WORLD TRADE ORGANIZATION

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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

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TABLE OF ABBREVIATIONS USED IN THIS REPORT

TABLE OF GATT AND WTO CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Australia –	

Short Title	Full Case Title and Citation
US –	

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

four reviews of the anti-dumping duties on Siderca, at the request of the domestic producers in the United States.

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 ", and

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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,

(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]

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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*, .[60]

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 does not flow from the former. The United States Tc l -0.2308ea 0 (inconsis8(d

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 rU Tj 94.5 (

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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*

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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

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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.

(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

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*

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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

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-

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

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*

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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 determ

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

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.

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.c

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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.

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 erencemitted

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

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

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-R*

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

"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.

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[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

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[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 co

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*

(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

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.

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] 6.2 must be demonstr

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,

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]

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

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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.

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

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[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

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 pres1lcdAl.j The Panel rejected Argentina's claims and found that SectAl. 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 l. 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 determinatAl. of likelihood of continuatAl. or recurrence of dumping in sunset reviews, although other factors may also be as important, depending l. the circumstances of the ca se The three factual scenarios in SectAl. II.A.3 of the SPB, which describe how these two factors will be considered in individual determinatAl.s, thus have certain probatAve value, the degree of which may vary from case to case For example, if, under scenario (a) of SectAl. II.A.3 of the SPB, dumping *continued* with substantial margins despite the existence of the anti-dumping duty order, this would be highly probatAve of the likelihood that dumping would continue if the anti-dumping order were revoked Conversely, if, under scenarios (b) and (c) of SectAl. II.A.3 of the SPB, imports ceased after issuance of the anti-dumping duty order, or imports continued but without dumping margins, the probatAve 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 determinatAl. cannot be questAl.ed; however, our concern here is with the possible mechanistic applicatAl. of the three scenarios based l. these factors, such that other factors that may be of equal importance are disregarded.

209. In our view, therefore, in order to objectAvely assess, as required by Article 11 of the DSU, whether the three factual scenarios of SectAl. II.A.3 of the SPB are regarded as determinatAve/conclusAve, it is essential to examine concrete examples of cases where the likelihood determinatAl. of continuatAl. or recurrence of dumping was based solely l. one of the scenarios of SectAl. II.A.3 of the SPB, eve. though the probatAve value of other factors might have outweighed that of the identified scenario Such an examinatAl. requires a qualitatAve assessment of the

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 suggest

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 basis of 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 paragraph 7.166 the sole basis

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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.*

(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

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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

step."[328] The Panel disagreed, finding that, "[t]o the extent that the order-wide determination of

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 0.0eo4herregards en

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 partieh01217 Tw (The Panel then dete.ing)4n5omplete

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 "

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

[370] See Panel Report, para. 7.139.

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

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*

251. Under the legal regime governing sunset reviews in the United States, the investigating

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

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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> …

[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.

> 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

[401] Argentina's second written submission to the Panel, paras. 43 and 47 (quoting Antifriction Bearings from Sweden, *United States Federal Register*, Vol.

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

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[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.
>
> ...

[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 351.218(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 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.

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.

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

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.

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

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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

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 as u", in theTD f [the a30.75 0 9m81a/25 0 rces from which price

> 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]

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*

311. As we have already mentioned, Article

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.

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 proformon in ieda in cum ordernal investigation."

> 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. 8ee("sheer speculation"); para. 84e("unfounded speculation"); para.86e("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. 98e("the [USITC] based its determination on speculation").

[524] Panel Report, para. 7.295.

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*

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:

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[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 iAs long as 4 001.As034he ctat, girs75 -u.1131

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

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consistent manner

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

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

(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 l074875 0 TD -0.2467 Tc 0 .75 Tf 0 Tc 0. TD 0.1388 Tc 1.92393rce's r

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WT/DS268/5

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.

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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

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 Determinati
anti-dumping duty measure on drill pipe
material injury to an industry in the Unite
Department issued a determination to c
(Department's Determination to Continue [illegible][7]

The Republic of Argentina c
Department's Sunset Determination, t
Determination to Continue the Order are
laws, regulations, policies and procedures
US WTO obligations. The Republic of
Articles 4.7 and 6 of the DSU to address
duty measure on OCTG from Argentina as set forth below.

that the Department's Determination to
mission's Sunset Determination, and the
ent with US WTO obligations, and that certain
to the administration of sunset reviews are inc
na requests that a panel be established in acc
cific claims related to the US sunset reviews of

A. The Department's Determination to Expedite and the Department's Sunset Deter
inconsistent with the Anti-Dumpi ng Agreement and the GATT 1994

umping A

laws, regulations, and procedures
rticles 11, 2, 6 and 12 of the Anti-Dumping Agreement.
1.218(e) operate in certain instances to preclude the De
etermination as to whether termination of an ant

set reviews are inco
r, 19 U.S.C. § 1675(c)(4) an
om conducting a sunset revie
dty (measure) would be likely to

4. The Commission's application of a "cumulative" injury analysis in the sunset review of the Page