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UNITED STATES - SUNSET REVIEWS OF ANTI-DUMPING MEASURES ON OIL COUNTRY TUBULAR GOODS FROM ARGENTINA (DS268)

Report of the Panel

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[redacted]

ANNEX E

QUESTIONS AND ANSWERS

[2] Pursuant to the explanations provided by the United States at the beginning of the second substantive meeting of the Panel with parties, the United States provided a revised version of its written answers to the questions of the Panel in connection with the first substantive meeting of the Panel with parties. In this revised version, the full text of paragraph 14 of the original document dated 8 January 2004, as well as similar sentences found in paragraph 17 (the penultimate sentence), paragraph 41 (the second sentence), and paragraph 44 (the latter part of the third sentence) were deleted.

[3] Pursuant to the explanations provided by the United States at the beginning of the second substantive meeting of the Panel with parties, the United States provided a revised version of its written answers to the questions of Argentina in connection with the first substantive meeting of the Panel with parties. In this revised version, edits were made to paragraph 14 of the original document dated 8 January.

ANNEX F

REQUEST FOR THE ESTABLISHMENT
OF A PANEL

I. INTRODUCTION

1.1 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 Understanding on Rules and Procedures Governing the Settlement of Disputes ("the *DSU*"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("the GATT 1994"), and Article 17.3 of the Agreement on Implementation of Article VIh0 Tw ( ) 6
GATT 1994

2.2 The only exporter from Argentina that was party to the original investigation was Siderca. The dumping margin calculated for Siderca was 1.36 per cent, which also established the basis for the anti-dumping duty imposed. The USDOC calculated a residual duty at the same rate, i.e. 1.36 per cent for other Argentine exporters.

2.3 Following the imposition of the duty, Siderca stopped exporting OCTG into the US market.

2.4 During the five-year lifespan of the anti-dumping duty, four administrative reviews were initiated by the USDOC at the request of the domestic producers of OCTG in the United States. In these administrative reviews, Siderca stated that it had not made any shipment for consumption in the United States and, following its analysis, the USDOC agreed with Siderca and rescinded the administrative review.

2.5 On 3 July 2000, the USDOC initiated, on its own initiative, a sunset review of the anti-dumping duty on OCTG from Argentina. The US producers, petitioners in the sunset review, participated in the sunset review and filed substantive responses to the USDOC. Siderca also participated and filed a substantive response on 2 August 2000. On 22 August 2000, the USDOC decided to conduct an expedited sunset review under US law because Siderca was the lone respondent and accounted for significantly less than the threshold provided for in the Regulations of 50 per cent of total imports of OCTG from Argentina to the United States in the 1995-1999 period.

2.6 In its final determination, the USDOC determined that dumping was likely to continue or recur at 1.36 per cent should the duty on OCTG from Argentina be revoked and reported that to the USITC as the likely margin of dumping.

2.7 The USDOC's final likelihood of continuation or recurrence of dumping determination, in which it found that dumping was likely to continue or recur, was published on 7 November 2000. In June 2001, the USITC published its final injury determination in which it also found a likelihood of continuation or recurrence of material injury. On 25 July 2001, the USDOC published the notice of continuation of the anti-dumping duty on OCTG from Argentina.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. ARGENTINA

3.1 Argentina requests the Panel:

1. To find that 19 U.S.C. § 1675(c)(4) of the Tariff Act of 1930 and 19 C.F.R. § 351.218(d)(2)(iii) of the USDOC's Sunset Regulations (the "waiver provisions") violate:

   - Article 11.3 of the Anti-Dumping Agreement because the waiver provisions mandate that the USDOC find likelihood of continuation or recurrence of dumping without the conduct of a "review," without any analysis and, hence, without the required "determination" of Article 11.3;

   - Article 6.1 of the Anti-Dumping Agreement because the waiver provisions preclude respondent interested parties from being able to present evidence in sunset reviews;

   - Article 6.2 of the Anti-Dumping Agreement because the waiver provisions deny respondent interested parties the ability to defend their interest in sunset reviews;

2. To find that the provisions of 19 U.S.C. § 1675a(a)(1) and (5) of the Tariff Act of 1930 are inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 11.1 and 11.3 of the Anti-Dumping Agreement because these statutory requirements provide for an open-ended

analysis for possible future injury by requiring that the USITC determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" and that the USITC "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time";

3. To find that the irrefutable presumption embodied in Sections 751(c) and 752(c) of the Tariff Act of 1930, the provisions of Statement of Administrative Action ("the SAA") relating to sunset reviews, and Section II.A.3 of the Sunset Policy Bulletin ("the SPB") and demonstrated in the USDOC's consistent practice in sunset reviews violates Article 11.3 because the principal obligation of Article 11.3 of the Anti-Dumping Agreement requires that anti-dumping measures be terminated after five years of imposition, unless the authorities satisfy the requirements for maintenance of the measure;

4. To find that The USDOC's determination to conduct an expedited sunset review and its conduct of an expedited review, on the basis that Siderca's OCTG exports to the United States were less than 50 per cent of the total OCTG exports from Argentina to the United States, and the application of waivers provisions were inconsistent:

_ with the requirements of Articles 11.3, 11.4, 6.1, 6.2, 6.8, 6.9 and Annex II of the Anti-Dumping Agreement because notwithstanding Siderca's full cooperation and submission of a complete substantive response consistent with the USDOC's regulatory requirements, the USDOC deemed Siderca's response to be inadequate solely on the basis of import data and, hence, denied Siderca the opportunity to defend its interest;

_ with Article 11.3 of the Anti-Dumping Agreement because the USDOC rendered a determination of likelihood of continuation or recurrence of dumping without any analysis;

_ with Article 6.1 of the Anti-Dumping Agreement because the USDOC failed to give Siderca the opportunity to present evidence;

_ with Article 6.2 because the USDOC denied Siderca the right to defend its interests;

_ with Article 6.8 and Annex II of the Anti-Dumping Agreement because the USDOC did not comply with these provisions in its use of facts available;

5. To find that the USDOC's determination to conduct an expedited sunset review and the USDOC's sunset determination, which incorporated the USDOC's *Issues and Decision Memorandum* by reference, violated Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because the USDOC failed to provide public notice and explanations in sufficient detail of its findings on all issues of fact and law;

6. To find that The USDOC's sunset determination was inconsistent with Article 11.3 of the Anti-Dumping Agreement because:

_ the USDOC failed to apply the disciplines of Article 2;

_ the USDOC failed to conduct a prospective analysis;

_ the USDOC failed to make a determination of "likely" (or "probable") dumping;

_ the USDOC failed to base its determination on positive evidence;

- the USDOC's reliance on the cessation of Siderca's exports into the United States in the wake of the anti-dumping measure as the sole basis for its likelihood determination was inconsistent with Article 11.3 of the Anti-Dumping Agreement;

- the USDOC's reliance on the original margin of dumping of 1.36 per cent, calculated using the WTO-inconsistent practice of zeroing negative margins for purposes of its likelihood decision, as well as its reporting of that margin to the USITC was inconsistent with Article 11.3 and Article 2 of the Anti-Dumping Agreement;

7. Separate and apart from whether US anti-dumping laws and regulations regarding sunset reviews are deemed to establish an unlawful presumption, or are otherwise found to be

13. To suggest that the United States implement the Panel's recommendations by terminating the anti-dumping duty on OCTG from Argentina and by repealing its WTO-inconsistent laws, regulations, and procedures or by amending such laws, regulations, and procedures to eliminate the WTO-inconsistencies.

B. UNITED STATES

3.2 The United States requests the Panel to reject Argentina's claims in their entirety. The United States requests the Panel to find that the claims set forth in paragraph 3.1 beyond those found in Argentina's panel request are not within the Panel's terms of reference.

IV. ARGUMENTS OF THE PARTIES

4.1

6.6 Second, **Argentina** argues that the Panel should make findings regarding Argentina's claim concerning the use by the USDOC of the original dumping margin, which, in Argentina's view, had been calculated on the basis of the so-called methodology of zeroing.

6.7 The **United States** submits that the Panel should exercise judicial economy and not make any findings regarding this aspect of Argentina's claim.

6.8 **We** note that in paragraph 7.219 below we found that the USDOC erred in basing its factual finding that dumping had continued over the life of the measure on the existence of the margin of dumping from the original investigation. We therefore concluded that the factual basis of the USDOC's determination that dumping had continued over the life of the measure was improper. In paragraph 7.223, we stated that, having found that the USDOC erred in relying on this original dumping margin, we did not analyse the issue of whether that margin had been calculated through zeroing. We therefore decline to make additional findings in this regard.

6.9 Third, **Argentina** submits that the Panel should make findings regarding the USDOC's reliance on the post-order decline in the volume of imports of OCTG from Argentina.

6.10 The **United States** argues that the Panel should exercise judicial economy and not make any findings regarding this aspect of Argentina's claim.

6.11 **We** note that in paragraphs 7.201-7.206 below, we made the relevant factual findings regarding Argentina's claim challenging the USDOC's determinations in the OCTG sunset review. In particular, in paragraph 7.202, we observed as a matter of fact that the USDOC had based its likelihood determination on the facts that dumping had continued over the life of the measure and that import volumes of the subject product had declined. It is, therefore, clear that we have made relevant factual findings in this regard. As far as legal findings are concerned, we note that we have decided Argentina's claim regarding the USDOC's likelihood determinations in the OCTG sunset review. We have found that the USDOC's reliance on the existence of the original dumping margin was inconsistent with Article 11.3 of the Anti-Dumping Agreement. We therefore did not need to address whether the USDOC's reliance on declined import volumes was yet another action inconsistent with that article. Argentina argues that we should make a finding in this regard in case our decision is appealed and the Appellate Body finds that the USDOC's reliance on the original dumping margin was in fact consistent with Article 11.3. We do not consider, however, that it would be appropriate to make an additional legal finding based on the hypothetical situation Argentina

B. REQUEST OF THE UNITED STATES

6.24 The **United States** requests the Panel to make certain modifications to paragraphs 7.85 and 7.91 to prevent a potential misunderstanding regarding the legal basis of the provisions of US law governing affirmative and deemed waivers. More particularly, the United States argues that under US law the provisions that apply to deemed waivers are found exclusively in the Regulations, not the Statute. The modifications that the United states is suggesting are aimed at clarifying this issue.

6.25 **Argentina** disagrees with the United States with respect to both paragraphs and opines that although the provision that creates the deemed waiver category is found in the Regulations, the Statute is also relevant with respect to the provisions applicable to deemed waivers in that it is the Statute, and not the Regulations, that sets out the legal consequence of deemed waivers.

6.26 **We** note that, as stated in the two paragraphs cited by the United States, under US law it is the USDOC's Regulations, and not the Statute, which creates the deemed waivers category. Section 751(c)(4)(A) of the Tariff Act provides that interested parties may elect to waive participation in the USDOC part of a sunset review and limit their participation to the USITC part. Section 351.218(d)(2)(iii) of the USDOC's Regulations, however, describes the situations in which in the US.7449 Tf -0.0829 Tc 18168 Tcd-er Tj -237 -12.75 0 Twt3BOC

6.34 **Argentina** disagrees with the United States and submits that the Panel should reject the US comment because the application of waiver provisions and the conduct of an expedited sunset review in the OCTG sunset review precluded Siderca from having the opportunity to request a hearing.

6.35 **We** note our factual finding in paragraph 7.235 that in the OCTG sunset review, which took the form of an expedited sunset review under US law, Siderca did not have an opportunity to request a hearing because US law precluded such an opportunity. This is, in our view, enough ground to make a decision as to the WTO-consistency of the procedural rights provided to interested parties in the OCTG sunset review. In other words, we disagree with the view that in order to be able to challenge the US investigating authorities' failure to provide an opportunity for a hearing in the OCTG sunset review, Siderca had to make such a request and have it denied even though it was evident that such a request would not be granted as a matter of US law. We therefore decline to make any modification to our report in this regard.

6.36

> permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

7.4 Thus, together, Article 11 of the *DSU* and Article 17.6 of the Anti-Dumping Agreement set out the standard of review we must apply with respect to both the factual and legal aspects of our examination of the claims and arguments raised by the parties.[9]

7.5 In light of this standard of review, in examining the claims under the Anti-Dumping Agreement in the matter referred to us, we must evaluate whether the United States measures at issue are consistent with relevant provisions of the Anti-Dumping Agreement. We may and must find them consistent if we find that the United States investigating authorities have properly established the facts and evaluated them in an unbiased and objective manner, *and* that the determinations rest upon a "permissible" interpretation of the relevant provisions. Our task is not to perform a *de novo* review of the information and evidence on the record of the underlying sunset review, nor to substitute our judgment for that of the US authorities, even though we might have arrived at a different determination were we examining the record ourselves.

2. Burden of Proof

7.6 We recall that the general principles applicable to burden of proof in WTO dispute settlement

7.8 Second, the United States contends that certain claims presented in Argentina's first submission are not within our terms of reference because they were not raised in Argentina's panel request. These are:

- Argentina's claim challenging the US practi

not intended to set out additional claims that are not found elsewhere in the request. According to Argentina, therefore, even if page four is severed from the rest of its panel request, the effect would be minimal.[14]

7.13 **We** note that, under Article 7 of the *DSU*, it is Argentina's panel request that determines our terms of reference in these proceedings. Article 6.2 of the *DSU* Tj emness 1.7064 99( ) Tj 0 -12 T1.25 91 11.25
minimal.

DSU

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section III.A of its second written submission, Argentina extends the scope of this claim to Section 351.218(d)(2)(iii) of the Regulations. **Argentina** submits that the Panel should reject the US allegation.

7.21 **We** note that section A.1 of Argentina's panel request reads, in relevant part:

> ...In particular, 19 U.S.C. § 1675(c)(4) and 19 C.F.R. § 351.218(e) operate in certain instances to preclude the Department from conducting a sunset review and making a determination as to whether termination of an anti-dumping duty measure would be likely to lead to continuation or recurrence of dumping, in violation of Articles 11.1, 11.3...of the Anti-Dumping Agreement. When a respondent interested party is deemed by the Department to have "waived" participation in the Department sunset review, US law mandates that the Department find that termination of the order would be likely to lead to continuation or recurrence of dumping, without requiring the Department to conduct a substantive review and to make a determination based on the substantive review. (emphasis added)

7.22 We note that, as the United States also concedes[18], the narrative part of section A.1 clearly refers to US law's provisions relating to deemed waivers and asserts that the USDOC is precluded from making the requisite determination in these cases. We therefore consider that the text of Argentina's panel request makes it sufficiently clear that Argentina could pursue a claim challenging Section 351.218(d)(iii) of the Regulations, which contains the provision that creates the deemed waivers category under US law.

7.23 Furthermore, we note that the United States also acknowledges that this alleged extension of Argentina's claim did not cause any prejudice to the United States.[19]

7.24 We therefore decline the US request for a preliminary ruling in this regard.

(ii) Section VII.B.2 of Argentina's first written submission

7.25 The **United States** argues that section VII.B.2 of Argentina's first written submission contains claims regarding 19 U.S.C. 1675(c) and 1675a(c), the SAA, and the SPB. However, section A of the panel request refers to 19 U.S.C. 1675(c)(4) only and does not refer to the other provisions of 19 U.S.C. 1675(c), 19 U.S.C. 1675a(c), the SAA, or the SPB. According to the United States, therefore, these portions of Argentina's claims are outside the Panel's terms of reference and have to be disregarded by the Panel. **Argentina** submits that the Panel should reject the US allegation.

7.26 **We** note that Section A.4 of Argentina's panel request provides:

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

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[18] Footnote 26 to the Response of the United States to Question 22 from the Panel Following the Second Meeting.

[19] First Written Submission of the United States, footnote 103; footnote 26 to the Response of the United States to Question 22 from the Panel Following the Second Meeting.

7.27 We note that section A.4 of Argentina's panel request takes issue with US law's provisions relating to the likelihood of continuation or recurrence of dumping determinations. In addition to this general reference, the mentioned section also cites the SPB and the USDOC's practice in this regard. In our view, this section is sufficiently clear to inform the United States that Argentina may pursue a claim to challenge the provisions of US law regarding the alleged irrefutable presumption under US law concerning the likelihood of continuation or recurrence of dumping determinations in sunset reviews. We consider that the references to 19 U.S.C. 1675(c), 19 U.S.C. 1675a(c) and the SAA on page four of the panel request, viewed in conjunction with section A.4, further clarify that Argentina can invoke these provisions of US law in its first written submission to the Panel.

(iii) Section VII.E.1 of Argentina's first written submission

7.28 The **United States** argues that section VII.E.1 of Argentina's first written submission raises a claim regarding the United States' administration of its laws, regulations, decisions, and rulings with respect to sunset reviews in violation of Article X:3(a) of the GATT 1994. However, section A.4 of the panel request only challenges the OCTG sunset determination in this regard, rather than all US laws, regulations, decisions, and rulings with respect to all sunset reviews. **Argentina** submits that the Panel should reject the US allegation.

7.29 **We** need not, and do not, address this aspect of the US request for a preliminary ruling here given that this claim was submitted by Argentina as an alternative to its claim regarding the alleged irrefutable presumption under US law regarding the likelihood of continuation or recurrence of dumping determinations and that we did not address it[20].

(iv) Section VIII.C.2 of Argentina's first written submission and section III.D.2 of its second written submission

7.30 The **United States** argues that section VIII.C.2 of Argentina's first written submission and section III.D.2 of its second written submission contains a claim regarding the USITC's application of 19 U.S.C. 1675a(a)(1) and (5) in the instant sunset review even though section B.3 of the panel request is limited to US law "as such" and makes no reference to the instant sunset review. **Argentina** submits that the Panel should reject the US allegation.

7.31 **We** note that section B of Argentina's panel request reads, in relevant part:

> **B. The Commission's Sunset Determination was inconsistent with the Anti-Dumping Agreement and the GATT 1994:**
>
> ...
>
> 3. The US statutory requirements that the Commission determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" (19 U.S.C. § 1675a(a)(1)) and that the Commission "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time" (19 U.S.C. § 1675a(a)(5)) are inconsistent with Articles 11.1, 11.3 and 3 of the Anti-Dumping Agreement. (emphasis added)

7.32 On its face, section B.3 of Argentina's panel request seems to be limited to the US statutory provisions and does not refer to the USITC's application of these statutory provisions in the sunset review at issue. However, the heading of section B refers to the USITC's determinations in this sunset review. Therefore, we consider that the text of section B, including the heading, is sufficiently clear

[20] See,

to inform the United States that Argentina may challenge the application of the cited statutory prm1age

that Argentina could be raising a claim aimed against US law as such concerning this alleged irrefutable presumption.

(viii) Conclusion

> Commission's findings on these issues do not constitute "positive evidence" of likely injury in the event of termination, in violation of Articles 11.1, 11.3, 11.4, 3.1, 3.2, 3.3, 3.4, 3.5, and 6 of the Anti-Dumping Agreement.
>
> 3. The US statutory requirements that the Commission determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" (19 U.S.C. § 1675a(a)(1)) and that the Commission "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time" (19 U.S.C. § 1675a(a)(5)) are inconsistent with Articles 11.1, 11.3 and 3 of the Anti-Dumping Agreement.

7.44 We note that sections B.1 and B.2 contain a number of references to specific paragraphs of Articles 11 and 3 of the Anti-Dumping Agreement and a general reference to Article 6. Section B.1 contains Argentina's claim regarding the standard applied by the USITC in the instant sunset review, whereas section B.2 deals with the USITC's alleged failure to carry out an objective examination. We note, however, that with respect to both claims, Argentina has not invoked Article 6 in its submissions to the Panel during these proceedings. Consequently, in our report, we have not made any findings with regard to Article 6 under these two claims. We therefore need not, and do not, rule on the US request for a preliminary ruling concerning the general references to Article 6 of the Anti-Dumping Agreement in sections B.1 and B.2 of Argentina's panel request.

7.45 Turning to section B.3, we note that this section contains a general reference to Article 3, as well as specific references to two individual paragraphs of Article 11 of the Anti-Dumping Agreement. We also note that in its submissions to the Panel, although Argentina cited various subparagraphs of Article 3 in support of its claim challenging US law's provisions regarding the time-frame on the basis of which the USITC carries out its likelihood determinations, it only developed arguments under paragraphs 7 and 8 thereof. Therefore, the issue is whether section B.3 of Argentina's panel request was sufficiently clear to inform the United States that Argentina could invoke Articles 3.7 and 3.8 as part of this claim.

7.46 As we have already stated, Article 3 contains, in its various paragraphs, detailed rules dealing with injury determinations in anti-dumping investigations. These provisions govern different aspects of injury determinations. Paragraphs 7 and 8, in their turn, deal with threat of material injury determinations in anti-dumping investigations. Article 3 sets out certain factors to be considered in threat of material injury determinations whereas Article 3.8 requires that special care be exercised in the application of anti-dumping measures on the basis of a threat of material injury. Among other things, Article 3.7 also contains provisions regarding the timing aspect of threat of material injury determinations. In this context, we note that the chapeau of Article 3.7 reads in the relevant part:

> A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent[10]....

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[10] One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future

"imminent", "within a reasonably foreseeable time" and "over a longer period of time" in section B.3 of Argentina's panel request demonstrates that the panel request was sufficiently clear to allow the United States to expect that Argentina could be relying on Articles 3.7 and 3.8 in its submissions to the Panel in this regard. We therefore conclude that although Article 3 of the Agreement contains multiple obligations that apply to different aspects of injury determinations, in the circumstances of the present proceedings, section B.3 of Argentina's panel request was sufficiently clear to inform the United States about the nature of the claim that could be pursued by Argentina.

(i) Conclusion

7.48 In conclusion, we decline the US request for preliminary rulings regarding the citation of Articles 6 and 3 of the Anti-Dumping Agreement in their entirety in sections B.1 through B.3 of Argentina's panel request.

2. Certain Claims That Have Allegedly Not Been Raised in Argentina's Panel Request

7.49 The **United States** asserts that certain claims that appear in Argentina's first written submission are not within our terms of reference because these claims have not been raised in Argentina's panel request.

7.50 **Argentina** argues that none of the matters referred to by the United States in this context are new because they are all found in Argentina's panel request. Further, Argentina submits that in order for an allegation of inconsistency with Article 6.2 to prevail, the defending party has to prove actual prejudice resulting from the alleged deficiency, which, according to Argentina, the United States has not done so far.

7.51 Claims which, in the United States' view, are outside our terms of reference and our analysis with respect to each of them are as follows:

(a) Argentina's claim challenging the US practice as such and as applied in the instant sunset review regarding the alleged irrefutable presumption in sunset reviews

7.52 The **United States** submits that Argentina's claim challenging the US practice as such and as applied in the instant sunset review regarding the alleged irrefutable presumption in sunset reviews is not included in its panel request and therefore the Panel should find these claims to be outside its terms of reference.

7.53 **Argentina** argues that section A.4 of its panel request contains both an "as such" and an "as applied" claim regarding the US practice concerning the alleged irrefutable presumption in sunset reviews.

7.54 **We** note that section A.4 of Argentina's panel request reads:

> 4. The Department's Sunset Determination is inconsistent with Article 11.3 of the Anti-Dumping Agreement, and Article X:3(a) of the GATT 1994 because it was based on a virtually irrefutable presumption under US law as such that termination of the anti-dumping duty measure would be likely to lead to continuation or recurrence of dumping. This unlawful presumption is evidenced by the consistent practice of the Department in sunset reviews (which practice is based on US law and the Department's Sunset Policy Bulletin). (emphasis added)

7.55 We also note that we did not rule on Argentina's claim regarding the USDOC's practice as such in this regar

7.63 **We** note that this aspect of the US request for a preliminary ruling is the same as the one the United States raised in the context of its challenge regarding page four of Argentina's panel request. Therefore, on the basis of our above analysis (*supra*, para. 7.29) we decline the US request here.

(d) Argentina's claim regarding the USITC's sunset determinations in the instant sunset review

7.64 The **United States** contends that section VIII.C.2 of Argentina's first written submission contains a claim regarding the USITC's application of 19 U.S.C. 1675a(a)(1) and (5) in the instant sunset review. According to the United States, however, the relevant portion of Argentina's panel request, section B.3, is limited to the US statutory provisions "as such" and makes no reference to the instant sunset review.

7.65 **Argentina** asserts that the heading of section B of its panel request clearly states that Argentina is also challenging the application of the US statutory provisions by the USITC in the instant sunset review.

7.66 **We** note that this aspect of the US request for a preliminary ruling is the same as the one the United States raised in the context of its challenge regarding page four of Argentina's panel request. Therefore, on the basis of our above analysis (*supra*, paras. 7.31-7.32) we decline the US request here.

(e) Argentina's consequential claims under Articles 1 and 18 of the Anti-Dumping Agreement, Article VI of the GATT 1994 and Article XVI:4 of the WTO Agreement

7.67 The **United States** submits that Article VI of the GATT 1994, Articles 1 and 18 of the Anti-

United States raised in the context of its challenge regarding page four of Argentina's panel request. Therefore,

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of precision with respect to certain parts of Argentina's panel request.[23] However, we consider that without supporting arguments, this simple allegation can not be taken to establish prejudice.[24]

C. CLAIMS REGARDING US LAW[25] AS SUCH

1. Waiver Provisions under US Law

(a) Arguments of parties

(i) Argentina

7.72 Argentina argues that Section 751(c)(4) of the Tariff Act and Section 351.218(d)(2)(iii) of the Regulations ("hereinafter "waiver provisions"), which relate to the circumstances in which an exporter waives its right to participate in a sunset review, are inconsistent with Article 11.3 of the Agreement. Argentina submits that these waiver provisions, under certain circumstances, direct the USDOC to find likelihood of continuation or recurrence of dumping without carrying out a substantive review as required under Article 11.3. Argentina contends that Article 11.3 requires the investigating authority to take an active role in sunset reviews. In order to make the required determination under Article 11.3, the investigating authority has to gather and evaluate relevant facts. It can not passively assume that dumping is likely to continue or recur.

7.73 According to Argentina, the US waiver provisions also violate Articles 6.1, 6.2 and consequently 11.4 of the Agreement because they deny exporters involved in a sunset review the opportunity to submit evidence to the investigating authority and to defend themselves in sunset reviews.

(ii) United States

7.74 According to the United States, apart from the cross-references in Articles 11.4 and 12.3, Article 11.3 is the only provision in the Agreement that sets out the rules that govern sunset reviews. Aside from the obligations set out in these provisions, the Agreement leaves the conduct of sunset reviews to the discretion of the investigating authorities. Article 11.3 does not require the investigating authorities to conduct a full sunset review, as defined under US law, in all cases. Investigating authorities would have wasted their and some private parties' resources had they been required to conduct a full sunset review in all cases. The United States argues that the waiver provisions simply determine the factual basis upon which the USDOC will make sunset determinations and in no way prevent the USDOC from making the requisite likelihood determination under Article 11.3. The waiver provisions effectuate the expeditious completion of sunset reviews *vis-à-vis* interested parties that fail to submit substantive responses to the notice of initiation of a sunset review, as allowed under Article 6.14 of the Agreement.

7.75 The United States also contends that the waiver provisions do not contradict Articles 6.1 and 6.2 of the Agreement. The United States argues that US law provides interested parties in sunset reviews with ample opportunity to submit evidence and to defend their interests as required in these provisions. According to the United States, since the evidentiary standards for expedited sunset

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[23] See, for instance, First Written Submission of the United States, para. 110; Second Oral Submission of the United States, para. 41.

[24] We find support for this approach in the Appellate Body decision in *Korea-Dairy* and the panel decision in *HFCS*. See, Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea – Dairy*"), WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I,

> An interested party described in section 1677(9)(A) or (B) of this title may elect not to participate in a review conducted by the administering authority under this subsection and to participate only in the review conducted by the Commission under this subsection.
>
> (B) Effect of waiver
>
> In a review in which an interested party waives its participation pursuant to this paragraph, the administering authority shall conclude that revocation of the order or termination of the investigation would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) with respect to that interested party.[27] (emphasis added)

7.82 Next, we turn to Section 351.218(d)(2) of the USDOC's Sunset Regulations, which provides in relevant part:

> (2) Waiver of response by a respondent interested party to a notice of initiation–
>
> (i) Filing a Statement of Waiver. A respondent interested party may waive participation in a sunset review before the Department under Section 751(c)(4) of the Act by filing a Statement of Waiver with the Department, not later than 30 days after the date of publication in the Federal Register of the notice of initiation. If a respondent interested party waives participation in a sunset review before the Department, the Secretary will not accept or consider any unsolicited submission093 Tw (Department, t

Act, an interested party in a sunset review may elect to waive its right to participate in the USDOC part of a sunset review. Section 351.218(d)(2)(i) of the Regulations provides that interested exporters who wish to waive participation may do so by submitting a statement of waiver to the USDOC. Under Section 351.218(d)(2)(iii) of the Regulations, an exporter's failure to submit a complete substantive response to the notice of initiation is deemed to constitute a waiver of its right to participate in the USDOC proceedings. In either case, the application of Section 1675(c)(4) of the Tariff Act leads to the same result: The USDOC "shall" find likelihood of continuation or recurrence of dumping with respect to an exporter which waives its right to participate.

7.85

of positive evidence that dumping is likely to continue or recur should the measure be revoked. The obligation to make such a determination precludes an investigating authority from simply assuming that likelihood exists. The authority must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination.[30]

7.89 Accordingly, we consider that Article 11.3 requires that an investigating authority's determination that dumping is likely to continue or recur must be supported by reasoned and adequate conclusions based on the facts before it in a sunset review. We will therefore consider whether the waiver provisions of US law prevent the USDOC from making such a determination in situations where an interested party has waived its right to participate in a sunset review .[31]

Examination of the consistency of the waiver provisions

7.90 In the context of its claim under Article 11.3 of the Agreement, Argentina is challenging the provisions of US law relating to both affirmative and deemed waivers.[32] We will, therefore, analyse both of these two types of waivers in light of the investigating authorities' obligation to determine likelihood of continuation or recurrence of dumping under Article 11.3.

Deemed waivers

Thus, the USDOC is precluded from taking into consideration, in its determination with respect to a given exporter, the facts submitted by that exporter (or any other facts before it that might be relevant to its determination), and it is further precluded from receiving, much less considering, any other facts relevant to this question. To the contrary, it is required to make an affirmative determination on the basis of one fact alone: the failure of the exporter to submit a complete substantive response to the notice of initiation of a sunset review.[34] In our view, this can not be a determination supported by reasoned and adequate conclusions based on the facts before an investigating authority.

7.94 The second situation that may lead to a deemed waiver is failure to respond at all to the notice of initiation of a sunset review. In this case, the exporter concerned neither explicitly waives its right to participate nor submits any information to the USDOC. Under Section 351.218(d)(2)(iii) of the Regulations, this situation is also deemed to constitute a waiver of participation.[35] Pursuant to Section 751(c)(4)(B) of the Tariff Act, the USDOC is required to find likelihood with respect to the exporter that remains silent following the publication of the notice of initiation.

7.95 We recall our view that Article 11.3 requires that an investigating authority's determination that dumping is likely to continue or recur be supported by reasoned and adequate conclusions based on the facts before the authority in a sunset review. In the factual situation we are now analyzing, the failure of the exporter to put any information before the USDOC may mean that the USDOC has little or no information before it that is relevant to whether dumping by that exporter is likely to continue or recur (although some relevant evidence, such as the results of administrative reviews, may nevertheless be available). Such non-cooperation clearly is not without consequences for the exporter. Under these circumstances, the USDOC may, consistent with the terms of Article 6.8 and Annex II of the Agreement, resort to the use of the facts available, including information from secondary sources. As Annex II clearly indicates, "this situation could lead to a result which is less favourable to the party than if the party did cooperate". It is clear to us that in this context, the USDOC may have no choice but to make its determination on the basis of a more limited and less robust record than would exist had the exporter co-operated. This does not, however, mean that the
35 USDOC may be automatically authorized, and indeed required, to make an affirmative find5 -24.ret2ieca3owinl.5 0

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Affirmative waivers

7.96 Under Section 751(c)(4)(A) of the Tariff Act and Section 351.218(d)(2)(i) of the Regulations, an exporter may file a statement of waiver declaring that it will not participate in the USDOC portion

response to the notice of initiation, that final determination will be made either through a full or an expedited sunset review. The United States, therefore, submits that the waiver provisions do not violate Article 11.3 of the Agreement because they do not determine, in and of themselves, the final outcome of a sunset review; they only determine the outcome of the first step.[41]

7.101 Even focusing on the final order-wide determination, we find the US argument unconvincing. As explained above, Article 11.3 requires that an investigating authority's determination that continuation or recurrence of dumping is likely must be supported by reasoned and adequate conclusions based on the facts before it. The United States concedes that company-specific likelihood determinations are "considered" when making an order-wide likelihood determination, and argues only that they do not determine, in and of themselves, the order-wide result.[42] To the extent that the

defend their interests. Therefore, no matter which one of the above-cited two approaches is followed

7.119 In order to evaluate whether the provisions of US law regarding deemed waivers fall foul of Articles 6.1 and 6.2, we must first examine the precise implications of a deemed waiver on an exporter's ability to participate in a sunset review. We shall then analyse separately two factual situations that lead to a deemed waiver, i.e. failure to submit a complete response to the notice of initiation and failure to respond at all.

7.120 We recall that Section 751(c)(4)(B) of the Tariff Act requires the USDOC to make an

consideration by the USDOC in its order-wide analysis for the country as a whole.[47] According to the United States, therefore, deemed waivers provisions of US law are not inconsistent with the provisions of Article 6.1 of the Agreement.

7.125 In our view, to the extent that the order-wide determination of likelihood is based in whole or in part upon a company-specific determination that was established inconsistently with Articles 6.1 and 6.2 of the Agreement, we do not see how the order-wide determination can be interpreted as being consistent with these two provisions. We consider that the violations of Articles 6.1 and 6.2 at the company-specific level would necessarily taint the USDOC's order-wide determination. Assuming *arguendo* that the USDOC does evaluate this information in its order-wide analysis consistently with the requirements of Articles 6.1 and 6.2, that can not cure the inconsistency stemming from the USDOC's failure to consider that information in the company-specific determination relating to the exporter submitting the information.

7.126 Further, the United States has not clarified to us in what ways and for what purpose information submitted by an exporter that is not being used in the company-specific determination conducted for that particular exporter can be used in the order-wide sunset determination for the country subject to the sunset review. For instance, in a sunset review where all exporters either failed to respond at all or submitted incomplete responses, the USDOC would have to make an affirmative likelihood determination with respect to all exporters by virtue of Section 751(c)(4)(B) of the Tariff Act, without taking into account the information contained in these exporters' incomplete submissions. Yet, according to the US argument, the USDOC would conduct another order-wide analysis for the country as a whole in which it would consider the information contained in the incomplete submissions of these exporters. We do not understand how usefully this information could be considered for the country as a whole, given that it would not be used with respect to the individual exporter submitting it. As we stated above (*supra*, para. 7.102), there has never been a sunset review in which the USDOC found no likelihood in the order-wide analysis where it had already found likelihood for some exporters under the waiver provisions. This supports our view that the US explanation regarding the consideration of the evidence submitted in the incomplete responses of some exporters does not reflect the US practice and is far from convincing.

7.127 The second situation that can lead to a deemed waiver is an exporter's failure to respond, within the specified time period, to a notice of initiation. Under US law, exporters that do not submit a timely substantive response to the notice of initiation of a sunset review are precluded from submitting any further evidence to the USDOC and from requesting, or participating in, hearings. In our view, the fact that an exporter failed to submit a substantive response to the notice of initiation at the outset of a sunset review can not justify depriving that exporter of its procedural rights under Articles 6.1 and 6.2 of the Agreement for the rest of the sunset review. We recognize that in many such cases the USDOC will be entitled to resort to facts available under Article 6.8 and Annex II of the Agreement, which, in turn, may lead to an unfavourable determination with respect to such an exporter. In that regard, the USDOC may decline, on a case-by-case basis, to take into consideration evidence submitted by that exporter if the submission is not made within a reasonable time.[48] Article 6.8 and Annex II do not, however, allowation

Conclusion

7.128 In conclusion, we find Section 351.218(d)(2)(iii) of the USDOC's Regulations relating to deemed waivers to be inconsistent with Articles 6.1 and 6.2 of the Agreement.[49]

2. Alleged Irrefutable Presumption of Likelihood Under US Law/Practice

(a) Arguments of parties

(i) Argentina

7.129 Argentina asserts that US law as such is inconsistent with Article 11.3 because it contains an irrefutable presumption of likelihood of continuation or recurrence of dumping in sunset reviews where certain factual scenarios are met. According to Argentina, US law in this respect consists of Sections 751(c) and 752(c) of the Tariff Act of 1930, the provisions of the SAA relating to sunset reviews, and Section II.A.3 of the SPB. Argentina considers that the statutory provisions cannot be analysed in isolation from the SAA and the SPB. Argentina points out that the SAA and the SPB provide the USDOC with a simple checklist as the basis for the latter's decision as to whether there is a likelihood of continuation or recurrence of dumping. The SPB contains three basic factual scenarios that would support a finding of likelihood of continuation or recurrence of dumping in a sunset review. Therefore, rather than carrying out a prospective analysis as required under Article 11.3 of the Agreement, the USDOC simply checks whether one of these three scenarios is present, and if so, concludes that there is a likelihood of continuation or recurrence of dumping should the measure be lifted. Argentina argues that USDOC has a consistent practice which demonstrates that the USDOC attributes a decisive relevance to the factual scenarios set out in the SPB.

7.130 Independently from its challenge to US law, Argentina also argues that the USDOC's consistent practice as such is inconsistent with Article 11.3 of the Agreement because it embodies the WTO-inconsistent irrefutable presumption regarding the likelihood of continuation or recurrence of dumping determinations in sunset reviews. For instance, according to Argentina, in all sunset reviews in which a domestic interested party participated the USDOC found likelihood of continuation or recurrence of dumping. According to Argentina, "practice that prescribe[s] a standard can be subject to WTO challenge."[50] Therefore, this practice is also susceptible to a WTO challenge.

7.131 If the Panel rejects Argentina's 8currenina argu9t77n0.2625 0 Tw (79oo Arg0.o/F1 6.75 Tf0761 Tc 1.0136

action or preclude GATT/WTO-consistent action can be found to be GATT/WTO-inconsistent.[54] Under this approach, if the challenged provision provides the executive branch with discretion, rather than requiring it to follow a certain course of action, then that provision can not be found to be inconsistent as such.[55] Similarly, if the challenged provision does not have legal force, it could not be found to require WTO-inconsistent action. Of course, the *application* of that provision could nevertheless be found to be inconsistent if the discretion inherent in the provision is exercised in a WTO-inconsistent manner.

7.138 We note that the Appellate Body has so far not pronounced its views about the status of the mandatory/discretionary test that has been applied by WTO panels. To the contrary, the Appellate Body has to date made clear, even in cases where the mandatory/discretionary test was at issue, that it was not ruling on the validity of the test.[56] It has, however, reviewed the "application" of that test by WTO panels. In its decision in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body disagreed with the panel's finding that "the Sunset Policy Bulletin is not a mandatory legal instrument obligating a certain course of conduct and thus can not, in and of itself, give rise to a WTO violation".[57] In this context, although the Appellate Body did not consider that the appeal in that dispute required it to "undertake a comprehensive examination" of the mandatory/discretionary

[54] The reason mandatory legislation mandating GATT-inconsistent behaviour must be challengeable was first explained by the GATT panel in *US – Superfund*. See, Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances* ("*US – Superfund*"), adopted 17 June 1987, BISD 34S/136, para. 5.2.2. The mandatory/discretionary distinction continued to be applied by other GATT and WTO panels.

Regarding the application of this distinction by other GATT panels, see, Panel Report, *European Economic Community – Regulation on Imports of Parts and Components* ("*EEC – Parts and Components*"), adopted 16 May 1990, BISD 37S/132, pp. 198-199; Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* ("*Thailand – Cigarettes*"), adopted 7 November 1990, BISD 37S/200, pp. 227-228; Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages* ("*US – Malt Beverages*"), adopted 19 June 1992, BISD 39S/206, pp. 281-282 and 289-290; Panel Report, *United States – Denial of Most-Favoured Nation Treatment as to Non-Rubber Footwear from Brazil*, adopted 19 June 1992, BISD 39Sw (–) thi-44 0 by WTO

> As we have found in other situations, the use of presumptions may be inconsistent with an obligation to make a particular determination in each case using positive evidence. Provisions that create "irrebuttable" presumptions, or "predetermine" a particular result, run the risk of being found inconsistent with this type of obligation.[64] (footnote omitted, emphasis added)

7.142 The Appellate Body then went on and opined that legal provisions that give a determinative, rather than probative, value to certain factors would be inconsistent with Article 11.3 of the Agreement.[65] In this regard, the Appellate Body stated:

> We therefore consider that the consistency of Sections II.A.3 and 4 of the Sunset Policy Bulletin with Article 11.3 of the *Anti-Dumping Agreement* hinges upon whether those provisions instruct USDOC to treat dumping margins and/or import volumes as determinative or conclusive, on the one hand, or merely indicative or probative, on the other hand, of the likelihood of future dumping.[66] (emphasis added)

7.143 The Appellate Body has made it clear that Article 11.3 requires that a likelihood determination in a sunset review be based on a sufficient factual basis, taking into consideration the circumstances of the case at issue. It can not be based on presumptions that contain pre-determined conclusions for certain factual scenarios. In other words, a scheme that attributes a determinative/conclusive value to certain factors in sunset determinations is likely to violate Article 11.3.

7.144 With these considerations in mind, we will analyse the provisions of US law cited by Argentina to decide whether they, either individually or in conjunction with one another, give rise to the presumption alleged by Argentina. We shall commence our analysis with the legal provisions cited by Argentina. If the text of the legal provisions cited by Argentina does not allow us to reach a conclusion, then we shall also evaluate evidence that Argentina submitted regarding the alleged consistent application by the USDOC of these provisions of US law.

(iii) Examination of the Measures Cited by Argentina

7.145 Argentina generally argues that the alleged irrefutable presumption under US law consists of the provisions of the Tariff Act, the SAA and the SPB. As far as the Tariff Act is concerned, [illegible] 751(c) [illegible] 752(c)(3) [illegible]
[illegible]

7.149 We note that, under US law, the SAA provides an authoritative interpretation of the Statute.[70] Therefore, in order to interpret the above statutory provisions we shall take into consideration the following relevant provisions of the SAA:

> (3) Likelihood of Dumping
>
> Section 221 of the bill adds section 752(c) which establishes standards for determining the likelihood of continuation or recurrence of dumping. Under section 752(c)(1), Commerce will examine the relationship between dumping margins, or the absence of margins, and the volume of imports of the subject merchandise, comparing the periods before and after the issuance of an order or the acceptance of a suspension agreement. For example, declining import volumes accompanied by the continued existence of dumping margins after the issuance of an order may provide a strong indication that, absent the order, dumping would be likely to continue, because the evidence would indicate that the exporter needs to dump to sell at pre-order volumes. In contrast, declining (or no) dumping margins accompanied by steady or increasing imports may indicate that foreign companies do not have to dump to maintain market share in the United States and that dumping is less likely to continue or recur if the order were revoked.
>
> The Administration believes that the existence of dumping margins after the order, or the cessation of imports after the order, is highly probative of the likelihood of continuation or recurrence of dumping. If companies continue to dump with the discipline of the order in place, it is reasonable to assume that dumping would continue if the discipline were removed. If imports cease after the order is issued, it is reasonable to assume that the exporters could not sell in the United States without dumping and that, to re-

or recurrence of dumping where dumping was eliminated after issuance of the order or the suspension agreement, as applicable, and import volumes remained steady or increased. Declining margins alone normally would not qualify because the legislative history makes clear that continued margins at any level would lead to a finding of likelihood. See section II.A.3, above. In analyzing whether import volumes remained steady or increased, the Department normally will consider companies' relative market share. Such information should be provided to the Department by the parties.

The Department recognizes that, in the context of a sunset review of a suspended investigation, the elimination of dumping coupled with steady or increasing import volumes may not be conclusive with respect to no likelihood. Therefore, the Department may be more likely to entertain good cause arguments under paragraph II.C in a sunset review of a suspended investigation.

...

C. *Consideration of Other Factors*

Section 752(c)(2) of the Act provides that, if the Department determines that good cause is shown, the Department also will consider other price, cost, market or economic factors in determining the likelihood of continuation or recurrence of dumping. The SAA at 890, states that such other factors might include,

the market share of foreign producers subject to the antidumping proceeding; changes in exchange rates, inventory levels, production capacity, and capacity utilization; any history of sales below cost of production; changes in manufacturing technology in the industry; and prevailing prices in relevant markets.

Argentina asserts 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. The United States contends that these statistics fail to demonstrate the alleged irrefutable presumption. According to the United States, if at all, only statistics relating to the sunset reviews in which the interested parties contested the existence of likelihood can provide guidance. The United States argues that out of the 291 sunset reviews cited in ARG-63 only 35 were in this category. The United States acknowledges that the USDOC found likelihood in all of these 35 sunset reviews but contends that that fact alone does not prove the irrefutable presumption alleged by Argentina. More specifically, the United States submits:

> It may well be that in these 35 cases, the evidence presented a scenario that satisfied one or more of the criteria that the Sunset Policy Bulletin identifies as indicia of likelihood. If so, the respondent interested parties may have been unable to demonstrate that the facts of their case called for a departure from the "normal" conclusion. It could be the case that one or more, or maybe all, of these parties may have been in the situation where they were not capable of competing in the US market without dumping. We simply do not know.[76]

7.159 Argentina disagrees with the US view that only sunset reviews in which interested parties contested the existence of likelihood can be taken into account. According to Argentina, interested parties' participation is immaterial regarding the investigating authority's obligation to determine likelihood under Article 11.3. Argentina argues, however, that even accepting the US position in this respect, the fact that the USDOC found likelihood in these 35 sunset reviews on the basis of the factual scenarios of the SPB still proves Argentina's claim.[77]

7.160 We asked the United States to explain its views as to whether the statistics provided by Argentina in ARG-63 and ARG-64 were factually correct. The United States submitted the following response:

> The United States has not examined each and every sunset review cited by Argentina in Exhibit ARG-63 and Exhibit ARG-64. To the extent that the United States has addressed these exhibits in its written submissions, the United States has no reason to believe that the overall total of sunset reviews conducted and the ultimate outcomes in those sunset reviews as alleged by Argentina is significantly flawed.[78] (emphasis added)

7.161 In response to questioning from the Panel, the United States stated that these statistics were irrelevant to the question of whether the USDOC perceived Section II.A.3 of the SPB as conclusive in its sunset determinations. According to the United States, these statistics can at best indicate a repeated pattern of similar responses to a set of circumstances, which, according to the United States and as found by a WTO panel, can not be challenged as such in WTO dispute settlement proceedings. The United States also contends 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.[79]

7.162 Regarding the issue of whether the consistent application of a Member's law can be taken into account by WTO panels in cases dealing with an alleged WTO-inconsistency of that law, we find support in the following finding of the Appellate Body in *US-Carbon Steel*:

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[76] First Written Submission of the United States, para. 186.
[77] Second Written Submission of Argentina, paras. 83-84.
[78] Response of the United States to Question 14(a) from the Panel Following the Second Meeting.
[79] Response of the United States to Question 14(b) from the Panel Following the Second Meeting.

Thus, a responding Member's law will be treated as WTO-*consistent* until proven otherwise. 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

particular pattern of behaviour in a certain number or percentage of cases. As the Appellate Body stated, "[t]he nature and extent of the evidence required to satisfy the burden of proof will vary from case to case".[83] We find that in the circumstances of the present proceedings the evidence submitted by Argentina in ARG-63 is sufficient to demonstrate that Section II.A.3 of the SPB directs the USDOC to treat evidence with respect to "import volumes" and "dumping margins" as conclusive for purposes of the latter's sunset determinations.

7.168 Having found Section II.A.3 of the SPB to be inconsistent with Article 11.3, we need not, and

into the future. We note in this regard that an assessment regarding whether injury is likely to continue or recur that focuses too far in the future would be highly speculative, and that it might be very difficult to make a properly reasoned and supported determination in this regard. The issue, however, is whether the standard provided for under US law is inconsistent with that standard, and we see no reason to believe that the "reasonably foreseeable time" standard adopted by the United States would pose such difficulties.

7.186 Argentina submits that Article 11.3 requires an investigating authority to determine whether termination of a measure would be likely to lead to the continuation or recurrence of injury upon expiry of the measure. According to Argentina, by defining the "reasonably foreseeable time" as longer than "imminent" the US statutory provisions run counter to the "likely" standard of Article 11.3.[88] We understand Argentina to argue that the likelihood determination must be based on the circumstances as of the date of the proposed revocation of the measure.

7.187 We do not agree with the proposition that Article 11.3 necessarily requires that the investigating authority base its likelihood of continuation or recurrence of injury determination upon the expiry of the duty. As we already stated, Article 11.3 does not impose a particular time-frame on which the investigating authority has to base its likelihood determination. Further, in our view,

incorporate our analysis regarding the applicability of Article 3 in sunset reviews (*infra*, section VII.E.3(c)(i)). We therefore consider that on the basis of a textual analysis of Articles 3.7 and 3.8 on the one hand and Article 11.3 on the other, it becomes clear that they operate in highly distinct factual situations. It follows that the provisions of Articles 3.7 and 3.8 do not apply to sunset reviews.[90]

7.191 We note that our analysis based on the text of the Agreement is supported by the Appellate Body's ruling in *US – Corrosion-Resistant Steel Sunset Review*, in which the differences between an anti-dumping investigation and a sunset review were highlighted. The Appellate Body stated that investigations and reviews are two distinct processes with different purposes.[91] It follows that it is normal that they may be subject to different rules and disciplines where circumstances so dictate. This is not to suggest that no provision of the Agreement that applies to investigations can apply to sunset reviews. Indeed, the Appellate Body has decided with respect to some of the provisions of the Agreement that they also apply to sunset reviews.[92] Similarly, in this report, we have found that certain provisions of Article 6 of the Agreement also apply to sunset reviews.[93] However, we do not see any reason to reach the same conclusion with respect to Articles 3.7 and 3.8.

7.192 The overall scheme in which threat of material injury determinations are made in investigations is remarkably different from that of a sunset review. The focus of the inquiry in a sunset review is the likelihood of continuation or recurrence of injury in the event of revocation of the order, while in the case of an original investigation imports are not subject to an anti-dumping measures at the time the analysis is performed. In an investigation, the investigating authority engages in a threat of material injury analysis only if there is no present material injury. In a sunset review, however, factors giving rise to material injury may be present as of the date of the proposed revocation of the measure. In other words, in a sunset review, there is a history of injury in the records of the investigating authority. In our view, therefore, it is entirely sensible that threat of

Article 11.3 because the USDOC failed to conduct a review and to make a likelihood determination. According to Argentina, the USDOC failed to base its determinations on fresh facts gathered during the sunset review. Rather, inconsistently with Articles 2 and 11.3, it relied on the dumping margin obtained in the original investigation and reported that margin to the USITC as the likely dumping margin at which dumping was found to be likely to continue or recur. The fact that this original dumping margin was calculated through the practice of "zeroing" also made the USDOC's reliance on that margin in this sunset review inconsistent with Article 11.3.

7.195 Argentina contends that the conduct of an expedited sunset review and the application of the waiver provisions violated Articles 6.1 and 6.2 because Siderca, the only Argentine exporter that submitted a substantive response to the notice of initiation of the sunset review at issue, was denied a full opportunity to submit evidence and to defend its interests in this sunset review. Argentina also argues that the USDOC did not take the provisions of Article 6.8 and Annex II of the Agreement into account in its decision to use facts available.

7.196 Finally, Argentina submits that in this sunset review the USDOC also violated Articles 12.2 and 12.2.2 because it is impossible to discern the basis of the USDOC's decision to conduct an expedited review. In particular, Argentina argues that the public notice does not contain information about dumping determinations in this sunset review and that it is not clear whether the basis for the USDOC's decision to expedite was the "waiver" provision under Section 751(c)(4), or the "facts available" provision under Section 751(c)(3)(B) of the Tariff Act.

(b) United States

7.197 The United States argues that the USDOC carried out a WTO-consistent sunset review in this case. The United States submits that the USDOC did not determine that Siderca had waived its right to participate in the instant sunset review. The USDOC decided to conduct an expedited sunset review because the respondents' share in the total imports of the subject product into the United States was significantly less than 50 per cent. The United States contends that the USDOC based its determinations in this sunset review on the information from the original investigation and the information submitted by interested parties in their substantive responses to the notice of initiation in this sunset review.

7.198 The United States asserts that Siderca was given notice of the information required and a full opportunity to submit evidence and to defend its interests in the sunset review at issue, but it did not avail itself of some of these opportunities to submit information. In its sunset determinations the USDOC considered the information Siderca submitted in its substantive response to the questionnaire. Therefore, the USDOC did not act inconsistently with Articles 6.1 and 6.2.

7.199 The United States contends that the Final Sunset Determination and the accompanying Decision Memorandum explain the bases for the USDOC's sunset determinations in this sunset review and therefore the USDOC did not act inconsistently with Article 12.2.

2. Arguments of Third Parties

(a) European Communities

7.200 The European Communities contends that the USDOC's decision to conduct an expedited sunset review simply because of Siderca's share in the volume of total imports of the subject product into the United States was inconsistent with Article 11.3 of the Agreement. Since this decision also resulted in the exclusion of relevant evidence it also violated Articles 6.1 and 6.2.

3. Evaluation by the Panel

(a) Relevant facts

7.201 In addition to Argentina, three other countries were subject to the USDOC part of the OCTG sunset review.[94] With respect to all four countries, the USDOC concluded that the revocation of the orders would likely lead to the continuation or recurrence of dumping.

7.202 With regard to all of these four countries, the USDOC's likelihood determination was based on the existence of dumping margins and reduced import volumes following the imposition of the original anti-dumping duties.[95] The USDOC decided that since dumping had continued over the life of the orders and import volumes had dropped significantly as compared to the pre-order levels, dumping was likely to continue or recur in the event of revocation.

7.203 There were no affirmative waivers with respect to Argentine exporters subject to this sunset review. In other words, no Argentine exporter explicitly waived participation. The only Argentine exporter that cooperated with the USDOC and for which an individual dumping margin was calculated in the original investigation was Siderca. Following the imposition of the order Siderca stopped exporting OCTG to the United States. However, the USDOC determined that other Argentine exporter(s) had exported the subject product to the United States during the period of application of the measure. The USDOC did not identify these exporter(s) in its final determination, nor did it point to evidence in the record establishing the identity of these exporter(s).[96]

7.204 Since these other Argentine exporter(s) did not submit a response to the notice of initiation of this sunset review, they were deemed to have waived their right to participate under Section 351.218(d)(2)(iii) of the USDOC's Regulations. It is therefore factually undisputed that deemed waivers provisions of US law were applied in this sunset review with respect to one or more Argentine exporter(s) other than Siderca.

7.205 Following the initiation of the sunset review at issue, Siderca was the only Argentine exporter that submitted a substantive response to the notice of initiation. We recall that according to Section 351.218(e)(1)(ii)(A) of the USDOC's Regulations, in cases where the exporters from a particular country that submit a complete substantive response to the notice of initiation of a sunset review altogether account for less than 50 per cent3 0 TD 8eF.57oyountP 0 TDll

with respect to Argentina, the USDOC determined that dumping would be likely to continue or recur should the duty be revoked.

(b) Alleged violations of Articles 11.3 and 2 of the Agreement

7.207 As an initial matter, we note Argentina's assertion that the application of the waiver provisions and the conduct of an expedited sunset review violated Article 11.3 of the Agreement because the USDOC did not make the requisite likelihood determination of Article 11.3 when concluding that dumping was likely to continue or recur should the duty be revoked.[97]

7.208 Regarding the issue of whether or not the USDOC made a likelihood determination in this sunset review, we note that the contents of the USDOC's *Issues and Decision Memorandum* clearly reveals that such a determination was made. Therefore, there is no doubt that the USDOC made a determination as such. The question is whether that determination conformed to the provisions of the Agreement. With that in mind, we now turn to the various aspects of the USDOC's sunset determination that are being challenged by Argentina.

7.209 Argentina contends that in the instant sunset review, the USDOC based its likelihood of continuation or recurrence of dumping determinations on past data. It did not gather fresh evidence that would support a forward-looking likelihood analysis. Instead, the USDOC merely relied on the dumping margin from the original investigation as the basis of its likelihood determination in the instant sunset review.

7.210 The United States submits that in its likelihood determination in the instant sunset review, the USDOC relied on the dumping margins found in the original investigation, the depressed import volumes and the information submitted by the interested parties. According to the United States, Article 11.3 of the Agreement requires nothing more.

7.211 The issue is whether the USDOC's likelihood determination in this sunset review rested on a sufficient factual basis.[98] In this respect, we recall our finding above that on its face Article 11.3 does not impose a particular methodology to follow in sunset determinations. However, as we stated above, the Article 11.3 obligation to "determine" the likelihood of continuation or recurrence of dumping requires the investigating authority to make a reasoned finding on the basis of positive evidence that dumping is likely to continue or recur should the measure be revoked.

7.212 With that in mind, we turn to the USDOC's *Issues and Decision Memorandum* which reads in relevant parts:

> [T]he Department indicated that normally it will determine that revocation of an antidumping order 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, (b) imports of the subject merchandise ceased after the issuance of the order, (c)

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[97] First Written Submission of Argentina, paras. 148 and 155.

[98] We note that, regarding the sufficiency of the factual basis of an investigating authority's likelihood determination in sunset reviews, the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* endorsed the following findings of that panel:

> 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. (footnote omitted, emphasis added)
>
> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 114.

7.226 Therefore, the initial issue that we need to resolve is whether Articles 6.1, 6.2 and 6.8 and Annex II apply to sunset reviews. In this context, we recall our above observation regarding the nature of the obligations set out in Articles 6.1 and 6.2 of the Agreement (*supra*, paras. 7.113-7.117). We also recall our finding that these two articles apply to sunset reviews because they contain rules that deal with evidence and procedure as set out in Article 11.4 of the Agreement. In addition to Articles 6.1 and 6.2, we consider that Article 6.8 and Annex II also apply to sunset reviews because

Conclusion

7.236 We therefore find that the USDOC acted consistently with Article 6.1 of the Agreement, but inconsistently with Article 6.2 in the OCTG sunset review.

(iii) Alleged violations of Article 6.8 and Annex II of the Agreement in the OCTG review

7.237 **Argentina** contends that the USDOC's conduct of an expedited sunset review violated Article 6.8 and Annex II of the Agreement because the USDOC applied facts available to Siderca on the grounds that Siderca had failed the adequacy test of US law that triggered the expedited sunset review. According to Argentina, Article 6.8 does not permit the use of facts available on such grounds. Siderca fully cooperated with the USDOC, thus the USDOC could not possibly use facts available against Siderca. Argentina also asserts that the USDOC did not use facts available in the manner set out in Article 6.8 and Annex II.

7.238 The **United States** submits that the USDOC did not apply facts available with respect to Siderca. Rather, it applied facts available in the context of its order-wide likelihood determination. The United States also contends that as part of facts available the USDOC used the information Siderca submitted in its substantive response to the notice of initiation. According to the United States, therefore, the USDOC did not act inconsistently with Article 6.8 or Annex II of the Agreement.[111]

7.239 **We** note that in the OCTG sunset review, because of Siderca's zero per cent share in the total imports of the subject product, the USDOC carried out an expedited sunset review in which it based its determinations on facts available. We also note that Section 351.308(f) of the USDOC's Regulations, the provision of US law regarding the information to be used by the USDOC in an expedited sunset review where facts available are used, confirms the US assertion that the USDOC applied facts available *vis-à-vis* Argentina, and not Siderca.[112] It is therefore factually clear that in the instant sunset review the USDOC applied facts available on an order-wide basis and not *vis-à-vis* Siderca. We have seen nothing in the record of this sunset review that would suggest the contrary. We finally note that the USDOC's *Issues and Decision Memorandum* states that as part of facts available , information submitted by Siderca was considered by the USDOC in its determinations.[113]

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[111] First Written Submission of the United States, paras. 214 and 221.
In this context, we note the following statement of the United States:
The *Final Sunset Determination*, the *Decision Memorandum*, and the *Adequacy Memorandum*, however, each clearly state that Siderca filed a complete substantive resp1.5Se

7.240 Therefore, the issue is whether the USDOC violated Article 6.8 and therefore Annex II of the Agreement in its use of facts available on an order-

inconsistently with Articles 12.2.1 and 12.2.2 by failing to include in its final determination fresh information collected during the sunset review regarding Siderca's dumping margins.

7.247 The **United States** submits that the USDOC's final determination contains the bases for the USDOC's likelihood determination. According to the United States, Article 12.2.2 does not impose any substantive obligation on the investigating authorities in sunset reviews.

7.248 **We** note that Article 12 is entitled "Public Notice and Explanation of Determinations". It sets forth the investigating authorities' obligation to give public notice of certain decisions/determinations made at various stages of an investigation. Paragraph 3 of Article 12 states that the provisions of that Article apply *mutatis mutandis* to reviews under Article 11. Therefore, the provisions of Article 12 apply to sunset reviews with necessary changes that the nature of sunset reviews may necessitate.

7.249 With that in mind, we now turn to Argentina's first argument, that it is impossible to discern the basis for the USDOC's determination. We note that regarding the content of public notices, Article 12.2 of the Agreement that Argentina cites in this context provides in relevant part:

> Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities.

7.250 In light of the obligation set forth in Article 12.2, we shall inquire whether the USDOC's final determination in the instant sunset review contained sufficient information as to the USDOC's findings and conclusions on the relevant issues of fact and law in the instant sunset review. In this context, we note the following portions of the USDOC's *Issues and Decision Memorandum*:

> Although the Department received a substantive response on behalf of Siderca, the Department explained in its August 22, 2000 adequacy determination that because, during the period 1995 to 1999, the average annual share of Siderca's exports of the subject merchandise *vis-à-vis* the total Argentine exports of the subject merchandise during the same period was significantly below the fifty-per cent threshold...the Department determined Siderca's substantive response to be inadequate.[117]
>
> In the instant sunset reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to Section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation.[118]
>
> Therefore, given that dumping continued after the issuance of the orders, average imports continued at levels far below pre-order levels from 1995 through 1999, and respondent interested parties waived their right to participate in these review or failed to submit adequate substantive responses, we determine that dumping is likely to continue if the orders were revoked.[119]
>
> In the Argentine case, however, the Department determined to conduct an expedited review because of its finding that Siderca did not provide adequate substantive responses.[120] (emphasis added)

7.251 We note that the memorandum generally provides that Argentina was treated differently from the other countries subject to the sunset review by stating that Siderca did not provide an adequate

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[117] *Issues and Decision Memorandum* (Exhibit ARG-51 at 3).
[118] *Issues and Decision Memorandum* (Exhibit ARG-51 at 5).
[119] *Issues and Decision Memorandum* (Exhibit ARG-51 at 5).
[120] *Issues and Decision Memorandum* (Exhibit ARG-51 at 7).

substantive response to the notice of initiation, whereas the respondents in other countries waived their right to participate in the sunset review by failing to file a complete substantive response. However, in the second paragraph quoted above, the USDOC seems to state that all interested parties waived their right to participate in this sunset review by not submitting an adequate substantive response. This seems to be at odds with the above-outlined structure of US law regarding waivers (*supra*, para. 7.84) and the submission of an adequate response to the notice of initiation in sunset reviews (*supra*, note 40). In response to questioning from the Panel, the United States pointed out that the phrase "this constitutes a waiver of participation" refers to the interested parties that failed to submit a substantive response to the notice of initiation whereas Siderca, as an interested party that did submit such a response, was not deemed to have waived its right.

7.252 In light of the above, we are of the view that the existence of this inconsistent statement regarding the legal basis under US law on which Siderca was treated by the USDOC does not render

E. CLAIMS RELATING TO THE USITC'S LIKELIHOOD DETERMINATION IN THE OCTG SUNSET REVIEW

1. Introduction

7.255 The USITC part of the OCTG sunset review concerned five countries, i.e. Argentina, Italy, Japan, Korea and Mexico. Because both the domestic industry and the respondent interested party groups submitted adequate responses, the USITC carried out a full sunset review.[123] The USITC carried out a cumulative analysis with respect to these five countries.[124] The USITC determined that material injury would be likely to continue or recur in the case of revocation of the order on OCTG from Argentina, Italy, Japan, Korea and Mexico.[125]

2. Temporal Aspect of the USITC's Likelihood Determination

(a) Arguments of parties

(i) Argentina

7.256 Argentina submits that the application of Sections 752(a)(1) and (5) of the Tariff Act in the instant sunset review was inconsistent with Articles 11.3 and 3 of the Agreement. According to Argentina, the USITC's determination merely cites the relevant provisions of the Act and the SAA and does not specify what "reasonably foreseeable time" means for purposes of the instant sunset review.

(ii) United States

7.257 The United States argues that because Article 11.3 is silent as to the time-frame relevant to sunset reviews, the USITC's determination can not be inconsistent with Articles 3 and 11.3 of the Agreement on the grounds that it did not specify the time-frame on which it was based.

(b) Evaluation by the Panel

7.258 Argentina argues in the first place that the fact that the USITC applied Sections 752(a)(1) and (5) of the Tariff Act in the instant sunset review made its determinations WTO-inconsistent. We recall, however, our above finding that the US statutory provisions relating to the time-frame on the basis of which the USITC makes its likelihood determinations in sunset reviews are not WTO-inconsistent (*supra*, para. 7.193). We can not, therefore, find that their application in the OCTG sunset review were necessarily WTO-inconsistent.

7.259 Argentina argues that even if the US statutory provisions containing this standard are WTO-consistent, the USITC failed to apply these provisions properly to the evidence before it in the instant sunset review. Argentina asserts that the USITC acted inconsistently with Article 11.3 of the Agreement by failing to explain the parameters of the reasonably foreseeable period of time on the basis of which it found injury to be likely to continue or recur.[126] We recall our analysis that Article 11.3 does not require investigating authorities to specify the time-frame on which they are basing their likelihood of continuation or recurrence of injury determinations (*supra*, para. 7.184). Article 11.3 provides that the investigating authority must establish on the basis of a sufficient factual

[123] Although the USITC found that the Japanese exporters' response was not adequate, it nevertheless decided to conduct a full sunset review as to Japan for reasons of administrative efficiency. USITC's Sunset Determination (Exhibit ARG-54 at 2).

[124] USITC's Sunset Determination (Exhibit ARG-54 at 14).

[125] USITC's Sunset Determination (Exhibit ARG-54 at 16-17).

[126] First Written Submission of Argentina, paras. 277-278; Second Written Submission of Argentina, para. 206.

basis that there is a likelihood of continuation or recurrence of injury. We therefore see no WTO-inconsistency in the USITC's failure to specify the time period that it considered to be reasonably foreseeable for purposes of its likelihood determinations in the instant sunset review.

(i) Conclusion

7.260 In light of the above considerations, we decline Argentina's claim regarding the application by the USITC of Sections 752(a)(1) and (5) of the Tariff Act in the OCTG sunset review.

3. Standard Applied by the USITC

(a) Arguments of parties

(i) Argentina

7.261 Argentina submits that the USITC failed to apply the "likely" standard of Article 11.3 in the sunset review at issue. According to Argentina, although the relevant provision of the US Statute and the USITC's determination in the instant sunset review contains the word "likely", the USITC in fact applied a different standard in the instant sunset review. According to Argentina, "likely" means "probable". In this sunset review, however, the USITC applied a "possibility" standard instead of the proper likely standard of Article 11.3 in respect of its determinations regarding the likely volume of dumped imports, the likely price effect of such imports and their likely impact on the US domestic industry. Thus, the USITC determined that injury would be likely to continue or recur on the basis of facts that demonstrated that a certain outcome was possible, rather than probable. Argentina also argues that regarding these three aspects, the USITC failed to carry out an objective examination on the basis of positive evidence, inconsistently with Articles 11.3, 3.1 and 3.2 of the Agreement.

7.262g to Argentina, although the relevant provision of the US Statute and

(b) Arguments of third parties

(i) European Communities

7.266 The European Communities agrees with Argentina that the provisions of Article 3 of the Anti-

investigations, hence it also generally applied to sunset reviews.[127] That panel then went on and analysed whether a particular paragraph of Article 3, namely paragraph 3, was applicable in sunset reviews and decided that because of its text Article 3.3 was an exception to its general observation and hence it did not apply to sunset reviews.

7.272 To the extent that that panel found that the above-cited phrases found in Article 3 and footnote 9 thereto make the provisions of Article 3 generally applicable to sunset reviews, we disagree. We note that the nature of the inquiries in investigations and sunset reviews is significantly different. Regarding the differences between original investigations and sunset reviews, we note the following observation of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*:

> In considering the nature of a likelihood determination in a sunset review under Article 11.3, we recall our statement in *US – Carbon Steel*, in the context of the *SCM Agreement*, that:
>
> > … original investigations and sunset reviews are distinct processes with different purposes. The 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.[128]
>
> This observation applies also to original investigations and sunset reviews under the Anti-
>
> Agre5terminat598 0 TD du TD -0.12p T co-0.14 Tw [illegible]

has already been in place for up to five years. Just as the Appellate Body stated that an investigating authority is not required to make a dumping determination in a sunset review[130], we consider that an investigating authority is not required to make an injury determination in a sunset review. It follows, then, that the obligations set out in Article 3 do not normally apply to sunset reviews.

7.274 If, however, an investigating authority decides to conduct an injury determination in a sunset review, or if it uses a past injury determination as part of its sunset determination, it is under the obligation to make sure that its injury determination or the past injury determination it is using conforms to the relevant provisions of Article 3.[131] For instance, Article 11.3 does not mention whether an investigating authority is required to calculate the price effect of future dumped imports on the prices of the domestic industry. In our view, this means that an investigating authority is not necessarily required to carry out that calculation in a sunset review. However, if the investigating authority decides to do such a calculation, then it would be bound by the relevant provisions of Article 3 of the Agreement. Similarly, if, in its sunset injury determinations, an investigating authority uses a price effect calculation made in the original investigation or in the intervening reviews, it has to assure the consistency of that calculation with the existing provisions of Article 3.

7.275 However, this does not mean that we will disregard the provisions of Article 3 in our analysis regarding the USITC's determinations in the instant review. Just as the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* pointed out regarding the definition of dumping set out in Article 2.1 of the Agreement[132], we consider that throughout the Agreement – including sunset reviews – the term injury should be understood and interpreted as set out in Article 3 of the Agreement, including footnote 9 thereto. The Agreement contains no other definition of injury made for purposes of sunset reviews. Therefore, although we find that the provisions of various paragraphs of Article 3 do not necessarily apply in sunset reviews, we shall in our analysis be mindful of the definition of injury set out in footnote 9 and the parameters of injury determinations as generally set out in Article 3. We shall find guidance in Article 3 where appropriate.

7.276 It follows from the above-outlined analysis that we will entertain Argentina's claims under Article 3 only to the extent the USITC made an injury determination – as opposed to a likelihood of continuation or recurrence of injury – in the OCTG sunset review, or in cases where the USITC used an injury determination from the original OCTG investigation or the intervening reviews and Argentina alleges that the USITC failed to make the necessary corrections to these original injury determinations to make them consistent with the current provisions of Article 3.

(ii) Claims relating to the USITC's determinations regarding the likely volume of dumped imports, their likely price effect and their likely impact on the US domestic industry

7.277 Argentina contends that the USITC applied a standard different from the "likely" standard of Article 11.3 in the instant sunset review. According to Argentina, the USITC applied a "possibility" standard instead of the "likely" standard of Article 11.3 of the Agreement which according to Argentina means "probable". In the view of Argentina, the fact that the USITC did not apply the likely standard can be seen through an analysis of its determinations relating to the likely volume of dumped imports, their likely price effect and their likely impact of the US domestic industry. Argentina also asserts that the USITC violated Articles 3.1 and 3.2 of the Agreement in its determinations relating to these three factors because it failed to carry out an objective examination on the basis of positive evidence. Argentina concedes, however, that the US Statute and the USITC's sunset determination contains the word "likely".

[130] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, [illegible] "likely" standard.

7.278 We note that Argentina's claim regarding the USITC's injury analysis with respect to the likely volume of dumped imports, the likely price effect of such imports and their likely impact of the US domestic industry is two-fold. First, Argentina asserts that with regard to each one of these three factors the USITC failed to apply the likely standard of Article 11.3. Second, Argentina contends with respect to the same three aspects of the USITC's determinations that the USITC failed to conduct an objective examination on the basis of positive evidence, inconsistently with Articles 3.1 and 3.2. Hence, in the context of this claim Argentina claims violations of Article 11.3 as well as Articles 3.1 and 3.2 of the Agreement.

7.279 In accordance with our above-framed approach regarding the applicability of Article 3 of the Agreement to sunset reviews, we find it useful to first inquire whether the USITC made a determination of injury or a determination of the likelihood of continuation or recurrence of injury in the instant sunset review. We note that the USITC's determination makes clear that it is about the likelihood of continuation or recurrence of injury, rather than a determination of injury.[133] Nor does Argentina argue that what the USITC did in this case was a determination of injury. Similarly, Argentina does not assert that in the OCTG review the USITC used an injury determination from the original OCTG investigation that is now inconsistent with the provisions of Article 3 of the Agreement. We will therefore only entertain Article 11.3 aspects of Argentina's claim and decline those relating to Article 3.

7.280

> continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[134] (emphasis added)

We note that, as Argentina agrees, on its face the USITC's determination references the likely standard of Article 11.3.

7.284 However, Argentina puts forward other arguments in its effort to prove that notwithstanding the standard spelled out in its final determination, the USITC did in fact use a different standard in the sunset review at issue. In this respect, Argentina first asserts that the USITC's statements in different fora reveals the fact that it interprets "likely" to mean "possible" rather than "probable". One such alleged admission relates to the USITC's statement before a US court that "likely" does not mean "probable", but something else. The second relates to the USITC's views expressed before a NAFTA panel in which the USITC allegedly stated that "likely" does not necessarily mean "probable".

7.285 We note that the standard set out in Article 11.3 of the Agreement for the investigating authorities' sunset determinations is "likely". This standard applies to the likelihood of continuation or recurrence of dumping as well as injury determinations in sunset reviews, and this is precisely the standard that the USITC applied. It seems to us that the essence of Argentina's claim is not that the USITC applied the wrong standard, but that it erred in determining that the likely standard was met. Our task is to reach a decision on Argentina's allegation that the USITC erred in the instant sunset review in the application of the likely standard of Article 11.3. Hence, the USITC's statements before US courts or before a NAFTA panel regarding the meaning of likely as used in Article 11.3 of the Agreement are not relevant to our consideration as to whether the USITC's determination in this sunset review present proceedings satisfied Article 11.3's likely standard.

7.286 We therefore turn to the specific aspects of the USITC's determination in the instant sunset review, regarding which Argentina alleges that the USITC failed to apply Article 11.3's likely standard.

Likely volume of dumped imports

7.287 Argentina submits that the USITC'

our conclusion regarding Argentina's main claim that the USITC's determination regarding the likely volume of dumped imports was not based on an objective examination of the evidence in the record.

7.293 Argentina first contends that the USITC's finding regarding the existence of trade barriers in third-country markets was only based on an antidumping order imposed by Canada against Korea. Since the USITC could not cite any other trade barrier against the other four countries subject to this sunset review, Argentina asserts that this finding was not based on positive evidence.

7.294 The USITC's determination reads, in relevant part:

> Fourth, subject country producers also face import barriers in other countries, or on related products. Argentine, Japanese, and Mexican producers are subject to antidumping duty orders in the United States on seamless standard, line, and pressure pipe, which are produced in the same production facilities as OCTG. Korean producers are subject to import quotas on welded line pipe shipped to the United States and U.S. antidumping duty orders on circular, welded, non-alloy steel pipe. Canada currently imposes 67 per cent antidumping duty margins on casing from Korea.[139] (footnotes omitted)

7.295 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.

7.296 Next, Argentina submits that the USITC's analysis concerning the price differences between the US and the world markets was based on anecdotal evidence rather than independent reports. We note that the USITC's report cites the testimony of three individuals in this sector as evidence of this price differentiation and it cites no objection raised by interested parties in this respect.[140] Argentina is not raising any argument as to the correctness of the substance of this testimony. Nor has it brought to our attention another piece of evidence that might support the opposite finding in this regard. Argentina's claim in this regard therefore is limited to the kind of evidence the USITC relied upon. Keeping in mind our standard of review with respect to factual determinations by an investigating authority, and conscious that there are no rules in the Anti-Dumping Agreement as to the type of evidence that can support an investigating authority's findings, we are of the view that the USITC's reference to the testimonies of individuals who are knowledgeable in the relevant sector was proper.

7.297 Argentina also argues that the fact that the producers forming Tenaris already had long-term contracts with their customers indicated to the USITC that Tenaris was not likely to increase its exports to the United States in the event of revocation. This is because these producers would not turn away their long-term customers for the sake of increasing their exports to the United States. The United States asserts, and the USITC's Final Determination states, that given the difference between the US and world market prices, the United States' being the world's largest OCTG market and casing

[139] USITC's Sunset Determination (Exhibit ARG-54 at 20).

and tubing's being the highest valued pipe and tube product, the USITC was justified in concluding that Tenaris had a strong incentive to increase exports to the United States. We find it reasonable to conclude from these facts that Tenaris had an incentive to increase its exports to the United States should the measure be revoked. In our view, a determination that certain producers have an incentive to increase their exports towards a certain market is one that can be made on the basis of an analysis of various factors, such as the size of the target market, differences between prices and qualities and other costs associated with the shipment of the subject product. In the circumstances of the instant sunset review, we see 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.

Conclusion

7.298 In light of the above considerations, we conclude that Argentina has failed to prove that the USITC's determinations concerning the likely volume of dumped imports were WTO-inconsistent and therefore decline this aspect of Argentina's claim.

Likely price effects of dumped imports

7.299 The USITC's discussion of the issues relating to the likely price effect of dumped imports is found on pages 20 and 21 of its Final Determination. Here too, the USITC starts its analysis by citing the relevant findings in the original investigation. It then discusses the determinations made during the period of application of the order and mentions that price underselling continued over the life of the measure. The USITC then concludes:

> Given the likely significant volume of subject imports, the high level of substitutability between the subject imports and domestic like product, the importance of price in domestic purchasing decision, the volatile nature of U.S. demand, and the underselling by the subject imports in the original investigation and during the current review period, we find that in the absence of the orders, casing and tubing from Argentina, Italy, Japan, Korea and Mexico likely would compete on the basis of price in order to gain additional market share. We find that such price-based competition by subject imports likely would have significant depressing or suppressing effects on the prices of the domestic like product.[141] (footnote omitted)

7.300 Argentina argues that the USITC's findings regarding the likely price effects of dumped imports were not based on an objective examination of the evidence in the record. First, according to Argentina, the USITC's price underselling analysis was based on a limited set of comparisons.

7.301 We note the following part of the USITC's determination in this regard:

> While direct selling comparisons are limited because the subject producers had a limited presence in the U.S. market during the period of review, the few direct comparisons that can be made indicate that subject casing and tubing generally undersold the domestic like product especially in 1999 and 2000.[142] (footnote omitted)

7.302 Argentina does not dispute the fact that the USITC did carry out some sort of price comparison. According to Argentina, however, the base of this comparison was not adequate because of the limited number of comparisons involved.

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[141] USITC's Sunset Determination (Exhibit ARG-54 at 21).
[142] USITC's Sunset Determination (Exhibit ARG-54 at 21).

7.303 In our view, a price comparison made as part of a sunset determination does not necessarily require a threshold in terms of the number of comparisons used. In fact, in sunset reviews, depending on the volume of imports following the imposition of the measure the number of such comparisons may inevitably be limited. It may even be impossible to do any comparison in cases where imports completely cease following the imposition. In this case, the USITC carried out a number of price comparisons as part of its price effect analysis. The USITC's determination explains that the reason for the limited number of price comparisons was the low volume of imports following the imposition of the measure at issue. Argentina does not dispute this fact. Argentina does not contend that the USITC, for instance, acted selectively in making these comparisons or that the methodology used was biased or otherwise improper. The 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 Agreement. We therefore consider that under the circumstances of this case the USITC's calculations were adequate because the volume of export sales into the US market were limited in the period of application of the measure.

7.304 Argentina also argues 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. We note that the staff report that accompanied the USITC's determination in the instant sunset review demonstrates that purchasers in the US market ranked eight factors between 1.8 and 2.0 on a scale of importance from 0 to 2.0. Price, being one of such factors, was ranked 1.8.[143] In our view, the fact that other factors are also important does not diminish the importance of price in purchasing decisions. The 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.

7.305 In light of these circumstances, we do not consider that the USITC erred in relying on this fact in its determinations merely because of the fact that some other factors were also ranked similarly to price. This alone does not suffice to prove that the USITC's likely price effects analysis was not based on an objective examination of the evidence in the record, as Argentina asserts.

Conclusion

7.306 On the basis of the above, we are of the view 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.

Likely impact of dumped imports on the US industry

7.307 Argentina argues that the USITC's determinations regarding the likely impact of future imports on the US industry were not based on an objective examination of the evidence in the record. According to Argentina, the USITC's flawed determination regarding the likely volume and price effects of dumped imports fatally affected its examination of the adverse impact of such imports on the US industry.

7.308 In the relevant part of its determination, the USITC once again commences its analysis by citing its relevant findings in the original investigation and continues with the findings made during the period of application of the measure. The USITC clearly finds that the state of the domestic industry as of the date of the sunset review at issue is positive. However, on the basis of its earlier findings regarding the likely volume of dumped imports and their likely price effects, it nevertheless concludes that these imports are likely to have an adverse impact on the US industry. The determination reads, in relevant parts:

[143] Staff Report Annexed to USITC's Sunset Determination (Exhibit ARG-54 at II-19).

Conclusion

7.312 On the basis of the above explanations, we find that under the circumstances of this sunset review, the USITC's determinations regarding the likely consequent impact of the likely dumped imports on the US industry was not inconsistent with Article 11.3 of the Agreement.

4.

5. Alleged violation of Article 3.5 of the Agreement

(a) Arguments of parties

(i) Argentina

7.318 According to Argentina, the USITC failed to conduct the causal link analysis required under Article 3.5 of the Agreement because it failed to inquire whether there would be other factors that would also affect the domestic industry in the event of revocation of the anti-dumping duty.

(ii) United States

7.319 The United States generally argues that Article 3 does not apply to sunset reviews. The United States nevertheless submits that the violations alleged by Argentina with regard to Article 3.5 are groundless because the USITC's determinations demonstrate that it did not act inconsistently with these provisions.

(b) Arguments of third parties

(i) European Communities

7.320 The European Communities agrees with Argentina that the provisions of Article 3 of the Anti-Dumping Agreement

Argentina also submits that the low "possibility" standard used by the USITC in order to resort to cumulation also conflicted with the "likely" standard of Article 11.3. This is because in the absence of cumulation, the USITC would not be able to find likelihood of continuation or recurrence of injury with respect to Argentina. By using a low standard to resort to cumulation, the USITC also disregarded the more general "likely" standard of Article 11.3.

(ii) United States

7.324 The United States submits that there is no provision in the Agreement that prohibits the use of cumulation in sunset reviews. Therefore, WTO Members are generally free to use this methodology in such reviews. According to the United States, the texts of Articles 3.3 and 5.8 of the Agreement confirm that the numerical criteria set out in Article 3.3 of the Agreement regarding the use of cumulation are limited to investigations and do not extend to sunset reviews. Thus, the United States argues that the USITC did not act inconsistently with the Agreement by using cumulation in the instant sunset review without taking into consideration the requirements of Article 3.3.

(b) Evaluation by the Panel

7.325 Argentina asserts in the first place that cumulation can not be used at all in sunset reviews. In the alternative, Argentina submits that if the Agreement does not disallow the use of cumulation in sunset reviews, then the investigating authorities in sunset reviews have to take into account the requirements of Article 3.3 where they decide to use cumulation.

7.326 Argentina argues that according to Article 3.3 cumulation can only be used in investigations. Argentina bases its argument on the text of the Agreement and submits that there is no cross-reference either in Article 11 or in Article 3.3 that would allow the use of cumulation in sunset reviews. According to Argentina, the object and purpose of Article 11 or the other provisions of the Agreement can not support the view that cumulation can be used in sunset reviews either.

7.327 We note that Article 31.1 of the *Vienna Convention* provides that a treaty should be interpreted on the basis of its text, read in context and in the light of its object and purpose.[145] With that in mind, we turn once again to the text of Article 11.3, which provides:

> Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.[22] The duty may remain in force pending the outcome of such a review.
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> [22] When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9

[145] Article 31.1 of the

7.334 Argentina argues that the use of the word "duty" in the singular, as opposed to the plural, in Articles 11.1 and 11.3 indicates the drafters' intention not to allow cumula

F. CONSEQUENTIAL CLAIMS UNDER THE ANTI-DUMPING AGREEMENT, THE WTO AGREEMENT AND THE GATT

1. Arguments of Parties

(a) Argentina

7.339 Argentina submits that US law as such and as applied in this sunset review also violated Articles 1, 18.1 and 18.4 of the Anti-Dumping Agreement, Article XVI:4 of the WTO Agreement and Article VI of the GATT 1994.

7.340 Argentina is submitting these claims as consequential claims. In other words, in Argentina's view, any violation of the Agreement would also lead to the violation of one or more of these provisions.[149]

(b) United States

7.341 The United States argues that since the measures identified by Argentina with regard to its substantive claims are not WTO-inconsistent, there may be no consequential violations of the kind alleged by Argentina.

2. Evaluation and conclusion by the Panel

7.342 We note that the only basis for Argentina's consequential claims flows out of a violation with regard to Argentin

authorities' obligation to determine likelihood of continuation or recurrence of dumping under Article 11.3 of the Agreement,

(c) In respect of US law's standard for the likelihood of continuation or recurrence of injury determinations in sunset reviews, Sections 752(a)(1) and (5) of the Tariff Act are not inconsistent with Article 11.3 of the Anti-Dumping Agreement,

(d) In respect of the USDOC's determinations in the OCTG sunset review:

(i) The USDOC acted inconsistently with Articles 11.3 and 6.2 of the Anti-Dumping Agreement,

(ii) The USDOC did not act inconsistently with Articles 12, 6.1, 6.8 and Annex II of the Anti-Dumping Agreement,

(e) In respect of the USITC's determinations in the OCTG sunset review:

(i) The USITC did not act inconsistently with Article 11.3 of the Anti-

8.5 We note that Article 19.1 of the *DSU* states that WTO panels may suggest ways the Member concerned could implement their recommendations.[150]