BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

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

(AB-2004-4)

APPELLEE'S SUBMISSION
OF THE UNITED STATES OF AMERICA

September 27, 2004

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

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SERVICE LIST

OTHER APPELLANT

H.E. Mr. Alfredo V. Chiaradia, Permanent Mission of Argentina

THIRD PARTIES

H.E. Mr. Carlo Trojan, Permanent Delegation of the European Commission
H.E. Mr. Shotaro Oshima, Permanent Mission of Japan
H.E. Mr. Hyuck Choi, Permanent Mission of Korea
Mr. Mateo Diego-Fernández, Permanent Mission of Mexico
Mr. Ching-Chang Yen, Permanent Mission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

I. Introduction and Executive Summary

1. Argentina has appealed the Panel's findings regarding the U.S. International Trade Commission's ("ITC") determination in the sunset review underlying this dispute. Argentina has also made appeals conditional on the Appellate Body's reversing any of the Panel's findings as requested by the United States. The Appellate Body should decline Argentina's requests.

2. Although Argentina states that its claims relate to "errors of law and legal interpretations developed by the panel,"[1] a review of Argentina's other appellant's submission reveals that Argentina is instead saying that most of its "claims" are in fact requests for the Appellate Body to engage in a re-weighing of the evidence presented to the Panel. As the Appellate Body has itself recognized, Article 17.6 of the DSU authorizes the Appellate Body to evaluate whether a panel made errors of law; however, the Appellate Body is not authorized to second-guess the weight a panel assigned to evidence, nor is the panel required to attach the same weight to evidence as the party offering it.

3. Argentina is asking the Appellate Body to engage in a semantic and irrelevant evaluation of the meaning of the word "likely" in lieu of reviewing the Panel's findings of fact with respect to a determination that was itself detailed and careful. However, without regard to whether "likely" means "likely" or "likely/probable," it is clear that the Panel evaluated the ITC's determination based on the standard of Article 11.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Antidumping Agreement" or "AD Agreement"). Moreover, the Panel correctly concluded that the determination was based on evidence that was properly established and an objective evaluation of that evidence.

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[1] Other Appellant's Submission of Argentina, para. 1.

4. Contrary to Argentina's assertions, the Panel did not err in finding that the ITC's determination was consistent with Article 11.3 with respect to the ITC's findings on the likely volume, price effects and impact of imports if the antidumping measures were revoked.

5. The ITC's sunset determination was fully consistent with the obligations of investigating authorities under Article 11.3 to conduct a "review" and make a "determination," notwithstanding Argentina's assertion to the contrary.

6. Argentina's alternative argument that the Panel erred in finding that Article 3 does not apply to sunset reviews should be rejected. The Panel's conclusion that Article 3 does not apply to sunset reviews is supported by the fundamentally different nature of original investigations and sunset reviews, by the Appellate Body's report in *Japan Sunset*, and by a textual analysis of the Antidumping Agreement

7. The Panel correctly rejected Argentina's claims that the U.S. statutory requirements contained in sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930, as amended, are inconsistent "as such" with AD Agreement. Article 11.3 does not specify the time frame relevant to a sunset inquiry. Article 11.3 only requires a determination of whether revocation "would be likely to lead to continuation or recurrence of injury." In the absence of any specific provision in Article 11.3, Members remain free to determine under their own laws and procedures the time frame relevant in sunset inquiries. The Panel properly rejected Argentina's attempt to inject the "imminent" and "special care" terms from Articles 3.7 and 3.8 into an Article 11.3 sunset review. In addition to the general inapplicability of Article 3 to Article 11.3 sunset reviews, the text of Articles 3.7 and 3.8 and the substantive differences between original threat determinations and sunset reviews demonstrate that these provisions do not apply to sunset reviews.

8. Argentina has argued that the Panel erred in finding that cumulation is prohibited by Article 11.3. Alternatively, Argentina argues that, if cumulation is permitted in Article 11.3 sunset reviews, the conditions for Article 3.3 original determinations apply. The Panel correctly rejected both of these claims. The Panel's analysis is not legal error and is based on a solid textual analysis.

9. Argentina's conditional appeals involve claims that were not within the terms of reference of this dispute, *i.e.,* claims that Commerce precedent ("practice") is inconsistent with Article 11.3 and that the administration of U.S. law is inconsistent with Article X:3(a) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). Moreover, Argentina has failed to provide evidence sufficient to make a *prima facie* case in support of these claims. What evidence Argentina has provided is simply not probative.

10. For the foregoing reasons, the Appellate Body should decline Argentina's requests.

II. The Panel's Interpretation of the Likely Standard of Article 11.3 Was Proper

11. Argentina has argued that the Panel did not properly interpret the likely standard in evaluating the ITC's determination of likelihood or recurrence of injury.[2] Argentina's argument rests on an excessive emphasis on the relevance of the word "probable" to the outcome of this dispute. Argentina alleges that the Panel ought to have substituted the word "probable" for "likely" (or "likely/probable") in Article 11.3 of the Antidumping Agreement and that the Panel's failure to do so is reversible error. Argentina's argument is an attempt to divert the Appellate Body from the real issue: whether the Panel's evaluation of the ITC determination's consistency

[2] *See*, *e.g.,* Section II.A of the Other Appellant's Submission of Argentina.

with Article 11.3 constituted legal error. It does not. Argentina appears to be suggesting that the Panel should have, and the Appellate Body should, assess whether the determination in this dispute conformed to the likely standard of Article 11.3 by relying on a simplistic semantic discussion, rather than an assessment of the facts of the original ITC determination or the Panel's detailed review of those facts in its report.

12. In addition, Argentina has attempted to argue that the Panel committed legal error by not assigning probative value to ITC statements about the meaning of "likely" made in other fora. The substance of Argentina's claim is in fact not that the Panel made a legal error but that Argentina disagrees with the Panel's weighing of the evidence, a matter not subject to review. Regardless, the Panel's views on the probative value of these statements were correct.

A. The Panel's Failure to Discuss Synonyms for "Likely" Is Not Legal Error.

13. Argentina seeks to exaggerate the relevance of the Appellate Body's findings in the *Japan Sunset* dispute in order to claim that the Panel failed to apply the correct standard. A review of the Appellate Body's findings in *Japan Sunset* exposes the tenuousness of this argument.

14. In *Japan Sunset*, the Appellate Body sought to shed light on the meaning of "likely" in Article 11.3. In so doing, it noted the definition of "likely," which included the following: "Having an appearance of truth or fact; that looks as if it would happen, be realized, or prove to be what is alleged or suggested; probable; to be reasonably expected."[3] The Appellate Body

[3] Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan,* WT/DS244/AB/R, adopted December 15, 2003 ("*Japan Sunset"),* para. 110.

further clarified the meaning of "likely" by stating that it means probable *rather than* simply possible or plausible.[4]

15. Argentina suggests that this discussion is somehow a watershed event for purposes of understanding the meaning of "likely" in Article 11.3.[5] Yet the Appellate Body's treatment of this issue refutes Argentina's argument. The Appellate Body, in examining the underlying determination in *Japan Sunset*, did not use the word "probable," insist on a "probability" standard, or so much as intimate that the administering authority (in that dispute, the U.S. Department of Commerce) failed to meet the likelihood standard by failing to use a "probable" standard. In short, the Appellate Body was not changing the language of Article 11.3 to substitute "probable" for "likely." Instead, the Appellate Body reasoned as follows:

> USDOC explained that . . . [it] "may reasonably infer that dumping would continue if the discipline were removed" . . . . USDOC determined that "dumping is likely to continue . . . ." Thus, in this case, there appears to be sufficient justification for USDOC's reliance on the dumping margins and import levels as well as the inferences it drew from this data. . . . . In our view, it was not unreasonable for USDOC to conclude that *both* of these factors pointed in the same direction, that is, towards likely future dumping.[6]

16. It is worth noting that the panel in that dispute also never stated that continuation or recurrence of dumping was "probable" or "likely/probable." Still, the Appellate Body did not disturb that panel's findings.

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[4] *Japan Sunset*, para. 111.

[5] *E.g.,* "[T]he Panel did not interpret 'likely' to means probable, despite the *authoritative pronouncement* of the Appellate Body on the plain meaning of this key term . . . ." Other Appellant's Submission of Argentina, para. 18 (emphasis added).

[6] *Japan Sunset*, paras. 204-205.

17. While not explicitly substituting the term "probable" for Article 11.3's term "likely," there is no evidence that the Panel *did not* interpret "likely" as "probable" in the sense that the Appellate Body used that term in *Japan Sunset.*[7] As discussed further below, the Panel in this dispute did precisely what the Appellate Body did in *Japan Sunset*: It reviewed the record before it to assess whether there was sufficient justification for the ITC to conclude that the evidence "pointed in the direction" of likely injury. If Argentina contends that the Panel erred in its evaluation of the ITC's determination here, then Argentina must also contend that the Appellate Body erred in its evaluation of Commerce's determination in *Japan Sunset.*

18. The Panel's decision to focus on whether the ITC's sunset determination actually met the likely standard was well-founded and in keeping with the Panel's obligations under Article 17.6 of the Antidumping Agreement. As the Panel recognized, but Argentina downplays, the U.S. statute on its face employs the same language and imposes the identical standard as that imposed under Article 11.3, *i.e.*, the "likely" standard.[8] Hence, the Panel noted at the outset that the ITC stated that it had applied the likely standard under U.S. law,[9] and the Panel then proceeded to analyze whether expiry of the antidumping measure at issue would be likely to lead to

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[7] Argentina states that the Panel simply concluded that because the ITC used the word "likely" in its determination, that determination was consistent with Article 11.3. Other Appellant's Submission of Argentina, para. 44. This is a serious misrepresentation of the Panel's discussion of this issue. The Panel noted that Argentina attempted to prove that the ITC's failure to apply the likely standard could be seen through the determination's discussion of factors, such as volume, price effect, and impact. Panel Report, para. 7.277. The Panel subsequently dealt with Argentina's arguments in this regard. *See* Panel Report, paras. 7.287-7.312.

[8] Panel Report, paras. 7.277, 7.285. Compare 19 U.S.C. 1675(a)(1) with Article 11.3. (Exhibit ARG-1).

[9] Panel Report, para. 7.277.

continuation or recurrence of injury. Under these circumstances, the best way -- indeed the only way – for the Panel to determine whether the ITC's sunset determination was consistent with the "likely" standard of Article 11.3 was to examine what the ITC actually did. And, in arguing that the ITC applied the wrong standard, Argentina itself focused largely on the factual aspects of the ITC's determination.[10]

B. It Was Not Legal Error for the Panel to Discount Argentina's Arguments Regarding Past ITC Statements in Other Fora as to the Meaning of "Likely."

19. Argentina argued to the Panel, and continues to maintain, that the ITC's statements in other fora prove that the ITC did not interpret "likely" to mean "probable" in this dispute. The Panel recognized these arguments,[11] but found that it should focus its analysis on the ITC's actual determination in this sunset review.[12]

20. First, the United States notes that the Panel's dismissal of these statements as irrelevant is simply the result of the Panel weighing the evidence. As the Appellate Body noted in *Australia Salmon,* "the Panel's consideration and weighing of the evidence . . . relates to its assessment of the facts and, therefore, falls outside the scope of appellate review under Article 17.6 of the DSU."[13] The Appellate Body, recalling this finding in *Japan Varietals*, rejected an argument by the United States that a panel had committed an error of law by failing to make a particular finding by noting that the United States was "in essence challeng[ing] the Panel's consideration

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[10] *See, e.g.*, First Written Submission of Argentina, paras. 243-254.

[11] Panel Report, para. 7.284.

[12] The United States notes that its law imposes a higher standard than that of Article 11.3, by applying the "likely" standard to the constituent parts (volume, price and impact) of the sunset determination, and even to the statutory factors underlying each of these constituent parts. See 19 U.S.C. § 1675a(a)(2), (3) and (4) (Exhibit ARG-1).

[13] Appellate Body Report, *Australia - Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, ("*Australia -- Salmon*"), para. 261.

and weighing of the evidence before it."[14] As such, Argentina's claim that this was *legal* error is itself erroneous. Argentina's argument is that the Panel's assessment of the facts was defective because it assigned no value to facts Argentina considered dispositive; as such, Argentina should have made a claim under Article 11 of the DSU. Having failed to do so, this claim must be rejected.

21. Regardless, as a substantive matter, Argentina's claim is without merit. The Panel concluded that the statements in question were not relevant; a panel is not required to attach to a piece of evidence the same weight that the submitting party attached to that evidence.[15] And the Panel was correct in assigning no probative value to this evidence. The discussion in the NAFTA panel brief and in ITC submissions to the U.S. Court of International Trade, on which Argentina relies, concerning the approach taken by some ITC Commissioners was based on their understanding that the term "probable" connoted a very high degree of certainty.[16] As it became apparent from subsequent opinions of the U.S. court, however, there are different connotations associated with the word "probable." As the Appellate Body in *Japan Sunset* sought to clarify the meaning of the term "likely," so did the courts in the United States, and they eventually clarified that "probable" was synonymous with the statutory term "likely." It became clear that the views of a majority of the Commissioners as to the standard applicable in sunset reviews

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[14] Appellate Body Report, *Japan - Measures Affecting Agricultural Products,* WT/DS76/AB/R, adopted 19 March 1999, para. 98.

[15] Appellate Body Report, *United States - Countervailing Duties on Certain Corrosion Resistant Carbon Steel Flat Products from Germany,* WT/DS213/AB/R, adopted 19 December 2002, *("German Sunset"),* para. 146.

[16] *See, e.g.*, the discussion of this issue in the July 2002 submission by the ITC in the *Usinor* case (Exhibit ARG-56 at 6).

(including the standard applied in the OCTG sunset review) were either identical to that articulated by the court or indistinguishable from it.[17]

22. In short, the other litigation to which Argentina refers only confirms that the ITC applied the correct standard in this determination. Moreover, Argentina's emphasis on this issue simply highlights the difficulty in interpreting the meaning of the words "probable" and "likely" in a vacuum, rather than in the context of a specific determination.[18]

III. The Panel Did Not Err in Finding that the ITC's Sunset Determination Was Consistent With Article 11.3 With Respect to Its Findings of the Likely Volume, Price Effects and Impact of Subject Imports

A. Argentina's Claims

23. Argentina argues that the Panel erred in upholding the ITC's findings with respect to the likely volume, likely price effects, and likely impact of imports. According to Argentina, the

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[17] *See* U.S. Response to Questions from Argentina at the First Panel Meeting, para. 17; U.S. Response to Questions from Argentina at the Second Panel Meeting, para. 30; Comments of the United States on Argentina's Response to Questions from the Panel at the Second Panel Meeting, paras. 11-12.

[18] Argentina also continues to argue that the U.S. Statement of Administrative Action ("SAA") instructs the ITC to interpret "likely" to mean something less than probable. The SAA (H.R. Doc. No. 316, 103d Cong., 2d Sess., Vol. 1 (1994) (Exhibit ARG-5) provides authoritative interpretative guidance in respect of the U.S. statute. *See* Panel Report, *United States - Measures Treating Export Restraints as Subsidies ("U.S. Export Restraints")*, WT/DS194/R, adopted 23 August 23 2001, paras. 8.99-8.100 (discussing the status in U.S. law of the SAA). As the United States explained to the Panel, the SAA does not instruct the ITC to interpret "likely" to mean something less than probable. The SAA simply recognizes the inherently predictive nature of the inquiry involved in a sunset review, explaining that "[t]here may be *more than one* likely outcome following revocation" and that "[t]he possibility of other likely outcomes does not mean that a determination that revocation . . . is likely to lead to continuation or recurrence of . . . injury . . . is erroneous, as long as the determination of likelihood of continuation or recurrence is reasonable in light of the facts of the case." SAA at 883 (emphasis added) (Exhibit US-11). The language in the SAA merely recognizes the reality of this type of analysis. As the Appellate Body has stated, "[t]he likelihood determination is a prospective determination. In other words, the authorities must undertake a forward-looking analysis and seek to resolve the issue of what would be likely to occur if the duty were terminated." *Japan Sunset,* para. 105.

Panel erred in two respects: first, by failing to assess whether the ITC properly established the facts, objectively evaluated these facts, and made a determination based on positive evidence, and second, by not applying the "likely/probable" standard to each factor considered in making the overall determination.[19] Argentina's arguments are not persuasive, for the reasons discussed below.

B. The Panel Evaluated the Overall Determination and Each Factor Considered According to the Correct Standard

24. Argentina's appellant submission is replete with suggestions that each item of information considered by the ITC in its analysis of the likely volume, price effects, and impact of subject imports must individually satisfy the "likely" standard of Article 11.3.[20] This is not what Article 11.3 requires. Article 11.3 asks investigating authorities to determine whether "expiry of the duty would be likely to lead to continuation or recurrence of . . . injury." Thus, the "likely" standard applies to the overall assessment by the authorities, based on their consideration of the record as whole.[21]

25. The Panel correctly began its analysis by noting that the ITC used the phrase "likely" in making its overall determination.[22] Recognizing that use of the phrase alone does not necessarily resolve the issue, the Panel generously allowed Argentina to treat its arguments regarding the ITC's findings on the likely volume of imports, price effects, and impact – that the ITC did not

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[19] Other Appellant's Submission of Argentina, paras. 56-57.

[20] *E.g.,* Other Appellant's Submission of Argentina, paras. 56-57.

[21] The United States notes that its statute contains additional sub-elements beyond what is required by Article 11.3. Under the U.S. law, the ITC applies the "likely" standard by considering constituent parts (likely volume, price and impact), as well as the statutory factors underlying each of these constituent parts. See 19 U.S.C. § 1675a(a)(2), (3) and (4) (Exhibit ARG-1).

[22] Panel Report, para.7. 283, 7.284.

meet the objective assessment standard – as evidence that the ITC may not have had sufficient evidence to reach its likelihood conclusion.[23] The Panel correctly reasoned that, inasmuch as the ITC made a determination which it stated was based on the likely standard, then the standard for the Panel's review of that conclusion had to be whether the ITC assessed the evidence objectively – otherwise, how could the ITC have concluded that recurrence or continuation of injury was likely? Therefore, the Panel properly evaluated whether the ITC's findings were based on an objective examination of the record.

26. Argentina attempts to create a series of distinctions that are ultimately without a difference. For example, Argentina argues that the ITC applied the *wrong* standard.[24] However, the Panel can only assess whether the ITC applied the wrong standard by examining the evidence upon which the ITC relied. In other words, by evaluating whether the evidence supported the determination, the Panel also evaluated whether the ITC applied the correct standard.

27. Similarly, Argentina argues that the Panel incorrectly stated that the crux of Argentina's claim was that the ITC either did not establish the facts properly or did not evaluate them objectively or did not base its determination on a sufficient factual basis.[25] Again, in light of the fact that the ITC *stated* that it applied the likely standard, the only way for the Panel to assess whether that standard was in fact applied was to evaluate whether the facts supported that finding. Therefore, whether Argentina calls it "evaluating whether the ITC applied the wrong standard" or whether the Panel calls it "assessing the basis of the evidence," it amounts to the

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[23] Question 17 of the Questions from the Panel after the Second Substantive Meeting.
[24] Other Appellant's Submission of Argentina, para. 41.
[25] Other Appellant's Submission of Argentina, para. 42.

same thing, and the question is ultimately whether the ITC's establishment and assessment of the facts supported its finding. The Panel examined that issue and correctly concluded that the ITC's establishment and assessment of the facts *did* support its conclusion that injury was likely to continue or recur.

28. The United States notes that Argentina asked the Panel to review these factors in isolation. However, Argentina's burden of proof was not to establish that any one of these factors was insufficient to support the determination but that the facts in the determination as a whole failed to meet the likely standard of Article 11.3. Argentina did not meet this burden. Nevertheless, we turn to the Panel's evaluation of the ITC's findings on volume, price, and impact. The Panel correctly found that these findings were based on a proper establishment of the facts and an objective assessment of them. In light of the Panel's reasoned approach, it is difficult to see how Argentina's request that the Appellate Body overturn them as anything other than a re-weighing of the evidence before the Panel, which is beyond the scope of the Appellate Body's review under Article 17.6 of the DSU. Nevertheless, if the Appellate Body were to decide that the Panel's conclusions were insufficient as a matter of law or legal interpretation, the record itself demonstrates that the ITC properly established and objectively evaluated the facts.

1. Volume

29. The Panel made no errors of law or of legal interpretation in reviewing the ITC's findings on volume. The Panel correctly concluded that the ITC's findings were made based on a proper establishment of facts and an objective evaluation of those facts. Moreover, Argentina has provided no evidence that these finding are inconsistent with the likely standard of Article 11.3.

30. Even if the Appellate Body were to set aside the Panel's findings, a review of the ITC's determination itself confirms that the ITC applied the likely standard of Article 11.3 and that its establishment and evaluation of the facts was proper and unbiased. Therefore, the Appellate Body should not find that the ITC**'s** determination is inconsistent with Article 11.3**.**

a. The Panel Correctly Found the ITC's Findings to be Consistent with Article 11.3

31. Argentina argues that the Panel applied a less-than-likely standard by citing to the Panel's use of words like "could" and "incentive."[26] As the United States has already explained, the likely standard of Article 11.3 is not applicable to each factor considered in rendering the overall determination, nor did Argentina so argue until this appeal. The proper question is whether Argentina's arguments regarding volume indicate that the ITC's overall likelihood determination reflects a failure to establish the facts properly or to evaluate them objectively.

32. Nevertheless, the Panel's report reveals that it did not apply a less-than-likely standard. The Panel found the ITC's discussion of the issues relating to likely volume to be "detailed"[27] and that the ITC provided "supporting arguments for its conclusion that there *will be* a *significant* volume of dumped imports in the event of revocation."[28] Argentina fails to cite this, the most important of the Panel's own findings in this regard. The use of the word "will" goes beyond a probability standard to virtual certitude, and the finding is not just that any dumped imports will be in the market but that a "significant" volume of them will.

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[26] Other Appellant's Submission of Argentina, paras. 78-80.
[27] Panel Report, para 7.288.
[28] Panel Report, para. 7.288 (emphasis added).

33. With respect to the reasoning underlying the ITC's conclusion regarding the likely volume of imports, the Panel cited the five reasons the ITC provided for its findings on volume and noted that Argentina was only challenging two of them.[29] The Panel reviewed Argentina's arguments that Tenaris companies were not likely to increase shipments to the United States. Argentina argues that the Panel erred because it allegedly applied a standard less than "likely" in evaluating the evidence. In support of its arguments, Argentina cites statements in the Panel report that, for example, production capacity *could* be shifted.[30] But Argentina misrepresents the Panel's findings. Argentina has culled the odd phrase in which the Panel used the word "could" without recognizing that the word was used to establish a fact, not to draw a conclusion. For example, Argentina mischaracterizes the Panel's statement that Tenaris could shift its production as evidence that the Panel applied a less-than-probable standard;[31] but the Panel was merely establishing that, as a matter of fact, such production was physically possible.[32] As to whether Tenaris was *likely* to shift production, Argentina ignores the fact that the Panel concluded: "[i]t 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."[33] The Panel recognized that as a *factual* matter that producers could shift their production *and* that they would have every reason to do so if the order were revoked as a matter of pure business logic. Therefore, not only did the Panel and the ITC both follow the "likely" standard of Article 11.3 but the Panel ensured that the ITC's

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[29] Panel Report, paras. 7.291 and 7.292.
[30] Other Appellant's Submission of Argentina, para.78.
[31] Other Appellant's Submission of Argentina, para. 78.
[32] Panel Report, para. 7.290.
[33] Panel Report, para. 7.295.

conclusions were based on an objective assessment of properly established facts. Argentina has not offered persuasive evidence to the contrary.

34. The Panel also considered and rejected arguments by Argentina as to the nature of the evidence before the ITC establishing that prices for casing and tubing in the United States were higher than on world markets. The Panel noted that the ITC relied on testimony from individuals that were knowledgeable in the relevant sector; the Panel also noted that Argentina simply argued that the *nature* of the evidence – testimony – was inadequate but did not challenge the correctness of the testimony.[34]

35. The Panel ultimately concluded that the ITC was justified in concluding that Tenaris had a "strong incentive" to increase exports to the United States.[35] In light of the Panel's discussion of the evidence, including the ITC's findings, it is difficult to see how the Panel applied a standard less than "likely" in evaluating the ITC's volume findings or improperly found that the ITC met the standard of Article 17.6.

36. In the end, although Argentina takes pains to argue otherwise, its complaint is, again, with the Panel's weighing of the evidence, and not the conclusions the Panel drew. Inasmuch as Argentina's claim is limited to an error of law by the Panel, rather than a failure by the Panel to meet the requirements of Article 11 of the DSU, Argentina's claim must be dismissed for that reason as well.

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[34] Panel Report, para. 7.296.
[35] Panel Report, para. 7.297.

b. A Review of the ITC Determination Also Supports An Affirmative Likelihood Determination

37. If the Appellate Body disagrees that the Panel's findings were correct and elects to complete the Panel's analysis, then a review of the ITC's findings regarding volume will confirm that those findings were correct.

38. The following is a comprehensive summary of the ITC's volume decision, as it was before the Panel, along with a rebuttal of Argentina's selective critique of that decision.[36]

39. The ITC first reviewed its findings as to the volume of imports in its original injury determination. There the ITC found that the rate of increase in the volume of cumulated subject imports was far greater than the overall increase in consumption between 1992 and 1994. The ITC also found that the market share of subject imports by both volume and value rose significantly, nearly doubling from 1992 to 1994, and that domestic producers' market share declined substantially.

40. The ITC then noted that after the antidumping duty orders went into effect, subject imports decreased, but remained a factor in the U.S. market. The ITC found that while current import volume and market share of subject imports was substantially below the levels of the original investigation, current levels likely reflected the restraining effects of the orders.[37]

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[36] The U.S. arguments to the Panel on likely volume can be found in section VI.H.2.a of its first written submission and section VI.D of its second written submission.

[37] Argentina argues that it was improper for the ITC to review the conditions that existed at the time of the original injury determinations. Other Appellant's Submission of Argentina, para. 98. Argentina makes similar arguments in connection with the ITC's analysis of likely price effects and impact. Other Appellant's Submission of Argentina, paras. 107 and 199-123. Argentina fails to appreciate that what occurred in the past, in the most recent period before dumping orders were imposed, has some relevance to an assessment of what is likely to occur in the future if these orders are revoked. The prior injury determination was but one of a number of factors which the ITC considered. There is nothing in Article 11.3 that precludes considering these conditions. Argentina's assertion that the ITC's

41. The ITC considered foreign producers' operations not just with respect to OCTG casing and tubing, but with respect to all pipe and tube products produced on the same machinery and equipment as casing and tubing.[38] It did so because it had found that pipe and tube producers in the subject countries produced a variety of other tubular products in addition to OCTG (on the same equipment in the same production facilities. These other products included standard, line, and pressure pipe, mechanical tubing, pressure tubing, and structural pipe and tubing). These producers thus could easily shift production away from other tubular products toward production of OCTG and vice versa.

42. Argentina asserts that "there was no positive evidence or reasoning offered by the Commission to support its bald assertion that this would necessarily mean that producers would have an incentive to shift their production in favor of [OCTG]."[39] Argentina is mistaken. Based on evidence in the record of its sunset review, the ITC found that "casing and tubing are among the highest valued pipe and tube products, *generating among the highest profit margins.*"[40] It is Argentina that is engaged in speculation when it states in its submission that "it could well be that it is more profitable to sell lower valued rather than higher valued product."[41]

43. The ITC found there to be substantial overall available capacity in the five subject countries for increasing exports of casing and tubing to the United States.

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consideration of these conditions was somehow inconsistent with the obligation to rely on positive evidence and to conduct an objective examination is unpersuasive.

[38] ITC Report at 17 (Exhibit ARG-54).

[39] Other Appellant's Submission of Argentina, para. 90.

[40] ITC Report at 19 (emphasis added) (Exhibit ARG-54).

[41] Other Appellant's Submission of Argentina, para. 90.

44. With respect to producers in Japan, the ITC noted that in the original investigations the import volume, market share, and production capacity of the Japanese industry was the largest of the subject countries, and that Japanese producers had reported excess capacity. Because only one of the four Japanese producers identified in the original investigation participated in the sunset review, the precise size of the Japanese industry was not known. The participating producer, NKK, apparently represented a lesser share of total Japanese production. The ITC noted the reported capacity of NKK, and taking into account the fact that other Japanese producers chose not to provide the ITC with data, concluded that there was significant available capacity among other Japanese producers.[42] According to the ITC Report, U.S. producers stated that non-responding Japanese producers had the potential to supply 3.5 million tons of OCTG – an amount that exceeded the total capacity of the U.S. casing and tubing industry in 2000 of 3.3 million tons.[43]

45. With respect to producers in Korea, the ITC took note of their unused capacity and compared it in size to total U.S. consumption.[44]

46. Argentina completely ignores this evidence of substantial unused capacity among producers in Japan and Korea. It discusses the volume issue as if it only involved the other three subject countries, Argentina, Italy and Mexico, and the one responding Japanese producer.[45] The

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[42] ITC Report at 18 (Exhibit ARG-54).
[43] ITC Report at II-8 and III-1, table III-1. (Exhibit ARG-54)
[44] ITC Report at 19 (Exhibit ARG-54).
[45] As the United States stressed in its submissions to the Panel, the ITC's finding of high capacity utilization rates did not apply to Japan and Korea. First Submission by the United States paras. 317-321, and Second Written Submission of the United States paras. 63-65

unused capacity among Japanese producers was particularly important in view of the relative size of that industry.

47. With respect to producers in the other three subject countries, the ITC recognized that their "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."[46] Despite the apparently high capacity utilization rates of producers in Argentina, Italy and Mexico, the ITC found that these producers, and the producers in Japan and Korea, would have incentives to devote more of their productive capacity to producing and shipping casing and tubing to the U.S. market, for the following five reasons.

48. First, the ITC found that the alliance of five foreign producers known as Tenaris[47] would be likely to have a strong incentive to expand its presence in the United States if the orders were revoked. The ITC's analysis of this issue is worth quoting in full:[48]

> Tenaris is the dominant supplier of OCTG products and related services to all of the world's major oil and gas drilling regions except the United States. Tenaris states that it is the only entity that can serve oil and gas companies on a global basis, and that it seeks worldwide contracts with such companies. Many of Tenaris' existing customers are global oil and gas companies with operations in the United States. 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.

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[46] ITC Report at 19 (Exhibit ARG-54).

[47] The members of Tenaris are: Siderca in Argentina, Dalmine in Italy, TAMSA in Mexico, NKK in Japan, and Algoma in Canada. The ITC found that the Tenaris companies operate as a unit, submitting a single bid for contracts to supply OCTG products and related services; and that Tenaris' customer base includes large multi-national oil and gas companies, many of which have operations in the United States. ITC Report at 16 (Exhibit ARG-54).

[48] ITC Report at 19 (Exhibit ARG-54).

49. Argentina asserts that the ITC ignored positive evidence from the Tenaris Group that it was not likely to increase shipments to the United States.[49] This is untrue. Tenaris had argued to the ITC that it was not likely to increase exports to the United States because of long-term contractual commitments of its members to sell elsewhere. But, Tenaris' own testimony in the sunset reviews established that its long-term agreements accounted for only about 55 percent of its sales of OCTG.[50] In other words, Tenaris' commitments under long-term contracts would not present a significant impediment to expanding shipments to the United States. Moreover, the record before the ITC showed that many of Tenaris' long-term contracts were with global oil and gas companies that would be eager to buy from Tenaris in the United States if the orders were revoked. Tenaris described itself as the only entity that could serve oil and gas companies on a global basis, and stated that it sought worldwide contracts with such companies.[51]

50. The second reason supporting the ITC's finding that the subject producers would have an incentive to devote more of their capacity to shipping casing and tubing to the U.S. market is that OCTG casing and tubing were among the highest valued pipe and tube products, generating among the highest profit margins.[52] Argentina does not dispute this fact. As noted above, Argentina's contention that relatively high prices and profit margins are not an incentive to produce more of this product is counterintuitive.

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[49] Other Appellant's Submission of Argentina, para. 86.

[50] *Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico,* Inv. Nos. 701-TA-364, 731-TA-711, and 713-716, ITC Hearing Transcript, ("ITC Hearing Tr."), pp. 200 and 205 (German Cura, Siderca) (Exhibit US-30).

[51] ITC Report at 19 (Exhibit ARG-54).

[52] ITC Report at 19 (Exhibit ARG-54).

51. The third factor that the ITC relied on is that prices for casing and tubing on the world market were significantly lower than prices in the United States.[53] Indeed, one major distributor testified that Tenaris "could dramatically undersell the going price in the United States and still get greater returns than they currently do from their international sales."[54] This price gap represents a very strong incentive not only to increase shipments to the United States, but to shift sales from other markets to serve U.S. customers. Argentina does not address this factor in its appeal.

52. The fourth reason that the ITC found that the subject producers would have an incentive to devote more of their capacity to shipping casing and tubing to the U.S. market is that subject country producers faced import barriers on OCTG in other countries, or on related products in the United States.[55]

53. Argentina argues that the ITC should not have relied on the existence of barriers in the U.S. market to other tubular products also made by OCTG casing and tubing producers.[56] Argentina asserts that such barriers are "not pertinent to the likelihood of injury arising from OCTG imported into the United States." Argentina is mistaken. If a producer that makes several types of products on the same equipment faces import barriers on some of them, it stands to reason that the producer is more likely to devote a greater share of its capacity to making and shipping greater volumes of the product (casing and tubing) on which it does not face import barriers. This is especially true, where as here, the United States is the largest market in the world

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[53] ITC Report at 19-20 (Exhibit ARG-54).
[54] Hearing Tr. at 56 (Mr. Chaddick) (Exhibit US-20).
[55] ITC Report at 20 (Exhibit ARG-54).
[56] Other Appellant's Submission of Argentina, paras. 95-96.

for casing and tubing, offers higher prices than other markets, and no significant practical impediment prevents a producer from shifting its production from other tubular products.

54. The fifth reason that the ITC found that the subject producers would have an incentive to devote more of their capacity to shipping casing and tubing to the U.S. market is that industries in at least some of the subject countries were heavily export-dependent. The ITC noted that Japan and Korea in particular had very small home markets and depended nearly exclusively on exports.[57]

55. Argentina argues that the ITC's reliance on this export orientation is neither positive evidence nor an objective examination.[58] But, the extent to which a producer focuses its production and sales efforts on foreign markets clearly is a factor that is relevant to the overall inquiry. The ITC did not rely on this factor alone; it was but one of many that entered into its overall assessment of the likely volume of imports if the orders were revoked.

56. Together, the evidence concerning the importance of the U.S. market, substantial unused capacity among producers in Japan and Korea, Tenaris's desire for global contracts, the desire of its end users to purchase imports in this market, the evidence of import barriers on OCTG and related products, the price gap between world markets and the United States, and the import volume trends in the original investigation, strongly supports the ITC's finding that subject imports were likely to increase in volume if the antidumping orders were revoked. Notwithstanding Argentina's arguments to the contrary, the ITC's decision was based on a proper establishment of the relevant facts, an unbiased and objective evaluation of those facts,

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[57] ITC Report at 20 (Exhibit ARG-54).

[58] Argentina Other Appellant's Submission, paras. 97-98.

and on positive evidence; and the decision was consistent with the "likely" standard of Article 11.3.

2. Price

57. Argentina advances similar arguments regarding the Panel's review of the ITC's findings regarding price.

a. The Panel Correctly Upheld the ITC's Findings on Price

58. Argentina also argues that the Panel failed to apply the likely standard in its evaluation of the ITC's findings regarding likely price effects and that these findings were not supported by the evidence. Again, the ITC's likely price effects findings in this regard are not subject to an independent Article 11.3 analysis to begin with, so that Argentina's argument about the Panel's failure to hold the ITC to this standard is unavailing. However, even if Article 11.3 did apply to each factor considered, Argentina has provided no compelling evidence that the Panel evaluated the ITC's findings on each factor with anything less than the standard set out in Article 11.3. In any event, the Panel correctly found that the ITC's establishment and evaluation of the facts was proper.

59. First, in this example even more than with volume, Argentina is masking a critique of the Panel's weighing of the evidence as a claim of legal error. A quick review of Argentina's grievances highlights that Argentina is asking the Appellate Body to re-weigh the evidence, in the absence even of a complaint that the Panel's evaluation of the evidence failed to meet the requirements of Article 11 of the DSU. For example, Argentina argues that the Panel was wrong to dismiss the argument that the ITC used findings from the original investigation to support its

conclusions regarding likely price effects.[59] It is difficult to characterize this as anything other than a disagreement with the probative value the Panel assigned to the findings from the original investigation, notwithstanding Argentina's statements otherwise. Similarly, Argentina's grievance with the Panel's refusal to find the number of price comparisons on the record inadequate[60] also goes to the probative value those comparisons have; the Panel explained that it did not believe a threshold number of comparisons was required in order to make a proper price comparison.[61]

60. Second, a review of the Panel's findings contradicts Argentina's arguments that the Panel's conclusions did not support a likely finding or that the ITC failed to establish or objectively evaluate the facts. The Panel cited the ITC's findings in support of its conclusion that revocation would likely have a significant depressing or suppressing effect on price.[62] The Panel also addressed Argentina's critiques of the ITC's analysis but did not find them persuasive. For example, the Panel discussed at length the relevance of the price comparisons that formed the basis for the underselling findings and concluded that they were adequate under the circumstances in light of the diminished imports into the market after imposition of the order.[63] The Panel also rejected Argentina's argument that the ITC's consideration of price as an important factor in purchasing decisions was flawed.[64]

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[59] Other Appellant's Submission of Argentina, para. 101.
[60] Other Appellant's Submission of Argentina, para. 100.
[61] Panel Report, para. 7.303.
[62] Panel Report, para. 7.299.
[63] Panel Report, para. 7.303.
[64] Panel Report, para. 7.304.

61. The Panel therefore correctly concluded that the ITC's findings regarding likely price effects were based on an objective examination of the evidence in the record.[65]

b. The ITC's Findings Were Correct

62. If the Appellate Body were to disagree with the Panel's findings and were to decide to complete the analysis, the facts on the record confirm that the ITC's findings were based on an objective examination of the evidence on the record.

63. As with its critique of the ITC's likely volume findings, Argentina's approach to the ITC's findings on likely price effects is to focus on a few isolated factors, and simply assert that the ITC's findings are WTO-inconsistent.[66] In order to refute Argentina's arguments, it is useful to review the basis for the ITC's finding, as the Panel did. The ITC determined 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."[67] The ITC further determined that "such price-based competition by subject imports likely would have significant depressing or suppressing effects on the prices of the domestic like product."[68] These conclusions rested on a number of findings, including:

- the likely significant volume of imports;
- the high level of substitutability between the subject imports and the domestic like product;
- the importance of price in purchasing decisions;

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[65] Panel Report, para. 7.305.

[66] The United States' arguments to the Panel on likely price effects can be found in section VI.H.2.b of its first written submission and section VI.H.2.b of its second written submission.

[67] ITC Report at 21 (Exhibit ARG-54).

[68] *Id.*

- the volatile nature of U.S. demand;
- the underselling by the subject imports in the original investigations and the current review period.[69]

64. With regard to underselling, the ITC found that "direct selling comparisons [were] limited because the subject producers had a limited market presence in the U.S. market during the period of review."[70] However, it also found that "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."[71] The Panel rejected arguments by Argentina that the ITC's analysis of likely price effects was not based on an objective examination because of the limited number of direct price comparisons.[72]

65. Argentina now argues that the Panel "ignored the fact that . . . any comparison chosen must support the conclusion that negative price effects would be probable."[73] The simple answer to this is that the price comparisons that were available *did* support the conclusion that negative price effects would be probable. These comparisons showed that the subject imports generally undersold the domestic like product, especially in more recent periods.[74]

66. With regard to the importance of price to purchasers, the ITC found that "price is a very important factor in purchasing decisions."[75] The Panel rejected arguments by Argentina that this

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[69] *Id.*
[70] ITC Report at 2 (Exhibit ARG-54).
[71] *Id.*
[72] Panel Report, paras. 7.300- 7.303.
[73] Other Appellant's Submission of Argentina, para. 101.
[74] Argentina criticizes as "sweeping" the ITC's statement that subject imports "generally undersold" the domestic like product. Other Appellant's Submission of Argentina, para. 110. The ITC was merely summarizing the more detailed information on price comparisons in the staff report accompanying the ITC's determination.
[75] ITC Report at 21 (Exhibit ARG-54).

finding was flawed because purchasers attached a similar importance to factors other than price.[76] The Panel explained:

> 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. 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.[77]

67. Focusing on the Panel's statement that price was *an* important factor, Argentina now argues that "the only other factor cited by the Commission was the mixed evidence of underselling during the original investigation."[78] This is not true. As explained above, the ITC relied on a number of factors in reaching its likely price effects finding, including: the likely significant volume of imports; the high level of substitutability between the subject imports and the domestic like product; the volatile nature of U.S. demand; and underselling by the subject imports in the period examined in the sunset review.

68. Argentina makes several additional points, in an attempt to show that the ITC's price effects finding was otherwise inconsistent with Article 11.3.[79]

69. Argentina also argues that the ITC "speculates that purchasers would shift among supply sources" and that "[t]here is no information in the factual record to support such a conclusion."[80] Argentina is mistaken. The record before the ITC indicated that U.S. purchasers of OCTG would

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[76] Panel Report, paras. 7.300- 7.303.
[77] Panel Report, para. 7.304.
[78] Argentina confuses the "factors" that enter into purchasing decisions with the "factors" cited by the Commission for its likely price effects finding.
[79] Other Appellant's Submission of Argentina, paras. 105-114.
[80] Other Appellant's Submission of Argentina, para. 107.

indeed shift to the subject imports if the orders were revoked. The director of one of the largest OCTG distributors in the United States testified that "[m]ost of the major end users already purchase from these subject producers internationally and the end users are unwavering in their desire to see the extremely low priced OCTG that they get internationally extended to the U.S. market."[81] The president and chief executive officer of another large U.S. OCTG distributor testified at the ITC hearing that:

> I recently spoke with a major end use[r] who told me that he could get a far lower price from his international supplier which happened to be one of the foreign producers subject to the orders here. He also said that if these orders were revoked, he would immediately switch to the same foreign producer to supply his needs.

Furthermore, the ITC found there to be a high level of substitutability between the subject imports and the domestic like product, and Argentina did not dispute this finding. Substitutable products are more likely to compete on the basis of price.

70. Argentina suggests that there was an inconsistency between the ITC's finding that prices for OCTG casing and tubing in the United States were higher than in world markets, and the ITC's conclusion that subject imports would likely undersell the domestic product if the orders were revoked. There is no such inconsistency. As noted above, one major OCTG distributor testified before the ITC that Tenaris "could dramatically undersell the going price in the United States and still get greater returns than they currently do from their international sales."[82]

71. Finally, Argentina's characterization of the ITC's likely volume finding as a mere "assumption"[83] is completely inaccurate, as explained above.

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[81] Hearing Tr. at 55 (Mr. Stewart, Hunting Vinson) (Exhibit US-20).
[82] Hearing Tr. at 56 (Mr. Chaddick) (Exhibit US-20).
[83] Other Appellant's Submission of Argentina, para. 114.

72. In sum, the ITC's finding of likely adverse price effects if the orders were revoked was based on a proper establishment of the relevant facts, an unbiased and objective evaluation of those facts, and on positive evidence; and the decision was consistent with the "likely" standard of Article 11.3.

3. Impact: The Panel's Evaluation Was Correct

73. Argentina argues that the Panel's decision upholding the ITC's likely impact finding is flawed because the Panel failed to apply the correct "likely" standard. Argentina maintains that the Panel should have concluded that an adverse impact was not likely – because of the ITC's finding that the state of the domestic industry was "positive" at the time of the sunset review – and that the fact that it did not do so shows that it did not properly apply the likely standard.[84] Again, Argentina would have the Panel, and the Appellate Body, draw mechanistic, *per se* conclusions in the absence of a more thorough review of *all* of the evidence on the record. The Panel correctly declined to do so.

74. The Panel recognized that the ITC had found the state of the domestic industry to be positive at the time of the review. However, the Panel also noted that the ITC had found that imports were likely to increase and to have a negative effect on the prices of the US industry in the even of revocation.[85] The Panel noted that the ITC further found that this likely increase and price effect would have a negative impact on the U.S. industry. The Panel reasoned that "[i]n 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

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[84] Other Appellant's Submission of Argentina, para. 116.
[85] Panel Report, para. 7.311.

the U.S. 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 negative effect of the prices of the likely dumped imports.* "[86]

75. Again, when Argentina's claim is closely examined, it is a DSU Article 11 claim, not a claim of legal error by the Panel. The Panel took the evidence of the current state of the industry into account, as did the ITC, but found that it was not dispositive of the *likely* outcome if the order were revoked.

76. Indeed, Argentina's argument ignores the plain text of Article 11.3 and the concept underpinning sunset reviews. The very purpose of an antidumping measure is to provide a remedy to protect domestic industries from injury caused by dumped imports. Therefore, it is to be expected that the condition of the domestic industry will improve *under the discipline of the order*. The question in a sunset review is not whether the industry improved under the discipline of the order but whether injury will continue or recur if the discipline of the order is removed. Article 11.3 anticipates that a domestic industry might not be injured at the time the sunset review is initiated; therefore, it allows Members to determine if injury is likely to continue *or recur*. Argentina's view that an order must be terminated if the industry has experienced improvement during the life of the order cannot be reconciled with the text of Article 11.3.

[86] Panel Report, para. 7.311 (emphasis added).

C. Argentina's Claim that the Panel Misunderstood the Evidentiary Requirements for An Article 11.3 Determination is Erroneous and Irrelevant.

77. In addition to the arguments above, Argentina argues that the Panel allegedly failed to understand that the positive evidence and objective examination standards must be considered "in light of the likely/probable standard" of Article 11.3.[87] A review of the Panel's discussion of this issue reveals Argentina's argument to be wrong; in fact, Argentina's argument would make sense only if the Panel had drawn a conclusion *opposite* from the one it drew.

78. In arguing that the Panel misunderstood the standard of review, Argentina quotes the Panel as stating, in its discussion of the standards of review under Article 3.1 and Article 11.3, "that an assessment under Article 3 and Article 11.3 would 'not bring any practical difference in terms of the outcome of our analysis.'" By equating Article 3.1 with 11.3, according to Argentina, the Panel failed to appreciate that Article 11.3 contains the additional "likely" standard.[88]

79. It is not clear what the import of this argument is. This argument would be relevant only if the Panel used the Article 3 standard *instead* of the Article 11.3 standard. But the Panel did just the opposite: it applied the Article 11.3 standard and explained that doing so would not bring about any practical difference (because Article 17.6 imposes the same "positive evidence" and "objective examination" obligations as Article 3.1).

80. Moreover, the premise of Argentina's argument is wrong. The Panel did *not* state that an assessment under Articles 3.1 and 11.3 would be substantially the same. The Panel was simply

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[87] Other Appellant's Submission of Argentina, para. 62.
[88] Other Appellant's Submission of Argentina, paras. 62-63.

stating that the standard of review – ensuring that a determination is based on positive evidence and an objective examination of that evidence – is, for practical purposes, the same under Article 3 and Article 11.3. [89] Whether the determination meets the substantive requirements of each of those Articles is the basis on which the standard of review is applied but does not alter the standard of review itself.[90]

81. Argentina goes on to repeat that the Panel failed to interpret "likely" to mean "probable."[91] The relevance of this statement in this context is entirely unclear, except that it emphasizes the dependence of virtually all of Argentina's claims on the sophistic argument that the "likely standard" is in fact a "likely/probable" standard and that the Panel failed to apply it. Yet, Argentina cites to nothing in the Panel's Report to substantiate this claim, other than to paragraph 7.280 – which, as noted above, does not support Argentina's assertion.

82. The United States notes that in addition to advancing an erroneous and irrelevant argument in this regard, Argentina attempts to use this section of its submission to put before the Appellate Body an "Annex" that contains new evidence not presented to the Panel. Argentina asserts that this Annex is for the "convenience of the Appellate Body and the parties" and that the chart summarizes the "legal errors committed by the Panel in assessing the Commission's determinations with respect to the likely volume, price, and impact of the imports on the U.S. industry."[92] It is unclear how this chart advances its stated purpose; the chart fails to identify

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[89] *See* Panel Report, para. 7.280.
[90] Panel Report para. 7.280.
[91] Other Appellant's Submission of Argentina, paras. 64, 99, and 115.
[92] Other Appellant's Submission of Argentina, para. 66.

even one legal error or to even *refer* to the Panel or its report, let alone provide any citations to substantiate its claims of error.[93]

83. Under Article 17.6 of the DSU, the Appellate Body may only review the Panel's legal interpretation; it goes without saying that the Panel cannot be criticized for failing to take into account evidence that Argentina never presented.

IV. The Panel Did Not Err in its Interpretation of Injury Under Article 11.3

A. Argentina's Claims

84. Argentina argues that the Panel erred in its interpretation of "injury" under Article 11.3 in two respects. First, Argentina maintains that the Panel failed to interpret Article 11.3 to encompass various substantive obligations, and to find that the ITC's sunset determination violated those obligations. Argentina argues in the alternative that the Panel erred in finding that the obligations of Article 3 of the Antidumping Agreement do not apply to sunset reviews.

B. The Panel Correctly Found that the ITC's Sunset Determination Was Consistent With the Obligations of Investigating Authorities to Conduct a "Review" and Make a "Determination," as Those Obligations Have Been Clarified By the Appellate Body.

85. Argentina recites at length the Appellate Body's explanations in previous reports of what is meant by the terms "determine" and "review" in Article 11.3.[94] It then baldly asserts that the Panel erred (i) in failing to interpret Article 11.3 to encompass the disciplines inherent in these terms, and (ii) in failing to find that the ITC's determination did not meet these standards.[95]

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[93] One may speculate as to the reason for this disconnect, but it is likely due to the fact that this document was prepared for *a separate* dispute settlement proceeding in which Argentina's counsel is representing another client – the dispute brought by Mexico (DS282).

[94] Other Appellant's Submission of Argentina, paras. 136-142

[95] Other Appellant's Submission of Argentina, para. 144.

86. Argentina cites to no evidence that the Panel did *not* hold the ITC to the standards described by the Appellate Body. Panels are not required to reiterate word for word the Appellate Body's description of the obligations that flow from the Agreement's use of the terms "determine" and "review." It is enough that the Panel examined the ITC's determination to ensure that it satisfied the requirements of the Agreement.

87. Argentina summarizes the Appellate Body's explanation as to what is involved in the conducting a sunset review and making a determination.[96] The ITC's sunset determination was fully consistent with these principles. Specifically:

- The ITC made a prospective determination. This is clear, for example, from the very nature of the dispute between Argentina and the United States over the appropriate *future* time frame for assessing whether injury is likely to recur.[97] Moreover, as explained elsewhere in this submission, the fact that the ITC also reviewed conditions as they existed in its original determination as part of its overall analysis does not undercut the forward-looking nature of the determination.

- The ITC conducted a rigorous examination and arrived at a reasoned conclusion on the basis of information gathered in the review. This is clear from the ITC's determination viewed as a whole, including the attached staff report. (Exh. ARG-54). The ITC's review lasted approximately nine months, and included gathering information by questionnaire from domestic producers, purchasers, foreign producers, and importers. The ITC conducted a hearing at which all interested parties were invited to present their views, and also accepted briefs from these parties.

- The ITC made a fresh determination and did not simply assume that a likelihood of injury existed. This is clear from the fact that the ITC gathered new data for the five-year period preceding the sunset review[98] and that it made its determination based largely on these data.

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[96] Other Appellant's Submission of Argentina, para. 141.
[97] *See, e.g.*, First Submission by the United States to the Panel, paras. 356-362
[98] *See* ITC Report at Table C-1 for a summary of these data (Exhibit ARG-54).

- The ITC *did* determine, on the basis of positive evidence, that termination of the duty would be likely to lead to continuation or recurrence of injury. This is clear, for example, from the ITC's analysis of the likely volume of imports if the orders were revoked.[99]

- The ITC *had* a sufficient factual basis to allow it to draw reasoned and adequate conclusions.[100]

C. The Panel Did Not Err in Finding That the Obligations of Article 3 Do Not Apply to Sunset Reviews

88. Argentina maintains that the Panel erred in finding that Article 3 obligations do not apply in sunset reviews. Argentina offers the following arguments for its position:

- It argues that the Panel was mistaken in recognizing a distinction between a "determination of injury" and a "determination of the likelihood of continuation or recurrence of injury;"[101]

- It contends that the Panel misunderstood the Appellate Body's report in *Japan Sunset*, and that this report supports the proposition that Article 3 obligations apply in sunset reviews;

- It maintains that the lack of cross-referencing between Articles 3 and 11.3 is not relevant;[102]

- It claims that the language of footnote 9 to Article 3 makes the obligations of Article 3 applicable to sunset reviews;[103]

- It maintains that the phrase "for purposes of Article VI of GATT 1994" in Article 3.1 suggests that "Article 3 injury determinations apply for all purposes of the Agreement;"[104]

89. Argentina's reasoning is unpersuasive. As discussed below, the Panel's conclusion that Article 3 does not apply *per se* to sunset reviews is supported by the fundamentally different

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[99] *See,* First Written Submission of the United States, paras. 313-332
[100] *See, e.g.,* First Written Submission of the United States, paras. 313-343.
[101] Other Appellant's Submission of Argentina, para. 161.
[102] Other Appellant's Submission of Argentina, paras. 153-156.
[103] Other Appellant's Submission of Argentina, paras. 147-149 and 154-155.
[104] Other Appellant's Submission of Argentina, para. 157.

nature of original investigations and sunset reviews, by the Appellate Body's report in *Japan Sunset*, and by a textual analysis of the Antidumping Agreement.

1. The Panel Correctly Recognized That the Fundamental Distinction Between Original Injury Determinations and Sunset Determinations Supports the Conclusion That Article 3 Obligations Do Not Apply to Sunset Reviews

90. The Panel recognized that the different nature of original investigations and sunset reviews provides support for the conclusion that Article 3 does not apply to sunset reviews.[105] These differences in the nature of the respective types of proceedings as well as differences in the practicalities of the inquiry in an original investigation and of the inquiry in a sunset review demonstrate that the requirements for each cannot be identical.

91. As the United States explained to the Panel,[106] in an original investigation, the investigating authorities examine the current condition of an industry that has been exposed to the effects of unrestrained, dumped imports that are competing without remedial measures in place. In doing so, the authorities must examine the volume, price effects and impact of the unrestrained imports on a domestic industry that may be indicative of present injury or threat of material injury.

92. Five years later, in an Article 11.3 sunset review, the investigating authorities must determine whether "expiry of the duty would be likely to lead to continuation or recurrence of . . . injury." Under U.S. law, the ITC examines the *likely* volume of imports *in the future* that have been restrained for the last five years by the antidumping duty order, the *likely* price effects *in the*

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[105] Panel Report, para. 7.273.

[106] First Written Submission of the United States, paras. 297-301.

future of such imports, and the *likely* impact of the imports *in the future* on the domestic industry that has been operating in a market where the remedial order has been in place.

93. As a result of the order, dumped imports may have decreased or exited the market altogether or, if they have maintained their presence in the market, they may be priced higher than they were during the original investigation, when they were entering the market unencumbered by any additional duties. With the presence of the order, it would not be surprising that no injury or threat of injury presently exists, a fact recognized by the standard of "continuation or recurrence of injury." Indeed, Article 11.3 does not require an investigating authority to assess whether a domestic industry is currently injured by imports as of the date that the order would be revoked.[107]

94. The inquiry contemplated pursuant to Article 11.3 is counterfactual in nature, and entails the application of a decidedly different analysis. Indeed, there may no longer be either any subject imports or material injury once an antidumping order has been in effect for five years. The authority must then decide the likely impact of a prospective change in the status quo; *i.e.,* the revocation of the antidumping duty order and the elimination of its restraining effects on volumes and prices of imports.

95. Argentina claims that the Panel erred in recognizing a distinction between a "determination of injury" and a "determination of the likelihood of continuation or recurrence of injury" as a basis for concluding that Article 3 does not apply to sunset reviews. Argentina

[107] *Cf.* Panel Report, para. 7.184 (noting that Article 11.3 does not specify a time-frame on which sunset reviews should be based).

characterized this distinction as a "false dichotomy."[108] Argentina's position is squarely at odds with past Appellate Body reports, which recognize 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.[109]

The Appellate Body elaborated on this distinction in *Japan Sunset*, explaining that:

> [i]n 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*.[110]

Therefore, the Panel correctly concluded that a determination of injury is different from a determination of likelihood or recurrence of injury.

2. The Appellate Body's Report in *Japan Sunset* Supports the Conclusion That Article 3 Obligations Do Not Apply in Sunset Reviews.

96. Contrary to Argentina's arguments,[111] the Panel did not misinterpret the Appellate Body's report in *Japan Sunset*.[112] In *Japan Sunset* the Appellate Body reiterated its earlier finding that "original investigations and sunset reviews are distinct processes with different purposes."[113] The Appellate Body then found that investigating authorities are under no obligation to calculate or rely on dumping margins when they make their likelihood-of-recurrence-of-dumping

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[108] Argentina Other Appellant's Submission, para. 161.
[109] *German Sunset*, para. 87; *Japan Sunset*, para. 106.
[110] *Japan Sunset*, para. 107 (emphasis in original)
[111] Argentina Other Appellant's Submission, paras. 164-175.
[112] The U.S. arguments to the Panel regarding the proper reading of the *Japan Sunset* report can be found in its oral statement at the second meeting of the Panel, paras. 22-24.
[113] *Japan Sunset*, para. 106 (quoting from *German Sunset*, para. 87).

determination in a sunset review.[114] The Appellate Body then concluded that *if* – and only *if* – investigating authorities choose to rely on dumping margins in making their likelihood determination, are they required to observe the disciplines of Article 2.4.

97. As the Panel recognized,[115] the parallel finding with respect to the likelihood of recurrence of injury determination is that investigating authorities are under no obligation in a sunset review to make an "injury" determination, as defined in Article 3, but that if they do, they must observe the disciplines of Article 3.

98. In this dispute, the ITC did not make an "injury" determination as part of its sunset review, nor did the Panel find otherwise. If the ITC had done so, it would have examined whether there was present material injury, or a threat of material injury, to the domestic industry, the only two possible determinations under Article 3 of the Agreement in the circumstances of this case.[116] The ITC clearly did not do so.

99. The Appellate Body's *Japan Sunset* report provides further support for the conclusion that Article 3 obligations do not apply in sunset reviews. It explains that

> Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review. Nor does Article 11.3 identify any particular factors that authorities must take into account in making such a determination.[117]

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[114] *Japan Sunset*, paras. 123 and 126. The Appellate Body explained that "it is consistent with the different nature and purpose of original investigations, on the one hand, and sunset reviews, on the other hand, to interpret the Anti-Dumping Agreement as requiring investigating authorities to calculate dumping margins in an original investigation, but *not* in a sunset review." *Japan Sunset*, para. 124 (emphasis added).

[115] Panel Report, paras. 7.273-7.274.

[116] Article 3 contemplates only three types of injury determinations: a determination of present material injury, a determination of threat of material injury, or a determination of material retardation of the establishment of an industry. *See* footnote 9 to Article 3.

[117] *Japan Sunset*, para. 123.

The Appellate Body was speaking of a likelihood determination respecting dumping, but the same observation holds true for an injury likelihood determination given the language of Article 11.3.

100. These observations by the Appellate Body directly refute Argentina's claim that the requirements of Article 3 must be satisfied in a five-year review. As the Appellate Body has recognized, Article 11.3 does not expressly prescribe *any* specific methodology in making a likelihood determination, nor does it identify *any* particular factors that authorities must take into account. Accordingly, no obligation is imposed on investigating authorities to make a finding of material injury, threat of material injury, or material retardation in a five-year review. While it is true that such a finding is required in original investigations, an analysis of this type "will not necessarily be conclusive of" whether the expiry of the duty would be likely to lead to continuation or recurrence of injury.

101. Argentina argues that the Panel misunderstood the *Japan Sunset* Appellate Body report because the Panel failed to perceive an alleged distinction in the Appellate Body's report between (i) calculating dumping margins, and (ii) making a dumping determination. Argentina states that the Panel erred in concluding that the *Japan Sunset* Appellate Body report stands for the proposition that "'an investigating authority is not required to make a dumping determination in a sunset review.'"[118] Apparently Argentina believes that the *Japan Sunset* report compels the conclusion that Members, although not required to calculate dumping margins in sunset reviews,

[118] Other Appellant's Submission of Argentina, para. 169, quoting the Panel Report (no citation provided).

are nevertheless required to make *dumping determinations* in sunset reviews – as opposed to likelihood of dumping determinations.

102. Argentina's argument is without merit, as evidenced by its own quotation of the report in question: "[i]n a sunset review, dumping margins may well be relevant to, but they will not necessarily be conclusive of, whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping."[119] The Appellate Body's statement clearly makes the distinction between (i) dumping margins, and (ii) the "likely to lead to continuation or recurrence of dumping" determination. It is the latter distinction, and not the alleged distinction that Argentina seeks to make, that the Panel found decisive and which the Appellate Body found the text of Article 11.3 requires. Yet if a determination of dumping were required in a sunset review, the Appellate Body would *have* to have also found that Article 2.4 applies in sunset reviews. The Appellate Body found just the opposite.

103. Argentina's argument that the *Japan Sunset* decision supports the application of Article 3 to sunset reviews is therefore unavailing.[120] Argentina's distinction between the discretionary act of relying on dumping margins and the mandatory act of deciding the likelihood of the continuation or recurrence of injury is an empty one and meaningless. Argentina goes on to argue that if the discretionary act of relying on dumping margins is sufficient to make Article 2.4 applicable to sunset reviews, then there is all the more reason to find that the mandatory act of deciding the likelihood of the continuation or recurrence of injury serves to invoke the obligations of Article 3.

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[119] Other Appellant's Submission of Argentina, paras. 170 (quoting from *Japan Sunset*, para. 124.)

[120] Other Appellant's Submission of Argentina, paras. 176-177.

104. This argument is illogical. The applicability of Article 2.4 or 3 to sunset reviews does not hinge on whether the investigating authorities are performing a discretionary or mandatory act. Rather, it hinges, in the case of Article 2.4, on whether investigating authorities rely on dumping margins,[121] and in the case of Article 3, on whether "the USITC made an injury determination – as opposed to a likelihood of continuation or recurrence of injury."[122]

105. In sum, the Panel did not misunderstand the *Japan Sunset* report, and that report supports the Panel's finding that the obligations of Article 3 do not apply to sunset reviews.

3. A Textual Analysis Supports the Conclusion That Article 3 Obligations Do Not Apply to Sunset Reviews

106. The Panel correctly concluded that Article 3 obligations do not apply to sunset reviews. A textual analysis supports the Panel's conclusion, should the Appellate Body wish to revisit the issue.

107. Argentina contends that "the disciplines of Article 3 apply to sunset reviews, as they are incorporated directly into Article 11.3 through footnote 9."[123] Footnote 9 does not, however, purport to incorporate the disciplines of Article 3 into Article 11.3.

108. Footnote 9 is attached to the phrase "Determination of Injury," which is the title of Article 3. Footnote 9 states:

> 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.

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[121] *Japan Sunset,* para. 127.
[122] Panel Report, para. 7.276.
[123] Other Appellant's Submission of Argentina, para. 146.

109. Article 3 plainly applies to any determination of material injury, threat of material injury, or material retardation under the Antidumping Agreement. That is consistent with Article 3.1, which states that Article 3 refers to "[a] determination of injury for purposes of Article VI of the GATT 1994." Article VI of GATT 1994 provides that dumping is to be condemned if it causes or threatens material injury to an established industry . . . or materially retards the establishment of a domestic industry." Thus, any of these three bases for an affirmative determination in an original injury investigation recognized in Article VI – material injury, threat of material injury, or material retardation – must be analyzed pursuant to Article 3.

110. Five-year reviews and antidumping orders, however, are *not* discussed in Article VI of the GATT at all. Instead, they are discussed only in Article 11 of the Antidumping Agreement. And that Article does *not* require a finding of material injury, threat of material injury, or material retardation. Instead, it requires the investigating authorities to determine whether "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury."

111. Footnote 9 does not serve to require that the determination in Article 11.3 be made as though it were a determination under Article 3.

112. Indeed, this is the only interpretation of footnote 9 and Article 11.3 that can possibly be reconciled with the context of Articles 3 and 11. Article 3 requires the administering authority to make a number of determinations that would be wholly out of place in a five-year review:

- Article 3.1 states that investigating authorities should examine "the volume of dumped imports and the effect of dumped imports on prices." It may be impossible to comply with this obligation in a sunset review given that imports may not even be present in the market at the time of the sunset review, and they may not be sold at dumped prices.

- Article 3.2 provides that "{w}ith regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports." Such an analysis would be ludicrous in the context of five-year reviews, where an order has been in place specifically to prevent any significant increase in dumped imports.

- Article 3.5 provides that "{i}t must be demonstrated that the dumped imports are, through the effects of dumping . . . *causing injury* within the meaning of this Agreement." (emphasis added) But a five-year review is supposed to determine whether injury would "continue or recur," not whether subject imports are already causing such injury.

- Article 3.7 provides that as part of a threat determination, the administering authority should consider "whether imports *are entering* at prices that will have a significant depressing or suppressing effect on domestic prices." (emphasis added). Once again, such an analysis would be absurd in the context of a five-year review, which is supposed to determine what imports *will do* if orders are revoked, not what such imports *are doing* at the time of the review.

113. As the Panel recognized,[124] the inapplicability of Article 3 to sunset reviews under Article 11.3 is underscored by the absence of any cross-references in Article 11.3 to Article 3. The existence of cross-references in paragraphs 4 and 5 of Article 11 to other articles of the AD Agreement, and in Article 5 to Article 3, indicate that the drafters would have been explicit had they intended to make the disciplines of Article 3 applicable to sunset reviews.[125] The Appellate Body recognized in *Japan Sunset* that "the absence of a cross-reference in Article 11 to Article 2 may be of some significance."[126] In the same way, the absence of a cross-reference in Article 11 to Article 3 suggests that there was no intention to make Article 3 applicable in sunset reviews.

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[124] Panel Report, para. 7.270.

[125] *Cf. German Sunset*, para. 69 (stating that the existence of cross-references in the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") suggests that when the negotiators of the Agreement intended the disciplines of one provision to apply to another, they expressly provided for such application).

[126] *Japan Sunset*, para. 125

114. Argentina's argument relies on the Appellate Body's finding in *Japan Sunset* that the opening words of Article 2.1 ("[f]or the purpose of this Agreement") "go beyond a cross-reference." In the same way, according to Argentina, the words "[u]nder this Agreement" in footnote 9 to Article 3 make a cross-reference between Articles 3 and 11.3 unnecessary.[127] The flaw in Argentina's argument is that in *Japan Sunset* the opening words of Article 2.1 were seen as evidence that merely *that paragraph* – defining "dumping" -- applied to the entire Agreement.[128] Therefore, the Appellate Body's finding in *Japan Sunset* does not support Argentina's effort to interpret Footnote 9 as effecting the wholesale application of Article 3 throughout the Agreement. When the drafters of the Antidumping Agreement intended to make the provisions of an entire article applicable to another, they clearly knew how to do so explicitly, as they did, for example, in Articles 11.5 and 12.3 of the Antidumping Agreement.[129]

4. Conclusion

115. There is no danger, as Argentina suggests, that failure to incorporate the requirements of Article 3 into Article 11.3 would give WTO Members "unbridled discretion" in conducting five-year reviews. The Appellate Body has made clear that Article 11.3 carries its own requirements

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[127] Other Appellant's Submission of Argentina, para. 153.

[128] *Japan Sunset*, para. 126.

[129] Finally, the history of footnote 9 and Article 11.3 is also relevant to the question of whether Article 3 applies to sunset reviews. The text of footnote 9 to Article 3 existed in its present form in the Tokyo Round Anti-Dumping Code prior to the adoption of the Article 11.3 provision for sunset reviews at the conclusion of the Uruguay Round, with the only exception that the prior text referred to the "Code," whereas footnote 9 refers to the "Agreement." The United States is of the view that footnote 9, like its precursor in the Antidumping Code, is simply a drafting device that avoids unnecessary repetitions of the principle that actionable injury can take any of three distinct forms: present injury, threat of material injury, or material retardation of the establishment of an industry.

that must be satisfied in a five-year review. In *Japan Sunset*, the Appellate Body concluded 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.[130]

116. The requirements of Article 11.3 were fully satisfied by the ITC's sunset determination in this case. Argentina's efforts to graft onto Article 11.3 additional requirements from Article 3 – requirements that have no place in five-year reviews and would indeed be anomalous in such reviews – should be rejected.

D. The Appellate Body Should Reject Argentina's Suggestion That it Complete the Analysis with Respect to this Sunset Review

117. The Panel correctly found that the substantive provisions of Article 3 do not apply to Article 11.3 sunset reviews. Having made this finding, the Panel did not make factual findings regarding Argentina's contingent claims that the ITC failed to comply with those provisions. Even if the Appellate Body disagrees with the Panel's findings on the legal question as to the applicability of the Article 3 provisions to sunset reviews, the record nonetheless lacks factual findings by the Panel to provide a sufficient basis for the Appellate Body to complete the analysis on this issue.[131] Argentina's efforts to litigate in this forum the factual aspects of its contentions concerning the consistency of the ITC determination with Article 3 are therefore not appropriate, inasmuch as there are not sufficient undisputed facts on the record for the Appellate Body to so

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[130] *Japan Sunset*, para.114.
[131] *See Japan Sunset*, paras. 137-138.

decide.[132] Should the Appellate Body, however, determine that is it necessary to address the factual Article 3 claims and that the record contains sufficient undisputed facts on this issue, the United States incorporates the arguments it made in its submissions to the Panel.[133]

V. The Panel Correctly Found that the "Reasonably Foreseeable Time" Provision of the U.S. Statute is Not Inconsistent With Articles 11.3, 3.7, or 3.8 of the AD Agreement

118. Argentina raises one ostensible "as such" challenge to the statutory provisions concerning the ITC's likely injury determination. Specifically, Argentina argued in its written submissions to the Panel that the provision in the U.S. law setting out a time frame for the likely injury analysis is inconsistent with the Agreement. Argentina claims that the U.S. statutory requirements contained in sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930, as amended, are inconsistent "as such" with AD Agreement Articles 11.3.[134]

119. Sections 752(a)(1) and 752(a)(5) instruct the ITC in a sunset review to determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" and to "consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time."[135]

120. For the reasons explained in the United States Appellant Submission,[136] the United States believes the Panel erred in the first instance in even addressing this claim. Having determined, however, that the claim was properly raised, the Panel correctly disposed of it by finding that the

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[132] Other Appellant's Submission of Argentina, paras. 178-204.

[133] First Written Submission of the United States, paras. 308-343, 347, and 355.

[134] Other Appellant's Submission of Argentina, paras. 216, 219-239. Sections 752(a)(1) and (a)(5) are codified at 19 U.S.C. § 1675a(a)(1) and (5). (Exhibit ARG-1).

[135] 19 U.S.C. §§ 1675a(a)(1), 1675a(a)(5) (Exhibit ARG-1).

[136] Appellant Submission of the United States, paras. 101-105.

"reasonably foreseeable time" standard of the U.S. statute was not inconsistent with the AD Agreement.

A. The Panel Correctly Found that the Statute Is Not Inconsistent with Article 11.3

121. At the outset, the Panel properly noted that on its face Section 752(a)(1) of the Tariff Act provides for the application of the "likely" standard in the ITC's determinations.[137] As the Panel went on to discuss, the U.S. statute goes one step further than Article 11.3, and requires the ITC 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 ITC's likelihood determinations in sunset reviews. The Panel was correct in rejecting Argentina's argument that this additional provision of U.S. law somehow changes the likely standard into a more lenient one. As the Panel found, Argentina has not shown that this provision of the law is inconsistent with Article 11.3 or with the other provisions of the Agreement cited by Argentina.[138]

122. Article 11.3, the provision that contains the substantive requirements applicable 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. Based on the explicit text of the Agreement, in particular the absence of any reference to an exact time frame within which the

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[137] Panel Report, para. 7.182.
[138] Panel Report, paras. 7.183-7.184.

likely injury must continue or recur, the Panel correctly concluded that Argentina had failed to show a conflict between that the requirement in the U.S. statute for the ITC to determine whether injury is likely to continue or recur within a reasonably foreseeable time and the "likely" standard of Article 11.3.

123. Argentina continues to press its claim that the U.S. statute imposes no limitations in terms of the temporal aspect of sunset determinations. As the Panel found, both the Agreement and the U.S. statute impose a standard of reasonableness in terms of temporal limitations.[139] With respect to the Agreement, the Panel stated that "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 into the future."[140] The Panel went on to find, correctly, that the "reasonably foreseeable time" standard provided for under U.S. law is consistent with any implicit reasonableness standards in Article 11.3.[141]

124. In challenging the Panel's findings on this issue, Argentina misconstrues Article 11.3. Article 11.3 does not specify the time frame relevant to a sunset inquiry. Article 11.3 only requires a determination of whether revocation "would be likely to lead to continuation or recurrence of injury." This word choice indicates the resultant effects of revocation on the domestic industry need not be, and are not likely to be, immediate. Rather, the words "to lead to" affirmatively indicate that the Agreement contemplates the passage of some period of time between the revocation of the order and the continuation or recurrence of injury. The deliberate choice of this language is apparent by contrasting it to the use of the present tense in Article 3.5

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[139] Panel Report, para. 7.184.
[140] Panel Report, para. 7.185.
[141] Panel Report, para. 7.185.

and the reference to "imminent" injury in Article 3.7. Article 11.3 reflects that an order will have been in place for at least five years, and that the consequences of revocation of that order may not be immediate.

125. Therefore, Argentina has failed to demonstrate that the Panel made an error of law in its findings in this regard.

B. The Panel Correctly Found that the Statute is Not Inconsistent With Article 3.7 or 3.8

126. Argentina also contends that the cited provisions of the Tariff Act are inconsistent with Articles 3.7 and 3.8 of the Agreement. In this regard, Argentina attempts to inject the "imminent" and "special care" terms from Articles 3.7 and 3.8 into an Article 11.3 sunset review.

127. The Panel properly rejected Argentina's efforts to graft the requirements of Articles 3.7 and 3.8 onto Article 11.3. As discussed *supra*, the Panel first correctly found that no substantive requirements of Article 3 apply to Article 11.3 sunset reviews.[142] That by itself justifies rejection of Argentina's claim that the "imminent" language for threat determinations under Article 3.7 carries over to sunset reviews.

128. In addition to the non-applicability of Article 3 in general to Article 11.3, the Panel properly found that there are additional reasons why Articles 3.7 and 3.8 in particular do not apply here.[143] That is, Articles 3.7 and 3.8 by their terms pertain to original threat determinations, not to sunset reviews (notwithstanding Argentina's attempt to extend the application of these provisions to all "prospective injury determinations.")[144]

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[142] Panel Report, para. 7.190.
[143] Panel Report, paras. 7.190-7.192.
[144] Other Appellant's Submission of Argentina, paras. 222, 225.

129. Argentina continues to argue that because Articles 3.7 and 3.8 of the Agreement contain provisions about future injury, they are relevant to likelihood of continuation or recurrence of injury determinations in sunset reviews. Indeed, Argentina insists that these two provisions impose additional obligations on the investigating authorities in their sunset determinations. In other words, Argentina would interpret the Agreement to impose all of the same requirements on every determination that looks beyond the immediate present, even if such requirements are not included in the provisions of the Agreement relevant to sunset reviews under Article 11.3.

130. The Panel's rejection of Argentina's claim is based upon a correct textual analysis of the cited provisions of the AD Agreement. Articles 3.7 and 3.8 govern determinations of "threat of material injury" in an original investigation, before any measure is applied. Article 11, which is entitled "Duration and Review of Anti-Dumping Duties and Price Undertakings," does not apply until after the measure is already in place. Thus, by the time Article 11 comes into play, the market presumably will have adjusted to conditions related to imposition of the order, such as declines in subject import volume or increases in subject import prices.

131. Article 11.3 sets out rules that apply to likelihood of continuation or recurrence of injury determinations in sunset reviews. As the Panel correctly concluded, the determinations set out in Articles 3.7 and 11.3 are substantively different from one another. As the Panel found–

> 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 measure 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.[145]

132. The Panel's analysis is supported by *Japan Sunset*, wherein the Appellate Body highlighted the difference between an antidumping investigation and a sunset review. The Appellate Body stated that investigations and reviews are two distinct processes with different purposes.[146] It follows that investigations and reviews are subject to different rules and disciplines, *viz*., those explicitly applicable to each type of determination, unless otherwise indicated by the text of the Agreement.

133. In its efforts to impose the requirements of Articles 3.7 and 3.8 onto Article 11.3 sunset reviews, Argentina attempts to establish an analogy between the language of Article 11.1 instructing that antidumping measures remain in force only as long as necessary and the language of Article 3.8 that "with respect to case where injury is *threatened* by dumped imports, the *application* of anti-dumping measures shall be considered and decided with special care." (Emphasis added).

134. Argentina's argument disregards the text of the Agreement. First, the unequivocal language of Article 3.8 indicates that it applies only to determinations of threat of material injury. Second, Article 3.8 explicitly addresses the *application* of antidumping measures in the first instance. It does not address the *duration* of such measures once they are applied. Instead, duration is addressed in Article 11.

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[145] Panel Report, para. 7.192.
[146] *Japan Sunset*, paras. 106-107; *See also German Sunset*, para. 87.

C. Argentina Is Wrong in its Assertion that the Statute Gives the ITC "Unbridled Discretion" With Regard to the Time frame it Examines for Purposes of the Likely Injury Analysis

135. Argentina's challenge to the U.S. statute is largely based on conjecture by Argentina as to how the ITC *might* apply the statute. Argentina states that the statute vests the ITC with "unbridled discretion" to speculate about market conditions "several years into the future."[147] By its very terms, the statute does not, however, give the ITC any such "unbridled discretion."

136. Argentina ignores that the statute specifies that the prospective analysis must look only to the *reasonably* foreseeable future. That Argentina may be able to come up with ways in which the forward period examined by the investigating authority would not be "reasonably" foreseeable misses the point. In this case, Argentina has not shown one iota of evidence that the ITC was actually contemplating what might occur over an unreasonably lengthy period in the future.

137. Argentina's reliance on language in the SAA is likewise unavailing to prove its case.[148] The SAA states that "a 'reasonably foreseeable time" will vary from case-to-case, but normally will exceed the "imminent" time frame applicable in a threat of injury analysis."[149] Argentina fails to note, however, that the SAA goes on to explain why the time for a sunset analysis by its nature will usually be longer than the imminent, or immediate, future. Argentina also ignores that the SAA provides guidelines and criteria for the ITC to consider in ascertaining whether injury is likely to continue or recur "in a reasonably foreseeable time." Thus, the SAA goes on to explain that:

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[147] Other Appellant's Submission of Argentina, para. 223.
[148] Other Appellant's Submission of Argentina, paras. 219, 223.
[149] SAA at 887 (Exhibit ARG-5).

> 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.[150] (emphasis added)

138. In any event, the most that Argentina has shown is that the statute gives the ITC *discretion* that under some scenario might create a question of WTO-consistency. Even if that were so, Argentina had not alleged, let alone shown, that the statute *mandates* the ITC to look beyond a future period of time that would be consistent with Article 11.3.[151]

139. Nor is there merit to Argentina's argument about an alleged "gap" created by U.S. law. Argentina's argument about a supposed "temporal 'grace period'" bears no connection to the statutory provision it is challenging. The provision in question pertains only to the ITC's analysis in a five-year review. Argentina is in effect attempting to isolate the requirements of Article 11.1 from those of Article 11.3, the latter of which pertain specifically to five-year reviews. However, the terms of reference in this dispute pertain to the ITC's five-year review procedures, and in particular, its review of the orders on OCTG casing and tubing.

140. Also flawed is Argentina's contention that the time period on which the investigating authority must focus its likely analysis is as of the time of expiry of the order.[152] Article 11.3

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[150] SAA at 887 (Exhibit ARG-5).

[151] In fact, the statute does not even mandate that the ITC always look beyond the "imminent" future that Argentina claims to apply to reviews by virtue of Article 3.7. The statute states that the time frame would "normally" extend beyond the imminent future, but does not prohibit the ITC from looking only to the imminent future if the circumstances of the particular case so warrant.

[152] Other Appellant's Submission of Argentina, para. 228.

logically does not call for investigating authorities to address likely injury that might continue or recur prior to the revocation of the order. This is clear from the language calling for a determination of whether revocation *would be likely to lead to* continuation or recurrence of injury. Given that Argentina argues that the investigating authority should not look at likely injury beyond the expiry of the duty, Argentina's proposed reading leaves only one option, *i.e.,* that the authority must determine how the lifting of the order will affect the industry at the moment the order it lifted. This reading renders meaningless the *would be likely to lead to* language of Article 11.3, in contravention of the principles of treaty interpretation.[153]

141. Argentina itself cites to the Appellate Body's recognition in *Japan Sunset* that the duty may remain in place while the sunset process in underway.[154] Indeed, the Appellate body has stated that the requirements of Article 11.3, including its provision for the duty to remain in place during the period in which the review is ongoing, is "in addition to, and *irrespective of*, the obligations set out in the first two paragraphs of Article 11."[155] (Emphasis supplied)

142. The U.S. statute does not, as Argentina alleges, authorize the continued application of antidumping duties during "an impermissible gap."[156] If the ITC finds, as of the time it makes it five-year review determination, that expiry of the duty would *not* be likely to lead to continuation or recurrence of injury, then the duty will be revoked shortly after the ITC's negative determination.[157] That is exactly what happened with respect to the Argentina and Mexico drill

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[153] *See, e.g.,* Appellate Body Report, *Brazil - Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 2 August 1999, para. 163.

[154] Other Appellant's Submission of Argentina, *citing Japan Sunset*, para. 113.

[155] *Japan Sunset*, para. 113.

[156] Other Appellant's Submission of Argentina, para. 238.

[157] 19 CFR 351.222(i)(1)(iii) & (i)(2) (Exhibit ARG-3.)

pipe antidumping duty orders, which were reviewed by the ITC simultaneously with the review of the casing and tubing OCTG orders. In late June 2001, the ITC made both an affirmative determination in the reviews of casing and tubing and a negative determination in the reviews of drill pipe from Argentina and Mexico.[158] On July 25, 2001, shortly after the ITC's determination, the United States revoked the orders on drill pipe from Argentina and Mexico.[159]

143. Argentina insists that the U.S. statute allows an "undefined time frame" within which injury may continue or recur after expiry of the duty. This characterization is wrong. Contrary to Argentina's assertion, the statute does not give the ITC "unbridled discretion" to extend the period without limits. Rather, in order to effectuate the notion that an order can be maintained only if expiry of the duty would be likely to lead to continuation or recurrence of (dumping and) injury, the U.S. statute restricts the period for the injury review to what is likely to occur within a "reasonably foreseeable time." This standard is consistent with the forward-looking nature of sunset reviews, as recognized by the Appellate Body in *Japan Sunset* and *German Sunset*.[160]

144. Nothing in the Agreement spells out any set period of time that should be examined between the potential expiry of the duty and any resultant continuation or recurrence of injury. Argentina's reliance on Article 11.1 and on the last sentence of Article 11.3 to show otherwise is misplaced. Neither of those provisions refers to the length of the future period that should be

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[158] Exhibit ARG-54. The ITC determined that revocation of the order on drill pipe from Japan was likely to lead to continuation of material injury within a reasonably foreseeable time, but that revocation of the orders on drill pipe from Mexico and Argentina was not likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. As a result, the antidumping duty orders on drill pipe from Mexico and Argentina were revoked.

[159] 66 Fed. Reg. 38630 (July 25, 2001) (Exhibit US-10). As stated in that notice, the effective date of the revocation was August 11, 2000, the fifth anniversary of the date of publication of the original orders.

[160] *Japan Sunset*, para. 105; *German Sunset*, para. 87.

examined to ascertain whether revocation of the order is likely to lead to continuation or recurrence of injury. Rather, they both address the timing of removal of the duty in the event of a negative determination, not the length of the time period between potential revocation and the consequences of such revocation for the domestic industry.

145. Argentina complains that, under the statute, the ITC determination will be "based on speculation about events into the undefined future."[161] Argentina ignores that the *Agreement,* not the statute, omits any definition of the period upon which the Article 11.3 likely determination should be based. As the Panel found, the statute imposes restrictions that are absent from the Agreement, and defines the time for that determination as that which is "reasonably foreseeable." Thus, the U.S. statute is actually more confining on the investigating authority than the text of the Agreement itself.

146. Argentina claims that the Panel ignored the standard set out in the Agreement and substituted a standard of its own.[162] In reality, Argentina, not the Panel, seeks to create a standard which does not exist. Article 11.3 does not state, as Argentina says it does, that the authorities must determine "whether injury would continue or recur upon expiry of the duty." In setting forth its version of the Article 11.3 standard. Argentina has in the first instance written out the "likely" to lead to modifier altogether. In addition, Argentina misquotes the Agreement to support its view that the Agreement should require investigating authorities to look at the effect of revocation at the exact moment of, *i.e.*, "upon", expiry of the duty.

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[161] Other Appellant's Submission of Argentina, para. 232.
[162] Other Appellant's Submission of Argentina, para. 235.

147. As illustrated above, the Agreement does not say what Argentina would like it to say. Instead, it directs the investigating authority to determine whether expiry of the duty "would *be likely to lead to* continuation or recurrence of [dumping and] injury." (Emphasis supplied). Argentina simply failed to show that the additional U.S. statutory obligation to look ahead to a "reasonably foreseeable time" is inconsistent with the Agreement.

148. Standing principles of treaty interpretation on their head, Argentina claims that the drafters of the Agreement "could have used express language" if they wished to leave the time-frame for the sunset injury analysis to the discretion of each Member.[163] Just the opposite is true. In the absence of any specific or cross-referenced provision in Article 11.3 , Members remain free to determine under their own laws and procedures the time frame relevant in sunset inquiries.[164] It is inherently reasonable for the United States to consider the likelihood of continuation or recurrence "within a reasonably foreseeable time" and that the "effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time."

D. The Panel's Finding Regarding the ITC's Application of the Time- Frame Are Correct and Should be Upheld

149. Argentina also appeals the Panel's finding that Argentina failed to show that the ITC's application of the U.S. statutory requirements contained in Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930 was inconsistent with AD Agreement Articles 11.3 and 3.

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[163] Other Appellant's Submission of Argentina, para. 236.

[164] *Cf. German Sunset*, paras. 103-105 (in the context of the SCM Agreement, discussing the absence of language qualifying the method for self-initiation of a sunset review.)

150. Notwithstanding Argentina's couching of paragraphs 240-247 in terms of an "as applied" challenge, Argentina merely reiterates it attacks upon the statute. Argentina failed to demonstrate that the ITC did not apply a proper standard in the OCTG review. Notably, Argentina does not even mention the OCTG review in its "as applied" challenge.

151. The crux of Argentina's "as applied" argument is that the ITC did not explicitly state what the outer limits of the "reasonably foreseeable time" were for the purposes of this review. Argentina's focus on this point ignores that there is nothing in the Agreement requiring authorities to specify the temporal context of its likely injury determination, let alone identify an exact date cut-off for that analysis. As explained in the preceding section, Article 11.3 is silent on the time frame relevant to a sunset review and imposes no obligations in this respect. Accordingly, the ITC cannot be found to have acted inconsistently with Article 11.3 or Article 3 by failing to specify the precise period that it considered relevant.

152. The Panel correctly found 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.[165] Rather, Article 11.3 provides that the investigating authority must establish on the basis of a sufficient factual basis that revocation of the order would be likely to lead to the continuation or recurrence of injury. In this case, the Panel found that Argentina had failed to demonstrate that the ITC had not met these obligations. Under DSU Article 17.6, the Appellate Body's review is limited to issues of law and legal interpretations and cannot extend to the Panel's factual findings on this matter.[166]

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[165] Panel Report, paras. 7.184, 7.259.

[166] *See* Appellate Body Report, *U.S. – Wheat Gluten*, WT/DS166/AB/R, adopted 19 January 2001, para. 151. As discussed, *supra,* with respect to the panel's review of the ITC's findings concerning

VI. The Panel Found the ITC's Cumulative Analysis was Not Inconsistent With Any Provision of the AD Agreement

153. Section 752(a)(7) of the Tariff Act grants the ITC discretion to engage in a cumulative analysis if: (1) reviews are initiated on the same day; and (2) imports would be likely to compete with one another and with the domestic like product in the United States market. It further provides that the ITC shall not cumulate imports from a country if those imports are likely to have no discernible adverse impact.[167]

154. With respect to OCTG casing and tubing products, the ITC first determined that imports of casing and tubing from each of the subject countries individually were not likely to have no discernible adverse impact on the domestic industry.[168] The ITC than examined whether there was a likelihood of reasonable overlap of competition among the subject imports. It determined that there was and that it was appropriate to evaluate the effects of subject casing and tubing imports from Mexico, Argentina, Italy, Japan and Korea on a cumulated basis.[169]

155. Argentina argued before the Panel, and continues to argue to the Appellate Body, that cumulation cannot be used at all in sunset reviews. In the alternative, Argentina submits that if the Agreement does not prohibit the use of cumulation in sunset reviews, then investigating authorities must comply with the requirements of Article 3.3 before they can conduct a cumulative likely injury analysis in an Article 11.3 sunset review. The Panel properly rejected both of these claims.

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likely volume, price, and impact, the background for this determination showed that during the last period of time in which there was no order, subject imports were able to double their market share and suppress domestic prices during a two-year period.

[167] 19 U.S.C. § 1675a(a)(7) (Exhibit ARG-1.)

[168] ITC Report at 10-11. (Exhibit ARG-54.)

[169] ITC Report at 10-14. (Exhibit ARG-54.)

A. The Panel Correctly Found that The ITC Did Not Act Inconsistently with Article 11.3 of the AD Agreement by Conducting a Cumulative Analysis in the OCTG Sunset Review

156. Argentina argues that because cumulation is not expressly permitted in Article 11.3, the ITC is prohibited from engaging in a cumulative analysis in a sunset review.[170] Argentina's position turns elementary principles of treaty interpretation on their head. The treaty interpreter is to interpret the ordinary meaning of the terms of the treaty in their context and in light of the treaty's object and purpose.[171] Accordingly, the genesis of any obligation arising under the WTO Agreement is the text of the relevant provision.[172] Absent a textual basis, the rights of Members cannot be circumscribed.

157. The Appellate Body has recognized that silence in an Agreement must have some meaning.[173] Members are free to do that which is not prohibited. In this situation, where nothing in the text of the AD Agreement prohibits cumulation and Article 11.3 is silent on the subject, the Panel drew the only logical conclusion, *i.e.*, that cumulation is permitted.

158. The Panel properly rejected Argentina's contention that Article 11.3 prohibits a cumulative assessment for the purposes of the likely injury determination. As the Appellate Body recognized in *EC – Pipe Fittings*, imports from a group of countries may cumulatively

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[170] Other Appellant's Submission of Argentina, paras. 253-276.

[171] *Vienna Convention on the Law of Treaties*, art. 31(1); Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline,* WT/DS2/AB/R, adopted 20 May 1996, Sec. III.B.

[172] *See* Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 114; Appellate Body Report, *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, Sec. G.

[173] *German Sunset*, paras. 64-65.

cause injury even if imports from individual countries in the group may not.[174] Accordingly, it would be illogical to require that the injury analysis in sunset reviews be conducted only on a country-specific basis. Such a requirement would require Members to allow antidumping duties to expire even though the expiry of the duty would be likely to lead to continuation or recurrence of injury.

159. Contrary to Argentina's characterization, the Panel did not "sidestep" this issue, when it "considered" the text to be silent on the issue of cumulation in sunset reviews.[175] The text **is** silent on this issue.

160. Given the absence of any explicit textual support for the proposition that cumulation in sunset reviews is prohibited, Argentina attempts to pin its argument on the use of the word duty rather than duties in Article 11.3.[176] The one reference in the text of Article 11.3 to "the duty" in the singular is not convincing. The reference to "any definitive anti-dumping duty" is not necessarily to the singular. Moreover, the reference in Article 11.3 to "the duty" is merely descriptive and is not evidence that the drafters intended to prohibit cumulation.

161. As the Panel noted, the title of Article 11 in fact contains the word "duties" and not "duty."[177] The Panel reasonably found that this further indicates that the drafters did not intend to convey any 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.

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[174] Appellate Body Report, *European Communities - Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted August 18, 2003 *("EC– Pipe Fittings")*, para. 116.

[175] Other Appellant's Submission of Argentina, para. 263.

[176] Other Appellant's Submission of Argentina, paras. 257-261.

[177] Panel Report, para. 7.334.

162. Argentina's citation to the language of Article VI of GATT 1994 does not support, but instead detracts from, its argument.[178] Argentina ignores that Article VI:6 of GATT 1994, in requiring an injury evaluation for purposes of an original investigation, refers to the levying of an anti-dumping (or countervailing) *duty*. Specifically, Article VI:6 states that:

> No contracting party shall levy any anti-dumping or countervailing *duty* on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten to cause material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry. (Emphasis added).

163. Cumulation in antidumping investigations was widespread among GATT contracting parties under Article VI, even prior to the adoption of Articles 3.3 and 11.3 of the AD Agreement in the Uruguay Round.[179] Argentina has not disputed this point.[180] It makes no sense for Argentina to be arguing that reference to the same word in Article 11.3 somehow indicates an intention to prohibit cumulation in sunset reviews. Argentina's "textual" arguments in support of its contention that the cumulation is prohibited in sunset reviews are unpersuasive.[181]

164. Argentina also claims that cumulation is inconsistent with the object and purpose of the Agreement and the sunset provisions. The only object and purpose which Argentina cites, however, is that each WTO Member individually is entitled to the right not to have antidumping

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[178] Other Appellant's Submission of Argentina, para. 272.

[179] *See* The GATT Uruguay Round, A Negotiating History (1986-1992), (T. Stewart, Ed.) at 1475-1478, 1594, and 1598 (Exhibit US-27).

[180] Indeed, as the Panel noted, throughout Article 3, as well as in other Articles of the Agreement, the drafters referred to "dumped imports," without any specification of country. As the Panel found, this 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." Panel Report, para. 7.333.

[181] Other Appellant's Submission of Argentina, paras. 257-262.

measures "continue into perpetuity.[182] Despite its mention of the object and purpose of the *treaty,* which is the relevant principle of treaty interpretation,[183] Argentina's argument demonstrates that it truly is focusing on what it believes to be the object and purpose of Article 11.3. However, the purpose of a provision is to be found in its language, and it is that language which a treaty interpreter must consider; there is no basis for altering a provision's meaning based on speculation as to its purpose. Moreover, Argentina's speculation is at odds with the very language of Article 11.3. If Article 3 were merely intended to effect ministerial rescission of antidumping duties, there would be no need to inquire as to whether expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.

165. Argentina's proposed prohibition itself would be illogical and run counter to providing a remedy to protect domestic industries from injury caused by dumped imports). The Appellate Body explained the rationale behind the practice of cumulation in investigations in its report in *EC - Pipe Fittings*:

> A cumulative analysis logically is premised on a recognition that the domestic industry faces the impact of the "dumped imports" as a whole and that it may be injured by the total impact of the dumped imports, even though those imports originate from various countries. If, for example, the dumped imports from some countries are low in volume or are declining, an exclusively country-specific analysis may not identify the causal relationship between the dumped imports from those countries and the injury suffered by the domestic industry. The outcome may then be that, because imports from such countries could not individually be identified as causing injury, the dumped imports from these countries would not be subject to anti-dumping duties, even though they are in fact causing injury.[184]

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[182] Other Appellant's Submission of Argentina, paras. 273-274.
[183] *Vienna Convention on the Law of Treaties*, Art. 31(1).
[184] *EC Pipe Fittings*, para. 116.

166. Just as imports from several countries may cumulatively cause injury in an original investigation, the lifting of antidumping duty orders on imports from those same countries may result in the continuation or recurrence of injury. Argentina posits that cumulation should not be allowed in sunset reviews because such allowance would leave too much to the "caprice" of the investigating authorities,[185] but Argentina has not shown that there was anything "capricious" about the ITC's determination to cumulate imports in this review. In any event, an authority's sunset determination, like any other action it takes under the Agreement, must be based on an unbiased and objective evaluation of the facts in accordance with Article 17.6(i).

167. Argentina's discussion of the reasons why it believes cumulation is not fair in sunset reviews has no bearing on what the Agreement requires.[186] The fact is that the Agreement simply does not prohibit cumulation in sunset reviews. Furthermore, many of the complaints Argentina has about permitting cumulation in a sunset review echo those rejected by the panel and Appellate Body in *EC – Pipe Fittings*, concerning use of a cumulative analysis in an original investigation.

168. Perhaps recognizing this, Argentina attempts to distinguish the rationale of *EC – Pipe Fittings* from the circumstances of a sunset review.[187] Argentina's arguments, however, amount to no more than hypothetical scenarios that do not apply to this case. For example, Argentina's contention is based on circumstances where "there is no credible sign of [the subject imports'] return. Those hypothetical facts are inapposite to this case.

169. Argentina seeks to bolster its argument that cumulation is not permitted in sunset reviews

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[185] *See* Other Appellant's Submission of Argentina, para. 253.
[186] *E.g.*. Other Appellant's Submission of Argentina, paras. 67-68 & n.44, 266-268.
[187] Other Appellant's Submission of Argentina, paras. 266-268.

by noting that there is no explicit cross-reference to cumulation or to Article 3.3 in the context of Article 11.[188] The lack of cross-referencing indicates just the opposite of what Argentina says it means. A cross-reference to an obligation is necessary where the drafters seek to assert a broader obligation. There is no need to cross-reference to a permissive authority where a right exists absent its limitation in the Agreement.

170. The discussion and references by Argentina to the Appellate Body's analysis in *German Sunset* of the 1.0 percent *de minimis* standard and Article 21.3 of the SCM Agreement support the U.S. interpretation rather than Argentina's interpretation. The Appellate Body found that the 1.0 percent *de minimis* standard set out in Article 11.9 of the SCM Agreement is not implied in Article 21.3 sunset reviews. Accordingly, the Appellate Body found the U.S. application of the different (0.5)*de minimis* standard in sunset reviews was not a violation of Article 21.3.[189]

171. Argentina also relies on the Appellate Body's finding in *Japan Sunset* that Articles 11.3 and 9.2 do not require authorities to make their likelihood determinations on a company-specific basis.[190] We fail to see how this has any relevance to the question of whether cumulation is permitted. If anything, Article 9.2 suggests that "an anti-dumping duty" is not limited to a single country because that article envisions that "an anti-dumping" duty might be applied to "all the supplying countries involved."

172. In sum, because Article 11.3 is silent on the subject of cumulation, the Panel correctly found that a prohibition on cumulation in sunset reviews should not be read into Article 11.3.

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[188] Other Appellant's Submission of Argentina, para. 270.
[189] *German Sunset*, para. 97.
[190] Other Appellant's Submission of Argentina, para. 261, *citing Japan Sunset,* para. 155.

B. The Panel Correctly Found that the ITC Did Not Act Inconsistently with Article 3.3 of the AD Agreement Because Article 3.3 Does Not Apply to Sunset Reviews

173. Argentina argues that the Panel did not address its claim whether the ITC decision to cumulate in this case was inconsistent with Article 11.3.[191] Contrary to Argentina's statement, the Panel addressed and properly rejected all of the arguments that Argentina properly raised before the Panel in this regard. The focus of Argentina's claims concerning cumulation was on whether the Agreement either prohibited cumulation altogether in a sunset review, or, alternatively required the ITC to comply with the condition set out in Article 3.3. The Panel rejected Argentina's argument on both counts, and found that "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."[192]

174. The Panel correctly found that the conditions on cumulation set forth in Article 3.3. for original investigations do not apply to Article 11.3 sunset reviews.[193] The Panel noted that Article 3.3 refers to "antidumping investigations," not to reviews. As the Panel found, the plain meaning of Article 3.3's text – "subject to anti-dumping *investigations*" – indicates that the conditions for cumulation addressed in Article 3.3. apply only to investigations. Article 11 contains no cross-reference to Article 3 that would render it applicable to Article 11 reviews. Moreover, Article 3 does not cross-reference Article 11. The lack of cross-references with

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[191] Other Appellant's Submission of Argentina, para. 69.
[192] Panel Report, paras. 7.335-7.336.
[193] Panel Report, paras. 7.335-7.336.

respect to Articles 3 and 11 provides contextual support that Article 3's limitation on cumulation in original investigations is inapplicable to Article 11 reviews.[194]

175. Nor are there cross-references between Article 11.3 and Article 5 – which addresses the initiation and conduct of original investigations. This should be contrasted to the explicit incorporation in Article 11.4 of the Article 6 evidentiary and procedural requirements, and to the express language applying the provisions of Article 8 and Article 12 *mutatis mutandis* to Article 11.[195]

176. Argentina's suggestion that, if cumulation is permitted in sunset reviews, the limitations of Article 3.3 apply, conflicts with the findings of the Appellate Body in *German Sunset*. As discussed in the previous section, the Appellate Body found that, in the SCM Agreement, the *de minimis* standard found in Article 11.9, the parallel provision to Article 5.8 of the AD Agreement, does not apply to Article 21.3 sunset reviews or, by logical extension, to Article 11.3 reviews under the AD Agreement.

177. As the Appellate Body stated in *German Sunset*:

> [T]he technique of cross-referencing is frequently used in the *SCM Agreement*. ... These cross-references suggest to us that, when the negotiators of the *SCM Agreement* intended that the disciplines set forth in one provision be applied in another context, they did so expressly. In light of the many express cross-references made in the *SCM Agreement*, we attach significance to the absence of any textual link between Article 21.3 reviews and the *de minimis* standard set forth in Article 11.9 [of the SCM Agreement].[196]

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[194] *See German Sunset*, paras. 81, 105 (noting that the lack of cross-references in the parallel provisions of the SCM Agreement.)

[195] AD Agreement, Articles 11.5 and 12.3.

[196] *German Sunset,* para. 69.

178. Similarly, there are no cross-references between Articles 11.3 and Article 5 of the AD Agreement. Nothing in the text of Article 5 of the AD Agreement supports the proposition that the negligibility standard of Article 5.8, which is an express component of an Article 3.3 cumulation test, applies to sunset reviews. In addition, the application of Article 5.8's negligibility thresholds would be unworkable in the context of sunset reviews. In sunset reviews, the investigating authorities are tasked with determining *likely* import volumes not only at some point in the future, but also under different conditions, namely a market without the discipline of an antidumping order. Precise numerical thresholds appropriate for characterization of current import volumes in investigations of current injury, or threat thereof, are simply not workable for characterizing likely volumes of dumped imports in determinations of whether injury will continue or recur in the future and under different conditions. The predictive nature of sunset reviews suggests a need for a flexible standard for cumulation, rather than the strict numerical negligibility threshold applied in the investigative phase.

179. The Panel properly rejected Argentina's attempts to read the conditions of Article 3.3 into Article 11.3.[197] There is nothing in the Agreement requiring investigating authorities to apply the criteria set out in Article 3.3 to an Article 11.3 review.[198]

180. Even if, as Argentina claims, the Panel failed to discuss the factual underpinnings of the ITC's cumulation determination, the DSU does not provide for the Appellate Body to make

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[197] Panel Report, para. 7.336.

[198] The U.S. statute nonetheless allows the ITC to conduct a cumulative analysis in a sunset review only if, *inter alia*, the imports from each subject country would be likely to compete with one another and with the domestic like product in the United States market. Section 752(a)(7) of the Act; 19 U.S.C. § 1675a(a)(7) (Exhibit ARG-1). *See* United States Second Written Submission, para. 28.

factual findings that the Panel failed to make.[199] Moreover, in urging the Appellate Body to make such findings, Argentina has distorted the evidence and the record. For example, in quoting from the passage of the ITC determination regarding likely simultaneous presence of imports from each of the subject countries, Argentina has notably deleted a critical footnote (footnote 82 of the ITC Report). In that footnote, the ITC explained that the imports of casing and tubing from Argentina, as well as from each of the other subject countries, remained simultaneously in the U.S. market in every year since 1996.[200] Argentina is simply wrong factually when it states that "the Argentine product was no longer present in the market" during the review period."[201]

181. In sum, the Appellate Body should uphold the Panel's findings that nothing in the Agreement either prohibits or sets conditions for a cumulative analysis in an Article 11.3 review. The Panel's findings are consistent with the express language of both Articles 3.3 and 5.8, as well as the lack of any cross-reference in Article 11.3 to either Articles 3.3 or 5.8. The Panel's findings are also supported by Appellate Body reports in other sunset cases.

VII. Argentina's Conditional Appeals

182. In the event that the Appellate Body reverses any of the conclusions reached by the Panel as requested by the United States, Argentina requests findings as appropriate on claims that, for reasons of judicial economy, the Panel did not address.[202] The United States addresses each of Argentina's conditional appeals below.

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[199] *See Australia – Salmon*, Appellate Body Report, para. 213.
[200] ITC Report at 14, n.82. *See also* ITC Report at IV-2, Table IV-1.
[201] Other Appellant's Submission of Argentina, para. 68.
[202] Other Appellant's Submission of Argentina, para. 284.

A. U.S. Practice and Article 11.3

183. Argentina argues that the Appellate Body should find that Commerce practice is inconsistent with Article 11.3. The Appellate Body should decline this appeal for several reasons.

1. Argentina's Claim Was Not Within the Terms of Reference of this Dispute

184. The United States argued before the Panel that this claim was not within the terms of reference of this dispute. The Panel decided that it did not need to rule on the issue.[203] Therefore, the Appellate Body, if it decides to address Argentina's claim, must first decide that the claim is within the terms of reference of the dispute. It is not.

185. As the United States pointed out in its first submission (as part of its preliminary ruling request), the only portion of Argentina's panel request that makes any reference at all to an "irrefutable presumption" is section A.4.[204] As noted in the U.S. Appellant Submission, section A.4 is an as applied claim regarding this particular sunset determination, not an as such claim.[205] Further, the plain language of Section A.4 states that the consistent practice is *evidence* of a "virtually irrefutable presumption;" citing "practice" as evidence is not the same as making a claim against "practice." Therefore, it is impossible to construe Argentina's panel request as including a claim against Commerce "practice" as such.

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[203] Panel Report, para. 7.55.
[204] First Written Submission of the United States, para. 116.
[205] *See, e.g.,* U.S. Appellant Submission, para. 92.

2. The Panel Made No Findings Regarding Whether a Practice is a Measure

186. Argentina assumed that "practice" is a measure subject to dispute settlement, and, to buttress this assumption, mischaracterized the Appellate Body's report in *Japan Sunset* as standing for the proposition that "practice" can be challenged.[206] The Panel made no findings in this regard. Therefore, before reaching the merits of Argentina's claim, the Appellate Body would also have to first conclude that "practice" is a measure subject to WTO dispute settlement. Because the Panel engaged in no analysis as to whether practice is such a measure, the Appellate Body would have to "complete the analysis" – which it cannot do given the lack of factual findings by the Panel.

3. The Record Requires the Conclusion that Practice is Not A Measure Subject to Dispute Settlement

187. A review of the evidence before the Panel requires the conclusion that "practice" – agency precedent – is not a measure subject to dispute settlement. As the United States noted in its first written submission; in order for something to be a measure for purposes of WTO dispute settlement, it must "constitute an instrument with a functional life of its own," and that it must "*do* something concrete, independently of any other instruments."[207] "Practice" is not such an instrument. Commerce is not bound by its precedent but may freely depart from it as long as it explains its reasons for doing so.[208] Moreover, as the United States further elaborated in its first

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[206] Second Written Submission of Argentina, para. 87. The Appellate Body did not conclude that practice is subject to dispute settlement, nor is it clear that the "practice" to which the Appellate Body referred in *Japan Sunset* is the kind of "practice" – Commerce precedent – at issue in this dispute.

[207] *Export Restraints,* para 8.85 (italics in original), quoted in First Written Submission of the United States, para. 194.

[208] First Written Submission of the United States, para. 198.

submission, prior panels have already found that Commerce "practice" is not a measure for purposes of the WTO; in the *US - India Plate* dispute, the panel concluded that

> a practice is a repeated pattern of similar responses to a set of circumstances . . . . India argues that at some point, repetition turns the practice into a "procedure", and hence into a measure. We do not agree. That a particular response to a particular set of circumstances has been repeated, and may be predicted to be repeated in the future, does not, in our view, transform it into a measure. Such a conclusion would leave the question of what is a measure vague and subject to dispute itself, which we consider an unacceptable outcome.[209]

188. The United States advanced detailed arguments in connection with this issue in its first submission and in answers to Panel questions.[210] Argentina fails to address this threshold issue in its other appellant's submission, instead moving directly to an empirical assessment of Commerce determinations allegedly illustrating "practice." This assessment is irrelevant in light of the fact that "practice" is not a measure.[211] Further, inasmuch as Argentina before the Panel failed to rebut U.S. evidence on the status of Commerce precedent in U.S. law, the only uncontested facts on the record support a finding that Commerce "practice" is not a measure.

189. Argentina misleadingly states that its empirical evidence, provided in Exhibits ARG-63 and ARG-64, "was not rebutted by the United States, and can therefore be accepted as established fact by the Appellate Body."[212] What the United States in fact said was that it had no reason to doubt the statistics provided by Argentina but that those statistics, and the summary

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[209] *India Steel Plate*, para. 7.22, quoted in First Written Submission of the United States, para. 198.

[210] First Written Submission of the United States, paras. 193-206; Answers to First Set of Panel Questions, paras. 81-82 and n. 77; Answers to Second Set of Panel Questions, para. 19.

[211] *See* Other Appellant's Submission of Argentina, paras. 285-286.

[212] Other Appellant's Submission of Argentina, paras. 287.

chart provided with them, were simply not probative.[213] Therefore, the relevant facts – the probative value and relevance of these statistics – were very much in dispute. Argentina provided no other purported evidence to support its argument that a Commerce "practice" not to consider "additional factors" exists and is WTO-inconsistent. For example, the exhibits Argentina supplied to the Panel in no way demonstrated that Commerce failed to take "additional factors" into account. The "evidence" in these exhibits demonstrated at best a *correlation* between the existence of one of the factors in the Sunset Policy Bulletin ("SPB") and the outcome in a given dispute; it demonstrated nothing about Commerce's consideration of additional factors in any of the determinations allegedly illustrating this "practice." Therefore, the evidence does not even establish what Argentina has argued, leaving aside that even had it done so, this would not constitute an Article 11.3 violation.

B. U.S. Practice and Article X:3(a) of the GATT 1994

190. Similarly, Argentina asks the Appellate Body to make a finding on its Article X:3(a) claim, should the Panel's conclusions be reversed.

1. This Claim is Not Within the Terms of Reference of This Dispute

191. Just as Argentina's claim regarding U.S. practice and Article 11.3 is not within the terms of reference of this dispute, neither is its claim regarding U.S. practice and Article X:3(a) of the GATT 1994. As the United States noted in its first submission, the only portion of Argentina's panel request that even mentions Article X:3(a) is Section A.4.[214] However, as discussed above, Section A.4 is an as applied claim regarding the particular sunset determination at issue in this

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[213] *See* First Written Submission of the United States, paras. 183-187; Answers to First Set of Panel Questions, paras. 16 and 17-19.

[214] First Written Submission of the United States, para. 122.

dispute. Argentina refers to practice as *evidence* in support of this "as-applied" claim but does not make a claim regarding the practice itself.

192. The Panel erroneously concluded that this claim was in fact within the terms of reference of this dispute.[215] However, its reasons for doing so undermine its conclusion. The Panel dismissively stated that the U.S. arguments in connection with this claim were the same as those raised in connection with the Page Four claims. This is untrue and is contradicted by the U.S. arguments to the Panel.[216] Moreover, it is confirmed by the Panel's own discussion of the analogous Article 11.3 claim, where the Panel recognized that the U.S. argument pertained to the language of section A.4, not Page Four.[217] The Panel provided no further explanation as to why it considered the practice claim with respect to Article X:3(a) to be within the terms of reference.[218] It is therefore impossible to conclude that the Panel's finding is a reasoned one based on an objective assessment of the matter before it. As a result, the Appellate Body should reverse the Panel's conclusion that Argentina's Article X:3(a) claim is within the terms of reference of this dispute. For the reasons set forth above and in the U.S. preliminary ruling request and answers to panel questions, the Appellate Body should conclude that this claim is not within this dispute's terms of reference. Even if the Appellate Body considers this claim, it fails for substantive reasons as well, described below.[219]

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[215] Panel Report, para. 7.59.

[216] First Written Submission of the United States, paras. 121-122 ("The only portion of Argentina's panel request that makes any reference at all to Article X:3(a) is Section A.4.")

[217] Panel Report, para. 7.56.

[218] Panel Report, para. 7.169.

[219] The United States further notes that Argentina's claim regarding Article X:3(a) appears to be bound up with its "claim" regarding the SPB and Commerce "practice." Argentina stated in its panel request that its Article X:3(a) claim is based on a "virtually irrefutable presumption under U.S. law as such . . . This unlawful presumption is evidence by the consistent practice of the Department in sunset

2. Argentina Seeks to Expand the Measure Alleged to be Inconsistent with Article X:3(a)

193. In the panel request, Argentina indicates that its Article X:3(a) claim relates to Commerce's determination at issue in this dispute. In its panel request Argentina stated that the "Department's Sunset Determination is inconsistent with . . . Article X:3(a) . . . because it was based on a virtually irrefutable presumption under U.S. law as such . . . . This unlawful presumption is evidenced by the consistent practice of the Department in sunset reviews (which practice is based on U.S. law and the Sunset Policy Bulletin)."

194. In its submissions to the Panel, Argentina argued that the United States failed to administer "U.S. antidumping laws, regulations, decisions, and rulings with respect to the Department's sunset reviews of antidumping duty order" in a manner consistent with Article X:3(a).[220] Argentina never specified what these laws, regulations, decisions, and rulings were. Now, in its other appellant's submission, Argentina seems to indicate that *all* of the measures *mentioned anywhere* in its panel request are included in this claim – including the final determination of the ITC, which was not mentioned in the section, paragraph, or sentence of the panel request containing the Article X:3(a) claim, nor was it mentioned in Argentina's written submissions to the Panel.[221] Argentina simply cannot before the Appellate Body expand the scope of claims presented to the Panel.[222]

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reviews (which practice is based on U.S. law and the Sunset Policy Bulletin.)Thus, a finding that U.S. law and the SPB establish such an irrefutable presumption is a condition precedent to Argentina's Article X:3(a) claim.

[220] *See* First Written Submission of Argentina, para. 194.

[221] Other Appellant's Submission of Argentina, para. 293.

[222] If, on the other hand, Argentina were to deny that it is arguing in its other appellant's submission that all of the measures identified in the panel request are subject to its Article X:3(a) claim, then Argentina has provided *no description anywhere* in this dispute of the measures that

195. Argentina's continuing efforts to expand the measures forming the basis for its Article X:3(a) claim can be traced directly back to the flaws in its panel request. Argentina failed to specify the "laws, regulations, decisions, and rulings" that are allegedly inconsistent with Article X:3(a). Section A.4 of the panel request, where this claim is purportedly found, states that the virtually irrefutable presumption is under U.S. law as such. No further specificity is provided.[223]

196. A plain reading of the panel request indicates that the only measure subject to the Article X:3(a) claim is Commerce's sunset review in this dispute. The United States will address below why this claim must fail. In addition, the United States will also address the other "measures" Argentina now appears to be including in its Article X:3(a) claim.

3. Argentina's Claim Does Not Meet the Requirements of Article X:3(a)

197. If the measure subject to Argentina's Article X:3(a) claim is Commerce's sunset determination, that claim must fail. Article X:3(a) claims pertain to the *administration* of laws. Argentina has advanced no argument as to how Commerce's determination in this sunset review affects the administration of U.S. laws under Article X:3(a). For example, the panel in *Japan Sunset* rejected Japan's argument that a single determination could be inconsistent with Article X:3(a), noting that

> a primary threshold issue would be whether the determinations of the US investigating authorities in the instant sunset review have had a significant impact on the administration of US sunset review legislation. That does not seem to be

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form the basis of its Article X:3(a) claim.

[223] Argentina appears to be arguing that any of the measures identified anywhere in its panel request are measures identified in connection with the Article X:3(a) claim. *See* Other Appellant's Submission of Argentina, para. 293. "The U.S. measures identified by Argentina in its Panel request, including the final determinations of the Department and the Commission, as well as certain U.S. laws, regulations, procedures, and administrative decisions, clearly fall within the types of laws and regulations enumerated in Article X:1."

> the case here because the sunset review at issue is one of the many other reviews conducted by the United States and the United States seemingly applies the same provisions of its domestic legislation in all these sunset reviews. The thrust of the claims in these panel proceedings is the alleged inconsistency of US law with relevant WTO provisions. The claims challenging the application US law in the instant sunset review appear to have been derived from the main claims dealing with the US law as such.[224]

Because Argentina has offered no evidence that this determination has had a "significant impact" on U.S. administration of its sunset review law, this claim must be rejected.

198. Even if Argentina's panel request could somehow be read to include a claim against other measures, the claim must still fail. First, the only conceivable reference to other measures in the panel request language dealing with Article X:3(a) is the passing reference to "US law as such" in section A.4. As noted above, this "US law" is never identified. This level of imprecision renders it impossible to draw conclusions about the consistency of U.S. administration of any specific laws. Argentina never identifies the laws, let alone explains how the administration of each of them breaches Article X:3(a). Argentina has thus failed even to attempt to present a *prima facie* case.

199. Another way in which Argentina fails to meet its burden of proof in connection with its Article X:3(a) claim lies in its exclusive reliance on statistical evidence as support for its claim. The statistical evidence provided by Argentina ultimately only demonstrates that in 87 of sunset reviews, the issue of likelihood of dumping was simply not contested. The failure of respondent interested parties to contest the likelihood of dumping cannot be imputed to Commerce.

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[224] *Japan Sunset Panel*, paras. 7.307, 7.308.

200. Regardless, aside from the statistical evidence, Argentina has provided no substantive evidence to support its claim that U.S. laws are being administered in a partial or unreasonable manner. Contrary to Argentina's unsupported assertion, it is not *inherently* unreasonable to make 35 affirmative determinations (the number left after the uncontested ones are subtracted); in its other appellant's submission, Argentina has not even attempted to provide evidence that any of the determinations in those reviews, with the exception of the current one, were erroneous or reflected bias or lack of reasonableness. Argentina has, quite simply, not met its burden of proof with respect to this claim.[225]

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[225] *See* U.S. arguments on this claim in its First Written Submission, paras, 269-275. In its other appellant's submission, Argentina provides a citation to its submissions to the Panel regarding this issue. Even were Argentina's arguments to the Panel considered, the conclusion that Argentina has not met its burden would remain unchanged. A review of those arguments confirms that the substance of Argentina's claim is not against U.S. administration of its antidumping laws but against the substance of some of those laws. For example, Argentina argued that in some sunset proceedings, Commerce applied its "50 percent" threshold to deny a foreign interested party's attempt to participate in the sunset proceeding. First Written Submission of Argentina, para. 207. Aside from the fact that this description mischaracterizes U.S. law – foreign interested parties are not denied the right to participate in sunset reviews because the aggregate responses account for less than 50 percent of the total responses – this challenge at its heart is of Commerce's regulations providing for a 50 percent threshold, 19 CFR 351.218(e)(1)(ii). Indeed, Argentina included section (e) of the regulations in Section A.1 of its panel request and alleged it to be inconsistent with Articles 12, 2, 6, and 12 of the Antidumping Agreement, but ultimately did not pursue this specific claim, nor did the Panel make any findings with regard to it.

Similarly, when the United States rebutted Argentina's claim regarding the relevance of a simple statistical analysis by noting that in the vast majority of reviews, foreign interested parties failed to respond, Argentina responded by noting that under Article 11.3, administering authorities are nevertheless required to make a determination based on positive evidence. Second Written Submission of Argentina, para. 95. Again, Argentina seems to be arguing an inconsistency with Article 11.3 as such, not an Article X:3(a) breach relating to the administration of a U.S. law. As the Appellate Body has noted, claims against the substance of the law must be made under the applicable WTO provision, not Article X:3(a). Appellate Body Report, *European Communities - Regime for the Importation, Distribution, and Sale of Bananas III,* WT/DS27/AB/R, adopted 25 September 1997, para. 200.

Second, before the Panel, Argentina cited just one review – *Industrial Cellulose from Yugoslavia* – as representative of Commerce's unreasonableness. One review is insufficient to demonstrate that the entire administration of U.S. sunset review law is unreasonable or impartial. Therefore, Argentina failed to meet its burden before the Panel and similarly fails to meet its burden before the Appellate Body.

VIII. Argentina's Request that the Appellate Body Recommend Termination of the Measure

201. Argentina offers an unpersuasive explanation as to why the Appellate Body should recommend that the United States terminate the measure. According to Argentina, this result follows from the "time-bound" nature of Article 11.3; according to Argentina, if a Member's conduct of a sunset review is deficient in any way – no matter how small or large the defect – Article 11.3 does not permit the Member to cure the defect.

202. As a preliminary matter, the United States notes that the Panel stated that in "the circumstances of the present proceedings, we see no particular reason" to recommend termination.[226] In short, the Panel rejected Argentina's argument to the Panel that Article 11.3 requires termination of a measure if the review were conducted in a manner inconsistent with a WTO provision. Argentina is not alleging that the Panel made an error of law or legal interpretation in rejecting Argentina's argument, and the Panel made no such error.

203. Second, Argentina's request is at odds with a Member's right to retain flexibility on how to implement DSB recommendations and rulings. In recognition of this right, prior panels have declined to make suggestions on implementation. This Panel followed that approach, and there is no reason to deviate from it. Whether Article 11.3 has a "time-bound" obligation is immaterial; Argentina has offered no logical or legal justification as to why Members cannot correct breaches of so-called time-bound provisions as they do breaches of any other obligation.

204. Indeed, the core of Argentina's argument is that a suggestion to terminate is necessary precisely because the United States will otherwise correct "retroactively" a violation of Article

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[226] Panel Report, para. 8.5.

11.3 and thus supposedly render the obligation to terminate an antidumping order after five years meaningless.[227] Argentina's argument finds no basis in the text of Article 11.3; the obligation under Article 11.3 is for a Member to terminate a measure unless it *initiates* a review before the expiry of the five-year period, not that it complete a WTO-consistent review before then. Further, Article 11.3 provides that the duty may remain in force pending the outcome of the review. Even if the review in this dispute were found inconsistent with Article 11.3, it will remain true that the United States timely initiated the review. And, even were it incorrectly concluded that the United States breached Article 11.3, there is no reason why such a breach could not be corrected.

205. For these reasons, the Appellate Body should reject Argentina's request that it recommend termination of the measure.

IX. Conclusion

206. For the foregoing reasons, the United States respectfully requests that the Appellate Body affirm the Panel's findings and conclusions in paragraphs 7.258-7.260, 7.268-7.312, 7.317, 7.322, 7.325-7.338, and 8.1(e)(i)(ii)& (iii) of the Panel Report, that the United States did not act inconsistently with Article 11.3 or Article 3 of the AD Agreement in making its determination regarding the likelihood of continuation or recurrence of injury. If the Appellate Body finds that Argentina's panel request was sufficiently clear to raise an *as such* claim concerning the statutory "reasonably foreseeable time" standard, the Appellate Body should affirm the Panel's findings and conclusions in paragraphs 7.178-7.193 and 8.1(c), that Argentina has failed to show that

[227] Other Appellant's Submission of Argentina, paras. 307 and 303.

Sections 752(a)(1) and (5) of the Tariff Act are inconsistent with Article 11.3 or Articles 3.7 and 3.8 of the AD Agreement.

207. The United States also respectfully requests that the Appellate Body decline Argentina's conditional appeals.