WORLD TRADE ORGANIZATION

WT/DS268/AB/RW
12 April 2007

(07-1455)

Original: English

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY ARGENTINA

AB-2007-1

Report of the Appellate Body

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EC – Bed Linen (Article 21.5 – India)	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, adopted 24 April 2003, modified by Appellate Body Report, WT/DS141/AB/RW, DSR 2003:IV, 1269
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US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005
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Short Title	Full Case Title and Citation
US – Offset Act (Byrd Amendment)	Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234/R, adopted 27 January 2003, modified by Appellate Body Report, WT/DS217/AB/R, WT/DS234/AB/R, DSR 2003:II, 489
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257
US – Oil Country Tubular Goods Sunset Reviews	Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/R and Corr.1, adopted 17 December 2004, modified by Appellate Body Report, W/DS/268/AB/R, DSR 2004:VIII, 3421
US – Oil Country Tubular Goods Sunset Reviews	Award of the Arbitrator, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Arbitration under Article 21.3(c) of the DSU*, WT/DS268/12, 7 June 2005
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/RW, circulated to WTO Members 30 November 2006
US – Section 211 Appropriations Act	Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, 589
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US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006
US – Softwood Lumber VI (Article 21.5 – Canada)	Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/RW, adopted 9 May 2006, modified by Appellate Body Report, WT/DS277/AB/RW
US – Tobacco	GATT Panel Report, *United States Measures Affecting the Importation, Internal Sale and Use of Tobacco*, DS44/R, adopted 4 October 1994, BISD 41S/131
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Definition
Anti-Dumping Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
OCTG	oil country tubular goods
original panel	panel in the *US – Oil Country Tubular Goods Sunset Reviews* proceedings
original panel report	Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*
Panel	Panel in these *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* proceedings
Panel Report	Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*
Regulations	*United States Code of Federal Regulations*
SPS Agreement	*Agreement on the Application of Sanitary and Phytosanitary Measures*
Tariff Act	United States Tariff Act of 1930, as amended
URAA	Uruguay Round Agreements Act
USDOC	United States Department of Commerce
USITC	United States International Trade Commission
Working Procedures	*Working Procedures for Appellate Review*, WT/AB/WP/5, 4 January 2005
WTO	World Trade Organization
WTO Agreement	*Marrakesh Agreement Establishing the World Trade Organization*

WORLD TRADE ORGANIZATION
APPELLATE BODY

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

Recourse to Article 21.5 of the DSU by Argentina

United States, *Appellant/Appellee*
Argentina, *Other Appellant/Appellee*

China, *Third Participant*
European Communities, *Third Participant*
Japan, *Third Participant*
Korea, *Third Participant*
Mexico, *Third Participant*

AB-2007-1

Present:

Taniguchi, Presiding Member
Janow, Member
Unterhalter, Member

I. Introduction

1. The United States and Argentina each appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina, Recourse to Article 21.5 of the DSU by Argentina* (the "Panel Report").[1] The Panel was established to consider a complaint by Argentina concerning the consistency with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") and the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*") of measures taken by the United States to comply with the recommendations and rulings of the Dispute Settlement Body (the "DSB") in the original proceedings in *US – Oil Country Tubular Goods Sunset Reviews*.[2]

2. In the original proceedings, Argentina challenged various aspects of United States laws, regulations, and procedures relating to the conduct of sunset reviews. For purposes of these proceedings pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), the relevant laws and regulations are those relating to the waiver of an exporter's right to participate in the review conducted by the United States Department of

[1]WT/DS268/RW, 30 November 2006.

[2]The recommendations and rulings of the DSB resulted from the adoption on 17 December 2004, by the DSB, of the Appellate Body Report, WT/DS268/AB/R, and the Panel Report, WT/DS268/R, in *US – Oil Country Tubular Goods Sunset Reviews*. In this Report, we refer to the panel in these Article 21.5 proceedings as the "Panel", and to the panel that considered the original complaint brought by Argentina as the "original panel" and to its report as the "original panel report".

Commerce (the "USDOC"). At the time of the original proceedings, two waiver situations were contemplated under United States laws and regulations: (i) the so-called "affirmative waiver", where an exporter explicitly waives its right to participate pursuant to Section 751(c)(4)(A)[3] of the United States Tariff Act of 1930 (the "Tariff Act"); and (ii) the so-called "deemed waiver", where an exporter, through silence or failure to submit a complete substantive response to a notice of initiation of a sunset review by the USDOC, was "deemed" to have waived its right to participate pursuant to Section 351.218(d)(2)(iii) of the *United States Code of Federal Regulations* (the "Regulations"). Argentina also challenged in the original proceedings several aspects of the sunset review conducted by the USDOC and the United States International Trade Commission (the "USITC") of the anti-dumping duty order on oil country tubular goods ("OCTG") imported from Argentina.[4]

3. The following conclusions of the original panel are relevant for purposes of these Article 21.5 proceedings:

> (a) In respect of waiver provisions of [United States] law:
>
> (i) The provisions of Section 751(c)(4)(B) of the Tariff Act relating to affirmative waivers are inconsistent with the investigating authorities' obligation to determine likelihood of continuation or recurrence of dumping under Article 11.3 of the Anti-Dumping Agreement,
>
> (ii) The provisions of Section 351.218(d)(2)(iii) of the USDOC's Regulations relating to deemed waivers are inconsistent with the investigating authorities' obligation to determine likelihood of continuation or recurrence of dumping under Article 11.3 of the Anti-Dumping Agreement,
>
> ...
>
> (d) In respect of the USDOC's determinations in the OCTG sunset review:
>
> (i) The USDOC acted inconsistently with Article[] 11.3 ... of the Anti-Dumping Agreement[.][5] (original underlining)

[3]Section 751 of the United States Tariff Act of 1930 is codified as Section 1675 of Title 19 of the *United States Code*. See Exhibit ARG-33 submitted by Argentina to the Panel.

[4]Original Panel Report, para. 3.1.

[5]*Ibid*., para. 8.1.

4. On appeal, the Appellate Body upheld the original panel's findings that Section 751(c)(4)(B) of the Tariff Act and Section 351.218(d)(2)(iii) of the Regulations are inconsistent as such with Article 11.3 of the *Anti-Dumping Agreement*.[6] There was no appeal of the original panel's finding that the USDOC's sunset determination on Argentine OCTG is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

5. The original panel and Appellate Body reports were adopted by the DSB on 17 December 2004.[7] The "reasonable period of time" for the United States to implement the DSB's recommendations and rulings was determined by arbitration pursuant to Article 21.3(c) of the DSU. The Arbitrator determined a "reasonable period of time" of 12 months, expiring on 17 December 2005.[8]

6. On 28 October 2005, the USDOC announced that it was amending its Regulations relating to sunset reviews.[9] In particular, the USDOC amended Section 351.218(d)(ii) relating to "affirmative" waivers and repealed Section 351.218(d)(iii) relating to "deemed" waivers.[10] The amendments became effective on 31 October 2005 and were applicable to sunset reviews initiated on or after that date. Section 751(c)(4) of the Tariff Act was not changed.

7. On 2 November 2005, the USDOC initiated Section 129 proceedings to address the original panel's and Appellate Body's findings adopted by the DSB regarding the sunset review on Argentine OCTG. The USDOC's Section 129 Determination[11] was issued on 16 December 2005. In the Section 129 Determination, the USDOC found that "there [was] likelihood of continuation or recurrence of dumping had the antidumping duty order on OCTG from Argentina been revoked in 2000, *i.e.*, at the end of the original sunset review period."[12]

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[6]Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*, para. 365(c)(i).

[7]WT/DS268/8.

[8]Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews*, para. 53.

[9]Procedures for Conducting Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, Final rule, *United States Federal Register*, Vol. 70, No. 208 (28 October 2005), pp. 62061-62064 (Exhibit ARG-12 submitted by Argentina to the Panel).

[10]The text of these provisions, before and after the amendments, as well as the text of Section 751(c)(4)(B) of the Tariff Act, are set out *infra* at paras. 106-107, and footnotes 207 and 246.

[11]USDOC Memorandum from S. Claeys to J.A. Spetrini, "Section 129 Determination: Final Results of Sunset Review, Oil Country Tubular Goods from Argentina", A-357-810 (16 December 2005) (Exhibit ARG-16 submitted by Argentina to the Panel).

[12]Section 129 Determination, *supra*, footnote 11, p. 11.

8. Argentina considered that the United States had failed to bring its measures into conformity with the United States' obligations under the *Anti-Dumping Agreement* and the *WTO Agreement* and requested that the matter be referred to a panel pursuant to Article 21.5 of the DSU. On 17 March 2006, the DSB referred the matter to the original panel. Before the Panel in these Article 21.5 proceedings, Argentina claimed that the amendments to the USDOC's Regulations and the Section 129 Determination failed to bring the United States into compliance with the recommendations and rulings of the DSB, and the United States thereby continued to act inconsistently with, *inter alia*, Articles 11.3 and 11.4 of the *Anti-Dumping Agreement*.[13]

9. The Panel Report was circulated to the Members of the World Trade Organization (the "WTO") on 30 November 2006. The following conclusions of the Panel are relevant for purposes of this appeal:

> (a) The United States waiver provisions under Section 751(c)(4)(B) of the Tariff Act, operating in conjunction with Section 751(c)(4)(A) of the Tariff Act and Section 351.218(d)(2) of the Regulations, remain *inconsistent* with Article 11.3 of the [Anti-Dumping] Agreement,
>
> (b) The USDOC did *not* act *inconsistently* with Articles 11.3 and 11.4 of the [Anti-Dumping] Agreement by developing a *new* factual basis for its Section 129 Determination, [and]
>
> (c) The USDOC acted *inconsistently* with Article 11.3 of the [Anti-Dumping] Agreement as the Section 129 Determination that dumping was likely to continue or recur lacked a sufficient factual basis with regard to its analysis of both (1) likely past dumping and (2) volume[.][14] (original emphasis)

10. The Panel concluded that, "[s]ince the original DSB recommendations and rulings in 2004 remain operative, [it] make[s] no new recommendation."[15]

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[13]Panel Report, para. 3.1.

[14]*Ibid*., para. 8.1. In addition, the Panel concluded that the USDOC acted inconsistently with Article 6.4 of the *Anti-Dumping Agreement*—because it did not give the Argentine exporters timely opportunities to see certain information that the USDOC used in its Section 129 Determination—and with Article 6.5.1—because the USDOC did not require a petitioner submitting confidential information to submit a non-confidential summary thereof. (*Ibid*., para. 8.1(e) and (f)) However, the Panel rejected Argentina's claims that the USDOC acted inconsistently with Articles 6.1, 6.2, 6.6, and 6.9 of the *Anti-Dumping Agreement*. (*Ibid*., para. 8.1(d), (g), and (h))

[15]*Ibid*., para. 8.2. (footnote omitted)

11. Argentina made a request, pursuant to Article 19.1 of the DSU, "that the Panel suggest that the United States bring its measures into conformity with its WTO obligations by revoking the anti-dumping order at issue."[16] In response, the Panel stated that, "[i]n the circumstances of the present proceedings, ... we see no particular reason to make such a suggestion and therefore decline Argentina's request."[17]

12. On 12 January 2007, the United States notified the DSB, pursuant to Article 16.4 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Appeal[18] pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[19] On 19 January 2007, the United States filed an appellant's submission.[20] On 24 January 2007, Argentina notified the DSB, pursuant to Article 16.4 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Other Appeal[21] pursuant to Rule 23(1) and (2) of the *Working Procedures*. On 29 January 2007, Argentina filed an other appellant's submission.[22] On 5 February 2007, the European Communities filed a third participant's submission.[23] On 6 February 2007, Argentina and the United States each filed an appellee's submission.[24] On the same day, China and Japan each filed a third participant's submission[25], and Korea and Mexico each notified the Appellate Body Secretariat of its intention to appear at the oral hearing and to make an oral statement.[26]

13. The oral hearing in this appeal was held on 19 February 2007. The participants and the third participants presented oral arguments and responded to questions posed by the Members of the Division hearing the appeal.

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[16]Panel Report, para. 9.1.

[17]*Ibid.*, para. 9.4.

[18]WT/DS268/19 (attached as Annex I to this Report).

[19]WT/AB/WP/5, 4 January 2005.

[20]Pursuant to Rule 21 of the *Working Procedures*.

[21]WT/DS268/20 (attached as Annex II to this Report).

[22]Pursuant to Rule 23(3) of the *Working Procedures*.

[23]Pursuant to Rule 24(1) of the *Working Procedures*.

[24]Pursuant to Rules 22 and 23(4) of the *Working Procedures*.

[25]Pursuant to Rule 24(1) of the *Working Procedures*.

[26]Pursuant to Rule 24(2) of the *Working Procedures*.

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by the United States – Appellant*

1. Amended Waiver Provisions

14. The United States requests that the Appellate Body reverse the Panel's finding that Section 751(c)(4)(B) of the Tariff Act, operating in conjunction with Section 751(c)(4)(A) of the Tariff Act and Section 351.218(d)(2) of the Regulations (collectively, the "amended waiver provisions") are inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. The United States makes three claims in this regard: (i) that the Panel committed a legal error when it considered whether Section 751(c)(4)(B) of the Tariff Act *could* breach Article 11.3 of the *Anti-Dumping Agreement*, rather than considering whether the statute *mandates* a breach; (ii) that the Panel inappropriately shifted from Argentina to the United States the burden of providing arguments and evidence; and (iii) that the Panel failed to make an objective assessment of the matter, as required by Article 11 of the DSU.

(a) The Panel's Approach to Examining the Consistency of the Amended Waiver Provisions with Article 11.3 of the *Anti-Dumping Agreement*

15. The United States asserts that the Panel correctly stated that its task was to consider whether Section 751(c)(4)(B) of the Tariff Act precludes the USDOC from making, in some or all situations, a reasoned determination of likelihood of continuation or recurrence of dumping if the order were revoked, as required under Article 11.3 of the *Anti-Dumping Agreement*. According to the United States, the Panel's formulation of its task in this way amounted to "a variation on the classic mandatory/discretionary distinction used in determining whether a statutory provision 'as such' breaches a particular WTO obligation."[27]

16. According to the United States, the Panel set out the proper test and then failed to apply it. The United States explains that the Panel correctly noted that, under United States law, determinations of likelihood of dumping for purposes of sunset reviews are conducted on an order-wide basis.[28] An individual respondent company may elect to waive participation in a sunset review, pursuant to Section 751(c)(4)(A) of the Tariff Act, with the effect that an affirmative finding of likelihood of

[27]United States' appellant's submission, para. 9 (referring to Appellate Body Report, *US – Section 211 Appropriations Act*, para. 259, in turn referring to Appellate Body Report, *US – 1916 Act*, para. 88, and GATT Panel Report, *US – Tobacco*, para. 118). According to the United States, the effect of the finding in the GATT Panel Report in *US – Tobacco* is that, in order for a statute to be WTO-consistent, it "need not unambiguously require a WTO-consistent result"; rather, it need only "permit" one. (United States' appellant's submission, para. 13)

[28]*Ibid*., para. 11 (referring to Panel Report, paras. 7.37-7.38).

dumping will be made for that company under Section 751(c)(4)(B). Section 351.218(d)(2)(ii) of the Regulations provides that the election not to participate in the sunset review must be effectuated by filing a "statement of waiver", which must now include a statement that the respondent interested party is likely to dump if the order were revoked or the investigation were terminated.

17. The United States asserts that the Panel ultimately concluded that the "USDOC 'will have to find likelihood [of dumping] on an order-wide basis if one exporter waives its right to participate'"[29], notwithstanding the United States' explanation that this was not a result required under United States law. The United States argues that the Panel did not examine whether Section 751(c)(4)(B) precludes a reasoned and adequate order-wide determination consistent with Article 11.3 of the *Anti-Dumping Agreement* but, rather, the Panel "examined just the opposite"[30], namely, whether there were any provisions of United States law that preclude Section 751(c)(4)(B) from requiring an affirmative order-wide determination where one respondent company waives its right to participate. The Panel thereby misdirected itself and reversed the standard enunciated in *US – Tobacco*, making it incumbent on the United States to show that the provisions of United States law definitively foreclose any opportunity that order-wide determinations might be affected by company-specific determinations, and that United States law establishes that these two determinations are "independent".[31]

18. The United States argues further that, on the basis of the mandatory/discretionary standard, the Panel's factual recognition that "[t]here is no provision under [United States] law, statutory or otherwise ..., that determines the outcome of the USDOC's order-wide sunset determinations" should have obliged the Panel to find that Section 751(c)(4)(B) did not breach Article 11.3.[32] According to the United States, if there is nothing in United States law requiring the USDOC to reach a particular outcome in its order-wide sunset determinations, then, by definition, Section 751(c)(4)(B) neither precludes, nor requires, a particular result in order-wide determinations. The United States criticizes the Panel for, instead, concluding on this factual basis that Section 751(c)(4)(B) of the Tariff Act did breach Article 11.3 of the *Anti-Dumping Agreement* and for, in the process, rejecting the United States' explanation that, in making its affirmative order-wide determinations, the USDOC does not rely only on a company-specific finding pursuant to Section 751(c)(4)(B) but, rather, on all the evidence on the record.[33]

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[29]United States' appellant's submission, para. 11 (quoting Panel Report, para. 7.39).

[30]*Ibid*., para. 11.

[31]*Ibid*., para. 13 (referring to Panel Report, para. 7.39).

[32]*Ibid*., para. 12 (quoting Panel Report, para 7.37).

[33]*Ibid*., para. 12.

(b) Burden of Proof

19. The United States claims that the Panel relieved Argentina of its burden to provide arguments and evidence establishing that the amended waiver provisions are inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. According to the United States, the Panel relied on "pure speculation" in finding that the USDOC "will" have to find likelihood of dumping on an order-wide basis if one company waives its right to participate.[34] Specifically, the United States cites as "speculative" various statements in which the Panel suggested that company-specific determinations of likelihood of dumping made pursuant to Section 751(c)(4)(B) of the Tariff Act have a determinative impact on the order-wide determination.[35] The United States also questions the basis of the Panel's statement that the USDOC would not consider evidence submitted by exporters who do not waive their right to participate in the USDOC's sunset review investigation.[36] According to the United States, the Panel's reasoning in arriving at these conclusions is "not logical" and "does not hold up on its face".[37] Further, the United States argues that the Panel failed to support its "speculations" with factual evidence, which in any event would have been impossible since Argentina had never even made the arguments apparently relied on by the Panel.[38] The United States contends that the Panel thereby erroneously shifted the burden of proof to the United States to disprove "unproven assertions".[39]

20. The United States recalls that the burden of proof was on Argentina to demonstrate that the statute could not be applied in a manner consistent with Article 11.3. Instead, the Panel wrongly considered that it was for the United States to illustrate that, under United States law, order-wide and company-specific determinations of likelihood of dumping are independent of each other, and therefore that United States laws could not be applied in a manner inconsistent with Article 11.3. The United States claims that, although Argentina's argument was that the USDOC's alleged lack of discretion in making an affirmative determination about a company waiving participation "tainted" the order-wide determination, the Panel did not address this argument.[40] Rather, according to the United States, the Panel focused on its own conclusion that Section 751(c)(4)(B) of the Tariff Act requires that an affirmative company-specific determination of likelihood of dumping result in an affirmative order-wide determination without regard to the evidence relating to other companies that do not waive

[34]United States' appellant's submission, para. 14.

[35]*Ibid*. (referring to Panel Report, paras. 7.37 and 7.39).

[36]*Ibid*., para. 14 (referring to Panel Report, para. 7.40).

[37]*Ibid*., para. 14.

[38]*Ibid*., para. 15.

[39]*Ibid*., paras. 15 and 22.

[40]*Ibid*., paras. 19-21 (referring to Argentina's response to Question 7 posed by the Panel, Panel Report, p. E-7, para. 20).

participation.[41] The United States argues that this line of argument was neither asserted, nor proven, by Argentina.

(c) Objective Assessment of the Matter under Article 11 of the DSU

21. The United States claims that the Panel failed to make an objective assessment of the matter as required under Article 11 of the DSU. The United States recalls the Panel's finding that Section 751(c)(4)(B) of the Tariff Act and Section 351.218(d)(2) of the Regulations are inconsistent as such with Article 11.3 of the *Anti-Dumping Agreement*.[42] Bearing in mind the jurisprudence of the Appellate Body that the starting point for considering "as such" claims is always the text of the municipal law in question[43], the United States argues that the Panel was first required to analyze whether the statute and Regulations require, for purposes of United States municipal law, the USDOC to make an affirmative order-wide determination, without considering other probative evidence that might be relevant to that determination. According to the United States, the Panel should have made this determination based on an examination of the regulatory and statutory text as well as the evidence proffered by the parties.

22. The United States recalls that Argentina had argued simply that the United States was required to repeal Section 751(c)(4)(B) of the Tariff Act, because the statute continues to mandate a finding of likelihood of dumping at the company-specific level, which would "taint" the order-wide determination and would therefore be inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. However, according to the United States, the recommendations and rulings of the DSB in this case do not prohibit statutorily-mandated findings of likelihood of future dumping *per se*; rather, they do not permit statutorily-mandated findings based on *assumptions*. The United States argues that Argentina failed to provide evidence—either based on the text of the statute, its application, or otherwise—that Section 751(c)(4)(B) requires a determination based on an *assumption*.

23. Further, the United States argues that the Panel breached Article 11 of the DSU because it engaged in its own analysis based on facts not argued by Argentina and not on the record. In so doing, the United States contends, "[t]he Panel disregarded the evidence before it and made findings that lacked a basis in the ... panel record."[44] The United States explains that the factual evidence did not show that the text of the statute mandates a WTO-inconsistent order-wide finding of likelihood of dumping, and that the Panel did not refer to other evidence establishing the meaning of the statute.

[41]United States' appellant's submission, para. 20 (referring to Panel Report, para. 7.40).

[42]*Ibid*., para. 25 (referring to Panel Report, para. 7.41).

[43]*Ibid*., paras. 25-26 (referring to Appellate Body Report, *US – Carbon Steel*, para. 157; and Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168).

[44]*Ibid*., para. 34.

The Panel could not have done so because the amended provisions have never been applied. Further, the factual finding that the Panel did make—that is, that no provision of United States law determines the outcome of the USDOC's order-wide determination[45]—is irreconcilable with the Panel's own conclusion that "the USDOC may have to find likelihood on an order-wide basis because of the company-specific determinations that it may have made under Section 751(c)(4)(B)".[46]

24. According to the United States, the Panel breached further Article 11 of the DSU by disregarding evidence that contradicted its ultimate conclusion that the statute is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. The United States emphasizes that the USDOC makes the order-wide determination on the basis of *all* the evidence before it—which would include, but is not limited to, the company-specific determination. The USDOC specifically included a statement explaining that it would proceed in this manner in the preamble to its amended regulation.[47] According to the United States, the import of this "uncontradicted evidence" was that, notwithstanding a company's statement that it is likely to dump, none of the statutory or regulatory waiver provisions prevent the USDOC from making a determination that dumping is not likely if there is countervailing evidence to that effect.[48]

25. For these reasons, the United States requests the Appellate Body to reverse the Panel's findings that the amended waiver provisions are inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

2. The USDOC's Finding on Import Volumes

26. The United States requests the Appellate Body to reverse the Panel's finding that the volume analysis on which the USDOC had partly based its first sunset review determination in 2000, and which it incorporated by reference and in an unchanged form into the Section 129 Determination, was properly before it. Specifically, the United States challenges the Panel's finding that the volume analysis was part of the "measure taken to comply" under Article 21.5 of the DSU.

27. In its original sunset review determination, the USDOC based its affirmative likelihood-of-dumping determination on two factual bases: first, that dumping had continued over the life of the anti-dumping duty order; and second, that import volumes had declined after the imposition of the order. The United States recalls that the original panel found that the factual basis of the first finding

[45]United States' appellant's submission, para. 34 (referring to Panel Report, para. 7.37).

[46]*Ibid*., para. 34 (quoting Panel Report, para. 7.37).

[47]*Ibid*., para. 31 (referring to United States' response to Question 3 posed by the Panel, Panel Report, p. E-57, para. 11).

[48]*Ibid*., para. 32.

by the USDOC—that is, that dumping had continued over the life of the anti-dumping duty order—was "flawed".[49] The United States notes that the original panel exercised judicial economy with respect to the second factual finding of the USDOC, that is, that import volumes had declined after the imposition of the order. According to the United States, in conducting its Section 129 Determination, the USDOC complied with the recommendations and rulings of the DSB with respect to the first factual basis. However, as the recommendations and rulings identified no error concerning the volume analysis, the USDOC could not "fix any such unidentified flaws, nor did [the] recommendations and rulings oblige [the USDOC] ... to do so".[50]

28. The United States challenges the Panel's finding that "[t]he fact that a panel, in an original dispute settlement proceeding, did not make findings ... cannot preclude a compliance panel ... from reviewing those aspects which have been incorporated ... in the measure taken to comply."[51] According to the United States, the Appellate Body has noted that the starting point for identifying "measures taken to comply" is the recommendations and rulings of the DSB.[52] Since no DSB recommendations or rulings were made specific to the USDOC's original volume analysis, it could not have been within the scope of these compliance proceedings. Instead of starting with the DSB's recommendations and rulings, the United States contends, the Panel began with the wrong assumption that the Section 129 Determination as a whole was the measure taken to comply, then found that the volume analysis was an "integral" part of it, and therefore concluded that the volume analysis was within its terms of reference and the scope of the measure taken to comply.[53]

29. The United States refers to the Appellate Body's holding in *EC – Bed Linen (Article 21.5 – India)* that, because the recommendations and rulings of the DSB did not require the European Communities to redo its "other factors" analysis in order to bring its measure into compliance, that aspect of the re-determination was beyond the scope of those Article 21.5 proceedings. The United States asserts that, in these proceedings, the Panel's discussion of the Appellate Body's reasoning in *EC – Bed Linen (Article 21.5 – India)* supports the conclusion that the volume analysis was not part of the measure taken to comply.[54] The United States notes that, according to the Panel, that case stands for the proposition that, in some instances, parts of a re-determination that merely incorporate elements of the original determination do not automatically become an inseparable part of the

[49]United States' appellant's submission, para. 35.

[50]*Ibid.*

[51]*Ibid*., para. 39 (quoting Panel Report, para. 7.92).

[52]*Ibid*., para. 40.

[53]*Ibid*., paras. 39-40 (referring to Panel Report, paras. 7.91-7.92).

[54]*Ibid*., para. 44 (referring to Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 93 and 96).

measure taken to comply.[55] The United States notes, in this regard, that the volume analysis was not affected by the revised dumping analysis.

30. The United States also challenges the Panel's assessment that the present dispute is "distinguishable" from *EC – Bed Linen (Article 21.5 – India)*. According to the United States, if there is a distinction, it is not "legally significant".[56] In that dispute, as well as in *US – Shrimp (Article 21.5 – Malaysia)*, the important consideration was that, regardless of the reason for the absence of a DSB recommendation or ruling in the original proceedings, the complainant should not be afforded a "second chance" in compliance proceedings to obtain a finding that it could not secure in the original proceedings.[57] The United States recalls that, in *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body rejected India's claim on the basis that "an *unappealed* finding included in a panel report that is *adopted* by the DSB must be treated as a *final resolution* to a dispute between the parties in respect of the *particular* claim and the *specific* component of a measure that is the subject of that claim."[58] According to the United States, the important consideration is the finality of the unappealed findings, which is equally applicable to this case because the original panel exercised judicial economy and Argentina accepted the original panel's finding on the volume analysis.[59] Although Argentina had asked the original panel to make factual findings, it never appealed the exercise of judicial economy in the original proceedings, but waited until the compliance proceedings to challenge the volume analysis.[60]

31. The United States asserts further that the consequences of the original panel's exercise of judicial economy, and Argentina's failure to appeal it, should not fall entirely on the respondent.[61] Such an approach would "collapse" the textually distinct requirements of compliance proceedings and original proceedings, and would allow panels and complaining parties to "undo" choices that they made in original proceedings.[62] Under the Panel's approach, a respondent that had not changed an aspect of its measure because it was not subject to the DSB recommendations and rulings would learn for the first time at the compliance stage that certain aspects of its measures were WTO-inconsistent,

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[55]United States' appellant's submission, para. 45 (referring to Panel Report, para. 7.94).

[56]*Ibid*., para. 47.

[57]*Ibid*. (quoting Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 96).

[58]*Ibid*., para. 43 (quoting Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 93 (original emphasis)).

[59]United States' statement at the oral hearing.

[60]United States' appellant's submission, para. 48 (referring to Original Panel Report, para. 6.11).

[61]The United States agrees with a statement of the recent panel in *Chile – Price Band System (Article 21.5 – Argentina)* that cautions against permitting complaining parties to "misuse ... the special expedited procedures contemplated in Article 21.5 of the DSU" at the expense of the respondent. (*Ibid*., para. 48 (quoting Panel Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 7.142))

[62]*Ibid*., paras. 36 and 50.

and, therefore, the respondent would not have a "reasonable period of time" to bring its measure into compliance. Unlike the respondent that is exposed to suspension of concessions without a "reasonable period of time" to bring its measure into compliance, the complainant suffers no "comparable disadvantage" given that it can always bring a new dispute.[63]

32. The United States submits that another "troubling aspect" of the Panel's reasoning is that, in cases where the original panel declines to make findings on a particular aspect of a measure, the respondent would be required "to *guess* that the panel *might have thought* there were WTO inconsistencies" with respect to that aspect of the measure.[64] This would "strip" the complainant of its obligation to make its case in the original proceedings and the panel of its obligation to comply with Article 11 of the DSU, which requires panels to make findings that assist the DSB in making recommendations and rulings under the covered agreements.[65]

33. For these reasons, the United States requests the Appellate Body to reverse the Panel's finding that the volume analysis was properly before it and, consequently, to declare the Panel's finding, that the volume analysis is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*, to be "moot and of no legal effect".[66]

B. *Arguments of Argentina – Appellee*

1. Amended Waiver Provisions

34. Argentina requests the Appellate Body to reject all of the United States' claims of error regarding the Panel's assessment of the amended waiver provisions. Argentina contends that the United States' arguments are based on a misunderstanding of the findings of the panel and the Appellate Body in the original proceedings.

(a) The Panel's Approach to Examining the Consistency of the Amended Waiver Provisions with Article 11.3 of the *Anti-Dumping Agreement*

35. In response to the United States' argument that Section 751(c)(4)(B) of the Tariff Act does not mandate a breach of Article 11.3 of the *Anti-Dumping Agreement*, Argentina argues that the United States "confuses the issue".[67] For Argentina, the issue is not whether the amended waiver provisions

[63]United States' appellant's submission, para. 48 (referring to Panel Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 7.153).

[64]*Ibid*., para. 49. (original emphasis)

[65]*Ibid*.

[66]*Ibid*., para. 51.

[67]Argentina's appellee's submission, paras. 26-27 (referring to United States' appellant's submission, para. 12).

mandate an affirmative determination on an order-wide basis; rather, as considered by the panel and the Appellate Body in the original proceedings, as well as by the Panel in these Article 21.5 proceedings, the issue is whether the operation of the amended waiver provisions prevents the USDOC from reaching a reasoned determination based on all the evidence with respect to a company waiving participation in the sunset review. Argentina recalls that, in the original proceedings, the Appellate Body found that Section 751(c)(4)(B) was inconsistent with Article 11.3 because it mandated the USDOC to find that a waiving company is likely to dump, which in turn meant that the order-wide determination would be based, "at least in part, on statutorily-mandated *assumptions* about a company's likelihood of dumping".[68] According to the Appellate Body, this order-wide result was inconsistent with the obligation of an investigating authority to arrive at a reasoned conclusion on the basis of "positive evidence".[69] Given that Section 751(c)(4)(B) has not been amended, the WTO-inconsistent aspects of the waiver provisions remain in place and nothing has been done by the United States to address the source of the violation; Section 751(c)(4)(B) continues to mandate an affirmative finding for a company that waives participation. Argentina explains that the statute divests the USDOC of discretion to weigh other evidence as to a company's likelihood to dump and therefore prevents the USDOC from arriving at a reasoned conclusion. Argentina contends further that, "even assuming *arguendo* that an admission of likely dumping constitutes positive evidence, the USDOC is still required to conduct a 'review' and to make a 'determination' that dumping would be likely/probable in the event of termination of the duty. ... That determination cannot rest on 'assumptions' based on a statutorily-mandated finding of likelihood and remain consistent with the requirements of Article 11.3."[70] The fact that the statutory mandate is now triggered by a statement from the waiving exporter that it is likely to dump does not change the nature of the violation of Article 11.3.

36. Moreover, Argentina asserts that the USDOC continues to take into account company-specific likelihood-of-dumping determinations when making an order-wide likelihood-of-dumping determination. Argentina notes that the Appellate Body found in the original proceedings that, even assuming that the USDOC took into account the totality of record evidence in making its order-wide determination, as a result of the operation of the waiver provisions, certain *order-wide* likelihood-of-dumping determinations made by the USDOC would be based on statutorily-mandated *assumptions*

[68]Argentina's appellee's submission, para. 16 (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 234). (original emphasis)

[69]*Ibid*., para. 16 (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 234).

[70]*Ibid*., para. 20.

about a company's likelihood of dumping.[71] This finding confirms that a company-specific determination need not determine, or necessarily result in, an affirmative order-wide determination in order for the latter to be inconsistent with Article 11.3; rather, the company-specific determination need only to be taken into account in the order-wide determination.

37. Argentina submits that the United States' reliance on the GATT Panel Report in *US – Tobacco* for the proposition that "a statute need not ... require a WTO-consistent result, but only that it permit a WTO-consistent result", in fact reinforces Argentina's argument of inconsistency, because it is the unchanged statutory mandate (irrespective of the fact that it is now triggered by an admission) that gives rise to the WTO-inconsistency.[72] Argentina contends that the Panel in this case correctly found that the amended waiver provisions continue to mandate a particular company-specific determination that affects the order-wide determination.[73] Argentina also argues that the United States has failed to provide any rebuttal to Argentina's submission that, once a company waives participation in the USDOC stage of the sunset review, the USDOC must, pursuant to the statutory mandate, make an affirmative determination with respect to that company.

38. Argentina asserts that the Panel correctly held that the amended waiver provisions "do", and not simply "could", violate Article 11.3 of the *Anti-Dumping Agreement*.[74] In this regard, Argentina notes that the United States admits that the Panel set forth for itself the correct test of whether Section 751(c)(4)(B) precludes the USDOC from making a reasoned determination based on an adequate factual foundation. Argentina argues that, even after the modification of the Regulations, the statute continues to require statutorily-mandated affirmative findings for a company that elects to waive participation in the sunset review, regardless of the other evidence on the record, which in turn affects the order-wide determination. Argentina also contends that the Appellate Body has made it clear that, contrary to the United States' assertion, the mandatory/discretionary test is not dispositive and that its relevance may vary from case to case.[75] Moreover, the Panel recognized that, in some circumstances, Section 751(c)(4)(B) prevents an objective assessment of the admission made by the

[71]Argentina's appellee's submission, para. 36 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 234).

[72]*Ibid*., para. 28 (quoting United States' appellant's submission, para. 13).

[73]Argentina's statement at the oral hearing.

[74]Argentina submits that the United States' focus on whether the amended waiver provisions "could" or "do" violate Article 11.3 suggests that the United States does not believe that the application of the new provisions could actually be in breach unless they had been applied. Argentina argues, however, that, especially in the context of compliance proceedings, it is no defence to an "as such" claim that a new provision has not as yet been applied in the context of an "as applied" challenge. (Argentina's appellee's submission, footnote 38 to para. 35)

[75]*Ibid*., footnote 38 to para. 35 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93; and Appellate Body Report, *US – Zeroing (Japan)*, para. 211).

waiving company. According to Argentina, the United States has not asserted that this statement is incorrect, so there is no basis for the United States' claim that the Panel failed to satisfy its own test of WTO-consistency.

(b) Burden of Proof

39. Argentina rejects the United States' argument that the Panel reversed the burden of proof. Argentina submits that it properly identified the relevant text of the statutory and regulatory waiver provisions, noted that Section 751(c)(4)(B) had neither been repealed nor amended, and demonstrated that the amendment of the Regulations did not eliminate the WTO-inconsistency of Section 751(c)(4)(B) of the Tariff Act. According to Argentina, it had established a *prima facie* case, based on the text of the amended waiver provisions, that the operation of Section 751(c)(4)(B) prevents the USDOC from basing its likelihood-of-dumping determination on anything other than the statutory mandate.

40. Argentina also dismisses the United States' suggestion that the Panel's approach was entirely different from the approach taken by Argentina in its arguments.[76] According to Argentina, the Panel recognized that the operation of Section 751(c)(4)(B) prevents an analysis of all the evidence with respect to the company waiving participation and therefore found that the order-wide determination remained inconsistent with Article 11.3.[77] Argentina also disagrees with the United States' contention that the Panel shifted the burden to the United States to disprove an allegation that Argentina had never proven, namely, that an affirmative company-specific determination would necessarily lead to an affirmative order-wide determination.[78] This was not Argentina's argument, nor was it the argument on which the Panel based its finding.

(c) Objective Assessment of the Matter under Article 11 of the DSU

41. Argentina contends that the Panel met its obligations under Article 11 of the DSU to make an objective assessment of the matter before it. As required under that provision, the Panel neither distorted nor disregarded any evidence on the issues presented to it.

42. Argentina recalls the United States' argument that the Panel should have examined whether the text of the amended waiver provisions, as well as evidence establishing the meaning of the provisions, require an affirmative order-wide determination whenever there is a company-specific

[76]Argentina's appellee's submission, para. 44 (referring to United States' appellant's submission, para. 19).

[77]*Ibid*., para. 44 (referring to Panel Report, para. 7.36).

[78]*Ibid*., para. 48 (referring to United States' appellant's submission, para. 22).

waiver.[79] Argentina contends, however, that this was not the proper "test" to resolve the issue[80]; rather, as the United States agrees, the issue was whether there was evidence that the amended waiver provisions preclude the USDOC in some or all situations from making a reasoned conclusion based on an adequate factual foundation. Indeed, the Panel clearly did find that the amended waiver provisions precluded the USDOC from making such a reasoned determination.[81] Argentina also rejects the United States' assertion that the Panel did not base its "as such" finding on the text of the statute or on the arguments of the parties. Argentina notes that the Panel examined the text of the statute in the light of the Statement of Administrative Action[82] and the relevant provisions of the Regulations, and that the Panel's finding was based on the United States' acknowledgment of the role and importance of company-specific findings for order-wide determinations.[83] Argentina furthermore points out that the United States did not direct the Panel's attention to any provision of United States law supporting the proposition that the company-specific and order-wide determinations are independent of each other.[84]

2. The USDOC's Finding on Import Volumes

43. Argentina requests the Appellate Body to reject the United States' appeal of the Panel's finding that the USDOC's volume analysis was part of the "measure taken to comply". Argentina notes that it is uncontested that the USDOC relied on the analysis of the decline in import volumes in its Section 129 Determination.[85]

44. Argentina argues that WTO jurisprudence does not support the United States' reading of Article 21.5 of the DSU but, rather, suggests that the "measures taken to comply" must be considered in their "totality".[86] Further, Argentina argues that the United States misinterprets and misapplies the Appellate Body decision in *EC – Bed Linen (Article 21.5 – India)*. According to Argentina, the Appellate Body's findings regarding the final resolution of an issue between the parties, for purposes

[79]Argentina's appellee's submission, para. 60 (referring to United States' appellant's submission, para. 34).

[80]*Ibid*., para. 63.

[81]*Ibid*., para. 62 (referring to Panel Report, para. 7.41).

[82]Statement of Administrative Action to the Uruguay Round Agreements Act, H.R. Doc. No. 103-316 (1994), reprinted in 1994 USCAAN 3773, 4040 (Exhibit ARG-31 submitted by Argentina to the Panel).

[83]Argentina's appellee's submission, para. 65 (referring to Panel Report, paras. 7.37 and 7.39).

[84]*Ibid*., para. 67 (referring to Panel Report, para. 7.39).

[85]*Ibid*., para. 73 (referring to Section 129 Determination, *supra*, footnote 11, pp. 1, 6, and 11; and Panel Report, paras. 7.89-7.90).

[86]*Ibid*., paras. 75-77 (referring to Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41; Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 87; and Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 102).

of Article 21.5 proceedings, do not apply to situations where a panel has exercised judicial economy.[87] Argentina asserts that the United States omits the "single most relevant" passage relating to judicial economy for the purposes of the present appeal and misrepresents the ruling in *EC – Bed Linen (Article 21.5 – India)*.[88] According to Argentina, in this dispute, the original panel's exercise of judicial economy afforded Argentina only a partial resolution of the matter at issue, and Argentina should not be penalized for the original panel's false exercise of judicial economy.

45. Moreover, Argentina submits that the United States cannot "unilaterally" determine what constitutes a "measure taken to comply" for purposes of Article 21.5 of the DSU.[89] According to Argentina, if the United States' assertion were to prevail, a compliance panel's ability to examine the WTO-consistency of compliance measures would be undermined.[90] In this case, it is not possible to exclude from the Panel's terms of reference either of the two grounds on which the USDOC based its Section 129 Determination. In addition, Argentina points out that its request for the establishment of a panel "specifically identified" both the Section 129 Determination and the finding on import volumes relied upon by the USDOC.[91] Argentina asserts that the "nexus-based" test, which provides that measures "inextricably linked to" or "clearly connected to" the steps taken by the respondent to implement the recommendations and rulings of the DSB also constitute "measures taken to comply"[92], should apply to this dispute because: (i) the Section 129 Determination was made in order to implement the recommendations and rulings of the DSB in the original proceedings; (ii) the USDOC's volume analysis formed an integral part of the Section 129 Determination; and (iii) the USDOC based its likelihood-of-dumping determination specifically on the volume analysis.[93]

46. Finally, Argentina contends that the United States' claims of procedural unfairness are misplaced. The United States' contention that a respondent is deprived of notice when learning of the WTO-inconsistency of an aspect of its measure for the first time at the compliance stage ignores the

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[87]Argentina's appellee's submission, para. 81.

[88]*Ibid*., para. 82 (referring to Appellate Body Report, *EC – Bed Linen (Article 21.5 - India)*, footnote 115 to para. 96, which reads in part:

> We believe that in a situation where a panel, in declining to rule on a certain claim, has provided only a partial resolution of the matter at issue, a complainant should not be held responsible for the panel's false exercise of judicial economy, such that a complainant would not be prevented from raising the claim in a subsequent proceeding.)

[89]*Ibid.*, subheading III.B.3, p. 27.

[90]*Ibid*., para. 92.

[91]*Ibid*., para. 93.

[92]*Ibid*., paras. 94-96 (referring to Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.5; Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, subparagraph 22; and Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, paras. 78-79).

[93]*Ibid*., para. 96.

Appellate Body's ruling that a measure taken to comply will be assessed for WTO-consistency in its totality, and not only from the perspective of the claims, arguments, and factual circumstances related to the original measure; otherwise, the utility of the Article 21.5 review would be undermined.[94] Argentina asserts that the United States' approach of immunizing certain aspects of measures taken to comply from Article 21.5 proceedings has been rejected previously by the panel in *EC – Bananas III (Article 21.5 – Ecuador)*.[95] Argentina rejects the notion that suspension of concessions resulting from a finding of inconsistency regarding an unchanged aspect of an original measure would be a "drastic" result, because this is the situation contemplated under Article 22.6 of the DSU, regardless of whether the measure is a modified version of an old measure or an entirely new one.[96] Furthermore, contrary to the United States' assertion that it would have to "guess" about a possible claim of inconsistency regarding the volume analysis, the United States could have readily anticipated a claim in the Article 21.5 proceedings because the exact same volume analysis had been contested in the original proceedings, and Argentina had made a specific request for findings by the original panel in the interim review stage.[97]

C. *Claims of Error by Argentina – Other Appellant*

1. New Evidentiary Basis

(a) Interpretation and Application of Articles 11.3 and 11.4 of the *Anti-Dumping Agreement*

47. Argentina requests the Appellate Body to reverse the Panel's finding that the USDOC was permitted to develop a new evidentiary basis for its Section 129 Determination. Argentina claims that, by failing to consider properly the temporal limitations contained in Articles 11.3 and 11.4 of the *Anti-Dumping Agreement*, the Panel committed a legal error in interpreting and applying those provisions. Further, Argentina asserts that the Panel's reliance on "broader, horizontal considerations underpinning the operation of the WTO dispute settlement system" led to an incorrect interpretation of the substantive requirements of Articles 11.3 and 11.4.[98]

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[94]Argentina's appellee's submission, para. 98 (referring to Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41).

[95]*Ibid*., para. 98 (referring to Panel Report, *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 6.3 and 6.9-6.10).

[96]*Ibid*., para. 99.

[97]*Ibid*., para. 101 (referring to United States' appellant's submission, para. 49).

[98]Argentina's other appellant's submission, para. 45 (quoting Panel Report, para. 7.51 (footnote omitted)).

48. Argentina notes that, in making the Section 129 Determination, the USDOC developed a new evidentiary basis to support its likelihood-of-dumping determination.[99] This was not merely a clarification of the information developed in the 2000 sunset review. Further, the "undisputed" factual record clearly shows that the new information, which could have been developed in 2000, was used by the USDOC in 2005 to advance a "new theory" for making its likelihood-of-dumping determination.[100] According to Argentina, allowing the USDOC to continue applying the anti-dumping duty when it did not develop sufficient positive evidence at the time of the initial review in 2000 is inconsistent with Articles 11.3 and 11.4.

49. Argentina observes that, under the terms of Article 11.3, the "determination" of likelihood of future dumping has to occur in a review initiated no later than five years after the imposition of the anti-dumping duty. Moreover, Article 11.3 requires that an investigating authority exercise diligence and rigour in carrying out its investigatory and adjudicatory functions and reach reasoned conclusions on the basis of information gathered as part of a process of reconsideration and examination.[101] Further, under Article 11.4, an anti-dumping duty may continue during the course of a sunset review, but only as a "further exception" to the requirement to terminate the measure at the expiry of the five-year period. It is permitted only because the investigating authority is required in a sunset review to develop—diligently and actively—the necessary evidentiary basis for its likelihood-of-dumping determination.[102] Therefore, Argentina argues, Articles 11.3 and 11.4 establish that the evidentiary basis for continuing an anti-dumping duty beyond the presumptive expiration date of five years must be developed at the time of the original sunset review.[103]

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[99]Argentina's other appellant's submission, para 24. Argentina lists the following as constituting the "new evidentiary basis" of the Section 129 Determination:

> ... financial statements for the Argentine producers for the period 1995-2000; cost information for ten categories of OCTG products; a description of each company's sales and marketing processes; a statement as to whether the company exported OCTG to the United States during the 1995-2000 period; confidential import statistics from the [United States] Customs and Border Protection authorities ...; observed OCTG selling prices in the [United States] market during the 1995-2000 period from an industry publication; financial statements of [United States] producers; and data from Argentine export statistics.

(*Ibid*. (referring to Panel Report, paras. 7.48-7.49; Argentina's first written submission to the Panel, Panel Report, pp. A-16 to A-18, paras. 52-67; and Argentina's second written submission to the Panel, Panel Report, pp. C-5 to C-7, paras. 8-18))

[100]*Ibid*., paras. 26-27.

[101]*Ibid*., paras. 13-14 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 111).

[102]*Ibid*., para. 29 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 113).

[103]*Ibid*., para. 29.

50. Argentina submits that, having chosen not to develop the evidentiary basis during the sunset review in 2000, the USDOC did not and could not meet the conditions for invoking the "exception" in Article 11.3 and therefore for continuing the anti-dumping duty order. Argentina explains that, in some cases, the nature of a violation has consequences for the manner in which a Member can bring itself into compliance with DSB recommendations and rulings, which may in turn mean that it has fewer options to achieve compliance. To illustrate its point, Argentina offers a hypothetical situation in which a Member seeking to continue an anti-dumping duty order conducts no review at all and simply fails to terminate its measure after five years. Argentina submits that, in such a case, a Member would be precluded from bringing its measure into compliance by initiating a review for the first time after the measure was found by a WTO panel or the Appellate Body to be in violation.

51. Argentina asserts that, had the USDOC exercised sufficient diligence and established a sufficient evidentiary basis for its 2000 sunset review determination but failed to explain adequately its decision, the USDOC might have been able to bring itself into compliance in 2005 by clarifying the information collected in 2000 or by further explaining its action. However, as this did not happen, the United States could not bring itself into compliance "without negating the rights and obligations established in Articles 11.3 and 11.4".[104] Argentina objects to the Panel's suggestion that, as long as the USDOC *eventually* complies with its obligation to be "active" in conducting its sunset reviews and *eventually* develops an evidentiary basis that contains more than an unsubstantiated inference, the USDOC complies with the obligations under Articles 11.3 and 11.4.[105]

52. Argentina also submits that the Panel ignored the requirements of Article 3.2 of the DSU and the customary international rules of treaty interpretation when it subordinated the interpretation of the text of Articles 11.3 and 11.4 to the "broader, horizontal considerations underpinning the operation of the WTO dispute settlement system"[106] and to "vague and undefined overarching principles of the DSU".[107] Argentina argues that the Panel's reliance on these broad considerations led to an incorrect interpretation of the substantive obligations under Articles 11.3 and 11.4. The Panel should have examined the ordinary meaning of key terms in those provisions, such as "review" and "determination", and given meaning to those Articles through a contextual analysis of the other paragraphs of Article 11.[108] Instead, in Argentina's view, the Panel's analysis came "full circle", and ended where it started, because it dismissed Argentina's claim that the United States was precluded

[104]Argentina's other appellant's submission, para. 34.

[105]*Ibid*., para. 37.

[106]*Ibid*., para. 44 (quoting Panel Report, para. 7.51 (footnote omitted)).

[107]*Ibid*., para. 46 (referring to Panel Report, para. 7.52).

[108]*Ibid*., paras. 46-47.

from using new facts on the basis that this would run counter to the overall operation of the WTO dispute settlement system.[109]

(b) Objective Assessment of the Matter under Article 11 of the DSU

53. Argentina claims further that, in subordinating its analysis of Articles 11.3 and 11.4 to the broader systemic considerations of the WTO dispute settlement system, the Panel failed to make an objective assessment of the matter before it in violation of Article 11 of the DSU.

54. Argentina asserts that the Panel's consideration of the text of Articles 11.3 and 11.4 was limited to a few sentences[110], in contrast to the "abundantly evident" influence of non-textual issues, including the "broader, horizontal considerations" and consideration of other trade remedy and non-trade remedy cases.[111] According to Argentina, these broader considerations were not part of the Panel's mandate, and the Panel's consideration of these concerns did not comply with its obligation under Article 11 of the DSU to make an objective assessment of the matter before it. Instead of a rigorous textual interpretation of Articles 11.3 and 11.4, the Panel based its analysis on conjecture and relied on a vague assertion that Argentina's claim ran "counter to the overall operation of the WTO dispute settlement system, and, in particular, the notion of *implementation* of the DSB recommendations and rulings embodied in the relevant provisions of the DSU".[112] Argentina argues that Articles 19, 21, and 22 of the DSU do not run "counter to" its claims under Articles 11.3 and 11.4; rather, Articles 11.3 and 11.4 are easily reconcilable with the United States' rights and obligations under the DSU.[113]

(c) Articles 3.2 and 19.2 of the DSU

55. Argentina asserts that, by permitting the USDOC to develop a new evidentiary basis for its Section 129 Determination, the Panel acted inconsistently with Articles 3.2 and 19.2 of the DSU, which provide that panels, the Appellate Body, and the DSB cannot "add to or diminish" the rights of WTO Members.[114] Specifically, Argentina claims that the Panel diminished Argentina's right to the termination of the anti-dumping duty order by finding that, in spite of the United States' failure to comply with the strict requirements of Articles 11.3 and 11.4 of the *Anti-Dumping Agreement*, the

[109]Argentina's other appellant's submission, para. 48 (referring to Panel Report, para. 7.52).

[110]*Ibid*., para. 57 (referring to Panel Report, para. 7.50).

[111]*Ibid*., para. 58.

[112]*Ibid*., para. 60 (quoting Panel Report, para. 7.52 (original emphasis)).

[113]*Ibid*., para. 61 (referring to Argentina's first written submission to the Panel, Panel Report, pp. A-12 to A-20, paras. 38-67; and Argentina's second written submission to the Panel, Panel Report, pp. C-5 to C-9, paras. 8-27).

[114]*Ibid*., para. 63.

USDOC could continue imposing anti-dumping duties as long as a WTO-consistent determination was made "at some indeterminate point in the future".[115] Similarly, Argentina claims that the United States' ability to develop a new evidentiary basis in 2005 to justify its 2000 sunset review determination "added to" the United States' rights under Article 11.3.[116]

2. Argentina's Request for a Suggestion pursuant to Article 19.1 of the DSU

(a) The Panel's Obligations under Articles 11 and 12.7 of the DSU

56. Argentina claims that, by failing to provide explanations and reasons for its dismissal of Argentina's request for a suggestion that the anti-dumping duty order be terminated, pursuant to Article 19.1 of the DSU, the Panel acted inconsistently with its obligations under Article 11 of the DSU to make an objective assessment of the matter before it.[117] Although Argentina recognizes the discretionary nature of a panel's right to make a suggestion, it argues that the Panel was obliged under Article 11 of the DSU to consider the specific provision of the covered agreement at issue, which, in this case, was Article 19.1 of the DSU[118], and to make it clear that it "has reasonably considered [the] claim" before it.[119] Argentina submits that the Panel failed to take objectively into account the fact that the United States has twice violated its "binding obligations" under Article 11.3 of the *Anti-Dumping Agreement*, and to consider reasonably Argentina's request for a suggestion.[120] According to Argentina, the Panel's statement that it saw "no particular reason to make a suggestion" renders meaningless the "duty" and "obligation" inherent in Article 11 of the DSU.[121]

57. Argentina asserts that the manner in which the Panel "summarily" dismissed its request for a suggestion also violates the requirements of Article 12.7 of the DSU.[122] Argentina explains that, under Article 12.7, a panel has a three-fold obligation to set out: (i) the findings of fact; (ii) the applicability of relevant provisions; and (iii) the basic rationale behind any findings and recommendations that it makes.[123] Argentina argues that the Panel complied with only the first of

[115]Argentina's other appellant's submission, para. 64.

[116]*Ibid*., para. 65.

[117]*Ibid*., para. 80 (referring to Panel Report, para. 9.4).

[118]*Ibid*., para. 71 (referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 184, where the Appellate Body stated that "an 'objective assessment' under Article 11 of the DSU must be understood in the light of the obligations of the particular covered agreement at issue in order to derive the more specific contours of the appropriate standard of review").

[119]*Ibid*., para. 72 (quoting Appellate Body Report, *EC – Poultry*, para. 135).

[120]*Ibid*., para. 81.

[121]*Ibid*.

[122]*Ibid*., heading III, p. 19.

[123]*Ibid*., paras. 73-77 and 83 (referring to Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 106-108).

these obligations. According to Argentina, the Panel failed to comply with the second requirement under Article 12.7 because "[i]t did not set out the 'applicability' of Article 19.1 in the context of the present dispute".[124] With regard to the third obligation specified in Article 12.7, Argentina explains that the Panel was required to give a justification or state reasons why it was unnecessary to make a suggestion, which it did not do. In this case, the situation was compounded by: the threat of a "never-ending cycle" of litigation; the "intrinsic links between the requested suggestion of revocation and Article 11.3"; and, at the time, an "imminent second sunset review" by the USDOC.[125] In these circumstances, the "cursory explanation"[126] by the Panel that "the circumstances of the present proceedings" did not require it to make a suggestion, was inadequate.[127]

(b) Request for the Appellate Body to Make a Suggestion under Article 19.1 of the DSU

58. Argentina requests the Appellate Body to make a suggestion that the United States terminate its anti-dumping duty order. Argentina asserts that the continuation of the illegal measure would render the temporal limitations in Articles 11.3 and 11.4 meaningless. In addition, Argentina argues that the "patently absurd" sequence of events in this dispute—the 2000 and 2005 WTO-inconsistent likelihood determinations for the original sunset review, followed by a second sunset review conducted by the USDOC in October 2006, which could leave the anti-dumping duties in place through to 2011—exacerbates the violation of Argentina's WTO rights.[128] According to Argentina, the inclusion of the discretionary authority in Article 19.1 of the DSU "demonstrates that its drafters contemplated circumstances in which such a suggestion would be both appropriate and necessary to help resolve [a] dispute."[129] In this regard, Argentina refers to specific WTO disputes where panels exercised their discretion to make a suggestion.[130] Finally, Argentina submits that the Appellate Body should be guided by the obligation, under Article 21.7 of the DSU, that the DSB consider what further action it might take in cases involving developing countries.

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[124]Argentina's other appellant's submission, para. 89.

[125]*Ibid*., paras. 89-92.

[126]*Ibid*., para. 92.

[127]*Ibid*. (quoting Panel Report, para. 9.4).

[128]*Ibid*., paras. 96-97.

[129]*Ibid*., para. 94.

[130]*Ibid*., para. 102 (referring to Panel Reports, *EC – Export Subsidies on Sugar*, paras. 8.6-8.8; Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 8.5; Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 8.7; Panel Report, *US – Offset Act (Byrd Amendment)*, para. 8.6; Panel Report, *US – Cotton Yarn*, para. 8.5; Panel Report, *Guatemala – Cement II*, para. 9.6; and Panel Report, *US – Lead and Bismuth II*, para. 8.2).

D. *Arguments of the United States – Appellee*

1. New Evidentiary Basis

(a) Interpretation and Application of Articles 11.3 and 11.4 of the *Anti-Dumping Agreement*

59. The United States requests the Appellate Body to reject Argentina's appeal and to uphold the Panel's finding that it was not inconsistent with Articles 11.3 and 11.4 of the *Anti-Dumping Agreement* for the USDOC to develop a new evidentiary basis for its Section 129 Determination.

60. The United States contends that there is nothing in the text of Article 11.3 or Article 11.4 to support Argentina's assertion that the temporal limitations referred to in these provisions have a bearing on whether an investigating authority may gather new evidence in order to bring a measure into compliance. These provisions require only that a sunset review be initiated prior to the expiration of the five-year period and that such a review normally be completed within 12 months; they do not, according to the United States, address the issue of whether a new evidentiary basis may be developed in the course of implementing the recommendations and rulings of the DSB.

61. According to the United States, "the sole effect of Argentina's interpretation [of Articles 11.3 and 11.4] would be to prevent reasoned and adequate affirmative redeterminations."[131] Further, Argentina's interpretation would mean that, even if new factual material supported an affirmative determination, the determination would nonetheless remain WTO-inconsistent, not because it was not reasoned and adequate, but simply because the new evidence on which the determination was based was collected during the process of implementation. The United States contends that nothing in the *Anti-Dumping Agreement*—including Article 6 and Annex II thereto, which set out various procedural rights and obligations—suggests that this was the drafters' intention.

62. The United States notes that the Panel referred to further contextual considerations after "[h]aving considered and rejected" Argentina's interpretation of the temporal limitations in Articles 11.3 and 11.4.[132] The Panel correctly considered Article 19.1 of the DSU in the context of examining Argentina's arguments with respect to the collection of new evidence. The United States endorses the Panel's reasoning that Article 19.1 does not prescribe the ways in which a WTO-inconsistent measure may be brought into conformity with the WTO rules.[133]

[131]United States' appellee's submission, para. 7.

[132]*Ibid*., para. 6.

[133]*Ibid*. (referring to Panel Report, paras. 7.54 and 7.60).

(b) Objective Assessment of the Matter under Article 11 of the DSU

63. The United States maintains that the Panel did make an objective assessment of the matter before it, because it considered whether any provisions of the DSU provide contextual support for Argentina's argument only after it had found that the text of Articles 11.3 and 11.4 did not support Argentina's claim. The Panel agreed with Argentina that Articles 11.3 and 11.4 reflect temporal obligations[134], but then stated that it did not consider those obligations to "preclude[] an investigating authority from developing a *new* factual basis pertaining to the original review period in the course of implementing the DSB recommendations and rulings pertaining to the original determination".[135] The United States argues that the concise nature of the Panel's conclusion on the issue was legitimate because panels are required only "to provide explanations and reasons sufficient to disclose the essential, or fundamental, justification for [their] findings".[136] In this case, the brevity of the Panel's reasoning reflected "the absence of any basis in the [Anti-Dumping] Agreement for Argentina's claims", and not a failure on the part of the Panel in discharging its obligations.[137]

(c) Articles 3.2 and 19.2 of the DSU

64. In response to Argentina's claims that the Panel violated Articles 3.2 and 19.2 of the DSU, the United States argues that, as the Appellate Body found in *Chile – Alcoholic Beverages*, there is no independent basis of appeal under these provisions because they are "predicated on underlying findings of legal error".[138] The United States notes that the Panel's conclusion—that the USDOC was not precluded from developing a new evidentiary basis in the Section 129 Determination—reflects a correct interpretation and application of the relevant agreements so that, even if an independent basis for appeal did exist under Article 3.2 or Article 19.2, Argentina fails to establish that the Panel acted contrary to those provisions. Further, with regard to the argument that the Panel denied Argentina's "right" to termination of the anti-dumping duty order in question, the United States responds that Argentina has never attempted to demonstrate that such a right even exists.[139] No such right can be

[134]United States' appellee's submission, para. 11 (referring to Panel Report, para. 7.50).

[135]*Ibid*., para. 11 (quoting Panel Report, para. 7.50 (original emphasis)).

[136]*Ibid*., para. 12 (referring to Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 108-109).

[137]*Ibid*., para. 12.

[138]*Ibid*., para. 15 (referring to Appellate Body Report, *Chile – Alcoholic Beverages*, para. 79).

[139]*Ibid*., para. 15.

found in either the *Anti-Dumping Agreement* or the DSU.[140] The United States also points out that Article 3.2 is directed to the DSB, not to panels or to the Appellate Body.

2. Argentina's Request for a Suggestion under Article 19.1 of the DSU

(a) The Panel's Obligations under Articles 11 and 12.7 of the DSU

65. The United States argues that Argentina's claims under Articles 11 and 12.7 of the DSU are "baseless and should be rejected" because "[t]he simple fact is that [the text of] Article 19.1 provides that a panel or the Appellate Body 'may' suggest ways in which a Member 'could' implement a recommendation."[141]

66. The United States contends that the Panel did not err in declining to make a suggestion under Article 19.1 of the DSU with regard to implementation of the recommendations and rulings of the DSB. Article 11 of the DSU requires a panel to assess objectively the "matter" before it, and the "matter" before a panel comprises the "claims" and "measures" in question.[142] In the United States' view, a request for a suggestion is neither a claim nor a measure. Therefore, the requirements of Article 11 do not extend to a panel's exercise of its discretion to make a suggestion.

67. Further, the United States argues that the Panel had no obligation under Article 12.7 of the DSU to provide a rationale for choosing not to make a suggestion under Article 19.1, because the Panel's decision was not a "finding" or a "recommendation" as provided under Article 12.7, nor has Argentina argued that it is.[143] According to the United States, a "suggestion" under Article 19.1 is distinct from a "recommendation" or "finding".[144] The United States also argues that nothing in Article 19.1 requires an explanation of a panel's exercise of its discretion to make a suggestion, nor is there any guidance under this provision regarding how a panel or the Appellate Body should respond to a party's request for a suggestion. In response to Argentina's argument that the Panel failed to set out the applicability of Article 19.1, the United States contends that the Panel did recognize its applicability but, in the light of the fact that Article 19.1 states that WTO panels "may" suggest means of implementation, simply elected not to exercise its discretion to make a suggestion.[145]

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[140]United States' appellee's submission, para. 15 (referring to Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 187).

[141]*Ibid*., para. 18.

[142]*Ibid*., para. 19 (referring to Appellate Body Report, *Guatemala –Cement I*, paras. 72-73).

[143]*Ibid*., para. 21.

[144]*Ibid*., para. 18.

[145]*Ibid*., para. 23.

(b) Request for the Appellate Body to Make a Suggestion under Article 19.1 of the DSU

68. The United States requests the Appellate Body to dismiss Argentina's request that it make a suggestion under Article 19.1 of the DSU in this appeal. According to the United States, Argentina's claim that a suggestion from the Appellate Body is "vital" or "necessary to help resolve" the dispute is unsubstantiated.[146] As the DSU attaches no legal consequences to suggestions made under Article 19.1, the United States contends that a suggestion cannot, therefore, be "vital" or "necessary" to resolve a dispute.[147] The United States submits that Argentina links its argument for a suggestion to its flawed interpretation of the temporal limitations provided for in Articles 11.3 and 11.4 of the *Anti-Dumping Agreement*. Even if a suggestion *were* "necessary", as Argentina would have it, "a legal requirement of automatic termination for correctable breaches would obviate any need for a suggestion."[148] In any case, the United States asserts that it is well established that a WTO Member has the right to determine its "means of implementation".[149]

69. For these reasons, the United States requests the Appellate Body to find that the Panel did not err by refusing to make a suggestion under Article 19.1 of the DSU and to reject Argentina's request that the Appellate Body make a suggestion in the current appeal.

E. *Arguments of the Third Participants*

1. China

70. China argues that the USDOC's Section 129 Determination "as a whole" constitutes the measure taken by the United States to comply with the recommendations and rulings of the DSB and that, because the volume analysis was an "inseparable basis" for that determination, it too was part of the measure taken to comply.[150]

71. China agrees with the United States that the DSB recommendations and rulings are an appropriate starting point for assessing a Member's compliance, and that they are important in identifying the "measure taken to comply".[151] However, China considers that the United States

[146]United States' appellee's submission, para. 24 (referring to Argentina's other appellant's submission, paras. 87 and 94, respectively.)

[147]*Ibid*., para. 25.

[148]*Ibid*.

[149]*Ibid*., para. 26 (referring to Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 187).

[150]China's third participant's submission, para. 63.

[151]*Ibid*., paras. 33-34 (referring to United States' appellant's submission, paras. 37-38).

misreads the findings made by the original panel. China notes that the original panel concluded that the USDOC's likelihood-of-dumping determination was inconsistent with Article 11.3 of the *Anti-Dumping Agreement* after finding that one of the factual bases of that determination was not proper, that is, that dumping had continued over the life of the order.[152] The original panel did not find that the continuation of dumping over the life of the order was an independent measure, nor did the USDOC make a new and separate determination that was limited to this evidentiary basis. Rather, China observes, the USDOC's Section 129 Determination was aimed at addressing the original panel's findings on the likelihood-of-dumping determination. China considers that the USDOC made a *single* and *new* finding in its Section 129 Determination, which was therefore the "measure taken to comply" under Article 21.5 of the DSU.[153] China also notes that the plain language of Article 21.5 authorizes a compliance panel to decide on the consistency of a measure with the covered agreements.[154] In China's view, the fact that the Section 129 Determination was premised on two evidentiary bases, coupled with the Panel's mandate to examine the consistency with the covered agreements, means that "it is permissible for the compliance Panel to review these two factual bases from the angles of the DSB recommendations and rulings as well as Article 11.3 of the [*Anti-Dumping*] *Agreement*."[155] For China, it is "unreasonable and illogical" to conclude that, even though the Section 129 Determination is a "measure taken to comply", the evidentiary basis thereunder is not.[156]

72. With respect to the United States' reliance on the Appellate Body Report in *EC – Bed Linen (Article 21.5 – India)* for its argument that the volume analysis was not part of the "measure taken to comply", China submits that the reasoning in that case can be distinguished from the present situation on three grounds.[157] First, China argues that the "other factors" analysis at issue in *EC – Bed Linen (Article 21.5 – India)* was a necessary part of the *legal* analysis with respect to causation under Article 3.5 of the *Anti-Dumping Agreement*, whereas the volume analysis in the current appeal is just part of the *evidentiary* basis used by the USDOC to make a likelihood-of-dumping determination. China also points out that the "other factors" analysis in *EC – Bed Linen (Article 21.5 – India)* was an independent legal finding that the Appellate Body found was not an inseparable element of the compliance measure. China contrasts that situation to that of the present dispute by arguing that the

[152]China's third participant's submission, para. 36 (referring to Original Panel Report, para. 7.221).

[153]*Ibid*., paras. 37-38 (referring to Section 129 Determination, *supra*, footnote 11, pp. 2 and 11).

[154]*Ibid*., para. 38 (referring to Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41). China also cites the Appellate Body's reasoning in *US – Shrimp (Article 21.5 – Malaysia)* in support of its view that the volume analysis forms part of the new measure that must be reviewed "in its totality". (*Ibid*., para. 42 (quoting Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 87))

[155]*Ibid*., para. 39.

[156]*Ibid*., para. 40.

[157]*Ibid*., paras. 46-62 (referring to United States' appellant's submission, paras. 44, 47, and 48).

volume analysis is "inseparable"[158] from the revised likelihood-of-dumping determination. China explains that, had the USDOC not incorporated the volume analysis into its factual reasoning, it might not have been possible for the USDOC to have made an affirmative likelihood-of-dumping determination.

73. Another difference, in China's view, between the present appeal and *EC – Bed Linen (Article 21.5 – India)* concerns the changed "aspect" of the Section 129 Determination.[159] China submits that the "aspect" at issue in *EC – Bed Linen (Article 21.5 – India)* was the "other factors" analysis required pursuant to Article 3.5 of the *Anti-Dumping Agreement*, and that the comparable "aspect" in the present dispute is the likelihood-of-dumping determination required by Article 11.3.[160] In *EC – Bed Linen (Article 21.5 – India)*, the "other factors" aspect *did not change* between the original proceedings and the compliance proceedings. By contrast, in this dispute, the USDOC made a new likelihood-of-dumping determination in the Section 129 Determination (albeit generating the same affirmative result), and therefore the "aspect" at issue was *changed* between the original proceedings and the compliance proceedings. For China, the volume analysis can only be regarded as a "sub-aspect" of the "measure taken to comply".[161]

74. Finally, China distinguishes *EC – Bed Linen (Article 21.5 – India)* on the basis that a finding was made by the panel in that dispute on the "other factors" analysis. In this dispute, there was *no finding* made on the volume analysis in the original proceedings because the original panel exercised judicial economy. Therefore, it cannot be said that this dispute has been finally resolved. Hence, this is not a case where the claim relating to the volume analysis is being given a "second chance".[162]

2. European Communities

75. The European Communities states that the legal basis for, and the existence of, the mandatory/discretionary doctrine referred to by the United States is "obscure" and does not derive

[158]China's third participant's submission, para. 51.

[159]China explains that the USDOC and the USITC are responsible for making likelihood-of-dumping and likelihood-of-injury determinations, respectively. According to China, each of these determinations constitutes an "aspect" of a sunset determination under Article 11.3 of the *Anti-Dumping Agreement*. Therefore, in the case of the Section 129 Determination, the measure actually concerns only one aspect, that is, the likelihood-of-dumping determination. (*Ibid*., footnote 21 to para. 53)

[160]*Ibid*., paras. 52-53.

[161]*Ibid*., para. 54.

[162]*Ibid*., para. 61.

from the *Anti-Dumping Agreement*, the *WTO Agreement*, or WTO case law.[163] The European Communities notes that the arguments made by the United States in *US – Zeroing (EC)* on the mandatory/discretionary doctrine were rejected by the Appellate Body.[164] The European Communities submits that many of the core concepts associated with the mandatory/discretionary doctrine have "fallen by the way-side"[165], including: that the measure must be adopted by the "legislature", as opposed to the "executive"[166]; that it must be "binding"[167]; that it needs to have been applied[168]; and that it is allegedly susceptible to different interpretations by various municipal courts.[169]

76. Regarding the United States' argument that, according to the mandatory/discretionary doctrine, a measure can only be impugned if it leads to WTO-inconsistent action *in all cases*, the European Communities argues that a mechanistic application of that test would mean that a measure would "never or almost never" be found inconsistent "as such" with WTO rules.[170] In the European Communities' view, this approach contradicts both the *WTO Agreement* and the *Anti-Dumping Agreement*. Furthermore, the European Communities observes that, in deference to interpretations advanced by the executive branch, United States courts have refused to correct the USDOC's WTO-inconsistent interpretations of ambiguous United States statutes and, thereby, have denied economic operators effective remedies in United States courts.

77. Secondly, the European Communities argues that the United States' appeal regarding the scope of "measures taken to comply" should be rejected. The European Communities submits that the United States and Argentina offer two competing models with regard to determining the scope of the "measure taken to comply": (i) the "measure model", under which compliance panels refer to the original measure in general; and (ii) the "element of the measure model", according to which compliance panels focus on certain elements of the original measure.[171] The European Communities considers neither model to be satisfactory in all cases and asserts that a relevant consideration for

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[163]European Communities' third participant's submission, paras. 2-3 (referring to United States' appellant's submission, para. 9).

[164]*Ibid*., paras. 2-3 and 6 (referring to Appellate Body Report, *US – Zeroing (EC)*, paras. 211-214).

[165]*Ibid*., para. 4.

[166]*Ibid*. (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81).

[167]*Ibid*., para. 4 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 38 and 85; and Appellate Body Report, *Guatemala – Cement I*, para. 69 and footnote 47 thereto).

[168]*Ibid*., para. 4 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82).

[169]*Ibid*., para. 4 (referring to Appellate Body Report, *US – 1916 Act*, para. 90).

[170]*Ibid*., para. 5.

[171]*Ibid*., para. 10.

identifying the measure taken to comply is whether there is one WTO obligation at stake. According to the European Communities, if an investigating authority's determination involves one WTO obligation and one finding on that obligation, a compliance panel should treat that determination as being indivisible. The European Communities argues that the present dispute is distinguishable from *EC – Bed Linen (Article 21.5 – India)* because, whilst this case involves one obligation and one finding regarding Article 11.3 of the *Anti-Dumping Agreement*, *EC – Bed Linen (Article 21.5 – India)* concerned multiple obligations under the second and third sentences of Article 3.5 of the same Agreement. Moreover, contrary to the United States' assertion, the European Communities was in fact not required to change its "other factors" analysis in *EC – Bed Linen (Article 21.5 – India)*.[172]

78. At the oral hearing, the European Communities made arguments concerning the amended waiver provisions. The European Communities agrees with the Panel that there remains a mechanistic relationship between an affirmative waiver and a finding of likelihood of dumping with respect to the waiving exporter, which, especially in circumstances where there is only one exporter and one country, would inevitably "taint" the order-wide likelihood-of-dumping determination. According to the European Communities, under the new provisions, a statement by the waiving exporter that it is likely to dump would make it even more likely that the USDOC would make an affirmative likelihood-of-dumping determination at the order-wide level.

79. The European Communities also commented at the oral hearing on the permissibility of developing a new evidentiary basis for purposes of the Section 129 Determination. On the specific facts of this case, the European Communities considers that the investigation conducted by the USDOC was internally inconsistent. Despite the fact that a new sunset review had been "initiated" in 2005, the likelihood-of-dumping determination was assessed through the "prism"[173] of 2000. The European Communities considers that the USDOC should have either returned to its original sunset review (without initiating a new one) and made a likelihood-of-dumping determination through a 2000 "prism", or initiated a new Article 11.3 review in 2005 and assessed the prospect of likelihood of dumping after 2005.[174] Instead, in the Section 129 Determination, the USDOC failed to make the type of prospective assessment required by Article 11.3 of the *Anti-Dumping Agreement*.

[172]European Communities' third participant's submission, para. 16 (referring to United States' appellant's submission, para. 42).

[173]European Communities' statement at the oral hearing.

[174]*Ibid*.

3. Japan

80. Japan asserts that the Panel correctly concluded that the amended waiver provisions are inconsistent as such with Article 11.3 of the *Anti-Dumping Agreement*. Japan emphasizes that domestic investigating authorities have an obligation "to arrive at a *reasoned* conclusion on the basis of *positive evidence*", and to undertake "an *active* rather than a passive decision-making role".[175] In Japan's view, the United States' sunset review mechanism "does not comport with these requirements" because it is "opaque, arcane, and permits the USDOC to make decisions without active investigation".[176] According to Japan, the arguments made by the United States in defending the relevant statutory and regulatory provisions "simply underline the absence of any provisions to regulate the decision-making with regard to the USDOC's order-wide determinations".[177] Japan submits that the Panel reached its conclusion with respect to order-wide determinations as a consequence of specific and clear arguments raised by Argentina in regard to the impact of company-specific determinations on order-wide determinations. Japan maintains that the relationship between company-specific and order-wide determinations in the United States has not changed since the original proceedings, and that the United States repeats the arguments it made in the original proceedings, even though they were rejected by the original panel and the Appellate Body.[178]

81. Japan also argues that it was within the Panel's mandate to make a finding on the WTO-consistency of the USDOC's volume analysis. First, Japan submits that Argentina's challenge to the consistency of the volume analysis is not a new claim because it was raised in the original proceedings, and the United States has therefore been given "sufficient opportunity to submit evidence and arguments on this point".[179] The Panel's finding therefore does not raise due process concerns. Secondly, in Japan's view, the finding by the original panel that the factual basis of the USDOC's likelihood-of-dumping determination was inadequate means that it was appropriate for the Panel in these Article 21.5 proceedings to examine "whether the factors, including volume decline, of the USDOC's re-determination [are] based on a sufficient factual basis or not".[180]

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[175]Japan's third participant's submission, para. 7 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 111). (original emphasis)

[176]*Ibid*., para. 7.

[177]*Ibid*.

[178]*Ibid*., para. 10 (referring to Original Panel Report, para. 7.102; and Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 233-234).

[179]*Ibid*., para. 14.

[180]*Ibid*., para. 15.

82. Moreover, according to Japan, "the United States was not entitled to assume that the volume analysis was consistent with its obligations under the [*Anti-Dumping*] *Agreement*."[181] Rather, the original panel indicated that the volume analysis would be inconsistent if it lacked an evidentiary basis, so the United States had a "reasonable period of time" to bring its likelihood-of-dumping determination into conformity with Article 11.3. Japan submits that the United States should have used that time "to provide the volume analysis with a sufficient factual basis, as part of the likelihood re-determination".[182] At the oral hearing, Japan argued that the fact that the original panel exercised judicial economy on the volume analysis means that the claim was not resolved. Therefore, the limitations on the scope of the Article 21.5 proceedings do not apply.

83. In addition, Japan requested at the oral hearing that the Appellate Body limit the Panel's interpretative findings regarding the new evidence that can be collected for purposes of implementing the recommendations and rulings of the DSB in original proceedings. Japan takes no position on the Panel's ruling on the facts of this case, but contends that the Panel's findings are too broad insofar as they articulate unqualified principles that apply to all trade remedy cases. According to Japan, the Panel's findings ignore the unique character of trade remedy agreements, which set out specific procedural requirements for the conduct of trade remedy investigations that are not replicated in other covered agreements, including the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*"). Japan therefore requests the Appellate Body to correct the Panel's finding that implementation in trade remedy disputes is the same as in all other disputes and to take into account the broader systemic implications of its findings when addressing the very specific new facts at issue in this dispute.[183]

4. Korea

84. Pursuant to Rule 24(2) of the *Working Procedures*, Korea chose not to submit a third participant's submission. At the oral hearing, Korea focused on the Panel's finding that the USDOC was not precluded from developing a new evidentiary basis for its Section 129 Determination. Korea contends that allowing the United States to start all over again would mean that investigating authorities are allowed to conduct inconsistent sunset reviews and justify the results only years later. For Korea, this would effectively undermine the fundamental purpose of the sunset review provisions, namely, the five-year temporal limit on the duration of an anti-dumping duty order. Korea also believes that the Panel's interpretation of Articles 11.3 and 11.4 of the *Anti-Dumping Agreement*

[181]Japan's third participant's submission, para. 17.

[182]*Ibid*.

[183]Japan's statement at the oral hearing.

departs from the ordinary meaning of the terms used in these Articles and cannot be justified by the "broader, horizontal considerations"[184] of the WTO dispute settlement system referred to by the Panel.

5. Mexico

85. Mexico chose not to submit a third participant's submission pursuant to Rule 24(2) of the *Working Procedures*. In its statement at the oral hearing, Mexico expressed support for Argentina's request for a suggestion, under Article 19.1 of the DSU, that the United States terminate the anti-dumping duties. According to Mexico, Argentina has a right to termination of the order, because the Panel found that the United States still had not brought itself into compliance after the expiration of the "reasonable period of time". In Mexico's view, Article 11.3 of the *Anti-Dumping Agreement* requires termination at this stage, and the Appellate Body should give effect to that provision, either through a direct interpretation of Article 11.3, or through a suggestion under Article 19.1 of the DSU.

III. Issues Raised in This Appeal

86. The following issues are raised in this appeal:

(a) whether the Panel erred in finding that Section 751(c)(4)(B)[185] of the United States Tariff Act of 1930 (the "Tariff Act"), operating in conjunction with Section 751(c)(4)(A) of the Tariff Act and Section 351.218(d)(2) of the *United States Code of Federal Regulations* (the "Regulations"), is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*; and whether, in reaching this finding, the Panel failed to make an objective assessment of the matter before it, as required by Article 11 of the DSU;

(b) whether the Panel erred in concluding that the finding of the United States Department of Commerce (the "USDOC") concerning the decline in import volumes after the imposition of the anti-dumping duty order, which was made in the original sunset determination and incorporated into the Section 129 Determination, was properly before it;

[184]Panel Report, para. 7.51.

[185]Section 751 of the United States Tariff Act of 1930 is codified as Section 1675 of Title 19 of the *United States Code*. See Exhibit ARG-33 submitted by Argentina to the Panel.

(c) whether the Panel erred in finding that the USDOC did not act inconsistently with Articles 11.3 and 11.4 of the *Anti-Dumping Agreement* by developing a new evidentiary basis pertaining to the original review period for purposes of its Section 129 Determination; and whether, in reaching this finding, the Panel acted inconsistently with its obligation under Article 11 of the DSU to make an objective assessment of the matter before it, and acted inconsistently with Articles 3.2 and 19.2 of the DSU by diminishing Argentina's rights and the United States' obligations under Articles 11.3 and 11.4 of the *Anti-Dumping Agreement*; and

(d) whether, in rejecting Argentina's request for a suggestion pursuant to Article 19.1 of the DSU, the Panel failed to make an objective assessment of the matter before it, as required by Article 11 of the DSU, and failed to set out "the applicability of relevant provisions and the basic rationale behind [its] findings and recommendations", as required by Article 12.7 of the DSU.

IV. Amended Waiver Provisions

87. We begin with the United States' appeal of the Panel's findings relating to Section 751(c)(4) of the Tariff Act and Section 351.218(d)(2) of the Regulations, the so-called "amended waiver provisions". Before examining the issue raised on appeal, we briefly set out the panel's and the Appellate Body's findings in the original proceedings; the measures taken by the United States to comply with the recommendations and rulings of the DSB arising from the original proceedings; the Panel's findings in these Article 21.5 proceedings; and the claims and arguments raised in this appeal by the participants.

A. *Original Proceedings*

88. Before the original panel, Argentina asserted that Section 751(c)(4) of the Tariff Act and Section 351.218(d)(2)(iii) of the Regulations were inconsistent as such with Article 11.3 of the *Anti-Dumping Agreement*.[186] At the outset of its analysis, the original panel distinguished between the two waiver situations contemplated in the United States' statute and Regulations, which it described as follows:

[186]In the original proceedings, Argentina also challenged the consistency of the waiver provisions with Articles 6.1 and 6.2 of the *Anti-Dumping Agreement*.

> We note that Section 751(c)(4)(A) of the Tariff Act provides that an interested party may elect to waive its participation in sunset review proceedings conducted by the USDOC and participate only in sunset review proceedings conducted by the USITC. Section 351.218(d)(2)(i) of the Regulations provides that an interested party may waive participation by filing a statement of waiver with the USDOC. We will refer to this as an "explicit" or "affirmative" waiver. Further, according to Section 351.218(d)(2)(iii) of the Regulations, the USDOC will consider the failure of an interested party to submit a complete substantive response to the notice of initiation of a sunset review to constitute a waiver of participation in the USDOC's sunset review proceedings. We will refer to this as an "implicit" or "deemed" waiver.[187] (original underlining)

The original panel noted that the "deemed" waiver category was "create[d]"[188] in the Regulations and that, consequently, "[its] findings regarding affirmative waivers will have implications on the Tariff Act whereas those relating to deemed waivers will only affect Section 351.218(d)(2)(iii) of the Regulations."[189]

89. The original panel examined the consistency of each of the two categories of waivers with Article 11.3 of the *Anti-Dumping Agreement*. As regards "deemed" waivers, in situations where an exporter files an incomplete response, the original panel found that the USDOC's determination cannot be "supported by reasoned and adequate conclusions based on the facts before an investigating authority", because "the USDOC is precluded from taking into consideration, in its determination with respect to a given exporter, the facts submitted by that exporter (or any other facts before it that might be relevant to its determination), and it is further precluded from receiving, much less considering, any other facts relevant to this question".[190] With regard to situations where an exporter fails to respond to the notice of initiation, the original panel found that "an affirmative [likelihood-of-dumping] determination based exclusively upon the fact that the exporter did not respond to a notice of initiation, and which disregards entirely even the possibility that other relevant information might be in the record, is not supported by reasoned and adequate conclusions based on the facts before an investigating authority, inconsistently with Article 11.3."[191] The original panel also "consider[ed] that even in a case of affirmative waiver, the investigating authority's obligation to make a determination supported by reasoned and adequate conclusions based on the facts before it continues to apply."[192] In

[187]Original Panel Report, para. 7.83.

[188]*Ibid*., para. 7.85.

[189]*Ibid*.

[190]*Ibid*., para. 7.93.

[191]*Ibid*., para. 7.95. (footnote omitted)

[192]*Ibid*., para. 7.99.

the original panel's view, "[t]he investigating authority cannot simply assume, without further inquiry, that dumping is likely to continue or recur because the exporter chose not to participate in the review."[193] Thus, the original panel found that "the provisions of [United States] law relating to affirmative waivers are also inconsistent with the obligation to determine likelihood of continuation or recurrence of dumping under Article 11.3 of the [Anti-Dumping] Agreement."[194]

90. The United States pointed out that, under United States law, "the final likelihood determination in a sunset review is made on an order-wide basis for a country."[195] It argued that, "[a]lthough [United States] law mandates an affirmative finding of likelihood with respect to exporters that have waived their right to participate in a sunset review, it does not do so with respect to the order-wide determination."[196] The original panel rejected this argument because, "[t]o the extent that the order-wide determination of likelihood is based in whole or in part upon a company-specific determination that was improperly established, [it did] not see how the order-wide determination can be supported by reasoned and adequate conclusions based on the facts before the investigating authority."[197]

91. The original panel concluded that:

> ... both affirmative and deemed waivers provisions of [United States] law, i.e. Section 751(c)(4)(B) of the Tariff Act and Section 351.218(d)(2)(iii) of the USDOC's Regulations, are inconsistent with the investigating authorities' obligation to determine likelihood of continuation or recurrence of dumping under Article 11.3 of the Anti-Dumping Agreement.[198]

[193]Original Panel Report, para. 7.99.

[194]*Ibid*.

[195]*Ibid*., para. 7.100.

[196]*Ibid*. (referring to the United States' response to Questions 4(c) and 5(d) posed by the original panel at the first meeting with the parties, Original Panel Report, p. E-23, paras. 24-25 and p. E-25, para. 30; and United States' second written submission to the original panel, Original Panel Report, p. C-9, para. 21).

[197]*Ibid*., para. 7.101.

[198]*Ibid*., para. 7.103.

92. The Appellate Body upheld the original panel's findings, even though it disagreed with the original panel's approach to company-specific determinations.[199] According to the Appellate Body, "[b]ecause the waiver provisions require the USDOC to arrive at affirmative company-specific determinations without regard to any evidence on the record, these determinations are merely *assumptions* made by the agency, rather than findings supported by evidence."[200] The Appellate Body further reasoned that, "even assuming that the USDOC takes into account the totality of record evidence in making its order-wide determination, it is clear that, as a result of the operation of the waiver provisions, certain *order-wide* likelihood determinations made by the USDOC will be based, at least in part, on statutorily-mandated *assumptions* about a company's likelihood of dumping."[201] "[T]his result", the Appellate Body reasoned, "is inconsistent with the obligation of an investigating authority under Article 11.3 to 'arrive at a reasoned conclusion' on the basis of 'positive evidence'."[202] Therefore, the Appellate Body upheld the original panel's findings that "Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(iii) of the USDOC Regulations are inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*."[203]

B. *Measures Taken to Comply*

93. In order to comply with the recommendations and rulings of the DSB, the United States introduced three amendments to its Regulations[204], which became effective on 31 October 2005. Two of the three modifications are relevant for purposes of this appeal.[205] First, Section 351.218(d)(2)(ii) of the Regulations, which sets out the contents of a statement of waiver, was revised and a new requirement was introduced whereby a respondent interested party wishing to waive its participation in the USDOC component of a sunset review must submit "a statement that [it] is likely to dump ... if

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[199]According to the Appellate Body:

> ... it was neither necessary nor relevant for the [original] Panel to draw a conclusion as to the WTO-consistency of the *company-specific* determinations resulting from the waiver provisions. [Rather,] the relevant inquiry ... [was] whether the *order-wide* likelihood determination would be rendered inconsistent with Article 11.3 by virtue of the operation of the waiver provisions.

(Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 232 (original emphasis))

[200]*Ibid*., para. 234. (original emphasis)

[201]*Ibid*. (original emphasis)

[202]*Ibid*. (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 111 and 114 (footnotes omitted)).

[203]*Ibid*., para. 235.

[204]*Supra*, footnote 9, p. 62061.

[205]*Ibid*., p. 62062. The third change relates to the use of waivers in countervailing duty sunset reviews and is not directly relevant for purposes of this appeal.

the order is revoked or the investigation is terminated."[206] Secondly, Section 351.218(d)(2)(iii) of the Regulations, which dealt with "deemed" waivers, was repealed.[207] The USDOC explained that, as a consequence of the repeal of this provision, it "will no longer make company-specific likelihood findings for companies that fail to file a statement of waiver and fail to file a substantive response to the notice of initiation".[208] Section 751(c)(4)(B) of the Tariff Act was neither repealed nor amended.[209]

C. *Panel Proceedings pursuant to Article 21.5 of the DSU*

94. In these Article 21.5 proceedings, Argentina claimed that the amendments to the Regulations failed to bring the United States into compliance with its obligations under Article 11.3 of the *Anti-Dumping Agreement*. The United States responded that it had fully "implemented the DSB recommendations and rulings regarding the WTO-inconsistencies found in [United States] law by eliminating deemed waivers and by requiring exporters who chose to affirmatively waive their right to participate in a sunset review to acknowledge in writing that they would be likely to continue or resume dumping in the case of the revocation of the duty."[210]

95. The Panel began its analysis by "identify[ing] the scope of the current waiver provisions subject to Argentina's claim".[211] It found that "the concept of *waiver* set out in Section 751(c)(4) of the Statute, in conjunction with the regulatory provisions in Section 351.218(d)(2), now refers only to the *affirmative waiver* situation that is, where an exporter elects not to participate in a review by filing an affirmative statement of waiver, accompanied by a statement that the exporter is likely to continue or resume dumping in the absence of the order."[212] Having identified the scope of the amended waiver provisions, the Panel proceeded to describe the issue before it as follows:

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[206]*Supra*, footnote 9, p. 62064.

[207]Before its repeal, Section 351.218(d)(2)(iii) provided:

> *No response from a respondent interested party*. The Secretary will consider the failure by a respondent interested party to file a complete substantive response to a notice of initiation under paragraph (d)(3) of this section as a waiver of participation in a sunset review before the [USDOC].

(See Exhibit US-13 submitted by the United States to the Panel)

[208]*Supra*, footnote 9, p. 62062.

[209]The text of Section 751(c)(4)(B) is reproduced *infra* at para. 106.

[210]Panel Report, para. 7.7.

[211]*Ibid*., para. 7.21.

[212]*Ibid*., para. 7.31. (original emphasis; footnote omitted)

> [W]hether, after the amendments made by the United States with a view to implementing the DSB recommendations and rulings in the original proceedings, the waiver provision under Section 751(c)(4)(B) of the Tariff Act, operating in conjunction with Section 751(c)(4)(A) of the Tariff Act and Section 351.218(d)(2) of the Regulations, precludes the USDOC in some or all situations arising in sunset reviews from making a reasoned determination of likelihood of continuation or recurrence of dumping based on an adequate factual foundation, as required by Article 11.3 of the Anti-Dumping Agreement.[213]

96. Looking at the operation of the amended waiver provisions, the Panel observed that "in some situations, the statutory and regulatory waiver provisions may not necessarily preclude the USDOC from arriving at reasoned conclusions of likelihood of continuation or recurrence of dumping on the basis of an adequate factual foundation as required by Article 11.3."[214] The Panel explained that "in a sunset review where all exporters explicitly and affirmatively waive their right to participate and acknowledge, in accordance with Section 351.218(d)(2)(ii) of the Regulations, that they are likely to continue or resume dumping if the measure is revoked, it may well be reasonable for the USDOC to find likelihood for these exporters individually and ... on an order-wide basis."[215] However, the Panel went on to find that "there may be other situations where the waiver provisions may preclude the USDOC from reaching reasoned conclusions on an adequate factual basis."[216] The Panel referred to a situation involving multiple exporters, where some neither file a complete substantive response nor expressly waive their right to participate and simply remain silent after the initiation of the sunset review, while others follow Section 351.218(d)(2)(ii) of the Regulations and affirmatively waive their right to participate. In a situation such as this, the Panel considered that "the USDOC may have to find likelihood on an order-wide basis because of the company-specific determinations that it may have made under Section 751(c)(4)(B) for the waiving exporters."[217]

97. The Panel rejected the United States' argument that, "where the USDOC makes such company-specific findings for some exporters under Section 751(c)(4)(B), those findings would be taken into account in the order-wide determination, but they would not necessarily determine the outcome of the order-wide determination."[218] The Panel found it "difficult to understand how the

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[213]Panel Report, para. 7.35. The Panel observed that it would "base [its] ultimate assessment of Argentina's claim regarding waivers on the USDOC's order-wide, as opposed to company-specific, determinations". (*Ibid*. (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 232))

[214]*Ibid*., para. 7.36.

[215]*Ibid*.

[216]*Ibid*., para. 7.37.

[217]*Ibid*.

[218]*Ibid*., para. 7.39.

USDOC would find no likelihood of continuation or recurrence of dumping on an order-wide basis in a sunset review where it may have made an affirmative likelihood determination for some exporters pursuant to Section 751(c)(4)(B) of the Tariff Act."[219] Rather, the Panel explained that it could "reasonably conclude that in every sunset review involving multiple exporters the USDOC will have to find likelihood on an order-wide basis if one exporter waives its right to participate".[220]

98. The Panel then examined whether the amended waiver provisions are consistent with Article 11.3 of the *Anti-Dumping Agreement*. The Panel explained that "[t]he provisions of Section 751(c)(4)(B) of the Tariff Act ... would preclude the USDOC from taking into consideration evidence submitted by cooperating exporters or evidence otherwise collected by the USDOC in sunset reviews where there is at least one other exporter who waives its right to participate."[221] "In such cases", the Panel continued, "the USDOC's order-wide determination would be based on the assumption that because one exporter waived its right to participate and acknowledged to be likely to continue or resume dumping, other exporters are also likely to continue or resume dumping."[222] Thus, the Panel reasoned, the USDOC "would fail to observe the obligation of the investigating authorities to make reasoned determinations of likelihood of continuation or recurrence of dumping based on a sufficient factual premise in accordance with Article 11.3 of the [Anti-Dumping] Agreement."[223]

99. The Panel concluded:

> Having found that the [United States] statutory and regulatory waiver provisions may, in some situations, preclude the USDOC from making a reasoned determination of likelihood of continuation or recurrence of dumping based on an adequate factual foundation—such as where the USDOC may be required to make an affirmative finding on an order-wide basis due to an affirmative finding, pursuant to Section 751(c)(4)(B) of the Tariff Act, for individual exporters who waive their right to participate—we thus find Section 751(c)(4)(B) of the Tariff Act, operating in conjunction with Section 751(c)(4)(A) of the Tariff Act and Section 351.218(d)(2) of the Regulations, to be inconsistent with Article 11.3 of the [Anti-Dumping] Agreement.[224]

[219]Panel Report, para. 7.39.

[220]*Ibid*.

[221]*Ibid*., para. 7.40.

[222]*Ibid*. (footnote omitted)

[223]*Ibid*., para. 7.40.

[224]*Ibid*., para. 7.41.

D. *Claims and Arguments on Appeal*

100. The United States claims on appeal that the Panel erred in concluding that the amended waiver provisions are inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. First, the United States argues that the Panel committed a legal error by applying an incorrect standard in its evaluation of the amended provisions. According to the United States, the Panel evaluated whether Section 751(c)(4) *could* breach the *Anti-Dumping Agreement*, rather than whether the statute *mandates* a breach.[225] Secondly, the United States asserts that the Panel reversed the burden of proof by relieving Argentina of its burden to provide evidence and arguments establishing a breach of Article 11.3, and, instead, relying on "pure speculation".[226] Thirdly, the United States submits that the Panel failed to make an objective assessment of the matter before it, as required by Article 11 of the DSU.[227]

101. Argentina asserts that the United States' arguments "are premised upon an erroneous understanding of the Appellate Body's findings [in the original proceedings] as to why the waiver provisions were found to be inconsistent with ... Article 11.3 of the Anti-Dumping Agreement".[228] According to Argentina, "[t]he Appellate Body was ... quite clear that the WTO-inconsistency of the waiver provisions resulted from statutorily-mandated company-specific determinations that taint the order-wide determinations, because in such cases, the determination will be based 'at least in part, on statutorily-mandated *assumptions* about a company's likelihood of dumping.'"[229] Argentina argues that "the same WTO-inconsistency remains"[230] because "[t]he modification of the waiver regulation by the United States did nothing to address the source of the ... violation."[231] It adds that "[t]he fact that the statutory-mandate is now triggered by an affirmative statement and an 'admission' has not changed the nature of the violation of Article 11.3", because "[t]he statutory-mandate strips [the] USDOC of its ability to assess evidence with respect to a waiving company in order to 'arrive at a

[225]United States' appellant's submission, subheading III.A, p. 4. According to the United States, the Panel examined whether there was any provision in United States law that precluded Section 751(c)(4) from requiring an affirmative order-wide determination in cases where an exporter filed a statement of waiver. Such an approach, the United States argues, is contrary to the standard set out by the GATT panel in *US – Tobacco* whereby "a statute need not unambiguously require a WTO-consistent result, but only ... permit a WTO-consistent result". (*Ibid*., para. 13) The United States points out that the Appellate Body referred to the *US – Tobacco* GATT panel report in *US – 1916 Act*. (*Ibid*., para. 9 (referring to Appellate Body Report, *US – 1916 Act*, para. 88))

[226]*Ibid*., para. 14.

[227]*Ibid*., para. 24.

[228]Argentina's appellee's submission, para. 10.

[229]*Ibid*., para. 17 (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 234 (original emphasis)).

[230]*Ibid*., para. 18.

[231]*Ibid*., para. 19. (original underlining)

reasoned conclusion' on the basis of the evidence developed for that company and, as a result, the order-wide determination 'will be based, at least in part, on statutorily-mandated *assumptions* about a company's likelihood of dumping.'"[232]

E. *Consistency of the Amended Waiver Provisions with Article 11.3 of the Anti-Dumping Agreement*

102. We turn now to assess the consistency of the amended waiver provisions with Article 11.3 of the *Anti-Dumping Agreement* and begin our examination by setting out the requirements established in this provision, as interpreted by the Appellate Body. Article 11.3 of the *Anti-Dumping Agreement* provides:

> Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.* The duty may remain in force pending the outcome of such a review.
>
> *[Original footnote 22] When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

103. The Appellate Body has explained that Article 11.3 "imposes a temporal limitation on the maintenance of anti-dumping duties" and "lays down a mandatory rule with an exception".[233] Article 11.3 requires WTO Members to terminate an anti-dumping duty within five years of its imposition *unless* the following three conditions are satisfied:

[232]Argentina's appellee's submission, para. 19 (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 234 (original emphasis)).

[233]Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 104.

> [F]irst, that a review be initiated before the expiry of five years from the date of the imposition of the duty; second, that in the review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of *dumping*; and third, that in the review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of *injury*. If any one of these conditions is not satisfied, the duty must be terminated.[234] (original emphasis; footnote omitted)

104. The review conducted by an investigating authority pursuant to Article 11.3 has been described by the Appellate Body as "combining *both* investigatory and adjudicatory aspects", requiring investigating authorities to take "an active rather than a passive decision-making role".[235] The words "review" and "determine" in Article 11.3 have been read by the Appellate Body as indicating that "authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination."[236] The Appellate Body further explained that "[t]he plain meaning of the terms 'review' and 'determine' in Article 11.3 ... compel an investigating authority in a sunset review to undertake an examination, on the basis of positive evidence, of the likelihood of continuation or recurrence of dumping and injury" and that, "[i]n drawing conclusions from that examination, the investigating authority must arrive at a reasoned determination resting on a sufficient factual basis; it may not rely on assumptions or conjecture."[237] The requirements that a determination be based on "positive evidence" and a "sufficient factual basis" "govern all aspects of an investigating authority's likelihood determination".[238]

105. At the same time, the Appellate Body has held 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 it "identify any particular factors that authorities must take into account in making such a determination."[239] The Appellate Body has also indicated that, where an investigating authority chooses to make its likelihood-of-dumping determination on an order-wide basis, the examination of the WTO-consistency of that determination must also be made on an order-wide basis.[240]

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[234]Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 104.

[235]*Ibid*., para. 111. (original emphasis)

[236]*Ibid*.

[237]Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 180.

[238]*Ibid*., para. 302.

[239]Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 123. (footnote omitted)

[240]Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 231.

106. Having set out the requirements of Article 11.3 of the *Anti-Dumping Agreement*, we now examine the consistency of the amended waiver provisions. The relevant provisions of United States law, for purposes of this appeal, are Section 751(c)(4) of the Tariff Act and Section 351.218(d)(2)(ii) of the Regulations. Section 751(c)(4) of the Tariff Act provides:

> WAIVER OF PARTICIPATION BY CERTAIN INTERESTED PARTIES
>
> (A) IN GENERAL.—An interested party described in Section 771(9)(A) or (B) may elect not to participate in a review conducted by the administering authority under this subsection and to participate only in the review conducted by the [USITC] under this subsection.
>
> (B) EFFECT OF WAIVER.—In a review in which an interested party waives its participation pursuant to this paragraph, the administering authority shall conclude that revocation of the order or termination of the investigation would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) with respect to that interested party.[241]

107. The relevant part of the amended Section 351.218(d)(2)(ii) of the Regulations states:

> *Contents of statement of waiver.* Every statement of waiver must include a statement indicating that the respondent interested party waives participation in the sunset review before the [USDOC]; a statement that the respondent interested party is likely to dump ... if the order is revoked or the investigation is terminated[.][242]

108. Pursuant to Section 751(c)(4)(A) of the Tariff Act, an interested party is allowed to waive its right to participate in the review conducted by the USDOC while still being able to participate in the review conducted by the United States International Trade Commission (the "USITC").[243] In such instances, Section 751(c)(4)(B) requires the USDOC to make an affirmative determination of likely dumping "with respect to that interested party". Section 351.218(d)(2)(ii) of the Regulations sets out the contents of the statement that must be submitted by the interested party wishing to waive its participation. As a result of the amendments to the Regulations, the statement of waiver now must include "a statement that the respondent interested party is likely to dump ... if the order is revoked or the investigation is terminated."

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[241]See Exhibit ARG-33 submitted by Argentina to the Panel.

[242]See *supra*, footnote 9, p. 62064.

[243]We assume, and Argentina has not alleged otherwise, that an exporter that fails to respond to the USDOC's notice of initiation, or provides an incomplete response, does not waive its right to participate in the USITC component of the sunset review.

109. Argentina does not appeal the Panel's finding that "the concept of *waiver* set out in Section 751(c)(4) of the Statute, in conjunction with the regulatory provisions in Section 351.218(d)(2), now refers only to the *affirmative waiver* situation that is, where an exporter elects not to participate in a review by filing an affirmative statement of waiver, accompanied by a statement that the exporter is likely to continue or resume dumping in the absence of the order."[244] Argentina confirmed at the oral hearing that it does not contest this finding. Consequently, in our analysis, we proceed on the basis that the amended waiver provisions require the USDOC to make an affirmative company-specific finding *only* in cases where an exporter files a statement of waiver, that is, in cases of "affirmative" waiver.[245]

110. In addition to the elimination of "deemed" waivers, there are significant differences in the requirements that apply to "affirmative" waivers under the amended Regulations. Prior to the amendments, an exporter wishing affirmatively to waive its participation in the USDOC's sunset review had to submit a statement of waiver "indicating that [it] waives participation in the sunset review".[246] The amendments to the Regulations introduced a new requirement: in addition to the statement indicating its intention to waive its participation, a waiving exporter must also include "a statement that [it] is likely to dump ... if the order is revoked or the investigation is terminated." The Panel acknowledged that this statement "may constitute at least part of the evidentiary basis on which

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[244]Panel Report, para. 7.31. (original emphasis; footnote omitted)

[245]In *US – Section 211 Appropriations Act*, the Appellate Body stated that:

> ... a panel may examine the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its obligations under the *WTO Agreement*. Such an assessment is a legal characterization by a panel. And, therefore, a panel's assessment of municipal law as to its consistency with WTO obligations is subject to appellate review under Article 17.6 of the DSU.

(Appellate Body Report, *US – Section 211 Appropriations Act*, para. 105)

[246]Prior to the amendments, Section 351.218(d)(2)(ii) read as follows:

> *Contents of statement of waiver*. Every statement of waiver must include a statement indicating that the respondent interested party waives participation in the sunset review before the [USDOC] and the following information:
>
> (A) The name, address, and phone number of the respondent interested party waiving participation in the sunset review before the [USDOC];
>
> (B) The name, address, and phone number of legal counsel or other representative, if any;
>
> (C) The subject merchandise and country subject to the sunset review; and
>
> (D) The citation and date of publication in the FEDERAL REGISTER of the notice of initiation.

(See Exhibit US-13 submitted by the United States to the Panel)

the authorities may base their sunset determinations".[247] Argentina recognizes that this statement is an admission that may be accorded weight.[248]

111. The significance of the amendments made to the Regulations lies in the relationship between the statement submitted by the waiving exporter and the conclusion that the USDOC is required to draw from the waiver pursuant to Section 751(c)(4)(B) of the Tariff Act. Prior to the amendments to the Regulations, the statement submitted by the waiving exporter indicated only that the exporter did not intend to participate in the USDOC sunset review; the statement said nothing about whether the exporter was likely to dump if the order were revoked or the investigation terminated. Nevertheless, that was the conclusion drawn from the waiver by the USDOC in accordance with Section 751(c)(4)(B). The waiver triggered the conclusion and there was no evidentiary basis to support it. Therefore, the conclusion drawn by the USDOC pursuant to Section 751(c)(4)(B) was a mere assumption. As the Appellate Body explained in the original proceedings, the USDOC arrived at "affirmative company-specific determinations without regard to any evidence on record", and thus the company-specific determinations were "merely *assumptions* made by the agency, rather than findings supported by evidence".[249]

112. Pursuant to the amended Regulations, an exporter who chooses to waive participation must now submit a statement indicating that it is likely to dump if the order is revoked or the investigation is terminated. The conclusion drawn by the USDOC from the statement, pursuant to Section 751(c)(4)(B) of the Tariff Act, is now synonymous with the statement submitted by the waiving exporter; there is a clear relationship between the statement and the conclusion drawn by the USDOC. A statement by an interested party who elects to make an admission, plainly against its own interest[250], as to its future conduct thereby provides significant, and sometimes overwhelming, evidence for the conclusion that is mandated by the statute. The statement required by the amended Regulations is such an admission and constitutes evidence that warrants the finding that is statutorily

[247]Panel Report, para. 7.36.

[248]Argentina's appellee's submission, paras. 19 and 25; Argentina's response to questioning at the oral hearing.

[249]Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 234. (original emphasis)

[250]Admissions are generally taken to be reliable because they are adverse to the interests of the parties making them. There may be exceptional circumstances where this may not be the case. Argentina offered a hypothetical example at the oral hearing involving strategic behaviour by a foreign affiliate of a petitioner domestic industry. The affiliate files a statement of waiver in order to make an affirmative order-wide determination more likely, for the benefit of its parent company. However, the United States has indicated that, if such a situation were to arise, evidence contradicting the waiving exporter's admission may be placed on the record of the sunset review and must be considered by the USDOC before it makes the order-wide determination. (United States' response to questioning at the oral hearing) See also United States' response to Question 4(a) posed by the Panel, Panel Report, p. E-58, para. 13.

mandated, because there is an unremarkable, and entirely rational, chain of reasoning that links the evidence of what a party says it will do to the finding that such party is likely to act in accordance with its acknowledged intention. Accordingly, the waiving exporter's statement clearly constitutes positive evidence and provides a reasoned basis for the USDOC to make the company-specific findings required by Section 751(c)(4)(B) of the Tariff Act. In these circumstances, we do not consider that the company-specific findings that rest upon the exporter's statement can be described as "merely *assumptions* made by the agency, rather than findings supported by evidence".[251] Likewise, although the company-specific finding of likelihood of dumping is still statutorily mandated, the legal consequence mandated by the statute does not go beyond what is declared by the waiving exporter in its statement of waiver. Therefore, even though Section 751(c)(4)(B) has not been amended, the manner in which it operates in conjunction with the amended Regulations has changed significantly, and this informs our assessment of the consistency of the amended waiver provisions with Article 11.3 of the *Anti-Dumping Agreement*.

113. We also note that exporters are not compelled to waive their right to participate in a sunset review. An exporter that submits a statement of waiver does so *voluntarily*. Exporters have the option to participate actively in the proceedings before the USDOC and to submit evidence. Alternatively, exporters may choose to remain silent, by failing to respond to a notice of initiation, in which case no company-specific determination will be made by the USDOC for that exporter.[252]

114. Having considered the underlying basis of the company-specific findings, we now address the relationship of these findings with the order-wide determination. The United States asserted that, "[i]n making its order-wide determination, [the USDOC] *must* consider all information and argument on the record of the sunset proceeding".[253] Argentina's argument is that, in the original proceedings, the Appellate Body did not consider relevant whether other evidence in the record would be considered by the USDOC when making the order-wide determination.[254] Argentina points to the following statement made by the Appellate Body in the original proceedings:

[251]Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 234. (original emphasis)

[252]See *supra*, para. 93.

[253]United States' response to Question 4(a) posed by the Panel, Panel Report, p. E-58, para. 13. (emphasis added)

[254]Argentina's appellee's submission, paras. 2, 17-18, and 36.

> [E]ven assuming that the USDOC takes into account the totality of record evidence in making its order-wide determination, it is clear that, as a result of the operation of the waiver provisions, certain *order-wide* likelihood determinations made by the USDOC will be based, at least in part, on statutorily-mandated *assumptions* about a company's likelihood of dumping.[255] (original emphasis)

115. The Appellate Body's statement must be read in the light of the measures at issue in the original proceedings. As we have explained, before the amendments to the Regulations, the USDOC made company-specific findings for exporters that filed incomplete submissions or failed to respond to a notice of initiation. In addition, the company-specific findings with respect to waiving exporters were based on statements that said nothing about whether the exporter was likely to dump if the order were revoked or the investigation terminated. In neither case were the company-specific findings based on positive evidence; instead, the company-specific findings were based on *assumptions*. This flaw could not be rectified by the USDOC's consideration, at the order-wide level, of evidence contradicting the company-specific finding. This is because the finding was based on an assumption, and not on evidence, and therefore was not capable of being properly weighed at the order-wide level against other evidence that may have been on the record.

116. The situation of the amended waiver provisions is different. We explained above that company-specific findings are no longer based merely on assumptions. Rather, the company-specific finding is based on a statement by the exporter that it is likely to dump if the order were revoked or the investigation terminated. This statement constitutes positive evidence. In addition, the amended waiver provisions do not preclude the USDOC from considering other evidence on the record when making an order-wide determination.[256] Thus, at both the company-specific and order-wide levels of analysis, the USDOC's findings would have an evidentiary basis and the totality of the evidence must be weighed before the order-wide determination is made.

117. Turning to the Panel's analysis, we note that, even though Argentina did not premise its claim on whether the company-specific findings were determinative for the order-wide determination, the Panel focused its reasoning on this issue. The Panel described the relationship between company-specific findings and the order-wide determination as follows:

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[255]Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 234.

[256]United States' appellant's submission, paras. 12 and 31-32. See also United States' response to Question 4(a) posed by the Panel, Panel Report, p. E-58, para. 13.

> Given that Section 751(c)(4)(B) requires the USDOC to make an affirmative likelihood determination for individual exporters who waive their right to participate, it seems to us that such company-specific determinations *would necessarily have a significant impact on, or even determine*, the outcome of the USDOC's order-wide determination. Hence, we can reasonably conclude that in every sunset review involving multiple exporters the USDOC will have to find likelihood on an order-wide basis if one exporter waives its right to participate, because otherwise the USDOC would have found no likelihood with respect to the exporters who waive their right to participate.[257] (emphasis added)

In such cases, the Panel added, "[t]he provisions of Section 751(c)(4)(B) of the Tariff Act ... would preclude the USDOC from taking into consideration evidence submitted by cooperating exporters or evidence otherwise collected by the USDOC in sunset reviews where there is at least one other exporter who waives its right to participate" and, as a result, "the USDOC's order-wide determination would be based on the assumption that because one exporter waived its right to participate and acknowledged to be likely to continue or resume dumping, other exporters are also likely to continue or resume dumping."[258]

118. We are unable to agree with the Panel's analysis for several reasons. First, the Panel did not fully appreciate the consequences that flow from the fact that, under the amended waiver provisions, the company-specific findings are now based on positive evidence taking the form of an admission. Secondly, as we have noted, Argentina did not set out to demonstrate that the company-specific findings determine the outcome of the order-wide determination. Rather, Argentina sought to prove that "the order-wide determination will be based, at least in part, on statutorily-mandated findings", which Argentina claims is sufficient to establish a violation of Article 11.3 of the *Anti-Dumping Agreement*.[259]

119. In addition, we note that the Panel concluded that the amended waiver provisions "would preclude the USDOC from taking into consideration evidence submitted by cooperating exporters or evidence otherwise collected by the USDOC in sunset reviews where there is at least one other exporter who waives its right to participate".[260] The Panel also concluded that "company-specific determinations would necessarily have a significant impact on, or even determine, the outcome of the

[257]Panel Report, para. 7.39.

[258]*Ibid*., para. 7.40. (footnote omitted)

[259]Argentina's appellee's submission, para. 48 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 234).

[260]Panel Report, para. 7.40.

USDOC's order-wide determination."[261] However, the United States emphasized before the Panel that, "[i]n making its order-wide determination, [the USDOC] *must* consider all information and argument on the record of the sunset proceeding."[262] Furthermore, the United States pointed out that "the relevance of ... a company-specific finding to the ultimate likelihood determination always would depend on the facts on the administrative record in that sunset review."[263]

120. We observe that a respondent's explanation of the basis on which its investigating authority will make a determination will have more weight if it is confirmed by the text of the applicable laws or regulations. But the United States' statements that the USDOC must consider all information and arguments on the record, and that the relevance of a company-specific finding to the order-wide likelihood determination would always depend on the facts of each case, cannot be rejected merely because there is no legal instrument that expressly requires the USDOC to act in this way. This is insufficient to support properly a finding of inconsistency as such. Thus, the Panel's reasoning seems speculative, and this is reflected in the language used in the Panel Report.[264]

121. In sum, on the basis of the evidence on the Panel record, we are not persuaded that the amended waiver provisions preclude the USDOC from making a reasoned determination with a sufficient factual basis, as required by Article 11.3 of the *Anti-Dumping Agreement*. Under the amended waiver provisions, a company-specific finding is not based on an assumption but, rather, on a statement by the waiving exporter indicating that it is likely to dump if the order were revoked or the investigation terminated. Moreover, the amended waiver provisions do not preclude the USDOC from considering other evidence on the record of the sunset review. Indeed, under Article 11.3 of the *Anti-Dumping Agreement*, the USDOC would have to consider any other evidence on the record, and assess the statement of waiver in the light of that other evidence, before making the order-wide determination. If it failed to do so, it would not exercise the degree of diligence required of

[261]Panel Report, para. 7.39.

[262]United States' response to Question 4(a) posed by the Panel, Panel Report, p. E-58, para. 13. (emphasis added)

[263]*Ibid*.

[264]For example, the Panel stated that "the USDOC *may* have to find likelihood on an order-wide basis because of the company-specific determinations that it may have made under Section 751(c)(4)(B) for the waiving exporters." (Panel Report, para. 7.37 (emphasis added)) Later, the Panel found it "*difficult to understand* how the USDOC would find no likelihood of continuation or recurrence of dumping on an order-wide basis in a sunset review where it may have made an affirmative likelihood determination for some exporters pursuant to Section 751(c)(4)(B) of the Tariff Act." (*Ibid.*, para. 7.39 (emphasis added)) Finally, the Panel stated that it "*[could] reasonably conclude* that in every sunset review involving multiple exporters the USDOC will have to find likelihood on an order-wide basis if one exporter waives its right to participate, because otherwise the USDOC would have found no likelihood with respect to the exporters who waive their right to participate." (*Ibid.* (emphasis added))

investigating authorities, nor could it make a reasoned determination with a sufficient factual basis, as required by Article 11.3 of the *Anti-Dumping Agreement*.

122. For these reasons, we *reverse* the Panel's finding, in paragraphs 7.41 and 8.1(a) of the Panel Report, that Section 751(c)(4)(B) of the Tariff Act, operating in conjunction with Section 751(c)(4)(A) of the Tariff Act and Section 351.218(d)(2) of the Regulations, is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. In the light of our finding, we do not consider it necessary to examine whether the Panel failed to make an objective assessment of the matter before it, as required by Article 11 of the DSU.

V. The USDOC's Finding on Import Volumes

123. We turn now to the United States' appeal of the Panel's conclusion that it could properly examine the USDOC's finding that the volume of imports of oil country tubular goods ("OCTG") from Argentina declined after the imposition of the anti-dumping duty order. We begin with a brief summary of the relevant aspects of the original proceedings and a description of the Section 129 Determination issued by the USDOC after the original panel and Appellate Body reports were adopted by the DSB. This is followed by a summary of the findings of the Panel in these Article 21.5 proceedings and the claims and arguments raised in this appeal. We then consider whether it was proper for the Panel to examine the USDOC's finding that import volumes declined after the imposition of the anti-dumping duty order, which is incorporated into the Section 129 Determination.

A. *Original Proceedings*

124. In the original sunset review, the USDOC based its affirmative determination of likelihood of dumping on two bases: (i) that dumping continued above *de minimis* levels during the time the anti-dumping duty order was in place; and (ii) that import volumes declined after the imposition of the anti-dumping duty order.[265] Argentina argued before the original panel that the USDOC's likelihood-of-dumping determination did not meet the requirements of Article 11.3 of the *Anti-Dumping Agreement*.[266]

125. The original panel began its assessment with the first basis of the USDOC's determination. It noted that the USDOC had relied on the dumping margin determined for Argentine OCTG in the original investigation to conclude that dumping had continued during the time the anti-dumping duty order was in place. The original panel rejected this approach because, in its view, "the original

[265]Original Panel Report, para. 7.213.

[266]*Ibid*., paras. 3.1, 7.214, and 7.218.

determination of dumping by itself cannot represent a sufficient factual basis for concluding that dumping continued during the life of the measure, let alone representing an adequate factual basis to conclude that dumping is likely to continue or recur after the expiry of the order."[267] Therefore, the original panel concluded that "the USDOC's likelihood determination in the instant sunset review was inconsistent with Article 11.3 of the Anti-Dumping Agreement."[268]

126. At the interim review stage, Argentina requested that the original panel "make findings regarding the USDOC's reliance on the post-order decline in the volume of imports of OCTG from Argentina".[269] The United States suggested that the original panel exercise judicial economy with respect to the USDOC's finding on import volumes.[270]

127. In response, the original panel stated:

> We note that in paragraphs 7.201-7.206 below, we made the relevant factual findings regarding Argentina's claim challenging the USDOC's determinations in the OCTG sunset review. In particular, in paragraph 7.202, we observed as a matter of fact that the USDOC had based its likelihood determination on the facts that dumping had continued over the life of the measure and that import volumes of the subject product had declined. It is, therefore, clear that we have made relevant factual findings in this regard. As far as legal findings are concerned, we note that we have decided Argentina's claim regarding the USDOC's likelihood determinations in the OCTG sunset review. We have found that the USDOC's reliance on the existence of the original dumping margin was inconsistent with Article 11.3 of the Anti-Dumping Agreement. We therefore did not need to address whether the USDOC's reliance on declined import volumes was yet another action inconsistent with that article. Argentina argues that we should make a finding in this regard in case our decision is appealed and the Appellate Body finds that the USDOC's reliance on the original dumping margin was in fact consistent with Article 11.3. We do not consider, however, that it would be appropriate to make an additional legal finding based on the hypothetical situation Argentina posits. We therefore decline to make additional findings in this regard.[271]

[267]Original Panel Report, para. 7.219.

[268]*Ibid*., para. 7.221.

[269]*Ibid*., para. 6.9.

[270]*Ibid*., para. 6.10.

[271]*Ibid*., para. 6.11.

Argentina did not appeal the original panel's decision not to make an additional finding on the USDOC's volume analysis. Neither did the United States appeal the original panel's finding that the likelihood-of-dumping determination was inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

B. *Measures Taken to Comply*

128. On 16 December 2005, the USDOC made a new likelihood-of-dumping determination pursuant to Section 129 of the Uruguay Round Agreements Act (the "URAA"). The USDOC concluded that "there is likelihood of continuation or recurrence of dumping had the antidumping duty order on OCTG from Argentina been revoked in 2000, *i.e.*, at the end of the original sunset review period."[272] The analysis in the Section 129 Determination focuses on whether dumping continued during the time the anti-dumping duty order was in place, that is, the first basis of the original sunset determination. The USDOC did not re-examine the second basis of its original sunset review, that is, the finding that the volume of imports had declined after the imposition of the anti-dumping duty order. Nevertheless, the Section 129 Determination contains several references to the USDOC's previous finding regarding the volume of imports.[273]

C. *Panel Proceedings pursuant to Article 21.5 of the DSU*

129. Before the Panel, Argentina asserted that the Section 129 Determination fails to bring the United States into conformity with Article 11.3 of the *Anti-Dumping Agreement*. Argentina challenged the USDOC's findings regarding likely past dumping, as well as the post-order decline in import volumes.[274] The United States responded that the incorporation of the analysis of the decline in import volumes from the original sunset determination into the Section 129 Determination is not part of the "measure taken to comply" with the recommendations and rulings of the DSB.[275] The United States underscored that "the original panel and the Appellate Body did not make any findings regarding the USDOC's volume analysis in the original proceedings".[276]

[272]Section 129 Determination, *supra*, footnote 11, p. 11.

[273]See *infra*, para. 145.

[274]Panel Report, paras. 7.64 and 7.81.

[275]*Ibid*., para. 7.82.

[276]*Ibid*.

130. The Panel observed that both Argentina and the United States noted that "the original panel applied judicial economy with respect to the USDOC's volume analysis."[277] The Panel then stated that "[t]he issue ... here is whether the volume analysis used by the USDOC in its Section 129 Determination—the basis of an issue that was raised and argued in the original proceedings, but on which the [original] panel did not make a finding—is part of the measure taken to comply by the United States and is therefore properly before [the Panel]."[278]

131. In resolving this issue, the Panel noted that the USDOC based its conclusion in the Section 129 Determination on both the finding of likely past dumping and the finding on import volumes from the original sunset review.[279] "As such", the Panel "consider[ed] the volume analysis from the original sunset review to have become an integral part of the Section 129 Determination."[280] The Panel therefore found that "the volume analysis from the original sunset review is part of the measure taken to comply by the United States and hence is properly before [the Panel] in these proceedings."[281]

132. The Panel rejected the United States' argument that Argentina was precluded from raising the claim in the Article 21.5 panel proceedings because the original panel had declined to make a finding on that issue.[282] The Panel explained:

> The fact that a panel, in an original dispute settlement proceeding, did not make findings regarding certain issues relating to the investigating authorities' determination that were raised and argued before the panel, cannot preclude a compliance panel, in its assessment under Article 21.5 of the DSU of the measures taken to comply with the DSB recommendations and rulings, from reviewing those aspects which have been incorporated by the authorities in the measure taken to comply.[283]

In addition, the Panel rejected the United States' reliance on the Appellate Body's findings in *EC – Bed Linen (Article 21.5 – India)* because it considered that the facts in that case differed from those before it. The Panel explained that the panel in the original proceedings in *EC – Bed Linen*

[277]Panel Report, footnote 56 to para. 7.89 (referring to Argentina's and the United States' responses to Question 17(a) posed by the Panel, Panel Report, p. E-25, paras. 65-68 and p. E-72, paras. 68-69, respectively).

[278]*Ibid*., para. 7.90.

[279]*Ibid*., para. 7.91.

[280]*Ibid*.

[281]*Ibid*.

[282]*Ibid*., para. 7.92.

[283]*Ibid*.

dismissed India's claim because India had failed to make out a *prima facie* case, whereas the original panel in this dispute exercised judicial economy with respect to Argentina's claim.[284]

133. Having decided that the USDOC's finding on import volumes was properly before it, the Panel examined its consistency with Article 11.3 of the *Anti-Dumping Agreement*. In the Panel's view, the USDOC's finding regarding the decline in the volume of imports was not based on a thorough evaluation of all possible causes of such a decline. The Panel pointed out that "the Section 129 Determination fails to examine potential reasons, other than a likelihood of continuation or recurrence of dumping, that could have triggered the decline in the volume of imports."[285] For this reason, the Panel found that "[t]he USDOC's determination regarding the decline in the volume of imports lacks a sufficient factual basis."[286] The Panel concluded:

> We have found above that both factual foundations of the USDOC's order-wide likelihood determination with respect to the imports of OCTG from Argentina, i.e. its findings regarding likely past dumping and the volume of imports, lack a sufficient factual basis. We therefore find the USDOC's order-wide determination to be inconsistent with Article 11.3 of the [Anti-Dumping] Agreement.[287]

D. *Claims and Arguments on Appeal*

134. The United States claims that the Panel erred in finding that the USDOC's "volume analysis was part of the measure taken to comply, even though that analysis was from the original determination and was simply incorporated by reference in the Section 129 determination."[288] The United States emphasizes that "[t]he text of Article 21.5 [of the DSU] provides that a compliance proceeding concerns the measure *taken to comply* with the recommendations and rulings of the DSB. Thus, the recommendations and rulings are the appropriate starting point for an analysis of compliance."[289] The United States explains that "the original Panel declined to make *any* recommendations or rulings regarding the volume analysis" and, therefore, "there was no

[284]Panel Report, paras. 7.93-7.96.

[285]*Ibid*., para. 7.101 and footnote 76 thereto. Siderca explained that it had diversified its export markets following the imposition of the anti-dumping duty order by the USDOC. Thus, the decline in United States imports of OCTG from Argentina was the result of this diversification rather than an alleged inability to sell in the United States without dumping. (Argentina's first written submission to the Panel, Panel Report, p. A-33, para. 130) See also Siderca's response to the USDOC questionnaire (30 November 2005) (public version) (Exhibit ARG-15 submitted by Argentina to the Panel), pp. 7-10.

[286]Panel Report, para. 7.101.

[287]*Ibid*., para. 7.102.

[288]United States' appellant's submission, para. 35.

[289]*Ibid*., para. 37. (original emphasis)

recommendation or ruling with which to comply in that respect."[290] As a result, the United States argues, "the unaltered, original volume analysis, which was incorporated by reference into the section 129 determination, was not part of the measure taken to comply, and was not within the scope of the compliance proceeding."[291]

135. In support of its argument, the United States refers to the Appellate Body Report in *EC – Bed Linen (Article 21.5 – India)* where the Appellate Body held that, the fact that a particular analysis is incorporated into a re-determination, or indeed forms part of the basis for a re-determination, does not render that analysis an inseparable part of the measure taken to comply.[292] The United States also relies on the Appellate Body's finding that a claim in respect of which a complainant had failed to make a *prima facie* case in the original proceedings cannot be reasserted in the Article 21.5 proceedings.[293] For the United States, this reasoning "is equally applicable when a panel has exercised judicial economy, in particular when the complaining party declines to appeal such exercise".[294] The United States refers also to what it describes as "another logically, and procedurally, troubling aspect to the Panel's reasoning".[295] The United States submits that, under the approach followed by the Panel, "if a panel declines to make findings with respect to a particular aspect of a measure in an original proceeding, the responding Member is, nevertheless, under an obligation to *guess* that the panel *might have thought* there were WTO inconsistencies with that aspect of the measure".[296] Moreover, the United States argues that a respondent whose measure is found to be WTO-inconsistent for the first time by a compliance panel is not given a "reasonable period of time" to bring itself into conformity, as is the case in original proceedings.[297]

136. For these reasons, the United States requests the Appellate Body to reverse the Panel's finding that "the original volume analysis was part of the measure taken to comply" and that, as a consequence, "the Panel's finding that the volume analysis is inconsistent with Article 11.3 should be declared moot and of no legal effect."[298]

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[290]United States' appellant's submission, para. 38. (original emphasis)

[291]*Ibid*.

[292]*Ibid*., para. 44 (referring to Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 86).

[293]*Ibid*., para. 47 (referring to Appellate Body Report, *EC – Bed Linen (Article 21-5 – India)*, para. 96).

[294]*Ibid*., para. 48.

[295]*Ibid*., para. 49.

[296]*Ibid*. (original emphasis)

[297]*Ibid*., para. 36.

[298]*Ibid*., para. 51.

137. Argentina contends that the USDOC incorporated by reference and relied upon the volume analysis in the Section 129 Determination and, therefore, it is part of the "measure taken to comply". According to Argentina, the situation in the present case is different from the situation in *EC – Bed Linen (Article 21.5 – India)* where the Appellate Body stated that a complainant could not reassert a claim in the Article 21.5 proceedings if the original panel made a definitive ruling of WTO-consistency or found that the complainant failed to make a *prima facie* case.[299] Either of these findings constitute a "final resolution" of the issue between the parties, which is not the case where the original panel exercises judicial economy.[300] Argentina draws attention to a statement by the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* that a complainant should not be prevented from reasserting a claim if the panel exercises false judicial economy.[301] In addition, Argentina argues that the United States cannot unilaterally determine the scope of the "measures taken to comply". Finally, Argentina dismisses the United States' arguments of procedural unfairness, because the issue of the decline in import volumes was argued by the parties both before the original panel and in the Article 21.5 panel proceedings.

E. *Whether the USDOC's Finding on Import Volumes was Properly Before the Panel*

138. The issue on appeal is whether the USDOC's finding that the volume of imports of OCTG from Argentina declined after the imposition of the anti-dumping duty order—which was made in the original sunset determination and incorporated into the Section 129 Determination—is part of the "measure taken to comply" within the meaning of Article 21.5 of the DSU.

139. Article 21.5 of the DSU provides, in relevant part:

> Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.

140. The Appellate Body has explained that a "Member's designation of a measure as one taken 'to comply', or not, is relevant to this inquiry, but it cannot be conclusive."[302] Instead, "it is, ultimately,

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[299]Argentina's appellee's submission, para. 81 (referring to Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 96).

[300]*Ibid*., para. 81.

[301]Argentina relies in particular on the Appellate Body's statement that the issue raised in the *EC – Bed Linen (Article 21.5 – India)* appeal "is different from a situation where a panel, on *its* own initiative, exercises 'judicial economy' by not ruling on the substance of a claim." (*Ibid*., para. 82 (quoting Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, footnote 115 to para. 96 (original emphasis)))

[302]Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 73. (footnote omitted)

for an Article 21.5 panel—and not for the complainant or the respondent—to determine which of the measures listed in the request for its establishment are 'measures taken to comply'."[303] Nonetheless, the Appellate Body has cautioned that "characterizing an act by a Member as a measure taken to comply when that Member maintains otherwise is not something that should be done lightly by a panel."[304]

141. Turning to the particular facts of this case, we recall that the USDOC's affirmative determination of likelihood of dumping in the Section 129 Determination is premised on two factual bases: (i) the finding of likely past dumping during the period of review; and (ii) the finding that import volumes declined after the imposition of the anti-dumping duty order, which was made in the original sunset determination and is incorporated into the Section 129 Determination.[305] It is undisputed that the USDOC did not conduct a new analysis of the volume of imports for purposes of the Section 129 Determination. It is also undisputed that no changes were made by the USDOC to the analysis it had conducted in the original sunset review; rather, that analysis is incorporated by reference without modification. Furthermore, it is undisputed that Argentina challenged the USDOC's volume analysis in the original panel proceedings and the original panel did not make a finding regarding the WTO-consistency of that analysis. Although the original panel did not expressly label it as such, Argentina and the United States both have characterized the original panel's approach to the issue as an exercise of judicial economy.[306]

142. The Appellate Body has explained that the first sentence of Article 21.5 establishes an "express link between the 'measures taken to comply' and the recommendations and rulings of the DSB" and, therefore, "determining the scope of 'measures taken to comply' in any given case must also involve examination of the recommendations and rulings contained in the original report(s) adopted by the DSB."[307] Accordingly, to determine the scope of the "measure taken to comply" in this case, we look first to the recommendations and rulings of the DSB in the original proceedings and to what they required of the United States. We then examine the specific steps taken by the United States to bring into conformity the measure found to be inconsistent in the original proceedings.

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[303]Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 78. (footnote omitted)

[304]Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 74.

[305]Panel Report, para. 7.87.

[306]*Ibid*., footnote 56 to para. 7.89. The original panel's decision not to make findings as to the WTO-consistency of the USDOC's volume analysis was not appealed by Argentina.

[307]Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 68.

143. The original panel concluded that "the USDOC's likelihood determination in the instant sunset review was inconsistent with Article 11.3 of the Anti-Dumping Agreement."[308] It is evident from this language that the original panel's finding of WTO-inconsistency is addressed to the USDOC's likelihood-of-dumping determination. Therefore, to comply with the original panel's finding, as adopted by the DSB, the United States had to bring its determination of likelihood of dumping into conformity with Article 11.3 of the *Anti-Dumping Agreement*. How it chose to do so was, in principle, a matter for the United States to decide. The original panel did not make a specific legal finding concerning the USDOC's finding on import volumes because it had already found that the factual basis of the original sunset determination was not proper. Thus, the original panel considered that this finding invalidated the likelihood-of-dumping determination.[309] There was no need for it to consider whether that determination was defective for other reasons. The original panel's conclusion concerning the USDOC's likelihood-of-dumping determination should not be confused with the particular reason that provided the basis for that conclusion.

144. Turning to the steps taken by the USDOC to bring its measure into compliance, we note that the Section 129 Determination states expressly that the review was initiated "to address the [original panel's] findings concerning the [USDOC's] likelihood determination".[310] In the Section 129 Determination, the USDOC concluded that "there is likelihood of continuation or recurrence of dumping had the antidumping duty order on OCTG from Argentina been revoked in 2000, *i.e.*, at the end of the original sunset review period."[311]

145. As noted earlier, the finding on import volumes is one of two factual premises on the basis of which the USDOC made its affirmative determination of likelihood of dumping. The Section 129 Determination indicates that the USDOC relied on *both* factual premises to make its affirmative determination. This is evident in the following excerpts from the Section 129 Determination:

> Based upon this information and argument, *as well as findings on import volumes during 1995-2000 from the original sunset review*, we continue to find that revocation of the order would be likely to lead to continuation or recurrence of dumping.
>
> ...

[308]Original Panel Report, para. 7.221.

[309]We note that, in response to Argentina's request at the interim review stage that it make a finding on the USDOC's reliance on the post-order decline in the volume of imports, the original panel stated that it had "decided Argentina's claim regarding the USDOC's likelihood determinations in the OCTG sunset review". (*Ibid*., para. 6.11)

[310]Section 129 Determination, *supra*, footnote 11, p. 2.

[311]*Ibid*., p. 11.

> In making our likelihood determination, *we also relied on our previous finding regarding the volume of imports* of subject merchandise for the period before and the period after the issuance of the antidumping duty order.
>
> ...
>
> In assessing likelihood, *we also rely on our previous finding regarding the volume of imports* of subject merchandise for the period before and the period after the issuance of the antidumping duty order. In the original sunset review, we found that after imposition of the order, import volumes significantly decreased from pre-order levels. Declining import volumes after, and apparently resulting from, imposition of an antidumping duty order indicate that exporters would need to dump to sell at pre-order levels.[312] (footnote omitted; emphasis added)

Before the Panel, the United States agreed that, "in addition to its finding regarding likely past dumping, the USDOC relied on its volume analysis from the original sunset review as the basis of its new sunset determination."[313]

146. The USDOC's reasoning in the Section 129 Determination indicates that the two factual premises operated together to support the determination of likelihood of dumping.[314] The affirmative determination of likelihood of dumping follows consideration of both the finding of likely dumping during the time the anti-dumping duty order was in place and the finding that the volume of imports declined after the imposition of the order. Because the likelihood-of-dumping determination in the Section 129 Determination is premised on both bases, which together support the affirmative likelihood determination, we consider that the USDOC's finding that the volume of imports declined after imposition of the anti-dumping duty order is an integral part of the "measure taken to comply" in this case. This is consistent with the Appellate Body's statement in *US – Shrimp (Article 21.5 –*

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[312]Section 129 Determination, *supra*, footnote 11, pp. 1, 6, and 11.

[313]Panel Report, para. 7.90.

[314]The European Communities states that the likelihood-of-dumping determination is based on a single bundle of facts and evidence that cannot be divided. (European Communities' statement at the oral hearing) The European Communities also points out that the proper test to determine whether an aspect of a measure is part of the "measure taken to comply" is "whether what is at stake is just one WTO obligation, or more than one". The European Communities argues that, in this case, "there is one WTO obligation: ... to make the determination in Article 11.3 of the *Anti-Dumping Agreement*" and "one finding". According to the European Communities, "this is sufficient to distinguish [this] case from the *EC – Bed Linen (Article 21.5 – India)* case, which involved different legal obligations". (European Communities' third participant's submission, paras. 15-16)

China argues that, "since the volume analysis is an indispensable factual basis of the USDOC's Section 129 Determination, it is unreasonable and illogical to conclude that the measure constitutes a measure taken to comply while the factual basis thereunder is not part of such a compliance measure." (China's third participant's submission, para. 40)

Malaysia) that "the task of a panel in a matter referred to it by the DSB for an Article 21.5 proceeding is to consider [the] new measure *in its totality*."[315]

147. We further note that the Appellate Body considered in *US – Softwood Lumber IV (Article 21.5 – Canada)* that "[s]ome measures with a particularly close relationship to the declared 'measure taken to comply', and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel acting under Article 21.5."[316] The Appellate Body noted that this "requires an Article 21.5 panel to examine the factual and legal background against which a declared 'measure taken to comply' is adopted" because "[o]nly then is a panel in a position to take a view as to whether there are sufficiently close links for it to characterize such an other measure as one 'taken to comply' and, consequently, to assess its consistency with the covered agreements in an Article 21.5 proceeding."[317] If a measure that is formally separate from, but closely linked to, a declared "measure taken to comply" can fall within the scope of an Article 21.5 proceeding, this would suggest *a fortiori* that, when both factual bases are relied upon for a likelihood-of-dumping determination, they can be considered by an Article 21.5 panel when assessing the consistency of that determination with Article 11.3.

148. The United States points out that "the original Panel declined to make *any* recommendations or rulings regarding the volume analysis" and, therefore, the finding on import volumes could not be part of the "measure taken to comply".[318] The United States submits that, in *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body recognized that the fact that a particular analysis is incorporated into a re-determination does not render that analysis an inseparable part of the "measure taken to comply".[319] We see significant differences between the facts before the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* and those of this appeal. In *EC – Bed Linen (Article 21.5 – India)*, the issue concerned the investigating authority's examination of the "other known factors" that could be injuring the domestic industry at the same time as the dumped imports, and the non-attribution of that injury, which were considered to be separable components of the "measure taken to comply" in that case. In the present case, the USDOC's finding on import volumes is merely one factual basis underlying a single inquiry: the likelihood-of-dumping determination. Moreover, the likelihood-of-dumping determination is supported by the finding on import volumes operating together with the finding of dumping during the period of review (1995-2000). In these circumstances, we consider that the USDOC's finding on import volumes is an integral part of the

[315]Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 87. (emphasis added)

[316]Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.

[317]*Ibid*.

[318]United States' appellant's submission, para. 38.

[319]*Ibid*., para. 44 (referring to Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 86).

likelihood-of-dumping determination. In addition, we note that *EC – Bed Linen (Article 21.5 – India)* concerned a claim for which the complainant was found not to have made out a *prima facie* case in the original proceedings. This is not what occurred in the original proceedings in the present case. The participants have characterized the original panel's approach as an exercise of judicial economy.[320] We do not express a view on whether this is a proper characterization of the approach taken by the original panel. In any event, even if the original panel's approach should properly be characterized as judicial economy, it would still mean that the central rationale of the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* would not be applicable.[321] The Appellate Body explained that the issue raised in that case differed "from a situation where a panel, on *its* own initiative, exercises 'judicial economy' by not ruling on the substance of a claim."[322]

149. The United States also raises several concerns related to the nature of Article 21.5 proceedings, which, in its view, should lead to the conclusion that it was improper for the Panel to consider Argentina's claim. First, the United States submits that, because the original panel did not make a specific finding concerning the USDOC's volume analysis, the United States is placed in the position of having "to *guess* that the panel *might have thought* there were WTO-inconsistencies" with respect to that aspect of the measure.[323] Secondly, the United States points out that a respondent whose measure is found to be WTO-inconsistent for the first time by a compliance panel is not given a "reasonable period of time" to bring itself into conformity, as is the case in original proceedings.[324] Instead, the Member concerned could immediately face the suspension of concessions or other obligations.

150. We do not consider that the concerns identified by the United States require that the finding on import volumes be excluded from the scope of these Article 21.5 proceedings. The original panel found that the USDOC's likelihood-of-dumping determination in the original sunset review was inconsistent with Article 11.3 of the *Anti-Dumping Agreement* because it lacked a proper factual basis. Therefore, the USDOC had to bring its likelihood-of-dumping determination into conformity

[320]Panel Report, para. 7.89 and footnote 56 thereto.

[321]In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body referred to situations where there was a finding of WTO-consistency or the complainant had failed to make out a *prima facie* case in the original proceedings. (Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 96) See also Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 97.

[322]The Appellate Body went on to indicate that, "in a situation where a panel, in declining to rule on a certain claim, has provided only a partial resolution of the matter at issue, a complainant should not be held responsible for the panel's false exercise of judicial economy, such that a complainant would not be prevented from raising the claim in a subsequent proceeding." (Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, footnote 115 to para. 96)

[323]United States' appellant's submission, para. 49. (original emphasis)

[324]*Ibid*., para. 36.

with Article 11.3 by ensuring that it rested on a proper factual basis. On the basis of the original panel's conclusions, the USDOC could not assume that its findings regarding the alleged decline in the volume of imports were WTO-consistent. The United States was given a "reasonable period of time" to bring the USDOC's likelihood-of-dumping determination into compliance following the adoption by the DSB of the panel and the Appellate Body reports in the original proceedings. Moreover, Argentina's arguments relating to the finding on import volumes were not raised for the first time in these Article 21.5 proceedings. Instead, the parties have offered arguments and counter-arguments on the issue twice, first in the original proceedings, and then in these Article 21.5 proceedings. Additionally, we do not believe that Argentina is unfairly getting a "second chance", as would be the case where a panel or the Appellate Body had found the measure to be WTO-consistent in the original proceedings, or that the complainant failed to make out a *prima facie* case.[325]

151. Furthermore, we recall that the aim of Article 21.5 of the DSU is to promote the prompt compliance with DSB recommendations and rulings and the consistency of "measures taken to comply" with the covered agreements by making it unnecessary for a complainant to begin new proceedings and by making efficient use of the original panelists and their relevant experience.[326] These considerations support the Panel's finding that the volume analysis was properly before it. Requiring Argentina to initiate new WTO proceedings against the United States in order to challenge the USDOC's finding on import volumes would entail a significant delay.[327] Moreover, it would be difficult to reconcile this with the objective that Article 21.5 panels "examine fully the 'consistency with a covered agreement of the measures taken to comply', as required by [that provision]".[328] Finally, it seems difficult to conceive how the two factual bases could each be examined by separate panels (one of which is operating pursuant to Article 21.5), considering that both factual premises together support the USDOC's likelihood-of-dumping determination.

152. For these reasons, we find that the USDOC's finding on import volumes is part of the "measure taken to comply" for purposes of these Article 21.5 proceedings. Accordingly, we *uphold* the Panel's finding, in paragraphs 7.91 and 7.96 of the Panel Report, that the USDOC's volume analysis was properly before the Panel. It thereby follows that the Panel's findings, in paragraphs 7.101, 7.102, and 8.1(c) of the Panel Report, also stand.

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[325]Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 96; Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 97.

[326]Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 72.

[327]The aim of prompt compliance is also embodied in Articles 3.3 and 21.1 of the DSU.

[328]Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41.

VI. New Evidentiary Basis

153. We proceed to Argentina's claim that the USDOC was not permitted to develop a new evidentiary basis for its Section 129 Determination. Before assessing the merits of this claim, we first summarize the Panel's findings and then provide an overview of the claims and arguments raised by the participants in this appeal.

A. *Panel Proceedings pursuant to Article 21.5 of the DSU*

154. We recall that, as part of the measures taken by the United States to comply with the recommendations and rulings of the DSB stemming from the original proceedings, the USDOC made a new likelihood-of-dumping determination concerning imports of Argentine OCTG, pursuant to Section 129 of the URAA.[329] Upon initiating the Section 129 proceedings, the USDOC issued questionnaires to three Argentine OCTG producers in which it solicited facts pertaining to the original review period.[330] The Section 129 Determination is based on the answers to the questionnaires by two of these producers, as well as on the information on the record from the original sunset review.[331]

155. Before the Panel, Argentina claimed that the USDOC was precluded, under Articles 11.3 and 11.4 of the *Anti-Dumping Agreement*, from developing "a 'new and different' factual basis in the 2005 Section 129 review which was not developed in the original sunset review".[332] The United States responded that Argentina's claim had "no textual support" and that the approach advocated by Argentina "would make implementation impossible in cases where a Member's determination is found to lack a sufficient factual basis".[333]

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[329]See *supra*, Section V.B.

[330]The USDOC's questionnaire to Argentine exporters asked for information regarding production volumes, per-unit cost of manufacture, interest expenses, and consolidated and unconsolidated financial statements for the fiscal years between July 1995 and June 2000. The questionnaire also asked exporters to describe the nature of their sales process in their domestic and export markets. (Panel Report, footnote 36 to para. 7.48) See also USDOC questionnaire to Acindar, Tubhier, and Siderca (31 October 2005) (Exhibit ARG-13 submitted by Argentina to the Panel).

[331]Panel Report, para. 7.48. See also Argentina's other appellant's submission, para. 24, where Argentina lists the following as constituting the "new evidentiary basis" of the Section 129 Determination: financial statements for Argentine producers for 1995 to 2000; cost information for 10 categories of OCTG products; a description of each company's sales and marketing processes; a statement as to whether the company exported OCTG to the United States during the 1995-2000 period; confidential import statistics from the United States Customs and Border Protection; observed selling prices in the United States market during the 1995-2000 period from an industry publication; financial statements of United States producers; and data from Argentine export statistics.

[332]Panel Report, para. 7.43.

[333]*Ibid*., para. 7.44.

156. The Panel identified the core issue before it as being whether, under Articles 11.3 and 11.4 of the *Anti-Dumping Agreement*, the USDOC was allowed to base its Section 129 Determination on facts pertaining to the original review period—that is, 1995 to 2000—which it collected for the first time in 2005.[334] In addressing this issue, the Panel turned to the text of Articles 11.3 and 11.4 of the *Anti-Dumping Agreement* and explained that, although both provisions "reflect temporal considerations", neither provision, "in isolation, resolve[s] the issue".[335] Instead, the Panel considered that "the resolution of Argentina's claim must have regard to broader, horizontal considerations underpinning the operation of the WTO dispute settlement system."[336] In the Panel's view, "Argentina's proposition that the United States was somehow precluded from developing a new factual basis in its implementing sunset re-determination in this case runs counter to the overall operation of the WTO dispute settlement system, and, in particular, the notion of *implementation* of the DSB recommendations and rulings embodied in the relevant provisions of the DSU."[337] Considering the context provided by Articles 3.7, 19.1, and 22.1 of the DSU, the Panel concluded that "[c]learly ... the non-conforming measure is to be brought into a state of conformity with specified treaty provisions either by *withdrawing* such a measure completely, or, where possible, by *modifying* it by revising the inconsistent aspect of the measure involved."[338]

157. Finally, the Panel referred to several previous panels that had dealt with similar situations involving implementation in trade remedies and other areas.[339] According to the Panel, "[t]hese examples demonstrate that competent authorities of WTO Members may need to collect new information supplementary to that on the record of their original determinations in making subsequent determinations in the context of implementing the DSB recommendations and rulings."[340] The Panel further observed that "[t]he WTO-consistency of collecting new facts in the implementation of the DSB recommendations and rulings was not questioned in any one of these cases."[341] Thus, the Panel

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[334]Panel Report, para. 7.49.

[335]*Ibid*., para. 7.50.

[336]*Ibid*., para. 7.51. The Panel observed that, "pursuant to Article 1.2 of the DSU, the rules and procedures of the DSU shall apply subject to special or additional rules and procedures identified in Appendix 2 to the DSU. Neither the provisions of Article 11 [of the *Anti-Dumping Agreement*] pertaining to reviews, nor the other provisions of the Agreement pertaining to investigations, are identified as such special or additional rules and procedures. Accordingly, we believe that the provisions of the DSU and the Anti-Dumping Agreement must be read together in a coherent manner." (*Ibid*., footnote 39)

[337]*Ibid*., para. 7.52. (original emphasis)

[338]*Ibid*., para. 7.54. (original emphasis)

[339]*Ibid*., paras. 7.58-7.59. As examples, the Panel referred to *Mexico – Corn Syrup (Article 21.5 – US)* and *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*. (*Ibid*., para. 7.58) The Panel also mentioned disputes outside of the field of trade remedies, such as *Australia – Salmon (Article 21.5 – Canada)* and *Japan – Apples (Article 21.5 – US)*. (*Ibid*., para. 7.59)

[340]*Ibid*., para. 7.60.

[341]*Ibid*.

"reject[ed] Argentina's claim that the USDOC acted inconsistently with Articles 11.3 and 11.4 of the [Anti-Dumping] Agreement by developing a new factual basis pertaining to the original review period for purposes of its Section 129 Determination."[342]

B. *Claims and Arguments on Appeal*

158. On appeal, Argentina challenges the Panel's finding that the USDOC was not precluded from developing a new evidentiary basis for the Section 129 Determination. First, Argentina asserts that the Panel incorrectly interpreted and applied Articles 11.3 and 11.4 of the *Anti-Dumping Agreement*, which contain explicit temporal limitations applicable to sunset reviews.[343] Argentina further argues that "[t]he Panel's reliance on 'broader, horizontal considerations underpinning the operation of the WTO dispute settlement system' led to an incorrect interpretation of the substantive obligations of Articles 11.3 and 11.4 of the [Anti-Dumping] Agreement."[344] Secondly, Argentina claims that the Panel did not make an objective assessment of the matter before it, as required by Article 11 of the DSU, because the Panel "subordinated the actual treaty text of Articles 11.3 and 11.4, and the disposition of Argentina's claims under these provisions, to broader, 'systemic' considerations of the WTO dispute settlement system and the hypothetical impact that such a finding might have 'in an analogous ... context' or in matters 'outside of the trade remedies area.'"[345] Finally, Argentina claims that the Panel acted inconsistently with Articles 3.2 and 19.2 of the DSU, because its findings concerning the USDOC's ability to develop a new factual basis "severely diminished Argentina's rights, and enhanced the rights of the United States, under the Anti-Dumping Agreement."[346]

159. The United States responds that "nothing in the text of Articles 11.3 and 11.4 supports Argentina's assertions" as "[n]either article addresses the issue of whether an investigating authority may gather new facts to bring a measure into compliance."[347] In addition, the United States argues that the Panel properly found that Article 19.1 of the DSU "does not prescribe ways in which a WTO-inconsistent measure may be brought into conformity with the WTO rules".[348] Furthermore, the United States questions Argentina's decision to raise an additional claim under Article 11 of the DSU, considering that "Argentina is claiming that the Panel's interpretation of Articles 11.3 and 11.4 ... was

[342]Panel Report, para. 7.60.

[343]Argentina's other appellant's submission, paras. 36-37.

[344]*Ibid*., para. 45 (quoting Panel Report, para. 7.51).

[345]*Ibid*., para. 50 (quoting Panel Report, paras. 7.51 and 7.57).

[346]*Ibid*., para. 63.

[347]United States' appellee's submission, para. 5.

[348]*Ibid*., para. 6 (referring to Panel Report, para. 7.54).

erroneous."[349] In any event, the United States asserts that the Panel properly fulfilled its obligations under Article 11 of the DSU in its examination of Articles 11.3 and 11.4 of the *Anti-Dumping Agreement* and of the context provided by provisions of the DSU, neither of which support Argentina's position.[350] Accordingly, the United States requests that the Appellate Body reject Argentina's challenge to the Panel's finding that the United States did not act inconsistently with Articles 11.3 and 11.4 of the *Anti-Dumping Agreement* by developing a new evidentiary basis for the Section 129 Determination.[351]

C. *Whether it was Permissible for the USDOC to Develop a New Evidentiary Basis for the Section 129 Determination*

160. The issue raised on appeal is whether, under Articles 11.3 and 11.4 of the *Anti-Dumping Agreement*, an investigating authority that makes a re-determination of likelihood of dumping, for the purpose of implementing the recommendations and rulings of the DSB, is precluded from developing a new evidentiary basis pertaining to the original sunset period.[352]

161. We recall that Article 11.3 of the *Anti-Dumping Agreement* reads:

> Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.* The duty may remain in force pending the outcome of such a review.
>
> *[Original footnote 22] When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

[349]United States' appellee's submission, para. 10.

[350]*Ibid*., para. 13.

[351]*Ibid*., para. 14.

[352]Argentina does not dispute that the information collected by the USDOC in the Section 129 proceedings related to the original sunset review period, that is, 1995 to 2000. (Argentina's response to questioning at the oral hearing) See also, Panel Report, paras. 7.48-7.49.

162. Article 11.4 of the *Anti-Dumping Agreement* provides:

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

163. As the Appellate Body has explained, these provisions set out several temporal limitations.[353] Article 11.3 provides that an anti-dumping duty must be *terminated* "five years from its imposition" *unless* there is a determination that "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury." According to the Appellate Body, this provision thus operates as "a mandatory rule with an exception".[354] There is the additional requirement that the sunset review be *initiated* by the investigating authority on its own initiative or upon a request by the domestic industry "before that date", that is, before the fifth anniversary of the imposition of the anti-dumping duty order. If the review is requested by the domestic industry, the request must be made "within a reasonable period of time prior to" the fifth anniversary. Article 11.4 requires that a sunset review "be carried out expeditiously" and that it "normally be concluded within 12 months of the date of initiation of the review". Article 6 of the *Anti-Dumping Agreement*, which applies to sunset reviews by virtue of the reference made in Article 11.4, also sets out additional temporal requirements relating to opportunities for the parties to the investigation to present evidence.

164. Argentina's arguments rest on the following distinction. In certain circumstances, Argentina submits, a WTO Member may seek to bring a sunset determination into compliance by making a re-determination of likelihood of dumping in order to "clarify" or "explain" its original sunset determination. However, Argentina considers that such a possibility is foreclosed in circumstances where the investigating authority seeks to develop a new evidentiary basis for its re-determination because it had not developed an adequate evidentiary foundation for its original sunset determination. Thus, we consider the specific question raised by Argentina and proceed on the premise that an investigating authority is not precluded from making a re-determination of likelihood of dumping in order to comply with the recommendations and rulings of the DSB.[355]

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[353]See Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 104.

[354]*Ibid*.

[355]As the Panel noted, WTO Members have often chosen to rectify the measure found to be WTO-inconsistent, rather than withdraw it without replacement. In a number of disputes involving trade remedies, WTO Members have sought to comply by having their investigating authorities issue a re-determination, which seeks to correct the deficiencies found in the original determination. Several of these re-determinations have been the subject of Article 21.5 proceedings: for example, *EC – Bed Linen (Article 21.5 – India)*; *Mexico – Corn Syrup (Article 21.5 – US)*; *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*; and *US – Softwood Lumber VI (Article 21.5 – Canada)*. (See Panel Report, para. 7.58)

165. According to Argentina, the limitation on developing a new evidentiary basis in a re-determination derives from the requirement in Article 11.3 that an investigating authority make a "determination" of likelihood of dumping in a review initiated before the fifth anniversary of the imposition of the anti-dumping duty.[356] Argentina points out that, in accordance with the Appellate Body's interpretation of Article 11.3, a determination of likelihood of dumping must rest on a sufficient factual basis. Argentina reads the temporal requirement in Article 11.3, together with the Appellate Body's interpretation of the term "determine"[357] in that provision, to mean that the evidentiary basis for the likelihood determination has to be developed in the original sunset review and cannot be developed at a later stage. Argentina submits that the Panel in this case allowed the United States to continue the anti-dumping duty without having developed evidence at the time of the review, and allowed the United States to develop new information later. In so doing, the Panel diminished Argentina's right to termination of the anti-dumping duty unless a proper review was conducted at the time prescribed by Article 11.3. Further, Argentina argues that this right is confirmed by the language in Article 11.3 that states that "[t]he duty may remain in force pending the outcome of such a review."[358]

166. At the same time, Argentina accepts that implementation of DSB recommendations and rulings through a re-determination of likelihood of dumping would be possible where an investigating authority merely "clarifies" the information developed in the original sunset review or "further explains its reasoning".[359] This is permissible, according to Argentina, because clarification of information or further explanation of evidence already on the record does not necessarily mean that the investigating authority was not "active" in the initial sunset review. On this basis, Argentina draws a distinction between the facts of this case and those of *US – Anti-Dumping Duty Measures on Oil Country Tubular Goods*, where the Appellate Body stated that the temporal limitation of Article 11.3 does not affect the provisions of the DSU governing, *inter alia*, the means of implementation and the

[356]Argentina's other appellant's submission, para. 29.

[357]See Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras 110-111 and 114; and Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 180.

[358]See Argentina's other appellant's submission, para. 29.

[359]*Ibid*., para. 34; Argentina's response to questioning at the oral hearing.

"reasonable period of time" accorded for implementation.[360] According to Argentina, in that case, the investigating authority had developed a sufficient evidentiary basis in the original sunset review, but the panel was not satisfied with the assessment of that evidence. Therefore, in order to comply, the investigating authority was required to reassess the evidence, rather than to develop an evidentiary basis that it had not developed in the original sunset review.[361] Argentina thus contends that implementation through a re-determination is possible only if the investigating authority was sufficiently "active" in developing a comprehensive record in the original sunset determination.

167. Article 11.3 of the *Anti-Dumping Agreement* does not refer to the steps that an investigating authority may take to implement DSB recommendations and rulings or to the collection of evidence at that stage. Article 11.4 states that the provisions of Article 6 of the *Anti-Dumping Agreement* regarding evidence and procedure are applicable to sunset reviews. Article 6 contains several provisions relating to the collection of evidence, including several time periods. However, like Articles 11.3 and 11.4, Article 6 does not specifically refer to the collection of evidence for purposes of implementing DSB recommendations and rulings. Therefore, we do not consider that Articles 11.3 and 11.4 address the specific question of whether an investigating authority can develop a new evidentiary basis when implementing DSB recommendations and rulings.

168. Neither do Articles 11.3 and 11.4 provide a basis for drawing a distinction between allowing an investigating authority to clarify information, or provide further explanations, on the one hand, and to develop a new factual basis, on the other hand. At the oral hearing, Argentina itself recognized that an investigating authority clarifying information, or providing further explanations, would be allowed to gather additional information and develop some new facts relating to the original sunset review period. This illustrates the difficulty of drawing the distinction relied upon by Argentina, where collection of some facts is allowed to clarify information or provide further explanations, but not to develop a new factual basis.

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[360]In *US – Anti-Dumping Measures on Oil Country Tubular Goods*, the Appellate Body said:

> The mere fact that Article 11.3 sets a temporal limit for termination of an anti-dumping duty, in the absence of a review leading to a WTO-consistent determination under that Article for its continuation, does not affect the other provisions of the DSU governing the implementation of the recommendations and rulings of the DSB, including, *inter alia*, the means of implementation and the reasonable period of time accorded to the implementing Member for implementation.

(Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 187)

[361]Argentina's response to questioning at the oral hearing.

169. Argentina offers two hypothetical examples that it considers demonstrate that a WTO Member's implementation options are restricted by the temporal limitations set out in Articles 11.3 and 11.4 of the *Anti-Dumping Agreement*. In the first example, an importing Member conducts no review at all, but fails to terminate the measure after five years. According to Argentina, "the violating Member would not have the option of bringing itself into compliance by initiating a review for the first time after it is found to be in violation."[362] At the oral hearing, Argentina offered a second hypothetical in which the importing Member initiates the sunset review within the time-limit prescribed in Article 11.3, but does nothing further. In this situation, Argentina also considers that the importing Member could bring itself into compliance only by terminating the anti-dumping duty order.

170. The hypothetical examples described by Argentina differ significantly from the facts in this case. The first hypothetical concerns the consequences of non-initiation and not, as in this case, the qualitative shortcomings of the fact-finding in the original review. The temporal limitations in Article 11.3 address directly the consequences of non-initiation, but do not speak to the facts of the present case. Moreover, as we explained earlier, Argentina does not contest that the USDOC initiated the sunset review on Argentine OCTG within the time-limit prescribed in Article 11.3. As for the second hypothetical, we note that the current case was not an instance where the investigating authority initiated a review, but then did nothing more.[363] Although inconsistencies were found in the original WTO proceedings, the USDOC did conduct a sunset review of the anti-dumping duty order on OCTG from Argentina. It did not simply refuse to terminate the anti-dumping duties after five years. Therefore, these hypothetical examples do not resolve the issue raised by Argentina in this appeal.

171. Argentina argues, furthermore, that allowing an investigating authority to develop a new evidentiary basis would reduce to inutility the temporal limitations set out in Articles 11.3 and 11.4 of the *Anti-Dumping Agreement*.[364] We do not share this view. As explained above, Argentina's claim that the USDOC was precluded from developing a new evidentiary basis is premised on the qualitative shortcomings of the fact-finding in the original review. It does not implicate the temporal requirements of Article 11.3, which remain valid even if an investigating authority is allowed to collect additional facts relating to the original review period when making a re-determination of the

[362]Argentina's other appellant's submission, para. 32.

[363]The Appellate Body has explained that "[t]he plain meaning of the terms 'review' and 'determine' in Article 11.3 ... compel an investigating authority in a sunset review to undertake an examination, on the basis of positive evidence, of the likelihood of continuation or recurrence of dumping and injury." (Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 180)

[364]Argentina's other appellant's submission, para. 44.

likelihood of dumping for the purpose of implementing recommendations and rulings of the DSB. Moreover, an investigating authority seeking to comply with an adverse WTO ruling by conducting a sunset re-determination would have to comply with all of the substantive obligations set out in Articles 11.3 and 11.4. This means that any additional factual information relating to the initial review period that is collected for purposes of the re-determination would have to be "sufficient", and the conclusion reached on the basis of those facts would have to be "reasoned".[365] It also means that the anti-dumping duties could not remain in place unless the investigating authority concluded in the re-determination that dumping and injury were likely to continue or recur. Furthermore, the due process and evidentiary obligations established in Article 11.4, by virtue of its reference to Article 6, would apply also to the process leading to the re-determination.

172. We note that Argentina considers that the Panel failed to fulfil properly its duties under Article 11 of the DSU by "subordinat[ing] the actual treaty text of Articles 11.3 and 11.4, and the disposition of Argentina's claims under these provisions, to broader, 'systemic' considerations of the WTO dispute settlement system".[366] We have found that Articles 11.3 and 11.4 do not address specifically whether an investigating authority may collect additional facts relating to the initial review period when making a re-determination of likelihood of dumping. Therefore, the Panel did not subordinate the text of these provisions to broader systemic considerations of the WTO dispute settlement system when it found that the USDOC could develop a new evidentiary basis.

173. We next address the provisions of the DSU referred to by the Panel and the participants to examine whether they provide us with contextual guidance. We note that the requirement in Article 19.1, first sentence, to "bring the measure into conformity" does not indicate that the choice of means of implementation is confined to withdrawal of the measure that was found to be WTO-inconsistent. Article 19.1, second sentence, confers authority on panels and the Appellate Body to suggest "ways in which the Member concerned could implement the recommendations", which implies that several "ways" of implementation may be possible.[367] The obligation under Article 21.3 that the Member concerned "inform the DSB *of its intentions* in respect of implementation" also suggests that alternative means of implementation may exist and that the choice belongs, in principle, to the Member. This implies that an investigating authority would not seem to be precluded from gathering additional facts relating to the review period in order to implement the recommendations

[365]Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 302.

[366]Argentina's other appellant's submission, para. 50 (quoting Panel Report, paras. 7.51 and 7.57).

[367]We note that Article 3.7 of the DSU states that "the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures" found to be WTO-inconsistent. In our view, this does not exclude that the inconsistent measure to be withdrawn can be brought into compliance by modifying or replacing it with a revised measure. See also Panel Report, para. 7.54.

and rulings of the DSB regarding an original sunset review determination. Finally, in this regard, we note the Appellate Body's statement in *US – Anti-Dumping Measures on Oil Country Tubular Goods*, that the temporal limitation in Article 11.3 of the *Anti-Dumping Agreement* "does not affect the other provisions of the DSU governing the implementation of the recommendations and rulings of the DSB, including, *inter alia*, the means of implementation and the reasonable period of time accorded to the implementing Member for implementation".[368] We believe also that the provisions of the DSU should not be read as altering the disciplines of Articles 11.3 and 11.4.

174. Before concluding, we note that the implementation of DSB recommendations and rulings in cases where a sunset review was found to be inconsistent with Articles 11.3 and 11.4 of the *Anti-Dumping Agreement* raises systemic questions. For example, on what basis may an anti-dumping duty order be maintained after a sunset determination has been found to be inconsistent with Article 11.3 or 11.4 of the *Anti-Dumping Agreement*?[369] These questions do not fall within the scope of the issue appealed by Argentina that the USDOC was precluded from developing a new evidentiary basis in the Section 129 Determination. Therefore, we do not address them further in this appeal.

175. In the light of the above, we *uphold* the Panel's finding, in paragraphs 7.60 and 8.1(b) of the Panel Report, that the USDOC did not act inconsistently with the United States' obligations under Articles 11.3 and 11.4 of the *Anti-Dumping Agreement* "by developing a new factual basis pertaining to the original review period for purposes of its Section 129 Determination".[370] Furthermore, we do not find error in the Panel's consideration of certain provisions of the DSU as appropriate context and, therefore, *reject* Argentina's claim that the Panel did not make an objective assessment of the matter before it, as required by Article 11 of the DSU.

VII. Argentina's Request for a Suggestion

176. Finally, we consider Argentina's request for a suggestion, pursuant to Article 19.1 of the DSU, that the anti-dumping duty order on OCTG from Argentina be terminated.

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[368]Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 187.

[369]This question, in turn, raises other issues, such as: when does a sunset review reach an "outcome" for the purpose of Article 11.3, last sentence; and what is implied by the requirements in Article 11.4 that the review "be carried out expeditiously" and that it "shall normally be concluded within 12 months of the date of initiation"?

[370]Because we see no error in the Panel's disposition of this issue, we do not consider that the Panel diminished the rights of Argentina and the obligations of the United States, in breach of Article 3.2 and Article 19.2 of the DSU.

177. Argentina requested that the Panel make a suggestion, pursuant to Article 19.1 of the DSU, that the United States implement its recommendations by terminating the anti-dumping duty order on Argentine OCTG. According to Argentina, a suggestion was justified in the light of the particular facts of the case, the nature of the obligation of Article 11.3 of the *Anti-Dumping Agreement*, and the overall objective of the dispute settlement mechanism.[371] The United States maintained that a WTO Member retains the right to determine the manner in which it implements the recommendations and rulings of the DSB, and that, while Argentina preferred to have the measure terminated, the relevant question before the Panel was the existence or consistency of the "measure taken to comply".[372]

178. In response to Argentina's request, the Panel noted that "Article 19.1 of the DSU states that WTO panels may suggest ways through which the Member concerned could implement their recommendations."[373] The Panel added that, "[i]n the circumstances of the present proceedings, [it saw] no particular reason to make such a suggestion and therefore decline[d] Argentina's request."[374]

179. On appeal, Argentina asserts that the manner in which the Panel "summarily" dismissed Argentina's request for a suggestion for withdrawal of the anti-dumping duty order was inconsistent with the Panel's duties under Articles 11 and 12.7 of the DSU. Argentina argues that the Panel failed to fulfil its duties under Article 11 because it did not "reasonably consider" Argentina's request for a suggestion under Article 19.1 of the DSU, and because it failed to assess objectively the fact that the United States has twice violated its obligations under Article 11.3 of the *Anti-Dumping Agreement*.[375] Furthermore, Argentina submits that the Panel did not comply with its obligations under Article 12.7 to set out the "applicability" of Article 19.1 in the context of the present dispute and to provide a basic rationale for its refusal of Argentina's request.[376] The United States responds that the requirement in Article 11 of the DSU to make an objective assessment of the "matter" entails a consideration of claims and measures and does not apply to a request for a suggestion under Article 19.1.[377] Moreover, the United States argues that the obligation under Article 12.7 to state a "basic rationale" relates to "findings" and "recommendations", and is not applicable to a request for a suggestion.[378]

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[371]Argentina's first written submission to the Panel, Panel Report, pp. A-53 to A-55, paras. 210-224.

[372]United States' first written submission to the Panel, Panel Report, pp. A-75 to A-76, paras. 85-87.

[373]Panel Report, para. 9.4. (footnote omitted)

[374]*Ibid*., para. 9.4.

[375]Argentina's other appellant's submission, paras. 78 and 81.

[376]*Ibid*., para. 89.

[377]United States' appellee's submission, para. 19 (referring to Appellate Body Report, *Guatemala – Cement I*, paras. 72-73).

[378]*Ibid*., para. 21.

180. In addition to its claims under Articles 11 and 12.7 of the DSU, Argentina requests that the Appellate Body exercise its authority under Article 19.1 and make, itself, a suggestion that the United States revoke its anti-dumping duty order on Argentine OCTG.[379] The United States submits that the Appellate Body should decline Argentina's request.[380]

181. Article 19.1 of the DSU provides:

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

182. The first sentence of Article 19.1 requires panels or the Appellate Body, if they find the challenged measure to be inconsistent with a provision of the covered agreements, to recommend that the respondent Member bring its measure into conformity with that agreement. The second sentence confers a discretionary right, authorizing panels and the Appellate Body to suggest ways in which those recommendations may be implemented. The Appellate Body has explained that the second sentence of Article 19.1 "does not oblige panels to make ... a suggestion".[381]

183. The Panel addressed Argentina's request for a suggestion in paragraph 9.4 of the Panel Report. The Panel's explanation is brief, but it is sufficient to convey that the Panel considered Argentina's request and that, in the light of the discretionary nature of the authority to make a suggestion, the Panel declined to exercise that discretion. The discretionary nature of the authority to make a suggestion under Article 19.1 must be kept in mind when examining the sufficiency of a panel's decision not to exercise such authority. However, it should not relieve a panel from engaging with the arguments put forward by a party in support of such a request. In the present case, Argentina offered several reasons in support of its request for a suggestion.[382] Although it would have been advisable for the Panel to articulate more clearly the reasons why it declined to exercise its discretion to make a suggestion, this does not mean that Panel's exercise of its discretion was improper, and,

[379]Argentina's other appellant's submission, paras. 102 and 106.

[380]United States' appellee's submission, para. 27.

[381]Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 189.

[382]Before the Panel, Argentina argued that a suggestion was justified because Argentina's rights under Article 11.3 had been "undermined completely" by the United States' implementation. Argentina explained that the USDOC had failed to conduct a WTO-consistent sunset review on two occasions—first in 2000, and again in 2005. According to Argentina, the respondent Member should not be given endless opportunities to correct a sunset determination. This would render meaningless the requirements of Article 11.3. (Argentina's first written submission to the Panel, Panel Report, pp. A-53 to A-54, paras. 211-218)

thus, even assuming *arguendo* that Articles 11 and 12.7 were applicable to a request for suggestion, we do not consider that, in the circumstances of this case, the Panel failed to fulfil its duties under those provisions.[383]

184. We noted earlier that Articles 19.1 and 21.3 of the DSU suggest that alternative means of implementation may exist and that the choice belongs, in principle, to the implementing Member.[384] In addition, we indicated that several systemic questions arise in connection with the implementation of DSB recommendations and rulings in cases where a sunset review was found to be inconsistent with Articles 11.3 and 11.4 of the *Anti-Dumping Agreement*.[385] These complex questions are implicated in Argentina's request for a suggestion that the United States terminate the anti-dumping duty order. We believe that these questions are beyond the scope of the issues raised by the participants in this appeal and, furthermore, we do not consider that we should resolve them in the context of considering a request for a suggestion under Article 19.1 of the DSU. For these reasons, we decline Argentina's request that we make a suggestion on how the United States could implement the recommendations in this case.

VIII. Findings and Conclusions

185. For the reasons set out in this Report, the Appellate Body:

(a) reverses the Panel's finding, in paragraphs 7.41 and 8.1(a) of the Panel Report, that Section 751(c)(4)(B) of the Tariff Act, operating in conjunction with Section 751(c)(4)(A) of the Tariff Act and Section 351.218(d)(2) of the Regulations, is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*; and in the light of this finding, does not consider it necessary to examine whether the Panel failed to make an objective assessment of the matter before it, as required by Article 11 of the DSU;

(b) upholds the Panel's finding, in paragraphs 7.91 and 7.96 of the Panel Report, that the USDOC's volume analysis was properly before the Panel; consequently, the Panel's findings, in paragraphs 7.101, 7.102, and 8.1(c) of the Panel Report, also stand;

[383]In the light of the above, we need not decide here whether the requirements of Articles 11 and 12.7 are applicable to a panel's consideration of a request for a suggestion pursuant to Article 19.1 of the DSU.

[384]See *supra*, para. 173.

[385]See *supra*, para. 174.

(c) upholds the Panel's finding, in paragraphs 7.60 and 8.1(b) of the Panel Report, that the USDOC did not act inconsistently with the United States' obligations under Articles 11.3 and 11.4 of the *Anti-Dumping Agreement* by developing a new factual basis pertaining to the original review period for purposes of its Section 129 Determination; and finds that the Panel did not fail to make an objective assessment of the matter before it, as required by Article 11 of the DSU, by considering certain provisions of the DSU as appropriate context; and

(d) rejects Argentina's claims that, in declining to make a suggestion pursuant to Article 19.1 of the DSU, the Panel did not properly fulfil its duties under Articles 11 and 12.7 of the DSU.

186. The Appellate Body recommends that the Dispute Settlement Body request the United States to implement fully the recommendations and rulings of the DSB.

Signed in the original in Geneva this 23rd day of March 2007 by:

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Yasuhei Taniguchi
Presiding Member

_____ _____

Merit E. Janow
Member

David Unterhalter
Member

ANNEX I

WORLD TRADE ORGANIZATION

WT/DS268/19
16 January 2007

(07-0180)

Original: English

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

Recourse to Article 21.5 of the DSU by Argentina

Notification of an Appeal by the United States
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the *Working Procedures for Appellate Review*

The following notification, dated 12 January 2007, from the Delegation of the United States, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel on *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina: Recourse to Article 21.5 of the DSU by Argentina* (WT/DS268/RW) and certain legal interpretations developed by the Panel in this dispute.

1. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the provisions of section 751(c)(4)(B) of the Tariff Act of 1930, operating in conjunction with section 751(c)(4)(A) of the Tariff Act and section 351.218(d)(2) of Title 19 of the Code of Federal Regulations, are inconsistent with Article 11.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Antidumping Agreement").[1] This finding is in error and is based on erroneous findings on issues of law and related legal interpretations, such as the finding that U.S. law, including section 751(c)(4)(B) of the Tariff Act and section 351.218(d)(2)(iii) of the Department of Commerce's regulations, precludes the Department of Commerce from making an order-wide determination of likelihood of continuation or recurrence of dumping, supported by reasoned and adequate conclusions based on the facts before the agency, where an interested party elects not to participate in the sunset review at the Department of Commerce.

Other errors include, for example, reversing the burden of proof by failing to require Argentina to prove its claim and instead requiring the United States to disprove it; in addition, the Panel applied the wrong legal standard by evaluating whether the statute "may" breach the Antidumping Agreement, rather than whether the statute mandates a breach of that Agreement.

[1] *See, e.g.*, paras. 7.32-7.41, 8.1(a).

Further, the Panel failed to make an objective assessment of the matter before it, including a failure to make an objective assessment of the facts of the case, contrary to Article 11 of DSU. For example, the Panel based its conclusion not on the evidence contained in the panel record – indeed, this provision of U.S. law had never been used – but rather on the basis of pure speculation by the Panel as to what the United States would do if the law were to be invoked. For example, the Panel moves from speculating that evidence would "necessarily" have a "significant impact" on the U.S. determination at issue to concluding that the United States would be unable to consider any additional evidence.

2. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the "volume analysis" incorporated by reference in the Section 129 determination forms part of the measure taken to comply within the meaning of Article 21.5 of the DSU for purposes of these proceedings.[2] This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations of DSU Article 21.5. For example, in the original proceeding, there were no recommendations or rulings pertaining to the volume analysis, and, in the redetermination, the volume analysis was an unchanged aspect of the original determination that was simply incorporated by reference, as was the case in *EC – Bed Linen (Article 21.5 – India)*.[3]

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[2]*See, e.g.*, paras. 7.88-7.96. Paragraphs 7.98-7.101 and 8.1(c)(2) would be rendered moot if the United States were to prevail with respect to this claim.

[3]Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India: Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003 ("*EC – Bed Linen (Article 21.5 – India)*").

ANNEX II

WORLD TRADE ORGANIZATION

WT/DS268/20
26 January 2007

(07-0370)

Original: English

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

Recourse to Article 21.5 of the DSU by Argentina

Notification of an Other Appeal by Argentina
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 23(1) of the *Working Procedures for Appellate Review*

The following notification, dated 24 January 2007, from the Delegation of Argentina, is being circulated to Members.

Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 23(1) of the *Working Procedures for Appellate Review*, Argentina hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel on *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Argentina – Recourse to Article 21.5 of the DSU By Argentina* (WT/DS268/RW) (the "Panel Report") and certain legal interpretations developed by the Panel in this dispute.

1. Argentina seeks review by the Appellate Body of the Panel's conclusions, and its related legal findings and interpretations, that "[t]he USDOC did *not* act *inconsistently* with Articles 11.3 and 11.4 of the Agreement by developing a new factual basis for its Section 129 Determination." This conclusion is set out in paragraph 8.1(b) of the Panel Report. The related legal findings and interpretations of the Panel are set out in paragraphs 7.47 to 7.61 of the Panel Report.

2. The Panel acted inconsistently with its obligation under Article 11 of the DSU to make an objective assessment of the matter before it. The Panel determined that "the resolution of Argentina's claim must have regard to broader, horizontal considerations underpinning the operation of the WTO dispute settlement system."[1] By basing its findings on "broader, horizontal considerations underpinning the operation of the WTO dispute settlement system", rather than on the specific claims and arguments raised by Argentina, the Panel failed to make an objective assessment of "the matter before it", including "the facts of the case" and "the applicability of and conformity with the relevant covered agreements."

[1]Panel Report, para. 7.51; *see also* para. 7.57.

3. The Panel's findings set out in paragraphs 8.1(b) and 7.47 to 7.61 of the Panel Report were also inconsistent with Articles 3.2 and 19.2 of the DSU. The Panel's findings have diminished Argentina's right under Article 11.3 of the Anti-Dumping Agreement to termination of the measure after five years in the absence of compliance with the requirements of Articles 11.3 and 11.4. The Panel's findings also diminished the obligation of the United States to terminate the antidumping measure on Argentine OCTG absent a review and determination consistent with Articles 11.3 and 11.4 of the Anti-Dumping Agreement.

4. The Panel acted inconsistently with its obligation under Article 11 of the DSU by failing to objectively assess Argentina's request for a suggestion pursuant to Article 19.1 of the DSU. Noting the original Panel's conclusion that it "saw no particular reason to make a suggestion and therefore decline[ed] Argentina's request"[2], Argentina provided additional argument and explanation as the need for a suggestion during the DSU Article 21.5 proceeding. However, without any analysis, the Panel simply repeated its statement that it "saw no particular reason to make a suggestion and therefore decline[ed] Argentina's request."[3] The Panel also violated Article 12.7 of the DSU by failing to set out the findings of fact, the applicability of relevant provisions and the basic rationale behind its finding that there was "no particular reason to make a suggestion."

5. In the light of the Panel's finding that the United States did not bring itself into compliance with its obligations under the Anti-Dumping Agreement, and in light of the fact that the United States has not appealed the Panel's finding in the regard,[4] Argentina respectfully requests that the Appellate Body suggest that the United States terminate the anti-dumping measure on OCTG from Argentina. The United States accepts the Panel's decision that the United States did not achieve compliance before the expiration of the implementation period. Article 19.1 of the DSU authorizes Panels and the Appellate Body to make suggestions, and to suggest ways in which the Member concerned could implement the recommendations. A suggestion to terminate the anti-dumping measure is appropriate and necessary in this case in order to protect the specific rights of Argentina which the United States violated, and continues to violate.

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[2]WT/DS268/R, para. 8.5.

[3]Panel Report, para. 9.4.

[4]While the U.S. Notice of Appeal and the U.S. Appellant's Submission allege certain legal errors related to the Panel's consideration of the matter before it, the United States does not appeal the Panel's findings in paragraph 8.1(c)(1) of the Panel's Report. The Panel concluded that the Section 129 Determination, which was one of the measures taken to comply, is inconsistent with U.S. obligations under the Anti-Dumping Agreement. Thus, the United States does not challenge the conclusion that at the United States failed to bring itself into compliance with its WTO obligations. Stated differently, even if the United States were to prevail on all its arguments in this appeal, it would still have failed to bring itself into compliance with its obligations under the Anti-Dumping [Agreement].