

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

Recourse to Article 21.5 of the DSU by ARGENTINA

*Report of the Panel*



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## I. INTRODUCTION

1.1 On 26 January 2006, Argentina requested the establishment of a panel pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") concerning the United States' ("US") alleged failure to implement the recommendations and rulings of the Dispute Settlement Body ("DSB") in the dispute *US – Oil Country Tubular Goods Sunset Reviews*. At its meeting on 17 March 2006, the DSB referred this dispute to the original panel, if possible, in accordance with Article 21.5 of the DSU, to examine the matter referred to by Argentina in document WT/DS268/16. At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

To examine, in the light of the relevant provisions of the covered agreements cited by Argentina in document WT/DS268/16, the matter referred to the DSB by Argentina in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

1.2 On 20 March 2006, the Panel was composed as follows:

Chairman: Mr. Paul O'Connor

Members: Mr. Bruce Cullen  
Dr. Faizullah Khilji

1.3 China, the European Communities, Japan, Korea, and Mexico reserved their third-party rights.

1.4 The Panel met with the parties on 12 July 2006. It met with the third parties on 13 July 2006. The Panel issued its interim report to the parties on 13 October 2006.

## II. FACTUAL ASPECTS

2.1 This dispute concerns the implementation by the United States of the DSB recommendations and rulings in *US – Oil Country Tubular Goods Sunset Reviews*.

2.2 The original anti-dumping investigation on OCTG from Argentina was completed by the United States in 1995, with the imposition of an anti-dumping duty. The only exporter from Argentina that participated in the original investigation was Siderca. The dumping margin calculated for Siderca was 1.36 per cent, which was also the rate of the anti-dumping duty imposed with respect to Siderca. The United States Department of Commerce ("USDOC") calculated a residual duty at the same rate, i.e. 1.36 per cent, for other Argentine exporters. During the five-years after 1995, four administrative reviews were initiated by the USDOC at the request of the domestic producers of OCTG in the United States. In each one of these administrative reviews, Siderca stated that it had not made any shipment of OCTG for consumption in the United States and the USDOC rescinded the administrative review. Another Argentine OCTG producer, Acindar, started shipping the subject product to the United States from 1998 onwards.

2.3 On 3 July 2000, the USDOC initiated, on its own initiative, a sunset review of the anti-dumping duty on OCTG from Argentina. In its final determination, the USDOC determined that dumping was likely to continue or recur should the duty be revoked. On 25 July 2001, the USDOC published the notice of continuation of the anti-dumping duty on OCTG from Argentina.

2.4 On 7 October 2002, Argentina requested consultations with the United States regarding certain aspects of US laws, regulations and procedures on sunset reviews and the OCTG sunset review carried out by the US authorities. Consultations did not result in a mutually agreed solution,

and a panel was established by the DSB. The original panel circulated its report to WTO Members on 16 July 2004. The United States appealed certain issues of law covered in the panel report and legal interpretations by the panel. Argentina cross-appealed certain issues. The Appellate Body circulated its report on 29 November 2004. The Appellate Body report and the original panel's report, as modified by the Appellate Body report, were adopted by the DSB on 17 December 2004. It is the measures taken to implement these rulings and recommendations by the DSB that this Panel is called upon to examine under Article 21.5 of the DSU.

2.5 The original panel found certain US statutory and regulatory provisions regarding sunset reviews to be inconsistent with various provisions of the WTO Anti-dumping Agreement ("Agreement"). More specifically, the original panel found the so-called statutory and regulatory affirmative and deemed waiver provisions to be inconsistent, among others, with Article 11.3 of the Agreement. This finding was upheld by the Appellate Body. The panel also found inconsistencies, among others, with regard to the determination by the USDOC in the OCTG sunset review that dumping was likely to continue or recur. These findings were not appealed by the parties.

2.6 In its effort to implement the DSB recommendations and rulings, the United States amended its sunset regulations. The amendment, which became effective on 31 October 2005, entailed the deletion of the provisions regarding deemed waivers and the adoption of a new provision requiring exporters who waive their participation to acknowledge in writing that they are likely to continue or resume dumping if the duty was revoked. In addition, the new Regulations provide that interested parties now have the right to request a hearing in a sunset proceeding. No changes were made to the text of the Statute, which was also found to be inconsistent by the original panel and the Appellate Body. Furthermore, in order to eliminate the inconsistencies found in the USDOC's likelihood determination in the OCTG sunset review, the USDOC initiated, on 2 November 2005, what is called a *Section 129 proceeding* under US law. In the context of this new sunset review, the USDOC sent questionnaires to the three known Argentine exporters, i.e. Siderca, Acindar and Tubhier. In its response to the USDOC's questionnaire, Tubhier stated that it had never exported the subject product to the United States and hence sought to be excluded from the review.<sup>1</sup> Siderca and Acindar responded to the questionnaires. On 16 December 2005, the USDOC issued its Section 129 Determination in which it found that dumping would have been likely to continue or recur had the anti-dumping duty on OCTG from Argentina been revoked in 2000.

2.7 In accordance with Article 21.5 of the DSU, we are called upon to assess the existence or consistency with a covered agreement of measures taken by the United States to comply with the DSB recommendations and rulings at issue in these proceedings. We note that the DSU Article 21.5 proceedings are distinct from the original proceedings in the sense that they deal with the existence or consistency with covered agreements of measures taken to comply with the DSB recommendations and rulings, which are different from the measures subject to the original proceedings. This does not mean, however, that DSU Article 21.5 proceedings have to be carried out in isolation from the original proceedings. To the extent necessary, panels functioning under Article 21.5 of the DSU can take account of the reasoning of the investigating authorities in an original determination or the reasoning of the original panel, because DSU Article 21.5 proceedings are part of a "continuum of events".<sup>2</sup> We shall, therefore, in our evaluation of Argentina's claims raised in these proceedings, take account of the USDOC's reasoning in the original sunset review and the reasoning of the panel and the Appellate Body in the original proceedings, where appropriate.

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<sup>1</sup> See, Exhibit ARG-20.

<sup>2</sup> Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States ("Mexico – Corn Syrup (Article 21.5 – US)"),* WT/DS132/AB/RW, adopted 21 November 2001, para. 121.

### III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 Argentina requests the Panel to find that the United States failed to implement the DSB recommendations and rulings in the dispute *US – Oil Country Tubular Goods Sunset Reviews* and remains in violation of its WTO obligations. In particular, Argentina requests that the Panel make the following findings:

#### Section 129 Determination

1. USDOC's Section 129 likelihood of dumping determination is inconsistent with Article 11.3 because:

- a. USDOC based its 2005 likelihood determination on factual evidence that USDOC developed in 2005, and which was not developed during the original sunset review in 2000, and therefore, the United States violated the requirements of Articles 11.3 and 11.4 of the Anti-Dumping Agreement.
- b. As for the USDOC's statement that it also relied on its position from the original sunset review that the post-order volume decline created a basis for inferring that dumping would be likely to continue or recur, this was an insufficient basis to support the 2000 likelihood determination and also cannot support the 2005 likelihood determination in violation of Article 11.3.

2. Alternatively, assuming that USDOC could, consistently with U.S. WTO obligations, conduct a proceeding in 2005 to justify USDOC's 2001 continuation of the antidumping duty order on Argentine OCTG, then USDOC's Section 129 likelihood of dumping determination is inconsistent with Article 11.3 because:

- a. The USDOC did not properly establish a sufficient factual basis, did not objectively assess the facts, and did not reach a reasoned conclusion supported by positive evidence that expiry of the order would be likely to lead to continuation or recurrence of dumping.
  - i. The USDOC determination with respect to the Argentine exporters is inconsistent with Article 11.3 of the Anti-Dumping Agreement.
  - ii. As for the USDOC's statement that it also relied on its position from the original sunset review that the post-order volume decline created a basis for inferring that dumping would be likely to continue or recur, this was an insufficient basis to support the 2000 likelihood determination and also cannot support the 2005 likelihood determination in violation of Article 11.3 of the Anti-Dumping Agreement.
- b. The USDOC's conduct of the Section 129 proceeding was also inconsistent with Articles 6.1, 6.2, 6.4, 6.5.1, 6.6, 6.8, 6.9, and Annex II of the Anti-Dumping Agreement:
  - i. The USDOC's failure to provide the parties notice regarding the procedures it would follow to make its determination and to notify the parties of the essential facts under consideration that formed the basis for the Section 129 Determination, including, when necessary, by providing reasonable summaries of confidential information, was

inconsistent with U.S. obligations under Articles 6.1, 6.4, 6.5, 6.5.1, and 6.9 of the Anti-Dumping Agreement.

- ii. The USDOC's failure to hold a hearing in the Section 129 proceeding and to provide to interested parties a full opportunity for the defence of their interests was inconsistent with U.S. obligations under Article 6.2 of the Anti-Dumping Agreement.
  - iii. The USDOC's failure to require interested parties to submit non-confidential summaries of their written submissions in the Section 129 proceeding in such a manner as to permit a reasonable understanding of the substance of the confidential information submitted violated U.S. obligations under Articles 6.1, 6.2, 6.5, 6.5.1 of the Anti-Dumping Agreement.
  - iv. The USDOC's characterization of Siderca's submitted cost information as unreliable without a reasonable basis for doing so and without following the requirements of the Anti-Dumping Agreement was in violation of U.S. obligations under Articles 6.1, 6.2, 6.4, 6.6, 6.8 and Annex II of the Anti-Dumping Agreement.
3. The failure of the United States to "implement" the Section 129 Determination, pursuant to Section 129(b)(4) of the *Uruguay Round Agreements Act*, was inconsistent with U.S. obligations under Article 13 of the Anti-Dumping Agreement.

Failure of the United States to Repeal or Amend the Tariff Act

4. The failure of the United States either to repeal Section 751(c)(4)(B) of the Tariff Act of 1930, or to amend this provision to remove the WTO-inconsistency, failed to implement the recommendations and rulings of the DSB and was inconsistent with U.S. obligations under Article 11.3 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement.

U.S. Amendment of Section 351.218(d)(2) of USDOC Regulations

5. The amendment by the United States of Section 351.218(d)(2) of the USDOC Regulations failed to implement the recommendations and rulings of the DSB and was inconsistent with U.S. obligations under Articles 6.1, 6.2, 6.6, 11.1, and 11.3 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement.

3.2 The United States requests the Panel to reject Argentina's claims in their entirety and to find that the United States properly implemented the DSB recommendations and rulings.

**IV. ARGUMENTS OF THE PARTIES**

4.1 The arguments of the parties are set out in their written submissions and oral statements to the Panel, as well as in their answers to the Panel's questions, the answers of the United States to Argentina's questions, and their comments on each others' answers. The parties' submissions are attached to this Report as Annexes (see List of Annexes, page iv).

## V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties, China, the European Communities, Japan, Korea, and Mexico are set out in their written submissions to the Panel and in the oral statements of China, the European Communities, Japan, and Mexico to the Panel. The third parties' written submissions and oral statements are attached to this Report as Annexes (see List of Annexes, page iv).

## VI. INTERIM REVIEW

6.1 On 13 October 2006, we submitted the interim report to the parties. Both parties submitted written requests for the review of precise aspects of the interim report. Parties also submitted written comments on the other party's comments. Neither party requested an interim review meeting.

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

### A. REQUEST OF ARGENTINA

6.3 First, Argentina submits that given its substantive findings regarding the inconsistency of the US measure taken to comply with the DSB recommendations and rulings, the Panel should make a finding that the United States failed to implement such recommendations and rulings. The United States disagrees and argues that there is no basis for an additional finding that the United States failed to comply with the DSB recommendations and rulings.

6.4 We recall that the mandate of a WTO panel operating under Article 21.5 of the *DSU* is to make a decision on "the existence or consistency with a covered agreement of measures taken to comply with the [DSB] recommendations and rulings" and this is what we did in our report with regard to the dispute at hand. We do not find any value added, nor a legal basis in the *DSU*, to make a finding that the United States failed to implement the DSB recommendations and rulings and therefore decline Argentina's request.

6.5 Second, Argentina contends that in the context of its claim pertaining to the USDOC's determination regarding the likelihood of continuation or recurrence of dumping in the Section 129 proceedings at issue, the Panel should cite Argentina's argument concerning the treatment by the USDOC of the data submitted by Siderca.

6.6 We note that paragraph 7.103 of our report clearly indicates that we did not need to address Argentina's argument relating to the treatment by the USDOC of Siderca's data in the resolution of the dispute at hand. We therefore decline to make any change to our report in this regard.

6.7 Third, Argentina submits that we should change paragraph 7.106 of our report to reflect that the sentence "Furthermore, because these estimated costs were inconsistent with the other cost information in the file, the USDOC could not use the data." is the United States' characterization of Siderca's data, not the Panel's.

6.8 We note that it is clear that the mentioned paragraph, found under the heading "United States", reflects the United States' arguments in response to Argentina's claims under Article 6 of the Agreement. As such, it can not, in our view, be interpreted to convey the Panel's characterization of facts. We nevertheless made a modification to the text of this sentence to make it more clear that it reflects the United States' arguments.

6.9 Fourth, Argentina disagrees with the Panel's finding in paragraph 7.138 of the report that Argentina failed to establish the aspect of its claim under Article 6.5.1 of the Agreement regarding the comments submitted by IPSCO and contends that the Panel should change its finding in this regard.

The United States agrees with the Panel's conclusion in this regard and submits that the Panel should not change it.

6.10 We note that in order to support its claim under Article 6.5.1 of the Agreement, Argentina cited two documents, i.e. a submission by US Steel and another by IPSCO. Argentina submitted the relevant parts of the submission by US Steel, but not the one by IPSCO. Having made our finding on the basis of the US Steel's submission, we concluded that Argentina did not properly establish the aspect of its claim relating to the submission by IPSCO. It is clear that just as we analysed the relevant parts of the US Steel's submission, we would have analysed IPSCO's submission too had Argentina submitted it. But it did not. We recall that we invited Argentina to specify which information it referred to in the context of its claim under Article 6.5.1 of the Agreement.<sup>3</sup> Argentina has not, however, shown us where the relevant parts of this submission could be found. We also recall that the role of a panel is not to make the case for either party, but to clarify parties' claims through questioning, where necessary.<sup>4</sup> We therefore decline to make any modification to our report in this regard.

B. REQUEST OF THE UNITED STATES

6.11 First, the United States invites the Panel to replace the word "explicit" with "affirmative" in paragraphs 2.5 and 7.36 of the report for the sake of consistency. We made these modifications.

6.12 Second, the United States proposes a modification to the characterization in paragraph 2.6 of our report of the facts relating to the amendments made by the United States to its Regulations. We modified this paragraph to accommodate the United States' comment.

6.13 Third, the United States invites the Panel to make certain modifications to the description of the United States' arguments in paragraphs 7.7 and 7.8 of our report. We modified these paragraphs to accommodate the United States' comment. The United States also suggests a modification regarding our citation of the Tariff Act of 1930 in paragraph 7.12 of our report, which we also made.

6.14 Fourth, the United States contends that the Panel should make a modification to paragraph 7.22 of the report to better describe the United States' position. Argentina proposes a counter-modification in case we accept the United States' comment.

6.15 We made the modifications requested by both parties to accommodate their comments.

6.16 Fifth, the United States contends that the Panel should add a sentence to paragraph 7.24 of the report to better describe the United States' position. Argentina proposes a counter-modification in case we accept the United States' comment.

6.17 We made the modifications requested by both parties to accommodate their comments.

6.18 Sixth, the United States contends that paragraph 7.26 of our report does not correctly describe the nature of the disagreement between the parties and proposes a modification to it. More specifically, the United States argues that the Panel should dispose of Argentina's argument by observing that it runs counter to the original panel's finding that deemed waivers were only found in the US Regulations, not the Statute. Argentina disagrees and submits that the Panel should reject the US request in its entirety. In case the Panel accepts the United States' comment, Argentina invites the

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<sup>3</sup> See, Question 23 from the Panel to Argentina.

<sup>4</sup> In this regard, we find support in the findings of the panel in *EC – Countervailing Measures on DRAM Chips*. See, Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea* ("EC – Countervailing Measures on DRAM Chips"), WT/DS299/R, adopted 3 August 2005, para. 7.7.

Panel to identify, and make findings on, certain arguments raised by Argentina in connection with its claim regarding US law's waiver provisions.

6.19 We took note of the United States' contention and made certain modifications to paragraphs 7.24 and 7.25 of our report to provide further clarity in this regard.

6.20 Seventh, the United States contends that the Panel should make a modification to paragraph 7.32 of the report to better describe the United States' argument. Argentina submits that the Panel should reject the United States' comment.

6.21 We note that the modification requested concerns the description of the United States' argument in line with its submissions to the Panel in these proceedings. We therefore made the requested modification to accommodate the United States' concern.

6.22 Eighth, the United States contends that the Panel should make two modifications to paragraph 7.65 of the report to better describe the United States' argument. Argentina argues that in the event that the Panel accepts the United States' comment, it should also make a modification to better reflect Argentina's position regarding the United States' argument for which clarification is sought.

6.23 We modified paragraphs 7.64 and 7.65 of our report to accommodate both parties' comments.

6.24 Ninth, the United States asks the Panel to broaden the scope of its quotation from the USDOC's Section 129 Determination in paragraph 7.72 of the report. We modified the mentioned paragraph to accommodate the United States' comment.

6.25 Tenth, the United States argues that the Panel should make a modification to paragraph 7.82 of the report to better describe the United States' position. Argentina proposes a counter-modification in case we accept the United States' comment.

6.26 We made the modifications requested by both parties to accommodate their comments.

6.27 Eleventh, the United States contends that the Panel should make a modification to paragraph 7.88 of the report to better describe the United States' position. Argentina proposes a counter-modification in case we accept the United States' comment.

6.28 We made the modifications requested by both parties to accommodate their comments.

6.29 Twelfth, the United States suggests a modification to paragraph 7.95 of our report to better reflect the United States' argument. Argentina disagrees and submits that the Panel should reject the United States' request.

6.30 We modified the mentioned paragraph in order to accommodate the United States' concern.

6.31 Thirteenth, the United States suggests a modification to paragraph 7.106 of our report to better reflect the United States' argument. We modified the mentioned paragraph to accommodate the United States' concern.

6.32 Fourteenth, the United States suggests a modification to the Panel's description in paragraph 7.129 of the report of the manner in which the USDOC carried out its obligations under the Agreement in the Section 129 proceedings at issue. Argentina asks the Panel to reject the United States' request.

6.33 We made a modification to the mentioned paragraph to accommodate the United States' concern.

6.34 Finally, the United States suggests a modification to paragraph 7.131 of our report to better reflect the United States' argument. We modified the mentioned paragraph to accommodate the United States' comment.

## **VII. FINDINGS**

### **A. GENERAL ISSUES**

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

7.1 The standard of review that we shall apply in these proceedings is the same as that in the original panel proceedings. We recall that Article 11 of the DSU provides the standard of review for WTO panels in general. Article 11 requires the panels to make an objective assessment of both the factual and the legal aspects of the case.

7.2 Article 17.6 of the Anti-dumping Agreement, however, sets forth a special standard of review that applies specifically to panel proceedings dealing with the application of this Agreement. Article 17.6 provides:

- (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
- (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

7.3 Thus, taken together, Article 11 of the DSU and Article 17.6 of the Anti-dumping Agreement establish the standard of review that we will apply with respect to both the factual and the legal aspects of these proceedings. We shall, therefore, find the US measures at issue to be consistent with the WTO Agreements if we find that the US investigating authorities have established the facts properly and evaluated them in an unbiased and objective manner, and that the determinations are based on a permissible interpretation of the relevant treaty provisions. We are not to carry out a *de novo* review of the evidence in the record of the sunset review at issue nor to substitute our judgement for that of the US investigating authorities even though we might have made a different determination were we examining these records ourselves.

#### **2. Burden of Proof**

7.4 The burden of proof in these proceedings is the same as that in the original panel proceedings. We recall that the general principles applicable to the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim.<sup>5</sup> In these Panel proceedings, Argentina, which has challenged the consistency of the US measures, thus bears the burden of demonstrating that the measures are not consistent with the relevant provisions of the Agreement. Argentina also bears the burden of

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<sup>5</sup> Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("US – Wool Shirts and Blouses"), WT/DS33/AB/R and Corr. 1, adopted 23 May 1997, p. 337.

establishing that its claims are properly before the Panel. We also note that it is generally for each party asserting a fact to provide proof thereof.<sup>6</sup> In this respect, therefore, it is also for the United States to provide evidence for the facts which it asserts. Finally, we recall that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case.

B. IMPLEMENTATION OF DSB RECOMMENDATIONS AND RULINGS REGARDING THE INCONSISTENCY OF US WAIVER PROVISIONS WITH ARTICLE 11.3 OF THE AGREEMENT

**1. Arguments of Parties**

(a) Argentina

7.5 Argentina submits that the United States failed to implement the DSB recommendations and rulings regarding the inconsistency with Article 11.3 of the Agreement found in US laws and regulations in the original proceedings. Argentina argues that in addition to the amendments made to the Regulations, the United States had also to amend Section 751(c)(4)(B) of the Tariff Act. Because the Appellate Body found both the Statute and the Regulations to be WTO-inconsistent, amending the Regulations only did not bring the US measures into conformity with its WTO obligations. In Argentina's view, Section 751(c)(4)(B) of the Tariff Act continues to mandate an affirmative finding of likelihood in cases where an exporter waives its right to participate in a sunset review, and as such, it is inconsistent with Articles 11.1 and 11.3 of the Anti-dumping Agreement and Article XVI:4 of the WTO Agreement. Regarding the new requirement under the US regulatory provisions that a statement of waiver has to be accompanied by a statement indicating that the exporter who waives its right to participate is likely to continue or resume dumping should the measure be revoked, Argentina contends that by giving decisive guidance to such a document, US law runs counter to investigating authorities' obligation under Article 11.3 of the Agreement to make adequate and reasoned determinations on the basis of positive evidence in sunset reviews. In Argentina's view, this regulatory provision precludes the USDOC from developing the requisite factual record for its sunset determinations.

7.6 Furthermore, Argentina maintains that Section 751(c)(4)(B) of the Tariff Act, read in conjunction with Section 751(c)(4)(A), mandates an affirmative finding of likelihood not only with respect to exporters who waive their right to participate consistently with the procedure set out in the Regulations, i.e. through signing a statement that they are likely to continue or resume dumping, but also with respect to those who choose not to participate without signing such a statement.

(b) United States

7.7 The United States argues that the findings of the original panel and the Appellate Body concerned the provisions of the Statute and the Regulations cumulatively. The issue, therefore, is not whether or not the Statute has been amended, rather the issue is whether the inconsistency with Article 11.3 of the Agreement that the original panel and the Appellate Body found in US law has been eliminated. The United States notes the original panel's statements in the panel report that the deemed waivers were created by the Regulations and not by the Statute and that any finding by the panel regarding these waivers would only have a bearing on the Regulations, not the Statute. The United States implemented the DSB recommendations and rulings regarding the WTO-inconsistencies found in US law by eliminating deemed waivers and by requiring exporters who chose to affirmatively waive their right to participate in a sunset review to acknowledge in writing that they would be likely to continue or resume dumping in the case of the revocation of the duty. Thus, a company-specific likelihood determination will be based on facts and not on assumptions, and the

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<sup>6</sup> *Id.*

United States therefore considers that it has brought its measure into compliance with the DSB recommendations and rulings.

7.8 The United States also disagrees with Argentina's argument that the current US law requires the USDOC to find likelihood for exporters who do not waive their right to participate. Waivers are now optional and unless an exporter affirmatively waives its right to participate through signing a document to the effect that it is likely to continue or resume dumping should the duty be revoked, the USDOC is not required to find likelihood for that exporter. It follows that with respect to exporters who do not affirmatively waive their right to participate, the USDOC will base its determinations on a review of all of the facts on the administrative record. The United States also contends that Argentina's argument that the Statute provides for deemed waivers runs contrary to the findings made in the original proceeding because the original panel found that the deemed waivers were created by the Regulations, not by the Statute.

## **2. Arguments of Third Parties**

### **(a) Japan**

7.9 Japan submits that Section 751(c)(4)(B) of the Tariff Act, in combination with Section 351.218(d)(2)(iii) Regulations, is inconsistent with Article 11.3 of the Agreement because it precludes the USDOC from collecting the facts necessary for a likelihood determination based on an adequate factual ground. According to Japan, Section 751(c)(4)(B) presupposes that a company's own admission is sufficient in every sunset review to support an affirmative finding of likelihood of continuation or recurrence of dumping. There may be, however, cases where the investigating authorities have to consider other factors on the basis of the information submitted by other parties or obtained by the authorities themselves.

### **(b) Korea**

7.10 Korea submits that the United States failed to bring Section 751(c)(4)(B) of the Tariff Act into conformity with its WTO obligations under Articles 11.1 and 11.3 of the Anti-dumping Agreement and Article XVI:4 of the WTO Agreement. Korea also asserts that the amended Regulations do not conform to the requirements of Article 11.3 because they preclude the US authorities from developing the relevant factual basis for their determinations.

## **3. Evaluation by the Panel**

### **(a) Introduction**

7.11 The Panel will first cite the relevant provisions of the challenged US Statute and Regulations, and then recall the original panel and Appellate Body findings of inconsistency. After describing the steps taken by the United States with a view to implementing the recommendations and rulings arising from the original dispute settlement proceedings, the Panel will clarify the scope of the current US waiver provisions, and then examine the substance of Argentina's claim of inconsistency of these current waiver provisions under Article 11.3.

### **(b) Relevant Provisions of the US Statute and Regulations**

7.12 Section 751(c)(4) of the Tariff Act of 1930, as codified in 19 U.S.C. § 1675(c)(4), provides, in relevant part:

(4) Waiver of participation by certain interested parties

(A) In general

An interested party described in section 1677(9)(A) or (B) of this title may elect not to participate in a review conducted by the administering authority under this subsection and to participate only in the review conducted by the Commission under this subsection.

(B) Effect of waiver

In a review in which an interested party waives its participation pursuant to this paragraph, the administering authority shall conclude that revocation of the order or termination of the investigation would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) with respect to that interested party.<sup>7</sup> (emphasis added)

7.13 Section 351.218(d)(2)(iii) of the Regulations, now repealed by the United States, used to read:

(iii) No response from an interested party. The Secretary will consider the failure by a respondent interested party to file a complete substantive response to a notice of initiation under paragraph (d)(3) of this section as a waiver of participation in a sunset review before the Department.<sup>8</sup> (emphasis added)

7.14 Section 351.218(d)(2)(ii) of the Regulations, revised by the United States, now reads:

(ii) *Contents of statement of waiver.* Every statement of waiver must include a statement indicating that the respondent interested party waives participation in the sunset review before the Department; a statement that the respondent interested party is likely to dump... if the order is revoked or the investigation is terminated...<sup>9</sup>

(c) Findings of the Original Panel and Appellate Body

7.15 We recall the original panel and Appellate Body findings regarding the US statutory and regulatory waiver provisions cited in paras. 7.12-7.13 above, before describing the revisions cited in paras. 7.13-7.14 above.

7.16 In the original proceedings, Argentina challenged the waiver provisions of US law, among others, under Article 11.3 of the Agreement. These provisions directed the USDOC to make an affirmative finding of likelihood for exporters who do not participate in the USDOC phase of a sunset review. In such cases, those exporters would have the possibility of participating in the United States International Trade Commission ("USITC") part of sunset reviews. The US statutory and regulatory provisions subject to the original proceedings provided for two types of waivers:

(a) Section 751(c)(4)(A) of the Tariff Act of 1930 provided that exporters could elect not to participate in the USDOC proceedings in a sunset review and limit their participation to the USITC proceedings. The original panel characterized such waivers as "affirmative waivers".<sup>10</sup>

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<sup>7</sup> Exhibit ARG-33 at 1152.

<sup>8</sup> Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("US – Oil Country Tubular Goods Sunset Reviews"), WT/DS268/R and Corr.1, adopted 17 December 2004, modified by Appellate Body Report, WT/DS268/AB/R, para. 7.82.

<sup>9</sup> Exhibit ARG-12 at 62064.

<sup>10</sup> Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("US – Oil Country Tubular Goods Sunset Reviews"), WT/DS268/R and Corr.1, adopted 17 December 2004, modified by Appellate Body Report, WT/DS268/AB/R, para. 7.83. For ease of reference, we

- (b) Section 351.218(d)(2)(iii) of the USDOC's Sunset Regulations (*supra*, para. 7.13), stipulated that failure to submit a full substantive response to the notice of initiation of a sunset review also constituted a waiver. The original panel referred to this as an "implicit" or "deemed" waiver.<sup>11</sup>

7.17 In the original proceedings, Argentina also challenged Section 751(c)(4)(B) of the Tariff Act of 1930, which enunciates the consequence of electing not to participate in the USDOC proceedings: the USDOC would find these exporters to be likely to continue or resume dumping in the event of the revocation of the order in question. Thus, pursuant to Section 751(c)(4)(B) of the Statute, the consequence of both deemed and affirmative waivers was the same: a finding by the USDOC that the exporters who waived participation would be likely to continue or resume dumping should the measure be repealed.

7.18 In its assessment of Argentina's claim regarding waivers, the original panel distinguished between affirmative and deemed waivers and opined that since the provisions relating to deemed waivers were only found in the Regulations, its findings about these waivers would also only affect the Regulations, whereas its findings regarding affirmative waivers would have implications for the statutory provisions.<sup>12</sup> The original panel then went on and found both affirmative and deemed waiver provisions to be inconsistent with Article 11.3 of the Agreement. In doing so, the original panel cited the relevant statutory and regulatory provisions of US law found to be WTO-inconsistent. The original panel stated:

In conclusion, we find that both affirmative and deemed waivers provisions of US law, i.e. Section 751(c)(4)(B) of the Tariff Act and Section 351.218(d)(2)(iii) of the USDOC's Regulations, are inconsistent with the investigating authorities' obligation to determine likelihood of continuation or recurrence of dumping under Article 11.3 of the Anti-Dumping Agreement.<sup>13</sup> (emphasis added)

7.19 The Appellate Body upheld the panel's findings with regard to both types of waivers.<sup>14</sup>

(d) Steps Taken by the United States to Implement the DSB Recommendations and Rulings

7.20 In its implementation of the DSB recommendations and rulings in this dispute, the United States made certain amendments to the USDOC's Regulations. The text of the Statute, however, remained unchanged. As indicated above, the United States repealed Section 351.218(d)(2)(iii), and revised Section 351.218(d)(2)(ii) of the Regulations. We note that, for purposes of these proceedings, the main significance of this amendment to Section 351.218(d)(2)(ii) of the Regulations is that an affirmative waiver has now to be accompanied by a written statement by the exporter waiving its right to participate in a sunset review that the exporter is likely to continue or resume dumping should the duty be repealed. In other words, there may only be an affirmative waiver if the statement of waiver includes an acknowledgement that the waiving exporter is likely to continue or resume dumping should the duty be repealed.

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will, to the extent necessary in our assessment of Argentina's claim in these proceedings, also use the same terminology for types of waivers used by the original panel.

<sup>11</sup> *Id.*, para. 7.83.

<sup>12</sup> *Id.*, para. 7.85.

<sup>13</sup> *Id.*, para. 7.103.

<sup>14</sup> Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("US – Oil Country Tubular Goods Sunset Reviews"), WT/DS268/AB/R, adopted 17 December 2004, para. 235.

(e) Scope of Current Waiver Provisions

7.21 Before addressing the substance of Argentina's Article 11.3 claim, we first identify the scope of the current waiver provisions subject to Argentina's claim.

7.22 Argentina argues that the amendment to the Regulations has not eliminated the WTO-inconsistency in the US sunset legislation. According to Argentina, in addition to the Regulations, the United States also had to amend Section 751(c)(4)(B) of the Tariff Act. According to Argentina, Section 751(c)(4)(B) of the Tariff Act continues to be inconsistent with Article 11.3 of the Agreement because it mandates an affirmative finding of likelihood *both* for exporters who waive their right to participate as required under Section 351.218(d)(2)(ii) of the Regulations, and those who elect not to participate in a sunset review without following this procedure (i.e. without explicitly waiving their right to participate and acknowledging that they are likely to continue or resume dumping in the event of the revocation of the order). The United States disagrees and asserts that all that the United States needed to do in its implementation of the DSB recommendations and rulings was to amend the Regulations to ensure that the US sunset legislation in its entirety would operate in a WTO-consistent manner. This did not necessarily require a statutory amendment. By repealing the provisions of the Regulations concerning deemed waivers, and by requiring that respondent interested parties waiving their right to participate also file a statement that they are likely to continue or resume dumping in the case of the revocation of the anti-dumping order, the United States eliminated WTO-inconsistencies in its law because, according to the United States, any company-specific likelihood determination based on a waiver would be based on affirmative evidence.

7.23 We understand that Argentina's argument concerns the scope of application of the waiver provisions of the Tariff Act. Argentina contends that Section 751(c)(4)(B) of the Tariff Act directs the USDOC to find likelihood for exporters who *elect not to participate* in a sunset review *without* filing a statement of waiver accompanied by a statement that the exporter is likely to continue or resume dumping in the event of the revocation of the anti-dumping order, as required under Section 351.218(d)(2)(ii) of the Regulations. In other words, Argentina contends that the Statute directs the USDOC to find likelihood of continuation or recurrence of dumping with respect to exporters who remain silent following the initiation of a sunset review.

7.24 Argentina agrees that the deemed waiver provisions under Section 351.218(d)(2)(iii) of the Regulations have been repealed by the United States.<sup>15</sup> In the view of Argentina, however, "elect not to participate" within the meaning of Section 751(c)(4)(A) of the Tariff Act entails not only exporters who file a statement of waiver as required under Section 351.218(d)(2)(ii) of the Regulations, but also those who elect not to participate simply by remaining silent. The United States disagrees and submits that electing not to participate within the meaning of Section 751(c)(4)(A) is tantamount to a waiver within the meaning of Section 751(c)(4)(B) and that the procedure through which a waiver has to be filed is explained in Sections 351.218(d)(2)(i) and (ii) of the Regulations.<sup>16</sup> In addition, the

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<sup>15</sup> Response of Argentina to Question 2(a) from the Panel.

<sup>16</sup> Response of the United States to Question 6 from the Panel.

We also recall the following finding by the original panel in this regard:

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

United States contends that Argentina's argument runs directly counter to the findings of the original panel.

7.25 We recall that the original panel found Section 751(c)(4)(B) of the Tariff Act and Section 351.218(d)(2)(iii) of the Regulations, both with regard to affirmative and deemed waivers, to be inconsistent with the investigating authorities' obligation to arrive at a reasoned conclusion on the basis of positive evidence pursuant to Article 11.3 of the Agreement. In particular, the original panel found:

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

(i) The provisions of Section 751(c)(4)(B) of the Tariff Act relating to affirmative waivers are inconsistent with the investigating authorities' obligation to determine likelihood of continuation or recurrence of dumping under Article 11.3 of the Anti-Dumping Agreement,

(ii) The provisions of Section 351.218(d)(2)(iii) of the USDOC's Regulations relating to deemed waivers are inconsistent with the investigating authorities' obligation to determine likelihood of continuation or recurrence of dumping under Article 11.3 of the Anti-Dumping Agreement...<sup>17</sup>

It is therefore clear that the original panel's finding relating to deemed waivers was restricted to the Regulations. Perhaps understandably, therefore, the United States concentrated its implementation efforts with respect to deemed waivers on revising the waiver provisions in the Regulations. That said, however, on the basis of the parties' claims and arguments before this Panel, the issue that now confronts us is the scope of US law's existing waiver provisions after the provisions of the Regulations relating to deemed waivers have been eliminated.

7.26 The disagreement between the parties as to the scope of the waiver provisions under US law boils down to the meaning of *electing not to participate* for purposes of Section 751(c)(4)(A) of the Tariff Act. We must therefore carefully examine the provisions of the municipal law of the United States in determining its consistency with the WTO rules.<sup>18</sup> It is well established that WTO panels may examine the relevant aspects of the municipal law of a WTO Member in order to determine whether that Member has complied with its WTO obligations. We are cognizant, however, that we are not called upon to interpret the US municipal law as such. Our examination shall be limited to determining whether the United States has complied with its WTO obligations.<sup>19</sup>

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Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("US – Oil Country Tubular Goods Sunset Reviews"), WT/DS268/R and Corr.1, adopted 17 December 2004, para. 7.85.

<sup>17</sup> *Id.*, para. 8.11

<sup>18</sup> In this regard, we note the Appellate Body's pronouncement that WTO panels may interpret the municipal law of a Member in assessing its consistency with the WTO rules. See, for instance, Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("US – Hot-Rolled Steel"), WT/DS184/AB/R, adopted 23 August 2001, para. 200.

<sup>19</sup> See, Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("India – Patents (US)"), WT/DS50/AB/R, adopted 16 January 1998, paras. 65-67. In *US – Section 211 Appropriations Act*, the Appellate Body opined that a Member's municipal law may serve not only as evidence of facts, but also as evidence of compliance or non-compliance with a Member's WTO obligations. A panel's examination of a Member's municipal law for the purpose of determining compliance with the covered agreements is a legal characterization by a panel. Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998* ("US – Section 211 Appropriations Act"), WT/DS176/AB/R, adopted 1 February 2002, paras. 105-106.

7.27 Turning to the Statute, we note that paragraph (4) of Section 751(c) of the Tariff Act which comprises subparagraphs (A) and (B) is entitled "Waiver of participation by certain interested parties". Subparagraph (A) states that an interested party may elect not to participate in the USDOC part of a sunset review and therefore limit its participation to the USITC proceedings. Subparagraph (B) provides that when an interested party waives its participation pursuant to paragraph (4) of Section 751(c), the USDOC will find that interested party to be likely to continue or resume dumping should the duty be revoked. It is clear from the text that subparagraph (B) enunciates the legal consequence of a waiver. We also recall that Section 351.218(d)(2)(ii) of the Regulations explains the procedure through which an exporter can waive its right to participate in the USDOC part of a sunset review. What is not clear from the text, and what the parties' views diverge on, is whether *electing not to participate* has a broader scope than *waiving participation*. More specifically, the parties disagree as to whether an exporter who remains silent following the initiation of a sunset review is deemed to have waived its right to participate even if that exporter does not file a statement of waiver as required by the Regulations.

7.28 We recall once again that the heading of paragraph (4) of Section 751(c) is "Waiver of participation by certain interested parties". This may indicate that the whole Section is about waivers. Hence, electing not to participate has the same meaning as waiving its right to participate. The heading of subparagraph (A) is "In general" and that of subparagraph (B) is "Effect of waiver". Read in conjunction with the heading of paragraph (4), it is reasonable to consider that subparagraph (A) is intended to explain waivers in general and (B) conveys the legal consequence of a waiver. However, given the lack of precision in the Statute in this regard, we turn, for guidance, to the Statement of Administrative Action ("SAA"), which is an authoritative interpretative tool for the Statute.<sup>20</sup> Because the SAA is an authoritative interpretative tool for the Statute under US law, we find it appropriate to look into the meaning of the Statute in light of the relevant provisions of the SAA. The SAA provides in relevant part:

To reduce the burden on all parties involved, new section 751(c)(4) permits foreign interested parties, including foreign governments, to waive their participation in a Commerce sunset review. If Commerce receives such a waiver, Commerce will conclude that revocation or termination would be likely to lead to continuation or recurrence of dumping or countervailable subsidies with respect to the submitter.<sup>21</sup> (emphasis added)

7.29 We note that in its first sentence, the above excerpt states that Section 751(c)(4) allows the interested parties to waive their right to participate in a USDOC sunset review. It does not mention the situation of exporters who remain silent following the initiation of a sunset review without waiving their right to participate. Furthermore, the second sentence, which clarifies the provisions of subparagraph (B) of Section 751(c)(4) relating to the legal consequence of a waiver, mentions the *submitter*, which, according to our reading of the text of the SAA, refers to the submitter of a waiver under Section 751(c)(4). The SAA therefore supports our interpretation of the Statute that the meaning of electing not to participate within the meaning of Section 751(c)(4)(A) is the same as waiving the right to participate in a sunset review.

7.30 Turning to the Regulations, we recall that the previous deemed waiver provisions under Section 351.218(d)(2)(iii) of the Regulations were repealed by the United States<sup>22</sup>, and that revised Section 351.218(d)(2)(ii) of the Regulations now indicates that every statement of waiver must include a statement by the respondent interested party that it waives its right to participate and that it

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<sup>20</sup> See, Response of the United States to Question 1 from the Panel, footnote 2. We note that Argentina has not objected to the US description of the SAA as being an authoritative interpretative tool for the Statute under US law.

<sup>21</sup> Exhibit US-12 at 881.

<sup>22</sup> Response of Argentina to Question 2(a) from the Panel.

is likely to dump if the order is revoked. In our view, therefore, the phrase *elect not to participate* within the meaning of Section 751(c)(4)(A) is tantamount to a waiver within the meaning of Section 751(c)(4)(B) and the procedure through which a waiver has to be filed is set out in Sections 351.218(d)(2)(i) and (ii) of the Regulations.<sup>23</sup> Whereas the previous regulatory provisions envisaged two types of *waivers*, i.e. deemed and affirmative, the revised regulatory provisions envisage only one kind of waiver, i.e. affirmative. It follows that the concept of waiver in the Statute now refers *only* to an affirmative election not to participate.

7.31 We therefore find that the concept of *waiver* set out in Section 751(c)(4) of the Statute, in conjunction with the regulatory provisions in Section 351.218(d)(2), now refers only to the *affirmative waiver* situation that is, where an exporter elects not to participate in a review by filing an affirmative statement of waiver, accompanied by a statement that the exporter is likely to continue or resume dumping in the absence of the order.<sup>24</sup>

(f) Examination of Consistency of the Waiver Provisions with Article 11.3 of the Agreement

7.32 We now turn to our assessment of the substance of Argentina's claim relating to the consistency of the waiver provisions clarified above with Article 11.3. We recall that Argentina argues that the current provisions of US law on waivers are inconsistent with Article 11.3 of the Agreement. Argentina submits that once an exporter waives its right to participate and files a statement of waiver along with a statement that it is likely to continue or resume dumping in the case of revocation of the order, the Regulations prevent the USDOC from developing the requisite factual basis for a determination based on positive evidence consistent with Article 11.3 of the Agreement. In Argentina's view, this is inconsistent both with regard to the company-specific determination mandated by the Statute and with regard to the order-wide determination which would inevitably be tainted by the statutorily-mandated company specific determination. The United States disagrees and submits that after the amendments made to the Regulations, US law now operates consistently with Article 11.3 of the Agreement as articulated by the Appellate Body. More specifically, the United States argues that the inconsistency which was found in US law by the original panel and the Appellate Body was that US law directed the USDOC to make a company-specific determination on the basis of assumptions, as opposed to evidence. The United States argues that because deemed waivers have been repealed and affirmative waivers have to be accompanied by the exporter's own acknowledgement that it is likely to continue or resume dumping if the measure is revoked, the USDOC's company-specific determinations will now be based on positive evidence.

7.33 Article 11.3 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

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<sup>23</sup> Response of the United States to Question 6 from the Panel.

<sup>24</sup> We note that the United States submitted the USDOC's determination in one sunset review that was carried out after the amendments made to the Regulations in which none of the foreign exporters participated and yet the USDOC did not make an affirmative finding of likelihood of continuation or recurrence of dumping pursuant to Section 751(c)(4)(B) of the Tariff Act. This determination shows that although none of the exporters responded, the USDOC nevertheless analyzed the facts available to it and then reached a conclusion. See Exhibit US-18 at 3-5. The manner in which the USDOC treated the non-existence of any response from the exporters involved in the mentioned sunset review, in our view, supports our interpretation of the Statute.

to lead to continuation or recurrence of dumping and injury.<sup>22</sup> The duty may remain in force pending the outcome of such a review.

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<sup>22</sup> When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

7.34 Article 11.3 requires investigating authorities to terminate an anti-dumping duty not later than five years from its imposition unless they determine in a review initiated before then that dumping and injury are likely to continue or recur should the duty be revoked. Article 11.3 does not, however, set out a specific methodology for making such determinations. In principle, therefore, investigating authorities are not restricted in the choice of methodology they will follow in making their sunset determinations. In their choice of methodology, however, the investigating authorities should have regard to both "investigatory and adjudicatory aspects"<sup>25</sup> of sunset reviews and make forward-looking determinations on the basis of evidence relating to the past. They must arrive at reasoned conclusions on the basis of positive evidence.<sup>26</sup> In so doing, the investigating authorities may not remain passive. Rather, the authorities have to act with an "appropriate degree of diligence".<sup>27</sup>

7.35 We therefore see the issue before us as whether, after the amendments made by the United States with a view to implementing the DSB recommendations and rulings in the original proceedings, the waiver provision under Section 751(c)(4)(B) of the Tariff Act, operating in conjunction with Section 751(c)(4)(A) of the Tariff Act and Section 351.218(d)(2) of the Regulations, precludes the USDOC in some or all situations arising in sunset reviews from making a reasoned determination of likelihood of continuation or recurrence of dumping based on an adequate factual foundation, as required by Article 11.3 of the Anti-dumping Agreement. In this regard, we shall base our ultimate assessment of Argentina's claim regarding waivers on the USDOC's order-wide, as opposed to company-specific, determinations.<sup>28</sup>

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<sup>25</sup> Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("US – Corrosion-Resistant Steel Sunset Review"), WT/DS244/AB/R, adopted 9 January 2004, para. 111.

<sup>26</sup> In this regard, we find support in the findings of the Appellate Body in the original proceedings in this case. See, Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("US – Oil Country Tubular Goods Sunset Reviews"), WT/DS268/AB/R, adopted 17 December 2004, para. 234. Also see Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("US – Corrosion-Resistant Steel Sunset Review"), WT/DS244/AB/R, adopted 9 January 2004, paras. 111-115, including the citation with approval of the panel report, para. 7.271.

<sup>27</sup> *Id.*, para. 111.

<sup>28</sup> In this regard, we find support in the following Appellate Body findings in the original proceedings:

In our view, it was neither necessary nor relevant for the Panel to draw a conclusion as to the WTO-consistency of the *company-specific* determinations resulting from the waiver provisions. As we have observed, the relevant inquiry in this dispute is whether the *order-wide* likelihood determination would be rendered inconsistent with Article 11.3 by virtue of the operation of the waiver provisions. It appears to us, therefore, that the Panel could not have properly arrived at a finding of consistency or inconsistency with Article 11.3 *until* it had examined how the operation of the waiver provisions could affect the order-wide determination. Had the Panel ceased its inquiry with the finding that the company-specific determinations are not "supported by reasoned and adequate conclusions based on the facts before an investigating authority", the Panel would not have had a basis to conclude that the waiver provisions are inconsistent, as such, with Article 11.3. (footnote omitted)

Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("US – Oil Country Tubular Goods Sunset Reviews"), WT/DS268/AB/R, adopted 17 December 2004, para.232.

7.36 We consider that, in some situations, the statutory and regulatory waiver provisions may not necessarily preclude the USDOC from arriving at reasoned conclusions of likelihood of continuation or recurrence of dumping on the basis of an adequate factual foundation as required by Article 11.3. For instance, in a sunset review where all exporters explicitly and affirmatively waive their right to participate and acknowledge, in accordance with Section 351.218(d)(2)(ii) of the Regulations, that they are likely to continue or resume dumping if the measure is revoked, it may well be reasonable for the USDOC to find likelihood for these exporters individually and arguably also on an order-wide basis. We do not disagree with Argentina's argument that the evidentiary value that should be given to a particular exporter's affirmative waiver and acknowledgement that it will continue or resume dumping in the absence of the order may vary from one sunset review to the other.<sup>29</sup> On this basis, it may well be that, in the circumstances of a given review, such a signed statement by one or several exporters may constitute at least part of the evidentiary basis on which the authorities may base their sunset determinations. The investigating authorities would have to assess such a statement or statements objectively in light of all other evidence gathered by the investigating authorities and placed on the record.

7.37 However, we also see that there may be other situations where the waiver provisions may preclude the USDOC from reaching reasoned conclusions on an adequate factual basis. We recall our finding above that, with the deletion of Section 351.218(d)(2)(iii) of the Regulations, the waiver provision of Section 751(c)(4)(B) of the Tariff Act now addresses only *affirmative* waivers. In other words, following the regulatory amendments undertaken by the United States, the waiver provisions of the Statute only require the USDOC to find likelihood of continuation or recurrence of dumping with respect to exporters who *affirmatively* waive their right to participate. We also recall that the statutory mandate only applies to the USDOC's company-specific determinations for individual exporters who waive their right to participate. On the other hand, we note that the SAA requires the USDOC to make its sunset determinations on an order-wide basis.<sup>30</sup> That is, after making its company-specific determination(s) pursuant to Section 751(c)(4)(B) of the Tariff Act, the USDOC has to make an order-wide final determination regarding the likelihood of continuation or recurrence of dumping from the country involved. There is no provision under US law, statutory or otherwise, however, that determines the outcome of the USDOC's order-wide sunset determinations. Given these considerations, in a sunset review involving multiple exporters from one country, where some of the exporters neither file a complete substantive response nor expressly waive their right to participate and simply remain silent after the initiation of the sunset review, while some other exporters follow Section 351.218(d)(2)(ii) of the Regulations and affirmatively waive their right to participate, the USDOC may have to find likelihood on an order-wide basis because of the company-specific determinations that it may have made under Section 751(c)(4)(B) for the waiving exporters.

7.38 We recall that US law requires the USDOC to make its sunset determinations on an order-wide basis. The question, therefore, is what impact, if any, a company-specific determination of likelihood made pursuant to Section 751(c)(4)(B) of the Tariff Act may have on the USDOC's order-wide determination.

7.39 In response to questioning on this matter, the United States argued that the USDOC is not required to make an affirmative finding of likelihood on an order-wide basis simply because it made a company-specific finding of likelihood pursuant to Section 751(c)(4)(B) of the Tariff Act. The United States submits that where the USDOC makes such company-specific findings for some

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<sup>29</sup> Second Written Submission of Argentina, paras. 170-171.

<sup>30</sup> See, Response of the United States to Question 1 from the Panel. We note that the Appellate Body, in *US – Corrosion-Resistant Steel Sunset Review*, found that US law's requirement that sunset determinations be made on an order-wide basis was not WTO-inconsistent because the Agreement did not mandate company-specific sunset determinations. Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("*US – Corrosion-Resistant Steel Sunset Review*"), WT/DS244/AB/R, adopted 9 January 2004, paras. 149-157.

exporters under Section 751(c)(4)(B), those findings would be taken into account in the order-wide determination, but they would not necessarily determine the outcome of the order-wide determination. The USDOC would take all record evidence into account in making its order-wide determination, including the company-specific determinations made under Section 751(c)(4)(B).<sup>31</sup> We note, however, that the United States has not directed our attention to any provision of US law which would support its proposition that the USDOC's order-wide determinations are independent from the company-specific determinations made under Section 751(c)(4)(B) of the Tariff Act.<sup>32</sup> We find it difficult to understand how the USDOC would find no likelihood of continuation or recurrence of dumping on an order-wide basis in a sunset review where it may have made an affirmative likelihood determination for some exporters pursuant to Section 751(c)(4)(B) of the Tariff Act. Given that Section 751(c)(4)(B) requires the USDOC to make an affirmative likelihood determination for individual exporters who waive their right to participate, it seems to us that such company-specific determinations would necessarily have a significant impact on, or even determine, the outcome of the USDOC's order-wide determination. Hence, we can reasonably conclude that in every sunset review involving multiple exporters the USDOC will have to find likelihood on an order-wide basis if one exporter waives its right to participate, because otherwise the USDOC would have found no likelihood with respect to the exporters who waive their right to participate.

7.40 Making an affirmative finding of likelihood of continuation or recurrence of dumping from a country without considering the information that may have been submitted by exporters who do not waive their right to participate in the sunset review would not, in our view, be a reasoned determination premised on an adequate factual basis.<sup>33</sup> As we noted above, the investigating authorities are expected to be sufficiently active in sunset reviews in developing the necessary factual premise for their determinations. The provisions of Section 751(c)(4)(B) of the Tariff Act, however, would preclude the USDOC from taking into consideration evidence submitted by cooperating exporters or evidence otherwise collected by the USDOC in sunset reviews where there is at least one other exporter who waives its right to participate. In such cases, the USDOC's order-wide determination would be based on the assumption that because one exporter waived its right to participate and acknowledged to be likely to continue or resume dumping, other exporters are also likely to continue or resume dumping.<sup>34</sup> The USDOC would thus be ignoring the information which is relevant to its sunset determination and which is readily available to it and would fail to observe the obligation of the investigating authorities to make reasoned determinations of likelihood of continuation or recurrence of dumping based on a sufficient factual premise in accordance with Article 11.3 of the Agreement.

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<sup>31</sup> Response of the United States to Question 4 from the Panel.

<sup>32</sup> The original panel also identified the same concern regarding the impact of the USDOC's company-specific determinations on its order-wide determinations and rejected the same argument put forward by the United States. Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("US – Oil Country Tubular Goods Sunset Reviews"), WT/DS268/R and Corr.1, adopted 17 December 2004, para. 7.102.

<sup>33</sup> In this regard, we find support in the Appellate Body's findings in *US – Corrosion-Resistant Steel Sunset Review*. See, Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("US – Corrosion-Resistant Steel Sunset Review"), WT/DS244/AB/R, adopted 9 January 2004, para. 111.

<sup>34</sup> In this regard, we note that the Appellate Body in the original proceedings found a legal scheme that would give rise to sunset determinations based on assumptions to be inconsistent with Article 11.3 of the Agreement. Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("US – Oil Country Tubular Goods Sunset Reviews"), WT/DS268/AB/R, adopted 17 December 2004, para. 234. We recognize that the Appellate Body's finding related to a specific aspect of US law's waiver provisions before the US implementation. We nevertheless find the concern underlying the Appellate Body's finding to support our reasoning with regard to Argentina's claim before us.

(g) Conclusion

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

7.42 We note that although Argentina also cited Articles 6 and 11.1 of the Anti-dumping Agreement and Article XVI:4 of the WTO Agreement in the context of this claim, it never developed arguments under these provisions and we therefore consider that it did not make a *prima facie* case. Given our finding of inconsistency with Article 11.3 of the Anti-dumping Agreement, even if Argentina developed arguments under these provisions, we do not consider that addressing these claims would be necessary for the resolution of this dispute. We therefore do not make any further finding with respect to this claim.

C. FACTUAL BASIS OF THE USDOC'S SECTION 129 DETERMINATION

**1. Arguments of Parties**

(a) Argentina

7.43 Argentina asserts that the United States failed to bring its measures into conformity with Articles 11.3 and 11.4 of the Agreement because the USDOC developed a "new and different" factual basis in the 2005 Section 129 review which was not developed in the original sunset review. According to Argentina, the original sunset determination that was found to be WTO-inconsistent could not be justified on the basis of the facts relating to the original review period, but collected for the first time in 2005. This would render the substantive and temporal requirements of Articles 11.3 and 11.4 meaningless. In this regard, Argentina cites the financial statements of the investigated Argentine exporters and the customs data obtained from the US customs authorities as two pieces of information that were examined by the USDOC for the first time in the Section 129 proceedings in 2005. The United States could have developed such data in its original sunset review, which it did not. Thus, the United States should not be entitled to do this five years after the original sunset determination.

(b) United States

7.44 The United States contends that Argentina has shown no textual support for its assertion that the USDOC was precluded from developing a new factual basis pertaining to the original review period for its Section 129 Determination. In the view of the United States, Argentina's approach would make implementation impossible in cases where a Member's determination is found to lack a sufficient factual basis.

**2. Arguments of Third Parties**

(a) China

7.45 China submits that neither the Anti-dumping Agreement nor the DSU precludes investigating authorities from developing new facts in implementing the DSB recommendations and rulings. Furthermore, Article 11.3 of the Anti-dumping Agreement requires investigating authorities to consider all the evidence in the new sunset proceedings, including newly-submitted evidence. In

China's view, in the proceedings at issue in this case, the USDOC could not possibly implement the DSB recommendations and rulings without gathering new facts.

(b) Mexico

7.46 Mexico agrees with Argentina that the USDOC could not base its Section 129 Determination on the new facts gathered following the original sunset review. Giving a Member multiple opportunities to gather the requisite factual basis for a sunset determination would, in Mexico's view, render Article 11.3 meaningless.

### 3. Evaluation by the Panel

7.47 We recall the original panel's finding regarding the factual basis of the USDOC's likelihood determination in the original sunset review. The original panel opined that the USDOC's sunset determination lacked an adequate factual foundation because it was based on the existence of the original dumping margin. According to the original panel, a finding of likelihood of continuation or recurrence of dumping in a sunset review could not be based on the existence of the original margin or on the continued imposition of the original duty during the lifespan of the anti-dumping duty at issue.<sup>35</sup>

7.48 In its effort to eliminate this inconsistency, the USDOC, in making its Section 129 Determination, sought *new* information from three Argentine exporters.<sup>36</sup> The information sought by the USDOC related to the original sunset review period, i.e. 1995-2000. Two exporters, Siderca and Acindar, provided some information in response to the USDOC's questionnaire. The USDOC based its Section 129 Determination partly on this new information and partly on its volume analysis from the original sunset review. Argentina argues that, pursuant to Articles 11.3 and 11.4, the USDOC was not allowed to collect new facts in its re-determination.

7.49 We note that Argentina uses the term "new and different factual basis" to refer to the facts that the USDOC collected for the first time in the Section 129 proceedings at issue.<sup>37</sup> Argentina also acknowledges, however, that part of the factual basis of the Section 129 Determination, notably that relating to the USDOC's volume analysis, was carried over from the original sunset review.<sup>38</sup> For purposes of our analysis, we also adopt the characterization used by Argentina. The main issue raised by Argentina's claim, therefore, is whether the USDOC was allowed under Articles 11.3 and 11.4 of the Agreement to base its Section 129 Determination, among others, on facts pertaining to the original review period, i.e. 1995-2000, that it collected for the first time in 2005, in the context of implementing the DSB recommendations and rulings after the original WTO dispute settlement proceedings.

7.50 We have cited the text of Article 11.3 above (*supra*, para. 7.33). That provision requires termination of an anti-dumping duty not later than five years from its imposition unless an investigating authority determines, in a review initiated before then, that dumping and injury are likely to continue or recur should the duty be revoked. Article 11.4 states, in part: "Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review". Both of these provisions reflect temporal considerations. However, we

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<sup>35</sup> Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("US – Oil Country Tubular Goods Sunset Reviews"), WT/DS268/R and Corr.1, adopted 17 December 2004, modified by Appellate Body Report, WT/DS268/AB/R, paras. 7.219-7.221.

<sup>36</sup> The USDOC's questionnaires asked for information regarding the Argentine exporters' production volumes, per-unit cost of manufacture, interest expenses and their consolidated and unconsolidated financial statements for the fiscal years between July 1995-June 2000. The questionnaires also asked the exporters to describe the nature of their sales process in their domestic and export markets. See, Exhibit ARG-13.

<sup>37</sup> See, for instance, First Written Submission of Argentina, paras. 52-54.

<sup>38</sup> See, First Written Submission of Argentina, para. 67.

disagree with Argentina that either or both of these provisions, in isolation, resolve the issue before us. We do not consider that the Article 11.3 obligation to terminate an anti-dumping duty within five years in the absence of an affirmative likelihood determination resulting from a review initiated before that point in time, or the Article 11.4 obligation to carry out a review expeditiously and normally within 12 months, precludes an investigating authority from developing a *new* factual basis pertaining to the original review period in the course of implementing the DSB recommendations and rulings pertaining to the original determination.

7.51 In our view, the resolution of Argentina's claim must have regard to broader, horizontal considerations underpinning the operation of the WTO dispute settlement system.<sup>39</sup> The issue of whether a WTO Member implementing the DSB recommendations and rulings arising from findings of WTO inconsistency of an original measure may subsequently collect *new* facts and establish a *new* evidentiary basis in support of the measure taken to comply, is not limited to the reviews of anti-dumping or countervailing duties, including sunset reviews. An analogous issue may arise in the context of anti-dumping or countervailing duty investigations, not to mention in general WTO dispute settlement outside the trade remedies area.

7.52 In our view, Argentina's proposition that the United States was somehow precluded from developing a new factual basis in its implementing sunset re-determination in this case runs counter to the overall operation of the WTO dispute settlement system, and, in particular, the notion of *implementation* of the DSB recommendations and rulings embodied in the relevant provisions of the DSU.

7.53 In this regard, we first note Article 19.1 of the DSU, which reads:

*Article 19*

*Panel and Appellate Body Recommendations*

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

7.54 Article 19.1 stipulates that when a WTO panel or the Appellate Body finds a Member's measure to be inconsistent with that Member's WTO obligations, it shall recommend that the Member concerned bring the measure into conformity with such obligations. It does not, however, prescribe the ways in which such measures may be brought into conformity with the WTO rules. Thus, a Member enjoys a certain degree of discretion in respect of implementation, which essentially consists of bringing the measure held to be inconsistent with the obligations of the WTO Member concerned under particular provisions of a particular covered agreement, into conformity with those same provisions. Article 3.7 of the DSU stresses that "the *first objective* of the dispute settlement mechanism is usually to secure *withdrawal of the WTO-inconsistent measure*" (emphasis added). For its part, Article 22.1 of the DSU cautions that neither compensation nor suspension of concessions or other obligations is to be "preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements". Clearly, therefore, the non-conforming measure is to be brought into a state of conformity with specified treaty provisions either by *withdrawing* such a

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<sup>39</sup> We recall that, pursuant to Article 1.2 of the DSU, the rules and procedures of the DSU shall apply subject to special or additional rules and procedures identified in Appendix 2 to the DSU. Neither the provisions of Article 11 pertaining to reviews, nor the other provisions of the Agreement pertaining to investigations, are identified as such special or additional rules and procedures. Accordingly, we believe that the provisions of the DSU and the Anti-dumping Agreement must be read together in a coherent manner.

measure completely, or, where possible, by *modifying* it by revising the inconsistent aspect of the measure involved. It may be that, in some cases, the *only* way to bring a measure into conformity with the pertinent WTO obligation would be to eliminate it. In other cases, a Member may, for example, revise the measure, in the implementation phase, including through the development of the requisite factual basis to support the measure taken to comply.

7.55 Furthermore, it is clear that implementation may also involve temporal considerations. Article 21.1 of the DSU indicates that, "[p]rompt compliance with recommendations and rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". Article 21.3 of the DSU indicates that "... if it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so". Article 22.1 states that "Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time".

7.56 By definition, a re-determination made in the course of implementing the DSB recommendations and rulings is different from the determination subjected to the original dispute settlement proceedings. The re-determination may involve the examination of factors different from, or in addition to, those examined in the context of the original determination. Arguing that a WTO Member is precluded from collecting new facts in a re-determination made in order to implement the DSB recommendations and rulings would, therefore, run counter to the overarching principle of the implementation of these recommendations and rulings, as elaborated in the provisions of Articles 19, 21 and 22 of the DSU cited above.

7.57 As we have already indicated, while this issue may arise, as is the case here, in the context of a sunset review re-determination, it may also arise not only in the implementation of the DSB recommendations and rulings relating to trade remedy investigations, but also more generally in any dispute settlement proceeding that involves a measure taken by a WTO Member on the basis of a determination/analysis carried out by the competent authorities of that Member.<sup>40</sup> It is therefore a systemic issue that concerns the implementation of the DSB recommendations and rulings in general. Indeed, we can easily find examples of WTO disputes – relating to both trade remedy and other types of measures in the WTO – where the Member complained against collected new facts in its implementation of the DSB recommendations and rulings.

7.58 In the trade remedies area, for example, in *Mexico – Corn Syrup*, the Mexican investigating authorities gathered new information from some interested parties in their re-determination for purposes of implementing the DSB recommendations and rulings.<sup>41</sup> In *US – Countervailing Measures on Certain EC Products*, the US investigating authorities collected new information in the course of a Section 129 sunset review.<sup>42</sup> Furthermore, we note that the panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* opined that pursuant to Article 21.3 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") "an investigating authority has the obligation to consider all evidence placed on the record in making a likelihood of continuation or recurrence of subsidization re-determination".<sup>43</sup> The panel stated that failure to accept into evidence relevant information submitted by interested parties for the first time in a Section 129 re-determination could

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<sup>40</sup> Such as in the case of sanitary or phytosanitary measures.

<sup>41</sup> Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, Recourse to Article 21.5 of the DSU by the United States ("Mexico – Corn Syrup (Article 21.5 – US))*, WT/DS132/RW, adopted 21 November 2001, upheld by Appellate Body Report, WT/DS132/AB/RW, para. 3.47.

<sup>42</sup> Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities, Recourse to Article 21.5 of the DSU by the European Communities ("US – Countervailing Measures on Certain EC Products (Article 21.5 – EC))*, WT/DS212/RW, adopted 27 September 2005, para. 7.252.

<sup>43</sup> *Id.*, para. 7.238.

lead to a WTO-inconsistent determination by the investigating authorities.<sup>44</sup> Given that Article 21.3 of the SCM Agreement is the parallel provision to Article 11.3 of the Anti-dumping Agreement, we find support in this finding for our reasoning with regard to Argentina's claim.<sup>45</sup>

7.59 We may also look beyond the trade remedies area for further examples of implementation involving the development of a new factual basis for a measure. In *Australia – Salmon*, for instance, the Australian Quarantine and Inspection Service undertook further import risk analyses with respect to certain fresh chilled and frozen salmon, in implementing the DSB recommendations and rulings.<sup>46</sup> In *Japan – Apples*, Japan made a re-determination regarding certain apple infections on the basis of additional scientific studies carried out in the implementation of the DSB recommendations and rulings.<sup>47</sup>

7.60 These examples demonstrate that competent authorities of WTO Members may need to collect new information supplementary to that on the record of their original determinations in making subsequent determinations in the context of implementing the DSB recommendations and rulings. The WTO-consistency of collecting new facts in the implementation of the DSB recommendations and rulings was not questioned in any one of these cases. On the basis of the foregoing, we reject Argentina's claim that the USDOC acted inconsistently with Articles 11.3 and 11.4 of the Agreement by developing a new factual basis pertaining to the original review period for purposes of its Section 129 Determination.

7.61 We note that Argentina's specific claims concerning the USDOC's Section 129 Determination at issue are raised as an alternative to its claim regarding the factual basis of this Determination. Having rejected Argentina's claim regarding the development of a new factual basis for the USDOC's Section 129 Determination, we now turn to Argentina's specific claims regarding this Determination.

D. USDOC'S DETERMINATION REGARDING THE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING

**1. Introduction**

7.62 The issue in these DSU Article 21.5 proceedings is whether the United States implemented the DSB recommendations and rulings at issue consistently with its WTO obligations. Argentina argues that the USDOC's Section 129 Determination, intended to implement the DSB recommendations and rulings, was inconsistent with Article 11.3 of the Agreement. We therefore have to assess the consistency of the US measure taken to comply with Article 11.3 of the Agreement. In our assessment, we shall view the implementing measure as independent from the measure in the original proceedings and assess its consistency with Article 11.3 independently. This does not mean,

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<sup>44</sup> *Id.*, paras. 7.252-7.254.

<sup>45</sup> We note that the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* also used its previous reasoning under the SCM Agreement in the context of the Anti-dumping Agreement. Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("*US – Corrosion-Resistant Steel Sunset Review*"), WT/DS244/AB/R, adopted 9 January 2004, para. 107 and footnote 39.

In this regard, we also find support in the *Ministerial Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures*, in which Ministers recognized the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures.

<sup>46</sup> Panel Report, *Australia – Measures Affecting Importation of Salmon, Recourse to Article 21.5 of the DSU by Canada* ("*Australia – Salmon (Article 21.5 – Canada)*"), WT/DS18/RW, adopted 20 March 2000, para. 2.6.

<sup>47</sup> Panel Report, *Japan – Measures Affecting the Importation of Apples, Recourse to Article 21.5 of the DSU by the United States* ("*Japan – Apples (Article 21.5 – US)*"), WT/DS245/RW, adopted 20 July 2005, paras. 4.21-4.22.

however, that we are completely precluded from referring to the original panel's reasoning in the original proceedings. Where appropriate, we shall take account of the USDOC's reasoning in the original sunset review or the original panel's own reasoning because DSU Article 21.5 proceedings are part of a "continuum of events".<sup>48</sup>

7.63 We note that in the sunset review at issue, the USDOC determined that dumping from Argentina was likely to continue or recur should the anti-dumping duty on the imports of OCTG from this country be revoked. The Section 129 Determination was based on two findings: 1) likely past dumping, and 2) the USDOC's volume analysis, incorporated from the original sunset review. Argentina submits that both of these findings were devoid of a sufficient factual basis. In Argentina's view, therefore, neither of these two findings could support the USDOC's order-wide determination for Argentina. Below, we examine these two allegations of Argentina in turn.

## 2. USDOC's Analysis of Likely Past Dumping

### (a) Arguments of Parties

#### (i) *Argentina*

7.64 First, Argentina contends that the USDOC used the wrong standard in its past dumping analysis. The USDOC based its analysis on *likely* past dumping during the original sunset review, which is at odds with Article 11.3. According to Argentina, likely dumping in the past can not be the basis for a prospective likelihood analysis in a sunset review. Second, Argentina takes issue with the price comparison that the USDOC carried out in its likely past dumping analysis. In this regard, Argentina first argues that the USDOC erred by comparing Acindar's export prices to the United States with the US prices obtained from a publication. This, according to Argentina, is inconsistent with the definition of dumping under Article 2 of the Agreement. Argentina also asserts that the USDOC failed to make a product-specific comparison. More specifically, Argentina disagrees with the United States' position that the USDOC took into consideration relevant factors for price comparison, and argues that, based on the methodology used, the USDOC could not even know what specific products it was comparing. Furthermore, Argentina contends that the USDOC did not take account of the differences in the levels of trade in this price comparison. Third, Argentina argues that the USDOC improperly interpreted a statement in Acindar's financial statements to support its conclusion that this company was likely to continue or resume dumping. Regarding the financial statements, Argentina also argues that since OCTG constituted less than 1 per cent of Acindar's total production, the USDOC's conclusions drawn from this company's financial statements can not be representative of this industry in Argentina.

#### (ii) *United States*

7.65 The United States disagrees that the legal standard applied by the USDOC was WTO-inconsistent. The United States asserts that Article 11.3 does not prescribe a specific methodology regarding investigating authorities' determinations pertaining to the likelihood of continuation or recurrence of dumping. It follows that in cases where respondents can not provide information regarding their actual past behaviour, the investigating authorities can rely on likely past behaviour in determining likelihood of continuation or recurrence of dumping. According to the United States, Argentina's argument that the USDOC's approach was inconsistent with the definition of dumping under Article 2 of the Agreement can not be supported because the USDOC was not calculating a margin of dumping in the sunset review at issue. Regarding the price comparison, the United States acknowledges that the factors cited by Argentina could have affected the price comparison. The

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<sup>48</sup>Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada* ("US – Softwood Lumber VI (Article 21.5 – Canada)"), WT/DS277/AB/RW, adopted 9 May 2006, para. 103.

United States argues, however, that because Acindar's financial statements did not provide data on an OCTG-specific level and Acindar was unable to report its OCTG costs, the USDOC relied on "available data". Additionally, the United States contends that its comparisons did account for the factors that were most critical for price comparisons. Finally, the United States contends that the USDOC's use of Acindar's financial statements to conclude that Acindar planned to continue exporting OCTG to the United States was proper.

(b) Arguments of Third Parties

(i) *China*

7.66 China contends that the USDOC acted inconsistently with the notion of dumping as described in Article 2 of the Agreement, which also applies in sunset reviews, by comparing Acindar's export prices with the prevailing US prices. The USDOC should have compared Acindar's export prices with its normal value. China also asserts that the standard that the USDOC applied with regard to the past dumping determination was WTO-inconsistent. According to China, at the time the USDOC made its Section 129 Determination, whether Acindar was dumping during the period of review was a matter of fact, as opposed to an event that was or was not likely to occur. If the USDOC decided to rely on whether Acindar dumped in that period, it should have made a clear factual finding, not a finding that Acindar was likely dumping. In China's view, the factual basis of the USDOC's Section 129 Determination regarding the likelihood of continuation or recurrence of dumping, i.e. that there was likely dumping in the past and that imports declined after the imposition of the order, was not adequate.

(ii) *European Communities*

7.67 The European Communities argues that "although a sunset review determination is prospective, it must have as a foundation a valid historical determination of dumping". Without a calculation of dumping in the past, one can not properly talk about continuation or recurrence of that dumping. According to the European Communities, basing a sunset determination on a determination of past "likely" dumping runs against the provisions of the Agreement.

(iii) *Japan*

7.68 Japan submits that the USDOC's finding that Acindar was likely dumping in the past was speculative and hence it could not be the basis of a sunset determination.

(c) Evaluation by the Panel

7.69 In considering Argentina's allegation that the USDOC's finding of and reliance upon likely past dumping was inconsistent with Article 11.3, we first recall the relevant legal obligations, followed by the pertinent text of the Section 129 Determination.

7.70 We recall that Article 11.3 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 omitted)

7.71 We recall (*supra*, para. 7.34) the well-established substantive obligations that Article 11.3 imposes on the investigating authorities in sunset reviews. Article 11.3 stipulates that investigating authorities may maintain an anti-dumping measure past five years of imposition only if they make a determination, in a review initiated before the expiry of that period, that dumping and injury are likely to continue or recur in the case of the revocation of the measure. Although Article 11.3 does not prescribe a specific methodology through which such likelihood determinations have to be made, it is well established that the authorities have to base their likelihood determinations in sunset reviews on reasoned conclusions drawn from an adequate factual basis premised on positive evidence.

7.72 The USDOC's Section 129 Determination reads in pertinent parts:

The Department compared the unit prices of specific types of Acindar's U.S. OCTG shipments to average prices for the corresponding OCTG sold in the United States during these years...Our analysis indicates that Acindar's U.S. selling prices during the sunset period were substantially lower than prevailing U.S. market prices for the corresponding OCTG products. Based upon the foregoing, and in the absence of usable cost data from Acindar, we find that Acindar likely was dumping subject OCTG during the original sunset review period...Moreover, these Acindar sales occurred at a time when Acindar was showing losses on its financial statements; the financial statements of other significant OCTG producers, such as Siderca, Lone Star, Maverick, and North Star also were showing losses... These losses are an indication that the OCTG market was depressed. The combination of Acindar selling in the United States at below market prices at the end of the sunset period and the depressed OCTG market indicates that Acindar likely was dumping significantly in the U.S. market.<sup>49</sup> (Footnote omitted, emphasis added)

7.73 The Section 129 Determination demonstrates that the USDOC found that there was likely past dumping during the period of review. We note, and the United States does not disagree, that the USDOC's finding regarding likely past dumping was solely based on a comparison of the export prices of Acindar, one of the two Argentine exporters who participated in the sunset review at issue, with the prevailing OCTG prices in the US market during the period of review. Since the USDOC found the cost data submitted by the other Argentine exporter, Siderca, to be unreliable, it declined to use that data in its determination of likely past dumping. Our evaluation regarding the USDOC's finding of likely past dumping will, therefore, also be limited to the USDOC's determination with regard to Acindar.

7.74 The parties' arguments raise two important issues. The first issue is whether the USDOC's finding of likely past dumping was a *determination of dumping*. The second issue is whether the USDOC's reliance upon a finding of *likely* past dumping as one of the bases of its determination of the likelihood of continuation or recurrence of dumping was consistent with Article 11.3 of the Agreement. In our view, however, a definitive resolution of these questions regarding the USDOC's Section 129 Determination is not necessary to our assessment of Argentina's claim. This flows from our view that even if this was *not* a *determination of dumping* as the United States asserts, and even if relying on *likely* past dumping was appropriate – issues which we do not here address – the USDOC's analysis of *likely past dumping* lacked a sufficient factual basis.

7.75 Whether or not the USDOC's finding that "Acindar likely was dumping significantly in the US market" was a *determination of dumping* subject to the full requirements set out in Article 2, the fact remains that the USDOC carried out an analysis relating to the concept of *dumping*. This is evident from the plain language of the USDOC's Section 129 Determination. In order for the USDOC's finding to support a determination of likely continuation or recurrence of dumping pursuant to Article 11.3, the likely past dumping referred to in the USDOC's Section 129 Determination would

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<sup>49</sup> Section 129 Determination (Exhibit ARG-16 at 7-8).

have at a minimum to relate to the general concept of dumping that is reflected in Article 2 of the Agreement.

7.76 Article 2.1 of the Agreement, which applies throughout the Agreement<sup>50</sup>, sets out the two definitional components of dumping, i.e. normal value and export price. Article 2.1 stipulates that dumping occurs when an exporter exports its product at a price that is lower than its normal value. As Article 2.1 makes clear, the starting point for normal value is "the comparable price, in the ordinary course of trade" for the like product when destined for consumption in the exporting country.<sup>51</sup> Thus, the concept of dumping is, in the first instance, a comparison of home market and export prices. Only in the circumstances set forth in Article 2.2 may an investigating authority look to alternative bases to home market prices, such as costs, when determining normal value.

7.77 In the sunset review at issue, the USDOC did not *even ask* Acindar to provide information regarding its normal value and export price. Rather, it restricted itself to asking for certain cost information and, when that cost information was not provided, compared Acindar's export prices to the United States, obtained from the US customs authorities, with the prevailing prices in the US market. The failure to seek information about Acindar's home market prices means that the USDOC made a finding of likely dumping without making any effort to obtain information that is essential to the core principle of dumping as a price-to-price comparison. We do not see how a finding of *likely past dumping* could have a sufficient factual basis if it did not take into account at a bare minimum these elementary aspects of the concept of *dumping* as that term is used in the Anti-dumping Agreement.

7.78 The United States contends that "[the USDOC] did not seek Argentine producers' export prices to the United States because it was aware of the brevity of the time available to conduct the proceeding".<sup>52</sup> We do not consider the allegedly limited amount of time the USDOC had in order to complete the Section 129 proceedings at issue could absolve the USDOC from any of its obligations under the Anti-dumping Agreement, let alone an obligation as fundamental as observing the definition of *dumping* set out under Article 2.1 of the Agreement. The United States argues that the USDOC knew that "Acindar did not have a viable home market or third country sales".<sup>53</sup> We note, however, that the memorandum that the United States cites in order to prove this point pertains to an administrative review carried out after the period of review for the original sunset review and hence for the Section 129 proceedings at issue. It therefore is not germane to the period of review. Moreover, because this memorandum concerned only a one-year period, even if it pertained to one of the five years of the period of review, it would not, in our view, suffice to demonstrate that there were

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<sup>50</sup> In this regard, we find support in the following finding of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*:

We agree with Japan that the words "[f]or the purpose of this Agreement" in Article 2.1 indicate that this provision describes the circumstances in which a product is to be considered as being dumped for purposes of the entire *Anti-Dumping Agreement*, including Article 11.3. This interpretation is supported by the fact that Article 11.3 does not indicate, either expressly or by implication, that "dumping" has a different meaning in the context of sunset reviews than in the rest of the *Anti-Dumping Agreement*. Therefore, Article 2.1 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 suggest that the question for investigating authorities, in making a likelihood determination in a sunset review pursuant to Article 11.3, is whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping of the product subject to the duty (that is, to the introduction of that product into the commerce of the importing country at less than its normal value)... (footnote omitted)

Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("US – Corrosion-Resistant Steel Sunset Review"), WT/DS244/AB/R, adopted 9 January 2004, para. 109.

<sup>51</sup> See also Article VI.1 of the General Agreement on Tariffs and Trade 1994.

<sup>52</sup> Response of the United States to Question 10(b) from the Panel.

<sup>53</sup> Response of the United States to Question 11(a) from the Panel.

no viable home market or third country sales throughout the period of review. This does not justify the USDOC's failure to seek information relating to the Argentine exporters' home market sales. We therefore reject this argument too.

7.79 We recall that Argentina raised two more arguments regarding the alleged inconsistency of the USDOC's determination of likely past dumping. These arguments concern the mechanics of the comparison carried out by the USDOC between Acindar's export prices and the prevailing US prices, and the inferences the USDOC made from Acindar's financial statements. Given our finding that the USDOC's finding of likely past dumping lacked a sufficient factual basis because it was based on a comparison of Acindar's export prices with the prevailing prices in the US market, we need not and do not make any further findings regarding the manner in which the USDOC carried out such comparison.

7.80 We now turn to the second factual underpinning of the USDOC's order-wide likelihood determination, i.e. the volume analysis.

### **3. USDOC's Volume Analysis**

#### **(a) Arguments of Parties**

##### *(i) Argentina*

7.81 Argentina submits that the USDOC's volume analysis in its Section 129 Determination is part of its measure taken to comply with the DSB recommendations and rulings because the USDOC relied on this analysis in its determination. Argentina notes that in its Section 129 Determination, the USDOC incorporated its volume analysis from the original sunset review. Argentina contends that the investigating authorities have to analyze the reasons behind the decline in imports before concluding that the decline demonstrates that exporters cannot export the subject product without dumping. In this sunset review, Argentine exporters tried to explain to the USDOC that the decline in the volume of imports stemmed from other factors, but the USDOC did not address these comments in its determination. According to Argentina, therefore, because it disregarded positive evidence submitted by the exporters regarding the reasons for the decline in the volume of imports, the USDOC's Section 129 Determination fell short of the obligation to arrive at a reasoned conclusion on the basis of positive evidence under Article 11.3.

##### *(ii) United States*

7.82 The United States argues that, because the original panel and the Appellate Body did not make any findings regarding the USDOC's volume analysis in the original proceedings, the incorporation of this analysis into the Section 129 Determination can not make it part of the measure taken to comply with the DSB recommendations and rulings. According to the United States, it would be unfair for the United States to be told for the first time in a DSU Article 21.5 proceeding that its volume analysis is WTO-inconsistent because the United States could then be faced with a request for suspension of concessions without being granted a reasonable period of time to comply. Regarding the comments made by the Argentine exporters concerning the volume of imports, the United States asserts that these comments were not germane to the implementation by the United States of the DSB recommendations and rulings in these proceedings because, according to the United States, they addressed a question that was not relevant to the Section 129 proceedings at issue.

(b) Arguments of Third Parties

(i) *China*

7.83 China argues that the USDOC's reliance on the volume figures from the original sunset review, without explaining why the decrease in the volume of imports resulted from the imposition of the measure at issue, contradicted with investigating authorities' obligation to make a reasoned determination on the basis of positive evidence under Article 11.3.

(ii) *Japan*

7.84 According to Japan, to the extent that there is a close link between the USDOC's volume analysis and the DSB recommendations and rulings in the original proceedings, this Panel can reconsider whether the USDOC's volume analysis in its Section 129 Determination brings its measure into compliance with the United States' WTO obligations. Without taking a position regarding the factual aspects of Argentina's claim, Japan argues that the fact that the original panel did not make a finding on the issue of the volume of dumped imports in the original proceedings cannot excuse the USDOC, in the implementation of the DSB recommendations and rulings, from its obligation to make a determination on the basis of all the facts on the record, including the newly-submitted evidence. In other words, the USDOC should have evaluated its volume determination from the original sunset review in conjunction with the evidence on the record of the Section 129 proceedings. In Japan's view, therefore, by not doing that, the USDOC acted inconsistently with Article 11.3.

(iii) *European Communities*

7.85 The European Communities contends that the USDOC's volume analysis in its Section 129 Determination is part of the measure taken by the United States to comply with the DSB recommendations and rulings in these proceedings. This is because the volume analysis is among the factors on which the Section 129 Determination is premised.

(iv) *Mexico*

7.86 Mexico argues that it is clear that the USDOC specifically referenced its volume analysis from the original sunset review in the Section 129 Determination at issue. It follows that the USDOC's volume analysis in its Section 129 Determination is part of the measure taken by the United States to comply with the DSB recommendations and rulings. Mexico further submits that the USDOC's volume analysis was inconsistent with Article 11.3 because it failed to look into the causes of the decline in the volume of dumped imports.

(c) Evaluation by the Panel

(i) *Introduction*

7.87 We recall that the USDOC's order-wide determination of likelihood of continuation or recurrence of dumping from Argentina was premised on two findings: (1) likely past dumping, and (2) the USDOC's volume analysis, incorporated from the original sunset review. We found above that the first premise of the USDOC's determination, i.e. likely past dumping, lacked a sufficient factual basis. We will now examine the USDOC's volume analysis. In this context, we will first address the issue of whether the USDOC's volume analysis is part of the measure taken by the United States to comply with the DSB recommendations and rulings and hence whether it is properly before us. If so, subsequently, we will evaluate the consistency with Article 11.3 of the Agreement of the USDOC's volume analysis.

(ii) *Is the USDOC's Volume Analysis Part of the Measure Taken to Comply With the DSB Recommendations and Rulings?*

7.88 Argentina submits that the volume analysis is an integral part of the USDOC's Section 129 Determination as the USDOC specifically relied on it in its Determination. Argentina submits that by relying in its Section 129 Determination on its volume analysis from the original sunset review, the USDOC subjected that aspect of its Determination to WTO scrutiny. The United States will, therefore, not be prejudiced if the Panel addresses Argentina's claim in these proceedings. Argentina notes that it has consistently argued that the USDOC's volume analysis was WTO-inconsistent, hence it would be prejudiced if the Panel declines to address its claim in these proceedings. The United States notes that the original panel did not make a finding of inconsistency with regard to the USDOC's volume analysis in the original proceedings. Furthermore, the United States notes that Argentina requested the original panel to make a finding regarding the USDOC's volume analysis and the panel declined to make such a finding. Finally, the United States notes that Argentina could appeal the original panel's disinclination to make a finding on the volume issue and its exercise of judicial economy, which Argentina chose not to do. For these reasons, the United States submits that Argentina is now precluded from raising the USDOC's volume analysis in the original sunset review which has been incorporated by reference into the Section 129 Determination at issue without any changes.<sup>54</sup> According to the United States, it would be unfair for the United States to be told for the first time in these DSU Article 21.5 proceedings that the USDOC's volume analysis was WTO-inconsistent. According to the United States, this is because it would have no reasonable period of time to bring its measure into conformity with the Agreement and would be subject to potential suspension of concessions as a result of a finding of breach that was not in the original report.

7.89 The Panel finds it useful to commence its analysis by recalling the original panel's findings regarding the issue of volume. In the original proceedings, Argentina raised a claim, and the parties submitted arguments, regarding the WTO-inconsistency of the USDOC's volume analysis. The original panel, having found the USDOC's determination to be WTO-inconsistent on other grounds, did not address Argentina's allegations pertaining to the volume analysis in its interim report.<sup>55</sup> That is, the original panel applied judicial economy in this regard.<sup>56</sup> During the interim review, Argentina invited the original panel to make findings about the USDOC's volume analysis and the panel declined this request. In its final report, the panel noted that it made the relevant factual findings which, in case Argentina appealed the panel's decision, could allow the Appellate Body to complete the panel's analysis, if necessary.<sup>57</sup> Argentina did not appeal the panel's decision to apply judicial economy with regard to Argentina's claim on the USDOC's volume analysis. In its Section 129 Determination, the USDOC incorporated this volume analysis from the original sunset review. The Section 129 Determination provides in relevant parts:

Based upon this information and argument, as well as findings on import volumes during 1995-2000 from the original sunset review, we continue to find that revocation of the order would be likely to lead to continuation or recurrence of dumping.<sup>58</sup>  
(emphasis added)

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<sup>54</sup> Response of the United States to Question 17(b) from the Panel, para. 75.

<sup>55</sup> Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("US – Oil Country Tubular Goods Sunset Reviews"), WT/DS268/R and Corr.1, adopted 17 December 2004, modified by Appellate Body Report, WT/DS268/AB/R, para. 7.221.

<sup>56</sup> Both parties agree that the original panel applied judicial economy with respect to the USDOC's volume analysis. See, Response of Argentina to Question 17(a) from the Panel; Response of the United States to Question 17(a) from the Panel.

<sup>57</sup> Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("US – Oil Country Tubular Goods Sunset Reviews"), WT/DS268/R and Corr.1, adopted 17 December 2004, modified by Appellate Body Report, WT/DS268/AB/R, para. 6.11.

<sup>58</sup> Section 129 Determination (Exhibit ARG-16 at 1).

In making our likelihood determination, we also relied on our previous finding regarding the volume of imports of subject merchandise for the period before and the period after the issuance of the antidumping duty order.<sup>59</sup> (emphasis added)

In assessing likelihood, we also rely on our previous finding regarding the volume of imports of subject merchandise for the period before and the period after the issuance of the antidumping order. In the original sunset review, we found that after imposition of the order, import volumes significantly decreased from pre-order levels. Declining import volumes after, and apparently resulting from, imposition of antidumping order indicate that exporters would need to dump to sell at pre-order levels.<sup>60</sup> (Footnote omitted, emphasis added)

7.90 We note, and parties do not disagree, that, in addition to its finding regarding likely past dumping, the USDOC relied on its volume analysis from the original sunset review as the basis of its new sunset determination. The issue before us here is whether the volume analysis used by the USDOC in its Section 129 Determination – the basis of an issue that was raised and argued in the original proceedings, but on which the panel did not make a finding – is part of the measure taken to comply by the United States and is therefore properly before us.

7.91 We note that the United States identifies the measure taken to comply as the new analysis carried out by the USDOC in these Section 129 proceedings.<sup>61</sup> According to the United States, since the volume analysis was incorporated by reference, without any change, and the original panel made no findings with respect to this analysis, it is not part of the measure taken to comply. We recall that the function of a compliance panel under Article 21.5 of the DSU is to assess the existence or WTO-consistency of measures taken by a Member to comply with the DSB recommendations and rulings. Thus, as a compliance panel, we base our assessment on the measure taken to comply with the DSB recommendations and rulings.<sup>62</sup> The United States describes the measure taken to comply with the recommendations and rulings of the DSB in a certain manner. We do not consider, however, that we are bound by such description. In compliance proceedings under Article 21.5 of the DSU, it is for the Panel, and not the parties to the dispute, to determine what constitutes the measure taken to comply.<sup>63</sup> As the United States itself acknowledges<sup>64</sup>, the text of the Section 129 Determination at issue makes it clear that one of the two main underpinnings of the USDOC's order-wide likelihood determination was the volume analysis carried over from the original sunset review. The USDOC based its order-wide determination on its finding regarding likely past dumping as well as the volume analysis from the original sunset review. As such, we consider the volume analysis from the original sunset review to have become an integral part of the Section 129 Determination. In our view, therefore, the volume analysis from the original sunset review is part of the measure taken to comply by the United States and hence is properly before us in these proceedings.

7.92 The United States contends that because the original panel did not make any finding regarding the USDOC's volume analysis and the panel's disinclination to make such a finding was not

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<sup>59</sup> Section 129 Determination (Exhibit ARG-16 at 6).

<sup>60</sup> Section 129 Determination (Exhibit ARG-16 at 11).

<sup>61</sup> Response of the United States to Question 17(b) from the Panel, para. 76.

<sup>62</sup> Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* ("US – Shrimp (Article 21.5 – Malaysia)"), WT/DS58/AB/RW, adopted 21 November 2001, para. 87.

<sup>63</sup> In this regard, we find support in Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU* ("US – Softwood Lumber IV (Article 21.5 – Canada)"), WT/DS257/AB/RW, adopted 20 December 2005, para. 77; and in Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India* ("EC – Bed Linen (Article 21.5 – India)"), WT/DS141/AB/RW, adopted 24 April 2003, para. 78.

<sup>64</sup> See, for instance, First Written Submission of the United States, para. 44.

appealed by Argentina, the latter is now precluded from raising the same claim before us in these compliance proceedings. We disagree. The fact that a panel, in an original dispute settlement proceeding, did not make findings regarding certain issues relating to the investigating authorities' determination that were raised and argued before the panel, can not preclude a compliance panel, in its assessment under Article 21.5 of the DSU of the measures taken to comply with the DSB recommendations and rulings, from reviewing those aspects which have been incorporated by the authorities in the measure taken to comply.

7.93 To support its argument, the United States cites the Appellate Body's decision in *EC – Bed Linen (Article 21.5 – India)*. The United States argues that the issue being analogous, the reasoning of the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* is equally applicable in these proceedings. We find it useful to first note the facts of that dispute and then compare them to the facts presented in these proceedings. In the original proceedings preceding the compliance panel's decision in *EC – Bed Linen (Article 21.5 – India)*, India raised a claim regarding the EC investigating authorities' evaluation of other factors under Article 3.5 of the Anti-dumping Agreement. The panel concluded that India failed to make a *prima facie* case and rejected the claim. The European Communities, in its implementation of the DSB recommendations and rulings, did not make any changes to its evaluation of other factors. Before the compliance panel, India re-raised this claim. The compliance panel declined to make a ruling with respect to a claim that was raised by the complaining party in the original proceedings and rejected by the original panel. This, in that panel's view, would give the complaining party a second chance to raise a claim which it had raised during the original proceedings and failed to pursue successfully.<sup>65</sup> Furthermore, the panel, in response to India's assertion, noted that the original panel had not applied judicial economy with respect to India's claim under Article 3.5, but had dismissed it on the grounds that India had failed to make a *prima facie* case.<sup>66</sup>

7.94 On appeal by India, the Appellate Body agreed with the compliance panel and opined that India could not re-raise, in DSU Article 21.5 proceedings, a claim that it had raised in the original proceedings, which was disposed of by the panel and not appealed by the parties.<sup>67</sup> The Appellate Body recognized that in some cases, depending on the impact of the steps taken in the implementation of the DSB recommendations and rulings, the investigating authorities may have to change aspects of their determinations which are outside the DSB recommendations and rulings. It recognized, for instance, that should the EC authorities have to change their dumping determinations in order to implement the DSB recommendations and rulings, that new dumping determination could theoretically necessitate a new causality determination.<sup>68</sup> When this is not the case, parts of the re-determination that merely incorporate elements of the original determination would not automatically become an inseparable part of the measure taken to comply.<sup>69</sup>

7.95 Turning to the facts presented in these proceedings, we recall that the original panel in these proceedings found that the USDOC's original sunset determination was devoid of a sufficient factual basis. It noted that the USDOC based its sunset determination on two findings, i.e. that dumping continued over the life of the measure and that import volumes declined following the imposition of the measure. The original panel then found that the first finding was not supported by the facts and, without addressing Argentina's claim regarding the USDOC's volume analysis, found the

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<sup>65</sup> Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 of the DSU by India* ("EC – Bed Linen (Article 21.5 – India)"), WT/DS141/RW, adopted 24 April 2003, modified by Appellate Body Report, para. 6.43.

<sup>66</sup> *Id.*, para. 6.44.

<sup>67</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 by India* ("EC – Bed Linen (Article 21.5 – India)"), WT/DS141/AB/RW, adopted 24 April 2003, para. 97.

<sup>68</sup> *Id.*, para. 86.

<sup>69</sup> *Id.*

determination to be inconsistent with Article 11.3 of the Agreement.<sup>70</sup> We note that in this regard, the facts of these proceedings are significantly different from those in *EC – Bed Linen (Article 21.5 – India)*. As the United States also observes<sup>71</sup>, unlike the original panel in *EC – Bed Linen (Article 21.5 – India)*, the original panel in these proceedings applied judicial economy in not addressing Argentina's claim regarding the USDOC's volume analysis in the original sunset review. It declined to make such a finding.

7.96 We are therefore of the view that the facts of *EC – Bed Linen (Article 21.5 – India)* are distinguishable from the case before us, and that, for the reasons we have already given, the USDOC's volume analysis forms part of the measure taken to comply in these proceedings.

7.97 In order to implement the DSB recommendations and rulings, the USDOC made the Section 129 Determination at issue in which it incorporated its volume analysis from the original sunset review. In these DSU Article 21.5 proceedings, Argentina argues that the USDOC's Section 129 Determination lacks a sufficient factual basis. In this regard, Argentina challenges both the USDOC's likely past dumping determination and its volume analysis incorporated from the original sunset review. We therefore have to assess whether the Section 129 Determination is premised on a sufficient factual basis with respect to the USDOC's volume analysis.

(iii) *Was the USDOC's Volume Analysis Consistent With Article 11.3 of the Agreement?*

7.98 We cited above (*supra*, para. 7.34) the relevant legal obligation that applies to the investigating authorities' determination in sunset reviews under Article 11.3 of the Agreement. Turning to the substance of Argentina's claim, we note that the part of the original sunset review dealing with the volume of imports, incorporated into the USDOC's Section 129 Determination, states that the volume of dumped imports declined following the imposition of the anti-dumping measure at issue. The Section 129 Determination reads in relevant part:

In assessing likelihood, we also rely on our previous finding regarding the volume of imports of subject merchandise for the period before and the period after the issuance of the antidumping order. In the original sunset review, we found that after imposition of the order, import volumes significantly decreased from pre-order levels. Declining import volumes after, and apparently resulting from, imposition of antidumping order indicate that exporters would need to dump to sell at pre-order levels.<sup>72</sup> (Footnote omitted)

7.99 In the USDOC's Section 129 Determination, no explanation has been provided as to the possible causes of this decline, except the statement that "[d]eclining import volumes after, and apparently resulting from, imposition of antidumping order indicate that exporters would need to dump to sell at pre-order levels". This statement seems to suggest that declining volume of imports following the imposition of the measure necessarily means that exporters will dump again if the measure is revoked. We consider, however, that there may be other possible explanations for such decline, depending on the circumstances of each review. We note that the issue of the relevance of a decline in the volume of dumped imports following the imposition of an anti-dumping measure was raised before the Appellate Body on more than one occasion. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body opined:

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<sup>70</sup> Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("US – Oil Country Tubular Goods Sunset Reviews"), WT/DS268/R and Corr.1, adopted 17 December 2004, modified by Appellate Body Report, WT/DS268/AB/R, para. 7.221.

<sup>71</sup> Response of the United States to Question 17(a) from the Panel.

<sup>72</sup> Section 129 Determination (Exhibit ARG-16 at 11).

The cessation of imports in the second scenario and the decline in import volumes in the third scenario could well have been caused or reinforced by changes in the competitive conditions of the market-place or strategies of exporters, rather than by the imposition of the duty alone. Therefore, a case-specific analysis of the factors behind a cessation of imports or a decline in import volumes (when dumping is eliminated) will be necessary to determine that dumping will recur if the duty is terminated.<sup>73</sup> (emphasis added)

7.100 In *US – Anti-Dumping Measures on Oil Country Tubular Goods*, the Appellate Body stated:

Such a presumption cannot be the sole basis for a determination of "recurrence" of dumping. A company's strategy and ability to increase or decrease its exports to particular markets depend on a variety of market conditions, such as, in particular, the opportunities available in different markets and the competitive conditions in the market place. Therefore, unless all relevant factors are taken into account, there may not be an objective evaluation in such cases of the causes of the variations in import volumes in the importing Member's market.<sup>74</sup>

[T]he investigating authority has a duty to seek out information on relevant factors and evaluate their probative value in order to ensure that its determination is based not on presumptions, but on a sufficient factual basis.<sup>75</sup>

7.101 In our view, the USDOC's finding regarding the decline in the volume of imports was not based on a thorough evaluation of the possible causes of such decline. The decline could have resulted from a variety of other factors, which could theoretically indicate no likelihood of continuation or recurrence of dumping. In other words, it is possible that despite a decline in the volume of imports, there may not be likelihood of continuation or recurrence of dumping. In fact, Siderca, in its response to the USDOC's questionnaire, attempted to explain why the decline in the volume of Siderca's exports to the United States following the imposition of the measure at issue did not necessarily mean that Siderca could not export with the measure in place.<sup>76</sup> The United States contends that Siderca's comments were weakly supported and did not explain why Siderca stopped shipping to the United States.<sup>77</sup> The United States may or may not be correct in its proposition. We are by no means suggesting that Siderca's arguments should have been accepted by the USDOC. The fact remains, however, that the Section 129 Determination fails to examine potential reasons, other than a likelihood of continuation or recurrence of dumping, that could have triggered the decline in the volume of imports. This is not, in our view, the kind of determination that would be made by an

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<sup>73</sup> Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("US – Corrosion-Resistant Steel Sunset Review"), WT/DS244/AB/R, adopted 9 January 2004, para. 177.

We are cognizant that the Appellate Body's finding in this regard concerned the provisions of the US Sunset Policy Bulletin. Given the similarity of the substantive issue, however, we consider the Appellate Body's reasoning relevant to support our finding regarding the USDOC's volume analysis.

<sup>74</sup> Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, ("US – Anti-Dumping Measures on Oil Country Tubular Goods"), WT/DS282/AB/R, adopted 28 November 2005, para. 200.

We are cognizant that the Appellate Body's finding in this regard concerned the provisions of the Sunset Policy Bulletin of US law. Given the similarity of the substantive issue, however, we consider the Appellate Body's reasoning relevant to support our finding regarding the USDOC's volume analysis.

<sup>75</sup> *Id.*, para. 201.

We are cognizant that the Appellate Body's finding in this regard concerned the provisions of the Sunset Policy Bulletin of US law. Given the similarity of the substantive issue, however, we consider the Appellate Body's reasoning relevant to support our finding regarding the USDOC's volume analysis.

<sup>76</sup> Siderca's Response to the USDOC's Questionnaire (Exhibit ARG- 15 at 7-10).

<sup>77</sup> Comments of the United States on Argentina's Response to Question 18(b) from the Panel.

unbiased and objective investigating authority. The USDOC's determination regarding the decline in the volume of imports lacks a sufficient factual basis.

#### **4. Conclusion**

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

7.103 We note that Argentina also made an allegation regarding the treatment by the USDOC of the cost data submitted by Siderca. Having concluded that the USDOC's order-wide likelihood determination was devoid of a sufficient factual basis, hence inconsistent with Article 11.3 of the Agreement, we need not and do not make any findings under Article 11.3 with regard to the treatment of the data submitted by Siderca.

7.104 In its First Written Submission, Argentina cited Article 11.1 of the Agreement in addition to Article 11.3 in connection with its claims regarding the USDOC's finding of likely past dumping and its volume analysis. Argentina has not, however, developed any specific arguments regarding Article 11.1. Considering that Argentina has not developed Article 11.1-specific arguments, we do not consider that Argentina has established its claim under this provision and we do not make any findings in this regard.

#### **E. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE AGREEMENT**

##### **1. Arguments of Parties**

###### **(a) Argentina**

7.105 First, Argentina argues that the USDOC failed to provide Argentine exporters with adequate opportunity to present evidence, inconsistently with Article 6.1 of the Agreement. More specifically, Argentina asserts that the USDOC failed to issue supplemental questionnaires; to issue preliminary findings; to prepare a schedule that would allow the interested parties to submit comments; to request clarification or further comments from Argentine exporters on certain issues and to hold a hearing. Second, Argentina asserts that the cited inconsistencies with Article 6.1 also violated the general obligation under Article 6.2 to give interested parties full opportunity to defend their interests. Argentina also argues that failure to hold a hearing violated the specific obligation under Article 6.2. Third, Argentina asserts that the USDOC acted inconsistently with Article 6.4 by not informing the Argentine exporters of the existence of certain information that it had used in its Section 129 Determination and which was relevant to the presentation of the Argentine exporters' cases, until after that Determination was issued on 16 December 2005. Furthermore, the USDOC violated Article 6.4 by accepting the unsolicited comments submitted by the petitioners. Fourth, Argentina contends that the USDOC violated Article 6.5.1 by failing to request the non-confidential summaries of certain confidential information submitted by the petitioners. More specifically, Argentina argues that the non-confidential summaries were not of the kind that would allow the Argentine exporters to have a reasonable understanding of the content of the confidential information. Fifth, Argentina contends that the USDOC acted inconsistently with Article 6.6 by failing to verify the accuracy of Siderca's cost information before deciding to disregard it. Sixth, Argentina asserts that the USDOC acted inconsistently with Article 6.8 of the Agreement and certain provisions of Annex II with regard to its treatment of Siderca's and Acindar's information. More specifically in this respect, Argentina argues that the USDOC acted inconsistently with paragraphs 3 and 5 of Annex II by disregarding the information submitted by Siderca. It acted inconsistently with paragraph 6 of Annex II by not informing Siderca and Acindar of the reasons for the rejection of their information and not giving them an opportunity to provide further explanations. Argentina also contends that the USDOC did

not use the most appropriate information after deciding to disregard the information submitted by the Argentine exporters. Finally, Argentina argues that the USDOC violated Article 6.9 of the Agreement by failing to inform the Argentine exporters of the essential facts under consideration which formed the basis of its Section 129 Determination.

(b) United States

7.106 The United States contends that, in accordance with Article 6.1 of the Agreement, all interested parties in these Section 129 proceedings were given ample opportunity to submit in writing the evidence they deemed relevant. With respect to the specific allegations raised by Argentina, the United States argues that Article 6.1 does not require supplemental questionnaires, preliminary determinations, hearings or the issuance of a schedule. The United States submits that no hearing was requested in the Section 129 proceedings at issue, thus no violation of Article 6.2 occurred. The United States asserts that Argentina failed to make a *prima facie* case under Article 6.4. According to the United States, the USDOC made available to all interested parties all documents submitted by interested parties and obtained by the US authorities to the extent practicable, as required by Article 6.4. With regard to five memoranda placed on the file the day the Section 129 Determination was issued, the United States asserts that they were placed on the file as soon as practicable. With regard to Argentina's claim under Article 6.5.1, the United States argues that under US law, counsel for Argentine exporters could have access to all confidential information submitted by other interested parties. There was, therefore, no violation of Article 6.5.1. The United States submits that, in response to the USDOC's request for actual costs, Siderca only provided estimated costs. These estimated costs were inconsistent with the other cost information in the file, and because of this, the United States contends that the USDOC could not use the data. There was, therefore, no violation of Article 6.6. The United States asserts that the USDOC did not resort to facts available under Article 6.8 with regard to Siderca. The consequence of Siderca providing estimated costs was the USDOC making no company-specific determination regarding the likelihood of continuation or recurrence of dumping by Siderca. The USDOC's sunset determination was based on findings of likely dumping for Acindar and decreased volume of imports. There was, therefore, no violation of Article 6.8 and Annex II of the Agreement. The United States contends that Argentina failed to make a *prima facie* case regarding its claim under Article 6.9.

**2. Arguments of Third Parties**

(a) Japan

7.107 Japan submits that Article 6.2 of the Agreement sets out an overarching due process requirement that has to be observed by the investigating authorities in investigations and sunset reviews. In Japan's view, a measure that violates the following subparagraphs of Article 6 which address specific aspects of this general due process requirement would also conflict with Article 6.2. Japan then observes the claims Argentina raises under Article 6 and, without taking a position regarding the factual underpinnings of these claims, requires the Panel to review these facts and to decide whether these specific paragraphs of Article 6 and therefore Article 6.2 have been violated by the USDOC in the proceedings at issue. With regard to Argentina's claim under Article 6.2, Japan argues that the USDOC acted in a WTO-inconsistent way by failing to inform the interested parties that they had the right to request a hearing in these proceedings. Japan also contends that the USDOC acted inconsistently with Article 6.9 by failing to identify the essential facts that established the basis of its final determination.

(b) Korea

7.108 Korea supports Argentina's claims under Articles 6.1, 6.2, 6.4, 6.5.1, 6.6, 6.8 and 6.9 of the Agreement. According to Korea, all these procedural requirements of Article 6 concern the interested

parties' right to fundamental due process, which was not observed properly in the sunset review at issue.

**3. Evaluation by the Panel**<sup>78</sup>

(a) Alleged Violations of Articles 6.1 and 6.2

7.109 Argentina argues that the USDOC failed to give the Argentine exporters an ample opportunity to submit evidence, inconsistently with Article 6.1 because it:

- failed to issue supplemental questionnaires, despite the fact that it had some questions about the information submitted;
- failed to issue a preliminary re-determination;
- failed to establish a schedule to allow interested parties to submit comments, including rebuttal comments, to the USDOC;
- failed to request clarification or additional documentation from the responding parties; and
- failed to hold a hearing.<sup>79</sup>

7.110 Argentina also contends that because of these defects, Argentine exporters were denied the right to defend their interests as mentioned in Article 6.2. Furthermore, Argentina submits that failure to organize a hearing violated the specific obligation set out in Article 6.2.

7.111 The United States submits that the USDOC gave Argentine exporters all the procedural rights under Articles 6.1 and 6.2. The United States contends that the specific acts cited by Argentina do not constitute obligations for investigating authorities within the meaning of Articles 6.1 and 6.2. Hence, there has been no violation of these two provisions in the proceedings at issue.

7.112 Article 6.1 provides:

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

7.113 Article 6.2 provides:

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

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<sup>78</sup> We note that Article 11.4 of the Agreement provides, in part:

"The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article..."

Article 11.4 clarifies that the provisions of Article 6 of the Agreement regarding evidence and procedure apply in sunset reviews. It is by virtue of this cross-reference that we address Argentina's claims under Article 6 of the Agreement.

<sup>79</sup> First Written Submission of Argentina, para. 144.

party's case. Interested parties shall also have the right, on justification, to present other information orally. (emphasis added)

7.114 In the original proceedings in this case, the Appellate Body pronounced its views about Articles 6.1 and 6.2 of the Agreement in the following way:

These provisions set out the fundamental due process rights to which interested parties are entitled in anti-dumping investigations and reviews. Articles 6.1 and 6.2 require that the opportunities afforded interested parties for presentation of evidence and defence of their interests be "ample" and "full", respectively. In the context of these provisions, these two adjectives suggest there should be liberal opportunities for respondents to defend their interests. Nevertheless, we agree with the United States that Articles 6.1 and 6.2 do not provide for "indefinite" rights, so as to enable respondents to submit relevant evidence, attend hearings, or participate in the inquiry as and when they choose...<sup>80</sup> (Footnotes omitted, emphasis added)

7.115 Thus, these two provisions require the investigating authorities to allow adequate opportunities to interested parties for the submission of evidence that they deem relevant for their case and for the defence of their interests in investigations and reviews, while keeping in mind that these rights should not preclude the authorities from concluding investigations and reviews in a timely manner, as stated in Article 6.14. We therefore consider the issue in these proceedings to be whether or not the USDOC allowed adequate opportunities to Argentine exporters for the submission of evidence that they deemed relevant for their case and for the defence of their interests.

7.116 Turning to the specific violations alleged by Argentina, we note that, with the exception of the issue of a hearing, the instances cited by Argentina as violating Articles 6.1 and 6.2 seem to be rather vague in nature. We do not consider that failure to issue supplemental questionnaires or a preliminary determination necessarily constitutes such a violation because neither Article 6.1 nor 6.2 contains such specific obligations. We are cognizant that issuing supplemental questionnaires or deficiency letters and/or a preliminary determination may be the common practice of some WTO Members, and may be highly commendable. The fact, remains, however, that neither Article 6.1 nor 6.2 requires that an investigating authority do so. Nor can a mere allegation regarding the failure to establish a schedule that would allow interested parties to submit comments violate these provisions.<sup>81</sup> Argentina has not explained with sufficient clarity how the timetable applied by the USDOC violated Article 6.1 or 6.2.

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<sup>80</sup> Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("US – Oil Country Tubular Goods Sunset Reviews"), WT/DS268/AB/R, adopted 17 December 2004, paras. 241-242.

<sup>81</sup> In this regard, we find useful the following finding by the panel in *Guatemala – Cement II*: Article 6.1 requires investigating authorities to provide interested parties "ample opportunity" to present in writing certain evidence. Article 6.1 does not explicitly require an investigating authority to set time limits for the submission of arguments and evidence during the final stage of an investigation. Article 6.1 simply requires that interested parties shall have "ample" opportunity to present evidence and "full" opportunity to defend their interests. Interested parties may have such opportunity without the investigating authority setting time limits for the submission of evidence. In other words, these provisions impose substantive obligations, without requiring those obligations to be met through any particular form (except as provided for in sub-paragraphs 1 through 3 of Article 6.1). What counts is whether, in practice, sufficient opportunity was provided, not whether time limits for the submission of evidence were set. (footnote omitted)

Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico* ("Guatemala – Cement II"), WT/DS156/R, adopted 17 November 2000, para. 8.119.

7.117 Regarding the issue of not holding a hearing, we note that Article 6.2 clearly states that hearings have to be organized *when requested*. We note Argentina's allegation that "Siderca, specifically asked the USDOC to provide more information regarding the timing of the hearing, and the USDOC offered no response".<sup>82</sup> We asked Argentina whether the Argentine exporters requested a hearing and Argentina did not respond in the affirmative.<sup>83</sup> In the absence of a clear indication that a request for a hearing was made, we decline to find a violation of Article 6.2 in this regard either.

7.118 We note Argentina's allegation that by failing to respond to Siderca's letter dated 7 December 2005, the USDOC acted inconsistently with Articles 6.1 and 6.2. We note that this letter was prepared in response to the submission by the petitioners dated 30 November 2005. In the letter, Siderca responded to the petitioners' allegations regarding the USDOC's likelihood determination, as well as providing comments on the procedural aspects of the sunset proceedings at issue.<sup>84</sup> The USDOC did not respond to Siderca's letter. We note, however, that some of the arguments raised in Siderca's letter were addressed in the USDOC's Section 129 Determination.<sup>85</sup> Given that Siderca's letter was placed in the file by the USDOC and discussed in its Section 129 Determination, we fail to see any violation of Article 6.1 or 6.2 in this regard. The very fact that Siderca sent this letter, which then became part of the record indicates, in our view, that the requirements of Articles 6.1 and 6.2 *were* satisfied. Whether or not the views expressed in this letter were given adequate consideration has to do with the USDOC's substantive obligation, i.e. the obligation to arrive at a reasoned conclusion on the basis of positive evidence.

7.119 We note Argentina's argument that the US stated before the DSU Article 21.3(c) Arbitrator in these proceedings that it would have to comply with certain procedural requirements of Article 6, including holding a hearing, issuing supplemental questionnaires and making preliminary rulings. Argentina asserts that by failing to observe these steps it mentioned before the Arbitrator, the United States failed to fulfil the requirements of transparency and due process of Articles 6.1 and 6.2. We do not consider the US statements before the Arbitrator who determined the reasonable period of time for the US implementation of the DSB recommendations and rulings in these proceedings to be the benchmark against which the USDOC's actions have to be assessed. The USDOC's Section 129 Determination has to be evaluated in light of the provisions of Articles 6.1 and 6.2, and that is what we have done.

7.120 Finally with regard to Articles 6.1 and 6.2, we note Argentina's proposition that rather than opining what needs to be done by the investigating authorities to meet the specific requirements of these provisions, the Panel should inquire whether the fundamental due process right embodied in them has been observed.<sup>86</sup> We agree with Argentina that, as the Appellate Body also opined (*supra*, para. 7.114), Articles 6.1 and 6.2 "set out the *fundamental due process rights* to which interested parties are entitled in anti-dumping investigations and reviews" (emphasis added). This does not mean, however, that claims raised under these provisions may prevail without showing the specific instances of violation of these rights. Argentina failed to show how exactly the instances it cited violated Articles 6.1 and 6.2. We therefore reject Argentina's claim under these provisions.

(b) Alleged Violation of Article 6.4

7.121 Argentina argues that the USDOC failed to disclose to Argentine exporters information that was used by the USDOC in its Section 129 Determination, inconsistently with Article 6.4 of the Agreement. In this context, Argentina cites five memoranda that were prepared by the USDOC and

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<sup>82</sup> In its letter dated 7 December 2005, Siderca complained, among others, about the fact that the USDOC had failed to clarify the timing of any hearing. See, Exhibit ARG-19 at 3.

<sup>83</sup> Response of Argentina to Question 19(b) from the Panel.

<sup>84</sup> See, for instance, Exhibit ARG-19 at 3.

<sup>85</sup> See, Section 129 Determination (ARG-16 at 4-5).

<sup>86</sup> See, for instance, Response of Argentina to Question 19 from the Panel.

referenced in its Section 129 Determination, all of which were dated 16 December 2005, i.e. the date of the release of the Section 129 Determination. Argentina contends that two of these five memoranda contained confidential information and the other three contained non-confidential information. There was, on the record, a non-confidential version for each of the two memoranda that contained confidential information. According to Argentina, the USDOC was required, pursuant to Article 6.4 of the Agreement, to inform the Argentine exporters of the existence of these memoranda, allow the exporters to see the memoranda and to prepare their cases on the basis of the information in these memoranda. The United States argues that the limited amount of time the USDOC had to complete the sunset review at issue has to be taken into account in assessing Argentina's claim under Article 6.4.

7.122 Turning to the merits of Argentina's Article 6.4 claim concerning these five memoranda<sup>87</sup>, we recall that Article 6.4 provides:

The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information. (emphasis added)

7.123 Article 6.4 requires the investigating authorities to allow the interested parties in investigations and sunset reviews, whenever practicable, timely opportunities to see the *information* that is relevant to the presentation of their case. We note that in order for there to be a violation of Article 6.4, the information at issue must carry certain qualifications. The information must be relevant to the presentation of the interested parties' cases, it should not be confidential as defined in Article 6.5, and it must be used by the investigating authorities in their determinations.<sup>88</sup>

7.124 The first of the five memoranda is "the USDOC Memorandum to file from Mark Flessner", dated 16 December 2005, which is confidential, and which contains the US investigator's reasoning regarding the inconsistencies found in the data submitted by Siderca. In Exhibit ARG-21, Argentina submitted the public version of this memorandum. This one-page document contains a chart that seems to analyze the cost information submitted by Siderca. As such, this memorandum seems to contain the reasoning of the USDOC regarding perceived inconsistencies in the data pertaining to Siderca. As explained in para. 7.123 above, the text of Article 6.4 makes it clear that it does not apply

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<sup>87</sup> In respect of the scope of Argentina's Article 6.4 claim, we note that in addition to these five memoranda, Argentina included a sixth memorandum in the list of the memoranda that it cited in connection with this claim. See, for instance, Second Written Submission of Argentina, para.113. This is "the USDOC Memorandum to file from Fred Baker", dated 22 November 2005, which contains confidential information. Argentina submitted the public version of this memorandum as Exhibit ARG-18. The first page of the public version of this memorandum indicates that the memorandum has three attachments: 1) the response from the Embassy of Argentina to the USDOC's request for information dated 14 October 2005, 2) a listing of all entries of the subject merchandise during the review period for the sunset review at issue, i.e. 1995- 2000, obtained from the US Customs and Border Protection, and 3) average unit prices for the ten product groups the USDOC used in its price comparison for Acindar for the review period, obtained from Preston Publishing, Inc. Appendix 1 contains the letter from the Embassy of Argentina and Appendix 3 contains the Preston Publishing's price list. Appendix 2, however, is limited to a statement that it is not susceptible to public summary.

However, Argentina limited its argumentation in this regard to the five memoranda mentioned above. See, for instance, First Written Submission of Argentina, para. 158. Furthermore, Argentina stated that five of these six memoranda which were dated 16 December 2005 fulfilled the requirements of Article 6.4. Response of Argentina to Question 21(a) from the Panel. We therefore understand Argentina to base its claim under Article 6.4 exclusively on the above-mentioned five memoranda, and not on the memorandum dated 22 November 2005.

<sup>88</sup> We find support for our proposition in the Appellate Body's decision in *EC – Tube or Pipe Fittings*. Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* ("EC – Tube or Pipe Fittings"), WT/DS219/AB/R, adopted 18 August 2003, para. 142.

to the reasoning of the investigating authorities. Furthermore, Article 6.4 states that the obligation it contains applies to information that investigating authorities use in making their determinations. Given that this memorandum only contains the USDOC's reasoning regarding Siderca's data, we reject Argentina's claim in this regard.

7.125 The second memorandum is "the USDOC's Memorandum to file from Mark Flessner", dated 16 December 2005, regarding the Preston Publishing data on the OCTG prices in the US market. Argentina submitted this document, which contains public information, in Exhibit ARG-22. We observed above (*supra*, footnote 87) that the memorandum submitted by Argentina in Exhibit ARG-18 demonstrates that the USDOC placed in the file the Preston Publishing data on 22 November 2005. Since this memo concerns the same data, we reject Argentina's claim with regard to this memorandum too.

7.126 The third memorandum is "the USDOC Memorandum to file from Mark Flessner", dated 16 December 2005. Argentina submitted the public version of this memorandum, which contains confidential information, in Exhibit ARG-23. This one-page memorandum contains the USDOC's reasoning regarding perceived inconsistencies in the data submitted by Acindar. We recall our finding that the obligation under Article 6.4 does not apply to the investigating authorities' reasoning. Since this memorandum contains the investigating authorities' reasoning, we find no violation of Article 6.4.

7.127 The fourth memorandum is "the USDOC's Memorandum to file from Mark Flessner", dated 16 December 2005. Argentina submitted this document, which contains public information, in Exhibit ARG-24. It contains certain Securities and Exchange Commission filings of domestic OCTG producers. We note that the USDOC referenced and used this information in its Section 129 Determination in connection with its finding that the OCTG market was depressed.<sup>89</sup> This information was not made available to the Argentine exporters until the date of the USDOC's Section 129 Determination, i.e. 16 December 2005. It was used by the USDOC and was not confidential. Under Article 6.4, therefore, it should have been made available. We note that the Argentine exporters were not even informed of the existence of this information until the day they saw the USDOC's Section 129 Determination. We also note that, apart from its general argument regarding the allegedly limited amount of time the USDOC had to carry out this sunset review (*infra*, para. 7.129), the United States has not demonstrated to us that it was not practicable for the USDOC to allow the Argentine exporters to see this memorandum. We therefore find that the USDOC acted inconsistently with Article 6.4 by failing to make this memorandum available to the Argentine exporters until it released its Section 129 Determination.

7.128 The fifth memorandum is "the USDOC Memorandum to file from Fred Baker", dated 16 December 2005. Argentina submitted this document, which contains public information, in Exhibit ARG-25. This memorandum contains several documents from the original sunset review, including a submission by Siderca and several submissions from the petitioners. The United States argues that because these documents were taken from the file of the original sunset review, Argentine exporters had access to them since the original sunset review. We do not consider that the availability of the information in the memorandum to the parties in the original sunset review excuses the USDOC from its obligation under Article 6.4 for purposes of the sunset review at issue. We interpret Article 6.4 to require the investigating authorities to allow interested parties to see the information they use in their determinations irrespective of whether that same information may have been used in a previous proceeding and may have been made available to the same interested parties in connection with that past proceeding. Article 6.4 requires the investigating authorities to allow the interested parties to see the information relevant to the presentation of their cases with respect to each proceeding in which the information is used by the authorities. We also note that, apart from its general argument regarding the allegedly limited amount of time the USDOC had to carry out this

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<sup>89</sup> Section 129 Determination (Exhibit ARG-16 at 7).

sunset review (*infra*, para. 7.129), the United States has not demonstrated to us that it was not practicable for the USDOC to allow the Argentine exporters to see this memorandum. We therefore find that the USDOC acted inconsistently with Article 6.4 in connection with this fifth memorandum.

7.129 The United States argues that the Panel should take into account the limited amount of time that the USDOC had in order to complete this sunset review. In other words, the United States asserts that whether or not making the relevant information available to interested parties was "practicable" within the meaning of Article 6.4 has to be determined in light of the amount of time the USDOC had to complete the sunset review at issue. We note that the Arbitrator gave the United States 12 months from 17 December 2004 for the implementation of the DSB recommendations and rulings.<sup>90</sup> The United States submits that most of this time was spent with the amendments made to the Regulations regarding waivers. New Regulations became effective on 31 October 2005 and on 2 November 2005 the sunset review at issue was initiated. We do not agree with the United States' proposition that the allegedly limited amount of time the United States had in order to make a new sunset determination is a consideration to be taken into account in assessing the consistency with Article 6.4 of the Section 129 Determination at issue. We agree with Argentina that the WTO obligations apply concurrently and cumulatively. The fact that the United States had to spend most of the reasonable period of time for the amendment of its Regulations can not be an excuse for the United States' failure to meet its obligations under the Agreement. We therefore reject the United States' argument.

7.130 Finally in this regard, we note Argentina's argument that the USDOC also violated Article 6.4 by accepting unsolicited comments from the petitioners on 30 November 2005. In response to questioning, Argentina submitted that the receipt by the USDOC of unsolicited comments from the petitioners "further compounded" the violation of Article 6.4.<sup>91</sup> Having already found that the USDOC acted inconsistently with Article 6.4, we need not and do not make any finding in connection with this argument.

(c) Alleged Violation of Article 6.5.1

7.131 Argentina submits that the USDOC acted inconsistently with Article 6.5.1 of the Agreement either because it failed to require the petitioners to submit a non-confidential summary of the confidential information that they submitted or because the non-confidential summary of the confidential information submitted by the petitioners did not provide a reasonable understanding of the substance of the information. The United States disagrees and asserts that there can be no violation of Article 6.5.1. This is because Article 6.5 contemplates that parties will not be allowed access to confidential information, yet US law allows counsel for interested parties to access all confidential documents submitted during a review, negating the need for non-confidential summaries.

7.132 Article 6.5.1. provides:

The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

7.133 Article 6.5.1 requires investigating authorities to ask interested parties submitting confidential information to also submit non-confidential versions thereof. These summaries have to permit a reasonable understanding of the substance of the confidential information. In cases where the information is such that it can not be summarized in a non-confidential format, the reasons for that

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<sup>90</sup> WT/DS268/12.

<sup>91</sup> Response of Argentina to Question 22 from the Panel.

have to be explained by the party submitting the information. We note that Article 6.5.1 strikes a balance between the interests of the interested parties submitting confidential information to have that confidentiality maintained during the investigation and the interests of the rest of the interested parties to be reasonably informed about the substance of that information in order to be able to make comments on it.

7.134 Argentina cites a submission by US Steel, a petitioner, in this regard.<sup>92</sup> The submission by US Steel reads in relevant parts:

The Department issued a questionnaire to Acindar asking for information concerning Acindar's costs of production for certain OCTG products. The Department should compare such cost data with [

]. Based on [

], it is clear that Acindar [

]. Accordingly, Petitioner submits that a comparison of Acindar's costs with [ ] will reveal significant dumping...

...

In the event that Acindar does not elect to answer the Department's questionnaire, significant other information is available which shows that Acindar dumped OCTG in the United States during the period of review. First, during 1999 and 2000 [

].

...

In particular, World Atlas data for the period show welded OCTG exports of 5,392 NT to the United States and only 0.03 NT to third countries. [

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Fourth, Acindar's financial statements for fiscal year 1999-2000 show that the company recorded an operating loss of 24.4 million pesos. [

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The unavoidable conclusion is that [

].<sup>93</sup> (footnotes omitted)

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<sup>92</sup> Argentina submitted, in Exhibit ARG-28, a letter from Acindar which demonstrates that this company took issue with this matter in the course of the sunset review at issue.

7.135 We note that certain parts of the submission by US Steel have been deleted from the text and replaced by blank square brackets. We presume that what is left out is confidential information. We also note that no non-confidential summary of the omitted confidential information has been submitted to the USDOC, nor is there any indication that the USDOC requested such a non-confidential summary. It appears, therefore, that the USDOC failed to ask US Steel to submit a non-confidential summary of the confidential information left out of its submission. Article 6.5.1 imposes an obligation on the investigating authorities to require the interested parties who submit confidential information to also submit a non-confidential summary of that information.<sup>94</sup> In cases where the information is not susceptible to summarization, the investigating authorities have to ask the party submitting that information to explain the reasons why such summarization is not possible. The United States has not, however, shown to us any such explanation by US Steel on the record of the sunset review at issue, nor any indication that the USDOC required such an explanation. It follows that the USDOC acted inconsistently with its obligation under Article 6.5.1 of the Agreement to require US Steel to provide a non-confidential summary of the confidential information that it excluded from its submission to the USDOC, or, alternatively, to explain why the information is not susceptible to summarization.

7.136 The United States contends that US Steel summarized the confidential information in the submission itself and that more detailed summaries were not possible.<sup>95</sup> The United States has not, however, shown to us where such summarization could be found in US Steel's submission. Furthermore, the United States has not brought to our attention any indication on the record that would support this assertion. We therefore decline to accept this argument.

7.137 We also note the United States' argument that because US law allows counsel for parties to access all confidential information on the record, there was no violation of Article 6.5.1 in the sunset review at issue.<sup>96</sup> The Argentine exporters could have used this option through their counsel, but they did not. In response to questioning, however, the United States conceded that this right is given exclusively to counsel and that it can not be used by the interested parties themselves.<sup>97</sup> As we noted above, Article 6.5.1 protects the right of the interested parties generally to be reasonably informed about the substance of the confidential information that may be submitted by any other interested party. What matters for purposes of Article 6.5.1 is whether the interested parties themselves receive non-confidential summaries of the confidential information submitted to the investigating authorities. We therefore decline to accept the United States' argument.

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<sup>93</sup> Exhibit ARG-27 at 8-10.

<sup>94</sup> In this regard, we find the following finding by the panel in *Guatemala – Cement II* helpful: Thus, Article 6.5.1 generally obliges investigating authorities to require interested parties providing confidential information to furnish non-confidential summaries thereof. However, such non-confidential summaries need not be furnished when, "in exceptional circumstances", the information "is not susceptible of summary". In such cases, "a statement of the reasons why summarization is not possible must be provided". Although Article 6.5.1 does not explicitly provide that "the authorities shall require" interested parties to provide a statement of the reasons why summarization is not possible, any meaningful interpretation of Article 6.5.1 must impose such an obligation on the investigating authorities. It is certainly not possible to conclude that the obligation concerning the need to provide a statement of reasons is an obligation imposed exclusively on the interested party submitting the information, and not the investigating authority, since the AD Agreement is not addressed at interested parties. The AD Agreement imposes obligations on WTO Members and their investigating authorities. Accordingly, in our view Article 6.5.1 imposes an obligation on investigating authorities to require parties that indicate that information is not susceptible of summary to provide a statement of the reasons why summarization is not possible.

Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico* ("*Guatemala – Cement II*"), WT/DS156/R, adopted 17 November 2000, para. 8.213.

<sup>95</sup> First Written Submission of the United States, para. 71.

<sup>96</sup> First Written Submission of the United States, para. 70.

<sup>97</sup> Response of the United States to Question 24 from the Panel.

7.138 In addition to the submission by US Steel, Argentina also cited another submission which contained comments submitted by IPSCO, whom we understand to be another petitioner in the proceedings at issue.<sup>98</sup> Argentina has not, however, submitted the text of these comments. Hence we do not consider that Argentina has properly established this aspect of its claim.

7.139 Finally with regard to this claim, Argentina also argues that two memoranda prepared by the USDOC and referenced in the USDOC's Section 129 Determination contained brackets that failed to allow a reasonable understanding of their confidential versions. Argentina contends that this violates Article 6.5.1. The text of Article 6.5.1 clearly states that it applies to the information submitted by interested parties, not to the documents prepared by the investigating authorities. We therefore reject this aspect of Argentina's claim.

(d) Alleged Violation of Article 6.6

7.140 Argentina argues that the USDOC acted inconsistently with Article 6.6 of the Agreement by failing to first verify whether the cost data submitted by Siderca was accurate before declining to use such data. The United States asserts that it could not satisfy itself as to the accuracy of the cost data submitted by Siderca because it was based on estimates. The United States also argues that Article 6.6 only applies with respect to the information upon which the authorities base their determinations. Since the USDOC did not use Siderca's cost data in its determination, there was no violation of Article 6.6 in this case.

7.141 Article 6.6 reads:

Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

7.142 We note that, as the United States contends, Article 6.6 only applies to information that the authorities use in their determinations in an investigation or review. In other words, this provision requires the authorities to make sure that they are basing their determinations on information that has been found to be accurate. In this case, there is no dispute that the USDOC did not use Siderca's cost information. We therefore consider that Article 6.6 could not have been violated by the USDOC because of the information that it declined to use in its determination.

7.143 Argentina contends that the Panel should examine whether the USDOC's disinclination to use Siderca's cost information was "reasoned and adequate".<sup>99</sup> We do not consider this argument to be relevant to Argentina's claim under Article 6.6 and therefore decline to make any findings in this regard.

(e) Alleged Violation of Article 6.8

7.144 Argentina argues that the USDOC acted inconsistently with Article 6.8 and various paragraphs of Annex II to the Agreement with regard to its treatment of the information submitted by Siderca and its company-specific likelihood determination regarding Acindar.

7.145 We recall our substantive finding (*supra*, para. 7.102) regarding the USDOC's order-wide likelihood determination in the sunset review at issue. We found that the USDOC's two findings in support of its order-wide determination, i.e. likely past dumping and the volume analysis, lacked a

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<sup>98</sup> See, First Written Submission of Argentina, footnote 138. Argentina also submitted, in Exhibit ARG-29, a letter from Siderca which demonstrates that this company took issue with this matter in the course of the sunset review at issue.

<sup>99</sup> See, Second Written Submission of Argentina, para. 132.

sufficient factual basis. We further declined to make any findings under Article 11.3 of the Agreement with respect to Argentina's claim regarding the USDOC's treatment of Siderca's cost data (*supra*, para. 7.103).

7.146 Argentina's Article 6.8 claim deals with the factual basis for the USDOC's Section 129 Determination, and is thus closely linked to its substantive claim regarding the factual basis for USDOC's order-wide likelihood determination. Having found that the USDOC's order-wide likelihood determination was devoid of a sufficient factual basis, hence inconsistent with Article 11.3 of the Agreement, we consider that addressing Argentina's claim under Article 6.8 that challenges the procedure through which this determination was reached by the USDOC on an insufficient factual basis would provide no value-added to the resolution of the dispute at hand. We therefore need not and do not make any findings with regard to Argentina's claims under Article 6.8 and Annex II to the Agreement.

(f) Alleged Violation of Article 6.9

7.147 Article 6.9 provides:

The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

7.148 We note that Article 6.9 imposes a one-time disclosure obligation on the investigating authorities regarding the essential facts under consideration which would then form the basis of the authorities' final determination whether to apply definitive measures. The text of Article 6.9 clarifies that this obligation applies with respect to facts, as opposed to the reasoning of the investigating authorities. Furthermore, Article 6.9 applies to *essential facts* and not to all facts. Finally, we note that Article 6.9 applies to essential facts that form the basis of the authorities' decision whether to apply definitive measures. It follows that in order to prevail with regard to a claim under Article 6.9, the complaining party has to demonstrate that the investigating authorities failed to disclose essential facts that established the basis of the authorities' decision whether to apply definitive measures.

7.149 Argentina submits that the USDOC acted inconsistently with Article 6.9 by not disclosing to the Argentine exporters the essential facts that formed the basis of its decision to continue the measure at issue. In this regard, Argentina cites the same memoranda that it referenced in connection with its claim under Article 6.4. Argentina notes that two of these memoranda contained public versions of confidential information and they were not released until the Section 129 Determination was issued on 16 December 2005. The United States notes that Argentina's claim takes issue with the two memoranda that contained public versions of confidential information.<sup>100</sup> The United States contends that Argentina failed to make a *prima facie* case because it did not prove that the information in these memoranda constituted essential facts within the meaning of Article 6.9.

7.150 We agree with the United States' observation that Argentina's claim under Article 6.9 is limited to the two memoranda, dated 16 December 2005, i.e. the same date as the Section 129 Determination at issue.<sup>101</sup> These memoranda include the inconsistencies found by the USDOC in Siderca's and Acindar's cost data, submitted to the Panel as Exhibits 21 and 23, respectively. We recall our findings (*supra*, paras. 7.124 and 7.126) that these memoranda contained the USDOC's reasoning, and not facts. Furthermore, we note that this reasoning concerns the cost information submitted by the two Argentine companies themselves. Given that the obligation under Article 6.9

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<sup>100</sup> Second Written Submission of the United States, para. 76.

<sup>101</sup> First Written Submission of Argentina para. 190; Second Written Submission of Argentina, para. 143.

applies to essential *facts* and that the two memoranda cited by Argentina contain the USDOC's reasoning regarding the data submitted by the Argentine exporters, we reject Argentina's claim under Article 6.9.

F. ALLEGED VIOLATION OF ARTICLE 13 OF THE AGREEMENT

7.151 Although Argentina initially raised a claim under Article 13 of the Agreement, it subsequently withdrew it.<sup>102</sup> We therefore do not address this claim.

**VIII. CONCLUSIONS AND RECOMMENDATION**

8.1 On the basis of the above findings, we conclude that:

- (a) The United States waiver provisions under Section 751(c)(4)(B) of the Tariff Act, operating in conjunction with Section 751(c)(4)(A) of the Tariff Act and Section 351.218(d)(2) of the Regulations, remain *inconsistent* with Article 11.3 of the Agreement,
- (b) The USDOC did *not* act *inconsistently* with Articles 11.3 and 11.4 of the Agreement by developing a *new* factual basis for its Section 129 Determination,
- (c) The USDOC acted *inconsistently* with Article 11.3 of the Agreement as the Section 129 Determination that dumping was likely to continue or recur lacked a sufficient factual basis with regard to its analysis of both (1) likely past dumping and (2) volume,
- (d) The USDOC did *not* act *inconsistently* with Articles 6.1 and 6.2 of the Agreement in the sunset review at issue with regard to providing Argentine exporters with ample opportunity to present in writing all evidence which they considered relevant and with regard to giving them a full opportunity for the defence of their interests,
- (e) The USDOC acted *inconsistently* with Article 6.4 of the Agreement in the sunset review at issue by not giving the Argentine exporters timely opportunities to see certain information that the USDOC used in its Section 129 Determination,
- (f) The USDOC acted *inconsistently* with Article 6.5.1 of the Agreement by not requiring a petitioner submitting confidential information to submit a non-confidential summary thereof,
- (g) The USDOC did *not* act *inconsistently* with Article 6.6 of the Agreement with regard to satisfying itself as to the accuracy of the cost data submitted by Siderca in the sunset review at issue,
- (h) The USDOC did *not* act *inconsistently* with the Article 6.9 obligation to disclose essential facts.

8.2 Since the original DSB recommendations and rulings in 2004 remain operative, we make no new recommendation.<sup>103</sup>

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<sup>102</sup> Second Written Submission of Argentina, para. 147.

**IX. REMEDY**

A. ARGUMENTS OF PARTIES

**1. Argentina**

9.1 Argentina requests that the Panel suggest that the United States bring its measures into conformity with its WTO obligations by revoking the anti-dumping order at issue.

**2. United States**

9.2 The United States disagrees with Argentina that a suggestion by the Panel about the revocation of the order would be proper in these proceedings.

B. ARGUMENTS OF THIRD PARTIES

**1. Mexico**

9.3 Mexico submits that the Panel should use its authority under Article 19.1 of the DSU to ask the United States to bring its measure into conformity with its WTO obligations by revoking the duty at issue.

C. EVALUATION BY THE PANEL

9.4 We note that Article 19.1 of the DSU states that WTO panels may suggest ways through which the Member concerned could implement their recommendations.<sup>104</sup> In the circumstances of the present proceedings, however, we see no particular reason to make such a suggestion and therefore decline Argentina's request.

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<sup>103</sup> After identifying its specific claims against the United States, Argentina argued, at the very end of its request for establishment, that with regard to all the measures identified in the request, the United States also acted inconsistently with Articles 1 and 18.1 of the Anti-dumping Agreement and Article XVI:4 of the WTO Agreement. However, Argentina did not pursue these claims in its submissions to the Panel. Given the consequential nature of these claims and considering that Argentina did not pursue them in these proceedings, we do not consider that Argentina has established its claim under these provisions and we do not make any findings in this regard. More generally, we note that in its request for establishment, Argentina cited certain other provisions of the Anti-dumping Agreement, such as Article 12.2, which it then did not pursue. We therefore consider that Argentina has abandoned these claims.

<sup>104</sup> Article 19.1 of the DSU reads:

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