

## ANNEX B

### THIRD PARTIES' SUBMISSIONS

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## ANNEX B-1

### THIRD PARTY SUBMISSION OF THE EUROPEAN COMMUNITIES

14 November 2003

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**Table of cases referred to in this submission**

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<i>EC-Bed Linen</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on imports of Cotton-Type Bed Linen from India</i> , final report circulated 30 October 2000 Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/AB/R, adopted 12 March 2001
<i>EC-Bed Linen (Article 21.5)</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/R, final report circulated, 29 November 2002 Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003
<i>EC-Tube and Pipe</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/R, final report circulated 7 March 2003 Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003
<i>Egypt-Steel Rebar</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS/211/R, adopted 1 October 2002
<i>Guatemala-Cement II</i>	Panel Report, <i>Guatemala-Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico</i> , WT/DS156/R, adopted 17 November 2000
<i>Japan-Alcoholic Beverages II</i>	Panel Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, final report circulated, 11 July 1996 Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
<i>US-Carbon Steel from Germany</i>	Panel Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/R, final report circulated 3 July 2002 Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R, adopted 28 November 2002
<i>US-Carbon Steel from Japan</i>	Panel Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/R, final report circulated 14 August 2003, notice of appeal 15 September 2003
<i>US-CVDs on EC Products</i>	Panel Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , WT/DS212/R, final report circulated 31 July 2002 Appellate Body, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , WT/DS212/AB/R, adopted 8 January 2003
<i>US-DRAMs</i>	Panel Report, <i>United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of one Megabit or above from Korea</i> , WT/DS99/R, adopted 19 March 1999
<i>US-Hot-Rolled Steel</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/R, final report circulated 28 February 2001 Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001

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

## 1. INTRODUCTION

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

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

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

## 2. PRELIMINARY OBJECTION

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

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

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<sup>1</sup> First written submission of the United States, para. 84 and following.

<sup>2</sup> Para. 127.

"Moreover, compliance with the requirements of Article 6.2 must be determined on the merits of each case, *having considered the panel request as a whole*, and in the light of attendant circumstances." (emphasis added)

In the view of the European Communities, the Panel should not follow the United States suggestion to consider page 4 of Argentina's Panel request, i.e. the concluding section thereof, in isolation from the rest of the request. Rather, in order to establish whether the conditions of Article 6.2 DSU are met, the Panel should consider the Panel request as a whole.

### **3. THE INADEQUACY DETERMINATION**

3. An internal DOC memorandum dated 22 August 2000<sup>3</sup> explains that because Siderca had no exports to the United States during 1995 to 1999, and because there were imports of the product from Argentina during that period, Siderca accounts for less than 50 per cent of United States imports of the product from Argentina during the relevant period.<sup>4</sup>

4. The memorandum accordingly recommended that Siderca's response be determined to be inadequate and that DOC should conduct an expedited (120 day) sunset review. According to section 351.218(e)(1)(ii)(C) of DOC's regulations, in an expedited review, the review will be conducted on the basis of facts available as defined in Section 351.308(f). Section 351.308(f) of DOC's regulation provides in relevant part:<sup>5</sup>

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

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

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

5. Argentina argues<sup>6</sup>, and the European Communities agrees, that this determination is inconsistent with Article 11.3 AD Agreement. The finding in the present case produced a result that is inconsistent with the AD Agreement. It should be recalled that Siderca had, according to DOC, filed a complete substantive response. This response was found inadequate only on the basis that Siderca had not exported to the United States, so that its share of imports into the United States was less than 50 per cent.

6. This circumstance is not a sufficient justification given the far-reaching consequences of the decision to expedite the review. On the basis of Section 351.308(f), this decision led to the exclusion of relevant evidence from the contested sunset review investigation and determination, in a manner inconsistent with Article 6.1 and 6.2 AD Agreement. It had the additional effect of largely relieving the investigating authority of the obligation to investigate imposed on it by Article 11.3 AD Agreement. The European Communities therefore considers that the decision to expedite the review was incompatible with Articles 11.3 and 6 AD Agreement.

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<sup>3</sup> Exhibit ARG-50, pages 1 and 2.

<sup>4</sup> See the rules in Section 351.218(e)(1)(ii)(A) of DOCs regulations, exhibit ARG-3.

<sup>5</sup> Exhibit US-3, page 13524.

<sup>6</sup> First written submission of Argentina, paras. 166 to 171.

#### 4. LIKELY CONTINUATION OF DUMPING

##### 4.1 Required Standard of Determination: Likely

7. Article 11.3 AD Agreement provides:

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

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

##### 4.2 The Use of the Dumping Determination from the Original Investigation as the Sole Basis for the Determination of Historical Dumping

9. The only dumping determination used by the investigating authority in the contested sunset review investigation and determination (effective 7 November 2000) was that made in respect of the original investigation (the 6 months from 1 January 1994 to 30 June 1994).

10. The contested sunset review determination was based on the following statement in the issues and decisions memorandum<sup>9</sup>, that being a document expressly incorporated by reference into the contested determination:

"... we find that dumping has *continued* over the life of the Argentine order and is likely to *continue* if the order were revoked." (emphasis added)

11. Article 11.3 AD Agreement refers to likely “continuation or recurrence”. If “continuation” and “recurrence” would be interpreted as having the same meaning, one of the two words would be redundant. If that is to be avoided, the words must have different meanings.

12. Both words indicate a determination with a temporal aspect, being one that is partially *historical* and partially *prospective*. If dumping *continues*, it is present, *uninterrupted*, both before and (it is expected) after a point of reference in time. If dumping *recurs*, it is also present both before and

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<sup>7</sup> Panel Report, para. 6.45.

<sup>8</sup> First written submission of Argentina, paras. 89 to 93 and 211 to 233.

<sup>9</sup> Exhibit ARG-51, page 5, para. 2, final sentence.



(it is expected) after a point of reference in time, but it is *interrupted* by a time when there was no dumping.<sup>10</sup> These are the common and ordinary meanings of the words “continue” and “recur”.

13. The European Communities does not therefore consider that the unqualified statement in the United States Statement of Administrative Action:<sup>11</sup> “The determination called for in these types of reviews is inherently predictive and speculative.” is consistent with the AD Agreement. The facts and analysis in the historical part of the determination are neither predictive nor speculative. The prospective part must consist of positive evidence, that is, historical facts (that are neither predictive or speculative) plus analysis or reasoning. Of the four elements in the determination, it is only this final element of prospective analysis or reasoning that might be termed predictive or speculative. For similar reasons, the European Communities would not agree with the United States submissions in the present case, insofar as they suggest that a sunset review investigation and determination is concerned uniquely with a prospective analysis.<sup>12</sup>

14. Since time is continuous and sales punctual, whether dumping is continuous or recurrent can only be determined by reference to a defined *period*. Otherwise every dumped import would be a recurrence; continuous dumping could not by definition exist; and the word continuation would be redundant. Thus, an Article 11.3 AD Agreement review must be conducted by reference to a specific time period. As a matter of logic and common sense, it is not possible to conduct the analysis required by Article 11.3 AD Agreement without some temporal parameters.

15. For example, referring to the 5 year period provided for in Article 11.3 AD Agreement, a sunset review initiated before the end of year 5, that relied on a dumping determination in respect the period from the end of the original investigation up to the most recent available data would be an example of a review that relied on a likely *continuation* determination. On the other hand, an Article 11.3 AD Agreement review which sought to rely on a dumping determination limited to, for example, year 1, in circumstances where there was no subsequent dumping, would be an example of a review that relied on a likely *recurrence* determination.

16. Are there any requirements concerning the time parameters that an investigating authority may select for a sunset review ? As regards the historical element of the determination, the relevant time period may end with the end of the period in which the most recent data is available. There must also be a date on which the time period starts. It cannot stretch back indefinitely.

17. If the investigation period in an Article 11.3 review investigation is defined by the investigating authority as starting on the date of the original investigation period (in this case, 1 January 1994) and ending with the end of the period in which the most recent data is available, then there is no distinction between the concept of continuation and the concept of recurrence. This is the method that was used by the investigating authority in the present case. It is a method that renders the word “recurrence” redundant. Every case becomes a case of continuation. That is why in the issues and decisions memorandum<sup>13</sup> the investigating authority considered itself able to state:

“... we find that dumping has *continued* over the life of the Argentine order and is likely to *continue* if the order were revoked.” (emphasis added).

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<sup>10</sup> Panel Report, *US – Carbon Steel from Japan*, para. 7.179 : “We derive this from the reference to “recurrence”, which we understand to refer to the recommencement of a phenomenon that has ceased.”

<sup>11</sup> United States Statement of Administrative Action (SAA), accompanying the adoption of the Uruguay Round Agreements Act (URAA), implementing the WTO Agreement for the United States, with effect, for the purposes of the present case, from 1 January 1995. Exhibit ARG-5 at page 4208.

<sup>12</sup> First written submission of United States, paras. 250 and 255.

<sup>13</sup> Exhibit ARG-51, page 5, para. 2, final sentence.

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

19. The specific question before the Panel is: by relying in the contested sunset review investigation and determination, for the purposes of the historical part of a likely continuation determination, *only* on the dumping calculation in relation to the original investigation period (in this case, the six months from 1 January 1994 to 30 June 1994), did the United States act in a manner inconsistent with its WTO obligations? The Panel does not need to decide whether or not a Member could rely on dumping during any specific later period (such as, for example, years 1, 2 or 3).

20. The European Communities agrees with Argentina that on this point the United States acted inconsistently with its WTO obligations.<sup>14</sup> On the basis of the method used by the United States, a dumping measure could be perpetuated for 10 years, indeed indefinitely, on the basis of the calculation made in relation to the original investigation period, together with the prospective part of the likely continuation determination. That would not be consistent with Article 11.1 or 11.3 AD Agreement.

21. Article 11.1 AD Agreement states a general and overarching principle in the light of which Article 11.3 must be interpreted.<sup>15</sup>

22. Article 11.1 AD Agreement is particularly concerned with the *temporal* scope of an anti-dumping measure. This appears from the title of Article 11, which contains the word “duration”. It is confirmed by the use of the word “remain” in Article 11.1. The provision is not concerned with whether or not a measure should be imposed, but whether or not it should remain.

23. The words “only as long as” in Article 11.1 AD Agreement are significant. The text of the provision does not read “An anti-dumping duty shall remain in force *if* necessary to counteract dumping ...”. Rather, the agreed words “only as long as” indicate a *temporal* requirement that is more than the mere conditional “if”. They indicate that there must be a minimum temporal relationship between the existence of dumping and the existence of the duty. *Only as long as* there is dumping can there be an anti-dumping duty. In other words, a dumping determination in relation to the original investigation period has a limited “shelf-life”. It is not forever. It cannot be the *sole* basis for imposing anti-dumping duties for an *unlimited* period of time.

24. This analysis is further confirmed by the use of the words “*is causing*” (the present tense) in Article 11.1 AD Agreement. The dumping in question cannot be dumping that “caused” or “was causing” or “had caused” – it must be dumping that “is causing”. The present is now. Whilst it may be true that the requirement to use positive evidence may logically justify using historical data, in relation to a period that is closed (for example, year 4), that does not permit the investigating authority to evade entirely the Member’s obligation to determine that dumping *is present*. If a Member relies again only on the results of the original investigation, that would contradict the use of the present tense in Article 11.1 AD Agreement.

25. Further guidance may be derived from the word “immediately” in Article 11.2 AD Agreement, emphasizing that the dumping duty must be terminated immediately when the authorities determine that it is no longer warranted.<sup>16</sup>

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<sup>14</sup> First written submission of Argentina, paras. 156 to 165 and 184.

<sup>15</sup> Appellate Body Report, *US – Carbon Steel from Germany*, para. 70; Panel Report, *EC – Tube and Pipe*, para. 7.113.

<sup>16</sup> Appellate Body Report, *US – Carbon Steel from Germany*, para. 71.

26. The proposition that a Member can rely only on the prospective part of a likely continuation determination (together with the results of the original investigation), if that prospective determination does not involve a present dumping determination, is equally inconsistent with the text of the AD Agreement. Even a prospective determination must be based on positive evidence, that is, evidence capable of assessment, evidence that exists, historical evidence. If such evidence includes a dumping determination, then the preceding observations apply. If it does not include a dumping determination (but involves, for example, imports during the relevant period), then there will, by definition, be no sufficiently recent dumping determination. The language of Article 11.1, as analysed above, expressly and specifically requires a present determination of *dumping*, not a present determination concerning *imports*.

27. Once it is accepted that the results of a dumping calculation made in relation to an original investigation period cannot alone forever be the basis for imposing duties, the only question that remains is what is the maximum “sell-by date”? Is it 11 years, 7 months and 11 days, and, based on current United States methods and practice, almost certainly longer – indeed indefinite? In the opinion of the European Communities it results incontestably from Article 11.3 AD Agreement that the maximum period is five years. ***The minimum meaning of Article 11.3 AD Agreement is that, to continue the measure beyond five years, an historical dumping determination more recent than that made in the original investigation is necessary.***

#### 4.3 Prospective Continuation of Dumping

##### 4.3.1 Prospective determination

28. Article 11.3 AD Agreement requires a determination that is in part prospective. Article 11.3 AD Agreement does not merely require a finding that dumping occurred or recurred or continued (past tense). It requires a finding that dumping is likely to continue or recur (future tense). Thus, having made the required historical determination of dumping, an investigating authority must go on, in addition, to make the required prospective determination, based on positive evidence existing at least at the time of the determination.<sup>17</sup>

##### 4.3.2 Additional factual requirement

29. The question that arises is whether the prospective determination can consist only of analysis, no new facts being added to those used for the historical determination, or whether new facts must be added, before the prospective analysis is made. ***In the opinion of the European Communities, this may depend on how recent the historical dumping determination is.***

30. If the historical dumping determination relates, for example, to years 1 to 4 (during which the order is in force) and margins are constant or increasing over time, then the same facts might possibly carry weight both for the historical determination and the prospective determination. For the prospective determination what would be particularly necessary would be to add some *reasoning*. If dumping has recently occurred even with an order in place, then it might be relevant for the determination, especially if the trend in the margin is upwards.

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<sup>17</sup> Panel Report, *US – Carbon Steel from Japan*, para. 7.45 : “... the authorities are required to establish, on the basis of positive evidence, that there is likelihood of continuation or recurrence of dumping or injury ...”, and paras. 7.177 and 7.279 (“Future “facts” do not exist.”); Panel Report, *US-DRAMS*, para. 6.42 : “... such continued imposition must, in our view, be essentially dependent on, and therefore assignable to, a foundation of positive evidence that circumstances demand it. In other words, the need for the continued imposition of the duty must be demonstrable on the basis of the evidence adduced.”; Appellate Body Report, *US – Carbon Steel from Germany*, para. 88 : “... a fresh determination, based on credible evidence, will be necessary to establish that the continuation of the countervailing duty is warranted ...”; Appellate Body Report, *US – Lamb*, para. 136.

31. One point, however, is clear. If the historical dumping determination relates only to the original investigation period (as in the present case), in the opinion of the European Communities, some new facts must at least be added for the purposes of the prospective dumping determination. ***Otherwise the continuation of the measure would be based only on out-of-date data and speculation about the future.*** In that way, Article 11.3 AD Agreement would be rendered effectively meaningless, which would not be an acceptable interpretation of the AD Agreement, in conformity with customary rules of international law.

32. What kind of additional factual information is required ? If the requirements would be high (many detailed facts on a range of matters directly linked to the issue of likely future dumping), the balance would lie towards the first part of the first sentence of Article 11.3 AD Agreement : "... any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition ...". If the requirements would be low (few general facts on limited matters not directly linked to the issue of likely future dumping), the balance would lie towards the second part of the first sentence of Article 11.3 AD Agreement : "... unless the authorities determine ... that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury."

33. In the opinion of the European Communities, the threshold for additional factual information ***must be sufficiently high to give effective meaning*** to the rule in Article 11.3 AD Agreement.<sup>18</sup>

34. Accordingly, since Article 11.3 AD Agreement contains the presumption that duties will be terminated after 5 years, there must be positive factual findings capable of supporting a determination of likely continuation of dumping. Even if there is evidence as to dumping in the original investigation period, that does not mean that the prospective requirement is satisfied.

#### 4.3.3 Additional factual assertions in this case

35. In the issues and decisions memorandum<sup>19</sup> the investigating authority first rejects the no-likelihood argument advanced by Siderca. This rejection is based on *a contrario* reasoning derived from the truncated quotation from the SAA at the beginning of para. II.4 of the *Sunset Policy Bulletin*<sup>20</sup>, that being an example of a situation, it is said, in which dumping may be "less likely" to continue.

36. In the same paragraph of the issues and decisions memorandum, the final sentence is concerned with the affirmation of the likelihood determination (the reference to 1.27 per cent instead of 1.36 per cent appears to be a typographical error). It reads:

"Because 1.27 per cent is above the 0.5 per cent *de minimis* standard applied in sunset reviews, we find that dumping has continued over the life of the Argentine order and is likely to continue if the order were revoked."

37. This is a reference to point II.3(a) of the *Sunset Policy Bulletin*, which states in relevant part:

"... the Department normally will determine that revocation of an anti-dumping order ... is likely to lead to continuation or recurrence of dumping where – (a) dumping continued at any level above *de minimis* after the issuance of the order ..."

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<sup>18</sup> Appellate Body Report, *US – Carbon Steel from Germany*, para. 71 : "As we explained in our Report *US – Lead and Bismuth II*, the determination made in a review under Article 21.2 [of the SCM Agreement] must be a **meaningful** one." – otherwise "... the review mechanism under Article 21.2 [of the SCM Agreement] **would have no purpose**." (Appellate Body Report, *US – Lead and Bismuth II*, para. 61). (emphasis added)

<sup>19</sup> Exhibit ARG-51, page 5, para. 2, first 3 sentences.

<sup>20</sup> Exhibit ARG-35.

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

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

40. Whether or not such an *incidental* factual statement could be sufficient for the purposes of Article 11.3 AD Agreement, the European Communities has the following comments. We first consider the statement : "there has been no decline in dumping margins". In order to determine that something *has declined* it would be necessary to make at least 2 discrete measurements, at different times. The investigating authority did not do that. Instead, it stretched the period under consideration, extending it from the original investigation period (the 6 months from 1 January 1994 to 30 June 1994) to the time at which the assessment was made, and concluded that during this period there had been *no decline*, because there had been no change. If no additional measurement is made, that result is a foregone conclusion, following inevitably and automatically from the method used by the United States.<sup>21</sup> The conclusion must be that this part of the statement adds no new *factual* element to the historical dumping determination, for the purposes of the prospective part of the determination.

41. Thus, the single additional factual element relied on by the investigating authority is the statement:

"... there has been no ... increase in imports ... ."

42. The specific question before the Panel is: was this factual assertion alone, leaving aside for the time being the question of whether or not it is accurate, relevant to and sufficient for the purposes of the prospective part of the likely continuation of dumping determination ? ***Is it a feast of fact, or a meagre crumb?*** In the respectful opinion of the European Communities, the Panel should conclude that it is insufficient for the purposes of the AD Agreement.

43. That conclusion is confirmed when one considers the possible additional factual determinations that are *omitted*. The Panel need not enter into a general discussion of what they might or must be, it being sufficient for the purposes of the present case to refer to (without endorsing) United States legislation. The SAA provides:<sup>22</sup>

"... Commerce also will consider other information regarding price, cost, market or economic factors it deems relevant. Such factors might include the market share of foreign producers subject to the anti-dumping proceeding; changes in exchange rates, inventory levels, production capacity, and capacity utilization; any history of sales

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<sup>21</sup> Appellate Body Report, *EC – Bed Linen* (21.5), para. 132 : "The approach taken by the European Communities in determining the volume of dumped imports was not based on an "objective examination". The examination was not "objective" because its result is predetermined by the methodology itself."; Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.

<sup>22</sup> Exhibit ARG-5 at page 4214.

below cost of production; changes in manufacturing technology of the industry; and prevailing prices in relevant markets. ...<sup>23</sup>

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

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

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

#### 4.3.4 Additional reasoning

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

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

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

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

50. Whether or not such an *incidental* statement of reason could be sufficient for the purposes of Article 11.3 AD Agreement, the European Communities has the following comments. We note first that the phrase does not appear in the issues memorandum in exactly the same context as in the SAA. In the SAA, the preceding sentence contains an example of circumstances in which the measure subject to the sunset review investigation would *not be* terminated. It states:

"For example, declining import volumes accompanied by the continued existence of dumping margins *after the issuance of an order* may provide a strong indication that, absent an order, dumping would be likely to continue, because the evidence would indicate that the exporter needs to dump to sell at pre-order volumes." (emphasis added)

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<sup>23</sup> See also : 19 USC. 1675 (Exhibit ARG-1), at page 1157 : "If good cause is shown, the administering authority shall also consider such other price, cost, market or economic factors as it deems relevant."

<sup>24</sup> Exhibit ARG-5, page 4213.

<sup>25</sup> Exhibit ARG-35, page 18872.

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

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

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

54. It results from the preceding observations that the European Communities agrees with Argentina<sup>26</sup> that the United States acted inconsistently with Article 11.3 AD Agreement, insofar as the additional statement of fact, if any, and the additional statement of reason, if any, relied on by the investigating authority for the purposes of the prospective part of its likely continuation of dumping determination were insufficient to give effective meaning to Article 11.3 AD Agreement.

#### 4.4 Conclusion on Likely Continuation of Dumping

55. For each of the above reasons considered independently (reliance on the dumping determination from the original investigation, and no or insufficient statement of fact and reason for the purposes of the prospective determination) the European Communities considers that the United States did not act in accordance with its obligations under the AD Agreement. In any event, the European Communities invites the Panel to reach that conclusion when both arguments are considered together : continuation of the duty was based on out-of-date data and, essentially, speculation about the future, thus depriving Article 11.3 AD Agreement of effective meaning.

56. Articles VI (1) and (2) GATT 1994 are drafted in the present tense, as is most of the AD Agreement. There must therefore be a minimum temporal relationship between the dumping, and the duty. The object and purpose of Article 11.3 AD Agreement is to define, as a general rule or principle, what that minimum temporal relationship should be, subject to an exception. For Article 11.3 AD Agreement to have effective meaning, the exception cannot be interpreted in such a way as to make it the rule. ***A meaningful balance must be struck.*** There was no such meaningful balance struck in the present case. And the statistics submitted by Argentina in respect of United States sunset review investigations reveal that no such meaningful balance is being struck by the United States over time, nor will be struck in the future, unless the Panel reaches an appropriate conclusion and makes appropriate recommendations.

57. According to the SAA<sup>27</sup> which provides authoritative interpretation of United States law : “The [Anti-Dumping] Agreement does require a number of changes in US law, such as ... new five-year “sunset” review provisions. These changes ***do not diminish in any meaningful way the level of protection afforded US industries*** from dumped imports.” (emphasis added).

58. It is clear from the SAA<sup>28</sup> that administrative burden is an issue in the United States : “... there will likely be more than 400 of these transition orders ...”; “... thereby creating an extraordinary burden on the agencies’ resources ...”; “To promote administrative efficiency ...”. Certainly these pressures exist and are intense, not least because the United States did not previously have a sunset

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<sup>26</sup> First written submission of Argentina, paras. 181 and 184.

<sup>27</sup> At page 137.

<sup>28</sup> Exhibit ARG-5 at page 4208.

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

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

60. As the Appellate Body has observed:

“... we wish to underline the thrust of Article 21.3 of the SCM Agreement. An automatic time-bound termination of countervailing duties that have been in place for five years from the original investigation or a subsequent comprehensive review is **at the heart of this provision**. Termination of a countervailing duty is the **rule** and its continuation is the **exception**. The continuation of a countervailing duty must therefore be based on a properly conducted review and a positive determination that the revocation of the countervailing duty would “be likely to lead to continuation or recurrence of subsidization and injury”. Where the level of subsidization **at the time of the review** is very low, there must be **persuasive evidence** that revocation of the duty would nevertheless lead to injury to the domestic industry. **Mere reliance by the authorities on the injury determination made in the original investigation will not be sufficient**. Rather, a fresh determination, based on **credible evidence**, will be necessary to establish that the continuation of the countervailing duty is warranted to remove the injury to the domestic industry.”<sup>30</sup> (emphasis added)

## **5. THE SUNSET POLICY BULLETIN AND UNITED STATES METHODOLOGY “AS SUCH”**

61. Argentina argues that the *Sunset Policy Bulletin* and United States methodology “as such” are inconsistent with Article 11.3 AD Agreement because they establish and evidence that there is an irrefutable presumption that dumping is likely to continue or recur if dumping margins continue or imports cease or decline<sup>31</sup>. The United States argues that no such irrefutable presumption exists, and that, in any event, neither the *Sunset Policy Bulletin* nor United States methodology, not being mandatory, can be found “as such” inconsistent with the AD Agreement.<sup>32</sup>

62. The European Communities considers that the *Sunset Policy Bulletin*, or at least the specific provision of the *Sunset Policy Bulletin* in question, is a measure that may properly be referred to a Panel for the purposes of determining whether or not it is consistent with the AD Agreement.

### **5.1 The So-Called Mandatory/Discretionary Doctrine**

63. The European Communities considers that the distinction between mandatory and discretionary measures is not based on any provision in the WTO Agreements. Moreover, that

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<sup>29</sup> Appellate Body Report, *US – Carbon Steel from Germany*, para. 91.

<sup>30</sup> Appellate Body Report, *US – Carbon Steel from Germany*, para. 88.

<sup>31</sup> First written submission of Argentina, paras. 124 to 137.

<sup>32</sup> First written submission of the United States, paras. 171 to 208.



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

64. Some Panels have applied a mandatory/discretionary doctrine. Other Panels, and notably the Panel in *US – Section 301*, have taken a contrary, or at least more qualified view. The Appellate Body for its part has so far abstained from pronouncing itself clearly on the issue, although it may be called upon to do so soon in a case presently pending before it.<sup>33</sup> The European Communities considers that, even if relevant, the distinction could not be determinative, nor the end of the analysis.<sup>34</sup>

65. The European Communities further agrees with the Panel in *US – Section 301* that whether or not so-called “discretionary” legislation may be subject to challenge may depend on the specific obligations imposed by each provision of the WTO Agreement. It therefore considers that it is necessary to examine the specific provisions of the AD Agreement in order to establish whether the *Sunset Policy Bulletin* as such may constitute a violation of the disciplines of this agreement.

## **5.2 The *Sunset Policy Bulletin* Is an Administrative Procedure**

66. In the view of the European Communities, the decisive provision for determining whether the *Sunset Policy Bulletin* may give rise to a violation of the AD Agreement is Article 18.4 of the AD Agreement.

67. The European Communities considers that there are two aspects in the wording of this provision which are noteworthy in the present context. First of all, Article 18.4 AD Agreement requires that WTO Members take “all necessary measures, of a general or of a particular character”. Laws and regulations being by definition of a general character, this indicates that the obligations of WTO Members are not exhausted by merely enacting laws and regulations which are not incompatible with the AD Agreement, but must ensure that the AD Agreement is respected also in particular cases.

68. Second, Article 18.4 AD Agreement refers, as well as to “laws” and “regulations”, also to “administrative procedures”. In the view of the European Communities, this separate notion must have a distinct meaning compared to “laws and regulations”. However, by examining whether the *Sunset Policy Bulletin* is “binding under US law”, the United States is essentially asking the question whether the *Sunset Policy Bulletin* is a law or a regulation. It thereby fails to correctly interpret Article 18.4 AD Agreement.

69. The European Communities considers that the term “administrative procedures” cannot be limited to “rules” or “procedures” the compliance with which is “mandated” by municipal law. If this were the interpretation, the term would be deprived of all independent meaning. Rather, the European Communities considers that the term applies to all rules and procedures which guide proceedings falling under the AD Agreement, including those which have lesser legal force or effects in municipal law than laws and regulations.

70. The European Communities considers that this interpretation is also necessary in order to protect the efficiency of the multilateral system of dispute resolution. Anti-Dumping is characterized by a large number of proceedings affecting individual producers, which follow identical procedures and in which certain issues are bound to recur. It would be regrettable from the point of view of the efficiency of the DSU if a WTO Member could establish certain procedures which effectively result in WTO-incompatible behaviour in a large number of cases, without such procedures being challengeable as such.

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<sup>33</sup> *US – Carbon Steel from Japan* (DS 244/AB-2003-5).

<sup>34</sup> Panel Report, *US – Section 301*, para. 260.

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

72. For these reasons, the European Communities considers that the *Sunset Policy Bulletin* must be considered an administrative procedure within the meaning of Article 18.4 AD Agreement, and therefore challengeable as such.

### 5.3 The *Sunset Policy Bulletin* Is Mandatory in Character

73. Furthermore, and on a subsidiary note, even if the distinction between mandatory and discretionary measures were held to be relevant in the present case, the European Communities considers that the *Sunset Policy Bulletin* should be considered as being a mandatory measure.

74. In this context, the question should not be whether the *Sunset Policy Bulletin* is “binding under US law” on DOC. Rather, the question is whether the *Sunset Policy Bulletin* has binding effect by determining the actions of those who conduct sunset reviews. In this respect, the EC would submit that the *Sunset Policy Bulletin* is a formal instruction issued by DOC, and is as such binding on the staff of DOC.

75. Moreover, the European Communities notes that DOC may depart from the *Sunset Policy Bulletin* only *so long as it explains the reasons for doing it*.<sup>35</sup> This duty to provide reasons for any departure from the *Sunset Policy Bulletin* means that it is by no means without legal effect for DOC. This legal effect is reinforced by the fact that the *Sunset Policy Bulletin* is officially published, which means that any departure from it might be challenged by the participants in an anti-dumping proceeding. Thus, even if theoretically DOC might have the power to depart from its *Sunset Policy Bulletin* if it so decided, it is in practice highly unlikely that it would do so in the context of a concrete review investigation. This is confirmed by the fact that in hundreds of review investigations conducted so far, DOC has in fact never departed from the *Sunset Policy Bulletin*.

76. The European Communities observes that the *Sunset Policy Bulletin* is a formal policy statement signed by the Assistant Secretary for Import Administration, on behalf of and on the authority of the administration itself. It was published in the Federal Register. There was a formal consultation procedure (recorded in the *Sunset Policy Bulletin* itself) for its adoption. It is listed on the relevant web site<sup>36</sup>, in the same list, shortly after “laws and regulations”, that is, dealt with and presented to the public in the same way and given the same ranking. There are currently 23 such policy bulletins (not just in relation to anti-dumping) on the relevant web site, dating from 1991. They are thus relatively few in number, and durable. A “policy” that lasts for 13 years, for example, can, in the opinion of the European Communities, correctly be described as something of which the WTO should be notified pursuant to Article 18.5 AD Agreement, and in respect of which dispute settlement ought to be possible.

77. The European Communities would also invite the Panel to consider the preamble to DOCs final anti-dumping regulation. That repeatedly uses the word “policy” to describe the content of the *regulations*, confirming that in substantive terms the two documents contain the same type of material. It further refers several times to policy bulletins, stating, for example, that DOC “... *will*

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<sup>35</sup> Panel Report, *US – Carbon Steel from Japan*, para. 7.121 (quoting a response of the United States to a question from the Panel).

<sup>36</sup> <http://ia.ita.doc.gov>

describe” a certain methodology in a policy bulletin<sup>37</sup>, confirming that the *Sunset Policy Bulletin* can be described as “action taken under ... regulations” within the meaning of Article 1 AD Agreement.

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

## 6. ZEROING

### 6.1 Preliminary Observations

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

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

### 6.2 Model Zeroing and Simple Zeroing

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

82. Exhibit ARG-52 contains the detail of the original dumping calculation. On page 2, if the total of the column “TOTPUDD” (125478.93) is divided by the total of the column “TOTVAL” (9240392.64), the result is the 1.36 per cent in the original final determination and order. The column “CONNUMU” refers to the models sold in the United States; and the column “CONNUMT” refers to the models sold in the third country. The zeroing appears from the dots in columns “MRGOBS” to “WTAVPERC” and rows 25 to 58. These are the results for which the final column “USPR” exceeds the penultimate column “FUPDDL”, and for which the dumping margin was therefore negative, but set at zero. It thus appears from this table that the zeroing method used was *at least* equivalent to that used in *EC-Bed Linen* (model zeroing). It further appears from the columns TOTOBS and MRGOBS, and the differences between them, that each individual export transaction was in fact compared with a weighted-average normal value (simple zeroing).

83. Whilst it is true that the two methods are different, in the opinion of the European Communities it is possible to say that unjustified simple zeroing is worse than model zeroing. Model zeroing allows for the possibility of some set-off between negative and positive dumping margins.

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<sup>37</sup> 62 FR 27355, 27371, 27374, 27376.

<sup>38</sup> Appellate Body Report, *US – CVDs on EC Products*, para. 151.

<sup>39</sup> DS294.

<sup>40</sup> First written submission of Argentina, para. 190, final sentence.

<sup>41</sup> First written submission of Argentina, paras. 181 and 189 to 192.

Simple zeroing does not allow for any set-off at all. The conclusion would be that, in ruling as it did in the *EC Bed Linen* case that model zeroing is inconsistent with the AD Agreement, the Appellate Body effectively ruled that unjustified simple zeroing is also (even more) inconsistent with the AD Agreement, for the same reasons.

84. The European Communities refers the Panel to the text of Articles 2.1, 2.4 and 2.4.2 of the AD Agreement, and to *EC – Bed Linen*, para. 6.115 of the Panel Report and para. 55 of the Appellate Body Report.

85. The United States has not modified its methodology to take account of *EC – Bed-Linen*. For example, the “Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products From The Netherlands” published in FR 66 50408, amended in FR 66 55637, incorporates an issues and decisions memorandum, which states in relevant part (in response to comments from interested parties criticising the zeroing methodology):

"These statutory requirements [which, according to DOC, mandate zeroing] take precedence over any potentially conflicting obligations under the Uruguay Round Agreements. The Uruguay Round Agreements Act makes clear that if there is a conflict between US law and any provision of the WTO Uruguay Round Agreements, US law prevails. *See* section 102(a)(1) of the URAA ("no provision of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstances, that is inconsistent with any law of the United States shall have effect.") Moreover, the SAA specifically provides that "[r]eports issued by Panels or the Appellate Body under the DSU (i.e., the WTO Dispute Settlement Understanding) have no binding effect under the law of the United States." SAA at 1032, reprinted in 1994 USC.C.A.N. 4040, 4318. Finally, the *Bed Linens* Panel and Appellate Body decisions concerned a dispute between the European Union and India. We have no WTO obligation to act based on these decisions."

86. It results from the *EC – Bed Linen* case that if a Member elects to use models, it must still respect the requirement to make a fair comparison, and to compare weighted-average normal value with a weighted-average export price, absent justification pursuant to the final sentence of Article 2.4.2 AD Agreement. The rule is essentially sequential: by requiring averaging first, the possibility of zeroing is mathematically eliminated.

87. In the opinion of the European Communities it necessarily follows from the conclusion that model zeroing is inconsistent with the AD Agreement, that simple zeroing is also inconsistent with the AD Agreement, other than in the circumstances described in the final sentence of Article 2.4.2 AD Agreement.

### **6.3 Zeroing in Context of a Sunset Review Investigation**

88. The European Communities anticipates that the United States might eventually seek to argue that the provisions of Article 2 AD Agreement, or at least some of them, notably Article 2.4.2, which contains the phrase “during the investigation phase”, are irrelevant in the context of a review (as that term is used by the United States) because they relate only to investigations (as that term is used by the United States).

89. The European Communities would not agree with the proposition that Article 2.4.2 is not relevant in the context of a review. First, simple zeroing in a sunset review investigation is in any event inconsistent with the obligation in Article 2.4 AD Agreement to conduct a *fair comparison*<sup>42</sup>, and Article 2.4 does not refer to an “investigation” (as opposed to a “review”). Second, when no

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<sup>42</sup> Appellate Body Report, *EC – Bed-Linen*, paras. 59 and 60.

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

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

### 6.3.1 *The scheme of the AD Agreement and Article 2.1*

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

92. The European Communities invites the Panel to consider Articles 2, 3 and 4, which assume particular significance, given the relative brevity of Article 1. They are definitions. Article 2.1 begins with the text “For the purposes of this Agreement, a product is to be considered as being dumped ...”.<sup>43</sup> Article 3 begins with the words : “A determination of injury for the purposes of Article VI of GATT 1994 shall be ...”, and footnote 9 *defines* the term “injury”. Article 4 is entitled “*definition of domestic industry*” and begins with the words : “For the purposes of this Agreement, the term “domestic industry” shall be interpreted as ...”. Both principles and definitions are abstract text destined to be used when interpreting or applying other text.

93. The European Communities invites the Panel to consider the number of times these concepts are used in the text of the AD Agreement. By way of illustration only, a simple automatic computer search of the text of the AD Agreement yields the following results : dumping (110), dumped (37),

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<sup>43</sup> Appellate Body Report, *EC – Bed Linen*, para. 51 : “Article 2.4.2 of the Anti-Dumping Agreement explains how domestic investigating authorities must proceed in establishing “the existence of margins of dumping”, that is, it explains how they must proceed in establishing that there *is* dumping. Toward this end, Article 2.1 states : ...”; Panel Report, *US – Hot-Rolled Steel*, para. 7.115; Panel Report, *EC – Bed Linen*, para. 6.114. The introductory phrase of Article 2.1 is identical to the phrase used in Article 1 of the SCM Agreement : “For the purposes of this Agreement, a subsidy shall be deemed to exist ...”. See Appellate Body Report, *US – Carbon Steel from Germany*, para. 80 : “... Article 1 of the SCM Agreement sets out a **definition** of “subsidy” that applies to the whole of that Agreement ...”. See also Panel Report *EC – Bed Linen* (21.5), para. 6.124 and Appellate Body Report *EC – Bed Linen* (21.5) paras. 65 and 141 (the United States submits that Article 2.1 AD Agreement “*defines*” dumping ...). According to the SAA, (page 138) which provides authoritative interpretation of United States law : “Article 2 [ADA] ... adopts the standard **definition** of dumping ...”. Accordingly, the SAA sets out at page 150 the legislative steps necessary with respect to “**Definition** of dumping”. See also first written submission of the United States, paras. 253 and 256 : “ ... Article 2.1 provides the **general definition** that a product is considered to be “dumped” where the export price of that product is less than the comparable price in the comparison market.” and this applies “... throughout the AD Agreement ...”.

injury (50), domestic industry (27), total (224). Clearly, these basic concepts permeate the entire agreement.

94. The European Communities does not consider that an express cross-reference from Article 11 to some other provision is necessary, before that other provision must be considered for the purposes of interpreting Article 11. It is instructive, however, to trace the web of express cross-references : Article 11 refers to Articles 9 (twice), 6 and 8; Article 9 to Articles 2 (twice) and 6 (thrice); Article 6 to Article 5; Article 5 to Article 3 (and *vice versa*). Article 1 refers to Article 5; Article 4 to Articles 8 and 3; Article 7 to Articles 5 and 9; Article 10 Articles 7 and 9. This list incorporates, more than once, all the Articles from 1 to 11, and they are all connected to each other by these cross-references. The text of all these articles is thus meshed together as part of a single web or matrix. What was agreed to by all the Members of the WTO was the whole text, not Article 11 in isolation.

95. The European Communities would draw the Panel's very particular attention to the words "unless otherwise specified" in footnote 9 of the AD Agreement. These words indicate that, as regards the definition of injury, there may be derogations or special rules elsewhere in the AD Agreement. No such words are used in Article 2.1 AD Agreement as regards the definition of dumping. Thus, unlike in the case of injury, the AD Agreement does not foresee any possibility at all for departing from the definition of dumping set out in Article 2.1 AD Agreement.

96. Accordingly, the European Communities would invite the Panel not to follow, in any event, the reasoning of the Panel in *US – Carbon Steel from Japan*, paras. 7.99 to 7.101, which relies entirely on the words "unless otherwise specified" – words not present in this case. In fact, the Panel's reasoning in para. 7.99 of its report was that the presence of a definition "... would seem to support the view that the provisions of Article 3 concerning injury may be generally applicable throughout the Anti-Dumping Agreement ..." and that "Article 11 does not seem to explicitly specify otherwise in the case of sunset reviews." Transposing that reasoning to the definition of dumping, absent the words "unless otherwise specified", would confirm that Article 2 AD Agreement applies in the context of a sunset review investigation. As has been observed a number of times in the jurisprudence: "the fact that a particular treaty provision is silent on a specific issue must have some meaning."<sup>44</sup>

### 6.3.2 *Anti-Dumping Proceeding*

97. Neither of the words "investigation" or "review" is to be found in Article VI GATT 1994, which the AD Agreement implements.

98. In the opinion of the European Communities, *as a matter of WTO law* (which is what is determinative for the purposes of the present discussion) the unqualified word "investigation" does not describe the whole anti-dumping procedure. Convenience and the need for a common vocabulary in order to conduct meaningful discussions makes a label appropriate. The precise term is of little importance, but might reasonably be the "**proceeding**". That word is used as an abstract noun at least 4 times in the AD Agreement.<sup>45</sup> Furthermore, it corresponds to the common and ordinary meaning of the text : both court and administrative or quasi-judicial proceedings are commonly said to begin with the filing of the first document with the relevant authority, and the term is customary in WTO anti-dumping law.<sup>46</sup>

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<sup>44</sup> Appellate Body Report, *US – Carbon Steel from Germany*, para. 65; Appellate Body Report, *Japan – Alcoholic Beverages II*, para. 111; Appellate Body Report, *Canada – Patent Term*, para. 78.

<sup>45</sup> AD Agreement, Article 5.9, Article 8.1, Article 9.5 and footnote 19.

<sup>46</sup> For example : Panel Report, *US – Carbon Steel from Japan*, para. 7.32 : "This clause in Article 12.1 appears to us to serve a timing purpose : it explains when during an anti-dumping **proceeding** the public notice of initiation should be given."; Panel Report, *EC – Bed Linen*, footnote 45 (twice) and paras. 6.185 and 6.238; Panel Report, *EC – Tube and Pipe*, para. 7.208; Panel Report, *Egypt-Steel Rebar*, para. 7.139; Panel Report, *Guatemala-Cement II*, paras. 8.247, 8.249 and 8.250 (twice); Panel Report, *US – Lead and Bismuth II*,

### 6.3.3 Review

99. The word “review” is used 6 times in Article 9.5 AD Agreement (newcomer review), 3 times in Article 11.2 AD Agreement (changed circumstances review), 4 times in Article 11.3 AD Agreement (sunset review) and 5 other times in Article 11 and footnote 21 AD Agreement (changed circumstances and sunset reviews). It is also used once in Article 12.3 AD Agreement (changed circumstances and sunset reviews) and twice in Article 18.3 AD Agreement (all reviews).

100. The word “review” is also used four times in Article 13 AD Agreement. The first two times it refers to *judicial review* of administrative action (as in footnote 20 of the AD Agreement). The third and fourth times the word is used, apparently, in the sense indicated in the preceding paragraph.

101. The word “review” is also used twice in Article 18.6 AD Agreement, which refers to the review of the implementation and operation of the AD Agreement.

102. The conclusion must therefore be that the word or concept “review” is referred to in the AD Agreement with at least 5 different meanings : newcomer review, changed circumstances review, sunset review, judicial review, operational review. Sometimes it is used in two senses at the same time (for example, Article 11.4 AD Agreement). Sometimes it is used in three senses at the same time (for example, Article 18.3 AD Agreement). Which is the correct meaning in any given instance must necessarily be determined by looking beyond the text of the word itself, interpreting it in its context and having regard to the object and purpose of the provision in question.

### 6.3.4 Investigation

103. Similar remarks apply with respect to the word “investigation”.

104. That word appears 15 times in Article 5 AD Agreement (initiation and subsequent investigation). Each time it is expressly associated with the qualifying word “initiate” or “initiation”. The sense of the word in Article 5 may therefore be described as an Article 5 investigation or an “initial investigation” or an “original investigation” – also customary in WTO anti-dumping law.<sup>47</sup>

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para. 6.8; Panel Report, *US – Hot Rolled Steel from Japan*, para. 7.128; Appellate Body Report, *US – Offset Act*, para. 7.144. As regards the SCM Agreement, see : Panel Report, *US – Lead and Bismuth II*, paras. 6.8 (twice) and 6.40 (twice); Panel Report, *US – Lumber*, para. 7.116. In the present case, the notice of initiation of the contested sunset review determination (ARG-44) states : “Please consult the Department’s regulations at 19 CFR Part 351 (2000) for definitions of terms and for other general information concerning anti-dumping duty order proceedings at the Department.”. The explanatory memorandum to those regulations (62 FR 27296) states that DOC “... hereby revises its regulations on anti-dumping and countervailing duty proceedings ...”. Section 351.101 of those regulations states : “This part contains procedures and rules applicable to anti-dumping and countervailing duty proceedings ...”. The *Sunset Policy Bulletin* (ARG-35) also refers to “Sunset reviews in Anti-Dumping Proceedings”, at page 18872 and again at page 18874 in relation to countervailing duties. The issues memorandum in this case (ARG-51) also states 4 times that DOC has not conducted any duty-absorption investigations “in this proceeding.” See also first written submission of United States, for example at paras. 35, 39 and 40. (emphasis added)

<sup>47</sup> For example : Panel Report, *US – Carbon Steel from Japan*, para. 7.37, in which the Panel, in analysing the use of the word “investigation” in Article 5 AD Agreement, also recorded 9 times the use of the word “initiate” or one of its derivatives. The Panel then went on, in para. 7.38, to refer 3 times to the term “original investigations”. It also used the term original investigation in para. 7.8 (3 times), footnote 64, para. 7.162 and para. 7.186 of the Report. The term is also used in Appellate Body Report, *US – Carbon Steel from Germany* 23 times – see for example, para. 66, para. 83, para. 85, para. 86 and para. 87 (3 times). Para. 60 quotes from the SAA, which uses the term “initial” investigation. See also Panel Report, *US-DRAMS*, section II.A. (titled “The original anti-dumping duty investigation”); Appellate Body Report *US – CVDs on EC Products* (15 times) and Panel Report (13 times); Panel Report, *EC – Bed Linen (21.5)* (12 times); Panel Report, *US – Lumber* (5 times); etc. In the present case, the adequacy determination (ARG-50) itself used the

Similarly, the word is used in the same sense 4 times in Article 7 AD Agreement (provisional measures), being there also associated with Article 5 AD Agreement or with the word “initiation”. It is also used twice in Article 10 AD Agreement, again each time associated with the word “initiating” or “initiation”. In both cases this is perfectly logical, since both provisional measures and retroactivity are relevant in the context of initial or original investigations, but not, by definition, in the context of reviews.

105. The contrast with Article 6 AD Agreement is very striking.

106. Article 11.4 AD Agreement provides that the provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under Article 11 AD Agreement. The word “investigation” is used 21 times in Article 6 AD Agreement. Thus, the relevant provisions of Article 6 must be applied in the context of an Article 11.3 review, and when they so apply, they must apply in respect of “an investigation”, as that word is used in Article 6. For example, Article 6.6 AD Agreement requires authorities during the course of “an investigation” to satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based. This rule also applies to sunset review investigations. Thus, the type of investigation with which Article 6 read in conjunction with Article 11.4 AD Agreement is concerned must be described as a “**review investigation**” – again, customary in WTO anti-dumping law.<sup>48</sup> The United States does not argue that the provisions concerning “investigations” in Article 6 do not apply to sunset reviews, only that they were complied with in this case.<sup>49</sup>

107. It is not possible to apply the relevant provisions of Article 6 and to assert that there is no investigation, when those provisions expressly refer repeatedly to an investigation. Unlike certain other AD Agreement cross-references, Article 11.4 AD Agreement does not use the term “*mutatis mutandis*”, indicating that the drafters intended that all of the provisions of Article 6 AD Agreement (excluding those not relating to evidence and procedure) would apply in an identical manner to sunset review investigations, as they apply to initial or original investigations.<sup>50</sup> As we have already

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phrase “... in the **original** investigation ...”; as does the ITC initiation (ARG-45 at page 41088); the final sunset determination (ARG-46), at page 66702; the issues memorandum (ARG-51) 5 times at pages 6, 7 and 8; and the ITC final determination (ARG-54) at least 15 times at pages 3, 4, 5, 8, 11, 13, 15 and 17 [the limit of the European Communities’ verification on this point for the time being]. The *Sunset Policy Bulletin* (ARG-35) also uses the term “**original** investigation” twice (page 18873). See also first written submission from United States, for example, paras. 40, 51, 54, 55, etc. (emphasis added)

<sup>48</sup> For example : in the context of Article 11.2 AD, Panel Report, *US – DRAMS*, para. 2.3 : “The DOC initiated the first annual *review* of DRAMs from Korea on 15 June 1994 and **investigated** whether the Korean companies made sales of DRAMs less than normal value, (i.e. dumped) during the period of review.”. The same statement is made in para. 2.4 of the same Panel Report; Panel Report, *EC-Bed Linen (21.5)* (3 times); Panel Report, *US – CVDs on EC Products*, footnote 295 and para. 7.114 : “We consider that in a **sunset review investigation** the importing Member is obliged ...”. **In the present case**, the ITC notice of initiation (ARG-45) bears the title : “[**Investigations** Nos. 701-TA-364 (Review) and 731-TA-711 and 713-716 (Review)]”. This is highly significant. The description “investigation” is used in the general title, thus applying to all that follows; the word “investigation” is used for the purposes of assigning a case number; both the word “investigation” and the word “review” are used in the same description, thus to describe the same thing, showing that they are not mutually exclusive; and the word “investigation”, if anything, clearly takes precedence over the word “review”. The same page also includes a reference to the “Office of Investigations”. The reference to the investigation numbers are also included, twice, in the final ITC determination (ARG-54) on the title page and following page, and on page 6 the ITC refers expressly to “**review investigations**”. See also first written submission of United States, para. 154, in which dictionary definitions of “review” and “determine” are said to include “... conclude from reasoning or **investigation**, deduce ...”. (emphasis added)

<sup>49</sup> First written submission of United States, para. 163 and following.

<sup>50</sup> Panel Report, *US – Carbon Steel from Japan*, para. 7.33 : “... the use of term “*mutatis mutandis*” demonstrates that the drafters foresaw that certain provisions of Article 12 could not be applied, at all, or at the very least not in an identical manner, in the case of sunset reviews.”



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

108. Naturally, Article 6 AD Agreement also applies to initial or original investigations, as well as review investigations. This results particularly clearly from the fact that, unlike Article 5 AD Agreement, which refers always to initial investigations, Article 6 refers to an investigation in neutral terms. Thus, the word “investigation” in Article 6 AD Agreement has a more general meaning, that encompasses both initial or original investigations and review investigations. Once again, the fact that a particular treaty provision is silent on a specific issue must have some meaning.

109. The reason why an express cross-reference in Article 11.4 AD Agreement is necessary is not because the concept of “investigation” and the concept of “review” are mutually exclusive, as the United States would have it. It is simply because not every review necessarily involves an investigation, in exactly the same way as not every proceeding necessarily involves an investigation. Thus, Article 11.4 AD Agreement has a purpose : it ensures that the relevant Article 6 AD Agreement rules apply in all reviews, not just those reviews that involve an investigation.

110. This reading of the AD Agreement corresponds to the common and ordinary meaning of the word “investigation”, which is what the Panel is bound to use.

111. Further guidance is provided by the term “investigating authorities”, which is used several times in the AD Agreement. Given the common and ordinary meaning of this term, what an investigating authority does is to investigate, or in other words, to conduct an investigation. In *the* present case, having regard to the relevant provisions of Article 6 AD Agreement, which applied in this case, both DOC and the ITC can only be correctly described in terms of the AD Agreement as “investigating authorities”.<sup>51</sup> Thus, in the present case they were engaged in the conduct of an investigation – a sunset review investigation.

#### 6.3.5 “During the Investigation Phase”

112. In the light of the preceding observations, the European Communities does not agree with the interpretation advanced by the United States of the words “during the investigation phase” in Article 2.4.2 AD Agreement. It is incorrect to assert that the words “investigation” and “review” in the AD Agreement each have a single, mutually exclusive, meaning. They have different meanings, depending on the context and the object and purpose of the relevant provision. Under the AD Agreement, there may be both initial or original investigations, and review investigations. The text of Article 2.4.2 AD Agreement does not read : “during the *initial* investigation phase” or “during the *original* investigation phase” or “during the *Article 5* investigation phase”, as would be to be expected if the United States were correct. If that would be the intended or agreed meaning, it would have been a simple matter for the negotiating Members to insert one of those formulations in the text. But **they chose not to do that**. Instead, **the more general term “investigation” is used**, just as in Article 6 AD Agreement, encompassing both initial or original investigations as well as sunset review investigations conducted pursuant to Article 11.3 and Article 6 AD Agreement. To read into the text of Article 2.4.2 AD Agreement words that are not there, and that fly in the face of the context, object and purpose of the provisions, would be to diminish the rights accruing to the Members of the WTO under the AD Agreement, in a manner inconsistent with Articles 3(2) and 19(2) DSU.

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<sup>51</sup> Panel Report, *US – Carbon Steel from Japan*, para. 7.166; Panel Report, *US – DRAMs*, para. 6.58; Panel Report, *EC – Pipe and Tube*, para. 7.112. See also first written submission from United States, paras. 131, 132, 141, 239, 280 : “In a sunset review, the *investigating* authority ...”, etc.

### 6.3.6 Other phases : Pre-Investigation Phase

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

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

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

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

### 6.3.7 Object and Purpose of Article 11.3 AD Agreement

117. In the opinion of the European Communities, the object and purpose of Article 11.3 AD Agreement is simple and very clear. We must have a rule other than : duties are forever. That is what Article 11.3 achieves. It takes the period of time from now stretching forward into the future, and divides it up into 5 year segments. In respect of each 5 year segment, Members are required to ensure that any anti-dumping duties they impose are consistent with the AD Agreement. If a duty depends on dumping, and dumping on a comparison, why should it be the case that, with the passage of time, the necessary comparison should move from being “fair” to “unfair” ? If anything, surely the contrary observation would be more consistent with the WTO Agreement. Thus, to permit an unfair comparison in sunset review investigations would not be consistent with the object and purpose of Article 11.3, the AD Agreement as a whole, or Article VI GATT 1994.

### 6.4 Dumping Margin Calculated Under Previous Agreement

118. The European Communities agrees with the United States that the purpose of the present proceedings is not to consider whether or not, in adopting the original determination, the United States acted in a manner consistent with the Tokyo Round anti-dumping agreement or the present AD Agreement. However, the point is that for the purposes of the present sunset review investigation and determination, the use by the United States of the original dumping determination was inconsistent with the present AD Agreement.

119. The European Communities considers that the Panel should conclude that, given that the original determination involved an unjustified simple zeroing method inconsistent with Article 2.4 and 2.4.2 AD Agreement, it could not be relied on for the purposes of the contested sunset review determination, and the fact that it was made under the Tokyo Round anti-dumping agreement is not a valid defence for the United States.<sup>52</sup>

120. In this respect, the European Communities recalls that according to Article 18.3.2 AD Agreement the present AD Agreement applies also to reviews of measures existing at the date of entry into force of the WTO Agreement. This implies the continuation of such measure is made subject to the disciplines of the AD Agreement, including to the principle contained in Article 11.1 that anti-dumping duties should be maintained only as long as necessary to counteract dumping which is causing injury. This objective of Article 18.3.2 would be undermined if a party were allowed to continue a pre-WTO measure solely on the basis of findings which are not in accordance with the provisions of the AD Agreement.

121. Furthermore, the European Communities notes that the investigating authority made a determination of *continued* dumping, not by making a fresh assessment of fresh information, but by the fiction of stretching the sunset review investigation period back to the beginning of the original investigation period (1 January 1994). It was not possible for the investigating authority to rely on the concept of *continued* dumping during the period 1 January 1994 to the date of the sunset determination (effective 7 November 2000), given that during that period, on 1 January 1995, the basic definition of dumping, indeed the entire agreement, changed. The conclusion that there is dumping is a legal determination resulting from applying certain legal rules to certain facts. Even if the facts have remained the same, if the legal rules have changed, to conclude that dumping continues also during the period after the rules have changed it must *at the very least* be necessary to apply the new legal rules to the facts. Especially when, as in the present case, doing so would result in no dumping margin at all. In failing to do that in the present case, the investigating authority acted inconsistently with the AD Agreement. One simply cannot speak of a continuous legal determination, when during the period the applicable legal rules changed.

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<sup>52</sup> First written submission of United States, para. 260.

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

## 7. INJURY

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

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

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

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

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

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

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

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<sup>53</sup> First written submission of Argentina, paras. 234 to 241.

<sup>54</sup> Para. 7.100.

<sup>55</sup> We note that in accordance with the provisions of Article 1 of the *Anti-Dumping Agreement*, the reference to Article VI of GATT 1994 in Article 3 is also a general reference to the *Anti-Dumping Agreement* itself.

<sup>56</sup> First written submission of United States, para. 296.

<sup>57</sup> First written submission of United States, para. 302.

<sup>58</sup> First written submission of Argentina, para. 211.

<sup>59</sup> First written submission of Argentina, para. 243 et seq.

objective examination, as required by Article 3.1 AD Agreement. Mere speculation about facts that might or might not arise in the future is insufficient.

## 8. CONCLUSION

130. In the light of the preceding observations, the European Communities has the following conclusions:

- Whether the Panel request satisfies the requirements of Article 6.2 DSU should be established on the basis of the request as a whole, and not with respect to certain isolated parts of the request. The United States acted inconsistently with the AD Agreement insofar as it determined that the response from Siderca was inadequate, on the basis that it accounted for less than 50 per cent of total exports of the product from Argentina to the United States from 1995 to 1999, Siderca itself having made no exports during that period.
- The United States acted inconsistently with the AD Agreement in not correctly applying the “likely” standard for sunset review investigations provided for in Article 11.3 AD Agreement.
- The United States acted inconsistently with Article 11.3 AD Agreement, insofar as it relied only on the dumping determination made in respect of the original period of investigation. The minimum meaning of Article 11.3 AD Agreement is that, to continue the measure beyond five years, an historical dumping determination more recent than that made in the original investigation is necessary.
- The United States acted inconsistently with Article 11.3 AD Agreement, insofar as the additional statement of fact, if any, and the additional statement of reason, if any, relied on by the investigating authority for the purposes of the prospective part of its likely continuation of dumping determination were insufficient to give effective meaning to Article 11.3 AD Agreement.
- In any event, considering the two preceding arguments together, the United States acted inconsistently with Article 11.3 AD Agreement insofar as the contested determination was based on out-of-date data and essentially speculation about the future, thus emptying Article 11.3 AD Agreement of effective meaning.
- The *Sunset Policy Bulletin* is, as such, inconsistent with Article 11.3 AD Agreement.
- Model zeroing is inconsistent with the AD Agreement, Article 2, 2.4 and 2.4.2; simple zeroing is inconsistent with the AD Agreement, Article 2, 2.4 and 2.4.2, except as provided for in Article 2.4.2, second sentence (which exceptions are not relevant in the present case); and the investigating authority acted in a manner inconsistent with the AD Agreement insofar as it relied, for the purposes of the contested sunset review investigation and determination, on a dumping margin involving such zeroing, particularly insofar as it found *continued* dumping during a period in which the applicable legal rules changed. That conclusion is not contradicted by the phrase “during the investigation phase” in Article 2.4.2, first sentence AD Agreement, since it is a conclusion that results from the unqualified definition of dumping in Article 2.1, from the Article 2.4 obligation to make a “fair comparison” and from the Article 2.4.2, second sentence obligation to justify any use of simple zeroing. Furthermore, the word “investigation” in Article 2.4.2 is not qualified with the word “initial” (or original) or one of its derivatives, as in Article 5, but is used in the same more general sense as in Article 6, which applies to sunset review investigations by virtue of the unqualified cross-reference in Article 11.4 AD Agreement.
- Article 3 of the AD Agreement is applicable in the context of a sunset review.

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

## ANNEX B-2

### THIRD PARTY SUBMISSION OF JAPAN

14 November 2003

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## I. INTRODUCTION

1. Japan welcomes this opportunity to present its view in the dispute brought by Argentina over the consistency with Article VI of the General Agreement on Tariffs and Trade 1994 (“GATT”), the Agreement on Implementation of Article VI of the GATT (“AD Agreement”), and the Marrakech Agreement establishing the World Trade Organization (“WTO Agreement”) of the decisions by the United States not to terminate the imposition of the anti-dumping duty on oil country tubular goods (“OCTG”) from Argentina and US statutory, regulatory, and administrative measures with regard to sunset reviews.

2. Japan has systemic interests in the interpretation and application of the AD Agreement, GATT and WTO Agreement with regard to sunset reviews. As a third party, Japan would like to address the following issues raised by Argentina:

- Applicability of provisions of Articles 2, 3, 6, and 12 to Article 11.3;
- Inconsistency of margins of dumping based on the zeroing methodology for determining “dumping” with Articles 2.1 and 2.4; and inconsistency of determinations of likelihood of continuation or recurrence of both “dumping” by the US Department of Commerce (“DOC”) and “injury” by the US International Trade Commission (“ITC”) based on such dumping margins in the sunset review of OCTG from Argentina with Article 11.3;
- Inconsistency of the determination by the ITC of likelihood of continuation or recurrence of injury with Articles 3.1, 3.4, 3.5 and 11.3;
- Inconsistency of the waiver provisions in the US statute and regulations and the three scenarios in the *Sunset Policy Bulletin*<sup>1</sup> as such with Articles 6.2, 11.3 and 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement.

## II. ARGUMENTS

### A. ARTICLES 2, 3, 6 AND 12 APPLY TO SUNSET REVIEWS UNDER ARTICLE 11.3

3. Japan shares the view of Argentina that Articles 2, 3, 6 and 12 apply to sunset reviews under Article 11.3. Provisions of these Articles are explicitly cross-referenced either to or from Article 11, as discussed below. These cross-references show drafters’ unequivocal intent that provisions of these Articles apply to sunset reviews under Article 11.3. The Appellate Body in *US – Carbon Steel*<sup>2</sup> confirmed this interpretation. The Appellate Body in that case has reviewed phrases “for the purpose of this Agreement” and “under this Agreement,”<sup>3</sup> and stated “these cross-references suggest to us that, when the negotiators of the SCM Agreement intended that the disciplines set forth in one provision be applied in another context, they did so expressly.”<sup>4</sup>

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<sup>1</sup> *Policies Regarding the Conduct of Five-year (“Sunset”) Reviews of Anti-Dumping and Countervailing Duty Orders; Policy Bulletin*, 63 Fed. Reg. 18871 (16 April 1998) ( “*Sunset Policy Bulletin*”) (Exhibit ARG-35).

<sup>2</sup> Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* (“*US – Carbon Steel*”), WT/DS213/AB/R and Corr.1. (28 November 2002).

<sup>3</sup> See *ibid.*, footnote 59 (indicating phrases “For the purpose of this Agreement” regarding definition of “subsidy” in Article 1; “For the purpose of Part V” regarding calculation of the amount of a subsidy under Article 14; and “Under this Agreement” in the definition of “injury” under Article 15 and in footnote 45.).

<sup>4</sup> *Ibid.*, para. 69 (emphasis added).



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

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

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

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

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

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

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

**2. Provisions of Article 3 apply to Article 11.3**

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

**Under this Agreement** the term “injury” shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article. (emphasis added.)

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<sup>5</sup> Article 2.1 of the AD Agreement (emphasis added).

<sup>6</sup> Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (“*EC – Bed Linen*”), WT/DS141/AB/R (1 March 2001), para. 59 (a fair comparison in Article 2.4 “is a general obligation that, in our view, informs all of Article 2.”)

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

10. The texts of the individual provisions of Articles 3 further clarify that the requirements in these provisions apply to a determination of “injury.” Article 3.1 sets forth general requirements for a determination of “injury.” The phrase “a determination of injury for purposes of Article VI of GATT 1994” clarifies its cross-reference that the provisions of Article 3 apply to an “injury” determination throughout the AD Agreement to determine circumstances in which anti-dumping measure can be applied.<sup>7</sup> The Appellate Body has confirmed “Article 3.1 is an overarching provision that sets forth a Member’s fundamental, substantive obligation in this respect. Article 3.1 informs the more detailed obligations in succeeding paragraphs.”<sup>8</sup>

11. Article 3.1 requires the authorities to base their injury determination on positive evidence and objective examination of “the volume of the dumped imports” and “the effect of the dumped imports on prices.” Article 3.2 then sets forth further rules on how the authorities shall consider these two elements. In this way, Article 3.2 informs Article 3.1 and all other provisions of the AD Agreement of the analytical methods that the authorities must follow for making an injury determination.

12. Article 3.1 also provides that the authorities must base their injury determinations on positive evidence and objective examination of “the consequent impact of these imports on domestic producers of such products.” Article 3.4 then sets forth how “the impact of dumped imports on the domestic industry” must be examined. Article 3.4 thus provides the detailed requirements for the examination of the impact of dumped imports under Article 3.1, and therefore, for a determination of injury. As such, the authorities must satisfy the requirements in Article 3.4 to determine “injury” in any proceedings under AD Agreement.

13. Article 3.5 provides that injury “within the meaning of this Agreement” must be caused by dumped imports through the effects of dumping as set forth in paragraphs 2 and 4. The phrase “injury within the meaning of this Agreement” ensures that the provisions of Article 3.5 further define the term “injury” whenever the term “injury” appears in this Agreement. The causation and non-attribution requirements under Article 3.5, therefore, must be satisfied to make a determination of “injury.”

14. The phrase “likely to lead to continuation or recurrence” in Article 11.3 does not change the core concept of “injury,” as is the case of “dumping” discussed above. The terms “continuation or recurrence” demonstrate the drafters’ intent that the authorities must first find the current state of injury to the domestic industry, and then how the current state is likely to change. The modifying phrase therefore does not affect the applicability of Article 3 to Article 11.3.

15. The provisions of Article 3, therefore, apply to “injury” determinations in sunset reviews under Article 11.3.

### **3. Article 6 applies to determinations under Article 11.3**

16. Provisions of Article 6 also apply to Article 11.3. Article 11.4 provides the clear cross-reference that “the provisions of Article 6 regarding evidence and procedures shall apply to any review carried out under this Article.”

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<sup>7</sup> See Article 1 of the AD Agreement, which defines that “[a]n anti-dumping measure shall be applied under the circumstances provided for in Article VI of GATT 1994.”

<sup>8</sup> Appellate Report, *Thailand – Anti-Dumping Duties on Angles, Shape and Extensions of Iron or Non-Alloy Steel and H-Beams* (“*Thailand – H-Beams*”), WT/DS122/AB/R (12 March 2001), para. 106.

17. The language “regarding evidence and procedures” in Article 11.4 does not limit the applicability of provisions of Article 6 to Article 11.3. As the Appellate Body in *Thailand – H-Beams* stated, Article 6 “establishes a framework of procedural and due process obligations.”<sup>9</sup> The Appellate Body in *EC – Bed Linen (Article 21.5 – India)* has further stated:

Article 6 is entitled “Evidence”, and there is no indication in Article 6 – or elsewhere in the Anti-Dumping Agreement – that Article 6 does not apply generally to matters relating to “evidence” throughout that Agreement. Therefore, it seems to us that *the subparagraphs of Article 6 set out evidentiary rules that apply throughout the course of an anti-dumping investigation, and provide also for due process rights that are enjoyed by “interested parties” throughout such an investigation.*<sup>10</sup>

18. As the Appellate Body clarified, provisions of Article 6 set forth evidentiary and procedural rules. All provisions of Article 6, therefore, apply to Article 11.3 through Article 11.4.

#### **4. Article 12 applies to Article 11.3**

19. All provisions of Article 12 also apply to sunset reviews under Article 11.3. Article 12.3 specifically states “[t]he provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11.”

20. The plain and ordinary meaning of “*mutatis mutandis*” is “all necessary changes have been made.”<sup>11</sup> In other words, one must replace those terms in the original Article, which do not fit the situations in the other Article, with the appropriate terms. Because Article 12.3 expressly indicates that the requirements of Article 12 apply to Article 11, which deals with “reviews,” the most reasonable approach is to replace the term “investigation” in Article 12 with the word “review.” No other words need to be changed, and all remaining words would apply equally.

21. As such, all provisions of Article 12 apply to sunset reviews under Article 11.3 through Article 12.3.

B. THE UNITED STATES WOULD HAVE ACTED INCONSISTENTLY WITH ARTICLES 2 AND 11.3, IF ITS DETERMINATION WERE BASED ON DUMPING MARGIN WITH ZEROING METHODOLOGY

#### **1. Dumping margins using zeroing methodology cannot be a proper evidentiary basis for determining “dumping” in sunset reviews**

22. Japan agrees with Argentina that the margin of dumping calculated using the zeroing methodology cannot provide a WTO-consistent basis for determining likelihood of continuation of dumping in a sunset review. The practice of “zeroing” selectively calculates margins only for those sales of a product with positive margins, setting negative margins produced from sales of the product to zero. This methodology thus creates an artificial dumping margin. As discussed below, a “dumping” determination based on margins with the zeroing practice is inconsistent with Articles 2.1 and 2.4. Articles 2.1 and 2.4 apply to the determination of likelihood of continuation or recurrence of dumping under Article 11.3, as demonstrated above. Therefore, a determination of likelihood of continuation or recurrence of dumping based on the margins with the zeroing methodology is inconsistent with Article 11.3.

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<sup>9</sup> Appellate Body Report, *Thailand – H-Beams*, para. 109; see also Appellate Body Report, *EC – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* (“*EC – Pipe Fittings*”), WT/DS219/AB/R, (22 July 2003), para. 138.

<sup>10</sup> Para. 136 (emphasis added).

<sup>11</sup> See *Black’s Law Dictionary*, 1039 (7<sup>th</sup> ed. West Group 1999).

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

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

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

24. The Appellate Body in *EC - Bed Linen* proceeded to clarify that the “fair comparison” and “price comparability” requirements mean that the establishment of dumping margins under Article 2.4 must be made by evaluating the product under consideration as a whole, not just a portion of the product. The Appellate Body stated “[a]ll types or models falling within the scope of a “like” product must necessarily be ‘comparable’.”<sup>15</sup> It then further stated that:

The European Communities argues on the basis of the "due allowance" required by Article 2.4 for "differences in physical characteristics" that distinctions can be made among different types or models of cotton-type bed linen when determining "comparability". But here again we fail to see how the European Communities can be permitted to see the physical characteristics of cotton-type bed linen in one way for one purpose and in another way for another.<sup>16</sup>

25. The practice of zeroing in establishing dumping margins of a product under consideration, therefore, is inconsistent with Articles 2.1 and 2.4 of the AD Agreement. Any “dumping” determination based on the margin calculated by the zeroing methodology therefore lacks the proper evidentiary basis, and thus also inconsistent with these Articles.

## **2. DOC’s evidentiary basis for determining likelihood of continuation of dumping, if based on zeroing, would render the determination inconsistent with Articles 2 and 11.3**

26. It appeared to us that the dumping margin calculated in the original determination was the basis for DOC to make its affirmative determination in the sunset review of OCTG from Argentina. In its *Decision Memorandum*,<sup>17</sup> DOC has stated:

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<sup>12</sup> Appellate Body Report, *EC – Bed Linen*, para. 51.

<sup>13</sup> Appellate Body Report, *EC – Bed Linen*, para. 53 (emphasis added).

<sup>14</sup> 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 India (“*EC – Bed Linen (Article 21.5 – India)*”), WT/DS141/AB/RW (8 April 2003), para. 143, quoting the original panel report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R (30 October 2000), para. 6.136.

<sup>15</sup> Appellate Body Report, *EC – Bed Linen*, para. 58.

<sup>16</sup> *Ibid.* para. 60.

<sup>17</sup> Issues and Decision Memorandum for the Expedited Sunset Reviews of the Anti-Dumping Duty Orders on Seamless Pipe from Argentina, Brazil, Germany, and Italy; Final Results (“*Decision Memorandum*”) (7 November 2000) (Exhibit ARG-51).

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

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

28. Japan therefore respectfully requests that the Panel carefully review the evidence to confirm if DOC used the zeroing methodology to find the 1.36 per cent margin of dumping, and if the margin would have been negative without the zeroing methodology. If the Panel finds that DOC applied the zeroing methodology to find the positive margin, then Japan respectfully requests that the Panel find that the DOC's determination in the sunset review in question was inconsistent with Articles 2.1 and 2.4, and thus, inconsistent with Articles 11.3.

**3. ITC's evidentiary basis would not be proper for determining likelihood of continuation of injury, and would render its injury determination inconsistent with Article 11.3**

29. If the margin of dumping in the original investigation were calculated using the zeroing methodology, then it also would render the "injury" determination in the sunset review of OCTG inconsistent with Article 11.3.

30. In the sunset review of OCTG from Argentina, DOC reported to the ITC the dumping margin calculated in the original investigation as the dumping margin that is likely to prevail if the order were revoked.<sup>22</sup> As discussed above, the provisions of Articles 3.1, 3.4 and 3.5 apply to the determination of likelihood of continuation or recurrence of injury under Article 11.3. The ITC therefore must have based its determination of "dumped" imports under Article 3.1 and consideration of "the magnitude of margin of dumping" under Article 3.4, and the effects of dumping on the domestic industry under Article 3.5 on the reported margin to reach Article 11.3 injury determination.

31. As discussed above, if the reported margins were calculated using the zeroing methodology, these margins were inconsistent with Articles 2.1 and 2.4 for determining "dumping." In other words, the reported margin would not be a proper evidentiary basis to measure "dumping." The reported margin, therefore, could not be a proper evidentiary basis to determine dumped imports or to consider the magnitude of margin of dumping and the effects of dumping, and thus to determine "injury" under Article 11.3.

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<sup>18</sup> *Ibid.*, p. 5.

<sup>19</sup> *Ibid.*, p. 8.

<sup>20</sup> See Exhibit ARG-52.

<sup>21</sup> Japan notes that any determination must be based on proper evidence as required under Article 17.6(i) of the AD Agreement. See *US – Hot-Rolled Steel*, para. 56 ("Article 17.6(i) sets forth the appropriate standard to be applied by panels in examining the WTO-consistency of the investigating authorities' establishment and evaluation of the facts under other provisions of the *Anti-Dumping Agreement*.")

<sup>22</sup> See Decision Memorandum (Exhibit ARG-51).

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

C. ITC'S INJURY DETERMINATION IS INCONSISTENT WITH ARTICLES 3.4, 3.5 AND 11.3

33. Japan supports Argentina's claims that the ITC's injury determination was inconsistent with Articles 3.4 and 3.5 of the AD Agreement. As discussed above, Articles 3.4 and 3.5 apply to sunset reviews under Article 11.3. The ITC's failure to comply with the provisions of these Articles, therefore, renders its injury determination in the sunset review of OCTG from Argentina inconsistent with these Articles and Article 11.3.

**1. ITC acted inconsistently with Articles 3.4 and 11.3**

34. Argentina submitted convincing evidence<sup>23</sup> that the ITC did not evaluate certain factors mandated by Article 3.4 for determining injury. As Argentina pointed out, Article 3.4 requires that the authorities evaluate all relevant economic factors indices as set forth in the Article. The Appellate Body in *Thailand – H-Beams* confirmed the obligation of the authorities, stating, "Article 3.4 requires a mandatory evaluation of all of the factors listed in that provision."<sup>24</sup>

35. For example, the ITC stated in its report<sup>25</sup> the rates of likely margins of dumping reported from DOC. The ITC, however, did not provide any words stating its evaluation of these rates. Mere statement of facts is insufficient for the purpose of Article 3.4. As the Appellate Body confirmed, the ITC must evaluate each factor.

36. By failing to evaluate certain factors in Article 3.4, therefore, the ITC acted inconsistently with Article 3.4 and accordingly with Article 11.3 in the sunset review of OCTG from Argentina.

**2. ITC would have acted inconsistently with Articles 3.5 and 11.3**

37. Japan also requests the Panel to carefully review the facts in this dispute to decide whether the ITC acted inconsistently with Article 3.5 and therefore Article 11.3.

38. The first sentence of Article 3.5 expressly states that the authorities must demonstrate that the effects of "dumping" actually caused the injury. As discussed above, the term "dumping" is defined in Article 2.1 and detailed in subsequent provisions.<sup>26</sup> In these connections, the Appellate Body in *US – Carbon Steel* has stated:

Where the level of subsidization at the time of the review is very low, there must be persuasive evidence that revocation of the duty would nevertheless lead to injury to the domestic industry. Mere reliance by the authorities on the injury determination made in the original investigation will not be sufficient.<sup>27</sup>

39. In this case, DOC found that the magnitude of dumping that would be likely to prevail with respect to OCTG from Argentina was 1.36 per cent, the rate found in the original investigation. This

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<sup>23</sup> See first submission of Argentina, para. 259 and related exhibits.

<sup>24</sup> Appellate Body Report, *Thailand – H-Beams*, para. 128 (emphasis added).

<sup>25</sup> See Commission's Sunset Determination, p. V-1. (Exhibit ARG-54)

<sup>26</sup> See Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 142. See also *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217, 234/AB/R (13 January 2003), para. 240 ("We recall that, in *US – 1916 Act*, we said the constituent elements of dumping are found in the definition of dumping in Article VI:1 of the GATT 1994, as elaborated in Article 2 of the *Anti-Dumping Agreement*.").

<sup>27</sup> Appellate Body Report, *US – Carbon Steel*, para. 88.

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

40. Further, the “non-attribution” requirement<sup>28</sup> in the second and third sentences of Article 3.5 requires that the authorities explicitly separate and distinguish the injurious effects of other injury factors from the injurious effects of the dumping. In this case, the ITC acknowledged that the market share of the domestic industry has fallen from 90.0 per cent in 1995 to 74.9 per cent in 2000, “due largely to an increase in non-subject imports.”<sup>29</sup> The ITC also noted that “[o]il and natural gas prices, the ultimate drivers of OCTG demand”<sup>30</sup> and “a slowdown in the US and/or world economy”<sup>31</sup> would be factors contributing to likely injury to the domestic industry. It, however, appears that the ITC made no attempt to separate and distinguish effects of these known factors from the effects of dumping to the domestic industry. If the ITC had failed to separate and distinguish these known factors, then the ITC acted inconsistently with the non-attribution requirement under Article 3.5.

41. Japan, therefore, respectfully requests that the Panel carefully review whether the ITC demonstrated that the likely injury to the domestic industry would be caused by the effects of dumping, although the magnitude of its margin of dumping was very low. Japan also respectfully requests that the Panel carefully review whether the ITC separated and distinguished effects of all known factors to the likely injury to the domestic industry from the effects of dumping. If the ITC failed to do so, then the Panel should find that the ITC has acted inconsistently with Articles 3.4, 3.5, and 11.3.

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<sup>28</sup> See Appellate Body Report, *US – Hot-Rolled Steel*. In that report, the Appellate Body interpreted the second and third sentences of Article 3.5 as follows:

222. This provision [Article 3.5] requires investigating authorities, as part of their causation analysis, first, to examine *all* “known factors”, “other than dumped imports”, which are causing injury to the domestic industry “at the same time” as dumped imports. Second, investigating authorities must ensure that injuries which are caused to the domestic industry by known factors, other than dumped imports, are not “*attributed* to the dumped imports.”

223. . . . In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not “attributed” to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties.

*US – Hot-Rolled Steel*, paras. 222-23 (emphasis added).

<sup>29</sup> Commission’s Sunset Determination at 22 (Exhibit ARG-54).

<sup>30</sup> *Ibid.*, p. II-13.

<sup>31</sup> *Ibid.*

- D. WAIVER PROVISIONS IN US STATUTE AND THREE SCENARIOS IN *SUNSET POLICY BULLETIN* ARE INCONSISTENT WITH ARTICLES 6, 11.3 AND 18.4 OF THE AD AGREEMENT AND ARTICLE XVI:4 OF THE WTO AGREEMENT AS SUCH

42. Japan agrees with Argentina that the waiver provisions in the US statute and regulations and the three scenarios<sup>32</sup> in the *Sunset Policy Bulletin* are inconsistent with Articles 6, 11.3 and 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement. Articles 18.4 and XVI:4 require that each Member must “ensure” the “conformity of its laws, regulations and administrative procedures” with the AD Agreement. By establishing and applying the waiver provisions and the three scenarios, which are inconsistent with Articles 6 and 11.3, the United States acted inconsistently with Articles 18.4 and XVI:4.

**1. Both the Waiver Provisions and the three scenarios are actionable under Article 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement as such**

- (a) Inconsistency of a Measure As Such Must Be Examined in Accordance with Article 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement

43. A Member’s laws, regulations, and administrative procedures are inconsistent with Article 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement as such, where a complaining Member established that a responding Member failed to “ensure” the “conformity” of them with the AD Agreement. Article 18.4 provides:

Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

44. The phrase “administrative procedures” confirms that the rules subject to Article 18.4 and Article XVI:4 go well beyond just “laws” and “regulations.” The use of the word “administrative” confirms that the scope includes the conduct of authorities in administering their anti-dumping laws. Adding the word “procedures” provides a broader sweep. One of the basic meanings of “procedure” is “a particular mode or course of action.”<sup>33</sup> The term “administrative procedures” thus underscores the broad reach of Article 18.4 and Article XVI:4 that encompass from a legislative rule to a particular method of action adopted by the authorities. In addition, by requiring Members to take “all necessary steps, of a general or particular character,” Article 18.4 of the AD Agreement contemplates broad and comprehensive action to ensure compliance with WTO obligations.

45. By requiring Members to “ensure ... conformity,” Article 18.4 and Article XVI:4 further confirm this broad sweep. The plain or ordinary meaning of “ensure” is to “make certain the occurrence of (an event, situation, outcome, etc.).”<sup>34</sup> In the context of these Articles, “ensure” acts to create an affirmative obligation on the part of a Member. The Appellate Body has commented on the meaning of “conform to” in *EC-Hormones*, stating that “conform to” has a stricter meaning than the term “based on.” The Appellate Body explained “conform to,” means “‘comply with,’ ‘yield or show compliance’” with something, or “‘correspondence in form or manner,’” or “‘following in form or nature.’”<sup>35</sup> From this definition it is apparent that “conformity” goes beyond mere narrow formalities; “conformity” requires compliance, in manner and nature, as well as in form.

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<sup>32</sup> See the first submission of Argentina, para. 145; see also section II.A.3 of the *Sunset Policy Bulletin* (Exhibit ARG-35).

<sup>33</sup> New Shorter Oxford English Dictionary, Vol. II at 2363.

<sup>34</sup> New Shorter Oxford English Dictionary, Vol. I at 827.

<sup>35</sup> Appellate Body Report, *EC Measures Concerning Meat and Meat Products* (“*EC – Hormones*”), WT/DS26/AB/R, WT/DS48/AB/R (16 January 1998), para. 163.



46. The term “administrative procedures” must be understood in this context. Coming after “laws” and “regulations,” Articles 18.4 and Article XVI:4 provide the broader term “administrative procedures” to catch administrative rules that may appear discretionary, but that in fact operate as substantively and effectively mandatory rules. Moreover, the term “administrative procedures” must also be understood in the context of a Member needing to take “all” the steps necessary to “ensure” ... “conformity” with WTO obligations. Thus, this language calls for affirmative steps to comply with WTO obligations. To act consistently with Article 18.4, therefore, Members must adopt administrative procedures that are fully consistent with WTO obligations, not those that specifically ignore these WTO obligations.

47. WTO jurisprudence clarifies that the mere language of a measure might not be sufficient to determine whether the measure is inconsistent with Article 18.4 and Article XVI:4 as such. Rather, the nature of a measure -- and whether that measure meets the requirements to “ensure ... conformity of its ... administrative procedures with”<sup>36</sup> the provisions of the AD Agreement -- must be decided on a case-by-case basis. The Appellate Body in *US – 1916 Act* noted the need to address the “nature” and “breadth” of the discretion at issue.<sup>37</sup> The panel in *US – Countervailing Measures* stated “we are of the view that the existence of some form of executive discretion alone is not enough for a law to be *prima facie* WTO-consistent; what is important is whether the government has an effective discretion to interpret and apply its legislation in a WTO-consistent manner.”<sup>38</sup> The panel in *US – Section 301 Trade Act* echoed the same view when it stated that “[i]t simply does not follow from this test, as sometimes has been argued, that legislation with discretion could never violate the WTO.”<sup>39</sup>

48. WTO jurisprudence further explains that the Member’s failure to ensure the conformity of a law, regulation, or administrative procedure with the relevant WTO agreement can be shown by evidence of the case-by-case application of these measures. In this connection, the Appellate Body explained in *US – Carbon Steel*:

The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case.<sup>40</sup>

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<sup>36</sup> Article 18.4 of the AD Agreement, and Article XVI.4 of the WTO Agreement.

<sup>37</sup> Appellate Body Report, *US – 1916 Act*, para. 91.

<sup>38</sup> See Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities* (“*US – Countervailing Measures*”), WT/DS212/R (31 July 2002), para. 7.123 (emphasis added). The Appellate Body appears not to reverse this part of Panel decision, stating “We are not, by implication, precluding the possibility that a Member could violate its WTO obligations by enacting legislation granting discretion to its authorities to act in violation of its WTO obligation. We make no finding in this respect.” Appellate Body Report, *US – Countervailing Measures*, WT/DS212/AB/R (9 December 2002), n. 334.

<sup>39</sup> Panel Report, *United States – Sections 301-310 of the Trade Act of 1974* (“*US- Section 301 Trade Act*”), WT/DS152/R (22 December 1999), para. 7.54.

<sup>40</sup> Appellate Body Report, *US – Carbon Steel*, para. 157 (footnote omitted).

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

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

In a review in which an interested party waives its participation pursuant to this paragraph, the administering authorities shall conclude that revocation of the order or termination of the investigation would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) with respect to that interested party.<sup>41</sup>

The US regulations then provide:

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

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

51. The three scenarios in the *Sunset Policy Bulletin* are also actionable under Article 18.4 and XVI:4. Argentina established that DOC has consistently applied, and has never deviated from, these three scenarios to all sunset reviews in which domestic interested parties have participated.<sup>43</sup> Such consistent application of the three scenarios is sufficient evidence to prove the mandatory nature of the three scenarios and, thus, to make the three scenarios actionable under Articles 18.4 and XVI:4.

## **2. The Waiver Provisions are inconsistent with Articles 6.2 and 11.3**

52. As Argentina claims, the waiver provisions of the US statute and regulations are inconsistent with Articles 6.2 and 11.3. As discussed above, the waiver provisions in the US statute and regulations mandate DOC to make affirmative determination automatically where responding parties did not submit substantive responses to DOC. This determination method is inconsistent with Articles 6.2 and 11.3 as discussed below.

(a) Requirements for Sunset Review “Dumping” Determinations in Article 11.3

53. A determination in a sunset review under Article 11.3 requires that dumping be examined on a prospective basis and that the administering authority must base its determination on probable, not possible, outcomes, and on positive evidence. The term “likely” in Article 11.3 requires that the

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<sup>41</sup> 19 USC. § 1675(c)(4)(B) (Exhibit ARG-1).

<sup>42</sup> 19 C.F.R. §351.218(d)(1)(iii) Exhibit ARG-3).

<sup>43</sup> See first submission of Argentina, para. 133 and Exhibit ARG-63.

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

54. For the positive evidence requirement, the Panel in *US – DRAMs* has stated:

[S]uch continued imposition must, in our view, be essentially dependent on, and therefore assignable to, a foundation of *positive evidence* that circumstances demand it. In other words, *the need for the continued imposition of the duty must be demonstrable on the basis of the evidence adduced.*<sup>46</sup>

55. The Appellate Body in *US – Carbon Steel* has also stated, “a *fresh determination, based on credible evidence*, will be necessary to establish that the continuation of the countervailing duty is warranted...”<sup>47</sup> The Appellate Body further explained, “[m]ere reliance by the authorities on the injury determination made in the original investigation will not be sufficient.”<sup>48</sup>

56. This WTO jurisprudence must also be understood in conjunction with the “necessity” requirement under Article 11.1. Article 11.1 is an umbrella provision that informs the interpretation of all other provisions of Article 11, including the basic principle that imposition of anti-dumping duties “shall remain in force only as long as and *to the extent necessary*.”<sup>49</sup> When read in context with the concept of “necessary,” the obligation to “determine” under Article 11.3 reflects a serious burden. The panel in *US – DRAMs* explained:

We recognize that the certainty inherent to such a prospective analysis could be conceivably somewhat less than that attached to purely retrospective analysis, reflecting the simple fact that analysis involving prediction can scarcely aspire to a standard of inevitability. This is, in our view, a discernable distinction in the degree of certainty, but not one which would be sufficient to preclude that the standard of necessity could be met. In our view, this reflects the fact that the necessity involved in Article 11.2 is not to be construed in some absolute and abstract sense, but as that appropriate to circumstances of practical reasoning intrinsic to a review process. Mathematical certainty is not required, but the *conclusions should be demonstrable on the basis of the evidence adduced.*<sup>50</sup>

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<sup>44</sup> See Panel Report, *US – Carbon Steel*, para. 8.96 (“This is, obviously, an inherently prospective analysis”).

<sup>45</sup> See Panel Report, *US – DRAMs*, para. 6.45 (“a failure to find that an event is not likely is not equivalent to a finding that the event is likely.”).

<sup>46</sup> Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea* (“*US – DRAMs*”) WT/DS99/R (19 March 1999), para. 6.42. This panel report considers the standard under Article 11.2, but is relevant to sunset reviews because the prospective analysis considered in an Article 11.2 context is the same as in an Article 11.3 context.

<sup>47</sup> The Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* (“*US – Carbon Steel*”), WT/DS213/AB/R and Corr.1 (28 November 2002), para. 88.

<sup>48</sup> *Id.*

<sup>49</sup> See *US – DRAMs*, para. 6.41. (“We agree with the parties that, by virtue of Article 11.1 of the AD Agreement, an anti-dumping duty may only continue to be imposed if it remains ‘necessary’ to offset injurious dumping. We are of the view that Article 11.1 contains a general necessity requirement, whereby anti-dumping duties ‘shall remain in force only as long as and to the extent necessary’ to counteract injurious dumping. That anti-dumping duties ‘shall remain in force only as long as and to the extent necessary’ to counteract injurious dumping is therefore an unambiguous requirement of Article 11.1.”)

<sup>50</sup> *Id.*, para. 6.43. (emphasis added.)

(b) Inconsistency of the Waiver Provisions with Article 11.3

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

(c) Inconsistency of the Waiver Provisions with Article 6.2

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

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

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

**3. The three scenarios are inconsistent with Article 11.3**

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

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

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

predetermined method is beyond the permissive exercise of the authorities' discretion under Article 11.3 in conjunction with Article 17.6 and the *Vienna Convention* Article 26.<sup>51</sup>

64. Japan recognizes that Article 11.3 provides the authorities with certain discretion to consider relevant evidence. This discretion, however, is not unlimited. The AD Agreement does not confer unfettered discretion on the authorities to pick and choose whatever methodology they see fit for determining the likelihood of continuation or recurrence of dumping. Article 26 of the *Vienna Convention* dictates that any discretion under treaty provisions must be exercised in good faith. In *US – Shrimp*,<sup>52</sup> the Appellate Body explained that this general principle “prohibits the abusive exercise of a state's rights,”<sup>53</sup> and that the exercise of a state's right should be “*fair and equitable as between the parties* and not one which is calculated to procure for one of them an unfair advantage in the light of the obligation assumed.”<sup>54</sup> As clarified by the Appellate Body, the basic principle of good faith requires the authorities to act in an even-handed manner that respects fundamental fairness.<sup>55</sup>

65. The explanation by the Appellate Body in *US – Hot-Rolled Steel* with respect to DOC's treatment of a respondent's affiliated parties in connection with normal value is also instructive. The Appellate Body stated:

Although we believe that the Anti-Dumping Agreement affords WTO Members discretion to determine how to ensure that normal value is not distorted through the inclusion of sales that are not “in the ordinary course of trade,” that discretion is not without limits. In particular, the discretion must be exercised in an *even-handed* way that is fair to all parties affected by an anti-dumping investigation.<sup>56</sup>

66. Recently, the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* also stated in a slightly different context:

the examination was not “objective” because its result is predetermined by the methodology itself. ... This approach makes it “more likely [that investigating authorities] will determine that the domestic industry is injured” and, therefore, it cannot be “objective.”<sup>57</sup>

67. In Japan's view, the three scenarios, set forth in the *Sunset Policy Bulletin* and applied in all sunset reviews in which domestic interested parties have participated, did not abide by this important principle, and thus were inconsistent with the obligations set forth in the AD Agreement. One of three scenarios instructs that DOC find dumping is likely to continue where DOC finds that the dumping exists at the time of a sunset review. In order to find that dumping is likely to “continue,” however, the dumping must exist as the prerequisite. According to this scenario, therefore, all cases, in which DOC must consider whether dumping is likely to “continue,” result in its affirmative findings. In this way, this scenario predetermines the result. Indeed, no actual “determination” is involved to find the dumping is likely to “continue.”

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<sup>51</sup> Parties are obliged to perform their treaty obligations in good faith. See *Vienna Convention on the Law of Treaties*, Article 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

<sup>52</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12 October 1998) (“*US – Shrimp*”).

<sup>53</sup> Appellate Body Report, *US – Shrimp*, para. 158.

<sup>54</sup> *Id.* at n.156 quoting B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), Chapt. 4, page 125, (emphasis added by Appellate Body).

<sup>55</sup> See Appellate Body Report, *US – Hot-Rolled Steel*, para. 148 and n.142. See also *EC Measures Concerning Meat and Meat Products (“EC – Hormones”)*, WT/DS26/AB/R, WT/DS48/AB/R (16 January 1998), para. 133.

<sup>56</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 148 (emphasis in original).

<sup>57</sup> Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 132. (a footnote omitted).

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

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

#### **4. Conclusions**

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

### **III. CONCLUSION**

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

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<sup>58</sup> Section II.A.3 of the *Sunset Policy Bulletin* specifically stated “the SAA at 890, and the House Report, at 63-64, state that, [E]xistence of dumping margins after the order, or the cessation of imports after the order, is highly probative of the likelihood of continuation or recurrence of dumping.” (Exhibit ARG-35).

<sup>59</sup> Panel Report, *US – DRAMs*, para. 6.42.

## ANNEX B-3

### THIRD PARTY SUBMISSION OF KOREA

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## I. INTRODUCTION

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

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

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

## II. EXECUTIVE SUMMARY

4. Korea addresses the following issues in this submission:

5. All relevant substantive and procedural provisions of the AD Agreement, especially Articles 2, 3, 6 and 12, are applicable *mutatis mutandis* to Article 11.3, to the extent that they are relevant to sunset reviews. Article 11.3 of the AD Agreement does not set out detailed substantive or procedural rules. Accordingly, the standards governing sunset reviews must be found in the other relevant provisions of the AD Agreement. Bearing in mind the object and purpose of the AD Agreement, which is to establish clear and uniform multilateral disciplines governing the imposition and duration of anti-dumping measures, Article 11.3 cannot properly be interpreted as standing alone independent of the other disciplines of the Agreement.

6. US law and practice assume that dumping is likely to continue or recur where the respondents are deemed to have waived their rights to participate in the sunset review or where their responses are deemed inadequate. The United States’ practice in this regard fails to ensure that Members’ rights under Articles 6 and 12 of the AD Agreement are respected, in that parties are not afforded an opportunity to present all the evidence necessary to defend their interests. The Panel in *US – Sunset Review of Steel from Japan*<sup>3</sup> stated that a determination of the likelihood of continuation or recurrence of dumping and injury must be based on a “sufficient factual basis.” Under US practice in expedited cases, however, the DOC may assume that dumping is likely to continue or recur without any meaningful factual evidence or analysis. This failure to protect Members’ rights under Article 6 is

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<sup>1</sup> Hereinafter “Argentina’s first submission.”

<sup>2</sup> Hereinafter “US first submission.”

<sup>3</sup> Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Restraint Carbon Steel Flat Products from Japan*, WT/DS244/R (circulated 14 August 2003), para. 7.271.



particularly egregious where, as here, the respondent, Siderca, in fact responded to the DOC's notices, but its responses were deemed inadequate because the DOC alleged that it did not account for 50 per cent of exports of subject merchandise during the relevant period. It does not appear that Siderca had any effective means to challenge this determination.

7. The DOC's method of determining likely margins in the event of revocation of an order is biased in favour of finding continued dumping and is based on such limited evidence that it is not reasonably or objectively founded on "positive evidence." The DOC uses a mechanical analysis of previous dumping margins and import volumes to reach pre-ordained conclusions regarding the likely margin of dumping in the event of revocation. Argentina has shown that this approach has led to affirmative determinations in 100 per cent of the DOC's sunset determinations. The United States' practice is therefore inconsistent with the requirements of Articles 11.3 and 2, and undermines the presumption of Article 11 in favour of the termination of dumping measures after five years.

8. The USITC's interpretation of the term "likely" in Article 11.3 as requiring only a finding that injury may possibly continue or recur in the event of termination is inconsistent with Article 11.3 of the AD Agreement, as interpreted in the applicable WTO jurisprudence. WTO panels – in the *US – DRAMs from Korea*<sup>4</sup> and *US – Sunset Review of Steel from Japan*<sup>5</sup> cases – have found that "a 'likely' determination requires that the administering authority must base its determination on 'probable', not 'possible', outcomes."

### III. LEGAL ARGUMENTS

#### A. SUNSET REVIEWS UNDER ARTICLE 11.3 MUST BE CONDUCTED IN ACCORDANCE WITH THE SUBSTANTIVE AND PROCEDURAL RULES OF ARTICLES 2, 3, 6 AND 12 OF AD AGREEMENT

9. In Korea's view, the purpose of the AD Agreement is to establish multilateral control of and clear and consistent disciplines governing the imposition of anti-dumping measures. To achieve this purpose, the disciplines laid out in the AD Agreement must be applied consistently to all aspects of the imposition of an anti-dumping measure, including any determination whether to continue or terminate a measure. This purpose would be thwarted, however, if investigating authorities were permitted to use different substantive definitions and standards to determine whether initially to impose a measure (in an anti-dumping investigation) and whether to terminate or continue that measure (in a sunset review).

10. It is not disputed that an anti-dumping measure may only be imposed following findings of dumping and injury, and a causal link between the two. Article 11.3 of the AD Agreement provides that such a measure shall be terminated after five years unless the authorities determine that termination of the measure would be likely to lead to continuation or recurrence of dumping and injury. Thus, Article 11.3 refers to the same two prerequisites for continuation of a measure – dumping and injury – as were required to impose the measure in the first place. There is no rational reason why the terms "dumping" and "injury" as used in Article 11.3 should be defined or interpreted differently in deciding whether to terminate a measure than in deciding whether to impose the measure in the first place. To the contrary, to permit different definitions of dumping and injury in sunset reviews would undermine the disciplines and purpose of the AD Agreement.

11. Korea recalls that provisions of the AD Agreement are to be interpreted according to Article 31 of the Vienna Convention, which provides:

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<sup>4</sup> Panel Report, *US – Anti-Dumping Duties on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea*, WT/DS99/R (adopted 19 March 1999), footnote 494.

<sup>5</sup> Panel Report, *US – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Production from Japan*, WT/DS244/R (circulated 14 August 2003), para. 7.178.

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

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

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

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

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

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

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<sup>6</sup> See US first submission, paras. 140-142.

<sup>7</sup> *The New Shorter Oxford English Dictionary* (Fourth Ed. 1993), pgs. 494-495.

<sup>8</sup> *Id.*, pg. 2510.

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

17. Korea notes that it is not arguing that investigating authorities must make precisely the same determination of dumping following a complete investigation in sunset reviews as is made in an original investigation. Korea recognizes that a sunset review involves a prospective analysis of the likelihood of dumping on sales that have yet to be made. As a practical matter, these future sales cannot be the subject of the same price comparison as sales that have been previously made, as in an investigation. Rather, Korea’s position is that in determining whether “dumping” will continue or recur, the investigating authorities must be governed by the definitions established in Article 2 in determining what kind of “dumping” is likely to recur.

18. In its first submission, the United States argues that Article 11.3 does not set forth any methodology to be used in determining the likelihood of continued dumping.<sup>9</sup> The United States goes on to say that it is not required, and indeed could not, quantify the margin of dumping because of the inherently prospective nature of the determination. However, the United States fails to fully recognize that the reference in Article 11.3 to “dumping” is to the same practice of “dumping” defined in Article 2. There is no need for Article 11.3 to provide an additional definition of that term when it has already been defined in Article 2. Korea does not understand Argentina to argue that the United States must achieve some impossible feat of prognostication. The point, simply, is that the United States must ensure that any practice of dumping that it determines would continue or recur in the event of termination of the measure must be defined in accordance with the rules of Article 2. A finding of some sort of dumping other than that defined in Article 2 cannot justify continuation of a measure.

19. For the same reasons, Korea believes that the term “injury” in Article 11.3 must be interpreted as referring to injury as defined in Article 3 of the AD Agreement. Article 11.3 contains nothing to suggest that the term “injury” should be interpreted in any way other than fully consistent with Article 3. Again, it would undermine the disciplines of the entire AD Agreement to permit anti-dumping orders to be continued on the basis of a different standard than that required to impose the measure.

20. Korea finds the United States’ attempts to avoid this interpretation to be unpersuasive. The United States attempts to draw a distinction between the texts of Articles 3 and 11.3, saying that Article 3 refers to a “determination of injury” whereas Article 11.3 refers to a determination of “recurrence of injury.”<sup>10</sup> But that is not the point. Of course, there is a temporal difference between present injury in an original investigation and recurrence of injury in a sunset review. However, both Articles 3 and 11.3 refer to the same concept of injury – whether one looks forward or back in time – and the sole definition of the concept of injury is contained in Article 3.

21. Moreover, footnote 9 of the AD Agreement provides specific textual support for Korea’s view that Article 3 applies to Article 11.3. Footnote 9 of the AD Agreement explicitly states that “under this Agreement the term ‘injury’ shall, *unless otherwise specified*, be taken to mean material injury to a domestic industry, threat of material injury or material retardation of the establishment of such industry and shall be interpreted in accordance with the provisions of this Article [3]” (emphasis added). Nothing in Article 11 specifies any other meaning for the term “injury.” Accordingly, the reference to “injury” in Article 11.3 must be interpreted to mean the same “injury” referred to in Article 3 and footnote 9.

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<sup>9</sup> US first submission, paras. 250 *et seq.*

<sup>10</sup> US first submission, para. 289.

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

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

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

B. THE UNITED STATES’ PRACTICE OF MAKING AN AUTOMATIC FINDING OF CONTINUED DUMPING IN THE EVENT OF A FAILURE TO PARTICIPATE OR WAIVER IS INCONSISTENT WITH ARTICLES 6, 11.3 AND 11.4 OF THE AD AGREEMENT

25. Article 6 of the AD Agreement applies to Article 11.3 by virtue of the cross-reference in Article 11.4, which provides that “the provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article.”

26. Article 6.1 stipulates that “[a]ll interested parties in an anti-dumping investigation shall be given ... *ample opportunity* to present in writing all evidence which they consider relevant in respect of the investigation in question” (emphasis added). Further, Article 6.2 provides that “[t]hroughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests.”

27. Thus, all interested parties are guaranteed the opportunity to present all evidence, in order to be afforded an opportunity to defend their interests. Under US law, however, in the event that a party is deemed to waive its right to participate in a DOC sunset review,<sup>12</sup> or to have submitted an inadequate response,<sup>13</sup> the DOC automatically reaches an expedited determination that dumping would continue or recur in the event of termination of the measure. In Korea’s view, these expedited, automatic determinations – whether on the basis of waiver or inadequacy – fail to protect the rights of interested parties under Articles 6.1 and 6.2.

28. The Panel in *US – Sunset Review of Steel from Japan* held that Article 11.3 precludes an investigating authority from simply assuming that likelihood of continued or recurring dumping exists. The Panel stated that “in order to continue imposing the measure, the investigating authority has to determine, on the basis of positive evidence, that its termination of duty is likely to lead to continuation or recurrence of dumping and injury and it must have a *sufficient factual basis* to allow it

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<sup>11</sup> US first submission, para. 293.

<sup>12</sup> 19 USC. § 1675(c)(4)(B) (This section stipulates that “In a review in which an interested party waives its participation pursuant to his paragraph, the administering authority shall conclude that revocation of the order...would be likely to lead to continuation or recurrence of dumping...”).

<sup>13</sup> 19 USC. § 1675(c)(3)(B) (This section provides that “If interested parties provide inadequate responses to a notice of initiation, the administering authority... may issue, without further investigation, a final determination on facts available...”).

to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence.”<sup>14</sup>

29. Thus, the investigating authorities must have a sufficient factual basis for their finding that dumping is likely to continue or recur. By assuming that a waiver of participation means that dumping is likely to continue or recur, however, the US authorities are making determinations without having done any meaningful analysis or without *any* factual basis to suggest there is a likelihood of continuation or recurrence of the dumping and injury. This cannot be said to comply with the requirements of Articles 11.4 and 6.

30. Korea is also concerned that the US law and regulations and the DOC's practice do not comply with the rules of Article 6.8 and Annex II governing the use of facts available. First, it is not clear that the DOC's practice complies with paragraph 6 of Annex II regarding notification of and an opportunity to correct “inadequacies” in a response. Second, and perhaps more importantly, the DOC's practice of assuming a certain outcome where it deems responses to be “inadequate” fails to fulfil the DOC's obligation to make a determination, on the basis of the facts available, as to whether dumping would continue or recur in the event of termination of the measure.

31. This case presents a particularly troublesome example of how the United States' practice works to the detriment of foreign exporters (and Argentina has cited other examples in its first submission). The Argentine respondent, Siderca, had indicated that it had not exported to the United States during the five years the order was in existence and argued that the dumping margin from the original investigation was not large enough to support a finding that dumping would recur in the event of revocation. However, the DOC decided to conduct an expedited review on the grounds that Siderca did not account for 50 per cent of Argentine exports during the period of review. While the United States claims that Siderca had an opportunity to comment on this determination,<sup>15</sup> Korea does not understand the United States to claim that it sought additional information from Siderca regarding its exports or those of other exporters, that it specifically notified Siderca of the consequences of its likely determination, or that it otherwise attempted to ascertain which, if any, other Argentine exporters may account for the balance of exports that would make up the DOC's 50 per cent threshold. (Korea notes that this threshold has no basis in the AD Agreement).

32. The consequences of these omissions were grave for Siderca. These omissions ensured that the DOC expedited its review and, using the mechanical process described in further detail below, reached an automatic finding that dumping would be likely to continue or recur in the event of termination of the measure. While the United States goes to great lengths to defend its actions in its first submission, it fails to explain exactly what Siderca could have done to avoid having its response deemed inadequate, and to avoid the inevitable consequences of an expedited review in this case. Nothing in the United States' first submission suggests that Siderca could reasonably have done anything that would have resulted in the DOC conducting a “full” review and, in turn, perhaps determining that dumping would not continue in the event of revocation. In these circumstances, it is difficult to see how the rights guaranteed by Articles 6 and 11 were protected.

33. The United States argues that the provisions of US law relating to waivers and inadequate responses should be accepted as a practical means of achieving administrative efficiency in the conduct of administrative reviews. Although Korea understands the United States' concerns regarding the efficient use of administrative resources, these concerns cannot be allowed to supersede the substantive and procedural requirements of the AD Agreement, especially with regard to such an important issue as whether an anti-dumping measure should remain in effect.

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<sup>14</sup> Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Restraint Carbon Steel Flat Products from Japan*, WT/DS244/R (circulated 14 August 2003), para. 7.271 (emphasis added).

<sup>15</sup> US first submission, paras. 51-55.

34. Moreover, by making assumptions that favour continuation rather than termination of anti-dumping measures, the US laws and practice fail to give effect to the object and purpose of Articles 11.1 and 11.3. Article 11.1 expressly states that “an anti-dumping duty shall remain in force *as long as and to the extent necessary* to counteract dumping which is causing injury” (emphasis added). Further, Article 11.3 stipulates that a “definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition,” unless it is determined that termination would lead to continued or recurring dumping and injury. These provisions establish a presumption in favour of termination of measures after five years, absent clear and explicit determinations that the termination would lead to continued or recurring dumping and injury. In Korea’s view, the assumptions made under US law and practice are wholly inconsistent with this presumption, and therefore with the object and purpose of Article 11.

C. THE UNITED STATES’ METHOD OF DETERMINING LIKELY DUMPING MARGINS IN THE EVENT OF REVOCATION OF AN ORDER IS IMPERMISSIBLY BIASED IN FAVOUR OF A FINDING OF CONTINUED DUMPING

35. As discussed above, Korea submits that the determination of the likelihood of continued or recurring dumping under Article 11.3 must be based on the definition of dumping contained in Article 2 of the AD Agreement. Korea has explained that the text of Article 2 makes clear that its rules regarding determination of dumping are established “for the purpose of AD Agreement,” which includes Article 11.3. This reading is consistent with Article 31 of the Vienna Convention.

36. Thus, Article 11.3 imposes a positive obligation on the domestic authorities to determine that dumping, as defined in Article 2, is likely to continue or recur. Article 11.3 requires a determination based on a prospective analysis of “positive evidence” that there is a probability that dumping will continue or recur in the future.

37. In its sunset determinations, however, the DOC determines whether dumping is likely to continue in the future based only on two data points relating to past experience. These are the historical dumping margins and the historical import volumes. By limiting its inquiry in this manner, the DOC’s practice is flawed in two respects.

38. First, the DOC looks backwards rather than forward. The DOC makes no effort to extrapolate likely future data from the historical data, other than to assume that as matters were in the past, so shall they remain in the future. Thus, rather than making the kind of prospective determination contemplated by Article 11.3, the DOC simply relies on its retrospective data.

39. Second, the DOC does not consider the impact of any other events or external forces – even data regarding price changes, exchange rate changes, etc. that might affect its conclusion. The very limited nature of the DOC’s analysis cannot possibly provide a sufficient factual basis on which to make a determination regarding likely future dumping. Argentina has documented how this approach has led to an affirmative finding of likely continued dumping in 100 per cent of the DOC’s sunset determinations, without exception. The United States does not appear to dispute these statistics. In these circumstances, the DOC’s method of determining whether dumping is likely to continue – both in this case and in every other instance in which it has applied the same mechanical rules – lacks sufficient factual basis to satisfy the requirements of the AD Agreement.

D. THE USITC’S INTERPRETATION OF THE REQUIREMENT THAT INJURY BE “LIKELY” TO CONTINUE OR RECUR IS INCONSISTENT WITH ARTICLE 11.3 OF THE AD AGREEMENT

40. Argentina argues that the use of the term “likely” in Article 11.3 means that investigating authorities must find that continued or recurring dumping or injury would be “probable” and not merely “possible” in the event of termination of the measure. Argentina argues that the USITC’s

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

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

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

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

#### IV. CONCLUSION

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

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

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<sup>16</sup> Argentina’s first submission, para. 212.

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

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

<sup>19</sup> Argentina’s first submission, para. 217 (citations omitted).

## **ANNEX B-4**

### **THIRD PARTY SUBMISSION OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU**

14 November 2003

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

- (a) Expedited review and the “waiver” determination by the US Department of Commerce;
- (b) The issue of “irrefutable presumption” alleged by Argentina; and
- (c) The question of applicability of Articles 2 and 3 of the AD Agreement to Sunset Reviews.

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

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

3. We consider that the mandatory wording imposed by 19 USC. §1675(c)(4)(B) to the effect that “[i]n a review in which an interested party waives its participation pursuant to this paragraph, the administering authority *shall conclude* that revocation of the order or termination of the investigation would be likely to lead to continuation or recurrence of dumping or countervailable subsidy (as the case may be) with respect to that interested party” (emphasis added)<sup>1</sup>, on the face of it, leaves the Department of Commerce with no discretion as to the mandated result of its finding of “likelihood” once the participation of a foreign interested party is deemed waived, irrespective of whether, based on the “information available” or fresh evidence submitted during the sunset review, the continuation or recurrence of dumping is likely or not.

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

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<sup>1</sup> Argentina's first submission, para. 51.

<sup>2</sup> WT/DS213/AB/R cited in Argentina's first submission, para. 83.

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

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

B. THE ISSUE OF “IRREFUTABLE PRESUMPTION” ALLEGED BY ARGENTINA

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

6. As regards the practice of the Department of Commerce, we do not consider that it is proper to draw a conclusive inference from the analysis conducted by Argentina.<sup>5</sup> However, the fact that in 100 per cent of the cases in which domestic interested parties have participated, the Department has found the likelihood of continuation or recurrence of dumping, still suggests that the Department of Commerce has the apparent tendency of not properly conducting these reviews and making its positive determination as required by the Agreement. This should serve as giving complementary support to establishing Argentina’s *prima facie* evidence that is required of the Complainant in this regard, to show that the Department of Commerce has not conducted these reviews properly and that its determination is not based on positive evidence.

C. THE QUESTION OF APPLICABILITY OF ARTICLES 2 & 3 TO SUNSET REVIEWS

7. We do not share the view of the United States that Article 3 of the AD Agreement is inapplicable in total to a sunset review. We consider that the correct interpretation of the law on this issue should be the view expressed by the panel in *United States – Sunset Review of the Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* (“*Sunset Review-Japan Steel*”)<sup>6</sup> that, save Article 3.3, “the obligations in Article 3 pertaining to injury may apply throughout the Anti-Dumping Agreement, i.e. they are not limited to investigations”<sup>7</sup>, although we do have some reservations on excepting the application of Article 3.3 on Sunset Review.<sup>8</sup>

8. We also share the view of the panel in the same matter that in clarifying the requirements of a determination of dumping in an Article 11.3 review, “Article 2 also provides guidance as to the type of information that may be relevant to a sunset review examination of the presence or absence of

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<sup>4</sup> WT/DS194/R, adopted 23 August 2001, paras. 8.97-8.98.

<sup>5</sup> Argentina’s first submission, paras. 129-134.

<sup>6</sup> WT/DS244/R, circulated 14 August 2003.

<sup>7</sup> Ibid., para. 7.98-100.

<sup>8</sup> We consider that if *de minimis* dumping cannot be cumulatively assessed and thus is not subject to any duty in the original investigation, it is only logical to conclude that it should not be cumulatively assessed and subject to any duty in the sunset review either. In order for a coherent reading of the AD Agreement, Article 3.3 should be interpreted as applicable to sunset review.

dumping since the imposition of the order.”<sup>9</sup> The Panel seems to rely on the first paragraph of Article 2.1 “[f]or the purpose of this Agreement”, to come to its conclusion that this provision “describes a concept which is generally relevant throughout the Anti-Dumping Agreement”.<sup>10</sup>

9. Our proposition in support of the *Sunset Review – Japan Steel* Panel mentioned in the preceding paragraphs is based principally on the plain language of Article 11.3 of the AD Agreement, which purports to set out the conditions for continuing with an anti-dumping order. These conditions, which must be established simultaneously, may be summarized as follows: an authority must (i) conduct a review and (ii) make a positive determination that the expiry of the order would likely lead to continuation or recurrence of dumping and injury. We are of the view that it is the second condition which renders the application of Articles 2 and 3 of the AD Agreement relevant.

10. We consider that in each Article 11.3 review, the question of dumping and injury must also be examined when the question of likelihood of continuation or recurrence is determined. The provision in Article 11.3 already suggests such interpretation. The statement made by the Panel in the *Sunset Review – Japan Steel*<sup>11</sup>, cited in paragraph 9 above, further supports our contention that in a sunset review the question of whether dumping is present must be determined. We are of the view that the determination of the likelihood of continuation or recurrence must first rest on some positive determination that sales by exporters after lifting of the anti-dumping order do constitute dumping as defined by Article 2.1, as apparently not all sales by exporters in that case (albeit by those exporters that are subject to the original dumping order) are dumping *per se*. Equally, the incentive to sell immediately into such market after the lifting of the order does not necessarily equate to such exporter selling at a dumped price.

11. Although the standard of determination of dumping in an Article 11.3 review may not be the same as that in relation to investigation, it does not necessarily mean that the determination of the presence of dumping and that such dumping is causing injury, can be dispensed with. In a determination of dumping Article 2 will be relevant and should be followed in this regard. By the same token, the question of injury must also be established, as dumping based on the margin determined in the original investigation that was causing injury may not necessarily then be causing injury at later stage. In this context Article 3 would also be relevant.

12. Article 11.1 of the AD Agreement, which is stated by the panel in *EC – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*<sup>12</sup> to be “a general and overarching principle, the modalities of which are set forth in paragraphs 2 & 3”<sup>13</sup>, provides a mandatory requirement that anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury. The wording of Article 11.1, which informs the whole Article 11, is unambiguous. The present tense used in this Article, i.e. “which is causing injury” demonstrates that anti-dumping duty can only remain in force if there is dumping as defined by Article 2.1, and that such dumping is causing injury. If there is no act of dumping or if such dumping is not causing injury, the anti-dumping duty must be revoked.

13. If the above propositions are accepted, which we consider should be the case, any effective interpretation of Article 11.3 in the context of Article 11 and the AD Agreement, and in light of the object and purpose of the AD Agreement i.e. to discipline and counteract injurious dumping, requires a reading that both Article 2 for the purpose of determining the question of dumping, and Article 3 for the purpose of determining the question of injury, should be made applicable in an Article 11.3 review.

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<sup>9</sup> *Sunset Review – Japan Steel*, para. 7.174.

<sup>10</sup> *Ibid.*, footnote 144.

<sup>11</sup> *Supra* footnote 8.

<sup>12</sup> WT/DS219/R, adopted 18 August 2003.

<sup>13</sup> *Ibid.*, para. 7.113.

D. CONCLUSION

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

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

16. Furthermore, for instance, the "deemed waiver" rule applying only to respondent interested parties of the sunset review procedures and US parties being not similarly exposed to the same detrimental effect of a deemed waiver should be in violation of Article X:3(a) of the GATT 1994 with respect to the requirements of transparency and procedural fairness, which was emphasized in the *US – Shrimp* case dealing with an alleged violation of Article X relating to the failure of the United States to respect the due process in developing and applying its law prescribing the shrimp import ban. The Appellate Body observed that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations. It further noted that "insomuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure..."<sup>14</sup>

17. The essence of the argument is that if US laws and practices with regard to the waiver and determination of recurrence or continuation of dumping and injury are admitted under the WTO, the result would be that all Members will be able to manoeuvre the continuation of imposing anti-dumping duties without being subject to any time limit. This is not the purpose of the AD Agreement in setting five years as the maximum period in principle.

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<sup>14</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R.