

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

***Report of the Panel***



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<sup>1</sup> Argentina confirmed, by its letter dated 12 December 2003, that all references made to Exhibit ARG-56 in Argentina's first written submission, must now be understood as being made to Exhibit ARG-56 *bis*.



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<sup>2</sup> 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.

<sup>3</sup> 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.

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## 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 VI of GATT 1994 ("the Anti-Dumping Agreement") concerning, *inter alia*, the determinations of the United States Department of Commerce ("the USDOC") and the United States International Trade Commission ("the USITC") in the sunset reviews of anti-dumping duty measure on oil country tubular goods ("OCTG") from Argentina.<sup>4</sup> The United States and Argentina consulted on 14 November and 17 December 2002, but failed to settle the dispute.

1.2 On 3 April 2003, Argentina requested the Dispute Settlement Body ("the DSB") to establish a panel pursuant to Article XXIII of the GATT 1994, Article 6 of the *DSU* and Article 17 of the Anti-Dumping Agreement.<sup>5</sup>

1.3 At its meeting on 19 May 2003, the DSB established a panel in accordance with Article 6 of the *DSU* to examine the matter referred to the DSB by Argentina in document WT/DS268/2. At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by Argentina in document WT/DS268/2, the matter referred to the DSB by Argentina in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.4 On 22 August 2003, Argentina requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the *DSU*. On 4 September 2003, the Director-General accordingly composed the Panel as follows:

Chairman: Mr. Paul O'Connor

Members: Mr. Bruce Cullen  
Dr. Faizullah Khilji

1.5 The European Communities, Japan, Korea, Mexico and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu reserved their third-party rights.

1.6 The Panel met with the parties on 9-10 December 2003 and on 3 February 2004. It met with the third parties on 10 December 2003.

## II. FACTUAL ASPECTS

2.1 This dispute concerns certain aspects of US sunset reviews laws, regulations, and procedures as well as their application in the sunset review of the anti-dumping duty on OCTG from Argentina. The original anti-dumping investigation on OCTG from Argentina that gave rise to the sunset review at issue in these dispute settlement proceedings was initiated in 1994, i.e. before the establishment of the World Trade Organization ("the WTO") and was completed in 1995, i.e. following the entry into force of the Marrakesh Agreement Establishing the WTO. Therefore, the investigation was carried out under pre-WTO US laws and regulations.

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<sup>4</sup> WT/DS268/1.

<sup>5</sup> WT/DS268/2.

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 consistent on their face *per se* with the US WTO obligations, and irrespective of whether the SAA and SPB are "measures" that can be subject to challenge, to find that the USDOC failed to administer in an impartial and reasonable manner the US sunset review laws, regulations, decisions and rulings in violation of Article X:3(a) of the GATT 1994;
  8. To find that, in its determination of the likelihood of continuation or recurrence of injury in the instant sunset review, the USITC applied a lower standard than that which is required by Article 11.3 of the Anti-Dumping Agreement;
  9. To find that the USITC's sunset determination violated:
    - Articles 3.1, 3.2, 3.4, 3.5, and 11.3 of the Anti-Dumping Agreement because the USITC did not conduct an objective examination of the record or base its determination on positive evidence regarding its conclusions concerning the likely volume of imports, the likely price effects, and the likely impact of imports on the domestic industry;
    - Article 3.4 of the Anti-Dumping Agreement because in assessing the likelihood of continuation or recurrence of injury to the domestic industry, the USITC failed to evaluate all the relevant economic factors and indices having a bearing on the state of the industry, including those enumerated in the mentioned article;
    - Article 3.5 of the Anti-Dumping Agreement because the USITC failed to respect the causation provisions of this article;
  10. To find that the USITC's application of 19 U.S.C. § 1675a(a)(1) and (5) of the Tariff Act of 1930 in the sunset review of OCTG from Argentina was 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 by applying the "within a reasonably foreseeable time" standard and by using a time frame that is not "imminent" but which rather relates to "a longer period of time", the USITC speculated and conducted an open-ended analysis for possible future injury;
  11. To find that the USITC's use of cumulation in its likelihood of continuation or recurrence of injury determinations in the OCTG sunset review was inconsistent with Article 11.3 of the Anti-Dumping Agreement, which precludes the use of a cumulative injury analysis in sunset reviews; or, if cumulation is permitted in sunset reviews, to find in the alternative that the USITC's decision to cumulate in the OCTG sunset review violated Article 3.3 of the Anti-Dumping Agreement because the USITC failed to comply with the conditions set out in the mentioned article for the use of cumulation; in addition, to find that the USITC's use of cumulation also conflicted with the "likely" standard of Article 11.3;
  12. To find that because the United States violated its obligations under the Anti-Dumping Agreement, it also violated the provisions of Article VI of the GATT 1994, Articles 1 and 18 of the Anti-Dumping Agreement, and Article XVI:4 of the WTO Agreement;

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 The arguments of the parties are set out in their written submissions and oral statements to the Panel and their answers to questions. The parties' submissions, oral statements and their answers to questions are attached to this Report as Annexes (see List of Annexes, pages viii and ix).

**V. ARGUMENTS OF THE THIRD PARTIES**

5.1 The arguments of the third parties, the European Communities, Japan, Korea, Mexico and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu are set out in their written submissions and oral statements to the Panel and their answers to questions. The third parties' submissions, oral statements and their answers to questions are attached to this Report as Annexes (see List of Annexes, pages viii and ix).

**VI. INTERIM REVIEW**

6.1 On 7 May 2004, we submitted the interim report to the parties. Both parties submitted written requests for the review of precise aspects of the interim report. Parties also submitted written comments on the other party's comments. Neither party requested an interim review meeting.

6.2 We have outlined our treatment of the parties' requests below. Where necessary, we have also made certain technical revisions to our report.

**A. REQUEST OF ARGENTINA**

6.3 **Argentina** submits that the Panel should make a legal finding that the violations committed by the United States of its WTO obligations constitute nullification or impairment of Argentina's rights under WTO agreements within the meaning of Article 3.8 of the *DSU*.

6.4 The **United States** opines that since Argentina has not proved that it suffered actual harm due to the violations found by the Panel, the latter should refrain from finding that these violations lead to a nullification or impairment of Argentina's rights under WTO agreements.

6.5 **We** note that Article 3.8 of the *DSU* sets out the presumption that in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. The cited article does not require that the complaining party prove actual harm for the Panel to find that an infringement of a WTO obligation also constitutes nullification or impairment of the complaining party's WTO rights. We therefore made a modification to paragraph 8.2 of our report to accommodate Argentina's comment.

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 posits. We therefore decline to make additional findings in this regard.

6.12 Fourth, **Argentina** submits that it put forward sufficient argumentation to support its claim under Article 6.9 of the Anti-Dumping Agreement and therefore the Panel should make findings in this regard.

6.13 The **United States** agrees with the Panel's view that Argentina did not develop sufficient argumentation to make a claim under Article 6.9 and submits that the Panel should not make any finding in this regard.

6.14 **We** consider that Argentina did not develop arguments sufficient to make a claim under Article 6.9. We added paragraphs 7.243-7.244 to our report in order to further clarify the reasons why we decline to make any finding under Article 6.9 of the Agreement.<sup>6</sup>

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<sup>6</sup> We note that the United States requested to be given a new comment period in case the Panel decided to make a finding under Article 6.9. Given that our additional discussion in paragraphs 7.243-7.244 of our report is intended to clarify why we declined to make a finding regarding Argentina's argumentation under



6.15 Fifth, **Argentina** disagrees with the Panel's characterization of Argentina's claim regarding the USITC's failure to apply the "likely" standard of Article 11.3 of the Anti-Dumping Agreement in the OCTG sunset review. In particular, Argentina disagrees with the Panel's statement in paragraph 7.280 that "... the crux of Argentina's claim is..." and the statement in paragraph 7.285 that "...the essence of Argentina's claim is not..."

6.16 The **United States** did not specifically respond to this comment.

6.17 **We** note that Argentina's main argument in this regard, i.e. the USITC failed to apply the "likely" standard of Article 11.3 in the OCTG review, is correctly identified and then discussed by the Panel in paragraphs 7.284-7.285 below. The statement in paragraph 7.280 is intended to draw attention to the similarity between the texts of Articles 3.1 and 3.2 of the Anti-Dumping Agreement on the one hand and the Panel's standard of review in the present proceedings on the other. As such, this statement does not determine the Panel's main line of approach with respect to this claim. The statement in paragraph 7.285 is intended to link Argentina's claim regarding the USITC's failure to apply the "likely" standard to the three arguments raised by Argentina regarding the USITC's determinations in the OCTG sunset review, i.e. volume, price effect and consequent impact of likely dumped imports. Similarly, this statement does not undermine, nor change, the nature of Argentina's claim.

6.18 We therefore decline to make any modification to our findings in this regard.

6.19 Sixth, **Argentina** disagrees with the Panel's characterization of Argentina's claim regarding cumulation. In this context, Argentina argues that the Panel has failed to discuss Argentina's arguments that Articles 11.3 and 3.3 of the Agreement prohibit cumulation in sunset reviews and that the USITC's use of cumulation in the OCTG sunset review led to a failure to apply the "likely" standard of Article 11.3.

6.20 The **United States** generally disagrees with Argentina and submits that the report adequately discusses Argentina's argument that Articles 11.3 and 3.3 prohibit cumulation in sunset reviews.

6.21 **We** note that in paragraphs 7.325 and 7.326 below we have addressed Argentina's argument that Article 3.3 limits the use of cumulation to investigations. This, in our view, is equivalent to the proposition that Article 3.3 prohibits the use of cumulation in sunset reviews. We have nevertheless added paragraph 7.334 to discuss Argentina's argument regarding the use of the word "duty" in the singular, as opposed to the plural, in Articles 11.1 and 11.3 of the Agreement in connection with the present claim.<sup>7</sup>

6.22 Regarding Argentina's claim that the USITC failed to apply the "likely" standard of Article 11.3 by using cumulation in the OCTG sunset review, we note that we have discussed this particular issue in paragraph 7.337 below. We therefore decline to make any modification to our findings in this regard.

6.23 We have made a modification to paragraph 7.239 at the request of Argentina.

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Article 6.9, rather than constituting a finding, we do not find it necessary to give the United States another opportunity to make comments in this regard.

<sup>7</sup> We note that the United States requested to be given a new comment period in case the Panel decided to engage in an additional discussion of Argentina's arguments under this claim. Given that our discussion of Argentina's argument regarding the word "duty" does not change our conclusion with respect to this claim and that the United States has already expressed its views on this particular issue (see, for instance, First Written Submission of the United States, para. 366), we do not find it necessary to give the United States another opportunity to make comments in this regard.

**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 waivers may arise. One of the situations described in this section is the deemed waivers category. The legal consequence of waivers, regardless of the situation in which they arise, is set out in Section 751(c)(4)(B) of the Tariff Act, i.e. an affirmative finding of likelihood. We cannot, therefore, accept the US comment, which suggests that the Statute has no effect with respect to deemed waivers.

6.27 Second, the **United States** requests that the Panel make certain modifications to paragraphs 7.156 and 7.158 of the report to reflect the fact that the SPB has no authority to request the USDOC to do anything and similarly no authority to give the USDOC the discretion to do anything.

6.28 **Argentina** opines that the modifications requested by the United States are aimed at re-litigating certain substantive issues that have been decided by the Panel and therefore the Panel should reject them.

6.29 **We** note that the basis on which the United States builds its comments at issue are closely related to the substance of the claims raised by the parties and discussed by the Panel in the present proceedings. We have already made a decision regarding the US' view that the SBP as such cannot give rise to a WTO violation because it is not binding under US law. We therefore decline to revisit our substantive finding in that regard. We have nevertheless made certain modifications to the descriptive portions of paragraphs 7.156 and 7.158 to accommodate the concern raised by the United States regarding the binding effect of the SPB on the USDOC.

6.30 Third, the **United States** requests the Panel to add to the recitation of facts in paragraph 7.203 of the report the fact that no Argentine exporter other than Siderca responded to the notice of initiation.

6.31 **Argentina** requests that the preceding four sentences of this paragraph be maintained should the Panel decide to make any modification to this paragraph.

6.32 **We** note that the two paragraphs that follow paragraph 7.203 make clear that no Argentine exporter other than Siderca filed a substantive response to the notice of initiation in the OCTG sunset review. We therefore decline to make any modification to paragraph 7.203 in this regard.

6.33 Fourth, the **United States** submits that either the Panel should point to relevant evidence that demonstrates that Siderca requested a hearing in the OCTG sunset review and was declined or paragraphs 7.232 through 7.236 should be deleted.

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 We have deleted four paragraphs from the part of our report dealing with the United States' request for preliminary rulings at the request of the United States. We have also made the modifications requested by the United States to paragraphs 7.11, 7.74 and 7.106.

6.37 Finally, we have made some typographical and style-related improvements to the interim report.

## **VII. FINDINGS**

### **A. GENERAL ISSUES**

#### **1. Standard of Review**

7.1 In light of the claims and arguments made by the parties in the course of these Panel proceedings, we recall, at the outset of our examination, the standard of review we must apply to the matter before us.

7.2 Article 11 of the *DSU*<sup>8</sup>, in isolation, sets forth the appropriate standard of review for panels for all covered agreements except the Anti-Dumping Agreement. Article 11 imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", an obligation which embraces all aspects of a panel's examination of the "matter", both factual and legal.

7.3 Article 17.6 of the Anti-Dumping Agreement sets forth the special standard of review applicable to anti-dumping disputes. It provides:

“(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;”

“(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one

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<sup>8</sup> Article 11 of the *DSU*, entitled "Function of Panels", states: "The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements..."

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.<sup>9</sup>

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 require that a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim.<sup>10</sup> In these Panel proceedings, Argentina, which has challenged the consistency of the United States' measures, thus bears the burden of demonstrating that the measures are not consistent with the relevant provisions of the Agreement. Argentina also bears the burden of establishing that its claims are properly before us. We also note that it is generally for each party asserting a fact to provide proof thereof.<sup>11</sup> In this respect, therefore, it is also for the United States to provide evidence for the facts which it asserts. We also recall that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case.

### B. UNITED STATES' REQUEST FOR PRELIMINARY RULINGS

7.7 In its first written submission, the United States made a request for preliminary rulings by the Panel.<sup>12</sup> From an analytical point of view, the bases of the United States' request for preliminary rulings can be divided into two groups. First, the **United States** asserts that Argentina's panel request is vague in two respects. The United States submits that, inconsistently with Article 6.2 of the *DSU*, the claims raised by Argentina on page 4 of its panel request do not present the problem clearly. Along the same line, the United States argues that references to Articles 6 and 3 of the Anti-Dumping Agreement in sections B.1, B.2 and B.3 of Argentina's panel request do not present the problem clearly, because these articles are being referred to generally in their entirety, without any specification of the relevant sub-paragraphs.

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<sup>9</sup> Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("US – Hot-Rolled Steel"), WT/DS184/AB/R, adopted 23 August 2001, paras. 54-62.

<sup>10</sup> Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("US – Wool Shirts and Blouses"), WT/DS33/AB/R and Corr. 1, adopted 23 May 1997, DSR 1997:I, 323, p. 337.

<sup>11</sup> *Ibid.*

<sup>12</sup> The US request for preliminary rulings is premised solely on the allegation that Argentina has failed to provide a brief summary of the legal basis of some of its claims sufficient to present the problem clearly, inconsistently with Article 6.2 of the *DSU*. The United States has not alleged a failure to identify the specific measure at issue. See, Response of the United States to Question 21 from the Panel Following the Second Meeting.

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 practice as such and as applied in the instant sunset review regarding the alleged irrefutable presumption in sunset reviews,
- Argentina's claim regarding the alleged irrefutable presumption under US law as such,
- Argentina's claim under Article X:3(a) of the GATT 1994,
- Argentina's claim regarding the USITC's sunset determinations in the instant sunset review,
- 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.

7.9 In response to the United States' request for preliminary rulings on the basis of Article 6.2 of the *DSU*, **Argentina** generally submits that the United States can not prevail because it has failed to demonstrate to the Panel that it has suffered prejudice as a result of the alleged deficiencies in Argentina's panel request. In addition to this general observation, Argentina also puts forward counter-arguments to the US allegations with regard to each aspect of the latter's request for preliminary rulings.

#### **1. Alleged Vagueness of Argentina's Request for Establishment**

7.10 The **United States** requests that we dismiss certain claims raised by Argentina in its panel request on the grounds that, inconsistently with the requirements of Article 6.2 of the *DSU*, these claims were identified vaguely. In this context, the United States takes issue with the claims raised on page four and those raised in sections B.1 through B.3 of Argentina's panel request.

(a) Claims raised on page 4 of Argentina's panel request<sup>13</sup>

7.11 The **United States** argues that Argentina failed to provide a brief summary of the legal basis of the claims raised on page four of its panel request. According to the United States, inconsistently with Article 6.2 of the *DSU*, the claims raised by Argentina on page 4 of its panel request fail to present the problem clearly and are therefore outside our terms of reference. The United States submits that Argentina's reference to various articles from WTO agreements that contain multiple obligations fell short of the requirements of Article 6.2 of the *DSU*. The United States also asserts that the absence of a brief summary of the legal basis of the claims raised on page four renders this portion of the panel request inconsistent with Article 6.2 of the *DSU*.

7.12 **Argentina** argues that the Panel has to read Argentina's panel request as a whole in deciding whether it meets the requirements of Article 6.2 of the *DSU*. Argentina submits that the minimum requirement to clarify the legal basis of a claim in WTO dispute settlement proceedings is the citation of the treaty articles alleged to have been violated. According to Argentina, claims on page four of its panel request met this standard. Argentina contends that, although Article 6.2 does not require the inclusion of a narrative description of the legal basis of a claim, Argentina did provide such a description in relation to its page four claims. Argentina states that page four of its panel request is

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<sup>13</sup> We note that page four of Argentina's panel request is not limited to the part that the United States is challenging on the grounds of vagueness. The United States is taking issue with the portion of page four of Argentina's panel request that is found between the paragraph numbered four and the concluding paragraph that starts with "Accordingly, Argentina respectfully requests that..." Given that both parties refer to this portion of Argentina's panel request as "page four", we have also used the same characterization for ease of reference.

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.<sup>14</sup>

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*, which sets out the requirements applicable to the requests for the establishment of a panel, provides:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

7.14 According to Article 6.2, therefore, a panel request must identify *the specific measures at issue* and must provide a *brief summary of the legal basis of the complaint*. Together, these two elements comprise the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the *DSU*. It is important that the panel request be sufficiently clear for two reasons: First, it defines the scope of the dispute. Second, it serves the *due process* objective of notifying the parties and third parties of the nature of a complainant's case. We must therefore scrutinize carefully Argentina's panel request 'to ensure its compliance with both the letter and the spirit of Article 6.2 of the *DSU*.' In doing that, we shall consider Argentina's panel request as a whole and take into account the circumstances of the present proceedings.<sup>15</sup>

7.15 With these considerations in mind, we now turn to the text of Argentina's panel request to decide whether it conforms to the requirements of that article. The portion of page four of Argentina's panel request contested by the United States reads:

Argentina also considers that certain aspects of the following US laws, regulations, policies, and procedures related to the determinations of the Department and the Commission are inconsistent with US WTO obligations, to the extent that any of these measures mandate action by the Department or Commission that is inconsistent with US WTO obligations or preclude the Department or Commission from complying with US WTO obligations:

- Sections 751(c) and 752 of the Tariff Act of 1930, as amended, codified at Title 19 of the United States Code §§ 1675(c) and 1675a; and the US Statement of Administrative Action (regarding the Agreement on Implementation of GATT Article VI) accompanying the Uruguay Round Agreements Act (the SAA), H.R. Doc. No. 103-316, vol. 1;
- The Department's *Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Anti-Dumping and Countervailing Duty Orders*; Policy Bulletin, 63 Federal Register 18871 (16 April 1998) (Sunset Policy Bulletin);

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<sup>14</sup> Argentina's Comments on the US Closing Statement at the Second Substantive Meeting of the Panel, and US Answers to Questions from the Panel and Argentina in Connection with the Second Substantive Meeting, para. 49.

<sup>15</sup> We find support for our approach in the Appellate Body decision in *US – Carbon Steel*. See, Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("US – Carbon Steel"), WT/DS213/AB/R and Corr.1, adopted 19 December 2002, paras. 125-127.

- The Department's sunset review regulations, codified at Title 19 of the United States Code of Federal Regulations § 351.218; and the Commission's sunset review regulations, codified at Title 19 of the United States Code of Federal Regulations §§ 207.60-69 (Subpart F).

Argentina considers that the Department's Determination to Expedite, the Department's Sunset Determination, the Commission's Sunset Determination, the Department's Determination to Continue the Order and the above mentioned US laws, regulations, policies and procedures are inconsistent with the following provisions of the Anti-Dumping Agreement, the GATT 1994, and the WTO Agreement:

- Articles 1, 2, 3, 6, 11, 12, 18 and Annex II of the Anti-Dumping Agreement;
- Articles VI and X of the General Agreement on Tariffs and Trade (GATT) 1994; and
- Article XVI:4 of the WTO Agreement.<sup>16</sup>

7.16 We note that on page four, Argentina invokes various articles of the Anti-Dumping Agreement and other WTO agreements in their entirety, many of which contain multiple obligations, such as Articles 2, 3 and 6 of the Anti-Dumping Agreement. However, as we stated above, we shall not read page four of Argentina's panel request in isolation. Argentina's panel request consists of four pages altogether. We have to scrutinize the text of the panel request as a whole in inquiring whether it conforms to the requirements of Article 6.2.

7.17 The crux of the US allegation regarding page four of Argentina's panel request is that page four is vague in the sense of being overly broad. The United States argues that since page four is not sufficiently clear, it is not possible to discern the nature of the claims raised in this part of the panel request.

7.18 In our view, the task before us is not to decide, in the abstract, whether Argentina's panel request conforms to the requirements of Article 6.2 of the *DSU*. Rather, the issue is whether Argentina has, during the course of these proceedings, asked us to address claims which are not identified with sufficient clarity in its panel request to satisfy the terms of Article 6.2 and thus could not be foreseen by the defendant and the third parties. To that end, we invited the United States to identify, in concrete terms, which claims in Argentina's submissions to the Panel were based exclusively on page four of the panel request and therefore should, in the United States' view, be found to be outside our terms of reference. In response to our question, the United States identified a number of claims raised by Argentina in its first and second submissions that it considered to fall in this category. In response to the US allegation, Argentina generally argued that the United States was attempting to recast Argentina's claims, and asked the Panel to reject the US allegations in this regard in their entirety.

7.19 The claims that are alleged by the United States to be outside our terms of reference because of the alleged vagueness on page four of Argentina's panel request<sup>17</sup> and our analysis with regard to each one of them are as follows:

- (i) *Section VII.A of Argentina's first written submission and section III.A of its second written submission*

7.20 The **United States** asserts that although section A of Argentina's panel request refers only to Section 351.218(e) of the USDOC's Regulations, in section VII.A of its first written submission and

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<sup>16</sup> WT/DS268/2, p.4.

<sup>17</sup> See, Response of the United States to Question 22 from the Panel Following the Second Meeting.

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<sup>18</sup>, 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.<sup>19</sup>

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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<sup>18</sup> Footnote 26 to the Response of the United States to Question 22 from the Panel Following the Second Meeting.

<sup>19</sup> 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<sup>20</sup>.

(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

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<sup>20</sup> See, *infra* para. 7.169.

to inform the United States that Argentina may challenge the application of the cited statutory provisions in the sunset review at issue.

(v) *Section IX of Argentina's first written submission and section V of its second written submission*

7.33 The **United States** argues that Article VI of the GATT 1994, Articles 1 and 18 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement that are being raised in section IX of Argentina's first written submission and section V of its second written submission only appear on page four of Argentina's panel request. According to the United States, therefore, these claims are outside our terms of reference. **Argentina** submits that the Panel should reject the US allegation.

7.34 **We** note that we exercised judicial economy with respect to these consequential claims raised by Argentina and did not rule on them<sup>21</sup>. We therefore need not, and do not, rule on this aspect of the US request for a preliminary ruling either.

(vi) *Section X of Argentina's first written submission*

7.35 The **United States** takes issue with the phrase "US sunset review, statutory, regulatory, and administrative provisions as such violate the Anti-Dumping Agreement and the WTO Agreement" in the conclusion part of Argentina's first written submission and argues that the only basis for this general assertion is page four of Argentina's panel request. **Argentina** submits that the Panel should reject the US allegation.

7.36 **We** note that the phrase cited by the United States is heading A under the "Conclusion" section of Argentina's first written submission. As evidenced by its name, rather than introducing new claims, the conclusion is intended to, and does in fact, repeat the claims already raised by Argentina throughout its first submission. Given that we have not made substantive rulings regarding the "Conclusion" section of Argentina's first written submission, we need not, and do not, address this aspect of the US request for a preliminary ruling.

(vii) *Section III.B of Argentina's second written submission*

7.37 Regarding the alleged irrefutable presumption, the **United States** argues that the claim raised in section III.B of Argentina's second written submission regarding certain provisions of the US Statute, the SAA and the SPB are outside our terms of reference because section A.4 of Argentina's panel request only contains a claim aimed against the application of an alleged irrefutable presumption in the instant sunset review. **Argentina** submits that the Panel should reject the US allegation.

7.38 **We** note once again that section A.4 of Argentina's panel requests 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)

7.39 Given the two clear references in this section to US law regarding the alleged irrefutable presumption, we consider that Argentina's panel request made it sufficiently clear to the United States

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<sup>21</sup> See, *infra* para. 7.342.

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

(viii) *Conclusion*

7.40 In conclusion, we decline the US request for preliminary rulings relating to the alleged vagueness of the claims set forth on page four of Argentina's panel request.

- (b) References to Articles 6 or 3 of the Anti-Dumping Agreement in sections B.1, B.2 and B.3 of the panel request

7.41 The **United States** argues that Argentina's references to Article 6 of the Anti-Dumping Agreement in sections B.1 and B.2, and to Article 3 in section B.3, of its panel request in their entirety fail to present the problem clearly. According to the United States, since Articles 3 and 6 of the Anti-Dumping Agreement both contain multiple obligations, the mere listing of these articles in their entirety makes it impossible to discern the nature of Argentina's problem, inconsistently with Article 6.2 of the *DSU*. The United States also claims to have suffered prejudice due to these deficiencies in sections B.1, B.2 and B.3 of Argentina's panel request because it did not know what case to answer. Therefore, the United States requires us to find that the claims of inconsistency with Article 6 in sections B.1 and B.2 and the claim of inconsistency with Article 3 in section B.3 of Argentina's panel request are not within our terms of reference.

7.42 Regarding the references to Article 6, **Argentina** submits that these references present the problem clearly because Article 6 is relevant to sunset reviews in its entirety. With regard to the reference to Article 3, Argentina similarly argues that given that Article 3 is generally applicable to sunset reviews and that it is particularly relevant to the issue of the time-frame on the basis of which sunset determinations have to be made, this reference also presents the problem clearly. Argentina argues that Article 6.2 requires that claims – not arguments – be set out in the panel request and that its panel request sets out its claims under Articles 3 and 6 with sufficient clarity. Finally, Argentina asserts that we should decline the US request because the United States has not been prejudiced in its right to defend itself due to the alleged inconsistency with Article 6.2 of sections B.1, B.2 and B.3 of its panel request.

7.43 **We** note that the contested sections B.1 through B.3 of Argentina's panel request read:

**The Commission's Sunset Determination was inconsistent with the Anti-Dumping Agreement and the GATT 1994:**

1. The Commission's application of the standard for determining whether the termination of anti-dumping duty measure would be "likely to lead to continuation or recurrence of ... injury" was inconsistent with Articles 11, 3 and 6 of the Anti-Dumping Agreement. The Commission failed to apply the plain and ordinary meaning of the term "likely" and instead applied a lower standard in assessing whether injury would continue or recur in the event of termination, in violation of Articles 11.1, 11.3, 11.4, 3.1, 3.2, 3.3, 3.4, 3.5, and 6 of the Anti-Dumping Agreement.

2. The Commission failed to conduct an "objective examination" of the record and failed to base its determination on "positive evidence" regarding whether termination of the anti-dumping duty measure "would be likely to lead to continuation or recurrence" of injury. In particular, the Commission's conclusions with respect to the volume of imports, price effects on domestic like products, and impact of imports of the domestic industry demonstrate the Commission's failure to conduct an objective examination in violation of Articles 11, 3, and 6. The

Commission's findings on these issues do not constitute "positive evidence" of likely injury in the event of termination, in violation of Articles 11.1, 11.3, 11.4, 3.1, 3.2, 3.3, 3.4, 3.5, and 6 of the Anti-Dumping Agreement.

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

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<sup>10</sup> ....

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<sup>10</sup> One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices. (emphasis added)

7.47 We note that there are important textual indications that Article 3.7 entails certain elements that deal with the time-frame on the basis of which threat of material injury determinations are to be made. In our view, a comparison of the text of Article 3.7 with section B.3 of Argentina's panel request reveals certain textual similarities. For instance, the use of certain words or phrases such as

"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 regard.<sup>22</sup> We therefore need not, and do not, rule on this aspect of the US request for a preliminary ruling.

7.56 In our view, however, it is nevertheless clear that section A.4 takes issue with an alleged irrefutable presumption in the context of sunset reviews. Further, the first sentence links this alleged presumption to the USDOC's determination in the instant sunset review whereas the second sentence links it to the USDOC's practice.

(b) Argentina's claim regarding the alleged irrefutable presumption under US law as such

7.57 The **United States** asserts that Argentina's claim that 19 USC. §§ 1675(c) and 1675(a)(c), the SAA, and the SPB, taken together, establish an irrefutable presumption that is inconsistent with Article 11.3 of the Anti-Dumping Agreement is not within our terms of reference because this claim is not set out in Argentina's panel request. The United States argues that section A.4, which is the only place where Argentina is raising its claim regarding this alleged presumption, is limited to the USDOC's determinations in this sunset review and thus does not challenge the US law.

7.58 **Argentina** submits that section A.4 of its panel request clearly states that Argentina's claim regarding the irrefutable presumption is premised on Argentina's allegation that the US law contains such a presumption. Therefore, this claim is within the Panel's terms of reference.

7.59 **We** note once again 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)

7.60 We note that section A.4 of the panel request contains the phrases "irrefutable presumption under US law as such" and "practice is based on US law and the Department's Sunset Policy Bulletin". Thus, we consider that the text of this section is sufficiently clear to put the United States on notice that Argentina may pursue a claim against US law as such regarding the alleged irrefutable presumption.

(c) Argentina's claim under Article X:3(a) of the GATT 1994

7.61 The **United States** argues that section VII.E of Argentina's first written submission introduces a claim of inconsistency with Article X:3(a) of the GATT 1994 regarding the US practice as such and as applied in the instant sunset review. However, in the view of the United States, section A.4 of Argentina's panel request challenges only the USDOC's sunset determination in the instant sunset review, not the US practice as such.

7.62 **Argentina** argues that section A.4 of its panel request clearly contains a claim under Article X:3(a) of the GATT 1994 regarding the US practice as such and as applied in the instant sunset review.

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<sup>22</sup> See, *infra*, para. 7.168.

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-Dumping Agreement and Article XVI:4 of the WTO Agreement that are being raised in section IX of Argentina's first written submission only appear on page four of Argentina's panel request. Given the US assertion that page four is not within our terms of reference, the United States argues that we should find these claims to be outside our terms of reference.

7.68 **Argentina** argues that given that these provisions are cited as consequential claims, their mere citation on page four of Argentina's panel request is sufficient to present the problem clearly in conformity with Article 6.2 of the *DSU*.

7.69 **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. 7.34) we decline to rule on the US request.

(f) Conclusion

7.70 In conclusion, we decline the US request for preliminary rulings regarding certain matters that are allegedly not raised in Argentina's panel request.

### **3. The Issue of Prejudice**

7.71 Finally, we note that as our analysis with respect to the totality of the United States' request for preliminary rulings was based on a textual analysis of Argentina's panel request, we did not need to inquire into the issue of whether the United States had been prejudiced in its right to defend itself in the present proceedings due to the alleged inconsistencies in the panel request. We nevertheless note that the United States has not shown to the Panel that it had been prejudiced in its right to defend itself in these proceedings due to these alleged inconsistencies in Argentina's panel request. In several instances, the United States argued that it did not know what case it had to answer because of the lack

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

C. CLAIMS REGARDING US LAW<sup>25</sup> 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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<sup>23</sup> See, for instance, First Written Submission of the United States, para. 110; Second Oral Submission of the United States, para. 41.

<sup>24</sup> 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, 3, para. 131; Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* ("*Mexico – Corn Syrup*"), WT/DS132/R and Corr.1, adopted 24 February 2000, DSR 2000:III, 1345, para. 7.17.

<sup>25</sup> Throughout this report, we use the term "US law" to refer to the relevant statutory provisions, the Regulations and other legal instruments in the US legal system, such as the SAA and the SPB.



reviews provided for under US law are consistent with Article 6, the fact that the United States provides interested parties in full sunset reviews with extended opportunities to submit evidence can not render US law WTO-inconsistent.

(b) Arguments of third parties

(i) *European Communities*

7.76 The European Communities criticises the SAA's mere concentration on the issue of the extraordinary administrative burden on the agency resources and on achieving administrative efficiency. Though acknowledging the importance of such objective, the European Communities submits that, as a matter of WTO law, resource allocation issues could never justify the disregard of Article 11.3 in sunset reviews.

(ii) *Japan*

7.77 Japan agrees with Argentina that the waiver provisions of US law are inconsistent with Articles 6, 11.3 and 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement.

(iii) *Korea*

7.78 Korea submits that all interested parties have to be given the opportunity to present evidence and to defend their interests. In Korea's view, expedited sunset reviews – whether on the basis of waiver or inadequacy – conflict with Articles 6.1 and 6.2. Korea also argues that the USDOC's practice does not comply with the provisions of Article 6.8 and Annex II of the Agreement governing the use of facts available.

(iv) *Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*

7.79 According to the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, although the conduct of an expedited sunset review in and of itself is not WTO-inconsistent, the provisions that direct the USDOC to make a likelihood determination in cases where interested parties waive their right to participate are inconsistent with Article 11.3 of the Agreement.

(c) Evaluation by the Panel

(i) *Alleged Violations of Article 11.3 of the Agreement*

Measures at issue

7.80 Argentina challenges the waiver provisions of US law as such.<sup>26</sup> Specifically, Argentina's claim relates to Section 751(c)(4) of the Tariff Act and Section 351.218(d)(2)(iii) of the Regulations. Argentina does not challenge Section 351.218(d)(2)(i) of the Regulations. We did, however, refer to Section 351.218(d)(2)(i) of the Regulations as context for analysis below.

7.81 Section 751(c)(4) of the Tariff Act of 1930 provides, in relevant part:

(4) Waiver of participation by certain interested parties

(A) In general

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<sup>26</sup> Argentina is not challenging the provisions of US law regarding expedited sunset reviews as such. See, Response of Argentina to Question 1 from the Panel Following the Second Meeting.

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.<sup>27</sup> (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 submissions from that party during the course of the review. Waiving participation in a sunset review before the Department will not affect a party's opportunity to participate in the sunset review conducted by the International Trade Commission. (emphasis added)

...

(iii) No response from an interested party. The Secretary will consider the failure by a respondent interested party to file a complete substantive response to a notice of initiation under paragraph (d)(3) of this section as a waiver of participation in a sunset review before the Department.<sup>28</sup> (emphasis added)

7.83 We note that Section 751(c)(4)(A) of the Tariff Act provides that an interested party may elect to waive its participation in sunset review proceedings conducted by the USDOC and participate only in sunset review proceedings conducted by the USITC. Section 351.218(d)(2)(i) of the Regulations provides that an interested party may waive participation by filing a statement of waiver with the USDOC. We will refer to this as an "explicit" or "affirmative" waiver. Further, according to Section 351.218(d)(2)(iii) of the Regulations, the USDOC will consider the failure of an interested party to submit a complete substantive response to the notice of initiation of a sunset review to constitute a waiver of participation in the USDOC's sunset review proceedings. We will refer to this as an "implicit" or "deemed" waiver.

7.84 On the basis of the above-cited provisions of US law, we understand the operation of the waiver provisions to be as follows: Following the publication of the notice of initiation of a sunset review, foreign exporters (referred to as "respondent interested parties" under US law) which desire to participate in the sunset review proceedings before the USDOC must submit a complete substantive response to the USDOC. For the substantive response to be complete, it has to contain all of the items listed in Section 351.218(d)(3) of the Regulations. According to Section 751(c)(4)(A) of the Tariff

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<sup>27</sup> Codified in 19 U.S.C. § 1675(c)(4) (Exhibit ARG-1 at 1152).

<sup>28</sup> Codified in 19 C.F.R. § 351.218(d)(2) (Exhibit ARG-3).

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 We consider it important to note that the distinction between affirmative and deemed waivers stems from Section 351.218(d)(2)(iii) of the Regulations, not the Tariff Act. The Tariff Act simply provides that interested parties may choose not to participate in the USDOC part of a sunset review, and that the effect of a waiver is an affirmative finding of likelihood by the USDOC. Section 351.218(d)(2)(iii) of the Regulations, however, creates the deemed waiver category by stipulating that submission of an incomplete, or no, response to the notice of initiation also constitutes a waiver. Therefore, our findings regarding affirmative waivers will have implications on the Tariff Act whereas those relating to deemed waivers will only affect Section 351.218(d)(2)(iii) of the Regulations.

#### Nature of the obligations in Article 11.3

7.86 Argentina contends that the above-cited waiver provisions of US law are inconsistent with the investigating authorities' obligation to determine likelihood of continuation or recurrence of dumping under Article 11.3 of the Agreement.

7.87 Article 11.3 of the Anti-Dumping Agreement reads:

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.<sup>22</sup> The duty may remain in force pending the outcome of such a review.

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<sup>22</sup> 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 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

7.88 Article 11.3 provides that an anti-dumping duty must be terminated after five years "unless the authorities determine, in a review..." that expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The ordinary meaning of "determine" is, *inter alia*, "settle or decide (a dispute, controversy, etc., or a sentence, conclusion, issue, etc.) as a judge or arbiter"<sup>29</sup>. This ordinary meaning seems to fit the usage of "determine" in Article 11.3, which requires that the investigating authority determine that dumping and injury is likely to continue or recur in a case where the duty is revoked. 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

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<sup>29</sup> The New Shorter Oxford English Dictionary, Oxford University Press, p. 651.

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.<sup>30</sup>

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.<sup>31</sup>

#### 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.<sup>32</sup> 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*

7.91 We recall that under 351.218(d)(2)(iii) of the USDOC's Regulations, there will be a deemed waiver in cases where an exporter submits an incomplete – or no – substantive response to the notice of initiation of a sunset review. Pursuant to Section 751(c)(4)(B) of the Tariff Act, which makes no distinction between affirmative and deemed waivers, the consequence of a waiver is a finding of likelihood of continuation or recurrence of dumping by the USDOC with respect to that exporter.

7.92 The first factual situation that leads to a deemed waiver is the submission by an exporter of an incomplete substantive response to the notice of initiation of a sunset review. In this case, the exporter intends to participate in the sunset review and submits information to the USDOC. However, the submission is not complete, i.e. it does not contain all the information that US law requires to be submitted in a substantive response to the notice of initiation of a sunset review. US law mandates a finding of likelihood in this case.

7.93 In our view, where the foreign exporter submits information to the USDOC, the obligation to make a reasoned determination of likelihood under Article 11.3 of the Agreement requires the USDOC to take that information into consideration in its sunset determination.<sup>33</sup> Taken together, however, Section 751(c)(4)(B) of the Tariff Act and Section 351.218(d)(2)(iii) direct the USDOC to find that likelihood exists with respect to a given exporter simply because the exporter's substantive response to the notice of initiation does not contain some of the information prescribed under US law.

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<sup>30</sup> We find support for this approach in the Appellate Body decision in *US – Corrosion-Resistant Steel Sunset Review*. See, Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("US – Corrosion-Resistant Steel Sunset Review"), WT/DS244/AB/R, 15 December 2003, paras. 111-115.

<sup>31</sup> We note that it is clear, and United States has not argued to the contrary, that waiver provisions bind the USDOC. Therefore, in the context of Argentina's present claim, we do not need to address the applicability of the mandatory/discretionary distinction. The only issue in this context is whether or not the content of the waiver provisions is WTO-inconsistent.

<sup>32</sup> Response of Argentina to Question 1 from the Panel Following the Second Meeting.

<sup>33</sup> Except, of course, to the extent it was entitled to disregard such information pursuant to Article 6.8 and Annex II of the Agreement. The United States has not, however, argued that US law regarding waiver provisions can be justified under those provisions. This does not of course prejudice the credibility and relevance of, and weight to be given to, the information submitted by an exporter, which will vary from case to case. The waiver provisions of US law, however, preclude the USDOC from considering these matters.

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.<sup>34</sup> 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.<sup>35</sup> 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 USDOC may be automatically authorized, and indeed required, to make an affirmative finding that the continuation or recurrence of dumping by the exporter is likely, without any further inquiry and irrespective of any relevant evidence before it.<sup>36</sup> In our view, an affirmative determination based exclusively upon the fact that the exporter did not respond to a notice of initiation, and which disregards entirely even the possibility that other relevant information might be in the record, is not supported by reasoned and adequate conclusions based on the facts before an investigating authority, inconsistently with Article 11.3.<sup>37</sup>

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<sup>34</sup> We note that Section 351.218(d)(2)(iii) of the USDOC's Regulations does not take account of the amount of the missing information in a substantive response to the notice of initiation when declaring that response to be "incomplete". In other words, this section provides on its face that no matter how minimal the quantity or the quality of the missing information is, if the response to the notice of initiation is incomplete the result will be an automatic finding of likelihood of continuation or recurrence of dumping by the USDOC.

<sup>35</sup> The United States confirmed that under US law failure to respond at all to the notice of initiation of a sunset review is equal to the submission of an incomplete substantive response. Response of the United States to Question 8 from the Panel Following the First Meeting.

<sup>36</sup> As previously noted (*supra*, note 33), the United States does not argue that its waiver provisions may be justified under Article 6.8 and Annex II of the Agreement.

<sup>37</sup> We note that this approach to non-cooperation in a sunset review is no different from the approach that an investigating authority takes in an original investigation. If an exporter fails to respond to a questionnaire or otherwise to participate in an investigation, the investigating authority may resort to the facts available. While it is likely, and perhaps highly probable, that the investigating authority's determination based on facts available will be unfavourable to the exporter, this would not exclude the investigating authority from the obligation to make a determination based on such information as was available to it pursuant to the rules set forth in Article 6.8 and Annex II of the Agreement.

*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 of a sunset review. In this situation, Section 751(c)(4)(B) directs the USDOC to make an affirmative finding of likelihood with regard to the exporter that explicitly waives its right to participate in the USDOC part of the sunset review.

7.97 Argentina asserts that Section 751(c)(4)(B) of the Tariff Act requires a finding of likelihood for an exporter that explicitly waives its right to participate in a sunset review and is inconsistent with the obligation to determine set out in Article 11.3 of the Agreement. According to Argentina, the investigating authority has the obligation to carry out an examination on the basis of positive evidence to make a reasoned determination even in a case of an affirmative waiver. It can not simply assume that dumping is likely to continue or recur without any analysis.<sup>38</sup>

7.98 We note that in a sunset review where an exporter explicitly states that it intends not to participate in the review, it is likely to be much easier for the investigating authority to discharge its obligation to determine likelihood with respect to that particular exporter, compared with an exporter that fully cooperates with the investigating authority. This is because in most cases the bulk of the information concerning the issue of whether an exporter is likely to continue or recur to dump in the event of revocation of the order will be submitted by the exporter concerned.

7.99 We nevertheless consider that even in a case of affirmative waiver, the investigating authority's obligation to make a determination supported by reasoned and adequate conclusions based on the facts before it continues to apply. The investigating authority can not simply assume, without further inquiry, that dumping is likely to continue or recur because the exporter chose not to participate in the review. In this respect, we incorporate our above analysis (*supra*, paras. 7.94-7.95) regarding deemed waivers in cases where the exporter remains silent following the initiation of the sunset review. In our view, therefore, the provisions of US law relating to affirmative waivers are also inconsistent with the obligation to determine likelihood of continuation or recurrence of dumping under Article 11.3 of the Agreement.

Company-specific vs. order-wide sunset determinations

7.100 The United States submits that, under US law, the final likelihood determination in a sunset review is made on an order-wide basis for a country. Although US law mandates an affirmative finding of likelihood with respect to exporters that have waived their right to participate in a sunset review, it does not do so with respect to the order-wide determination.<sup>39</sup> Therefore, depending on whether there are exporters that have waived their right to participate, a US sunset review may include two steps: If no exporter has waived its right to participate, there will only be one sunset determination, which will be made on an order-wide basis. If, however, some exporters have waived their right to participate, then the USDOC will make an affirmative likelihood determination with respect to these exporters. The USDOC will then make a final order-wide sunset determination for the country.<sup>40</sup> Depending on the share of the exporters that have submitted a complete substantive

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<sup>38</sup> Response of Argentina to Question 1 from the Panel Following the Second Meeting.

<sup>39</sup> Response of the United States to Questions 4(c) and 5(d) from the Panel Following the First Meeting; Second Written Submission of the United States, para. 21.

<sup>40</sup> Under US law, in cases where the respondent interested parties submitting a complete substantive response to the notice of initiation account for less than 50 per cent of the total exports of the subject product into the United States over the five-year period preceding the initiation of the sunset review, their complete substantive responses will be considered to be inadequate under Section 351.218(e)(1)(ii)(A) of the Regulations. According to Section 751(c)(3)(B) of the Tariff Act and Section 351.218(e)(1)(ii)(C)(2) of the Regulations, in case of an inadequate substantive response, the USDOC will conduct an expedited sunset review and will, "without further investigation", make its sunset determinations on the basis of facts available.

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.<sup>41</sup>

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.<sup>42</sup> To the extent that the order-wide determination of likelihood is based in whole or in part upon a company-specific determination that was improperly established, we do not see how the order-wide determination can be supported by reasoned and adequate conclusions based on the facts before the investigating authority.

7.102 We note in this regard that a company-specific determination of likelihood may have a significant, if not conclusive, impact on an order-wide determination. Where, for example, the exporter that has waived participation is the only exporter, the company-specific result is likely to be conclusive. In fact, we asked the United States whether the USDOC had ever made an affirmative likelihood determination with respect to some exporters that had waived their right to participate, and then found no likelihood on an order-wide basis. The United States responded in the negative.<sup>43</sup> Nor has the United States cited a provision of US law that clearly states that the order-wide sunset determinations are independent from the company-specific determinations made pursuant to the waiver provisions.

### Conclusion

7.103 In conclusion, we find that both affirmative and deemed waivers provisions of US law, i.e. Section 751(c)(4)(B) of the Tariff Act and Section 351.218(d)(2)(iii) of the USDOC's Regulations, are inconsistent with the investigating authorities' obligation to determine likelihood of continuation or recurrence of dumping under Article 11.3 of the Anti-Dumping Agreement.

#### *(ii) Alleged Violations of Articles 6.1 and 6.2 of the Agreement*

7.104 **Argentina** argues that deemed waivers provisions of US law, i.e. Section 351.218(d)(2)(iii) of the Regulations, violate Articles 6.1 and 6.2 of the Agreement because by precluding the USDOC

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<sup>41</sup> See, for example, Second Written Submission of the United States, para. 21; Response of the United States to Question 2 from the Panel Following the First Meeting.

In this context, we note that, as the United States asserts, both the SAA and the SPB clearly provide that the USDOC will make its sunset determinations on an order-wide basis. The SAA (Exhibit US-11 at 879); the SPB (Exhibit ARG-35 at 18872). We also note the Appellate Body's ruling in *US – Corrosion-Resistant Steel Sunset Review* that sunset determinations can be made on an order-wide basis. Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 155.

<sup>42</sup> In this respect, the United States stated:

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

Response of the United States to Question 4(b) from the Panel Following the Second Meeting.

<sup>43</sup> Response of the United States to Question 4(a) from the Panel Following the Second Meeting.

from making the required likelihood determination under Article 11.3, these provisions deprive interested parties of their right to submit evidence and to defend their interests, inconsistently with Articles 6.1 and 6.2, respectively.

7.105 The **United States** asserts that no provision of US law prevents interested parties from submitting evidence to the investigating authority and from defending their interests in sunset reviews in conformity with Articles 6.1 and 6.2 of the Agreement.

7.106 **We** note that in the context of the present claim regarding US law, Argentina does not challenge affirmative waivers provisions and limits its claim to the deemed waivers provisions. We shall, therefore, base our analysis exclusively on the deemed waivers provisions.

#### Applicability of Articles 6.1 and 6.2 to Sunset Reviews

7.107 We note that Argentina's claim here is based on the assumption that Articles 6.1 and 6.2 of the Agreement apply to sunset reviews. According to Argentina, these provisions apply to sunset reviews by virtue of the cross-reference in Article 11.4. The United States contends that this cross-reference incorporates into sunset reviews only those provisions of Article 6 that deal with evidence and procedure, but does not specifically dispute that Articles 6.1 and 6.2 fall within this category.<sup>44</sup>

7.108 The first issue before us is, therefore, whether the provisions of Articles 6.1 and 6.2 apply to sunset reviews.

7.109 Article 11.4 of the Anti-Dumping Agreement reads:

The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review. (emphasis added)

7.110 We note that the cross-reference in Article 11.4 of the Agreement makes the provisions of Article 6 regarding evidence and procedure applicable to sunset reviews. We also note, however, that the cross-reference in Article 11.4 to Article 6 is qualified by the language "regarding evidence and procedure". Considering that the drafters often did not qualify the cross-references in other parts of the Agreement, we have to address the significance of this language with regard to the applicability in sunset reviews of paragraphs 1 and 2 of Article 6 cited by Argentina.

7.111 In our view, two possible approaches can be taken regarding the meaning and effect of this qualifying language in Article 11.4: First, it can be argued that on its face this language suggests that there may be provisions in Article 6 that deal with matters other than "evidence and procedure". Otherwise, the drafters would not have inserted this qualifying language in Article 11.4. Therefore, when faced with the question of whether certain individual paragraphs/provisions of Article 6 apply to sunset reviews, the treaty interpreter has to analyse the provision at issue with the qualifying language in Article 11.4 in mind to decide whether or not that provision deals with "evidence and procedure". The second approach could be that this language in Article 11.4 does not qualify the cross-reference to Article 6; it simply reiterates the fact that Article 6 contains rules that deal with "evidence and procedure". This is evidenced in the title of Article 6, which reads "Evidence".

7.112 In our view, Articles 6.1 and 6.2 deal with "evidence and procedure". Article 6.1 of the Agreement sets out rules regarding interested parties' right to be given notice of the information required by the investigating authority and an ample opportunity to submit evidence to the investigating authority. Article 6.2 provides that interested parties shall be given a full opportunity to

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<sup>44</sup> Response of the United States to Question 10(a) from the Panel Following the First Meeting.



defend their interests. Therefore, no matter which one of the above-cited two approaches is followed regarding the meaning of the qualifying language in Article 11.4, we consider that Articles 6.1 and 6.2 apply to sunset reviews.

Nature of obligations under Articles 6.1 and 6.2 of the Agreement

7.113 Having concluded that the provisions of Articles 6.1 and 6.2 of the Agreement apply to sunset reviews, we now turn to the provisions of these two articles.

7.114 Article 6.1 provides, in relevant part that:

All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

7.115 We note that Article 6.1 stipulates generally that an investigating authority in a sunset review must give notice of the information that it requires from interested parties and allow interested parties ample opportunity to present in writing all evidence that the interested parties themselves deem relevant to the defence of their position in that sunset review. In its subparagraphs, Article 6.1 sets forth more specific procedural rights relating, *inter alia*, to questionnaires.

7.116 Article 6.2 provides:

Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.

7.117 Article 6.2 generally deals with the right of interested parties to defend their interests in an investigation and, by operation of Article 11.4, in a sunset review. More specifically, it provides that the investigating authority must provide, on request, interested parties an opportunity to meet other interested parties in the proceeding to hear their views and to make their own views known to them. In other words, Article 6.2 grants interested parties a right to participate in a hearing or otherwise to confront those parties with adverse interests. Further, it gives interested parties the right, on justification, to present other information orally.

Examination of the consistency of the deemed waivers provisions

7.118 Turning to the provisions of US law challenged by Argentina, i.e. those dealing with deemed waivers, we recall that the provision of US law that creates the deemed waiver category is Section 351.218(d)(2)(iii) of the USDOC's Regulations. This section considers exporters submitting incomplete responses to the notice of initiation of a sunset review and those that submit no response at all to have waived their right to participate in a sunset review. The consequence of having been deemed to waive the right to participate in a sunset review is the same as in the case of an affirmative waiver: an affirmative finding of likelihood of continuation or recurrence of dumping by the USDOC, as mandated by Section 751(c)(4)(B) of the Tariff Act. In this respect, the Statute does not distinguish between affirmative and deemed waivers.

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 affirmative finding of likelihood with respect to the exporter that has elected to waive its right to participate. Section 351.218(d)(2)(iii) of the USDOC's Regulations provides that an exporter that has not filed a complete substantive response to the notice of initiation of a sunset review is deemed to have waived its right to participate. As a result, that exporter will also be subject to an affirmative finding of likelihood by the USDOC.

7.121 We note that in a deemed waiver situation, US law does not allow the USDOC to take into account evidence submitted by an exporter in its incomplete submission when making its likelihood determination in respect of that exporter.<sup>45</sup> Further, it is clear that an exporter who has submitted an incomplete response is precluded from presenting any further evidence to the USDOC (and in any event, the USDOC would be precluded from taking it into account when making its likelihood determination with respect to that exporter). It is also clear that the exporter would not be permitted to participate in hearings or other procedures to confront other interested parties.<sup>46</sup> In fact, these conclusions flow naturally from the fact that the exporter is deemed to have waived participation in the review, and are not disputed by the United States.

7.122 The first situation that may lead to a deemed waiver is the submission by an exporter of an incomplete response to the notice of initiation. We recall that under US law, an exporter that is deemed to have waived its right to participate by submitting an incomplete response can not submit further evidence to the USDOC. Further, we also recall that the USDOC is required to reach an affirmative likelihood determination with respect to this exporter without considering evidence submitted in the exporter's incomplete response. It follows that the exporter is deprived of its right to submit evidence to the USDOC. This obviously runs foul of Article 6.1 of the Agreement, which requires that interested parties be given an ample opportunity to submit information to the investigating authority. We see no provision in the Agreement that allows such denial of the procedural rights provided for in Article 6.1 on the grounds that the exporter made an incomplete submission to the notice of initiation.

7.123 We also find US law to be inconsistent with Article 6.2 of the Agreement in that it denies an exporter that is deemed to have waived its right to participate in a sunset review by submitting an incomplete response to the notice of initiation of a sunset review the right to participate in a hearing or otherwise to confront those parties with adverse interests. We find no justification in the Agreement that would allow such a departure from the provisions of Article 6.2 on the grounds that that exporter has submitted an incomplete response to the notice of initiation.

7.124 The United States argues that the information contained in an incomplete submission of an exporter which is deemed to have waived its right to participate is nevertheless taken into

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<sup>45</sup> Section 751(c)(4)(B) of the Tariff Act, codified in 19 U.S.C. § 1675(c)(4)(B) (Exhibit ARG-1 at 1152).

<sup>46</sup> In this respect, we note the following statement of the United States:

If an exporter in fact submitted an incomplete substantive response – a hypothetical situation – that exporter would be deemed to have waived its right to participate in the sunset review, pursuant to Section 351.218(d)(2)(iii). Therefore, the exporter would not have the right to submit additional evidence or request a hearing.

Response of the United States to Question 2(e) from the Panel to the United States Following the First Meeting. We note that the United States made a similar statement in its second written submission. See, Second Written Submission of the United States, para. 25.

consideration by the USDOC in its order-wide analysis for the country as a whole.<sup>47</sup> 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.<sup>48</sup> Article 6.8 and Annex II do not, however, allow the USDOC to disregard all evidence submitted by an exporter in the period following the deadline for the submission of a substantive response to the notice of initiation on the ground that the exporter failed to make such a submission in the first place. The USDOC can only disregard information submitted by an exporter on the grounds, and by following the procedure, provided for in Article 6.8 and Annex II. It follows that the deemed waivers provisions of US law violate Articles 6.1 and 6.2 of the Agreement in this second factual situation too.

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<sup>47</sup> Response of the United States to Questions 2(e) and 7(b) from the Panel Following the First Meeting; Second Written Submission of the United States, para. 24.

<sup>48</sup> We find support for this proposition in the Appellate Body Report in *US – Hot-Rolled Steel*. See, Appellate Body Report, *US – Hot-Rolled Steel*, *supra*, note 9, paras. 80-82.

## 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.<sup>49</sup>

## **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."<sup>50</sup> Therefore, this practice is also susceptible to a WTO challenge.

7.131 If the Panel rejects Argentina's claim regarding the alleged irrefutable presumption under US law/practice, Argentina requires the Panel to find that the United States failed to administer its sunset review laws and regulations in a manner consistent with Article X:3(a) of the GATT 1994.

#### (ii) *United States*

7.132 The United States asserts that neither the SPB nor the SAA contains an irrefutable presumption regarding the likelihood of continuation or recurrence of dumping determinations in sunset reviews.<sup>51</sup> Even if they did, the United States contends that these two instruments do not

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<sup>49</sup> We note that Argentina also argues that violations of Articles 6.1 and 6.2 lead to consequential violations of Articles 11.3 and 11.4 of the Agreement. Given that these are purely consequential claims, we exercise judicial economy and do not rule on them.

<sup>50</sup> First Written Submission of Argentina, para. 139.

<sup>51</sup> Regarding Argentina's challenge against the Tariff Act in the context of this claim, the United States pointed out that:

[Argentina] does not allege that any US statutory provision establishes the presumption, nor could it, because there is no such provision. Instead, it turns to three items: the SAA, the Sunset Policy Bulletin, and supposed Commerce "practice."

First Written Submission of the United States, para. 174.

constitute "measures" for purposes of WTO dispute settlement proceedings, nor are they binding legal instruments under US law. They therefore can not be challenged in the WTO. Similarly, the United States submits that the USDOC's practice concerning sunset reviews cannot be challenged under WTO law because practice as such is not a measure.

(b) Arguments of third parties

(i) *Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*

7.133 Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu submits that the SAA and the SPB are not binding legal instruments under US law. Therefore, there does not seem to be an irrefutable presumption of likelihood of continuation or recurrence of dumping under US law. Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu contends that no conclusive inference can be drawn from the USDOC's practice in sunset reviews.

(c) Evaluation by the Panel

(i) *Status of the Sunset Policy Bulletin*

7.134 Argentina submits that US law is inconsistent with Article 11.3 of the Agreement in that it contains an irrefutable presumption regarding the likelihood of continuation or recurrence of dumping determinations in sunset reviews. In this respect, Argentina considers that US law 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. In Argentina's view, to discern the meaning and operation of US law regarding this alleged presumption, the relevant provisions of these three legal instruments should be read and analysed in conjunction with one another.

7.135 As an initial matter, the United States submits that the SPB does not constitute a measure that can be challenged in WTO dispute settlement proceedings because it is not a measure that has a functional life of its own under US law. The United States further argues that even if the Panel considers the SPB as a measure, it does not mandate WTO-inconsistent action because it is not a mandatory measure. We understand the United States to argue that the SPB can not possibly violate a WTO obligation because it is either not a measure at all, or because in any event it is not a mandatory measure.

7.136 Turning first to the US argument that the SPB is not a measure of the type that may be subject to dispute settlement challenge, we note that the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* has made it clear that the concept of a "measure" that can be subject to a WTO challenge is very broad. According to the Appellate Body, "any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings"<sup>52</sup> (footnote omitted). The Appellate Body further stated that any legal instrument under a WTO Member's law could also be challenged as a measure before a WTO panel irrespective of the way in which it operates in individual cases.<sup>53</sup> Given that the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* was addressing precisely the issue of the SPB, there can be no doubt that the Appellate Body considers the SPB to be a measure that can be subject to WTO dispute settlement, and we will proceed accordingly.

7.137 We next turn to the US contention that the SPB in any event cannot be found to be inconsistent with the WTO Agreement because it is not a *mandatory* measure. In advancing this argument, the United States is relying upon a series of GATT and WTO dispute settlement panels that have found that only those provisions of a Member's law that mandate GATT/WTO-inconsistent

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<sup>52</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 81.

<sup>53</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 82.

action or preclude GATT/WTO-consistent action can be found to be GATT/WTO-inconsistent.<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup> 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".<sup>57</sup> 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

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<sup>54</sup> 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 39S/128, p. 152.

Regarding the application of this test by WTO panels, see, for instance, Panel Report, *United States – Measures Treating Exports Restraints as Subsidies ("US – Export Restraints")*, WT/DS194/R and Corr. 2, adopted 23 August 2001, para. 8.131; Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by Japan ("US – 1916 Act (Japan)")*, WT/DS162/R and Add.1, adopted 26 September 2000, as upheld by the Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4831, para. 6.192; Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act ("US – Section 129(c)(1) URAA")*, WT/DS221/R, adopted 30 August 2002, para. 3.28.

<sup>55</sup> See, for example, Panel Report, *US – Export Restraints*, *supra*, note 54, para. 8.131.

<sup>56</sup> In this regard, footnote 94 of the Appellate Body report in *US – Corrosion-Resistant Steel Sunset Review* provides:

In our Report in *US – 1916 Act*, we examined the challenged legislation and found that the alleged "discretionary" elements of that legislation were not of a type that, *even under the mandatory/discretionary distinction*, would have led to the measure being classified as "discretionary" and therefore consistent with the Anti-Dumping Agreement. In other words, we *assumed* that the distinction could be applied because it did not, in any event, affect the outcome of our analysis. We specifically indicated that it was not necessary, in that appeal, for us to answer "the question of the continuing relevance of the distinction between mandatory and discretionary legislation for claims brought under the Anti-Dumping Agreement". (Appellate Body Report, *US – 1916 Act*, para. 99). We also expressly declined to answer this question in footnote 334 to paragraph 159 of our Report in *US – Countervailing Measures on Certain EC Products*. Furthermore, the appeal in *US – Section 211 Appropriations Act* presented a unique set of circumstances. In that case, in defending the measure challenged by the European Communities, the United States unsuccessfully argued that discretionary regulations, issued under a separate law, cured the discriminatory aspects of the measure at issue.

Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 93.

<sup>57</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 100.

distinction, it observed that the import of the distinction could vary from case to case, and cautioned against the application of the distinction in a "mechanistic fashion".<sup>58</sup>

7.139 Having reversed the finding of the panel in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body, in Section VI.E of its report, considered whether it could itself complete the analysis and rule on the claim in question, which was essentially the same claim now being pursued by Argentina.<sup>59</sup> It explained that a panel's analysis regarding a claim aimed at a WTO Member's law as such must start with the text of the challenged measure. If the text alone fails to clarify the issue, then the panel can look to other evidence. In this context, the Appellate Body recalled its earlier finding in *US-Carbon Steel* that in such cases evidence about the consistent application of the challenged measure can be taken into account by panels.<sup>60</sup> The Appellate Body discussed in some detail the issues it would have to resolve and the factual findings by the panel that would be required in order for it to rule on the claim in question. The Appellate Body concluded that the panel had not examined the nature and meaning of the relevant section of the SPB, nor had it considered evidence submitted by the complainant seeking to establish the consistent application of that section. The Appellate Body concluded that it was unable to rule on that claim because of the absence of relevant factual findings by the panel.<sup>61</sup>

7.140 We note that the Appellate Body's findings and its underlying reasoning appear to represent a significant shift from the mandatory/discretionary distinction previously applied by a number of GATT/WTO panels. The Appellate Body did not, however, clearly state whether this decision meant that the mandatory/discretionary test has from now on to be applied in a different manner. We are therefore left with a certain degree of uncertainty regarding the content and the applicability of this test in WTO dispute settlement proceedings. It is, however, clear to us from Section VI.E of the Appellate Body's Report that we must analyse the substance of Argentina's claim on the basis of the provisions of the SPB cited by Argentina. It is only as part of our substantive analysis of the SPB that we may decide whether it mandates WTO-inconsistent behaviour or precludes WTO-consistent behaviour. We shall refrain from applying the mandatory/discretionary test in the abstract to determine whether the SPB can give rise to a WTO violation or not. In the words of the Appellate Body, this would amount to applying the mentioned test in a "mechanistic fashion" and would not be acceptable.<sup>62</sup>

(ii) *Standard regarding presumptions*

7.141 Regarding the WTO-consistency of a legal instrument that contains presumptions concerning likelihood determinations in sunset reviews, the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* pointed out that:

[A] firm evidentiary foundation is required in each case for a proper determination under Article 11.3 of the likelihood of continuation or recurrence of dumping. Such a determination cannot be based solely on the mechanistic application of presumptions.<sup>63</sup> (emphasis added)

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<sup>58</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 93.

<sup>59</sup> The complainant argued that Section II.A.3 of the SPB was inconsistent with Article 11.3 "because it requires USDOC to make an affirmative likelihood determination in every case in which one of three scenarios exists". Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 164. Unlike the complainant in that case, however, Argentina does not challenge the consistency of the "good cause" requirements of US law with respect to the submission of other evidence to the USDOC in these proceedings.

<sup>60</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 168.

<sup>61</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 190.

<sup>62</sup> *Supra*, note 58.

<sup>63</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 178.

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.<sup>64</sup> (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.<sup>65</sup> 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.<sup>66</sup> (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, Argentina cited Sections 751(c) and 752(c) in its first written submission whereas it only cited 752(c) in its second submission. We note that although Argentina argues that the Panel should analyse these three legal instruments in conjunction with one another in deciding whether this irrefutable presumption exists under US law, it mainly focuses on the provisions of the SAA and the SPB in developing its arguments.<sup>67</sup> We nevertheless commence our analysis with the relevant provisions of the Tariff Act and then analyse the SAA and the SPB. In doing so, we shall evaluate the relevant provisions of these three measures individually and in conjunction with one another in deciding whether the alleged presumption exists.

The Statute and the Statement of Administrative Action

7.146 The provisions of the Tariff Act that are relevant to the present claim are found in Section 752(c), which provides in relevant parts:

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<sup>64</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 191.

<sup>65</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 178.

<sup>66</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 178.

<sup>67</sup> In fact, in the "Conclusion" section of its first written submission, Argentina submits that the Panel should find the SAA and Section II.A.3 of the SPB are inconsistent with Article 11.3 of the Agreement with respect to the alleged irrefutable presumption. Argentina has not requested that a particular provision of the Tariff Act be found to be WTO-inconsistent in this regard.



**(c) Determination of likelihood of continuation or recurrence of dumping**

**(1) In general**

In a review conducted under section 1675(c) of this title, the administering authority shall determine whether revocation of an antidumping duty order or termination of a suspended investigation under section 1673c of this title would be likely to lead to continuation or recurrence of sales of the subject merchandise at less than fair value. The administering authority shall consider—

(A) the weighted average dumping margins determined in the investigation and subsequent reviews, and

(B) the volume of imports of the subject merchandise for the period before and the period after the issuance of the antidumping duty order or acceptance of the suspension agreement.

**(2) Consideration of other factors**

If good cause is shown, the administering authority shall also consider such other price, cost, market, or economic factors as it deems relevant.<sup>68</sup> (emphasis added)

7.147 We note that the Statute provides that in determining whether dumping is likely to continue or recur in the case of revocation of the order, the USDOC has to consider two factors: "historical dumping margins" and "import volumes". The Statute also states that, where good cause is shown, the USDOC may – and in fact "shall" – consider other factors. Although these provisions seem to limit the factual basis of the USDOC's likelihood determinations, in the sense that they require a showing of good cause in order for other information to be considered, in our view they fall short of attaching a conclusive value to these two factors.<sup>69</sup> The Statute does not stipulate that the USDOC is required to limit the factual scope of its analysis to these two factors in all cases. To the contrary, it specifically states that if good cause is shown factors other than dumping margins and import volumes shall also be considered by the USDOC.

7.148 We note that the premise of Argentina's claim is that US law contains certain scenarios, the satisfaction of which would lead to an affirmative likelihood determination by the USDOC *per se*. The three scenarios that Argentina cites are found in Section II.A.3 of the SPB, as we discuss below (*infra*, paras. 7.152-7.154). We also note that these scenarios are premised on the same two factors that are mentioned in Section 752(c) of the Tariff Act of 1930, i.e. "import volumes" and "dumping margins". However, it is important to note that the manner in which these two factors are being used in the SPB's factual scenarios differs from the way Section 752(c) of the Tariff Act of 1930 treats them. The Statute directs the USDOC to evaluate these two factors in each sunset review. On its face, however, it does not require the USDOC to attach a decisive weight to them with respect to the likelihood determination. In fact, apart from the fact that it requires the USDOC to consider these two factors in its likelihood determinations, the Statute does not mention any factual scenario in which these two factors would play a certain role such that it would ultimately lead to an affirmative likelihood determination. In our view, therefore, the Statute on its face not only does not support Argentina's allegations regarding an irrefutable presumption of likelihood, but to the contrary seems to indicate that no such irrefutable presumption exists.

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<sup>68</sup> 19 U.S.C. § 1675a(c) (Exhibit ARG-1 at 1157).

<sup>69</sup> We do not understand Argentina to challenge the "good cause" provision of the Statute *per se*. We therefore do not discuss the implications of these provisions in the context of Argentina's claim.

7.149 We note that, under US law, the SAA provides an authoritative interpretation of the Statute.<sup>70</sup> 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-enter the U.S. market, they would have to resume dumping.

New section 752(c)(2) provides that, for good cause shown, Commerce also will consider other information regarding, price, cost, market or economic factors it deems relevant. Such factors might include the market share of foreign producers subject to the antidumping proceeding; changes in exchange rates, inventory levels, production capacity, and capacity utilisation; any history of sales below cost of production; changes in manufacturing technology of the industry; and prevailing prices in relevant markets. In practice, this will permit interested parties to provide information indicating that observed patterns regarding dumping margins and import volumes are not necessarily indicative of the likelihood of dumping. The list of factors is illustrative, and the Administration intends that Commerce will analyze such information on a case-by-case basis.<sup>71</sup> (emphasis added)

7.150 We note that the SAA also provides that certain patterns in dumping margins and import volumes following the imposition of the measure are "highly probative" or provide a "strong indication" of the likelihood of continuation or recurrence of dumping in the event of revocation of the order. This language suggests that these factors are important but not necessarily determinative. Further, the SAA also makes it clear that other factors can also be considered by the USDOC if good cause is shown by the exporters involved in the sunset review as to why that other factor is relevant to the USDOC's likelihood determination. The SAA even provides an illustrative list of such other factors, which includes changes in exchange rates, inventory levels and production capacity. The SAA specifically states that this will permit interested parties to provide information indicating that observed patterns regarding dumping margins and import volumes "are not necessarily indicative" of likelihood, and indicates that the USDOC "will analyze such information on a case-by-case basis".

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<sup>70</sup> The SAA (Exhibit ARG-5 at 4040).

<sup>71</sup> The SAA (Exhibit ARG-5 at 4213-4214).

Thus, not only does the SAA contain nothing that would cause us to disregard the plain meaning of the Statute, but to the contrary the SAA confirms that the Statute does not provide for the irrefutable presumption alleged by Argentina. It follows that our analysis concerning the Statute (read in conjunction with the SAA) ends on the basis of its text. We therefore do not need to go further to evaluate other factors, such as the alleged consistent application of the Statute, in order to complete our analysis regarding the Statute.

### *Conclusion*

7.151 The Tariff Act of 1930, interpreted in light of the SAA, does not contain an irrefutable presumption of likelihood for purposes of USDOC's sunset determinations.

### The Sunset Policy Bulletin

#### *Relevant provisions of the Sunset Policy Bulletin*

7.152 Finally, we note the following provisions of the SPB:

#### **II Sunset Reviews in Antidumping Proceedings**

##### *A. Determination of Likelihood of Continuation or Recurrence of Dumping*

...

##### *3. Likelihood of Continuation or Recurrence of Dumping*

...

[T]he Department normally will determine that revocation of an antidumping order or termination of a suspended dumping investigation is likely to lead to continuation or recurrence of dumping where—

(a) dumping continued at any level above *de minimis* after the issuance of the order or the suspension agreement, as applicable;

(b) imports of the subject merchandise ceased after issuance of the order or the suspension agreement, as applicable; or

(c) dumping was eliminated after the issuance of the order or the suspension agreement, as applicable, and import volumes for the subject merchandise declined significantly.

The Department recognizes that, in the context of a sunset review of a suspended investigation, the data relevant to the criteria under paragraphs (a) through (c), above, may not be conclusive with respect to likelihood. Therefore, the Department may be more likely to entertain good cause arguments under paragraph II.C in a sunset review of a suspended investigation.

##### *4. No Likelihood of Continuation or Recurrence of Dumping*

...

[T]he Department normally will determine that revocation of an antidumping order or termination of a suspended dumping investigation is not likely to lead to continuation

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

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

...

### C. *Consideration of Other Factors*

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

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

The SAA at 890, also notes that the list of factors is illustrative, and that the Department should analyze such information on a case-by-case basis.

Therefore, the Department will consider other factors in AD sunset reviews if the Department determines that good cause to consider such other factors exists. The burden is on an interested party to provide information or evidence that would warrant consideration of the other factors in question. With respect to a sunset review of a suspended investigation, where the Department determines that good cause exists, the Department normally will conduct the sunset review consistent with its practice of examining likelihood under section 751(a) of the Act.<sup>72</sup> (emphasis added)

7.153 We note that Section II.A.3 of the SPB provides that the USDOC will "normally" make an affirmative likelihood determination in cases where one of three factual scenarios is present. These factual scenarios are based on the same two factors that the Tariff Act, as interpreted by the SAA, directs the USDOC to consider in each sunset review, i.e. "dumping margins" and "import volumes". We note, however, that these factors are being treated by the SPB in a manner that differs from the framework within which the Tariff Act treats them. As we stated above, although Section 752(c) of the Act requires that the USDOC consider these two factors in all sunset reviews, in no way does it establish a presumption whereby the existence of these factors would lead to an affirmative likelihood determination *per se*. The SPB, however, presents these two factors in three different factual settings, which will "normally" lead to an affirmative finding of likelihood.

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<sup>72</sup> Sunset Policy Bulletin (Exhibit ARG-35 at 18872-18874).

7.154 Section II.A.3 of the SPB contains three scenarios. First is the existence of a dumping margin above *de minimis*; the second one relates to the case where imports cease following the imposition of the measure; and the third is where dumping disappears but import volumes decline following imposition. On its face, Section II.A.3 seems to contain a presumption of likelihood in cases where one of these factual scenarios is present.

7.155 According to the standard that we outlined above (*supra*, paras. 7.141-7.144), the issue here is whether the SPB directs the USDOC to treat the mentioned two factors, as presented in these three factual scenarios, as determinative/conclusive or simply indicative. If we find that the SPB requires the USDOC to treat them as conclusive it will follow that Section II.A.3 of the SPB is inconsistent with Article 11.3 of the Agreement. Alternatively, if these factors are not conclusive but simply indicative we will find Section II.A.3 to be consistent with Article 11.3.

7.156 In this context, we note that the word "normally" in the chapeau of Section II.A.3 qualifies the provisions of this section. It provides that in cases where one of these three factual scenarios is present the USDOC will "normally" find likelihood. The existence of "normally" suggests that the SPB envisions that there may be situations where likelihood may not be found even if one of these three scenarios is present. The United States asserts that the use of "normally" is incompatible with the notion of an irrefutable presumption.<sup>73</sup> However, we find no clarification in the SPB which supports the proposition that the word "normally" provides the USDOC with such discretion. To the contrary, we note that Section II.A.3 indicates that in certain circumstances its provisions relating to these three factual scenarios may not be conclusive. In this respect, Section II.A.3 provides:

The Department recognizes that, in the context of a sunset review of a suspended investigation, the data relevant to the criteria under paragraphs (a) through (c), above, [dumping margins and import volumes] may not be conclusive with respect to likelihood.<sup>74</sup> (emphasis added)

7.157 This portion of Section II.A.3 indicates that the provisions relating to the three factual scenarios may not be conclusive in the context of the sunset reviews of a suspended investigation, and arguably it is for this reason that the term "normally" was in Section II.A.3. This further suggests that these scenarios may be conclusive in the context of the sunset reviews of final anti-dumping duties. Yet, in our view, the SPB is not sufficiently clear as to whether the provisions of Section II.A.3 relating to the three factual scenarios are determinative for purposes of the USDOC's likelihood determinations.<sup>75</sup> Given our finding above that neither the Tariff Act nor the SAA contains any presumption regarding the USDOC likelihood determinations, we have not found any provision in these two measures that would clarify this point either.

#### *Consistent application of the Sunset Policy Bulletin*

7.158 Given that neither the SPB itself nor the Tariff Act or the SAA resolves the issue of whether Section II.A.3 of the SPB envisions that dumping margins and import volumes should be treated as conclusive in sunset reviews, we shall analyse evidence submitted by Argentina regarding the manner in which the provisions of the mentioned section have so far been implemented by the USDOC. In exhibits ARG-63 and ARG-64, Argentina submitted empirical evidence regarding the USDOC's consistent application of Section II.A.3 of the SPB. ARG-63 covers the sunset reviews carried out by the USDOC until September 2003, whereas ARG-64 covers the period October-December 2003.

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<sup>73</sup> First Written Submission of the United States, para. 178.

<sup>74</sup> Sunset Policy Bulletin (Exhibit ARG-35 at 18872). A similar sentence is contained in Section II.A.4 of the Sunset Policy Bulletin (Exhibit ARG-35 at 18872-18873).

<sup>75</sup> We find support for this proposition in the Appellate Body decision in *US – Corrosion-Resistant Steel Sunset Review*. See, Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 179.

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.<sup>76</sup>

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.<sup>77</sup>

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.<sup>78</sup> (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.<sup>79</sup>

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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<sup>76</sup> First Written Submission of the United States, para. 186.

<sup>77</sup> Second Written Submission of Argentina, paras. 83-84.

<sup>78</sup> Response of the United States to Question 14(a) from the Panel Following the Second Meeting.

<sup>79</sup> 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 of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case.<sup>80</sup> (footnote omitted, emphasis added)

This finding was also cited and confirmed by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*.<sup>81</sup>

7.163 Therefore, given that the text of the SPB, or the other legal instruments challenged by Argentina, does not answer the question of whether Section II.A.3 of the SPB directs the USDOC to treat evidence concerning "dumping margins" and "import volumes" as conclusive in its likelihood determinations, we consider it appropriate to analyse evidence submitted by Argentina regarding the consistent application of these provisions in deciding whether Section II.A.3 of the SPB is inconsistent with Article 11.3 of the Agreement.

7.164 We note that ARG-63 and ARG-64 contain, *inter alia*, data on the name of the sunset review, the date of the USDOC's determination, whether domestic interested parties or exporters participated in the review, the type of sunset review conducted, the outcome of the review and the legal basis of the determination. In addition, Argentina also provided the texts of the individual determinations in these sunset reviews.

7.165 At the outset, it should be noted that we based our analysis on the statistics regarding the determinations made before the date of initiation of these panel proceedings, i.e. Argentina's request for consultations.<sup>82</sup> An analysis of the statistics provided by Argentina demonstrates that the USDOC applied the contested provisions of the SPB in each sunset review and found likelihood of continuation or recurrence in each one of these sunset reviews on the basis of one of the three scenarios contained in Section II.A.3 of the SPB. We recall that the United States neither challenged nor disproved the factual correctness of these statistics. We therefore find that the evidence submitted by Argentina in exhibit ARG-63 demonstrates that the USDOC does in fact perceive the provisions of Section II.A.3 of the SPB as conclusive regarding the issue of likelihood of continuation or recurrence of dumping in the case of revocation of an order. As explained above, this runs counter to the requirement of Article 11.3 to carry out a rigorous examination and to base its determinations on a sufficient factual basis.

### *Conclusion*

7.166 On the basis of the above considerations, we find the provisions of Section II.A.3 of the SPB to be inconsistent with Article 11.3 of the Agreement.

7.167 We find it important to mention that although our finding of inconsistency is based on the evidence stemming from the consistent application of Section II.A.3 of the SPB, it does not necessarily mean that the complaining party has to produce statistical evidence that demonstrates a

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<sup>80</sup> Appellate Body Report, *US – Carbon Steel*, *supra*, note 15, para. 157.

<sup>81</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 168.

<sup>82</sup> We note, however, that the statistics pertaining to the rest of the period, i.e. until the end of December 2003, follow the same pattern that we have observed on the basis of the period ending as of Argentina's request for consultations.

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".<sup>83</sup> 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 do not, consider it necessary to rule on Argentina's claim that the US practice in this respect is also inconsistent with Article 11.3 for the same reasons.

7.169 Similarly, having found Section II.A.3 of the SPB to be WTO-inconsistent in this respect, we do not address Argentina's alternative claim under Article X:3(a) of the GATT 1994.

*Impact of the finding regarding the Sunset Policy Bulletin on the consistency of the Statute*

7.170 We find it necessary to address the issue of whether our finding of inconsistency with respect to the SPB has any impact on the status of the Tariff Act in this regard. We recall that Argentina requested that the Panel analyse the provisions of the Tariff Act, the SAA and the SPB in conjunction with one another with respect to the present claim. We also recall our finding above that Section 752(c) of the Tariff Act, interpreted in light of the relevant provisions of the SAA, does not contain any presumption with regard to the USDOC's likelihood determinations. To the contrary, we found that both the Tariff Act and the SAA state clearly that the USDOC can, and in fact "shall", take into account other relevant factors upon good cause shown.

7.171 In our view, the SPB does not purport to interpret the provisions of the Tariff Act. This is evidenced in the preamble of the SPB, which reads in relevant part:

The proposed policies are intended to complement the applicable statutory and regulatory provisions by providing guidance on methodological or analytical issues not explicitly addressed by the statute and regulations.<sup>84</sup> (emphasis added)

7.172 The preamble states that the SPB is designed to complement, not interpret, the provisions of the Tariff Act. Therefore, the provisions of the SPB in general, and those of Section II.A.3 in particular, can not change the meaning of the relevant provisions of the Tariff Act, including Section 752(c) that we analysed and found to be consistent with Article 11.3 of the Agreement for purposes of the present claim.

7.173 Assuming *arguendo* that the SPB did purport to interpret the provisions of the Tariff Act, our conclusion would not change. We found above (*supra*, para. 7.148) that the relevant provision of the Tariff Act, i.e. Section 752(c), does not contain any presumption and in fact explicitly provides that the USDOC shall consider factors other than import volumes and dumping margins in its likelihood determinations where good cause is shown. This demonstrates that the Statute contains an explicit provision as to the factors that the USDOC has to consider in its likelihood determinations. It follows that the SPB's provisions can not in any event change the plain meaning of the Tariff Act in this regard.

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<sup>83</sup> Appellate Body Report, *US – Carbon Steel*, *supra*, note 15, para. 157.

<sup>84</sup> Sunset Policy Bulletin (Exhibit ARG-35 at 18871).



**3. US Law's Standard for the Likelihood of Continuation or Recurrence of Injury Determinations in Sunset Reviews**

(a) Arguments of parties

(i) *Argentina*

7.174 Argentina submits that Sections 752(a)(1) and (5) of the Tariff Act violate Articles 11.1, 11.3, 3.1, 3.2, 3.4, 3.7 and 3.8 of the Agreement because these provisions require the USITC to determine whether there would be a likelihood of continuation or recurrence of injury 'within a reasonably foreseeable time' and they stipulate that the effects of the revocation of the duty may not be imminent but may manifest themselves over a longer period of time. According to Argentina, this standard goes too far into the future compared with the proper "likely" standard set out in Article 11.3.

(ii) *United States*

7.175 The United States contends that the statutory provisions under US law regarding the standard by which the USITC has to determine likelihood of continuation or recurrence of injury in sunset reviews are consistent with Article 11.3 of the Agreement. According to the United States, Article 11.3 does not impose a time-frame within which likelihood determinations in a sunset review have to be made.

(b) Arguments of third parties

(i) *Korea*

7.176 Korea argues that the meaning of the term "likely" under Article 11.3 is "probable". However, the standard established by the US Statute and the SAA fails to meet this standard.

(ii) *Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*

7.177 Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu contends that the provisions of Article 3 of the Anti-Dumping Agreement apply in the context of sunset reviews. Although Article 11.3 is silent as to the standard and methodologies which Members must follow in sunset reviews, it was not the drafters' intention to leave this matter to the complete discretion of the investigating authorities.

(c) Evaluation by the Panel

7.178 Argentina bases its claim on the Tariff Act and the SAA. As stated above (*supra*, para. 7.149), we shall analyze the provisions of the Tariff Act in light of the provisions of the SAA because of the SAA's relevance under US law as the authoritative tool for the interpretation of the Statute.

7.179 Section 752(a)(1) of the Tariff Act reads, in relevant part:

(1) In general

...The Commission shall determine whether revocation of an order, or termination of a suspended investigation, would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time...<sup>85</sup> (emphasis added)

7.180 Section 752(a)(5) of the Tariff Act reads, in relevant part:

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<sup>85</sup> 19 U.S.C. § 1675a(a)(1) (Exhibit ARG-1 at 1155).

(5) Basis for determination

The presence or absence of any factor which the Commission is required to consider under this subsection shall not necessarily give decisive guidance with respect to the Commission's determination of whether material injury is likely to continue or recur within a reasonably foreseeable time if the order is revoked or the suspended investigation is terminated. In making that determination, the Commission shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time.<sup>86</sup> (emphasis added)

7.181 The SAA provides, in relevant part:

A "reasonably foreseeable time" will vary from case-to-case, but normally will exceed the "imminent" timeframe applicable in a threat of injury analysis. New Section 752(a)(5) expressly states that the effects of revocation or termination may manifest themselves only over a longer period of time. The Commission will consider in this regard such factors as the fungibility or differentiation within the product in question, the level of substitutability between the imported and domestic products, the channels of distribution used, the methods of contracting (such as spot sales or long-term contracts), and lead times for delivery of goods, as well as other factors that may only manifest themselves in the longer term, such as planned investment and the shifting of production facilities.<sup>87</sup> (emphasis added)

7.182 At the outset, we note that on its face Section 752(a)(1) of the Tariff Act provides for the "likely" standard for the USITC's likelihood determinations. However, compared with the provisions of Article 11.3, the Tariff Act goes one step further and requires the USITC to inquire whether revocation of the duty would be likely to lead to the continuation or recurrence of injury within a reasonably foreseeable time. In other words, the Statute specifies the temporal aspect of the USITC's likelihood determinations in sunset reviews. Section 752(a)(5), read in conjunction with the above-quoted portion of the SAA, provides that although the meaning to be given to the concept of "reasonably foreseeable time" will vary from case-to-case, it is clear that this standard means a longer period of time than the imminence standard of Article 3.7 of the Agreement, which applies to threat of material injury determinations in investigations.

7.183 The issue is, therefore, whether this additional provision of US law regarding the temporal aspect of the USITC's sunset determinations changes the likely standard into a more flexible one, which renders that law inconsistent with Article 11.3, or the other provisions of the Agreement cited by Argentina.

7.184 We note that Article 11.3, the provision that contains the main substantive requirements that apply to sunset reviews, does not mention the time-frame on which the investigating authorities should base their sunset review determinations. Nor does Article 11.3 require the investigating authorities to specify the time-frame on which their likelihood determination is based. All that Article 11.3 requires is that the investigating authority determine on a sufficient factual basis that injury is likely to continue or recur should the duty be revoked. We are of the view, therefore, that the US Statute that requires the USITC to determine whether injury is likely to continue or recur within a reasonably foreseeable time does not conflict with the "likely" standard of Article 11.3.

7.185 That does not mean, however, that there is no limitation in terms of the temporal aspect of sunset determinations. Arguably, there is at least a logical limitation that would make it impossible for an investigating authority to base its sunset determinations on an unreasonably long period of time

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<sup>86</sup> 19 U.S.C. § 1675a(a)(5) (Exhibit ARG-1 at 1156).

<sup>87</sup> The SAA (Exhibit ARG-5 at 4211).

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.<sup>88</sup> 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, the investigating authority does not have to base its likelihood determination on a uniform time-frame with respect to each injury factor that it takes into consideration. The time-frame regarding different injury factors may be different from one another depending on the circumstances of each sunset review. For instance, in a case where the exporters have excessive inventories, the investigating authority's evaluation of likely volume of dumped imports can be based on a relatively short time-frame. On the other hand, an analysis regarding the cash flows or productivity of the domestic industry may necessarily have to be based on a longer time-frame.

7.188 Argentina also contends that the cited provisions of the Tariff Act are inconsistent with Articles 3.7 and 3.8 of the Agreement. We understand Argentina to argue that because Articles 3.7 and 3.8 of the Agreement contain provisions about future injury determinations, they are relevant to likelihood of continuation or recurrence of injury determinations in sunset reviews. It follows that these two provisions impose additional obligations on the investigating authorities in their sunset determinations.

7.189 We note that there is a certain similarity between a threat of injury analysis in an anti-dumping investigation and a likelihood of continuation or recurrence of injury determination in a sunset review in that they both require prospective analysis. Hence, it could be argued that Article 3.7 provides context for the interpretation of Article 11.3. In our view, however, the textual differences outlined below preclude the importation of a completely different test from Article 3.7 into Article 11.3.

7.190 Article 3 is titled "Determination of Injury". Footnote 9 to Article 3 sets out three types of injury that can establish the basis of investigating authorities' injury determinations in anti-dumping investigations.<sup>89</sup> One of these is "threat of material injury", which is governed by the provisions of Articles 3.7 and 3.8 of the Agreement. Article 11 is titled "Duration and Review of Anti-Dumping Duties and Price Undertakings". More specifically, Article 11.3 sets out rules that apply to likelihood of continuation or recurrence of injury determinations in sunset reviews. The determinations set out in Articles 3.7 and 11.3 are substantively different from one another. In this regard, we also

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<sup>88</sup> Second Written Submission of Argentina, para. 202.

<sup>89</sup> Footnote 9 reads:

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.

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.<sup>90</sup>

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.<sup>91</sup> 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.<sup>92</sup> Similarly, in this report, we have found that certain provisions of Article 6 of the Agreement also apply to sunset reviews.<sup>93</sup> 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 material injury determinations in investigations and likelihood of continuation or recurrence of injury determinations in sunset reviews be governed by different rules.

(i) *Conclusion*

7.193 On the basis of the above considerations, we find that Sections 752(a)(1) and (5) of the Tariff Act are not WTO-inconsistent in respect of the "within a reasonably foreseeable" time-frame that they contain regarding the USITC's likelihood determinations in sunset reviews.

D. CLAIMS RELATING TO THE USDOC'S LIKELIHOOD DETERMINATION IN THE OCTG SUNSET REVIEW

1. **Arguments of Parties**

(a) *Argentina*

7.194 Argentina argues that the USDOC's decision to conduct an expedited sunset review and the application of the waiver provisions of US law in the case of OCTG from Argentina violated

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<sup>90</sup> We note the US statement that the obligation to determine likelihood of continuation or recurrence of injury under Article 11.3 is a fourth type of determination regarding injury, separate from the three other types of injury determinations set out in footnote 9 of the Agreement. See, Response of the United States to Question 20(a) from the Panel Following the Second Meeting. We disagree with the United States on this issue. By concluding that Articles 3.7 and 3.8 do not apply to sunset reviews, we are by no means implying that Article 11.3 contains such a fourth category of injury determination.

<sup>91</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, paras. 106-107.

<sup>92</sup> See, for instance, Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, paras. 109, 151 and 158.

<sup>93</sup> See, for instance, *supra*, paras. 7.108-7.112.

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.<sup>94</sup> 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.<sup>95</sup> 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).<sup>96</sup>

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 cent of the total exports of the subject product from that country during the five-year period of application of the measure concerned, that aggregate response is deemed to be inadequate. An inadequate response triggers the conduct of an expedited – as opposed to full – sunset review. Accordingly, although Siderca's substantive response to the notice of initiation was complete, i.e. it contained all the information the US law required, since Siderca's share in the total exports of OCTG from Argentina during the five-year period of application of the measure at issue was below 50 per cent, the USDOC conducted an expedited sunset review. Following the submission of its substantive response to the notice of initiation, Siderca did not make any further submissions to the USDOC.

7.206 In its sunset determination with regard to Argentina, the USDOC considered the information submitted in Siderca's complete substantive response to the notice of initiation as well as some other evidence from other sources, such as import statistics. Having found that dumping continued over the life of the measure and that import volumes declined significantly, in its order-wide determination

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<sup>94</sup> The other countries were Italy, Japan and Korea. See, *Issues and Decision Memorandum* (Exhibit ARG-51 at 1).

<sup>95</sup> *Issues and Decision Memorandum* (Exhibit ARG-51 at 5).

<sup>96</sup> However, the United States stated that a company called Acindar, which was subject to an administrative review following the completion of the sunset review at issue, might have shipped the subject product to the United States during the initial period of application of the anti-dumping duty at issue. See, Response of the United States to Questions 12(a) and 13(a) from the Panel Following the First Meeting.

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.<sup>97</sup>

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.<sup>98</sup> 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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<sup>97</sup> First Written Submission of Argentina, paras. 148 and 155.

<sup>98</sup> 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.

dumping was eliminated after the issuance of the order and import volumes for subject merchandise declined significantly.<sup>99</sup> (emphasis added)

...

We note that there have been above *de minimis* margins for the investigated companies throughout the history of the orders, except for one company covered by the order on Japan.<sup>100</sup> (emphasis added)

...

Based on this analysis, the Department finds that the existence of dumping margins after the issuance of the orders is highly probative of the likelihood of continuation or recurrence of dumping. 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 reviews or failed to submit adequate substantive responses, we determine that dumping is likely to continue if the orders were revoked.<sup>101</sup> (emphasis added)

...

In the Argentine case, there has been no decline in dumping margins coupled with 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 [sic] 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 Argentine order and is likely to continue if the order were revoked.<sup>102</sup> (emphasis added)

7.213 We note that the USDOC's likelihood determination in the instant sunset review is premised on two findings: (a) that dumping continued above *de minimis* levels over the life of the order, and (b) that import volumes declined following the imposition of the order.

7.214 Argentina asserts that the USDOC's finding that dumping had continued over the life of the order was devoid of factual support because Siderca had not made any consumption shipments to the United States during this period and no administrative reviews were carried out to determine whether shipments made by other Argentine exporters were dumped. Therefore, the USDOC could not reasonably conclude that dumping continued over the life of the order.

7.215 The United States contends that the USDOC did not use the original dumping margin as the basis of its sunset determination in the instant sunset review. The USDOC made its likelihood determination on the basis of the existence of dumping during the life-span of the measure at issue. Following that likelihood determination, the USDOC sent the original dumping margin to the USITC as the margin that was likely to continue or recur.

7.216 In order to clarify the basis of the USDOC's determination that dumping had continued over the life of the measure, we put the following question to the United States following our first meeting with the parties:

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<sup>99</sup> *Issues and Decision Memorandum* (Exhibit ARG-51 at 4).

<sup>100</sup> *Issues and Decision Memorandum* (Exhibit ARG-51 at 5).

<sup>101</sup> *Issues and Decision Memorandum* (Exhibit ARG-51 at 5).

<sup>102</sup> *Issues and Decision Memorandum* (Exhibit ARG-51 at 5).



The Panel notes that the USDOC's *Issues and Decision Memorandum* in the instant sunset review mentions that it was determined that dumping continued over the life of the measure in question and that the margin of dumping did not decline in the same period. Please explain the factual basis of that determination, in particular, please indicate whether the USDOC calculated a dumping margin for Siderca or any other Argentine exporter after the imposition of the original measure.<sup>103</sup>

7.217 The United States responded as follows:

In the sunset review, Commerce found that dumping continued to exist during the five years preceding the sunset review because there were shipments of Argentine OCTG during four of those five years and dumping duties were assessed on those same imports.<sup>104</sup> (footnote omitted)

7.218 We note that parties' views differ as to what was the basis of the USDOC's finding that dumping continued over the life of the measure. Argentina argues that the USDOC's likelihood determination was based on the 1.36 per cent margin of dumping from the original investigation whereas the United States submits that it was based on the existence of the shipments of the subject product to the United States and the continued collection of the duty, not the margin from the original investigation *per se*.

7.219 In our view, the above-quoted parts of the USDOC's *Issues and Decision Memorandum* demonstrate that the USDOC relied on the existence of the original dumping margin when concluding that dumping continued over the life of the order. The issue therefore is whether the existence of a dumping margin from the original investigation can be interpreted to mean that dumping continued over the life of the measure. In our view, it can not. The original dumping margin reflects the result of the dumping margin calculations in the original investigation, which establish the basis for the anti-dumping measure to be imposed in that investigation. The existence of the original dumping margin can not be the basis of a factual determination that dumping continued over the life of the measure. Exporters subject to the measure might have changed their export or home market prices, or, their cost of production might have changed. Thus, if an investigating authority relies upon the existence of dumping over the life of the measure as part of its sunset determination, it has to have an adequate factual basis for so concluding. This can be, *inter alia*, a determination made as part of a duty assessment process carried out under Article 9 of the Agreement, or a review under Article 11.2. In our view however, the original determination of dumping by itself cannot represent a sufficient factual basis for concluding that dumping continued during the life of the measure, let alone representing an adequate factual basis to conclude that dumping is likely to continue or recur after the expiry of the order. The purpose of a sunset review is to examine whether the facts continue to justify the imposition of an anti-dumping measure. The USDOC, however, did not engage in that inquiry because it simply relied on the existence of the dumping margin from the original investigation.

7.220 Assuming *arguendo* that the basis of the USDOC's finding that dumping continued over the life of the measure was, as the United States asserts, the continued shipments of the subject product and the continued collection of the duty, rather than the existence of the original dumping margin *per se*, our analysis would not change. In our view, the fact that some imports of the subject product continued to be shipped from Argentina to the United States and that anti-dumping duties continued to be collected on these shipments over the life of the order does not represent an adequate factual basis for the proposition that dumping continued in that period.<sup>105</sup>

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<sup>103</sup> Question 23 from the Panel Following the First Meeting.

<sup>104</sup> Response of the United States to Question 23 from the Panel Following the First Meeting.

<sup>105</sup> We note that Argentine exporters subject to the anti-dumping duty at issue could request an administrative review in order to have their dumping margins calculated by the USDOC and have the duties

(i) *Conclusion*

7.221 We recall that the USDOC's likelihood determination in this sunset review was based on two factual findings, i.e. first dumping continued over the life of the measure and second import volumes declined following the imposition. We have found that the factual basis of the first one is not proper. We therefore conclude that the USDOC's likelihood determination in the instant sunset review was inconsistent with Article 11.3 of the Anti-Dumping Agreement.

7.222 We recall that in the OCTG sunset review, deemed waivers provisions of US law were applied to Argentine exporter(s) other than Siderca. The implication of this is that the USDOC was required to make an affirmative likelihood determination with respect to these exporter(s). We recall that we found deemed waivers provisions to be inconsistent with the investigating authorities' obligation to determine likelihood of continuation or recurrence of dumping under Article 11.3. Although the USDOC's final determination does not refer to these company-specific determinations, logically these determinations must be a relevant part of the factual basis of the USDOC's overall country-wide likelihood determination in the OCTG sunset review. In our view, the application of deemed waivers provisions to Argentine exporters other than Siderca invalidated the factual basis of the overall country-wide determination. Therefore, in addition to our above-stated considerations, we also find that the application of these provisions in the OCTG sunset review was inconsistent with Article 11.3 of the Agreement.

7.223 We note that Argentina also asserts that the dumping margin from the original investigation was calculated through the so-called methodology of zeroing and therefore could not be relied upon by the USDOC in its likelihood determination in this sunset review. It follows, in Argentina's view, that the USDOC violated Articles 2.4 and 11.3 of the Agreement by relying on this margin in its likelihood determinations. Having found that the USDOC erred in this sunset review by relying on the existence of this dumping margin in its determination that dumping continued over the life of the measure, we need not, and do not, evaluate various aspects of the methodology through which that original dumping margin was obtained.

(c) *Alleged violations of Article 6 of the Agreement*

(i) *Nature of the obligations in Articles 6.1, 6.2, 6.8 and Annex II of the Agreement and their applicability in sunset reviews*

7.224 Argentina contends that the application of waiver provisions and the conduct of an expedited sunset review in the OCTG sunset review violated Articles 6.1 and 6.2 of the Agreement. According to Argentina, the conduct of an expedited review also violated Article 6.8 and Annex II of the Agreement.

7.225 We note that Argentina's claims here are based on the assumption that Articles 6.1, 6.2 and 6.8 and Annex II of the Agreement apply to sunset reviews. According to Argentina, these provisions apply to sunset reviews by virtue of the cross-reference in Article 11.4. The United States, however, argues that this cross-reference incorporates into sunset reviews only those provisions of Article 6 that deal with evidence and procedure. According to the United States, the same holds true for the provisions of Annex II; they also apply to sunset reviews to the extent they concern evidence and procedure.

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paid refunded, if necessary. In our view, however, given the low dumping margin (1.36 per cent) and the low volume of imports made during the period of application of the measure at issue, the fact that no Argentine exporter requested the initiation of an administrative review could by no means be conclusive as to whether or not these sales in question were dumped.

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 their provisions concern "evidence and procedure". Article 6.8 explains under what circumstances an investigating authority is allowed to base its determinations on the facts available. Annex II contains detailed provisions to be followed by investigating authorities when resorting to facts available under Article 6.8.

(ii) *Examination of the consistency of the USDOC's determination with Articles 6.1 and 6.2 of the Agreement*

7.227 Argentina argues that Article 6.1 was violated by the USDOC because the conduct of an expedited review and the application of the waiver provisions prevented Siderca from submitting evidence to the USDOC. According to Argentina, the USDOC ignored the information submitted by Siderca.<sup>106</sup>

7.228 We recall that in the OCTG sunset review, waiver provisions of US law were not applied to Siderca. Certainly Siderca did not explicitly waive its right to participate. Nor was it deemed by the USDOC to have waived participation because it submitted a complete substantive response to the notice of initiation. Although Argentine exporters other than Siderca were deemed to have waived their right to participate, that did not, and in fact could not possibly, have an effect on Siderca's procedural rights under Article 6.1 in this sunset review. Therefore, we disagree with Argentina's statement that the application of waiver provisions deprived Siderca from submitting evidence to the USDOC.

7.229 It is factually correct that in the OCTG sunset review the USDOC carried out an expedited review. The issue therefore is what effect the conduct of an expedited sunset review had on Siderca's procedural rights under Article 6.1.

7.230 We note that the USDOC's final *Issues and Decision Memorandum* clearly demonstrates that the information Siderca submitted in its substantive response to the notice of initiation was considered by the USDOC.<sup>107</sup> Argentina has not directed our attention to any fact which demonstrates that the USDOC prevented Siderca from submitting evidence or that the information submitted by Siderca was not taken into consideration by the USDOC.

7.231 We also note that in addition to its substantive response to the notice of initiation, Siderca had the opportunity to submit a rebuttal brief to the USDOC, which it did not.<sup>108</sup> Siderca could also

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<sup>106</sup> First Written Submission of Argentina, para. 167.

<sup>107</sup> In this regard, we note the following parts of the USDOC's Memorandum:

With respect to the Argentine order, Siderca argues that revocation of the order would not result in antidumping margins above *de minimis*. It states that Siderca's margin is less than the WTO's standard for *de minimis* in the antidumping agreement at Article 5.8, and, therefore, there is no basis to conclude that dumping is likely to recur under the standard in Article 11.

...

In response to Siderca's comments in the Argentine case, the SAA and the Sunset Policy Bulletin provide that 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...

*Issues and Decision Memorandum* (Exhibit ARG-51at 4-5).

<sup>108</sup> In this regard, Section 351.218(d)(4) of the Regulations provides:

submit its views to the USDOC as to the USDOC's adequacy determination and the appropriateness of conducting an expedited sunset review in this case, which it chose not to.<sup>109</sup> We do not know whether it would have been enough to satisfy the requirements of Article 6.1 had Siderca used these other opportunities to submit information to the USDOC. However, the fact is that it did not.

7.232 Argentina also submits that the application of waiver provisions and the conduct of an expedited sunset review in the OCTG sunset review violated Article 6.2 of the Agreement because this precluded Siderca from defending its interests as set out in Article 6.2.

7.233 We recall that Article 6.2 provides:

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

7.234 Article 6.2 generally deals with the right of interested parties to defend their interests in an investigation and, by operation of Article 11.4, in a sunset review. More specifically, it provides that the investigating authority, if so requested, must provide interested parties an opportunity to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered.

7.235 In response to questioning from the Panel regarding the procedural rights conferred upon interested parties in expedited sunset reviews, the United States stated that hearings were not generally held in expedited sunset reviews.<sup>110</sup> Given the explicit provision of Article 6.2 that hearings have to be arranged when so requested by interested parties, it becomes clear that in the OCTG sunset review Siderca was subjected to a procedure that fell short of the requirements of Article 6.2 of the Agreement in respect of hearings. The reason why the USDOC carried out an expedited sunset review was Siderca's share in the total imports of the subject product. In other words, had exporters that had exported the subject product to the United States in the five-year period of application of this measure made a complete submission in response to the notice of initiation Siderca would have had the right to require that the USDOC arrange a hearing to allow interested parties to exchange their views with others. In our view, the fact that certain exporters do not participate in a sunset review can not justify depriving cooperating exporters of their procedural rights under Article 6.2.

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(4)*Rebuttal to substantive response to a notice of initiation.* Any interested party that files a substantive response to a notice of initiation under paragraph (d)(3) of this section may file a rebuttal to any other party's substantive response to a notice of initiation not later than five days after the date the substantive response is filed with the Department. (Exhibit US-3 at 13522).

<sup>109</sup> In this regard, Section 351.309(e) of the Regulations provides:

(e) *Comments on adequacy of response and appropriateness of expedited sunset review.* (i) *in general.* Where the Secretary determines that respondent interested parties provided inadequate response to a Notice of Initiation ... interested parties...that submitted a complete substantive response to the Notice of Initiation ... may file comments on whether an expedited sunset review ... is appropriate based on the adequacy of response to the notice of initiation. (Exhibit US-3 at 13524).

<sup>110</sup> Response of the United States to Question 2(d) from the Panel Following the First Meeting.

## 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.<sup>111</sup>

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.<sup>112</sup> 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.<sup>113</sup>

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<sup>111</sup> 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 response. Commerce's *Adequacy Memorandum* and the *Decision Memorandum* also make clear that Commerce's decision to expedite the review was based on the failure of Argentine producers/exporters of OCTG, other than Siderca, to respond to the notice of initiation. Consequently, Commerce determined to expedite the sunset review and to use facts available in making the final sunset determination because the Article 11.3 likelihood determination is made on an order-wide basis and Siderca represented zero exports to the United States of OCTG during the five-year period preceding the sunset review. (footnotes omitted)

First Written Submission of the United States, para. 243.

<sup>112</sup> Section 351.308(f) of the USDOC's Regulations reads in relevant part:

(f) *Use of facts available in a sunset review.* Where the Secretary determines to issue final results of sunset review on the basis of facts available, the Secretary will normally rely on:

(1) Calculated countervailing duty rates or dumping margins, as applicable, from prior Department determinations; and

(2) Information contained in parties' substantive responses to the Notice of Initiation filed under § 351.218(d)(3), consistent with section 752(b) or 752(c) of the Act, as applicable. (emphasis added)

19 C.F.R. § 351.308(f) (Exhibit US-3 at 13524).

<sup>113</sup> See, *supra*, note 107.

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-wide basis in the OCTG sunset review. In our view, it did not.

7.241 We note that the USDOC used facts available in its likelihood determination for Argentina. This was a determination that covered, in addition to Siderca, other Argentina exporter(s) that had exported the subject product to the United States during the period of application of this measure. In our view, the impact of facts available, if any, was on these other Argentina exporters who did not cooperate with the USDOC.<sup>114</sup> This is because by using facts available, the USDOC reached a likelihood determination for all Argentine exporters. Since these other exporters had not made themselves known to the USDOC, the USDOC used the information submitted by Siderca and other information in the record in reaching a conclusion with respect to these exporters.

7.242 We see no harm caused to Siderca because of the USDOC's use of facts available. The information submitted in Siderca's only submission to the USDOC, i.e. its substantive response to the notice of initiation, was considered by the USDOC. Further, as we noted above, Siderca chose not to use two additional opportunities that were available under US law to submit information, or make comments, to the USDOC.

7.243 We note that as part of this claim Argentina also argues that the USDOC acted inconsistently with Article 6.9 of the Agreement. The nature of Argentina's argument in connection with this article is not, however, entirely clear. In its second written submission, Argentina asserted that the USDOC's determination based on facts available violated, among others, Article 6.9 of the Agreement.<sup>115</sup> In its first oral submission, Argentina submitted that the USDOC violated Article 6.9 by not disclosing the essential facts forming the basis of the USDOC's decision to carry out an expedited sunset review.<sup>116</sup>

7.244 We consider that Argentina's argumentation in this regard has not been developed such that it would allow us to address and resolve it as an independent claim. Even if it had been sufficiently substantiated by Argentina, resolving such a claim would not, in our view, have a significant contribution to the resolution of the dispute at issue generally. We note that we have found certain substantive inconsistencies in the USDOC's determinations in the OCTG sunset review. Having made these findings of inconsistency regarding the substance of the USDOC's determinations, entertaining another claim under Article 6.9 of the Agreement, which is purely procedural, would not have any significant value added with respect to the United States' bringing its measure into conformity with its WTO obligations. We therefore decline to make any ruling in this regard.

### Conclusion

7.245 Under these circumstances, therefore, we find that the USDOC did not act inconsistently with Article 6.8 and Annex II of the Agreement in its use of facts available.

#### (d) Alleged violations of Article 12 of the Agreement

7.246 **Argentina** asserts that the USDOC violated Article 12.2 of the Agreement by failing to explain the basis of its sunset determinations in its final determination. First, Argentina submits that the USDOC did not explain whether the basis of its determinations was the waiver provisions of US law or the provisions relating to facts available. Second, Argentina submits that the USDOC acted

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<sup>114</sup> Argentina is not arguing that the USDOC's use of facts available in this sunset review violated these other Argentine exporters' rights under Article 6.8. In any event, in our view, the use of facts available could not possibly lead to a violation of Article 6.8 with respect to these exporters given that they did not cooperate with the USDOC.

<sup>115</sup> Second Written Submission of Argentina, paras. 123-125.

<sup>116</sup> First Oral Submission of Argentina, para. 63.

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.<sup>117</sup>

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.<sup>118</sup>

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.<sup>119</sup>

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.<sup>120</sup> (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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<sup>117</sup> *Issues and Decision Memorandum* (Exhibit ARG-51 at 3).

<sup>118</sup> *Issues and Decision Memorandum* (Exhibit ARG-51 at 5).

<sup>119</sup> *Issues and Decision Memorandum* (Exhibit ARG-51 at 5).

<sup>120</sup> *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 this determination inconsistent with Article 12.2 of the Agreement because when viewed in its entirety the memorandum states that Siderca and the other respondents were treated differently and that Siderca had not waived its right to participate in this sunset review.

7.253 Regarding the second argument raised by Argentina, that the USDOC failed to comply with Article 12.2.2 because its final determination did not contain fresh evidence regarding its likelihood of continuation or recurrence of dumping determinations, we note that Argentina is implying that Article 12.2 imposes certain substantive obligations on investigating authorities. However, neither Article 12.2 nor the other paragraphs of Article 12 contain substantive obligations regarding the conduct of sunset reviews. The substantive requirements of the Agreement regarding sunset reviews have to be found in the substantive provisions such as Article 11.3 and the treaty interpreter should refrain from interpreting procedural provisions of the Agreement, such as Articles 12 and 6, in a way to impose additional substantive obligations on investigating authorities. In this context, we find useful the following finding of the panel in *US – Corrosion-Resistant Steel Sunset Review*:

In other words, by finding that the provisions of Article 6.10 may contain evidentiary and procedural obligations that are, in general, applicable in sunset reviews, we do not (and cannot) find that Article 6.10, by virtue of the cross-reference in Article 11.4, operates so as to super-impose an *additional* substantive requirement of re-calculation of the likely dumping margin in sunset reviews, a requirement that not even Japan argues is found in the text of Article 11.3, or elsewhere in the text of the Anti-Dumping Agreement. We, as a treaty interpreter, are not allowed to derive substantive obligations out of the application of the evidentiary and procedural provisions of Article 6.<sup>121</sup> (footnote omitted)

We note that the panel's view on this issue was also upheld by the Appellate Body.<sup>122</sup>

(i) *Conclusion*

7.254 We therefore decline to sustain Argentina's claim under Article 12 of the Agreement.

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<sup>121</sup> Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("US – Corrosion-Resistant Steel Sunset Review"), WT/DS244/R, adopted 9 January 2004, as modified by the Appellate Body Report, WT/DS244/AB/R, para. 7.206.

<sup>122</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 155.



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.<sup>123</sup> The USITC carried out a cumulative analysis with respect to these five countries.<sup>124</sup> 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.<sup>125</sup>

**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.<sup>126</sup> 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

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<sup>123</sup> 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).

<sup>124</sup> USITC's Sunset Determination (Exhibit ARG-54 at 14).

<sup>125</sup> USITC's Sunset Determination (Exhibit ARG-54 at 16-17).

<sup>126</sup> 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.

7.262 Argentina also alleges violations of Articles 3.4 and 3.5 of the Agreement in the instant sunset review.

(ii) *United States*

7.263 The United States submits that in the instant sunset review the USITC applied the "likely" standard provided for under Article 11.3. The United States disagrees with Argentina's view that likely only means probable. According to the United States, Article 11.3 of the Agreement uses the word "likely", and not "probable", hence finding a decisive synonym for likely would not shed more light on the meaning of that term.

7.264 The United States also disputes Argentina's allegations regarding the standard applied with respect to the three aspects of the USITC's sunset determination in this case, the likely volume of dumped imports, the likely price effect of such imports and their likely impact on the US domestic industry. The United States generally argues that Article 3 – including Article 3.1 – does not apply to sunset reviews. According to the United States, the dictates of Article 3.1 are potentially incompatible with the nature of sunset determinations under Article 11.3. The United States nevertheless submits that the violations alleged by Argentina with regard to Article 3.1 are groundless because the USITC's determinations demonstrate that it did not act inconsistently with these provisions.

7.265 The United States also disputes Argentina's claims regarding Articles 3.4 and 3.5.

(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-Dumping Agreement apply *mutatis mutandis* in the context of sunset reviews. According to the European Communities, given the introductory wording of Article 3.1, the absence of an explicit cross-reference in Article 11.3 to Article 3 is irrelevant. The European Communities also agrees with Argentina that the required standard in sunset determinations is “likely”, not “possible”. According to the European Communities, the USITC did not correctly apply the “likely” standard in the instant sunset review.

(ii) *Japan*

7.267 Japan argues that the provisions of Article 3 apply to injury determinations in sunset reviews under Article 11.3. Therefore, the requirements of Articles 3.1, 3.2, 3.4 and 3.5 have to be fulfilled in such reviews.

(c) Evaluation by the Panel

(i) *Applicability of Article 3 in sunset reviews*

7.268 We note that the majority of Argentina's claims challenging the USITC's determinations in the OCTG sunset review are premised on various paragraphs of Article 3 of the Agreement, solely or together with Article 11.3. Parties' views as to the applicability of Article 3 in sunset reviews, however, diverge. Argentina submits generally that Article 3 of the Agreement applies to sunset reviews. In this regard, Argentina relies mainly on the provisions of footnote 9 of the Agreement that specifies the three types of injury, and on previous Appellate Body decisions. According to the United States, however, Article 3 does not apply to sunset reviews carried out under Article 11.3 because the nature of the inquiry is different under these two provisions. Article 3 applies to a determination of “injury” whereas the focus of the inquiry in a sunset review is a determination of the “likelihood of continuation or recurrence of injury”.

7.269 Given the central role of Article 3 in Argentina's arguments raised in support of its claims relating to the USITC's actions in the OCTG sunset review and the divergence between parties' views on this matter, we find it useful to outline at this juncture our views regarding the applicability of Article 3 in sunset reviews.

7.270 We note that neither Article 11.3 nor any other paragraph of Article 11 contains any provision as to whether the provisions of Article 3 in general, or those of certain specific paragraphs thereof in particular, apply to sunset reviews. Nor does Article 3 contain any cross-reference to that effect. However, there are textual indications in Article 3 that may suggest that its provisions define the scope of injury determinations throughout the Agreement. For instance, the introductory phrase in Article 3.1 (“for purposes of Article VI of GATT 1994”) and the phrase “[u]nder this Agreement” in footnote 9 indicate that the concept of injury should be understood in the manner set out in Article 3 throughout the Agreement. In this context, we also incorporate our above analysis regarding the textual analysis of Articles 3 and 11.3 of the Agreement (*supra*, paras. 7.184-7.191).

7.271 We note that the panel in *US – Corrosion-Resistant Steel Sunset Review* also opined that the term injury should be understood in the manner described in Article 3. However, that panel concluded that these phrases indicated that Article 3's scope of application was not limited to

investigations, hence it also generally applied to sunset reviews.<sup>127</sup> 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.<sup>128</sup>

This observation applies also to original investigations and sunset reviews under the Anti-Dumping Agreement. In an original anti-dumping investigation, investigating authorities must determine whether *dumping exists* during the period of investigation. In contrast, in a sunset review of an anti-dumping duty, investigating authorities must determine whether the expiry of the duty that was imposed at the conclusion of an original investigation would be *likely to lead to continuation or recurrence of dumping*.<sup>129</sup>

7.273 In our view, the Appellate Body's reasoning regarding the differences between original investigations and sunset reviews pertaining to dumping determinations equally applies to the injury side of investigations and sunset reviews. The focus of the injury determinations in investigations is to determine the existence of injury during the period of investigation whereas sunset reviews are about the likelihood of continuation or recurrence of injury in the event of revocation of an order that

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<sup>127</sup> In this regard, we note the following statements of the panel in *US – Corrosion-Resistant Steel Sunset Review*:

First, Article 3 is entitled "Injury". This title is linked to footnote 9 of the *Anti-Dumping Agreement*, which indicates that: "[u]nder 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." This seems to demonstrate that the term "injury" as it appears throughout the *Anti-Dumping Agreement* – including Article 11 – is to be construed in accordance with this footnote, unless otherwise specified. This would seem to support the view that the provisions of Article 3 concerning injury may be generally applicable throughout the *Anti-Dumping Agreement* and are not limited in application to investigations. Article 11 does not seem to explicitly specify otherwise in the case of sunset reviews.

There are other textual indications that the Article 3 injury obligations may generally apply throughout the Agreement. For example, the use of the language "for purposes of Article VI of GATT 1994" 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 investigations. (footnote omitted)

Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 121, paras. 7.99-7.100.

<sup>128</sup> (original footnote) Appellate Body Report, *US – Carbon Steel*, para. 106.

<sup>129</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, paras. 106-

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<sup>130</sup>, 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.<sup>131</sup> 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<sup>132</sup>, 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".

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<sup>130</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 123.

<sup>131</sup> We find support for this proposition in the Appellate Body's findings in *US – Corrosion-Resistant Steel Sunset Review*. See, Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, paras. 126-130.

<sup>132</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 30, para. 126.

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.<sup>133</sup> 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 However, we note that the crux of Argentina's claim is that the USITC either did not establish facts properly or did not evaluate them objectively or did not base them on a sufficient factual basis. We recall that the above-described standard of review (*supra*, paras. 7.1-7.5) applicable to the present proceedings provides that we should find that the USITC acted in a WTO-consistent way if it established the facts properly and evaluated them in an objective and unbiased manner. It follows that the substance of Argentina's claim under Articles 3.1 and 3.2, the alleged failure to carry out an objective examination on the basis of positive evidence, directly overlaps with the standard of review that we shall apply in this case. For the purposes of the present claim, the fact that we will not consider Article 3 aspects of Argentina's claim here will not bring about any practical difference in terms of the outcome of our analysis.

7.281 We will apply, therefore, the above-described standard of review in determining whether the USITC acted consistently with the Agreement regarding these three aspects of its determinations in the instant sunset review. If we find that the USITC's establishment of facts was proper and that these facts were evaluated in an unbiased and objective manner, we will not find an inconsistency even if we might have reached a different conclusion on the basis of the same facts. Given that the issue is whether the USITC's likelihood determination was based on a proper establishment of facts and on an unbiased and objective evaluation thereof, in case we find that either one of these criteria is not met we will find a violation of Article 11.3, not 3.1 or 3.2.

7.282 Having set out our approach with regard to Argentina's present claim, we now turn to the legal arguments Argentina raised in this context.

7.283 We recall our above observation that Argentina concedes that on its face the USITC's determination in the OCTG sunset review contains the word "likely". The USITC's final determination reads, in relevant part:

Based on the record in these five-year reviews, we determine under section 751(c) of the Tariff Act of 1930, as amended ("the Act"), that revocation of the antidumping duty orders on Oil Country Tubular Goods ("OCTG") other than drill pipe ("casing and tubing") from Argentina, Italy, Japan, Korea, and Mexico and of the countervailing duty order on casing and tubing from Italy would be likely to lead to

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<sup>133</sup> See, for instance, pages 1, 16 and 33 of the USITC's Sunset Determination (Exhibit ARG-54).

continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.<sup>134</sup> (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's analysis of the likely volume of dumped imports was not based on an objective examination of the evidence in the record.

7.288 We note that the USITC's analysis of the likely volume of dumped imports is found on pages 17-20 of the USITC's Sunset Determination. This part of the determination contains a detailed discussion of the issues relating to the likely volume of dumped imports. On page 17, the USITC starts its analysis with the relevant findings in the original investigation and then discusses the developments during the period of application of the measure. In the following pages, the USITC provides supporting arguments for its conclusion that there will be a significant volume of dumped imports in the event of revocation. Regarding capacity utilization, although the USITC acknowledges that the exporters' capacity utilization rates were high, it concludes that these foreign producers can devote more of their productive capacity from other types of tubular products to casing and tubing<sup>135</sup> because these two groups of products are produced in the same production lines with the same machinery. The USITC then explains the reasons on the basis of which it made this determination. In this context, the USITC mentions five reasons.

7.289 Argentina challenges the USITC's reasoning on three grounds and asserts therefore that the USITC's determination was not based on an objective examination of the evidence in the record.

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<sup>134</sup> USITC's Sunset Determination (Exhibit ARG-54 at 1).

<sup>135</sup> OCTG includes two different product sub-groups: "Casing and tubing" and "drill pipe". The like product definition in the OCTG sunset review at issue included "casing and tubing", but not "drill pipe". See, USITC's Sunset Determination (Exhibit ARG-54 at 1-4).

7.290 The main argument that Argentina raises in this respect relates to the USITC's finding that Tenaris<sup>136</sup> could re-orient more of its production capacity to the US market. Argentina does not dispute the fact that Tenaris could shift its production capacity used in the production of other types of pipe and tube products to casing and tubing. Indeed, Argentina states that the only way for Tenaris to increase its exports of casing and tubing into the United States would be through shifting more of its capacity to the production of this product.<sup>137</sup> Argentina asserts, however, that there was no positive evidence in the record of the OCTG sunset review that would support the USITC's finding that Tenaris had an incentive to shift its production in such a way. Therefore, the issue is whether the USITC's determination that Tenaris could shift its productive capacity from other pipe and tube products to casing and tubing had a sufficient factual basis in the record.

7.291 We note that the USITC identified five supporting arguments for its determination that subject producers, including Tenaris, could devote more of their productive capacity to the US market. The USITC's determination reads, in relevant part:

The recent\*\*\* capacity utilization rates represent a potentially important constraint on the ability of these subject producers to increase shipments of casing and tubing to the United States. Nevertheless, the record indicates that these producers have incentives to devote more of their productive capacity to producing and shipping more casing and tubing to the U.S. market.

First, ... While the Tenaris companies seek to downplay the importance of the U.S. market relative to the rest of the world, they acknowledge that it is the largest market for seamless casing and tubing in the world. Given Tenaris' global focus, it likely would have a strong incentive to have a significant presence in the U.S. market, including the supply of its global customers' OCTG requirements in the U.S. market.

Second, casing and tubing are among the highest valued pipe and tube products, generating among the highest profit margins....

Third, the record in these reviews indicates that prices for casing and tubing on the world market are significantly lower than prices in the United States...We have considered respondents' arguments that the domestic industry's claims of price differences are exaggerated, but nevertheless conclude that there is on average a difference sufficient to create an incentive for subject producers to seek to increase their sales of casing and tubing to the United States.

Fourth, subject country producers also face import barriers in other countries, or on related products...

Finally, we find that industries in \*\*\*of the subject countries are dependent on exports for the majority of their sales...

We therefore find that, in the absence of the orders, the likely volume of cumulated subject imports, both in absolute terms and as a share of the U.S. market, would be significant.<sup>138</sup> (footnotes omitted)

7.292 We note that Argentina challenges two of these five points highlighted by the USITC. Therefore, we shall first entertain Argentina's arguments regarding these two points before reaching

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<sup>136</sup> Tenaris is the name of a group of companies including Siderca. See, First Written Submission of Argentina, footnote 37. Therefore, for purposes of our analysis, we consider that Tenaris refers to Siderca.

<sup>137</sup> First Written Submission of Argentina, para. 244.

<sup>138</sup> USITC's Sunset Determination (Exhibit ARG-54 at 19-20).



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.<sup>139</sup> (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.<sup>140</sup> 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

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<sup>139</sup> USITC's Sunset Determination (Exhibit ARG-54 at 20).

<sup>140</sup> USITC's Sunset Determination (Exhibit ARG-54 at 21, footnote 128).

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.<sup>141</sup> (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.<sup>142</sup> (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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<sup>141</sup> USITC's Sunset Determination (Exhibit ARG-54 at 21).

<sup>142</sup> 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.<sup>143</sup> 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:

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<sup>143</sup> Staff Report Annexed to USITC's Sunset Determination (Exhibit ARG-54 at II-19).

On balance, we find that the domestic industry's condition has improved since the orders went into effect as reflected in most indicators over the period reviewed, and we do not find the industry to be currently vulnerable.

We find, however, as discussed above, that revocation of the orders likely would lead to a significant increase in the volume of subject imports which likely would undersell the domestic like product and significantly depress or suppress the domestic industry's prices. Moreover, in the original investigations, subject imports captured market share and caused price effects despite a significant increase in apparent consumption in 1993 and 1994 as compared to 1992. In these reviews, we find that a significant increase in subject imports is likely to have negative effects on both the price and volume of the domestic producers' shipments despite strong demand conditions in the near term. We find that these developments likely would have a significant adverse impact on the production, shipments, sales, market share, and revenues of the domestic industry. This reduction in the domestic industry's production, shipments, sales, market share, and revenues would result in erosion of the domestic industry's profitability as well as its ability to raise capital and make and maintain necessary capital investments.<sup>144</sup> (emphasis added)

7.309 Argentina contends that given the positive trends in the state of the domestic industry as of the date of the determination, the USITC should have made the opposite conclusion. According to Argentina, given the positive state of the US industry, the USITC must have made its conclusion on the basis of its findings in the original investigation.

7.310 We note that the USITC's determination references the USITC's findings in the original investigation as well as its determinations in the instant sunset review regarding the likely volume and prices effect of dumped imports and concludes that these developments would have a significant adverse impact on various aspects of the state of the US industry in the future. It is therefore not linked solely to the findings in the original investigation. Therefore, the issue here is whether, given its findings in the original investigation and those in the instant sunset review regarding the likely volume of dumped imports and their likely price effect, the USITC could conclude that the likely imports would have an adverse impact on the US industry.

7.311 In our view, the USITC did not act inconsistently with Article 11.3 of the Agreement in its determination regarding the likely impact of future dumped imports on the US industry. In this context, we recall our above analysis regarding the nature of the inquiry under Article 11.3 of the Agreement (*supra*, para. 7.211). Just as on the dumping side of sunset determinations, there is nothing in Article 11.3 that requires an investigating authority to follow a particular method in the likelihood of continuation or recurrence of injury determinations. As long as the investigating authority's determination is based on a sufficient factual basis and it reflects an objective examination of these facts, it will meet the requirements of Article 11.3. In this case, the USITC found that imports were likely to increase and to have a negative effect on the prices of the US industry in the event of revocation of the measure at issue. Then, the USITC found that this likely increase in imports and their likely price effect would have a negative impact on the US industry. In the circumstances of the case at hand, we find it proper to conclude that the likely increased volume and negative price effect of dumped imports would also have a negative impact on the state of the US industry. Further, in our view, the USITC's observations regarding the state of the US industry as of the date of the sunset review at issue do not preclude it from nevertheless finding that the US industry is likely to be affected by the increase in the volume and the negative effect of the prices of the likely dumped imports.

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<sup>144</sup> USITC's Sunset Determination (Exhibit ARG-54 at 22-23).

*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. Alleged violation of Article 3.4 of the Agreement**

(a) Arguments of parties

(i) *Argentina*

7.313 Argentina submits that in this sunset review the USITC violated Article 3.4 of the Agreement by failing to address some of the fifteen injury factors listed therein.

(ii) *United States*

7.314 Regarding Argentina's arguments under various paragraphs of Article 3, 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 3.4 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*

7.315 The European Communities agrees with Argentina that the provisions of Article 3 of the Anti-Dumping Agreement apply *mutatis mutandis* in the context of sunset reviews. According to the European Communities, given the introductory wording of Article 3.1, the absence of an explicit cross-reference in Article 11.3 to Article 3 is irrelevant. The European Communities also agrees with Argentina that the required standard in sunset determinations is "likely", not "possible". According to the European Communities, in the instant sunset review the USITC did not apply the "likely" standard correctly.

(ii) *Japan*

7.316 Japan argues that the provisions of Article 3 apply to injury determinations in sunset reviews under Article 11.3. Therefore, the requirements of Articles 3.1, 3.2, 3.4 and 3.5 have to be fulfilled in such reviews.

(c) Evaluation and conclusion by the Panel

7.317 We note that Argentina's claim here is based solely on Article 3.4 of the Agreement. In line with our above analysis regarding the applicability of Article 3 to sunset reviews (*supra*, paras. 7.268-7.276), we decline Argentina's claim.

## **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 apply *mutatis mutandis* in the context of sunset reviews. According to the European Communities, given the introductory wording of Article 3.1, the absence of an explicit cross-reference in Article 11.3 to Article 3 is irrelevant. The European Communities also agrees with Argentina that the required standard in sunset determinations is “likely”, not “possible”. According to the European Communities, in the instant sunset review, the USITC did not correctly apply the “likely” standard.

#### **(ii) Japan**

7.321 Japan argues that the provisions of Article 3 apply to injury determinations in sunset reviews under Article 11.3. Therefore, the requirements of Articles 3.1, 3.2, 3.4 and 3.5 have to be fulfilled in such reviews.

### **(c) Evaluation and conclusion by the Panel**

7.322 We note that Argentina's claim here is based solely on Article 3.5 of the Agreement. In line with our above analysis regarding the applicability of Article 3 to sunset reviews (*supra*, paras. 7.268-7.276), we decline Argentina's claim.

## **6. Cumulation**

### **(a) Arguments of parties**

#### **(i) Argentina**

7.323 Argentina argues that the USITC's use of the cumulation methodology in its sunset determinations in the instant sunset review was inconsistent with Articles 11.3 and 3.3 of the Agreement. According to Argentina, Article 3.3 limits the use of cumulation to investigations. Therefore, investigating authorities can not use cumulation in sunset reviews. In the alternative, Argentina argues that if cumulation can be used in sunset reviews, then the conditions set forth in Article 3.3 regarding the use of cumulation must be fulfilled. In this case, since the USITC used cumulation without respecting these conditions, it acted inconsistently with Articles 11.3 and 3.3.

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.<sup>145</sup> 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.<sup>22</sup> The duty may remain in force pending the outcome of such a review.

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<sup>22</sup> 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

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<sup>145</sup> Article 31.1 of the *Vienna Convention on the Law of Treaties* ('*Vienna Convention*'), which is generally accepted as reflecting a customary rule of interpretation of public international law referred to in Article 3.2 of the *DSU*, reads as follows:

"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 the light of its object and purpose."  
(1969) 8 *International Legal Materials* 679.

that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

7.328 The text of Article 11.3 does not mention whether cumulation can or can not be used in sunset reviews. Nor can one find any direct guidance on this matter in the other provisions of the Agreement. Unlike the cross-references in Articles 11.4 and 12.3 that make certain provisions of Articles 6 and 12, respectively, applicable in the context of sunset reviews, no such cross-reference can be found to shed light on the issue of whether or not cumulation can be used in sunset reviews.

7.329 Article 3.3 of the Agreement provides:

Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

7.330 We note that Article 3.3 does not answer the question of whether cumulation is allowed generally throughout the Anti-Dumping Agreement. It sets forth certain conditions for the use of cumulation. Parties, however, disagree as to whether these conditions are limited to investigations, or whether they also apply to sunset reviews.

7.331 The first issue therefore is whether the lack of clear language specifically allowing the use of cumulation in sunset reviews means that it can not be used in such reviews. Put differently, the issue is whether Article 3.3 is an authorization for cumulation or whether it establishes conditions for the use of cumulation in investigations. If Article 3.3 were considered as authorizing cumulation, it might be concluded that it is only allowed under the circumstances described therein, i.e. it can not be used in sunset reviews. If, however, Article 3.3 were considered as a provision that establishes conditions for the use of cumulation in investigations, then it might be concluded that cumulation is generally permitted, including in sunset reviews, but is subject to certain restraints in investigations, as set out in Article 3.3. In this case, cumulation in sunset reviews would not be inconsistent with the Agreement.

7.332 We interpret the lack of a clear provision in the Agreement as to whether cumulation is generally allowed to mean that cumulation is permitted in sunset reviews.

7.333 We note, in addition, that all paragraphs of Article 3 of the Agreement, except paragraph 3, contain the term "dumped imports".<sup>146</sup> The same term can also be found in other instances such as in Articles 4.1, 5.2, 5.8, 8.5, 10.2 and 10.6 of the Agreement. In our view, the use of "dumped imports" without any specification of the country in which these imports originate, such as "dumped imports originating in an exporting country" or a similar limiting language, suggests that the drafters foresaw that the investigating authorities would generally base their injury determinations on dumped imports from all countries subject to the investigation. It follows that the Agreement generally allows the use of cumulation and that Article 3.3 is not an authorization for cumulation. Rather, it sets out the conditions that must be fulfilled when cumulation is used in investigations.

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<sup>146</sup> Paragraph 3 of Article 3 contains the phrase "imports of a product from more than one country". In our view, the reason why Article 3.3, unlike other paragraphs of Article 3, does not mention "dumped imports" is because it is designed to set out what needs to be done before cumulation can be used in investigations. It is therefore bound to mention imports from more than one country.



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 cumulation in sunset reviews.<sup>147</sup> Argentina has not, however, specified precisely why the use of "duty" in the singular had to be interpreted as precluding cumulation in sunset reviews. We understand Argentina to argue that had drafters intended to allow cumulation in sunset reviews, they would have used the word "duties" instead of "duty". We find it difficult to agree with a view that attempts to derive such a far-reaching substantive meaning from the use of a word in the singular rather than the plural, or *vice versa*. We note, for instance, that the title of Article 11 contains the word "duties" and not "duty". This, in our view, further indicates that the drafters did not intend to convey their message as to the use of cumulation in sunset reviews by the use of the word "duty" in the singular or the plural. Had they had such an intention they would have done it clearly. We therefore decline to accept Argentina's argument in this regard.

7.335 Having concluded that cumulation is generally allowed throughout the Agreement, including sunset reviews, the next issue we have to address is whether the conditions for the use of cumulation set out in Article 3.3 also apply to sunset reviews. Argentina contends that if the Panel finds that cumulation is allowed in sunset reviews, then it should also find that the conditions of Article 3.3 regarding the use of cumulation apply to sunset reviews. We disagree.

7.336 We note that paragraph 3 of Article 3 is the only paragraph that contains the word "investigation" under Article 3. In our view, therefore, by its own terms Article 3.3 limits its scope of application to investigations. In this respect, we note that this particular issue was also raised in *US – Corrosion-Resistant Steel Sunset Review* and that panel opined:

As stated above, even if the provisions of Article 3, including the definition of injury in footnote 9, are generally applicable throughout the *Anti-Dumping Agreement*, paragraph 3 of Article 3 is exceptional, in that it alone explicitly refers to the term "investigations". Nowhere else in the text of any other paragraph of Article 3 is the word "investigation" mentioned. Therefore we are of the view that Article 3.3, by its own terms, is limited in application to investigations and does not apply to sunset reviews. It follows that the cross-reference in Article 3.3 to the negligibility standard in Article 5.8 does not apply to sunset reviews.<sup>148</sup>

We agree with this view, and therefore find that the conditions set forth in Article 3.3 do not apply in sunset reviews.

7.337 Finally, we note Argentina's argument that the low standard applied by the USITC in its recourse to cumulation in this sunset review also conflicted with the "likely" standard of Article 11.3. We note that Argentina challenged the standard applied by the USITC in the instant sunset review as a separate claim under which it raised detailed arguments. In our view, therefore, it is not proper to interpret Article 3.3 of the Agreement in a manner that would create extra substantive obligations for investigating authorities in terms of the standard they apply in their substantive determinations in sunset reviews.

(i) *Conclusion*

7.338 We therefore reject Argentina's claim that the USITC acted inconsistently with Articles 3.3 and 11.3 of the Agreement in its use of cumulation in the instant sunset review.

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<sup>147</sup> First Written Submission of Argentina, para. 282; Second Written Submission of Argentina, para. 189.

<sup>148</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 121, para. 7.102.

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.<sup>149</sup>

(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 Argentina's substantive claims raised in these proceedings. Therefore, addressing these consequential claims will provide no further guidance in terms of the implementation of our findings. We therefore exercise judicial economy with respect to Argentina's consequential claims and do not make any ruling on them.

## VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 In conclusion, we find that:

(a) In respect of waiver provisions of US law:

- (i) The provisions of Section 751(c)(4)(B) of the Tariff Act relating to affirmative waivers are inconsistent with the investigating authorities' obligation to determine likelihood of continuation or recurrence of dumping under Article 11.3 of the Anti-Dumping Agreement,
- (ii) The provisions of Section 351.218(d)(2)(iii) of the USDOC's Regulations relating to deemed waivers are inconsistent with the investigating authorities' obligation to determine likelihood of continuation or recurrence of dumping under Article 11.3 of the Anti-Dumping Agreement,
- (iii) The provisions of Section 351.218(d)(2)(iii) of the USDOC's Regulations relating to deemed waivers are inconsistent with Articles 6.1 and 6.2 of the Anti-Dumping Agreement,

(b) In respect of the alleged irrefutable presumption of likelihood under US law, the provisions of Section II.A.3 of the SPB are as such inconsistent with the investigating

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<sup>149</sup> We note that the title of Section V in which Argentina presented these claims in its second written submission reads "Consequential Violations Under Article VI of the GATT 1994, Articles 1 and 18 of the Antidumping Agreement, and Article XVI:4 of the WTO Agreement".

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-Dumping Agreement in its application of Sections 752(a)(1) and (5) of the Tariff Act,
  - (ii) The USITC did not act inconsistently with Article 11.3 of the Anti-Dumping Agreement in respect of its determinations relating to the likely volume of dumped imports, their likely price effect and their likely impact on the US domestic industry,
  - (iii) The USITC did not act inconsistently with Articles 11.3 and 3.3 of the Anti-Dumping Agreement in its use of cumulation.

8.2 Under Article 3.8 of the *DSU*, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that, to the extent the United States has acted inconsistently with the provisions of the Anti-Dumping Agreement, it has nullified or impaired benefits accruing to Argentina under that agreement. We therefore recommend that the Dispute Settlement Body request the United States to bring its measures mentioned in paragraph 8.1(a)(i), (ii), (iii), 8.1(b) and 8.1(d)(i) above into conformity with its obligations under the WTO Agreement.

8.3 Argentina requests that the Panel suggest that the United States bring its measures into conformity with its WTO obligations by revoking the anti-dumping order and repealing or amending the laws and regulations at issue.

8.4 The United States has not made a specific argument regarding this claim of Argentina. The United States requests the Panel to reject Argentina's claims in their totality.

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.<sup>150</sup> In the circumstances of the present proceedings, however, we see no particular reason to make such a suggestion and therefore decline Argentina's request.

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<sup>150</sup> Article 19.1 of the *DSU* reads:

Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations. (footnotes omitted).