ANNEX B

THIRD PARTIES' SUDCuSSIe 3 0 TD -0.1792 Tc -0.3833 TIES1

ANNEX B-1

THIRD PARTY SUBMISSION OF THE EUROPEAN COMMUNITIES

14 November 2003

TABLE OF CONTENTS

Table of cases referred to in this submission

Short Title	Full Case Title and Citation of Case
Canada-Patent Term	Panel Report, *Canada-Term of Patent Protection*, WT/DS170/R, final report circulated 5 May 2000 Appellate Body Report, *Canada-Term of Patent Protection*, WT/DS170/AB/R, adopted 12 October 2000
EC-Bed Linen	Panel Report, *European Communities – Anti-Dumping Duties on imports of Cotton-Type Bed Linen from India*, final report circulated 30 October 2000 Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001
EC-Bed Linen (Article 21.5)	Panel Report, *European Communities – Anti-Dumping Duties on imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/R, final report circulated, 29 November 2002 Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003

Short Title	Full Case Title and Citation of Case
US-Lamb	Panel Report, *United States-Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R and WT/DS178/R, final report circulated 21 December 2000 Appellate Body Report, *United States-Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R and WT/DS178/AB/R, adopted 16 May 2001
US-Lead and Bismuth II	Panel Report, *United States Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R, final report circulated 23 December 1999 Appellate Body Report, *United States Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000
US-Lumber	Panel Report, *United States-Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada*; WT/DS257/R, final report circulated 29 August 2003, notice of appeal 21 October 2003
US-Offset Act	Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS2117, 234/R, final report circulated 16 September 2002 Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS2117, 234/AB/R, adopted 27 January 2003
US-Section 301	Panel Report, *United States-Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000

1. INTRODUCTION

1. The European Communities makes this third participant submission because of its systemic interest in the correct interpretation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "AD Agreement").

2. In this written submission the European Communities will concentrate on the following issues, other matters being dealt with, to the extent necessary, in an oral statement:

- the United States preliminary objection as to whether the Panel request meets the requirements of Article 6.2 DSU, and in particular whether this can be established for certain parts of the Panel request in isolation;
- the determination in this case by the investigating authority that the response from Siderca was inadequate, on the basis that it accounted for less than 50 per cent of total exports of the product from Argentina to the United States from 1995 to 1999, Siderca itself having made no exports during that period, and the consequences of that determination;
- the "likely" standard for sunset review investigations provided for in Article 11.3 AD Agreement;
- as regards the historical occurrence of dumping, the reliance by the investigating authority only on the dumping margin (1.36 per cent) calculated in respect of the original investigation (the 6 months from 1 January to 30 June 1994), for the purposes of determining (effective from 7 November 2000) that the duty should be applied for a further 5 years (that is, until 11 August 2005 – **11 years, 1 month and 11 days** after the end of the original investigation period);
- as regards prospective likely dumping, the fact that the investigating authority relied on no additional fact or reason, or relied only on statements insufficient to give effective meaning to Article 11.3 AD Agreement;
- the consistency of the *Sunset Policy Bulletin* "as such" with the AD Agreement;
- the reliance by the investigating authority on a dumping determination, made under the Tokyo Round Anti-Dumping Agreement, that involved simple zeroing (comparison of weighted-average normal value with individual export transactions), in a manner inconsistent with the present AD Agreement; and
- the investigating authority's determination of likely injury.

2. PRELIMINARY OBJECTION

In its first written submission, the United States has requested a number of preliminary rulings. In particular, the United States has argued that certain parts of Argentina's request for the establishment of a Panel, and in particular page 4 thereof, do not comply with the requirements of Article 6.2 DSU.[1]

In this respect, the European Communities would like to observe that whether a Panel request is in compliance with the requirements of Article 6.2 DSU, and in particular whether it identifies the measure clearly and whether it provides a brief summary of the legal basis of the complaint, cannot be established by merely considering parts of a Panel request. This has been clearly stated by the Appellate Body in *US – Carbon Steel from Germany*.[2]

[1] First written submission of the United States, para. 84 and following.
[2] Para. 127.

4. LIKELY CONTINUATION OF DUMPING

4.1 Required Standard of Determination: Likely

7. Article 11.3 AD Agreement 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. The duty may remain in force pending the outcome of such a review." (footnote 22 omitted)

8. Argentina argues that Article 11.3 AD Agreement requires an anti-dumping duty to be terminated five years after imposition, unless the investigating authority determines that expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. According to the Panel in *US – DRAMs*, likely means "probable".[7] It does not mean "possible" or something less than "probable". Argentina further argues that in the contested sunset investigation and determination, the investigating authority failed to determine that dumping and injury were likely, if the duty expired. For this reason, according to Argentina, the contested sunset investigation and determination are inconsistent with the obligations of the United States under Article 11.3 AD Agreement.[8] As set out in the following sections, the European Communities agrees with Argentina that the DOC likelihood determination is not in accordance with the standard of Article 11.3 AD Agreement.

4.2 The Use of the Dumping Determination from the

(it is expected) after a point of reference in time, but it is *interrupted* by a time when there was no dumping.[10] These are the common and ordinary meanings of the words "continue" and "recur".

13. The European Communities does not therefore consider that the unqualified statement in the United States Statement of Administrative Action:[11] "The determination called for in these types of reviews is inherently predictive and speculative." is consistent with the AD Agreement. The facts and analysis in the historical part of the determination are neither predictive nor speculative. The prospective part must consist of positive evidence, that is, historical facts (that are neither predictive or speculative) plus analysis or reasoning. Of the four elements in the determination, it is only this final element of prospective analysis or reasoning that might be termed predictive or speculative. For similar reasons, the European Communities would not agree with the United States submissions in the present case, insofar as they suggest that a sunset review investigation and determination is concerned uniquely with a prospective analysis1 1

TheiWwluxetermin 5.25 0 ictive o61.1uw (TSicommn2.1875 doterlmi6il

18. The investigating authority made that finding of *continuity* notwithstanding the fact that there was a gap of six years, four months and seven days between the end of the original investigation period (30 June 1994), and the date of the contested sunset determination (effective 7 November 2000).

19.

38. The only factual statement in the first phrase above, from the memorandum, relates to the dumping margin calculated in the original investigation. We therefore conclude that for the purposes of the prospective part of the likely continuation determination, the contested determination contains ***no additional statement of fact***, other than the dumping margin calculated in relation to the original investigation period (1 January to 30 June 1994). For this reason, the European Communities considers the contested sunset review investigation and determination to be inconsistent with Article 11.3 AD Agreement.

39. It is correct that, in rejecting Siderca's comments on no-likelihood, DOC made an *incidental* factual assertion : "In the Argentine case, there has been no decline in dumping margins coupled with an increase in imports."

40. Whether or not such an *incidental* factual statement could be sufficient for the purposes of Article 11.3 AD Agreement, the European Communities [illegible] Argentine investigation and

> below cost of production; changes in manufacturing technology of the industry; and prevailing prices in relevant markets. …"[23]

44. In commercial terms, five years is a long time. There are very many reasons why imports from one Member to another might have been at a particular level prior to the order, and not increased after the order, other than the existence of the order itself. A sufficient and fair consideration of those possible reasons cannot be made if the factual basis for the prospective part of the determination is as narrow as that used by the investigating authority in the present case.

45. That conclusion is also confirmed when one considers the *ambiguity and lack of precision* in the factual statement – the absence of precise detail means one cannot conclude that an objective determination was made.

46. That conclusion is further confirmed when it is recalled what facts DOC *did not use* : throughout the period Siderca neither imported nor dumped the product in the United States.

4.3.4 Additional reasoning

47. Similar comments apply with regard to the need for additional reasoning. Given the requirement that the determination be based on positive evidence, and given that identifying facts relevant to a prospective determination may be problematic, the reasoning justifying the determination assumes a particular importance. A sufficiently detailed and persuasive set of reasons, such as to give effective meaning to Article 11.3 AD Agreement, is therefore necessary. In the present case, as indicated above, there was ***no additional reasoning***, DOC relying only the dumping margin calculated in respect of the original investigation period (1 January to 30 June 1994). For this reason, the European Communities considers the contested sunset review investigation and determination to be inconsistent with Article 11.3 AD Agreement.

48. It is correct that, in rejecting Siderca's no-likelihood comment, DOC *incidentally* mentioned the following:

> "… declining or no dumping margins accompanied by steady or increasing imports may indicate that a company does not have to dump in order to maintain market share."

49. As the issues and decisions memorandum indicates, that statement is also to be found in the SAA[24] and also appears as a truncated quotation from the SAA in the *Sunset Policy Bulletin*.[25]

50. Whether or not such an *incidental* statement of reason could be sufficient for the purposes of Article 11.3 AD Agreement, the European Communities has the following comments. We note first 5

51. DOC does not rely on this statement. Instead, DOC relied on an example of circumstances in which the measure might be terminated, drawing from this example, using *a contrario* reasoning, a different statement.

52. As already indicated above, the European Communities considers that there may be many reasons why import volumes decline, apart from an anti-dumping order, none of which were considered in the contested sunset review investigation and determination.

53. Again, it is appropriate to consider whether or not such a statement can be considered relevant, sufficient, persuasive, credible, even-handed. ***Is it a fair and persuasive justification for the contested determination, not to mention the 217 other determinations presented by Argentina, or is it a brush-off?*** In the respectful opinion of the European Communities, the Panel should conclude that it is insufficient for the purposes of the AD Agreement.

54. It results from the preceding observations that the European Communities agrees with Argentina[26] that the United States acted inconsistently with Article 11.3 AD Agreement, insofar as the additional statement of fact, if any, and the additional statement of reason, if any, relied on by the investigating authoritys of the

review investigation provision, and it is perfectly understandable that a Member should wish to take them into account. As a matter of WTO law, however, such resource allocation issues could never justify such a paucity of fact, reason and procedure as is reflected in the contested sunset review investigation and determination, such as to deprive Article 11.3 AD Agreement of effective meaning.

59. If the United States could conclude in the present case that dumping is likely up to a date more than 11 years after the ***single*** determination in the original investigation, surely this Panel can conclude on the basis of the ***217*** determinations submitted and analysed by Argentina, that no meaningful Article 11.3 AD Agreement balance is being struck or is likely to be struck by the United States, and act accordingly? To do otherwise would be to empty Article 11.3 AD Agreement of meaning, and thus to "upset the delicate balance of rights and obligations attained by the parties to the negotiations."[29]

60. As the Appellate Body has observed:

> "… we wish to underline the thrust of Article 21.3 of the SCM Agreement. An automatic time-bound termination of countervailing duties that have been in place for five years from the original investigation or a subsequent comprehensive review is **at the heart of this provision**[30]

approach does not reflect a general approach by WTO Panels, and has never been confirmed by the Appellate Body.

64

71. Additional guidance may be drawn from a number of further provisions of the AD Agreement, all of which indicate that administrative actions and procedures are subject to the disciplines of the Agreement: Article 18.1 ("action"); Article 18.3 and 18.3.2 ("measures"); Article 18.5 ("changes … in the administration of such laws and regulations."); Article 1 ("actions"); and Article 13 ("administrative actions").

72. For these reasons, the European Communities considers that the *Sunset Policy Bulletin* must

describe" a certain methodology in a policy bulletin[37], confirming that the *Sunset Policy Bulletin* can be described as "action taken under … regulations" within the meaning of Article 1 AD Agreement.

78. Finally, the European Communities notes that the Appellate Body has already held that trade defence methodologies can violate the WTO Agreement.[38] Although that case concerned the *SCM Agreement*, there is no reason to suppose that the same does not hold for the AD Agreement.

6. ZEROING

6.1 Preliminary Observations

79. The European Communities notes that Argentina has raised an argument about zeroing, to which the United States has responded by referring to the Tokyo Round anti-dumping agreement. The European Communities considers the zeroing issue of systemic importance, and has requested consultations with the United States in relation to it.[39] In view of the fact that the European Communities, as third participant in these proceedings, will not be able to respond to the arguments presented by the parties later in this procedure, the European Communities considers that it may be of assistance to the Panel to set out its views in some detail now.

80. The original applications having been made prior to 1 January 1995, it appears that the AD Agreement would not apply to the original final determination and order in this case. The question that arises, however, is whether the results of the original dumping determination could be used in the contested sunset review investigation and determination, given that they involve zeroing inconsistent with Article 2.4 of the AD Agreement[40]. The European Communities agrees with Argentina[41] that on this point the United States acted inconsistently with the AD Agreement. 82

6.2 Model Zeroing and Simple Zeroing

81. The European Communities recalls two methods of zeroing. What we may call "model zeroing" was the subject of the *EC-Bed Linen* case, and arises when the individual margins calculated for each model are combined. What we may call "simple zeroing" arises at an earlier stage in the calculation, when a weighted-average normal value is compared with individual export transactions.

82. Exhibit ARG-52 contains the detail of the original dumping calculation. On page 2, if the total of the column "TOTPUDD" (125478.93) is divided by the total of the column "TOTVAL" conntryr . On patisTew inDz0.3T5 wc 0dTSwimpljeT45.A5TD 0DT0.0060Th1.25 Tf 0EC.i002-2.5035u 2D0a3a 41.7

Simple zeroing does not allow for any set-off at all. The conclusion would be that, in ruling as it did in the *EC Bed Linen* case that model zeroing is inconsistent with the AD Agreement, the Appellate

justification is given, simple zeroing is also inconsistent with Article 2.4.2 AD Agreement, second sentence, which also makes no reference either to "investigation" or to "review". Third, in any event, the reference to "investigation" in Article 2.4.2 AD Agreement, first sentence does not have the limited and qualified meaning attributed to it by the United States. Of these three points, the European Communities focuses in this submission on the third. It reserves the possibility to submit further arguments, and to develop the first and second points, in its oral statement or in response to questions from the Panel.

90. According to the United States, it would appear (1) that a distinction must be made between the concept of "investigation" and the concept of "review"; (2) that it is correct to compare or juxtapose these two terms, as if, conceptually, like were being compared with like; and (3) that these concepts are mutually exclusive. The European Communities does not consider these propositions to be correct.

6.3.1 The scheme of the AD Agreement and Article 2.1

91. The European Communities observes that all of the provisions with which the present submission is concerned are in the same part – Part I – of the AD Agreement, which indicates a special degree of connexity between them. The European Communities also considers that there is a certain logical sequence to the articles in Part I of the AD Agreement, which is an integral part of the text. Thus, after the statement of principles (Article 1), Articles 2 (determination of dumping), 3 (determination of injury) and 4 (definition of domestic injury) set out what are clearly the basic building blocks. Articles 5 (initiation and subsequent investigation) and 6 (evidence) are more procedural. Articles 7, 8, 9 and 10 concern the various measures that may be taken. Article 11 concerns reviews. Articles 12 to 15 may fairly be described as miscellaneous.

92. The European Communities invites the Panel to consider Articles 2, 3 and 4, which assume particular significance, given the relative brevity of Article 1. They are definitions. Article 2.1 begins with the text "For the purposes of this Agreement, a product is to be considered as being dumped …".[43] Article 3 begins with the words : "A determination of injury for the purposes of Article VI of GATT 1994 shall be …", and footnote 9 *defines* the term "injury". Article 4 is entitled "*definition* of domestic industry" and begins with the words

6.3.3 Review

99. The word “review” is used 6 times in Ar

Similarly, the word is used in the same sense 4 times in Article 7 AD Agreement (provisional measures), being there also associated with Article 5 AD Agreement or with the word "initiation". It is also used twice in Article 10 AD Agreement, again each time associated with the word "in

recalled, the fact that a particular treaty provision is silent on a specific issue must have some meaning.

108. Naturally, Article 6 AD Agreement also applies to initial or original investigations, as well as review investigations. This results particularly clearly from the fact that, unlike Article 5 AD Agreement

6.3.6 Other phases : Pre-Investigation Phase

113. The European Communities considers that, following this reasoning, there is no particular difficulty in identifying the object and purpose of the words "during the investigation phase" in Article 2.4.2 AD Agreement. An anti-dumping proceeding may contains other phases, such as, for example, the pre-investigation phase (there may also be others).

114. Thus, the first step in an anti-dumping proceeding is not the initiation of an Article 5 investigation. The first step is normally the written application by the domestic industry, pursuant to Article 5.1 AD Agreement. There are several provisions of the AD Agreement regulating the period prior to the initiation of an Article 5 investigation. These provisions impose obligations on Members. For example, Article 5.2 sets out the minimum content of an application. If an application does not meet these requirements, a Member cannot initiate an Article 5 investigation without acting inconsistently with the AD Agreement. According to Article 5.3 AD Agreement, the authorities must examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation. Article 5.4 AD Agreement requires the authorities to determine that the application is supported by a sufficient proportion of the domestic industry – otherwise "An investigation shall not be initiated …". Article 5.5 AD Agreement prohibits the authorities from publicising the application prior to initiation of an investigation, and requires pre-notification to the government of the exporting Member. Article 5.7 AD Agreement contains rules regarding the consideration of dumping and injury, both in the pre-investigation phase, and "thereafter". Article 5.8 AD Agreement sets out circumstances in which an application must be rejected, and *de minimis* rules. Even if an Article 5 investigation is initiated pursuant to Article 5.6, there must necessarily first be a period during which the authorities gather the necessary evidence, and during which they will be bound by the rules set out in Article 5 AD Agreement. Finally, the European Communities notes that the transitional rule in Article 18.3 AD Agreement is formulated by reference to the date of *application*.

115. There is therefore, incontestably, a period of time before an Article 5 investigation is initiated during which (1) facts material to a possible final determination arise or are placed on the record (2) procedural steps are taken both by "interested parties" (the domestic industry) and by the authorities and (3) AD Agreement rules apply and impose obligations on Members. For the sake of convenience, this period of time or phase prior to the initiation of an Article 5 investigation, which incontestably exists, may be given a label. The precise term chosen is of little importance, but might reasonably be "**pre-investigation phase**".

116. Thus, the rule in Article 2.4.2 AD Agreement would not apply, for example, during the pre-investigation phase. That is common sense and consistent with the other provisions of the AD Agreement. Article 5.2 AD Agreement requires the applicant to provide "such information as is reasonably available to the applicant". Article 5.2 (iii) AD Agreement refers to "information on prices" in the domestic market and "information on export prices". That might, for example, include published price lists. In the opinion of the European Communities, the threshold established by Article 5.2(iii) can be met by information that falls short, very far short, of the information necessary to make a full anti-dumping determination. In fact, this will normally be the case. That is because the very detailed and *complete* information concerning like product, model types, costs of production, domestic export transactions and export transactions, and all information necessary to make a fair comparison pursuant to Article 2.4 AD Agreement, will simply not be available, or reasonably available, to the applicant. Complaints are not required to contain precise and accurate dumping margin calculations. So it would make no sense to apply rules about zeroing. So the AD Agreement expressly provides that the zeroing rules do not apply in the pre-investigation phase.

6.3.7 Object and Purpose of Article 11.3 AD Agreement

117. In the opinion of the European Communities, the object and purpose of Article 11.3 AD Agreement is simple and very clear. We must have a rule other than : duties are forever. That is what Article 11.3 achieves. It takes the period of time from now stretching forward into the future, and divides it up into 5 year segments. In respect of each 5 year segment, Members are required to ensure that any anti-dumping dut

122. These observations apply with equal or greater force insofar as Article 11.3 AD Agreement requires a prospective determination of likely continuation of dumping in the future. That future dumping could only be dumping according to the terms of the present AD Agreement.

7. INJURY

123. The European Communities agrees with Argentina that the provisions of Article 3 AD Agreement apply mutatis mutandis in the context of a sunset review investigation.[53] As for dumping, there must a determination either of likely continuation, or likely recurrence. In both cases there is an historical element and a prospective element.

124. Article 3.1 of the AD Agreement confirms this by referring to "a determination of injury for purposes of Article VI of GATT 1994". This introductory wording of Article 3.1 suggests that the disciplines of Article 3 are in principle relevant for the entire AD Agreement, which concerns the implementation of Article VI GATT. This was also the view of the Panel in *US – Carbon Steel from Japan*.[54]

125. There are other textual indications that the Article 3 injury obligations apply throughout the Agreement. For example, the use of the language "for purposes of Article VI of GATT 1994"[55] in Article 3.1 also suggests that, in general, the obligations in Article 3 pertaining to injury may apply throughout the *Anti-Dumping Agreement*, i.e. they are not limited to initial or original investigations.

126. Given the introductory wording of Article 3.1 AD Agreement, the absence of an explicit cross-reference in Article 11.3 to Article 3, to which the United States has referred,[56] is irrelevant. Moreover, the view of the United States that Article 3 is not applicable in the context of a sunset review would lead to a completely unfettered discretion of the authorities as to how they determine likelihood of continuation or recurrence of injury in a sunset review.

127. The United States has argued that even though Article 3 does not apply in a sunset review, some of its provisions "may provide guidance as to the type of information that may be relevant to the examination in a sunset review".[57] This line of reasoning is unconvincing. The provisions of the AD Agreement, including Article 3 thereof, contain binding legal commitments which must be respected throughout the application of the Agreement. The purpose of the provisions is not to provide mere "guidance" to the Members.

128. Furthermore, The European Communities agrees with Argentina that the required standard is "likely", not "possible" or "a concept that falls in between 'probable' and 'possible' on a continuum of relative certainty".[58] The contested sunset review investigation and determination did not correctly apply the "likely" standard, but a lesser standard, and is therefore inconsistent with the obligations of the United States under Article 11.3 AD Agreement.

129. Finally, The European Communities agrees with Argentina[59] that both the historical and prospective part of the injury determination must be based on positive evidence and involve an

---

[53] First written submission of Argentina, paras. 234 to 241.
[54] Para. 7.100.
[55] We note that in accordance with the provisions of Article 1 of the *Anti-Dumping Agreement*, the reference to Article VI of GATT 1994 in Article 3 is also a general reference to the *Anti-Dumping Agreement* itself.
[56] First written submission of United States, para. 296.
[57] First written submission of United States, para. 302.
[58] First written submission of Argentina, para. 211.
[59] First written submission of Argentina, para. 243 et seq.

The European Communities remain available should the Panel wish to pose any written or oral questions on the matters dealt with in this submission.

ANNEX B-2

THIRD PARTY SUBMISSION OF JAPAN

14 November 2003

TABLE OF CONTENTS

I.

1. The provisions of Article 2 apply to the determination of likelihood of continuation or recurrence of "dumping" under Article 11.3

4. As Argentina argues, the provisions of Articles 2.1 and its subsequent paragraphs in Article 2 define the term "dumping" throughout the AD Agreement, including Article 11.3. The title of Article 2 states "Determination of Dumping." Article 2.1 then states that:

> **For the purpose of this Agreement**, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.[5]

5. The first phrase "[f]or the purpose of this Agreement" demonstrates drafters' clear intent to apply the obligations of Article 2 throughout the AD Agreement, wherever the word "dumping" appears. The basic concept of "dumping" under Article 2 thus applies to all "dumping" determinations throughout the AD Agreement, including sunset reviews under Article 11.3. To find otherwise would render the opening phrase of Article 2.1 devoid of any meaning.

6. Article 2.1 is further defined by the other provisions of Article 2, including Article 2.4. Article 2.4 provides "a fair comparison shall be made between the export price and the normal value." As the Appellate Body in *EC – Bed Linen* has stated,[6] this general obligation inform Article 2.1 of how the margin of dumping, *i.e.*, the difference between the export price and the normal value, must be established.

7. The phrase "likely to lead to continuation or recurrence" in Article 11.3 does not change the core concept of "dumping," nor does it affect the applicability of Article 2 to Article 11.3. To find "continuation of dumping," the authorities must find the existence of dumping at the time of the sunset review before ascertaining whether it will "continue". To find "recurrence of dumping," the authorities must first find that dumping has ceased by the time of the sunset review before determining whether it will "recur." The threshold question, therefore, is how the authorities must find the existence of currently occurring dumping. Sunset reviews therefore focus on both the current existence of dumping and the continued existence, or occurrence in the future, of dumping. The underlying concept of "dumping" is the same in either case; the only difference is the period of time for which this assessment is being made.

8. A determination of whether future dumping is likely to continue or recur under Article 11.3, therefore, must reflect the definition and obligations enumerated in Articles 2.1, 2.4 and the other provisions of Article 2.

2. Provisions of Article 3 apply to Article 11.3

9. Argentina also correctly stated that provisions of Article 3 apply to Article 11.3. The title of this Article states "Determination of Injury." Footnote 9 then defines the term "injury" that:

> **Under this Agreement** the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article. (emphasis added) D.633 6Tw (in.25 TD -0.0988

The phrase "[u]nder this Agreement" in Footnote 9 ensures that, whenever the AD Agreement uses the term "injury," the provisions of Article 3 define the term. To find "injury," therefore, the provisions in Article 3 setting forth requirements for finding "injury" must be satisfied.

10. The texts of the individual provisions of Articles 3 further clarify that the requirements in these provisions apply to a determination of "injury." Article 3.1 sets forth general requirements for a determination of "injury." The phrase "a determination of injury for purposes of Article VI of GATT 1994" clarifies its cross-reference that the provisions of Article 3 apply to an "injury" determination throughout the AD Agreement to determine circumstances in which anti-dumping measure can be applied.[7] The Appellate Body has confirmed "

23. The term "a product" under Article 2.1 clarifies that the margin of dumping, *i.e.*, the basis of the determination of "dumping," must incorporate all types of the product that are subject to a particular anti-dumping proceeding. The Appellate Body in *EC - Bed Linen* has stated, "from the wording of this provision, it is clear to us that the Anti-Dumping Agreement concerns the dumping of a *product*."[12] The Appellate Body in *EC-Bed Linen* further clarified this point:

> all references to the establishment of "the existence of margins of dumping" are references to the *product* that is subject of the investigation. … Whatever the method used to calculate the margins of dumping, in our view, these margins must be, and can only be, established for the *product* under investigation as a whole.[13]

The Appellate Body in *EC – Bed Linen (Article 21.5 – India)* also confirmed "dumping is a determination made with reference to a product from a particular producer [or] exporter, and not with reference to individual transactions." (emphasis added)[14] Article 2.1 thus provides that dumping must be determined on the basis of all types of a product under consideration as a whole, not some types of the product.

24. The Appellate Body in *EC - Bed Linen* proceeded to clarify that the "fair comparison" and "price comparability" requirements mean that the establishment of dumping margins under Article 2.4 must be made by evaluating the product under consideration as a whole, not just a portion of the product. The Appellate Body stated "[a]ll types or models falling within the scope of a "like"[a]ll t65027 0 TDsid

> In this case, there has been no decline in dumping margins nor an increase in imports. Rather, absent an administrative review, the dumping margin from the original investigation is the only indicator available to the Department with respect to the level of dumping. Because 1.27 per cent is above the 0.5 per cent *de minimis* standard applied in sunset reviews, we find that dumping has continued over the life of the order and is likely to continue if the order were revoked.[18]

27. In the original investigation, DOC calculated the dumping margin of 1.36 per cent for Siderca only, and applied this margin to all others rate.[19] Argentina presented an exhibit showing how DOC calculated the margin of dumping for Siderca in the original investigation.[20] While Japan does not take any position with respect to the factual aspect of this dispute, it appears to us that Siderca's dumping margin might have been negative if the zeroing had not been applied in the original investigation. If it were the case, then DOC would lose its proper evidentiary basis for its affirmative determination in the OCTG sunset review under Articles 2.1 and 2.4.[21]

28. Japan therefore respectfully requests that 0653 TTc 0

32. In sum, as the ITC based these determination and consideration on the reported rates, the ITC's injury determination would also be inconsistent with Article 11.3 if the DOC

margin of dumping is below *de minimis* under the AD Agreement, and even could be negative without zeroing, if the original investigation were subject to the AD Agreement. In order for the injury determination to be consistent with Article 3.5 and 11.3, therefore, the ITC must have persuasive evidence demonstrating that the injury would be nonetheless likely to continue or recur if the duty were terminated.

40. Further, the "non-attribution" requirement[28]

D. WAIVER PROVISIONS IN US STATUTE AND THREE SCENARIOS IN *SUNSET POLICY BULLETIN* AULLco1 Tj -4134B

46. The term "administrative procedures" must be understood in this context. Coming after "laws" and "regulations," Articles 18.4 and Article XVI:4 provide the broader term "administrative procedures" to catch administrative rules that may appear discretionary, but that in fact operate as substantively and effectively mandatory rules. Moreover, the term "administrative procedures" must also be understood in the context of a Member needing to take "all" the steps necessary to "ensure" ... "conformity" with WTO obligations. Thus, this language calls for affirmative steps to comply with WTO obligations. To act consistently with Article 18.4, therefore, Members must adopt administrative procedures that are fully consistent with

(b) Both the Waiver Provisions and the Three Scenarios Are Actionable under Article 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement As Such

49. Applying the above jurisprudence to the instant case, both the waiver provisions and the three scenarios in the *Sunset Policy Bulletin* are actionable under Article 18.4 and XVI:4 as such. For the waiver provisions, the US statute provides:

> In a review in which an interested party waives its participation pursuant to this paragraph, the administering authorities 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.[41]

The US regulationulle0i -0.091wv

> The Secretary will consider the failure by a respondent interested party to file a complete substantive response to a notice of initiation … as a waiver of participation in a sunset review before the Department.[42]

50. These two provisions explicitly use the mandatory languages "shall" and "will." No modifying languages, which may give certain discretion to the authorities, are -0.091wd. These provisions therefore mandate that DOC make an affirmative determination automatically in the sunset review where no responding parties submitted substantive responses to DOC. No exceptionul are provi1wd in such case. These mandatory provisions are sufficient evi1wnce to make them actionable under Article 18.4 and XVI:4.

51. The three scenarios in the *Sunset Policy Bulletin* are also actionable under Article 18.4 and XVI:4. Argentina establishwd that DOC has consistently applied, and has never deviatwd from, these three scenarios to all sunset reviews in which domestic interested parties have participatwd.[43] Such consistentl application of the three scenarios is sufficient evi1wnce to prove the mandatory nature of the three scenarios and, thus, to make the three scenarios actionable under Articles 18.4 and XVI:4.

2. The Waiver Provisions are inconsistentlwith Articles 6.2 and 11.3

52. As Argentina claims, the waiver provisions of the US statute and regulations are inconsistentl with mandatory Articles GXVI:4 and 11.3. As discussed above, the waiver provisions in the US statute 4

authorities make an affirmative determination on a prospective basis[44] that there is a probability, not a mere possibility, that the dumping will continue or recur in the future.[45]

54. For the positive evidence requirement, the Panel in

(b) Inconsistency of the Waiver Provisions with Article 11.3

57. The US statute and regulations completely ignored the heavy burden placed on the authorities, and the need for the authorities to make their determination of the necessity of continued imposition of dumping duties, based on a "fresh" analysis of "credible evidence," and to reach the conclusion as "demonstrable [from] the evidence adduced". Instead, the waiver provisions require the authorities to make an affirmative determination without reviewing any positive evidence. The mandatory affirmative finding, with no evidence substantiating its affirmative finding, falls short of the requirements under Article 11.3.

(c) Inconsistency of the Waiver Provisions with Article 6.2

58. Furthermore, the waiver provisions are inconsistent with Article 6.2 because these provisions mandate the authorities to make an affirmative determination without any further procedures. The waiver provisions fail to provide any opportunity with responding parties for defending their interests, and thus, deny responding party's due process right under Article 6.2.

59. The due process right under Article 6.2 must be understood in conjunction with Article 6.9 because Articles 6.2 and 6.9 operate together to ensure (along with other provisions) that authorities provide interested parties a full and fair opportunity to defend their interests. Article 6.2 sets out the general procedural and due process obligations. Article 6.9 then requires an authority to inform the parties of the "essential facts under consideration which form the basis for the decision." The provision further requires that the disclosure take place "in sufficient time" for the parties to defend their interests. A "full opportunity" under Article 6.2 thus exists only where the authority discloses all of the relevant facts in sufficient time for their defence.

60. The waiver provisions mandate DOC to make an affirmative determination without further procedures, including the disclosure of essential facts to responding parties. These provisions give responding parties no opportunity to present their views on the essential facts. The waiver provisions thus fail to give any regard to the responding parties' due process right under Article 6.2. These provisions, therefore, are inconsistent with Article 6.2.

3. The three scenarios are inconsistent with Article 11.3

61. Japan agrees with Argentina that the three scenarios, which DOC sets forth in the *Sunset Policy Bulletin* to instruct or "guide" individual sunset review determinations, are inconsistent with 11.3. None of these scenarios meets requirements for sunset review determinations under Article 11.3.

62. As discussed above, the authorities must make prospective analysis based on positive evidence to determine the probability, not a mere possibility, of continuation or recurrence of dumping. None of these scenarios, however, requires the authorities to make any prospective analysis. Nor do any of these three scenarios require any positive evidence to establish that continuation or recurrence of dumping is probable. They simply require the authorities to check the current import volume to compare the volume during the period of original investigation, and the current state of dumping. These three scenarios then instruct that DOC make an affirmative determination either where dumping exits at the rate of 0.5 per cent or above, where imports were ceased, or where the import volume at the time of the sunset review was significantly lower than the volume during the period of original investigations. These three scenarios are far short of satisfying the requirements under Article 11.3, and therefore are inconsistent with Article 11.3.

63. Moreover, these scenarios predetermine the results in an uneven-handed, unfair, biased, and un-objective manner in favour of continuation of imposition of anti-dumping duties. Such

predetermined method is beyond the permissive exercise of the authorities' discretion under Article

68. Other two scenarios also rest on mechanical presumptions, not facts. Both scenarios reflect the presumption that all responding parties will export their products at volumes not less than the pre-order level, if the anti-dumping duty is lifted. These methods also stand on the further presumption that all responding parties will cut their export price to less than their normal value to sell their product at the volume of the pre-order level. These presumptions were in fact suggested in the legislative history, including the SAA and the House Report.[58] The two scenarios do not require DOC any information to substantiate that these presumptions are applicable to an individual case "on the basis of the evidence adduced."[59] This use of presumptions rather than facts, thus, predetermines the results to continue imposition of anti-dumping duties in favour of the domestic industry.

69. In sum, the three scenarios cannot satisfy the requirements under Article 11.3, and predetermine the results in favour of the domestic industry beyond the permissive exercise of the authorities' discretion under Article 11.3. These three scenarios are, therefore, inconsistent with Article 11.3.

4. Conclusions

70. As discussed above, both waiver provisions and the three scenarios are actionable under Article 18.4 and XVI:4 as shown by their language or repeated applications to sunset reviews and are inconsistent with Article 6.2 and 11.3. The United States thus failed to ensure the conformity of its statute, regulations, and administrative procedures regarding the waiver provisions and the three scenarios with Articles 6.2 and 11.3 of the AD Agreement. Japan thus respectfully requests that the Panel find that waiver provisions in the US statute and regulations and the three scenarios in the *Sunset Policy Bulletin* are inconsistent with Article 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement as such.

III. CONCLUSION

71. For the foregoing reasons, Japan respectfully requests the Panel to clarify that the United States acted inconsistently with Articles 2.1, 2.4, 3.1, 3.4, 3.5, 6.2, 11.3, and 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement.

[58] Section II.A.3 of the *Sunset Policy Bulletin* specifically stated "the SAA at 890, and the House Report, T Tw (Report) Tj 27 0 TD -0.09 1.58e0re 9lA-0 TD 0.0206 Tc79.75 Tw 350.1669lA6 6. "

ANNEX B-3

THIRD PARTY SUBMISSION OF KOREA

TABLE OF CONTENTS

I. INTRODUCTION

1. This third party submission is presented by the Government of Korea ("Korea") with respect to certain aspects of the first Panel submission by Argentina in *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268. The issues raised by Argentina are detailed in its first submission, dated 15 October 2003.[1] Korea also responds herein to certain points made by the United States in its own first submission, dated 7 November 2003.[2]

2. Korea has systemic interests in the interpretation and application of the provisions of Article 11 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("the AD Agreement") governing five-year or "sunset" reviews of anti-dumping measures. Therefore, Korea reserved its third party rights pursuant to Article 4.11 of Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). Korea appreciates this opportunity to present its views to the Panel.

3. Korea is concerned with several aspects of the US law and practice governing how the US Department of Commerce (the "DOC") and the US International Trade Commission ("USITC") make their respective determinations regarding the likelihood of continuation or recurrence of dumping and injury, as required by Article 11.3 of the AD Agreement. In Korea's view, US law and practice on sunset reviews fails to respect fully the disciplines of the AD Agreement and to give effect to the presumption inherent in the AD Agreement in favour of termination of anti-dumping measures after five years. Korea therefore generally supports the arguments raised by Argentina in its first submission. Rather than repeating all of those arguments, however, Korea will address in this submission only certain critical issues on which Korea has additional views.

II. EXECUTIVE SUMMARY

4. Korea addresses the following issues in this submission:

5. All relevant substantive and procedural provisions of the AD Agreement, especially Articles 2, 3, 6 and 12, are applicable *mutatis mutandis* to Article 11.3, to the extent that they are relevant to sunset reviews. Article 11.3 of the AD Agreement does not set out detailed substantive or procedural rules. Accordingly, the standards governing sunset reviews must be found in the other r Tj -80.25 -12.75 4.5 0 TD -0.27 0 (proce21a.1271 r05 0 TDws.) Tjreement,

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

12. Thus, the provisions of Article 11.3 of AD Agreement governing sunset reviews must be interpreted according to their ordinary meaning, within the context of Article 11 and the overall object and purpose of the AD Agreement as a whole. This means that the concepts of dumping and injury referred to in Article 11.3 must be interpreted in the same manner as those terms are used in other provisions of the AD Agreement, including, in particular, Articles 2 and 3. Similarly, the procedural protections of Article 6 and 12 of the AD Agreement must also apply to Article 11.3 reviews.

13. The United States argues that it is permissible to interpret Article 11.3 in isolation from the other provisions of the AD Agreement because Article 11.3 contains no explicit reference to the other provisions of the AD Agreement.[6] The absence of such cross-references cannot, however, be understood to permit the interpretation of the terms dumping and injury differently than elsewhere in the AD Agreement. To do so would be inconsistent with the principles of Article 31 of the Vienna Convention, quoted above, which provides that all the provisions must be read in the context of their object and purpose. This interpretive guide removes the need for explicit cross references in every case where terms such as dumping and injury recur.

14. Article 11.3 of the AD Agreement contains no detailed substantive definitions or procedural rules for the conduct of sunset reviews. These definitions and rules must be found elsewhere in the AD Agreement. Korea submits that all other provisions of the AD Agreement, especially Articles 2, 3, 6 and 12, are applicable *mutatis mutandis* to Article 11.3, to the extent that they are relevant to sunset reviews. To hold otherwise would render the terms dumping and injury, as used in Article 11.3, *inutile* and would mean that there were in effect no multilateral disciplines governing the conduct of sunset reviews. Korea finds no basis or support for this position, either evidenced in the intent of the drafters of the AD Agreement, in the general object and purpose of the AD Agreement, or in WTO jurisprudence generally.

15. Korea believes that the introductory words of Article 2.1 of the AD Agreement ("for purposes of the Agreement") mean that the definition of dumping and the rules for the determination of dumping contained in Article 2 apply *mutatis mutandis* to determinations under Article 11.3. Korea also notes that the literal meaning of the text of Article 11.3 itself supports the view that the term "dumping" in Article 11.3 should be interpreted as referring to dumping determined under the rules laid down in Article 2. Article 11.3 refers to a determination of the likelihood of "continuation or recurrence of dumping and injury." The dictionary definition of "continuation" is "the action of continuing in something; continuity in space or of substance; the action or fact of remaining in a state; continuous or prolonged existence of operation."[7] Similarly, "recurrence" refers to "the fact or instance of recurring" or "return or reversion to a state."[8] Both terms refer to a pre-determined or pre-established state. The "state" referred to by Article 11.3 is, of course, dumping. Thus, "a continuation or recurrence of dumping" means that the original state of dumping either remains in effect or is returned to. The logical meaning of this is that the state of dumping referred to in Article 11.3 is the same state of dumping established under the rules of Article 2 in the original investigation. To hold otherwise would permit the possibility that an Article 11.3 review could lead to an anti-dumping measure remaining in effect on the basis of a different "state" than was originally found.

16. The text of Article 11.1 provides additional contextual support for Korea's reading. Article 11.1 states that measures should remain in force only as long as necessary to "counteract"

---

[6] *See* US first submission, paras. 140-142.
[7] *The New Shorter Oxford English Dictionary* (Fourth Ed. 1993), pgs. 494-495.
[8] *Id.*, pg. 2510.

dumping. The use of the word "counteract" suggests that the measure is a response to the original finding of dumping, and must retain a nexus to that original finding of dumping. That nexus is lost if the determination of the likelihood of continuation of dumping is made using a different definition of dumping than is used for the original finding.

17.

22. The United States attempts to avoid this conclusion by saying that to define injury in the same manner in sunset reviews as original investigations would lead to absurd results.[11] The United States says that is impossible to base an Article 11.3 determination on a finding of threat of injury. Again, this is not the point (although in many respects the prospective nature of the sunset review is very analogous to a threat determination in an investigation). Instead, the point is that the injury that may be found likely to *continue* in a sunset review must be the same character of injury that was originally found to exist in the underlying investigation, using the definitions of Article 3.

23. Korea finds further textual support for this reading of Article 11.3 in Article 3.1 of the AD Agreement, which states the conditions upon which a determination of injury shall be made "for purposes of Article VI of GATT 1994," without exception or qualification for different injury determinations that may be required over the life of a measure.

24. While Korea has not addressed here every aspect of the claims raised by Argentina, Korea submits that for the reasons summarized above, it is critically important to the integrity of the AD Agreement that a single definition of each of the fundamental concepts of dumping and injury be applied consistently throughout the Agreement. Korea submits that this interpretation is fully consistent with the text, as well as with the context and the object and purpose, of the AD Agreement.

B. THE UNITED S

to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence."[14]

29. Thus, the investigating authorities must have a sufficient factual basis for their finding that dumping is likely to continue or recur. By assuming that a waiver of participation means that dumping is likely to continue or recur, however, the US authorities are making determinations without having done

interpretation of the term "likely" as requiring only a finding that recurring injury would be "possible" is therefore inconsistent with Article 11.3. Korea agrees, for the following reasons.

41. Argentina correctly relies on dictionary definitions to interpret the term "likely" to mean "probable."[16] The ordinary meaning of the term "likely" is, in effect, that there is a greater chance than not that the event will occur. WTO jurisprudence on this point supports Argentina's interpretation. The term "likely" as used in Article 11.3 (and Article 11.2) has been construed as meaning "probable" by the panel in *US – DRAMs from Korea*, which stated that "likelihood or likely carries with it the ordinary meaning of probable."[17] Similarly, the *US – Sunset Review of Steel from Japan* panel found that "a 'likely' determination requires that the administering authority must base its determination on 'probable', not 'possible', outcomes."[18] This interpretation is also consistent with the presumption in favour of termination of anti-dumping measures contained in the AD Agreement.

42. The United States ignores the proper interpretation of the term "likely." Argentina cites to USITC statements to the effect that the term "likely" "captures a concept that falls in between 'probable' and 'possible' on a continuum of relative certainty."[19] Neither the US statute nor the *Statement of Administrative Action* regarding the implementation of the law requires the USITC to adhere to a standard of probability.

43. Korea therefore submits that the USITC improperly interprets the term "likely" as meaning "possible" for the purposes of its determination of the likelihood of continued injury under Article 11.3. The US interpretation should be found to be inconsistent with the text of Article 11.3, and rejected by the Panel.

IV. CONCLUSION

44. Korea respectfully submits that in reaching its decision on Argentina's various claims, the Panel should ensure that the provisions of Articles 2, 3, 6, and 12 are applied consistently and rationally to sunset reviews under Article 11. This will add clarity, consistency and fairness to the conduct of sunset reviews, and give effect both to the ordinary meaning of, and the context, object and purpose of Article 11 and the AD Agreement as a whole.

45. Korea appreciates the opportunity to participate in this proceeding and to present its views to the Panel.

---

[16] Argentina's first submission, para. 212.

[17] Panel Report, *US – Anti-Dumping Duties on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R (adopted 19 March 1999), footnote 494.

[18] Panel Report, *US – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Production from Japan*, WT/DS244/R (circulated 14 August 2003), para. 7.178.

[19] Argentina's first submission, para. 217 (citations omitted).

1. As this dispute gives rise to certain important issues in respect of sunset review, which are of high significance to Members, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu has a systemic interest in the proper interpretation and operation of relevant provisions involving the procedures and would like to submit its views on the following aspects:

(a) Expedited review and the "waiver" determination by the US Department of Commerce;

(b) The issue of "irrefutable presumption" alleged by Argentina; and

(c) The question of applicability of Articles 2 and 3 of the AD Agreement to Sunset Reviews.

A. EXPEDITED REVIEW AND THE "WAIVER" DETERMINATION BY THE US DEPARTMENT OF COMMERCE

2. We are of the view that a Member may conduct an expedited sunset review if it deems appropriate in so far as its conduct is consistent with the relevant provisions of the AD Agreement. Article 11.4 of the AD Agreement explicitly provides that a review under Article 11 "shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review." However, the admission of an expedited review does not exempt a Member from its obligations under the AD Agreement.

3. We consider that the mandatory wording imposed by 19 USC. §1675(c)(4)(B) to the effect that "[i]n 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 countervailable subsidy (as the case may be) with respect to that interested party" (emphasis added)[1], on the face of it, leaves the Department of Commerce with no discretion as to the mandated result of its finding of "likelihood" once the participation of a foreign interested party is deemed waived, irrespective of whether, based on the "information available" or fresh evidence submitted during the sunset review, the continuation or recurrence of dumping is likely or not.

4. Article 11.3 of the AD Agreement provides in part that the authorities must "*determine*…that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury" in order not to terminate the imposition of a definitive anti-dumping duty. (emphasis added). In our view, a review with the finding of the Commerce Department pre-determined and mandated by statute could hardly be considered as determination being "properly conducted", which is a standard set for sunset review by the Appellate Body in *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*[2] *("Steel from Germany")* that "[t]ermination of countervailing duty is the rule and its continuation is the exception. The continuation of a countervailing duty must therefore be based on a ***properly conducted review*** and a ***positive determination*** that the revocation of the countervailing duty would be likely to lead to a continuation or recurrence of subsidization and injury"[3] (emphasis added). It follows, therefore, that this Panel

[1] Argentina's first submission, para. 51.

[2] WT/DS213/AB/R cited in Argentina's first submission, para. 83.

[3] WT/DS213/AB/R, para.88. Article 21.3 of the SCM Agreement has similar provision with Article 11.3 of the AD Agreement in that Article 21.3 also requires the authorities to determine whether the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury. Thus the Appellate Body report in *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* in relation to the requirement of "determination" should be applicable to AD case with regard to the determination of the continuation or recurrence of dumping and injury.

should find that the deemed "waiver" provision referred to in the preceding paragraph is inconsistent with Article 11.3 of the AD Agreement.

B. THE ISSUE OF "IRREFUTABLE PRESUMPTION" ALLEGED BY ARGENTINA

5. In relation to the Statement of Administrative Action ("SAA") and the *Sunset Policy Bulletin* ("Bulletin"), we note that these documents only contain guidelines for the Department of Commerce to follow in a normal situation. We do not find any provision in these documents that mandates compulsory compliance by the Department of Commerce. As such, we thus failed to see an irrefutable presumption that is inconsistent with Article 11.3 of the AD Agreement. However, the indication of SAA being an authoritative expression of US anti-dumping laws and the fact the Bulletin reflecting the Department of Commerce's own practice show that these documents could serve as strong evidence to support that the Commerce Department did act in accordance with the SAA and the Bulletin in the present case, in relation to its decision on the continuous imposition of anti-dumping duties. This helps Argentina in discharging its onus of proving violation of the AD Agreement by the Commerce Department's measures. In this respect, the panel report of *United States – Measures Treating Export Restraints as Subsidies* also recognized the authoritative status of the SAA.[4] It follows, therefore, that when this Panel considers whether there is evidence to show that the Department has acted inconsistently against the AD Agreement, the existence of the SAA and the Bulletin shall be taken into important account.

6. As regards the practice of the Department of Commerce, we do not consider that it is proper to draw a(575 -5.25 TD /F0 11.25 Tf -0.0619.1875 Tw ( ) Tj 27.75 0 -0.043327.75 0 -0.0433 Tc 1.2314 Tw59As rega Tj 36indicat 0 TD -0.0433 Tc 9.2446 T48(

D. CONCLUSION

14. Although Article 11.3 is silent as to the standard and methodologies which Members must follow in their sunset review, we do not consider that it is the intention of WTO Members to leave this question deliberately open and unchecked. We are of the view that a coherent reading of the AD Agreement calls for the application of sunset reviews to the provisions in Articles 2 and 3 of the AD Agreement.

15. We like to mention that the above-mentioned views that US laws and practices are in violation of AD Agreement are not exhaustive. For instance, we also agree with the view submitted by Argentina, in that the Commerce Department's "deemed waiver" of the right of a respondent party to participate in a Sunset Review violates Article 6.1 of the AD Agreement, which requires "all interested parties in an anti-dumping investigation shall be given . . . ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question" and Article 6.2, which provides that interested parties shall be given a full opportunity for the defence of their interests.

16. Furthermore, for instance, the "deemed waiver" rule applying only to respondent interested parties of the sunset review procedures and .12.65.25 0 14.5 0 TD 7nn2S172 . 6 5 . 2 8