determination. But the necessity of conducting such an analysis in a given case results from the requirement imposed by *Article 11.3*—not Article 3—that a likelihood-of-injury determination rest on a "sufficient factual basis" that allows the agency to draw "reasoned and adequate conclusions".

285. In the light of the above, we *uphold* the Panel's finding, in paragraph 7.273 of the Panel Report, that the obligations set out in Article 3 do not apply to likelihood-of injury determinations in sunset reviews. Consequently, we *need not* "complete the analysis" and make findings with respect to Argentina's claims that the USITC acted inconsistently with Articles 3.1, 3.2, 3.4, and 3.5 of the *Anti-Dumping Agreement*. We also *find* that the Panel did not err in its interpretation of the term "injury" in Article 11.3 of the *Anti-Dumping Agreement*, or in its analysis with respect to the factors that an investigating authority is required to examine in a likelihood-of-injury determination.

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[454]Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 110-112.

[455]*Ibid*., para. 111.

[456]*Ibid*., para. 123.

VIII. Cumulation in Sunset Reviews

286. We turn now to address Argentina's claim that the Panel erred in finding that the USITC's cumulative analysis, made in the course of conducting its likelihood determination, was not inconsistent with Articles 3.3 and 11.3 of the *Anti-Dumping Agreement*.

287. Argentina argued before the Panel that the *Anti-Dumping Agreement* authorizes investigating authorities to engage in a cumulative analysis in original investigations by virtue of Article 3.3, but that no such authorization exists for sunset reviews. As an alternative argument, Argentina submitted that, if cumulation were permitted in sunset reviews, investigating authorities must first satisfy the conditions set out in Article 3.3(a) and (b). The United States argued that, as the *Anti-Dumping Agreement* does not prohibit the use of cumulation, investigating authorities are permitted to engage in a cumulative analysis in likelihood-of-injury determinations in sunset reviews. As to the conditions set out in Article 3.3, the United States argued that they apply only in the context of original investigations.

288. The Panel began its analysis by observing that Article 11.3 and Article 3.3 do not speak to whether cumulation is permitted beyond the context of original investigations. In the Panel's view, "the lack of a clear provision in the Agreement as to whether cumulation is generally allowed [means] that cumulation is permitted in sunset reviews."[457] In support of its understanding, the Panel stated that the consistent use of the term "dumped imports" in the remainder of Article 3, without specifying that such imports would originate from a single source, reflects the position that investigating authorities would normally base injury determinations on imports from all investigated sources cumulatively. The Panel rejected Argentina's argument that the use of the singular "duty" in Article 11.3 indicates an intent not to authorize cumulation in sunset reviews, finding the attribution of such a "far-reaching substantive meaning" to the use of the singular as opposed to the plural term to be implausible.[458] The Panel then found that cumulation, when used in sunset reviews, does not need to satisfy the conditions of Article 3.3 because "by its own terms Article 3.3 limits its scope of application to investigations".[459] As a result, the Panel found that the USITC's cumulative analysis in the underlying sunset review determination was not inconsistent with Articles 3.3 and 11.3 of the *Anti-Dumping Agreement*.[460]

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[457]Panel Report, para. 7.332.

[458]*Ibid*., para. 7.334.

[459]*Ibid*., para. 7.336.

[460]*Ibid*., para. 7.338.

289. Argentina argues that the Panel erred: (1) in finding that cumulation is permitted in sunset reviews; (2) in finding that the conditions set out in Article 3.3 for the use of cumulation do not need to be satisfied in the context of sunset reviews; and (3) in dismissing Argentina's claim as to the consistency of the USITC's recourse to cumulation with the "likelihood" standard in Article 11.3.

290. As to the first error, Argentina refers to the use of the term "duty" in the singular in Article 11.3 as evincing the intent of the treaty drafters to have sunset review determinations focus on *one* anti-dumping measure applied to *one* source. Thus, according to Argentina, investigating authorities are required to determine whether the expiry of *each* duty, as applied to imports from *individual* Members, would lead to a continuation or recurrence of injury.[461] Furthermore, according to Argentina, the rationale for permitting cumulation in original investigations does not apply in sunset reviews. Because investigating authorities in original investigations look to evidence of past behaviour, Argentina argues, they will have a "factual foundation" to examine relevant issues, such as the conditions of competition among exporters from different sources, and thereby be able to determine whether cumulation is appropriate.[462] In sunset reviews, Argentina submits, the changed circumstances in the five years since the imposition of anti-dumping duties, and the prospective nature of the inquiry, preclude an agency from having a factual basis to consider the appropriateness of cumulation.[463]

291. With respect to the applicability of the prerequisites in Article 3.3, Argentina argues that if cumulation is permissible in sunset reviews, the prerequisites "must equally apply".[464] In Argentina's view, to conclude otherwise, as did the Panel, would permit investigating authorities to engage in a cumulative analysis in sunset reviews without the "disciplines" Members negotiated during the Uruguay Round.[465] Finally, Argentina argues that the Panel erred in declining to address Argentina's claim as to the consistency with Article 11.3 of the USITC's use of cumulation. Argentina observes that WTO obligations may apply on a "concurrent and overlapping basis"[466] and that, as such, the Panel was incorrect in dismissing Argentina's Article 11.3 claim on the basis that it would create "extra substantive obligations" in Article 3.3 for investigating authorities.[467]

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[461]Argentina's other appellant's submission, paras. 257-260.

[462]See *ibid*., para. 265.

[463]*Ibid*., paras. 266-267.

[464]*Ibid*., para. 278.

[465]*Ibid*.

[466]*Ibid*., para. 280. (Argentina's emphasis omitted)

[467]*Ibid*. (quoting Panel Report, para. 7.337).

292. We begin our analysis by recalling that the text of Article 11.3 of the *Anti-Dumping Agreement* makes no reference to cumulation or to Article 3.3.[468] Turning to Argentina's argument regarding the use of the singular, "duty", as opposed to the plural, "duties", we observe that this argument is premised on Argentina's understanding that the term "duty" in Article 11.3 refers to a *single* anti-dumping measure imposed on *one* Member, whereas the term "duties" refers to *multiple* anti-dumping measures imposed on *more than one* Member.

293. In our view, the *Anti-Dumping Agreement* does not ascribe to the singular and plural forms of the word "duty" the significance claimed by Argentina. Even where a Member issues an anti-dumping duty order applicable to products from one country, that order assigns separate duties to individual exporters from that country. Duties also vary from country to country. In this respect, we note, for example, the use of the term "duty", in the singular, in Article 9.2, which states, in part:

> When an anti-dumping *duty* is imposed in respect of any product, such anti-dumping *duty* shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. (emphasis added)

Article 9.2 provides that a "duty", in the *singular*, can be "collected ... on imports of [the investigated product] from *all* sources", although such duty may vary from source to source. It follows that a "duty", in the singular—as used in Article 11.3—is not necessarily limited to a duty that is imposed with respect to one Member only, but may also refer to duties imposed with respect to *multiple* sources of the imported product. We are, therefore, of the view that the mere use of the term "duty", in the singular, in Article 11.3 does not necessarily suggest that likelihood-of-injury determinations must be made on a Member-by-Member basis.

294. We next examine "the only provision in the *Anti-Dumping Agreement* that specifically addresses the practice of cumulation".[469] Article 3.3 provides:

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[468]*Supra*, para. 177.

[469]Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 108.

> Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

This provision plainly speaks to the situation "[w]here imports of a product from more than one country are simultaneously subject *to anti-dumping investigations*". (emphasis added) It makes no mention of injury analyses undertaken in any proceeding other than original investigations; nor do we find a cross-reference to Article 11, the provision governing reviews of anti-dumping duties, which itself makes no reference to cumulation. We therefore find Articles 3.3 and 11.3, on their own, not to be instructive on the question of the permissibility of cumulation in sunset reviews. The silence of the text on this issue, however, cannot be understood to imply that cumulation is prohibited in sunset reviews.

295. We recall that, in *EC – Tube or Pipe Fittings*, the Appellate Body discussed the "apparent rationale" behind the practice of cumulation:

> A cumulative analysis logically is premised on a recognition that the domestic industry faces the impact of the "dumped imports" as a whole and that it may be injured by the total impact of the dumped imports, even though those imports originate from various countries. If, for example, the dumped imports from some countries are low in volume or are declining, an exclusively country-specific analysis may not identify the causal relationship between the dumped imports from those countries and the injury suffered by the domestic industry. The outcome may then be that, because imports from such countries could not *individually* be identified as causing injury, the dumped imports from these countries would not be subject to anti-dumping duties, even though they are in fact causing injury. In our view, therefore, by expressly providing for cumulation in Article 3.3 of the *Anti-Dumping Agreement*, the negotiators appear to have recognized that a domestic industry confronted with dumped imports originating from several countries may be injured by the cumulated effects of those imports, and that those effects may not be adequately taken into account in a country-specific analysis of the injurious effects of dumped imports.[470] (original italics; underlining added)

[470]Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 116.

296. Although *EC – Tube or Pipe Fittings* concerned an original investigation, we are of the view that this rationale is equally applicable to likelihood-of-injury determinations in sunset reviews. Both an original investigation and a sunset review must consider possible sources of injury: in an original investigation, to determine whether to impose anti-dumping duties on products from those sources, and in a sunset review, to determine whether anti-dumping duties should *continue* to be imposed on products from those sources. Injury to the domestic industry—whether *existing* injury or *likely future* injury—might come from several sources simultaneously, and the cumulative impact of those imports would need to be analyzed for an injury determination.

297. Therefore, notwithstanding the differences between original investigations and sunset reviews, cumulation remains a useful tool for investigating authorities in both inquiries to ensure that all sources of injury and their cumulative impact on the domestic industry are taken into account in an investigating authority's determination as to whether to impose—or continue to impose—anti-dumping duties on products from those sources. Given the rationale for cumulation—a rationale that we consider applies to original investigations as well as to sunset reviews—we are of the view that it would be anomalous for Members to have limited authorization for cumulation in the *Anti-Dumping Agreement* to original investigations.

298. Argentina argues, however, that a logical basis exists for allowing cumulation in original investigations, but not in sunset reviews. Argentina considers that an investigating authority in an original investigation has a sufficient "factual foundation" to determine whether cumulation is appropriate because those facts relate to the past and are therefore verifiable.[471] In contrast, Argentina submits, the investigating authority in a sunset review will not have the facts to know whether cumulation is appropriate because any such assessment—relating to *future* market conditions—will be inherently speculative.

299. In our view, Argentina's distinction between the factual bases in original investigations and those in sunset reviews is without merit. A sunset review determination, although "forward-looking"[472], is to be based on existing facts as well as projected facts. Even where the focus of the inquiry is *likely future* injury, an investigating authority must have a "sufficient factual basis" to arrive at its conclusion.[473] Therefore, it does not follow from the fact that sunset reviews evaluate *likelihood* of injury that an investigating authority will not have an evidentiary basis for considering whether cumulation is appropriate in a given case.

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[471]Argentina's other appellant's submission, para. 265.

[472]Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 105.

[473]*Ibid*., para. 114 (quoting Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.271).

300. Given the express intention of Members to permit cumulation in injury determinations in original investigations, and given the rationale behind cumulation in injury determinations, we do not read the *Anti-Dumping Agreement* as prohibiting cumulation in sunset reviews.

301. Turning to Argentina's argument that the prerequisites specified in Article 3.3(a) and (b) should be satisfied by investigating authorities when performing cumulative analyses in sunset reviews, we note that Argentina offers no textual support for its claim. Indeed, as we observed above[474], the opening text of Article 3.3 plainly limits its applicability to original investigations.

302. Argentina suggests that the following consequences would arise if conditions were not imposed on the resort to cumulation in sunset reviews:

> To decide otherwise would vitiate the disciplines on cumulation negotiated during the Uruguay Round and provide a *carte blanche* to investigating authorities during sunset reviews – contrary to the plain text, as well as the object and purposes, of Articles 3 and 11.[475]

We disagree. As the Appellate Body has observed, a sunset review determination under Article 11.3 must be based on a "rigorous examination"[476] leading to a "reasoned conclusion".[477] Such a determination must be supported by "positive evidence"[478] and a "sufficient factual basis".[479] These requirements govern all aspects of an investigating authority's likelihood determination, including the decision to resort to cumulation of the effects of likely dumped imports. As a result, Argentina's concerns that investigating authorities will be given "*carte blanche*" to resort to cumulation when making likelihood-of-injury determinations is unfounded. We, therefore, conclude that the conditions of Article 3.3 do not apply to likelihood-of-injury determinations in sunset reviews.

303. Finally, Argentina submits that the Panel erred in dismissing Argentina's claim that the USITC's recourse to cumulation was inconsistent with the "likely" standard of Article 11.3.[480] We address this aspect of Argentina's cumulation-related claim under Article 11.3 in Section X.B of this Report, in the context of addressing Argentina's other challenges to the standard of likelihood applied by the USITC in its sunset review determination.

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[474]*Supra*, para. 294.

[475]Argentina's other appellant's submission, para. 278.

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

[477]*Ibid*., para. 111.

[478]*Ibid*., para. 114 (quoting Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.271).

[479]*Ibid*. (quoting Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.271).

[480]Panel Report, para. 7.337.

304. In the light of the above, we *uphold* the Panel's findings, in paragraphs 7.335 to 7.337 of the Panel Report, that Article 11.3 of the *Anti-Dumping Agreement* does not preclude investigating authorities from cumulating the effects of likely dumped imports in the course of their likelihood-of-injury determinations, and that the conditions of Article 3.3 of the *Anti-Dumping Agreement* do not apply in the context of sunset reviews.

IX. The Panel's Interpretation of the Term "Likely"

305. We now turn to the issue whether the Panel made an error of interpretation regarding the term "likely" in Article 11.3 of the *Anti-Dumping Agreement*.

306. The Panel stated the following with respect to Argentina's claims relating to the USITC's determinations regarding the likely volume of dumped imports, their likely price effects, and their likely impact on the United States' domestic industry:

> We note that the standard set out in Article 11.3 of the Agreement for the investigating authorities' sunset determinations is "likely". This standard applies to the likelihood of continuation or recurrence of dumping as well as injury determinations in sunset reviews, *and this is precisely the standard that the USITC applied*. It seems to us that the essence of Argentina's claim is not that the USITC applied the wrong standard, but that it erred in determining that the likely standard was met. Our task is to reach a decision on Argentina's allegation that the USITC erred in the instant sunset review in the application of the likely standard of Article 11.3.[481] (emphasis added)

307. Argentina argues that, in making this statement, the Panel made an error in its interpretation of Article 11.3, as it did not interpret "likely" to mean "probable".[482] In support of its position that "likely" means "probable", Argentina refers to the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review*, where it was stated that:

> ... an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be *probable* if the duty were terminated—and not simply if the evidence suggests that such a result might be *possible or plausible*.[483]

According to Argentina, the *practice* of the USITC "is <u>not</u> to apply a 'probable' standard".[484] Argentina argues that, by stating that the USITC applied the "likely" standard set out in Article 11.3,

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[481]Panel Report, para. 7.285.

[482]Argentina's other appellant's submission, para. 18.

[483]*Ibid*., para. 21 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 111). (emphasis added by Argentina)

[484]*Ibid*., para. 34. (original underlining)

and that it was the correct standard to apply, the Panel failed to interpret "likely" to mean "probable" and, thus, made an error of interpretation regarding the "likely" standard under Article 11.3 of the *Anti-Dumping Agreement*. Argentina emphasizes that the Panel erred in failing to consider the USITC's statements before United States courts and before a NAFTA panel that the USITC did not apply a "probable" standard.[485]

308. We agree with Argentina that, in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body equated "likely", as it is used in Article 11.3, with "probable". We also agree with Argentina that this interpretation of "likely" as "probable" is authoritative in relation to injury as well, given that the term "likely" in Article 11.3 applies equally to dumping and to injury.[486] The United States also agrees that "'probable' [is] synonymous with the statutory term 'likely'."[487] However, we do not consider that the Panel, in its analysis, made an error of interpretation regarding the term "likely" in Article 11.3 of the *Anti-Dumping Agreement*. We set out our reasons below.

309. The Panel stated that the standard set out in Article 11.3 is the "likely" standard; this is plain from the text of the provision itself. Although the Panel did not elaborate with respect to the meaning of "likely", or expressly state that "likely" means "probable", we see nothing in the Panel Report to suggest that the Panel was of the view that "likely" does not mean "probable", or that "likely" means "anything less than probable".

310. The Panel also stated that the USITC applied the "likely" standard. The wording of the final determination[488], on its face, suggests that the USITC applied the "likely" standard. The question then remains whether the USITC *actually* applied that standard in the sunset review at issue. This question, however, does not relate to the manner in which the Panel interpreted the term "likely" in Article 11.3; rather, it concerns the Panel's review of the basis on which the USITC made its determination concerning injury, an issue we discuss separately in Section X of this Report.

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[485]Argentina's other appellant's submission, paras. 29 and 34; Panel Report, para. 7.285.

[486]*Ibid*., paras. 21-22.

[487]United States' appellee's submission, para. 21.

[488]The USITC's final determination reads as follows:

> Based on the record in these five-year reviews, we determine under section 751(c) of the Tariff Act of 1930, as amended ("the Act"), that revocation of the antidumping duty orders on Oil Country Tubular Goods ("OCTG") other than drill pipe ("casing and tubing") from Argentina, Italy, Japan, Korea, and Mexico and of the countervailing duty order on casing and tubing from Italy would be *likely to lead to continuation or recurrence* of material injury to an industry in the United States within a reasonably foreseeable time.

(USITC Report, p. 1) (emphasis added)

311. As we have already mentioned, Article 11.3 requires that a determination of "likely" injury rest upon a sufficient factual basis that would permit the investigating authority to draw reasoned and adequate conclusions. We agree with the United States that because the USITC had explicitly stated in its final determination that it applied the "likely" standard, "the only way for the Panel to assess whether that standard was in fact applied was to evaluate whether the facts supported that finding".[489] Thus, by carrying out the task of evaluating whether the USITC's determination of likely injury was supported by a sufficient factual basis, the Panel responded to the question whether the USITC *actually* applied the "likely" standard in the sunset review. We examine this issue in the next section of this Report.

312. We move now to the question whether the Panel erred in failing to consider the USITC's statements before United States courts or before a NAFTA panel regarding the meaning of "likely" as used in Article 11.3 of the Agreement.[490] We agree with Argentina that the USITC's statements before United States courts or before a NAFTA panel are not, in principle, inadmissible evidence in WTO dispute settlement proceedings as such.[491] However, we disagree with Argentina's understanding of the Panel's position. The task of the Panel was to decide whether the determination of "likely" future injury rested, in this specific case, on a sufficient factual basis to allow the USITC to draw reasoned and adequate conclusions. In order to perform this exercise properly, the Panel did not need to resort to the statements of the USITC before domestic courts or before a NAFTA panel, because the Panel's assessment necessarily had to be based on the meaning of "likely" within the WTO legal system—namely the meaning attributed to this term by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*. Therefore, it was not unreasonable for the Panel to consider that the USITC's statements to which Argentina refers were "not relevant"[492] in the task of assessing the application of the "likely" standard in Article 11.3 with respect to injury in the sunset review at issue.

313. In any event, we consider that the Panel's decision not to rely on the statements of the USITC before domestic courts and before a NAFTA panel relates to the weighing of evidence. In *EC – Hormones*, the Appellate Body observed that:

[489]United States' appellee's submission, para. 27.

[490]Panel Report, para. 7.285.

[491]Argentina's other appellant's submission, paras. 47-48 (quoting Panel Report, *Mexico – Corn Syrup*, para. 7.32).

[492]Panel Report, para. 7.285.

> [the d]etermination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts.[493]

The Appellate Body has consistently emphasized that, within the confines of their obligation under Article 11 of the DSU to make "an objective assessment of the facts of the case", panels enjoy a "margin of discretion" as triers of facts.[494] Accordingly, we see no reason to interfere with the Panel's treatment of the USITC's statements before domestic courts and before a NAFTA panel.

314. In the light of these considerations, we *find* that the Panel did not err in its interpretation of the term "likely" in Article 11.3 of the *Anti-Dumping Agreement*.

X. Consistency of the USITC's Determination with the Standard of "Likelihood" in Article 11.3 of the *Anti-Dumping Agreement*

315. We now move to the issue of whether the Panel erred in finding that the likelihood-of-injury determination made by the USITC is not inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

316. The determination of the USITC—that the revocation of the anti-dumping duty orders on casing and tubing from Argentina, Italy, Japan, Korea, and Mexico would be likely to lead to continuation or recurrence of injury to the domestic industry—was based essentially on analyses of the likely volume of dumped imports, the likely price effects of dumped imports, and the likely impact of dumped imports on the United States' industry. The Panel examined separately the USITC's analyses with respect to the likely volume of dumped imports, the likely price effects of dumped imports, and the likely impact of dumped imports on the United States industry. As regards the finding of the USITC that "in the absence of the orders, the likely volume of cumulated subject imports, both in absolute terms and as a share of the U.S. market, would be significant"[495], the Panel's analysis focused on the main justification given by the USITC in support of its finding, namely that subject producers have incentives to devote more of their productive capacity to producing and shipping casing and tubing to the United States market. The Panel found that the USITC's determination that the subject producers could shift their productive capacity from other pipe and tube

[493]Appellate Body Report, *EC – Hormones*, para. 132.

[494]Appellate Body Report, *EC – Asbestos*, para. 161. See also, for example, Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 125; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; Appellate Body Report, *EC – Sardines*, para. 299; Appellate Body Report, *Korea – Alcoholic Beverages*, paras. 161-162; Appellate Body Report, *Japan – Agricultural Products II*, paras. 141-142; Appellate Body Report, *US – Wheat Gluten*, para. 151; Appellate Body Report, *Australia – Salmon*, para. 266; and Appellate Body Report, *Korea – Dairy*, para. 138.

[495]USITC Report, p. 20.

products to casing and tubing exported to the United States market, had a sufficient factual basis in the record. Consequently, the Panel concluded that Argentina failed to prove that the USITC's determination concerning the likely volume of dumped imports is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

317. With respect to the finding of the USITC that dumped imports "would compete on the basis of price in order to gain additional market share" and that "such price-based competition by subject imports likely would have significant depressing or suppressing effects on the prices of the domestic like product"[496], the Panel rejected Argentina's argument that the price comparison carried out by the USITC was not adequate because of the limited number of comparisons involved. For the Panel, "a price comparison made as part of a sunset determination does not necessarily require a threshold in terms of the number of comparisons used."[497] The Panel considered that the USITC's approach was adequate because the volume of export sales to the United States market was limited in the period under the anti-dumping orders. Also, the Panel found that the USITC did not err by stating that price was an important factor in purchasing decisions in the United States market. Consequently, the Panel concluded that the USITC's determination regarding the likely price effects of dumped imports was based on an objective examination of the evidence in the record and consistent with Article 11.3 of the *Anti-Dumping Agreement*.[498]

318. Regarding the likely impact of dumped imports on the United States industry, the Panel opined that the USITC's finding—that the state of the domestic industry as of the date of the sunset review at issue was positive—"[did] not preclude it from nevertheless finding that the US industry is likely to be affected by the increase in the volume and the negative effect of the prices of the likely dumped imports".[499] The Panel found that, given the circumstances of the case at hand, it was "proper to conclude that the likely increased volume and negative price effect of dumped imports would also have a negative impact on the state of the US industry".[500] Consequently, the Panel concluded that "the USITC's determinations regarding the likely consequent impact of the likely dumped imports on the US industry was not inconsistent with Article 11.3 of the [*Anti-Dumping Agreement*]".[501]

319. Argentina alleges that the Panel erred in failing to find that the USITC's determinations on injury were not based on properly established facts, positive evidence, or an objective examination.

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[496]USITC Report, p. 21.

[497]Panel Report, para. 7.303.

[498]*Ibid*., para. 7.306.

[499]*Ibid*., para. 7.311.

[500]*Ibid*.

[501]*Ibid*., para. 7.312.

In particular, Argentina contends that the USITC's decision to conduct a cumulative assessment of imports was inconsistent with Article 11.3. Argentina also argues that the Panel erred in concluding that the USITC properly established the facts necessary to satisfy the "likely" standard for determinations relating to injury, and in not finding that the USITC's determinations on likely volume, price, and adverse impact were not based on positive evidence or an objective examination.

320. Our analysis proceeds in the following order: (a) the standard of review the Panel had to apply in order to determine whether the USITC's determinations on injury were consistent with Article 11.3 of the *Anti-Dumping Agreement*; (b) whether the Panel erred by failing to find that the USITC's decision to conduct a cumulative assessment of imports was inconsistent with Article 11.3; (c) whether the Panel erred by finding that the USITC's determination concerning the likely volume of dumped imports was not inconsistent with Article 11.3; (d) whether the Panel erred by finding that the USITC's determination concerning the likely price effects of dumped imports was not inconsistent with Article 11.3; and (e) whether the Panel erred by finding that the USITC's determination concerning the likely impact of dumped imports on the United States industry was not inconsistent with Article 11.3.

A. *Standard of Review*

321. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body approved the description set out by the panel in that case of investigating authorities' obligations in a sunset review:

> The text of Article 11.3 contains an obligation "to determine" likelihood of continuation or recurrence of dumping and injury. The text of Article 11.3 does not, however, provide explicit guidance regarding the meaning of the term "determine". The ordinary meaning of the word "determine" is to "find out or establish precisely" or to "decide or settle". The requirement to make a "determination" concerning likelihood therefore precludes an investigating authority from simply assuming that likelihood exists. In order to continue the imposition of the measure after the expiry of the five-year application period, it is clear that *the investigating authority has to determine, on the basis of positive evidence*, that termination of the duty is likely to lead to continuation or recurrence of dumping and injury. *An investigating authority must have a sufficient factual basis* to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence.[502] (emphasis added)

[502]Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 114 (quoting Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.271 (footnotes omitted)). The Appellate Body stated, in paragraph 115, that:

> [t]he Panel's description of the obligations of investigating authorities in conducting a sunset review closely resembles our own, and we agree with it.

322. These obligations of investigating authorities inform the task of a panel called upon to evaluate the consistency of an investigating authority's determination with Article 11.3 of the *Anti-Dumping Agreement*. The task of the panel is to assess whether the investigating authorities properly established the facts and evaluated them in an unbiased and objective manner.[503] We agree with the Panel that "[its] task [was] not to perform a *de novo* review of the information and evidence on the record of the underlying sunset review, nor to substitute [its] judgment for that of the US authorities".[504] If the panel is satisfied that an investigating authority's determination on continuation or recurrence of dumping or injury rests upon a sufficient factual basis to allow it to draw reasoned and adequate conclusions, it should conclude that the determination at issue is not inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.[505]

323. Under Article 11.3 of the *Anti-Dumping Agreement*, a decision not to terminate an anti-dumping duty must be based on determinations of likelihood of continuation or recurrence of dumping and likelihood of continuation or recurrence of injury. We agree with the United States that the "likely" standard of Article 11.3 applies to the overall determinations regarding dumping and injury; it need not necessarily apply to each factor considered in rendering the overall determinations on dumping and injury.[506] In this case, the USITC's overall conclusion that continuation or recurrence of injury was likely, was the result of three separate conclusions: the likely volume of cumulated dumped imports; the likely price effects of dumped imports; and the likely impact of dumped imports on the domestic industry, in the event the anti-dumping duties were terminated. Therefore, given the manner in which the USITC structured its reasoning in this case—conducting a three-step approach to arriving at an overall determination—it was legitimate for the Panel to assess whether each of the three USITC conclusions rested on a sufficient factual basis.

B. *Cumulative Assessment of Dumped Imports*

324. The Panel found that the USITC's determination concerning the likely volume of dumped imports was not inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.[507] In its

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[503]*Anti-Dumping Agreement*, Article 17.6(i).

[504]Panel Report, para. 7.5.

[505]There are analogies between this description of the panel's task and what the Appellate Body stated in *US – Lamb* in the context of the application of safeguard measures. In that case, the Appellate Body recalled that the applicable standard is neither *de novo* review, nor total deference, but rather the objective assessment of the facts. (Appellate Body Report, *US – Lamb*, para. 101) The Appellate Body went on to state that "[f]irst, a panel must review whether competent authorities have evaluated *all relevant factors*, and, second, a panel must review whether the authorities have provided a *reasoned and adequate explanation* of how the facts support their determination." (*Ibid*., para. 103) (original emphasis; footnote omitted)

[506]United States' appellee's submission, para. 31.

[507]Panel Report, para. 7.298.

determination, the USITC made a cumulative assessment of the imports from Argentina, Italy, Japan, Korea, and Mexico.[508] On appeal, Argentina argues that the USITC's decision to conduct a cumulative assessment was inconsistent with Article 11.3, and that the Panel erred by failing to reach this conclusion.

325. We have already found, in Section VIII of this Report, that recourse to a cumulative analysis of imports is permissible in sunset reviews. The argument we are dealing with in this Section, however, is of a different nature. Here, we are addressing Argentina's contention that recourse to cumulation in this case is inconsistent with Article 11.3 because the USITC's decision to cumulate imports was not based on a sufficient factual basis.[509]

326. The USITC's decision to conduct a cumulative assessment was based principally on an analysis of four factors, namely: (i) whether subject imports of casing and tubing from any of the subject countries were likely to have "no discernible adverse impact on the domestic industry"[510]; (ii) whether the imports from Argentina, Italy, Korea, Japan, and Mexico, and the domestic like products, are fungible; (iii) whether the imports from Argentina, Italy, Korea, Japan, and Mexico, and the domestic like products, would likely be sold through similar channels of distribution if the orders were revoked; and (iv) whether the imports from all the subject countries and the domestic like products would be sold in the same geographic markets and simultaneously be present in the market if the orders were revoked.[511] On appeal, Argentina focuses on the fourth factor. Argentina contends that the USITC's decision to conduct a cumulative assessment did not rest on a sufficient factual basis because "the [USITC's] decision regarding the important issue of whether the imports would be simultaneously present in the market was based almost exclusively on an inference drawn from the original investigation."[512]

327. Argentina places great emphasis on the fact that in the analysis presented in support of the decision to cumulate imports, the USITC relied on information related to the original investigation. For Argentina, in doing so, the USITC acted inconsistently with the principle set out by the Appellate Body in *US – Carbon Steel*:

[508]USITC Report, p. 14.

[509]Argentina's other appellant's submission, para. 70.

[510]USITC Report, p. 11.

[511]*Ibid*., pp. 10-14.

[512]Argentina's other appellant's submission, para. 73.

> Mere reliance by the authorities on the injury determination made in the original investigation will not be sufficient. Rather, a fresh determination, based on credible evidence, will be necessary to establish that the continuation of the [measure] is warranted to remove the injury to the domestic industry.[513] (footnote omitted)

328. We disagree with Argentina that the USITC's references to information gleaned in the original investigation rendered WTO-inconsistent its decision to cumulate the effects of dumped imports. In *US – Carbon Steel*, the Appellate Body clarified that, in a sunset review, a "fresh determination" on the *likelihood* of future injury is necessary because "[t]he nature of the determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation."[514] Therefore, "[m]ere reliance by the authorities on the injury determination made in the original investigation will not be sufficient."[515] *US – Carbon Steel* does not, however, establish a prohibition on investigating authorities from referring in a sunset review to information related to the original investigation. In this case, it seems to us that the information to which the USITC referred was relevant to the decision to cumulate imports and, ultimately, to the task of assessing the likelihood of continuation or recurrence of injury.[516] Moreover, the USITC referred to this information in the context of a fresh determination as to whether the expiry of the orders would be likely to lead to continuation or recurrence of injury.

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[513]Appellate Body Report, *US – Carbon Steel*, para. 88 (cited in Argentina's other appellant's submission, para. 74).

[514]*Ibid*., para. 87.

[515]*Ibid*., para. 88. (footnote omitted)

[516]We note that the USITC also referred to information subsequent to the original investigation. The USITC noted that "[a]lthough the volume of subject imports has generally declined since 1995, at least one producer in each subject country has access to an active channel of distribution in the United States". (USITC Report, p. 10) The USITC referred to the "prevailing conditions of competition in the U.S. market". (*Ibid*., p. 10, and Part II) According to the USITC, "[t]he current record similarly indicates that subject imports and the domestic like products are relatively fungible and are made to the same specifications". (*Ibid*., p. 12) Regarding channels of distribution, the USITC observed that "today, the majority of all OCTG continues to be sold by both domestic producers and importers to distributors". (*Ibid*., p. 13) With respect to simultaneous presence and sales in the same geographic market, the factor highlighted by Argentina on appeal, the USITC made the following comment:

> [W]e note that import data indicate that subject imports from Argentina and Italy were present in the U.S. market in every year since the order went into effect. Thus, the record in the present reviews indicates that the domestic like product and imports of the subject merchandise continue to be simultaneously present in the market and sold in the same geographic markets.

(*Ibid*., p. 14, footnote 82) Therefore, this was not a situation of "mere reliance by the authorities on the injury determination made in the original investigation", as discussed in *US – Carbon Steel*. (Appellate Body Report, *US – Carbon Steel*, para. 88)

329. In the light of these considerations, we *find* that the Panel did not err in not finding that the USITC's decision to cumulate the dumped imports was based on an insufficient factual basis, and in not finding that the USITC's decision on cumulation was inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

C. *Likely Volume of Dumped Imports*

330. The USITC's determination that, in the absence of the anti-dumping duty order, the likely volume of dumped imports would be significant, was based principally on the finding that the subject producers had incentive to devote more of their productive capacity to producing and shipping more casing and tubing to the United States market.[517] As the Panel noted, the USITC identified five supporting factors for this conclusion:

> The USITC's determination reads, in relevant part:
>
> > The recent*** capacity utilization rates represent a potentially important constraint on the ability of these subject producers to increase shipments of casing and tubing to the United States. Nevertheless, the record indicates that these producers have incentives to devote more of their productive capacity to producing and shipping more casing and tubing to the U.S. market.
> >
> > First, ... [w]hile the Tenaris companies seek to downplay the importance of the U.S. market relative to the rest of the world, they acknowledge that it is the largest market for seamless casing and tubing in the world. Given Tenaris' global focus, it likely would have a strong incentive to have a significant presence in the U.S. market, including the supply of its global customers' OCTG requirements in the U.S. market.
> >
> > Second, casing and tubing are among the highest valued pipe and tube products, generating among the highest profit margins....
> >
> > Third, the record in these reviews indicates that prices for casing and tubing on the world market are significantly lower than prices in the United States...We have considered respondents' arguments that the domestic industry's claims of price differences are exaggerated, but nevertheless conclude that there is on average a difference sufficient to create an incentive for subject producers to seek to increase their sales of casing and tubing to the United States.
> >
> > Fourth, subject country producers also face import barriers in other countries, or on related products...
> >
> > Finally, we find that industries in ***of the subject countries are dependent on exports for the majority of their sales...

[517]USITC Report, p. 19.

> We therefore find that, in the absence of the orders, the likely volume of cumulated subject imports, both in absolute terms and as a share of the U.S. market, would be significant.[518]

331. The Panel was of the view that these five supporting factors constituted a sufficient factual basis for the USITC's determination that subject producers had incentive to devote more of their productive capacity to the United States market. Thus, the Panel saw:

> ... no element in the USITC's Final Determination which would support the assertion that the USITC's determination on this matter was based on an improper establishment of facts or a biased or unobjective evaluation thereof.[519]

332. On appeal, Argentina refers to some of the Panel's statements about the USITC's determination where the Panel used language such as "*could shift its production capacity*", "*might shift their production*", and "shifting was technically *possible*".[520] Argentina relies on these quotes to argue that the Panel did not equate "likely" injury with "probable" injury.

333. In Section IX of this Report, we addressed and rejected Argentina's argument that the Panel misinterpreted the term "likely" in Article 11.3. In any event, we do not agree with Argentina that it can necessarily be inferred from the use of words such as "could", "might", or "possible" that the Panel erred in the interpretation or application of the "likely" standard. As we mentioned above[521], the "likelihood" standard set out in Article 11.3 applies to a likelihood-of-injury determination as a whole, not to each and every factor that the investigating authority considers in the course of its analysis.

334. We see no reason to disturb the Panel's assessment that the USITC's determination regarding likely volume of dumped imports is not inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. According to the Panel, it was not unreasonable for the USITC to base its determination on the likely volume of dumped imports on an analysis of the question whether subject producers had incentive to devote more of their productive capacity to producing and shipping casing and tubing to the United States market. The finding of the USITC that subject producers had such an incentive rests upon its analysis of five factors. For the Panel, the issue was whether the USITC's determination, that subject producers could shift their productive capacity, had "sufficient factual basis in the record".[522]

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[518]Panel Report, para. 7.291 (quoting USITC Report, pp.19-20 (footnotes omitted)).

[519]*Ibid*., para. 7.297.

[520]Argentina's other appellant's submission, para. 78 (quoting Panel Report, paras. 7.290 and 7.295). (emphasis added by Argentina)

[521]*Supra*, para. 323.

[522]Panel Report, para. 7.290.

In this respect, the Panel concluded that Argentina had not shown that the USITC's analysis of the five factors was not supported by positive evidence.

335. We find no fault with the Panel's conclusion that it was reasonable for the USITC to base its determination on an analysis of the incentive for subject producers to shift production. Indeed, Argentina does not challenge this aspect of the Panel's reasoning; rather, its claim is based on an allegation that there was no positive evidence on the existence of such an incentive. On appeal, Argentina points to specific passages of the USITC's determination and contends that these specific passages are "based on speculation rather than positive evidence of what was probable to occur".[523] Argentina does not explain, however, how these alleged flaws of the USITC's determination undermine the Panel's reasoning.

336. In its reasoning, the Panel noted that Argentina challenged the factual basis of two of the five factors: trade barriers (the fourth factor) and price differences between the United States' and the world market (the third factor). As regards trade barriers (the fourth factor), the Panel provided the following explanation:

> We note that the USITC referred to a number of trade barriers. However, of these barriers only one related to the subject product, i.e. Canadian anti-dumping measure on casing and tubing from Korea. Others concerned related products, i.e. products that could be produced in the same production lines as casing and tubing. The issue therefore is whether the USITC erred in considering that certain exporters that were subject to trade barriers with respect to certain product types, which could be produced in the same production lines as casing and tubing, might shift their production to casing and tubing, which could enter the US market free of the anti-dumping measure at issue in these proceedings. Given that it is undisputed between the parties that such shifting was technically possible, we see no reason why the USITC could not make such an inference in the circumstances of the instant sunset review. It is only normal to expect a producer to seek to maximize its profits, which, in this case, would be possible through shifting production to casing and tubing in order to enter the US market free of the anti-dumping duty at issue had it been revoked. We therefore consider that this aspect of the USITC's conclusion was reasoned in light of the evidence in the record.[524]

[523]Argentina's other appellant's submission, para. 94. See also, *ibid.*, para. 83 ("sheer speculation"); para. 84 ("unfounded speculation"); para. 86 ("the [USITC] was simply speculating"); para. 88 ("these findings were based on speculation, rather than on positive evidence"); para. 90 ("This is simply unfounded speculation"); and para. 98 ("the [USITC] based its determination on speculation").

[524]Panel Report, para. 7.295.

337. We see no reason to disagree with the Panel that the fourth factor had a factual basis, namely, that shifting production was technically possible. Indeed, Argentina does not dispute this. Therefore, we find no error in the Panel's conclusion that the fourth factor "was reasoned in light of the evidence in the record".[525]

338. With respect to price differences between the United States and the world market (the third factor), the Panel made the following statement:

> Next, Argentina submits that the USITC's analysis concerning the price differences between the US and the world markets was based on anecdotal evidence rather than independent reports. We note that the USITC's report cites the testimony of three individuals in this sector as evidence of this price differentiation and it cites no objection raised by interested parties in this respect. Argentina is not raising any argument as to the correctness of the substance of this testimony. Nor has it brought to our attention another piece of evidence that might support the opposite finding in this regard. Argentina's claim in this regard therefore is limited to the kind of evidence the USITC relied upon. Keeping in mind our standard of review with respect to factual determinations by an investigating authority, and conscious that there are no rules in the Anti-Dumping Agreement as to the type of evidence that can support an investigating authority's findings, we are of the view that the USITC's reference to the testimonies of individuals who are knowledgeable in the relevant sector was proper.[526] (footnote omitted)

339. The factual basis of the third factor identified by the Panel was the testimony of three individuals knowledgeable in the sector. On appeal, Argentina does not challenge that the factual basis of the third factor was the testimonies, or that these testimonies constitute positive evidence. We, therefore, find no fault with the conclusion of the Panel that "the USITC's reference to the testimonies of individuals who are knowledgeable in the relevant sector was proper".[527]

340. We observe that most of the arguments put forward by Argentina on appeal with respect to the application by the USITC of the standard of likelihood is centred on the premise that some of the factors presented by the USITC are speculative. In particular, Argentina seems to assume that positive evidence requires absolute certainty on what is likely to occur in the future. We have some difficulty with this line of reasoning. Of course, we agree with Argentina that the investigating

[525]Panel Report, para. 7.295.

[526]*Ibid*., para. 7.296.

[527]*Ibid*.

authority's likelihood determinations under Article 11.3 must be based on "positive evidence". As the Appellate Body stated in *US – Hot-Rolled Steel*:

> The term "positive evidence" relates ... to the quality of the evidence that authorities may rely upon in making a determination. The word "positive" means ... that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible.[528]

341. The requirements of "positive evidence" must, however, be seen in the context that the determinations to be made under Article 11.3 are prospective in nature and that they involve a "forward-looking analysis".[529] Such an analysis may inevitably entail assumptions about or projections into the future. Unavoidably, therefore, the inferences drawn from the evidence in the record will be, to a certain extent, speculative. In our view, that some of the inferences drawn from the evidence on record are projections into the future does not necessarily suggest that such inferences are not based on "positive evidence". The Panel considered that the five factors addressed by the USITC were supported by positive evidence in the USITC's record and, as we have explained, we see no reason to disagree with the Panel.

342. Accordingly, we *uphold* the Panel's finding, in paragraph 7.298 of the Panel Report, that "Argentina has failed to prove that the USITC's determinations concerning the likely volume of dumped imports were WTO-inconsistent".

D. *Likely Price Effects of Dumped Imports*

343. The USITC determined that, in the absence of the anti-dumping orders, casing and tubing from the subject producers "would compete on the basis of price in order to gain additional market share" and "that such price-based competition by subject imports likely would have significant depressing or suppressing effects on the prices of the domestic like product".[530] The USITC based this determination on five factors: (1) the likely significant volume of subject imports; (2) the high level of substitutability between the subject imports and the domestic like products; (3) the importance of price in purchasing decisions; (4) the volatile nature of United States demand; and (5) the underselling by the subject imports in the original investigations and during the current review period.

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[528]Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

[529]Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 105.

[530]USITC Report, p. 21.

344. The Panel concluded that "the USITC's determination regarding the likely price effect of dumped imports was based on an objective examination of the evidence in the record."[531] In its reasoning, the Panel rejected Argentina's argument that the USITC's determination did not result from an objective examination of the evidence in the record because the USITC's price-underselling analysis was based on a limited set of comparisons.[532] For the Panel, "a price comparison made as part of a sunset determination does not necessarily require a threshold in terms of the number of comparisons used."[533] The Panel considered that "under the circumstances of this case the USITC's calculations were adequate because the volume of export sales into the US market [was] limited in the period of application of the measure."[534] Also, the Panel rejected Argentina's contention that "the USITC's determination that price was an important factor in the purchasing decisions in the US market was flawed because the documents in the record show that purchasers attached a similar importance to factors other than price."[535] The Panel noted that "[t]he USITC did not state that price was the only important factor, or even the most important factor; it just stated that it was an important factor."[536] For the Panel, such a statement was consistent with the evidence in the record.[537]

345. On appeal, Argentina argues that in endorsing a price-underselling analysis based on a limited set of comparisons, and in finding that the USITC stated that price was an important factor among others, the Panel failed to apply the "likely" standard when it considered the issue of pricing.[538] In addition, Argentina refers to a series of specific passages from the USITC's determination, and submits that they are not based on positive evidence.[539]

346. We see no reason to interfere in the Panel's conclusion that the price comparisons made by the USITC were adequate and supported its price-underselling analysis. We agree with the Panel that the small volume of export sales into the United States market following the imposition of the anti-dumping orders limited the number of comparisons the USITC could make. On appeal, Argentina seems to suggest that, merely because the price comparisons made by the USITC represented a

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[531]Panel Report, para. 7.306.

[532]*Ibid*., para. 7.300.

[533]*Ibid*., para. 7.303.

[534]*Ibid*.

[535]*Ibid*., para. 7.304.

[536]*Ibid*. (original underlining)

[537]*Ibid*. The Panel referred to the staff report that accompanied the USITC's determination. The Panel indicated that the staff report showed that purchasers ranked eight factors between 1.8 and 2.0, and that price was ranked 1.8.

[538]Argentina's other appellant's submission, paras. 99-104.

[539]*Ibid*., paras. 105-114.

"limited basis of information", they cannot be viewed as "positive evidence".[540] We disagree. We endorse the Panel's view that "[t]he simple fact that the number of price comparisons was limited does not make this aspect of the USITC's determination inconsistent with Article 11.3 of the [*Anti-Dumping Agreement*]."[541]

347. The Panel also addressed, in its reasoning, the question whether the USITC's statement that price was an important factor rested on a sufficient factual basis. The Panel pointed out that this statement was supported by a study on the perceptions of purchasers in the United States market, which was presented in the staff report that accompanied the USITC's determination.[542] We find nothing in Argentina's arguments to suggest that such study could not constitute a sufficient factual basis for the USITC's position that price is an important factor in the purchasing decisions in the United States market.

348. Argentina has failed to show that the Panel erred in its analysis of the USITC's determination on the likely price effects of dumped imports. Therefore, we *uphold* the Panel's finding, in paragraph 7.306 of the Panel Report, that "the USITC's determination regarding the likely price effect of dumped imports was based on an objective examination of the evidence in the record."[543]

E. *Likely Impact of Dumped Imports on the United States' Industry*

349. The Panel was of the view that the USITC's determination regarding the likely impact of dumped imports on the United States' industry met the requirements of Article 11.3 of the *Anti-Dumping Agreement*, as it rested upon a sufficient factual basis and reflected an objective examination of the facts. In this respect, the Panel made the following statement:

[540]Argentina's other appellant's submission, para. 109.

[541]Panel Report, para. 7.303.

[542]See *supra*, footnote 537.

[543]Panel Report, para. 7.306.

> As long as the investigating authority's determination is based on a sufficient factual basis and it reflects an objective examination of these facts, it will meet the requirements of Article 11.3. In this case, the USITC found that imports were likely to increase and to have a negative effect on the prices of the US industry in the event of revocation of the measure at issue. Then, the USITC found that this likely increase in imports and their likely price effect would have a negative impact on the US industry. In the circumstances of the case at hand, we find it proper to conclude that the likely increased volume and negative price effect of dumped imports would also have a negative impact on the state of the US industry. Further, in our view, the USITC's observations regarding the state of the US industry as of the date of the sunset review at issue do not preclude it from nevertheless finding that the US industry is likely to be affected by the increase in the volume and the negative effect of the prices of the likely dumped imports.[544]

350. On appeal, Argentina argues that, given the positive state of the domestic industry at the date of the sunset review, the Panel should have concluded that an adverse impact was not probable. Argentina submits that the findings of the USITC "disregard positive evidence that injury was *not probable*".[545]

351. Argentina has not persuaded us that the Panel made an error in its analysis. It appears to us that the Panel was correct in its reasoning that the USITC had a sufficient factual basis to conclude that adverse impact on the domestic industry was likely from a likely increase in the volume of dumped imports and their likely negative price effect. The positive state of the domestic industry as of the date of the sunset review need not necessarily be dispositive of the future when other adverse factors are present. Also, Argentina does not explain, on appeal, why the Panel could not properly find a relationship of cause and effect between, on the one hand, the USITC's determinations of likely increase in the volume of dumped imports and of likely negative price effect of dumped imports, and, on the other hand, likely adverse impact on the domestic industry.

352. Argentina has failed to show that the Panel erred in its analysis of the USITC's determination on the likely impact of dumped imports on the domestic industry. Therefore, we *uphold* the Panel's finding, in paragraph 7.312 of the Panel Report, that "under the circumstances of this sunset review, the USITC's determinations regarding the likely consequent impact of the likely dumped imports on the US industry [were] not inconsistent with Article 11.3 of the [*Anti-Dumping Agreement*]."[546]

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[544]Panel Report, para. 7.311.

[545]Argentina's other appellant's submission, para. 121. (original emphasis)

[546]Panel Report, para. 7.312.

XI. The Timeframe in a Likelihood-of-Injury Determination

353. We consider next the legal issues relating to the timeframe of the likelihood-of-injury determination. First, we assess whether the Panel erred in finding that the standard of continuation or recurrence of injury "within a reasonably foreseeable time", as provided in Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930, is not inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. Secondly, we address the issue of whether the Panel erred in finding that the *application* of the standard of continuation or recurrence of injury *within a reasonably foreseeable time* in the sunset review at issue is not inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

A. *Standard of Continuation or Recurrence of Injury Within a Reasonably Foreseeable Time*

354. Section 752(a)(1) of the Tariff Act of 1930 reads, in relevant part:

> (1) In general
>
> ... the Commission shall determine whether revocation of an order, or termination of a suspended investigation, would be likely to lead to continuation or recurrence of material injury *within a reasonably foreseeable time*.[547] (emphasis added)

355. Section 752(a)(5) of the Tariff Act of 1930 reads, in relevant part:

> (5) Basis for determination
>
> The presence or absence of any factor which the Commission is required to consider under this subsection shall not necessarily give decisive guidance with respect to the Commission's determination of whether material injury is likely to continue or recur *within a reasonably foreseeable time* if the order is revoked or the suspended investigation is terminated. In making that determination, the Commission shall consider that the effects of revocation or termination *may not be imminent*, but may *manifest themselves only over a longer period of time*.[548] (emphasis added)

356. The Panel noted that Article 11.3 of the *Anti-Dumping Agreement* does not prescribe any timeframe for likelihood of continuation or recurrence of injury; nor does it require investigating authorities to specify the timeframe on which their likelihood determination is based. The Panel

[547]Codified in Title 19, Section 1675(a)(1) of the *United States Code* (Exhibit ARG-1 submitted by Argentina to the Panel).

[548]Codified in Title 19, Section 1675(a)(5) of the *United States Code* (Exhibit ARG-1 submitted by Argentina to the Panel).

consequently concluded that the standard of the "reasonably foreseeable time", set out in Sections 752(a)(1) and 752(a)(5), does not conflict with Article 11.3 of the *Anti-Dumping Agreement*.[549]

357. Argentina contends that this finding is in error. According to Argentina, Article 11.3 contains a temporal limitation on the timeframe within which injury must be determined to be likely to continue or recur. This temporal limitation, argues Argentina, flows from Article 3.7 of the *Anti-Dumping Agreement*, which relates to the notion of threat of material injury and provides that "[t]he change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent."[550] For Argentina, an authority making an injury determination pursuant to Article 11.3 must base its findings on positive evidence that injury would be likely to continue or recur within the period of time beginning with the expiry of the order, but not exceeding circumstances deemed to be "imminent" within the meaning of Article 3.7.[551] Argentina posits that under the Tariff Act of 1930, a "reasonably foreseeable time" corresponds to a period that might exceed the "imminent" timeframe applicable in a threat of injury analysis.[552] Argentina adds that the standard of the "reasonably foreseeable time" would create an "impermissible gap" during which an anti-dumping duty would remain in effect without the existence of present or threatened material injury.[553]

358. The thrust of Argentina's argumentation on appeal is centred on footnote 9 of the *Anti-Dumping Agreement*, which provides, *inter alia*, that "[u]nder this Agreement the term 'injury' ... shall be interpreted in accordance with the provisions of ... Article [3]." According to Argentina, by virtue of footnote 9, Article 3 of the *Anti-Dumping Agreement* applies to determinations relating to injury in sunset reviews. In particular, the requirement set out in Article 3.7 that the threat of material injury be "imminent" is, Argentina argues, imported into Article 11.3 in the form of a temporal limitation on the timeframe within which "injury" must be determined to continue or recur. In Section VII of this Report, we have addressed the issue of whether Article 3 is applicable to sunset reviews and concluded that sunset reviews are not subject to the detailed disciplines of Article 3, which include the specific requirement of Article 3.7.[554]

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[549]Panel Report, para. 7.193.

[550]*Anti-Dumping Agreement*, Article 3.7, second sentence. (footnote omitted)

[551]Argentina's other appellant's submission, para. 221.

[552]*Ibid*., para. 223.

[553]*Ibid*., paras. 237-239.

[554]See *supra*, paras. 276-283.

359. As to the "impermissible gap" alluded to by Argentina, in our view, this argument is nothing more than a theoretical possibility, which Argentina builds from an abstract comparison between, on the one hand, the "imminent" manifestation of injury in the context of an original anti-dumping investigation and, on the other hand, the manifestation of injury within a "reasonably foreseeable time" in the context of a sunset review. The theoretical possibility of a "gap" would necessarily apply only to the situation of likelihood of "recurrence" of injury in the future, and not to the situation of "continuation" of injury. This mere theoretical possibility cannot justify the importation into Article 11.3 of an "imminent" standard for likelihood of recurrence of injury. Moreover, as the Appellate Body indicated in *US – Corrosion-Resistant Steel Sunset Review*, original investigations and sunset reviews are distinct processes with different purposes.[555] The disciplines applicable to original investigations cannot, therefore, be automatically imported into review processes.

360. In our view, the Panel correctly analyzed the timeframe issue. We agree with the Panel that an assessment regarding whether injury is likely to recur that focuses "too far in the future would be highly speculative"[556], and that it might be very difficult to justify such an assessment. However, like the Panel, we have no reason to believe that the standard of a "reasonably foreseeable time" set out in the United States statute is inconsistent with the requirements of Article 11.3.

361. In the light of these considerations, we *uphold* the Panel's findings, in paragraphs 7.193 and 8.1(c) of the Panel Report, that the standard of continuation or recurrence of injury "within a reasonably foreseeable time", as provided in Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930, is not inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

B. *Application of the Standard of Continuation or Recurrence of Injury Within a Reasonably Foreseeable Time*

362. The Panel found that the USITC did not act inconsistently with Article 11.3 of the *Anti-Dumping Agreement* in its *application* of Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930.[557] For the Panel, this conclusion results from the "finding that the US statutory provisions relating to the time-frame on the basis of which the USITC makes its likelihood determinations in sunset reviews are not WTO-inconsistent".[558] In addition, the Panel rejected Argentina's argument that the USITC failed to apply Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930 in a WTO-

[555]Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 106-107; Appellate Body Report, *US – Carbon Steel*, para. 87.

[556]Panel Report, para. 7.185.

[557]*Ibid*., paras. 7.259-7.260 and 8.1(e)(i).

[558]*Ibid*., para. 7.258.

consistent manner because it did not specify the timeframe that it considered to be reasonably foreseeable for purposes of its likelihood determination in this sunset review.[559]

363. On appeal, Argentina argues that, even assuming, *arguendo*, that the standard in Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930 is WTO-consistent, it is nevertheless WTO-inconsistent as applied. According to Argentina, the USITC erred in the application of the legal standard because it did not indicate the timeframe that it considered to be applicable.[560] Argentina submits that a determination that does not specify the relevant timeframe for the injury determination is not a "properly reasoned and supported determination"[561] and does not have a "firm evidentiary foundation".[562]

364. As we have noted above[563], the text of Article 11.3 does not establish any requirement for the investigating authority to specify the timeframe on which it bases its determination regarding injury. Thus, the mere fact that the timeframe of the injury analysis is not presented in a sunset review determination is not sufficient to undermine that determination. Article 11.3 requires that a determination of likelihood of continuation or recurrence of injury rest on a sufficient factual basis to allow the investigating authority to draw reasoned and adequate conclusions. A determination of injury can be properly reasoned and rest on a sufficient factual basis even though the timeframe for the injury determination is not explicitly mentioned. In this case, the Panel concluded that the USITC's determination with respect to injury rested on a sufficient factual basis. The Panel reached this conclusion in the absence of any reference to the timeframe for the injury analysis in the USITC's determination. As we explained in Section X of this Report, we see no reason to disagree with the Panel's conclusion that the USITC's determination rested on a sufficient factual basis. Therefore, we *uphold* the Panel's findings, in paragraphs 7.260 and 8.1(e)(i) of the Panel Report, that the USITC did not act inconsistently with Article 11.3 of the *Anti-Dumping Agreement* in its application of Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930.

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[559]Panel Report, para. 7.259.

[560]Argentina's other appellant's submission, para. 242.

[561]*Ibid*. (quoting Panel Report, para. 7.185).

[562]*Ibid*., para. 241 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 178).

[563]*Supra*, paras. 358-359.

XII. Findings and Conclusions

365. For the reasons set out in this Report, the Appellate Body:

(a) as regards the Panel's terms of reference:

(i) upholds the Panel's finding, in paragraph 7.27 of the Panel Report, that Section A.4 of Argentina's panel request, in accordance with Article 6.2 of the DSU, sets out with sufficient clarity Argentina's claims that Sections 751(c) and 752(c) of the Tariff Act of 1930, the SAA, and the SPB, are inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*, by virtue of the alleged "irrefutable presumption" contained in those provisions;

(ii) does not need to make a finding on the United States' "contingent" challenge under Article 6.2 of the DSU, with respect to Argentina's claims under Articles 3.7 and 3.8 of the *Anti-Dumping Agreement*, because Argentina does not appeal the Panel's findings on those claims; and

(iii) does not need to make findings on the United States' challenges under Article 6.2 of the DSU to Argentina's conditional appeals (1) under Article 11.3 of the *Anti-Dumping Agreement*, challenging the USDOC "practice" relating to likelihood-of-dumping determinations in sunset reviews, and (2) under Article X:3(a) of the GATT 1994, challenging the USDOC's administration of United States anti-dumping laws, regulations, decisions, and rulings relating to the conduct of sunset reviews;

(b) as regards the SPB:

(i) upholds the Panel's finding, in paragraph 7.136 of the Panel Report, that the SPB is a "measure" subject to WTO dispute settlement; and

(ii) finds that the Panel did not "make an objective assessment of the matter", as required by Article 11 of the DSU, in reaching, on the sole basis of the overall statistics in Exhibit ARG-63, the conclusion that the three scenarios in Section II.A.3 of the SPB are perceived by the USDOC to be determinative/conclusive of the likelihood of continuation or recurrence of dumping. Consequently, the Appellate Body reverses the Panel's findings, in paragraphs 7.166 and 8.1(b) of the Panel Report, that Section II.A.3 of the

SPB is inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*;

(c) as regards the waiver provisions of United States laws and regulations:

(i) upholds the Panel's findings, in paragraphs 7.103, 8.1(a)(i), and 8.1(a)(ii) of the Panel Report, that Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(iii) of the USDOC Regulations are inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*;

(ii) upholds the Panel's findings, in paragraphs 7.128 and 8.1(a)(iii) of the Panel Report, that Section 351.218(d)(2)(iii) of the USDOC Regulations is inconsistent, as such, with Articles 6.1 and 6.2 of the *Anti-Dumping Agreement*, with respect to respondents that file *incomplete* submissions in response to the USDOC's notice of initiation of a sunset review; but does not agree with the Panel that, with respect to respondents that file *no* submission, the failure to accord them the rights detailed in Articles 6.1 and 6.2 renders Section 351.218(d)(2)(iii) of the USDOC Regulations inconsistent, as such, with those provisions; and

(iii) finds that the Panel did not fail to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case", as required by Article 11 of the DSU, in ascertaining the relationship between company-specific and order-wide determinations and in examining the basis on which the USDOC concludes that a respondent's submission constitutes a "complete substantive response";

(d) as regards the factors that an investigating authority is required to examine in a likelihood-of-injury determination:

(i) upholds the Panel's finding, in paragraph 7.273 of the Panel Report, that the obligations set out in Article 3 do not apply to likelihood-of-injury determinations in sunset reviews. Consequently, the Appellate Body does not need to "complete the analysis" and make findings with respect to Argentina's claims that the USITC acted inconsistently with Articles 3.1, 3.2, 3.4, and 3.5 of the *Anti-Dumping Agreement*; and

(ii) finds that the Panel did not err in its interpretation of the term "injury" in Article 11.3 of the *Anti-Dumping Agreement*, or in its analysis with respect to the factors that an investigating authority is required to examine in a likelihood-of-injury determination;

(e) as regards cumulation of the effects of dumped imports:

(i) upholds the Panel's findings, in paragraphs 7.334 and 7.335 of the Panel Report, that Article 11.3 of the *Anti-Dumping Agreement* does not preclude investigating authorities from cumulating the effects of likely dumped imports in the course of their likelihood-of-injury determinations;

(ii) upholds the Panel's finding, in paragraph 7.336 of the Panel Report, that the conditions of Article 3.3 of the *Anti-Dumping Agreement* do not apply in the context of sunset reviews;

(f) as regards the interpretation of the term "likely" in Article 11.3 of the *Anti-Dumping Agreement*, finds that the Panel did not err in its interpretation;

(g) as regards the USITC's determination on likelihood of injury:

(i) finds that the Panel did not err in not finding that the USITC's decision to cumulate the dumped imports was based on an insufficient factual basis, and in not finding that the USITC's decision on cumulation was inconsistent with Article 11.3 of the *Anti-Dumping Agreement*;

(ii) upholds the Panel's finding, in paragraph 7.298 of the Panel Report, that "Argentina has failed to prove that the USITC's determinations concerning the likely volume of dumped imports were WTO-inconsistent";

(iii) upholds the Panel's finding, in paragraph 7.306 of the Panel Report, that "the USITC's determination regarding the likely price effect of dumped imports was based on an objective examination of the evidence in the record"; and

(iv) upholds the Panel's finding, in paragraph 7.312 of the Panel Report, that "under the circumstances of this sunset review, the USITC's determinations regarding the likely consequent impact of the likely dumped imports on the US industry [were] not inconsistent with Article 11.3 of the Agreement";

(h) as regards the timeframe used by the USITC in its likelihood-of-injury determination:

(i) upholds the Panel's findings, in paragraphs 7.193 and 8.1(c) of the Panel Report, that the standard of continuation or recurrence of injury "within a reasonably foreseeable time", as provided in Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930, is not inconsistent with Article 11.3 of the *Anti-Dumping Agreement*; and

(ii) upholds the Panel's findings, in paragraphs 7.260 and 8.1(e)(i) of the Panel Report, that the USITC did not act inconsistently with Article 11.3 of the *Anti-Dumping Agreement* in its application of Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930;

(i) as regards the conditional appeals of Argentina:

(i) even assuming *arguendo* that a "practice" may be challenged as a "measure" in WTO dispute settlement, finds that the record does not allow it to complete the analysis with respect to Argentina's challenge, under Article 11.3 of the *Anti-Dumping Agreement*, to the "practice" of the USDOC regarding the likelihood determination in sunset reviews; and

(ii) finds that the record does not allow it to complete the analysis with respect to Argentina's conditional appeal with respect to Article X:3(a) of the GATT 1994.

366. The Appellate Body recommends that the Dispute Settlement Body request the United States to bring its measures found in the Panel Report, as modified by this Report, to be inconsistent with the *Anti-Dumping Agreement*, into conformity with its obligations under that Agreement.

Signed in the original at Geneva this 12th day of November 2004 by:

Yasuhei Taniguchi
Presiding Member

Georges Abi-Saab
Member

A.V. Ganesan
Member

ANNEX I

WORLD TRADE ORGANIZATION

WT/DS268/5
31 August 2004

(04-3624)

Original: English

UNITED STATES – SUNSET REVIEWS OF ANTI-DUMPING MEASURES ON OIL COUNTRY TUBULAR GOODS FROM ARGENTINA

Notification of an Appeal by the United States
under paragraph 4 of Article 16 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes ("DSU")

The following notification, dated 31 August 2004, from the Delegation of the United States, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel on *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (WT/DS268R) and certain legal interpretations developed by the Panel in this dispute.

1. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the provisions of section 751(c)(4)(B) of the Tariff Act relating to "affirmative" waivers are inconsistent with Article 11.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement"). This finding is in error and is based on erroneous findings on issues of law and related legal interpretations, including, for example, that U.S. law, including section 751(c)(4)(B) of the Tariff Act and section 351.218(d)(2)(iii) of the Department of Commerce's regulations, precludes the Department of Commerce from making an order-wide determination of likelihood of continuation or recurrence of dumping, supported by reasoned and adequate conclusions based on the facts before the agency, where an interested party elects not to participate in the sunset review at the Department of Commerce;[1]

2. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the provisions of section 351.218(d)(2)(iii) of the Department of Commerce's regulations relating to "deemed" waivers are inconsistent with Article 11.3 of the Anti-Dumping Agreement. This finding is in error and is based on erroneous findings on issues of law and related legal interpretations, including, for example, that U.S. law, including section 751(c)(4)(B) of the Tariff Act and section 351.218(d)(2)(iii) of the Department of Commerce's regulations, precludes the Department of Commerce from making an order-wide determination of likelihood of continuation or recurrence of dumping, supported by reasoned and adequate conclusions based on the facts before the agency, where an interested party elects not to participate in the sunset review at the Department of Commerce;[2]

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[1]*See* Panel Report, paras. 7.80-7.103, 8.1(a)(i)-(ii).

[2]*See id.*

3. The United States seeks review by the Appellate Body of the Panel's legal conclusion that provisions of section 351.218(d)(2)(iii) of the Department of Commerce's regulations relating to "deemed" waivers are inconsistent with Articles 6.1 and 6.2 of the Anti-Dumping Agreement. These findings are in error and are based on erroneous findings on issues of law and related legal interpretations, including, for example, that under U.S. law, including section 751(c)(4)(B) of the Tariff Act and section 351.218(d)(2)(iii) of the Department of Commerce's regulations, an exporter that fails to file a complete response to the notice of initiation has been deprived of ample opportunity to submit information in accordance with Article 6.1 or to confront parties with adverse interests under Article 6.2, and which also renders the order-wide likelihood determination inconsistent with Articles 6.1 and 6.2;[3]

4. The United States seeks review by the Appellate Body of the Panel's legal conclusion that provisions of section II.A.3 of the *Sunset Policy Bulletin* are inconsistent with Article 11.3 of the Anti-Dumping Agreement, and, to the extent that the Panel's conclusion is premised on an erroneous assessment of the facts, the United States seeks review of that assessment pursuant to Article 11 of the DSU. This finding is in error and is based on erroneous findings on issues of law and related legal interpretations, including, for example: the Panel's conclusion that the *Sunset Policy Bulletin* is a measure, based solely on its conclusion that the Appellate Body found this in another dispute; the Panel's failure to rely on the meaning of the *Sunset Policy Bulletin* under U.S. municipal law in assessing whether the *Sunset Policy Bulletin* mandates a breach; and the Panel's reliance on the "consistent application" of the *Sunset Policy Bulletin* to conclude that the *Sunset Policy Bulletin* mandates a breach;[4]

5. The United States seeks review by the Appellate Body of the Panel's factual findings regarding U.S. law. These findings are in error and do not represent an objective assessment of the facts as required by Article 11 of the DSU;[5]

6. The United States seeks review by the Appellate Body of the Panel's legal conclusion that Argentina's Panel Request was not inconsistent with Article 6.2 of the DSU. This finding is in error and is based on erroneous findings on issues of law and related legal interpretations, including, for example: the Panel's conclusion that Argentina's panel request was sufficiently clear and presented the problem clearly,[6] the Panel's conclusion that certain claims were within the terms of reference,[7] and the Panel's conclusion that the United States did not establish prejudice.[8]

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[3]See *id.*, paras. 7.107-7.128, 8.1(a)(iii).

[4]*See id.*, paras. 7.134-7.144, 7.152-7.173, 8.1(b).

[5]*See id.*, paras. 7.80-7.128.

[6]*See id.*, paras. 7.10-7.48.

[7]*See id.*, paras. 7.49-7.70.

[8]*See id.*, para. 7.71.

ANNEX II

WORLD TRADE ORGANIZATION

WT/DS268/2
4 April 2003

(03-1912)

Original: English

UNITED STATES – SUNSET REVIEWS OF ANTI-DUMPING MEASURES ON OIL COUNTRY TUBULAR GOODS FROM ARGENTINA

Request for the Establishment of a Panel by Argentina

The following communication, dated 3 April 2003, from the Permanent Mission of Argentina to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 7 October 2002, the Government of the Republic of Argentina requested consultations with the Government of the United States of America pursuant to Article 4 of the World Trade Organization (WTO) Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 17.3 of the Agreement on Implementation of Article VI of GATT 1994 (the Anti-Dumping Agreement) regarding the determinations of the US Department of Commerce (Department) and the US International Trade Commission (Commission) in the sunset reviews of the anti-dumping duty measure on oil country tubular goods (OCTG) from Argentina.

The first consultation was held in Geneva, Switzerland, on 14 November 2002. A second consultation was held in Washington, D.C., on 17 December 2002. While the consultations enabled the parties to gain a better understanding of their respective positions, unfortunately the consultations failed to produce a mutually agreeable solution.

In the original anti-dumping duty investigation of OCTG from Argentina covering the period 1 January 1994 through 30 June 1994, the Department determined that Siderca S.A.I.C. (Siderca), an Argentine producer and exporter of OCTG, was dumping at a margin of 1.36 percent.[1] The Department did not conduct a substantive administrative review of the anti-dumping duty measure on OCTG from Argentina in the five years following its imposition.

On 3 July 2000, the Commission and the Department initiated sunset reviews of the anti-dumping measures on OCTG from Argentina, Italy, Japan, Korea, and Mexico.[2] Based on the Department's determination that the responses submitted by Argentine respondent parties to the initiation notice were "inadequate", the Department conducted an "expedited" sunset review of the anti-dumping duty measure

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[1] Final Determination of Investigation of Sales at Less Than Fair Value of Oil Country Tubular Goods From Argentina, 60 Federal Register 33539 (28 June 1995). The 1.36 percent margin was calculated on the basis of the Department's practice of "zeroing" negative dumping margins.

[2] Notice of Initiation of Five-Year ("Sunset") Reviews, 65 Federal Register 41053 (3 July 2000) (Department's notice); Oil Country Tubular Goods From Argentina, Italy, Japan, Korea, and Mexico, 65 Federal Register 41088 (3 July 2000) (Commission's notice).

applicable to OCTG from Argentina (Department's Determination to Expedite).[3] On the basis of the "expedited" review, the Department determined that termination[4] of the anti-dumping duty measure on OCTG from Argentina would be likely to lead to continuation or recurrence of dumping at 1.36 percent (Department's Sunset Determination).[5]

The Commission determined that termination of the anti-dumping duty measure on OCTG (other than drill pipe – *i.e.*, casing and tubing) from Argentina, Italy, Japan, Korea, and Mexico would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time (Commission's Sunset Determination).[6] The Commission also determined that termination of the anti-dumping duty measure on drill pipe from Japan would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. On 25 July 2001, the Department issued a determination to continue the anti-dumping duty measure on OCTG from Argentina (Department's Determination to Continue the Order).[7]

The Republic of Argentina considers that the Department's Determination to Expedite, the Department's Sunset Determination, the Commission's Sunset Determination, and the Department's Determination to Continue the Order are inconsistent with US WTO obligations, and that certain aspects of US laws, regulations, policies and procedures related to the administration of sunset reviews are inconsistent with US WTO obligations. The Republic of Argentina requests that a panel be established in accordance with Articles 4.7 and 6 of the DSU to address the specific claims related to the US sunset reviews of anti-dumping duty measure on OCTG from Argentina as set forth below.

A. The Department's Determination to Expedite and the Department's Sunset Determination are inconsistent with the Anti-Dumping Agreement and the GATT 1994:

1. US laws, regulations, and procedures regarding "expedited" sunset reviews are inconsistent with Articles 11, 2, 6 and 12 of the Anti-Dumping Agreement. In particular, 19 U.S.C. § 1675(c)(4) and 19 C.F.R. § 351.218(e) operate in certain instances to preclude the Department from conducting a sunset review and making a determination as to whether termination of an anti-dumping duty measure would be likely to lead to continuation or recurrence of dumping, in violation of Articles 11.1, 11.3, 11.4, 2.1, 2.2, 2.4, 6.1, 6.2, 6.6, 6.8, 6.9, 6.10, 12.2, 12.3, and Annex II of the Anti-Dumping Agreement. When a respondent interested party is deemed by the Department to have "waived" participation in the Department's sunset review, US law mandates that the Department find that termination of the order would be likely to lead to continuation or recurrence of dumping, without requiring the Department to conduct a substantive review and to make a determination based on the substantive review.

[3] Oil Country Tubular Goods From Argentina: Adequacy of Respondent Interested Party Responses to the Notice of Initiation, Department of Commerce Memorandum For J. May from E. Cho, No. A-357-810 (22 Aug. 2000).

[4] Referred to as "revocation" under US law.

[5] Final Results of Expedited Sunset Reviews: Oil Country Tubular Goods From Argentina, Italy, Japan, and Korea, 65 Fed. Reg. 66701 (7 Nov. 2000) (together with the Department of Commerce Issues and Decision Memorandum for the Expedited Sunset Reviews of the Antidumping Duty Orders on Oil Country Tubular Goods From Argentina, Italy, Japan, and Korea, dated 31 October 2000, and incorporated by reference into the Department's Sunset Determination).

[6] Oil Country Tubular Goods From Argentina, Italy, Japan, Korea, and Mexico, Inv. Nos. 701-TA-364 (Review), 731-TA-711, and 713-716 (Review), USITC Pub. 3434 (June 2001); 66 Federal Register 35997 (10 July 2001).

[7] Continuation of Countervailing and Antidumping Duty Orders on Oil Country Tubular Goods from Argentina, Italy, Japan, Korea and Mexico, and Partial Revocation of Those Orders from Argentina and Mexico With Respect to Drill Pipe, 66 Fed. Reg. 38630 (25 July 2001).

2. The Department's application of the expedited sunset review procedures in the sunset review of OCTG from Argentina was inconsistent with Articles 11, 2, 6 and 12 of the Anti-Dumping Agreement because: (1) Siderca was deemed to have waived its right to participate in the sunset review, despite its full cooperation with the Department, in violation of Articles 11.1, 11.3, 11.4, 2.1, 2.2, 2.4, 6.1, 6.2, 6.6, 6.8, 6.9, 6.10, 12.2, 12.3 and Annex II; (2) the Department did not in fact conduct a "review" within the meaning of Article 11.3; and the (3) the Department failed to "determine" – as required by Article 11.3 – whether termination of the anti-dumping order would be likely to lead to continuation or recurrence of dumping.

3. The Department's Determination to Expedite the review of Argentina solely on the basis that Siderca's shipments to the United States constituted less than 50 percent of the total exports from Argentina was inconsistent with Articles 11.1, 11.3, 11.4, 2.1, 2.2, 2.4, 6.1, 6.2, 6.6, 6.8, 6.9, 6.10, 12.2, 12.3 and Annex II of the Anti-Dumping Agreement.

4. The Department's Sunset Determination is inconsistent with Article 11.3 of the Anti-Dumping Agreement, and Article X:3(a) of the GATT 1994 because it was based on a virtually irrefutable presumption under US law as such that termination of the anti-dumping duty measure would be likely to lead to continuation or recurrence of dumping. This unlawful presumption is evidenced by the consistent practice of the Department in sunset reviews (which practice is based on US law and the Department's Sunset Policy Bulletin).

5. The Department's application of the standard for determining whether termination of anti-dumping measure would be "likely to lead to continuation or recurrence of dumping" is inconsistent with Articles 11.1, 11.3, 2.1, 2.2, and 2.4 of the Anti-Dumping Agreement. The Department's finding in this case that dumping was likely to recur in the event of termination, and that the likely margin of dumping would be 1.36 percent, is inconsistent with the standard established by Article 11.3 of the Anti-Dumping Agreement. The Department's reliance on the 1.36 percent margin from the original investigation cannot support a determination that dumping would be likely to continue or recur under Article 11.3. In addition, the 1.36 percent margin – calculated on the basis of the Department's practice of "zeroing" negative dumping margins – cannot support the Department's Sunset Determination or the Department's Determination to Continue the Order.

B. The Commission's Sunset Determination was inconsistent with the Anti-Dumping Agreement and the GATT 1994:

1. The Commission's application of the standard for determining whether the termination of anti-dumping duty measure would be "likely to lead to continuation or recurrence of ... injury" was inconsistent with Articles 11, 3 and 6 of the Anti-Dumping Agreement. The Commission failed to apply the plain and ordinary meaning of the term "likely" and instead applied a lower standard in assessing whether injury would continue or recur in the event of termination, in violation of Articles 11.1, 11.3, 11.4, 3.1, 3.2, 3.3, 3.4, 3.5, and 6 of the Anti-Dumping Agreement.

2. The Commission failed to conduct an "objective examination" of the record and failed to base its determination on "positive evidence" regarding whether termination of the anti-dumping duty measure "would be likely to lead to continuation or recurrence" of injury. In particular, the Commission's conclusions with respect to the volume of imports, price effects on domestic like products, and impact of imports of the domestic industry demonstrate the Commission's failure to conduct an objective examination in violation of Articles 11, 3, and 6. The Commission's findings on these issues do not constitute "positive evidence" of likely injury in the event of termination, in violation of Articles 11.1, 11.3, 11.4, 3.1, 3.2, 3.3, 3.4, 3.5, and 6 of the Anti-Dumping Agreement.

3. The US statutory requirements that the Commission determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" (19 U.S.C. § 1675a(a)(1)) and that the Commission "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time" (19 U.S.C. § 1675a(a)(5)) are inconsistent with Articles 11.1, 11.3 and 3 of the Anti-Dumping Agreement.

4. The Commission's application of a "cumulative" injury analysis in the sunset review of the anti-dumping duty measures on OCTG from Argentina was inconsistent with Articles 11.1, 11.3, 3.1, 3.2, 3.3, 3.4 and 3.5 of the Anti-Dumping Agreement. There is no textual basis in the Anti-Dumping Agreement for conducting a cumulative injury analysis in an Article 11.3 review. Assuming *arguendo* that cumulation is permitted in Article 11.3 reviews, then the Commission was required to adhere to the requirements of Article 3.3 (including those related to *de minimis* margins and negligible imports) in the Commission's Sunset Determination. The Commission's cumulative injury analysis in the Commission's Sunset Determination failed to satisfy the Article 3.3 requirements.

Argentina also considers that certain aspects of the following US laws, regulations, policies, and procedures related to the determinations of the Department and the Commission are inconsistent with US WTO obligations, to the extent that any of these measures mandate action by the Department or Commission that is inconsistent with US WTO obligations or preclude the Department or Commission from complying with US WTO obligations:

- Sections 751(c) and 752 of the Tariff Act of 1930, as amended, codified at Title 19 of the United States Code §§ 1675(c) and 1675a; and the US Statement of Administrative Action (regarding the Agreement on Implementation of GATT Article VI) accompanying the Uruguay Round Agreements Act (the SAA), H.R. Doc. No. 103-316, vol. 1;

- The Department's *Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Anti-Dumping and Countervailing Duty Orders*; Policy Bulletin, 63 Federal Register 18871 (16 April 1998) (Sunset Policy Bulletin);

- The Department's sunset review regulations, codified at Title 19 of the United States Code of Federal Regulations § 351.218; and the Commission's sunset review regulations, codified at Title 19 of the United States Code of Federal Regulations §§ 207.60-69 (Subpart F).

Argentina considers that the Department's Determination to Expedite, the Department's Sunset Determination, the Commission's Sunset Determination, the Department's Determination to Continue the Order and the above mentioned US laws, regulations, policies and procedures are inconsistent with the following provisions of the Anti-Dumping Agreement, the GATT 1994, and the WTO Agreement:

- Articles 1, 2, 3, 6, 11, 12, 18 and Annex II of the Anti-Dumping Agreement;
- Articles VI and X of the General Agreement on Tariffs and Trade (GATT) 1994; and
- Article XVI:4 of the WTO Agreement.

Accordingly, Argentina respectfully requests that, pursuant to Article XXIII of the GATT 1994, Article 6 of the DSU, and Article 17 of the Anti-Dumping Agreement, a panel with standard terms of reference be established at the next meeting of the Dispute Settlement Body to examine and find that the measures identified herein are inconsistent with US obligations under the Anti-Dumping Agreement, the GATT 1994, and the WTO Agreement. To that end, I would be grateful if this request could be included in the agenda of the Dispute Settlement Body scheduled for 15 April 2003.

The above text describes the legal basis of the claims. It does not restrict the arguments that Argentina may develop before the panel.

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