BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

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

**(AB-2004-4)**

**APPELLANT'S SUBMISSION**
**OF THE UNITED STATES OF AMERICA**

**September 13, 2004**

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**WORLD TRADE ORGANIZATION**
**APPELLATE BODY**

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

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## SERVICE LIST

APPELLEE

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

THIRD PARTIES

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

## I. Introduction and Executive Summary

1. The Panel committed several fundamental and serious errors in evaluating Argentina's claims in this dispute. First, in assessing Argentina's arguments regarding the Sunset Policy Bulletin ("SPB"), the Panel failed to conduct any analysis whatsoever to arrive at its conclusion that the SPB is a measure. The Panel incorrectly assumed that the Appellate Body had so concluded, and indeed it was unable to cite a single reference to support that conclusion. The Panel compounded the error by employing a deeply flawed approach to evaluating whether the SPB mandates a breach. Ignoring the status of the SPB under U.S. law, the Panel instead used a superficial and irrelevant statistical compilation as the basis for concluding that the Department of Commerce ("Commerce") "perceives" the SPB as mandatory. The SPB is not a measure, and it does not mandate a breach; therefore, the Panel's findings to that effect should be overturned.

2. Second, the Panel erred in concluding that the U.S. statute and regulations permitting interested parties to waive participation in part of the sunset review proceedings were inconsistent with Articles 6.1, 6.2, and 11.3 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Antidumping Agreement"). The Panel's errors were twofold. Not only was the analysis itself unconvincing and analytically flawed, but the Panel failed to conduct an objective assessment of the facts in conducting that analysis. For those reasons, the Panel's findings should be overturned.

3. Finally, the Panel erred in denying the U.S. preliminary ruling requests. In examining the request, the Panel expanded the scope of the request by essentially relying on a standard in which merely referring to a measure in one part of the panel request, and then referring to a WTO provision in another part of the request, regardless of context, would be sufficient to present the problem clearly. Rather than holding the party submitting the panel request to the requirements

of Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), the Panel's approach excuses the complaining party from fulfilling these requirements as long as the Panel is able – with the benefit of reading the complaining party's first submission – retroactively to cobble together various words in the panel request to conclude that the panel request had presented the problem clearly. It is impossible to reconcile this approach with Article 6 of the DSU. As a result, the claims of Argentina, as detailed in Section IV, that were not provided in the panel request should be found to be beyond the terms of reference of this dispute.

## II. The Sunset Policy Bulletin Is Not a Measure that Mandates a Breach

4. The Panel committed several errors in finding that the SPB is a measure that is inconsistent with Article 11.3 of the Antidumping Agreement. As these errors involve fundamental questions about the nature and meaning of documents of a Member, questions that pervade dispute settlement, it is important not just for this dispute, but for the dispute settlement system as an institutional matter, that the Appellate Body correct the Panel's findings. First, the Panel erroneously concluded that the SPB is a measure without undertaking any analysis of the nature of the SPB itself. Instead, the Panel based its conclusion solely on its mischaracterization of Appellate Body conclusions in another dispute. Second, the Panel erroneously found that the SPB mandates a breach of Article 11.3 based on an analytically bankrupt approach to determining the meaning of the SPB. The Panel neglected to determine the SPB's meaning in the only manner capable of yielding the correct result, that is, by reference to its meaning as a matter of U.S. municipal law. Instead, the Panel based its finding exclusively on the so-called "consistent application" of the SPB, notwithstanding that there is no such interpretive principle

in U.S. municipal law, and notwithstanding that it yields a result that is completely at odds with U.S. municipal law.

5. In short, the Panel's analysis with respect to the SPB yielded an egregiously incorrect result, one which underpinned its legal findings. If applied more generally in determining the meaning of measures in WTO dispute settlement, the Panel's approach can be expected to yield similarly incorrect results, to the detriment of the credibility of the dispute settlement system as a whole.

A. The Panel Erred in Concluding that the SPB is a Measure

6. The Appellate Body in *Japan Sunset* faulted the panel in that dispute for failing to undertake an adequate analysis of the question of whether the SPB is a measure, and reversed the panel on that basis. Here, the Panel did not merely undertake an inadequate analysis in concluding that the SPB is a measure – it undertook no analysis whatsoever. Instead, the Panel simply stated that the Appellate Body in the *Japan Sunset* Report found that

> any legal instrument under a WTO Member's law could also be challenged as a measure before a WTO panel irrespective of the way in which it operates in individual cases. Given that the Appellate Body . . . was addressing precisely the issue of the SPB, there can be no doubt that the Appellate Body considers the SPB to be a measure that can be subject to WTO dispute settlement.[1]

7. In other words, the Panel took the Appellate Body's finding that the panel in the *Sunset Japan* dispute had failed to make the necessary factual findings on whether the SPB is a measure and converted it into a finding to the exact opposite effect – that the SPB is a measure. The Panel's approach is rather extraordinary, not only in that it reverses the Appellate Body's finding

[1]Panel Report, para. 7.136.

while claiming to follow it, but also in that it would have the Appellate Body making factual findings, an area that is outside the purview of the Appellate Body, which the Appellate Body itself has been careful to note and observe on many occasions.

8. In addition to these fundamental points, a panel's conclusion of what the Appellate Body "considers" to be a measure in another dispute simply cannot serve as the basis for a finding so central as whether an asserted measure is in fact a measure subject to dispute settlement. In particular, while adopted panel and Appellate Body reports are often considered and taken into account by subsequent panels, "they are not binding, except with respect to resolving the particular dispute between the parties to that dispute." Moreover, the Panel did not so much as "take into account" the reasoning of the Appellate Body in *Sunset Japan*, which would presumably have involved setting forth the Appellate Body's reasoning and then explaining its persuasiveness here. In particular, as the issue of whether the SPB is a measure is, in important respects, a factual question, it would have been incumbent on the complaining party, and ultimately the Panel, to consider and explain why any findings in *Sunset Japan* would be persuasive given the factual record in this dispute.

9. The Panel's finding is based on no such analysis, but only on the asserted finding in *Sunset Japan*. Under DSU Article 11 a panel is to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements . . ." When a panel makes no assessment, it cannot be said to have made an objective assessment. Accordingly, the Panel's findings need to be reversed by the Appellate Body as being without foundation. The importance of a panel setting out its own analysis and basis for it findings is further underscored by Article 12.7 of the

DSU, which requires that in its report a panel set out "the basic rationale behind any findings and recommendations that it makes."[2]

10. Further, notwithstanding the Panel's assertion that "there can be no doubt" that the Appellate Body considers the SPB to be a measure, the Appellate Body did not so conclude. Indeed, the Panel could not provide a citation for such a specific conclusion. The Appellate Body reversed the panel's finding that the SPB was *not* a measure because the panel's analysis was insufficient.[3] However, in doing so, the Appellate Body did not go on to "complete the analysis," thus leaving the question of whether the SPB is a measure open. Yet the Panel in this dispute seems to have found that the Appellate Body's *general* conclusion that a legal instrument may be subject to dispute settlement under certain conditions meant that the Appellate Body reached the specific conclusion that the SPB is such an instrument. The gap in the syllogism, however, is that the Appellate Body report did not conclude that the SPB is a legal instrument, or that conditions for which a legal instrument can be subject to dispute settlement were met, and hence there is no such Appellate Body conclusion on which the Panel could have relied upon to assume that the SPB is a measure.

11. Before the Panel, the United States emphasized this point,[4] and further presented argument and evidence that the SPB is not a legal instrument under U.S. law: The SPB does not

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[2] The United States is not making an Article 12.7 claim in this appeal. The Panel's errors go well beyond simply failing to set out the Panel's basic rationale in that the Panel is clear in that it has not conducted its own analysis and so has no basic rationale. Accordingly, the U.S. complaint is more fundamental than a DSU Article 12.7 concern.

[3] *See United States - Sunset Review of Anti-dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan,* WT/DS244/AB/R, Report of the Appellate Body, adopted 9 January 2004, para. 99 ("*Japan Sunset*").

[4] U.S. Second Closing Statement, para. 3.

"*do*" anything.[5] It is simply a transparency tool to provide the private sector with guidance. In its first written submission, the United States explained that the SPB has no functional life of its own and has no independent legal status.[6] Rather than addressing these arguments, the Panel simply read into the Appellate Body Report a conclusion that was not made. Thus, even if the Panel's characterization of the Appellate Body's conclusion in *Japan Sunset* could be characterized as "an assessment," it is anything but objective, having failed to consider the Appellate Body's description of the necessary analysis, as well as the U.S. arguments with respect to that analysis, in the context of this dispute. For this reason as well, the Panel's finding that the SPB is a measure should be reversed.

12. Just as the Panel failed to address U.S. argumentation on whether the SPB is a measure, so too did Argentina. Although Argentina's second submission contained a heading stating that the SPB is a measure that can be challenged, the only argument put forth was the same elliptical and insufficient analysis ultimately employed by the Panel, *i.e.,* that the Appellate Body had allegedly concluded that all "administrative instruments" are measures, and the SPB is therefore a measure.[7] In short, Argentina failed to present evidence that the SPB is a measure and also failed to rebut the evidence to the contrary. Thus, the Panel lacked the factual information necessary to even conclude that the SPB is a measure.

13. Finally, even had the issue been properly set forth by Argentina or analyzed by the Panel, the conclusion that the SPB is not a measure is the correct one. As noted above, the SPB is not a

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[5]*United States - Measures Treating Export Restraints as Subsidies ("U.S. Export Restraints"),* WT/DS194/R, Report of the Panel, adopted 23 August 2001, para. 8.85.

[6]U.S. First Written Submission, paras. 193-195.

[7]Argentina Second Submission, para. 60.

legal instrument. Moreover, it does not "set[] forth rules or norms that are intended to have general and prospective application."[8] It provides guidance to the general public on Commerce's current views, but in no way binds Commerce as a "rule" or "norm" in individual sunset reviews. In particular, inasmuch as Commerce is entirely free to depart from SPB at any time, it cannot be concluded that the SPB has "general and prospective application." Non-binding documents that simply express agency "thinking" and provide guidance to the public should not be deemed measures; to conclude otherwise will simply discourage Members from issuing such documents. Findings against such documents are essentially meaningless, as they do not compel, and do not cause, administering authorities to do anything.

B. The Panel Erred in Concluding that the SPB Breaches Article 11.3

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[8] Japan Sunset AB Report, para. 82. The United States wishes to note that the Appellate Body Report in *Japan Sunset* at para. 85 cited a footnote in its Report in *Guatemala - Cement I* to support the proposition that a measure need not be legally binding and may include non-binding administrative guidance. However, the facts in *Guatemala - Cement I* did not involve the issue of whether administrative guidance or another non-binding legal instrument is a measure. Thus, the Appellate Body's passing reference in *Guatemala - Cement I* should not be construed as offering a definitive analysis on an issue that was not even considered in that dispute.

The *Guatemala - Cement I* Report in turn cited the panel report in *Japan - Trade in Semi-Conductors ("Japan - Semi-Conductors")*. However, the circumstances in *Japan - Trade in Semi-Conductors,* upon which the reference in *Guatemala - Cement I* was based, were materially different than those in the *Japan Sunset* dispute (and this one), and the conclusion reached in *Japan - Semi-Conductors* is inapposite here. Specifically, *Japan - Semi-Conductors* involved the question of whether Japan's use of supposedly non-binding administrative guidance, which effectively required the private sector to restrain exports in violation of Article XI of the GATT 1947, was a measure subject to dispute settlement. Read in context, *Japan - Semiconductors* does not stand for the proposition that any government action is a measure. Rather, the facts of that dispute justified a finding that the government action in question was a measure.

We note further that the panel in *Japan - Semi-Conductors* stated that "not all non-mandatory [government] requests could be regarded as a measure." Para. 108. By implication, not every government action is necessarily a measure. Thus, when examined in closer detail, *Japan - Semi-Conductors*, and *Guatemala Cement - I,* do not support the proposition that the *SPB* is a measure.

14. Having erroneously concluded that the SPB is a measure, the Panel then evaluated the meaning of the SPB. Aside from the error in finding the SPB to be a "measure," evaluating the meaning of a Member's measure calls for a certain degree of care, particularly when a panel proceeds to find that the measure means something other than what the Member understands its own measure to mean. Such care would require at a minimum that the Panel explain very carefully the interpretive elements of the Member's municipal law on which the Panel relied in reaching its findings. Otherwise the WTO dispute settlement system risks basing its recommendations and rulings on findings about the meaning of a Member's law that would be incorrect, and obviously so to anyone versed in the law of that Member. Such findings would be manifestly detrimental to the credibility of the system.[9] In this case, the Panel evaluated whether the SPB requires Commerce to treat dumping margins and import volumes as conclusive of likelihood of continuation or recurrence of dumping. The Panel found that it does, based on the conclusion that Commerce "perceives" the SPB as "conclusive" in this regard.[10] The sole basis for drawing this conclusion regarding Commerce's "perceptions," however, was an analysis of statistics on "the application" of the SPB in past sunset reviews. The Panel had examined the text of the SPB, but failed to conclude from that examination that the SPB directed the behavior in question.[11] Indeed, the Panel failed to consider any other evidence of how the SPB operated

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[9]This is not to say that a panel could not find a meaning different than that argued by a Member in a particular dispute. There is no "total deference" to a Member's arguments about the meaning of its own measures." *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products,* WT/DS50/AB/R, Report of the Appellate Body, adopted 16 January 1998, ("*India - Patents*"), paras. 65-71.

[10] Panel Report, para. 7.165.

[11]Panel Report, paras. 7.157-158, 7.163.

within the framework of U.S. law, or even whether there was any cause and effect relationship between the SPB and the determinations in prior investigations. Instead, the Panel relied on what it called the "consistent application" of the SPB to come to the conclusion that the SPB was mandatory in nature.

15. The Panel's analysis in concluding that the SPB directs Commerce to treat certain evidence as conclusive in its likelihood determinations is egregiously flawed. If accepted, it would divorce fact-finding on the meaning of measures from their actual legal status in the Member's legal system. DSU Article 3.3 explains that disputes under the DSU deal with "measures taken by another Member." The Panel's analysis would permit dispute findings on measures not actually taken by another Member, but on mischaracterized measures not taken by anybody.

1. The Continued Applicability of the Mandatory/Discretionary Distinction.

16. The Panel noted the Appellate Body's statement in *Japan Sunset* that it was applying, but not ruling on, the mandatory/discretionary test that has been applied in GATT and WTO dispute settlement,[12] but later observed that the Appellate Body's findings appeared to represent a "significant shift" from that distinction.[13] Nevertheless, the Panel properly framed the question before it in terms of a mandatory/discretionary analysis: "whether Section II.A.3 of the SPB directs the DOC to treat evidence concerning 'dumping margins' and 'import volumes' as conclusive in its likelihood determinations."[14] While the United States disagrees with the Panel's

[12]Panel Report, para. 7.138.
[13]Panel Report, para. 7.140.
[14]Panel Report, para. 7.163 (emphasis added). We understand the term "directs" to mean "requires."

statement that the Appellate Body's findings in *Japan Sunset* affect the mandatory/discretionary test, it does not disagree that the proper question is whether the SPB requires WTO-inconsistent actions.

17. The mandatory/discretionary test is well-established and has been consistently applied in GATT and WTO dispute settlement proceedings.[15] Wholly apart from that, the test reflects the fact that, as the Appellate Body has noted, panels may not presume bad faith on the part of Members.[16] If a Member has discretion to act in a WTO-consistent manner, it thus may not be presumed that the Member will exercise that discretion in bad faith.[17] Moreover, the test accords with the presumption in many Members' legal systems against conflicts in the interpretation of laws and treaty provisions.[18] Without the mandatory/discretionary test, the assessments of Members over the past 17 years on how to judge whether their measures are consistent with GATT and then WTO rules would be severely undermined.[19]

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[15] *United States - Final Dumping Determination on Softwood Lumber from Canada,* Report of the Appellate Body, WT/DS264/AB/R, para. 111, adopted on 31 August 2004, quoting *Japan - Alcohol*, p. 14.

[16] *Brazil - Export Financing Programme for Aircraft,* AB 1999-1, WT/DS46/AB/R, adopted 20 August 1999, para. 114.

[17] It should be noted that this does not preclude the possibility that a particular obligation, by its terms, prohibits such discretion.

[18] In general,

> [A]lthough national courts must apply national laws even if they conflict with international law, there is a presumption against the existence of such a conflict. As international law is based upon the common consent of the different states, it is improbable that a state would intentionally enact a rule conflicting with international law. A rule of national law which ostensibly seems to conflict with international law must, therefore, if possible always be so interpreted as to avoid such conflict.

*Oppenheim's International Law*, 9th ed., at 81-82 (footnote omitted).

[19] This would be an odd result from a dispute settlement system that is supposed to provide "security and predictability." *See* DSU Art. 3.2 ("The dispute settlement system of the

2. The Meaning of Municipal Law is a Fact, and Must be Determined by Reference to Municipal Law Principles of Interpretation.

18. While the Panel correctly articulated that it was charged with determining whether the SPB required Commerce to treat evidence in a WTO-inconsistent manner, its application of that test failed. Rather than seeking to determine what the SPB actually does or does not do, which would have required an examination of the SPB within the context of the municipal legal system of the United States, the Panel applied an artificial and incorrect interpretive analysis based on a misreading of the Appellate Body findings in *Japan Sunset.*

19. From the standpoint of WTO law, the meaning of a Member's municipal law is a fact which a WTO panel may need to determine in order to evaluate whether the Member is complying with its WTO obligations.[20] In order to determine the meaning of a purported measure, it is necessary to examine the status and meaning of that measure *within* the municipal legal system itself. By definition, the measure at issue has an effect *because* of how it operates within the municipal legal system of which it forms a part. An analysis of the meaning of a measure which neglects its actual status and meaning within the municipal legal system of the Member involved will not, and cannot, reflect an "objective assessment" under DSU Article 11.

20. In *US – German Steel*, the Appellate Body explained, "[t]he party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of

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WTO is a central element in providing security and predictability to the multilateral trading system.")

[20]*See India - Patents,* paras. 65-71 (citing *Certain German Interests in Polish Upper Silesia*, [1926], PCIJ Rep., Series A, No. 7, p. 19. "From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions and administrative measures.").

introducing evidence as to the scope and meaning of such law to substantiate that assertion."[21] Again, that evidence must, of necessity, demonstrate the measure's meaning under municipal law if it is to yield an objectively correct result.

21. Rather than examining the evidence before it of the meaning and status of the SPB under U.S. law, the Panel purported to analyze SPB based on the test set forth by the Appellate Body in *Sunset Japan* and *US – German Steel.* It noted that the Appellate Body in *Sunset Japan* emphasized that there should be an examination of the text of the measure, as well as of its consistent application.[22] However, it neglected to consider the explanation of the Appellate Body in *US – German Steel* that,

> "[s]uch evidence [of the scope and meaning of municipal law] will **typically** be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, **as appropriate**, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. **The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case**."[23]

22. The Appellate Body's emphasis on the case-by-case nature of the evidence necessary to determine the scope and meaning of a measure reflects both the differences among the municipal legal systems of Members as well as the different types of measures they maintain. For example, the Appellate Body noted that "pronouncements of domestic courts on the meaning of such laws" may be relevant in some cases. In the U.S. municipal legal system, such court decisions are a

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[21] *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products From Germany*, WT/DS213/AB/R, Report of the Appellate Body, adopted Dec. 19, 2002 ("*US - German Steel*"), para. 157.

[22] Panel Report, para. 7.139.

[23] *US - German Steel,* para. 157 (emphasis added).

fundamental interpretive tool.[24] For example, if the U.S. Supreme Court were to interpret the term "black" as meaning "white" in a particular statute, an examination of the text of the statute alone could easily yield an incorrect result, as the Supreme Court interpretation would be binding on U.S. authorities. Likewise, an examination of the "consistent application" of a law must be undertaken "as appropriate," and in a manner which reflects the actual manner in which the municipal legal system of a Member operates. For example, if a complaining party were to argue that a statute requires a defending Member's authorities to do X, but the law had been consistently applied by those authorities as requiring Y, the consistent application could be relevant to disproving the complainant's interpretation. Likewise, if courts had consistently interpreted a statute in the same manner, that would provide a strong indication of the statute's meaning, even if a definitive interpretation had not been issued by a Member's highest-level court. Neither of these, however, is the way in the which the Panel used "consistent interpretation." Rather, the Panel used "consistent application" in an invalid manner to create a tautology.

23. Rather than adopting such a nuanced approach to considering the text and alleged "application" of the SPB based on the relevance of these factors under U.S. municipal law, the Panel employed a superficial approach with no basis in the U.S. legal system, and one which yielded an egregiously incorrect result. While the Panel noted the Appellate Body's admonition not to apply the mandatory/discretionary test in a "mechanistic fashion,"[25] it proceeded to undertake a mechanistic, blindered approach to analyzing the meaning of the SPB.

Again, an assessment of the scope and meaning of U.S. law will not be objective if it ignores, and

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[24] *See, e.g., Marbury v. Madison,* 5 U.S. 137 (Cranch) (1803).

[25] Panel Report, para. 7.140.

is contrary to, the municipal legal principles which actually define its meaning.

3. The Panel's Analysis of the SPB Is Not Based on the Actual Meaning or Operation of the SPB, Is Not Objective, and Fails to Meet the Requirements of DSU Article 11.

24. The Panel alluded to the true significance of the SPB within the U.S. legal system when it concluded,

> 7.171 In our view, the SPB does not purport to interpret the provisions of the Tariff Act. This is evidenced in the preamble of the SPB, which reads in relevant part:
>
> > The proposed policies are intended to complement the applicable statutory and regulatory provisions by providing guidance on methodological or analytical issues not explicitly addressed by the statute and regulations.[footnote omitted] (emphasis added)
>
> 7.172 The preamble states that the SPB is designed to complement, not interpret, the provisions of the Tariff Act. Therefore, the provisions of the SPB in general, and those of Section II.A.3 in particular, **can not change the meaning** of the relevant provisions of the Tariff Act . . . [26]

25. While the Panel correctly found that the SPB's preamble explained that the SPB does no more than provide *guidance* on issues not addressed in the statute or regulations, and *does not change the meaning* of the statute and regulations, it disregarded the significance of this fact when questioning whether the SPB requires Commerce to treat dumping margins and import volumes as conclusive of likelihood of continuation or recurrence of dumping. Inasmuch as the only binding legal authority governing Commerce's conduct of sunset reviews – as a matter of U.S. municipal law – is the statute and regulations (as interpreted by the courts), and inasmuch as the SPB by its very terms provides only *guidance*, it is inaccurate to conclude that the SPB requires that

[26] Panel Report, paras. 7.171-7.172 (emphasis in para. 7.172 added).

Commerce do anything at all.[27] Before the Panel, the United States repeatedly explained, and Argentina failed to rebut, that the SPB is simply a transparency tool intended to explain Commerce's thinking on how it will exercise the discretion available to it under the statute and regulations.[28]

26. It is no more accurate to suggest that the SPB binds Commerce as it would be to suggest that Commerce is bound by speeches by the Assistant Secretary for Import Administration explaining his current thinking on how Commerce may exercise its statutory and regulatory discretion. As a matter of U.S. law, the willingness of the Assistant Secretary to assist the public by providing guidance on his thinking does not bind him or Commerce in its actual conduct of specific sunset reviews. Argentina cited no U.S. municipal legal authority to the contrary, nor did the Panel; nor could it have, because there is none. Any conclusion to the contrary would be a clear misstatement of U.S. law.

27. As a matter of WTO law, this fact is dispositive of the issue of whether the SPB requires the WTO-inconsistent action in question. Inasmuch as the SPB does not require Commerce to do anything, it cannot be said to breach the obligations at issue in this dispute.[29] In short, even if it were concluded that the SPB is a measure, the SPB does not mandate that Commerce treat certain

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[27] *See*, *e.g.*, First Written Submission of the United States, paras. 193-203, U.S. Answers to First Set of Panel Questions, paras. 83-84, 100, 103; U.S. Answers to Second Set of Panel Questions, paras. 17-19.

[28] *See, e.g.,* First Written Submission of the United States, paras. 193-203, U.S. Answers to First Set of Panel Questions, paras. 83-84, 100, 103; U.S. Answers to Second Set of Panel Questions, paras. 17-19. The Antidumping Agreement also affords Members discretion in implementing its provisions.

[29] Indeed, it is difficult to think of any WTO obligation the SPB might breach. There is no anti-transparency obligation preventing Members from disclosing their current thinking on how they intend to exercise the discretion available to them under municipal law.

data as conclusive of likelihood of continuation or recurrence of dumping.

28. The Panel's analysis of the text of the SPB was not inconsistent with that conclusion. It found that the text of the SPB itself does not resolve the question of whether dumping margins and import data should be treated as conclusive in sunset reviews.[30] However, the Panel then went on to examine the alleged "consistent application" of the SPB to conclude that Commerce "perceives" the SPB as "conclusive regarding the issue of likelihood of continuation or recurrence of dumping in the case of revocation of an order."[31]

29. The fact that the Panel based its finding on its speculation regarding what Commerce supposedly "perceives" underscores how far the Panel strayed from any sort of objective assessment in its analysis of the scope and meaning of the SPB. Commerce's "perceptions" of the meaning of the SPB are based, and as a matter of U.S. law can only be based, on the SPB's status under U.S. law.

30. The Panel's analysis of the so-called "consistent application" of the SPB cannot change this fact. There is no principle of interpretation of U.S. law which provides that a previously non-binding document becomes, through repeated application, binding. Argentina pointed to no such principle, nor did the Panel, because there is none. If Commerce has discretion to apply a law in a particular manner, the fact that it has, to date, not exercised its discretion in that manner would not change the fact that Commerce has the discretion to do so.

31. Moreover, even on its own terms, the Panel's analysis of the so-called "consistent

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[30] Panel report, para. 7.158. Of course, the text of the SPB does resolve this question, in that it clearly explains in the preamble that it merely provides guidance.

[31] Panel Report, para. 7.165.

application" of the SPB is fundamentally flawed. The Panel does no more than note a correlation between the results in particular sunset reviews and the scenarios set forth in the SPB. Nowhere does the Panel so much as ask the question of whether the SPB *caused* the determinations in question. Instead, the Panel simply assumed a cause and effect relationship, notwithstanding that the correlation is equally well explained by the fact that the SPB does precisely what it purports to do – accurately reflect the views of Commerce on how it normally expects to exercise its discretion in individual reviews. There is no basis for excusing the groundless assumption of the Panel that Argentina's statistical analysis demonstrated that the SPB required Commerce to act in a certain way. Leaving aside that it does not reflect any principle of interpretation of U.S. municipal law, the Panel's analysis is not an "objective assessment" in its own right.

32. For the foregoing reasons, the Appellate Body should reverse the Panel's finding that the SPB is a measure. The Appellate Body should also reverse the Panel's findings that the SPB requires Commerce to treat dumping margins and import volumes as conclusive of likelihood of continuation or recurrence of dumping and, consequently, that the SPB as such breaches Article 11.3.

## III. The Panel Erred in Finding Section 751(c)(4)(B) of the Act and Section 351.218(d)(1)(iii) of Commerce's Regulations to Inconsistent with the Antidumping Agreement and Failed to Make an Objective Assessment of the Facts

33. The Panel concluded that the waiver provisions of U.S. law were inconsistent with U.S. obligations under the Antidumping Agreement. The Panel's analysis was flawed. Moreover, the Panel erred in failing to conduct an objective assessment of the facts. Finally, Argentina failed to meet its burden with respect to its claims. Therefore, the Panel's findings in this regard should be overturned.

A. The Panel Erred in Finding That Application of Section 751(c)(4)(B) of the Tariff Act and Section 351.218(d)(2)(iii) of the Commerce's Regulations Precludes Commerce From Making an Order-wide Likelihood Determination Consistent With the Obligations in Article 11.3

34. The sole provision of the Antidumping Agreement requiring a Member to conduct a sunset review is Article 11.3. Article 11.3 requires an order to be terminated five years after its imposition, unless a Member conducts a review to determine whether revocation would be likely to lead to continuation or recurrence of dumping and injury. If a Member concludes that revocation would be likely to lead to continuation or recurrence of dumping and injury, then the Member may continue the order. This is all Article 11.3 requires; it does not prescribe the methodology by which such a review must be conducted.

35. In *Japan Sunset*, the Appellate Body examined the nature of the obligations arising from Article 11.3. By closely reviewing the language of Article 11.3 and comparing it with language in other provisions of the Agreement, the Appellate Body concluded that "Article 11.3 does not prescribe any particular methodology to be used by investigating authorities in making a likelihood determination in a sunset review;"[32] "WTO Members are free to structure their anti-dumping systems as they choose, provided that those systems do not conflict with the provisions of the *Anti-Dumping Agreement*."[33]

36. The Appellate Body also concluded that in a sunset review there is no "obligation for investigating authorities to make their likelihood determination on a company-specific basis."[34] Furthermore:

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[32] *Japan Sunset,* para. 149.
[33] *Japan Sunset,* para. 158.
[34] *Japan Sunset,* para. 155.

> Article 11.3 does *not* expressly state that investigating authorities must determine that the expiry of the duty would be likely to lead to dumping *by each known exporter or producer concerned.* In fact, Article 11.3 contains no express reference to individual exporters, producers, or interested parties ....[35]

The Appellate Body, therefore, confirmed that authorities may make sunset review determinations on an order-wide basis.

37. Finally, the Appellate Body also confirmed that a sunset review is fundamentally different from both an original investigation and an administrative review, both of which require company-specific determinations.

38. In this dispute, however, the Panel erred in its analysis of Article 11.3. Rather than evaluating whether U.S. law governing Commerce's order-wide determinations was consistent with Article 11.3, the Panel instead evaluated whether U.S. law governing company-specific determinations was consistent with Article 11.3, and then imputed any inconsistency to the order-wide determination.[36] This approach was incorrect and cannot be reconciled with the text of Article 11.3, which the Appellate Body has already addressed.[37] The Panel's findings and conclusions should be reversed because neither section 751(c)(4) of the Act nor section 351.218(d)(2)(iii) of Commerce's *Sunset Regulations* "precludes" Commerce from making a "determination" or from conducting a "review" in accordance with the obligations of Article 11.3.

39. As the United States explained during the panel proceeding,[38] U.S. law provides that an individual respondent interested party may "waive" participation during the course of

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[35]*Japan Sunset,* para. 149.
[36]Panel Report, para. 7.101.
[37]*See US - German Steel* and *Japan Sunset.*
[38]*See* Panel Report, para. 7.100.

Commerce's sunset review proceeding. This allows, but does not require, a respondent interested party to participate solely in the ITC's portion of the sunset review concerning the likelihood of continuation or recurrence of injury.[39]

40. The purpose of the waiver procedure is to avoid forcing respondent interested parties to incur the time and expense of participating in the Commerce portion of a sunset review when they wish only to contest the likelihood of continuation or recurrence of injury in the ITC portion.[40] In other words, interested parties are afforded the option of concentrating their efforts and resources on the ITC's injury proceeding, should they believe that such an approach would be in their best interests.[41]

41. Should a respondent interested party explicitly choose to waive participation in Commerce's sunset review proceeding or should a respondent waive participation by failing to submit a complete substantive response, then pursuant to section 751(c)(4)(B), Commerce concludes that revocation of the order would be likely to lead to continuation or recurrence of dumping *for that respondent*.[42] The United States also explained that this company-specific finding does not determine, in and of itself, the final outcome of a sunset review.[43]

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[39]19 U.S.C. § 1675(c)(4)(A) (Exhibit ARG-1).

[40]First Written Submission of the United States, para. 31. We note that out of the 217 final expedited and full sunset review determination included in Argentina's Exhibit ARG-63, at least one respondent interested party waived participation in 181 of those cases. Of those 181 cases involving waiver, 40 went negative at the ITC. Thus, in nearly a quarter of the cases where Commerce made a company-specific likelihood finding for at least one respondent interested party, respondent interested parties were successful in having the order revoked because the ITC made a negative likelihood of continuation or recurrence of injury determination.

[41]First Written Submission of the United States, para. 40.

[42]19 U.S.C. § 1675(c)(4)(B) (Exhibit ARG-1).

[43]*See* Panel Report, para. 7.100.

42. The Panel found that by finding likelihood for an individual respondent interested party in instances where that party waives its participation, Commerce somehow fails to "determine" – within the meaning of Article 11.3 – whether dumping would be likely to continue or recur on an order-wide basis.[44] The Panel's reasoning is flawed because it ignores the fact that Commerce reaches its conclusion on the order-wide determination independently of any individual determination. Contrary to the Panel's implied view, Commerce does not aggregate individual determinations to arrive at the order-wide determination. When viewed in proper context, it is clear that section 751(c)(4)(B) and section 351.218(d)(2)(iii) are not obstacles to Commerce's making a final order-wide likelihood determination consistent with Article 11.3.

43. It is also worthwhile to consider what evidence is on the record when Commerce makes an Article 11.3 determination, *i.e.*, the order-wide determination. First, domestic interested parties must notify their intent to participate in Commerce's review within 15 days of initiation. Failure to do so results in automatic revocation.[45] Thus, domestic interested parties who no longer view continuation of the order as necessary will simply decline to state an intention to participate in the review and, thus, implicitly agree to the automatic revocation of the order. As a result, if domestic interested parties do submit substantive responses, those responses inevitably will, as a rule, contain information that supports an affirmative finding of likelihood.[46] In other words, the domestic interested parties will place evidence of likelihood of continuation or recurrence of

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[44]Panel Report, paras. 7.93, 7.95, and 7.99.

[45]19 C.F.R. §§ 351.218(d)(1)(i) and 351.218(d)(1)(iii)(B) (Exhibit ARG-3).

[46]Indeed, the regulations so require. *See* 19 CFR 351.218(d)(3)(ii) (response to notice of initiation must contain a statement regarding the likely effects of revocation of the order, including factual information, arguments, and supportive reasoning). (Exhibit ARG-3.)

dumping on the record.

44. If respondent interested parties waive participation in the review, then they do so knowing that domestic interested parties have responded to the notice of initiation, are interested in continuation of the order, and will likely place information on the record in support of that view. By waiving participation, respondent interested parties waive their right to place evidence on the record rebutting the evidence the domestic interested parties have provide. Again, they do so intentionally. However, if not all respondent interested parties waive participation, then Commerce will consider the information placed on the record by those participating. Indeed, as the United States made clear to the Panel,[47] under section 351.308(f) of the Regulations, Commerce must consider *all* information contained in parties' substantive responses in making its final order-wide sunset determination. This includes information in both domestic and respondent interested parties' substantive responses, whether "complete" or not.

45. Commerce cannot be faulted for the lack of information on the record if respondent interested parties choose not to participate. In *Japan Sunset*, the Appellate Body confirmed the significant role that respondent interested parties play in sunset review proceedings (an issue that is at the heart of the dispute in OCTG from Argentina).[48] Based on the evidence placed on the record, nothing about the waiver provisions of U.S. law prevents Commerce from making an order-wide determination consistent with Article 11.3.

46. The Panel, however, concluded that the order-wide determination was "tainted" by the

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[47]*See, e.g.*, First Written Submission of the United States, paras. 156 and 217; U.S. Answers to First Set of Panel Questions, paras. 10 and 13; and Second Written Submission of the United States, paras. 24-25.

[48]*Japan Sunset,* para. 199.

company-specific determinations made pursuant to the statute and regulations. In arriving at this conclusion, the Panel committed two errors. First, the Panel seemed to find that an investigating authority is "obligat[ed] to determine likelihood with respect to [a] particular exporter."[49] As noted above, there is no such obligation under Article 11.3.

47. Second, in adopting this view with respect to individual likelihood determinations, the Panel compounded the error by imputing the consequences of individual non-cooperation in an original investigation to a sunset review determination. More specifically, the Panel stated that the approach to non-cooperation in a sunset review is "no different" from the approach that an investigating authority takes in an original investigation.[50] Yet the Panel's reasoning does not comport with the Appellate Body's findings in *German Steel Sunset* that "original investigations and sunset reviews are distinct processes with different purposes" and that "[t]he nature of the determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation."[51] While company-specific determinations are required in an original investigation (*i.e.*, Commerce will calculate a dumping margin for all of the respondents), they are not made in a sunset review – nor does Article 11.3 require that such determinations be made in a sunset review.

48. In a similar vein the Panel focuses on whether Commerce will have sufficient information to make a company-specific likelihood determination.[52] However, the order-wide determination is made independently of the company-specific determination. Therefore, to comply with Article

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[49]Panel Report, para. 7.98.
[50]Panel Report, note 37.
[51]*US - German Steel Sunset*, para. 87.
[52]*See* Panel Report, paras. 7.95 and 7.98.

11.3, Commerce need not employ the same level of analysis and scrutiny to an individual determination as it does to the order-wide determination.

49. The Panel stated that rather than making an affirmative likelihood determination based on the waiver alone, Commerce should make affirmative likelihood determinations using "facts available," while acknowledging that "the outcome would likely be the same."[53] Here, the Panel elevated form over substance. As noted above, Commerce relies on all evidence placed on the record by domestic and respondent interested parties in reaching its order-wide determination. Nothing in this procedure is inconsistent with Article 6.8 or Annex II. As result, Article 11.3 does not require the Panel to elevate form over substance.

50. In short, the Panel erred by analyzing the waiver provisions first by reviewing the compliance of an individual likelihood determination with Article 11.3 and by assuming that any such determination taints the order-wide determination. Instead, had the Panel examined the manner in which Commerce makes the order-wide determination, the Panel would have concluded that the determination is made based on adequate reasoning and evidence, consistent with Article 11.3.

### B. The Panel Erred in Finding That Section 351.218(d)(2)(iii) of the DOC's Regulations is Inconsistent With Articles 6.1 and 6.2 of the AD Agreement

51. Articles 6.1 and 6.2 of the Antidumping Agreement provide that interested parties shall have the right to present evidence and argument and to have a full opportunity for the defense of their interests. Argentina claimed that section 351.218(d)(2)(iii) is inconsistent with Articles 6.1 and 6.2. However, the United States noted in its first submission that the cited regulatory

[53] *See* Panel Report, para. 7.95; *see also* para. 7.127.

provision does not address the issue of the kind of information that can be provided in a sunset review.[54] Section 351.218(d)(2)(iii) simply states that "[t]he 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." Therefore, this section of the regulations is plainly not inconsistent with Articles 6.1 and 6.2, and the Panel's conclusions in this regard should be overturned.

52. The Panel erred even with respect to the substance of the claim, *i.e.,* that waivers operate in a manner inconsistent with Articles 6.1 and 6.2. The United States provided evidence and argument demonstrating how, under U.S. sunset laws and regulations, interested parties are afforded "ample opportunity to present in writing all evidence which they consider relevant" and have "full opportunity for the defence of their interests."[55]

53. As the United States explained, section 351.218(d)(3) of Commerce's *Sunset Regulations* provides that interested parties will have 30 days from the notice of initiation of the review to submit substantive responses. In addition to identifying information that is required of interested parties,[56] section 351.218(d)(3)(iv)(B) of Commerce's *Sunset Regulations* provides that parties

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[54]First Written Submission of the United States, para. 166.

[55]*See* First Written Submission of the United States, paras. 36-41, 164-170.

[56]Commerce regulations request that interested parties submit their contact information and that of any legal counsel; the identification of the subject merchandise and country subject to review; the citation and date of the notice of initiation; an expression of their willingness to participate and provide information in the review; information and argument with respect to the likelihood of continuation or recurrence of dumping and the likely dumping margin; and summaries of any findings of duty absorption, scope clarifications, circumvention and/or changed circumstances. In addition, from respondent interested parties, Commerce asks for the party's individual weighted average dumping margin from the investigation and any subsequent reviews, the party's value and volume of exports of subject merchandise for the five years preceding the year of the review's initiation (including quarterly data for the last three years); the party's value

may provide "*any* other relevant information or argument that the party would like [Commerce] to consider."[57] Further, in section 351.218(d)(4) of Commerce's *Sunset Regulations*, interested parties are afforded the opportunity to rebut evidence and argument submitted in other parties' substantive responses within five days of their submission.[58] Moreover, section 351.309(e) of Commerce's *Sunset Regulations* affords interested parties the opportunity to comment on whether an expedited review is appropriate.[59]

54. Thus, the United States argued, Commerce's *Sunset Regulations* fulfill the obligations of Articles 6.1 and 6.2 by informing the interested parties of the type of information that will be required in every sunset review and by expressly providing opportunities to submit written information and argument (including *any* other information the interested party believes is relevant to the proceeding), rebut information and argument submitted by other parties, and comment on the appropriateness of conducting an expedited review.

55. The Panel failed to address this argument. Instead, the Panel seems to have *assumed* that Articles 6.1 and 6.2 provide interested parties with an indefinite right to present evidence and argument to the investigating authorities and to request a hearing and that an interested party is not accountable for its failure to exercise that right. Yet, there is no such indefinite right – or obligation – in the text of Article 6.1 or 6.2. Inasmuch as U.S. law provides notice of and

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and volume of the party's exports of subject merchandise for the calendar year preceding the year of initiation of the original antidumping investigation; and the party's percentage of total exports of subject merchandise for the five calendar years preceding the review's initiation. 19 C.F.R. § 351.218(d)(3)(ii)-(iii) (Exhibit ARG-3).

[57]19 C.F.R. § 351.218(d)(3)(iv)(B) (emphasis added) (Exhibit ARG-3).

[58]19 C.F.R. § 351.218(d)(4) (Exhibit ARG-3).

[59]19 C.F.R. § 351.309(e) (Exhibit US-3).

opportunity to participate in a sunset proceeding, an interested party's failure to exercise that right does not mean Commerce failed to provide the right in question.

C. The Panel Failed Objectively to Assess the Facts Presented By the United States in Accordance With Article 11 Of The DSU by Completely Disregarding Those Facts

56. As discussed in Sections A and B above, the Panel erred in finding that section 751(c)(4)(B) of the Act and section 351.218(d)(2)(iii) of Commerce's regulations are inconsistent with Articles 11.3, 6.1 and 6.2 of the Antidumping Agreement. The Panel also erred its findings and conclusions regarding the relationship between company-specific and order-wide determinations, as well as those regarding the definition of what constitutes a "complete" response. In so doing, the Panel failed objectively to assess the facts in accordance with Article 11 of the DSU, thus its findings and conclusions with respect to these issues should be reversed.

57. Article 11 of the DSU provides, in relevant part:

> a panel should made an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

As the Appellate Body in *German Steel Sunset* said,

> Article 11 requires panels to take account of the evidence put before them and forbids them to wilfully disregard or distort such evidence. Nor may panels make affirmative findings that lack a basis in the evidence contained in the panel record.[60]

The Panel in this case has failed in this regard.

58. First, the Panel made erroneous findings of fact regarding the relationship under U.S. law

[60] *US - German Steel*, para. 142.

between company-specific and order-wide determinations in sunset reviews. The Panel concluded that "[t]o the extent that the order-wide determination of likelihood is based in whole or in part upon a company-specific determination that was improperly established, we do not see how the order-wide determination can be supported by reasoned and adequate conclusions based on the facts before the investigating authority."[61]

59. The Panel's analysis, and its conclusion, do not conform to the requirement under Article 11 that the Panel assess the facts objectively. It should be noted at the outset that the Panel did not actually conclude that the order-wide determination is based on the company-specific determination: It casually said that "to the extent" the order-wide determination is so based, then it cannot be supported by reasoned and adequate conclusions. It is difficult to see how a Panel can conclude that a Member is in breach of its WTO obligations if the Panel does not take the elemental step of actually drawing a conclusion about the underlying facts. Moreover, the Panel's equivocal conclusion itself indicates that the factual record did not demonstrate that order-wide determinations are based on, and therefore "tainted by," company-specific determinations. Had the record so indicated, presumably the Panel's conclusion would have been unequivocal.

60. Further, the record would not have supported the conclusion the Panel seemed to want to draw. The United States made it clear that "[t]he likelihood finding with regard to one company . . . is not dispositive of the results of the order-wide likelihood determination . . . . Even if Commerce finds that dumping is likely with regard to one company, Commerce still must decide whether to conduct a full or expedited review to determine order-wide likelihood."[62] The United

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[61]Para. 7.101 (emphasis added).

[62]U.S. Answers to First Set of Panel Questions, para. 3.

States also repeatedly pointed out that, pursuant to its regulations, Commerce takes all record evidence into account, including evidence in incomplete submissions, when making the order-wide determination.[63] Therefore, even if the company-specific determination were "considered" in making the order-wide determination, the other record evidence could more than support "reasoned and adequate conclusions" about the likelihood of continuation or recurrence of dumping. For example, the United States pointed out that, in spite of the fact that a particular company waived participation, the record might contain evidence regarding conditions in the country subject to the order that would indicate dumping was not likely to continue or recur.[64] In stating that it could not "see" how an order-wide determination "based" in whole or in part on a company-specific determination that was improperly established could be supported by reasoned and adequate conclusions, the Panel overreached; assuming *arguendo* that a company-specific determination was improperly reached, an order-wide determination is not necessarily unsupported by reasoned and adequate conclusions. For example, if the company waiving participation accounted for a fraction of the imports, and the companies participating had continued to dump over the life of the order and presented no evidence that they would stop doing so if the order were revoked, the affirmative determination would be supported by reasoned and adequate conclusions. Therefore, the Panel erred in concluding that a company-specific determination necessarily taints the order-wide determination.

61. Rather than dealing with the facts and arguments presented by the United States about the

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[63]*See, e.g.*, U.S. Answers to First Set of Panel Questions, paras. 10, 13, 16-17, 29, 31-32, 36, and 38-39; Second Written Submission of the United States, paras. 24-25, and 28; and U.S. Answers to Second Set of Panel Questions, para. 7.

[64]U.S. Answers to Second Set of Panel Questions, para. 11.

operation of its own law, the Panel elected to seize on one statement by the United States as justification for its tentative conclusion regarding the relationship between the company-specific and order-wide determinations. The United States noted that Commerce "considers" all information in the administrative record, including, among other things, the individual likelihood determinations. However, the United States *never* stated that the order-wide determination is based on the company-specific determination. The United States merely provided that "individual . . . determination *may* affect the order-wide likelihood determination."[65] The United States pointed out repeatedly that company-specific determinations are not dispositive of the order-wide determination.[66]

62. In addition, the Panel noted that Commerce had never made an affirmative company-specific determination but a negative order-wide determination. There is no probative value in that fact. There is simply no evidence, and the Panel cited none, that the United States *ever* made an affirmative order-wide determination based on an affirmative company-specific determination rather than on the totality of record evidence; similarly, there is no evidence, and the Panel cited none, that an affirmative order-wide determination was not based on reasoned and adequate conclusions.[67]

63. In light of the panel record, then, it is impossible to see how the Panel could conclude that

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[65]U.S. Answers to Second Set of Panel Questions, para. 3.

[66]*See, e.g.*, U.S. Answers to First Set of Panel Questions, paras. 3, 20, 24, and 29.

[67]Indeed, had the Panel followed the logic of its own conclusions, it would not have even reached the issue of whether the facts in this particular dispute – the continued dumping and drop in import volumes in OCTG from Argentina – were sufficient; it would have simply concluded that, by virtue of the deemed waiver, the determination was invalid. Instead, the Panel concluded as an afterthought that the waiver provisions rendered this determination inconsistent with Article 11.3. Panel Report, Para. 7.222.

U.S. law mandates a breach of Article 11.3 of the AD Agreement. Nothing in the law requires Commerce to draw its conclusion regarding an order-wide determination "based on" the company-specific determination. Even if, *arguendo*, Commerce had hypothetically done so in any determination – and neither Argentina nor the Panel presented any facts in support of such a finding – that result would not have been mandated by U.S. law. Therefore the Panel had no factual basis for concluding that U.S. law mandates a breach of Article 11.3.

64. Perhaps in recognition of this fact, the Panel in its report sought to reverse the burden of proof and compel the United States to prove that its law does *not* mandate a breach: "[T]he United States has [not] cited a provision of US law that clearly states that the order-wide sunset determinations are independent from the company-specific determinations made pursuant to the waiver provisions."[68] The United States notes that the Panel never asked the United States to provide such a citation. To the contrary, the Panel asked whether a negative determination on an order-wide basis would be a violation of the statute if an affirmative company-specific determination had been made; the United States *unequivocally* stated that no violation would occur.[69] The Panel's refusal to consider this uncontroverted statement and to instead improperly shift the burden on the United States as justification for drawing the opposite conclusion

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[68]Panel Report, para. 7.102.

[69]U.S. Answers to First Set of Panel Questions, para. 30. In the case where an exporter was deemed to have waived participation, the Panel asked the United States to "explain whether a negative finding for country X on an order-wide basis would violate Section 1675(c)(4)(B) of the Tariff Act of 1930 . . . ." The United States responded: "No violation of [that provision] or any other provision of U.S. law would result. The statute requires only that likelihood be found with respect to the company that waived; it does not mandate that likelihood be found on an order-wide basis. As noted above, Commerce, even if using facts available, will consider information from prior proceedings and from all substantive responses, complete or otherwise."

constitutes wilful disregard or distortion of the evidence, as well as making an affirmative finding that lacks a basis in the evidence contained in the panel record, and thus a failure to assess the facts in an objective manner.

65. The Panel employed this same defective technique in drawing its conclusions about Articles 6.1 and 6.2. "In our view, *to the extent that* the order-wide determination . . . is based in whole or in part upon a company-specific determination that was established inconsistently with Articles 6.1 and 6.2, we do not see how the order-wide determination can be interpreted as being consistent with these two provisions."[70]

66. In this discussion, the Panel was more explicit in its dismissal of the U.S. position. Noting again that the United States was unable to cite to a negative order-wide determination where some exporters had waived the right to participate, the Panel stated "[t]his supports our view that the US explanation regarding the consideration of the evidence submitted in the incomplete responses of some exporters does not reflect the U.S. practice and is far from convincing."[71] First, it is difficult to understand how there can be a "practice" of any kind given that Argentina referenced only one DOC sunset review in which submissions were found to be incomplete.[72] Thus, the Panel's analysis in that respect alone is unsupported by the panel record. Perhaps most importantly, the Panel ignored an example the United States provided demonstrating a scenario in which evidence in an incomplete response could in fact be useful in an order-wide determination. As noted above, in spite of the fact that a particular company waived participation, the

[70]Panel Report, para. 7.125.
[71]Panel Report, para. 7.126.
[72]Second Written Submission of Argentina, n. 68.

administrative record might contain evidence regarding conditions in the country subject to the order that would indicate dumping was not likely to continue or recur.[73] Instead of addressing this, the Panel simply stated that it did "not understand how usefully this information could be considered for the country as a whole, given that it would not be used with respect to the individual exporter submitting it."[74] The Panel's discussion of this issue, including the insinuation that the United States misrepresented its own practice (one that does not exist), demonstrates the lack of objectivity with which the Panel assessed the evidence. The Panel wilfully ignored facts presented by the United States, instead drawing its conclusions on the basis of non-probative "evidence." In so doing, the Panel failed objectively to assess the facts before it.

67. The Panel's failure to make an objective assessment of the matter before it also manifested itself in its analysis of "incomplete" responses. The Panel found that for a "substantive response to be complete, it has to contain *all of the items* listed in Section 351.218(d)(3) of the Regulations."[75] This definition is incorrect and disregards relevant evidence on this issue provided by the United States, including evidence and argument provided *in response to requests for clarification by the Panel*.

68. Commerce's *Sunset Regulations* require an examination of each substantive response submitted by a domestic or respondent interested party to assess whether it is complete, *i.e.,* whether it contains the information specified in the regulations.[76] A "complete" substantive

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[73]U.S. Answers to Second Set of Panel Questions, para. 11.

[74]Panel Report, para. 7.126.

[75]Panel Report, para. 7.84 (emphasis added); *see also* para. 7.92.

[76]*See* 19 C.F.R. 351.218(e) (Exhibit ARG-3) and Preamble, 63 Fed. Reg. at 13518 (Exhibit US-3).

response "normally" must contain the limited information required by section 351(d)(3)(ii) of the *Sunset Regulations*.

69. The Panel subsequently sought clarification as to what constitutes a "complete" response. Specifically, the Panel posed the following question to the United States in its first set of questions to the parties:

> **Q8. *The Panel notes the following provision in Section 351.218(d)(2) (iii) of the DOC's Sunset Regulations:***
>
> ***(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. (emphasis added)***
>
> ***(a) Please explain the relationship between the terms "no response" and "a complete substantive response" as used in this section. Does this provision mean that submission of an incomplete response by an interested party is deemed as no response under US law? Does this provision treat an incomplete response as no response at all not withstanding how minimal the lacking portion of this response may be? Or, does it treat these two cases differently? Is there a waiver when the exporter fails to respond at all, or also when the exporter submits its response but the response doesn't contain all required information?***

70. The United States answered as follows:

> 40. When a respondent interested party submits an incomplete substantive response, Commerce will find that the incomplete response is the equivalent of no response from that respondent interested party for the purposes of determining likelihood on a company-specific basis.
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> 41. *Commerce does not reject incomplete submissions per se. The evaluation concerning the completeness of a substantive response depends on the individual circumstances and is done on a case-by-case basis.*[33] *In addition, Commerce has general authority to waive deadlines for good cause, unless expressly precluded by statute.*[34] *Therefore, if a response were incomplete, Commerce could extend the 30 day deadline to permit the respondent interested party to complete the*

*submission.*

42. There is a deemed waiver when an exporter submits either an incomplete substantive response or no response at all. Nevertheless, the information submitted in an incomplete substantive response will be considered by Commerce when making the final sunset determination.[77]

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[33] *See* 19 C.F.R. 351.218(d)(3) (Exhibit ARG-3) and Preamble, 63 Fed. Reg. at 13518 (Exhibit US-3) (Commerce may consider incomplete company-specific substantive response to be complete or adequate where that interested party is unable to report the required information and provides explanation).
[34] 19 C.F.R. 351.302(b) (Exhibit US-3).

71. In other words, the United States explained that Commerce determined "completeness" *on a case-by-case basis* and has the *flexibility* to offer parties additional time to provide a complete submission.

72. The Panel then sought further clarification concerning Commerce's consideration and treatment of "completeness" of a substantive response. Specifically, in its second set of questions to the parties, the Panel asked the following of the United States:

> ***Q9. The Panel notes the US' statement that the decision concerning the incompleteness of an exporter's substantive response to the notice of initiation is made on a case-by-case basis by the DOC and that the DOC may consider an incomplete substantive response to be complete if the party submitting that response provides explanation as to why it was unable to provide that information. In this respect, the United States referred to section 351.218(d)(3) of the DOC's Regulations and to the preamble of the Regulations. However, the Panel notes that the cited portions of the Regulations deal with the DOC's adequacy determinations rather than waivers. Please clarify whether the cited provisions of the Regulations have any effect on the application of the waiver provisions of the US law to exporters that submit an incomplete response to the notice of initiation in sunset reviews.***

73. The United States responded as follows:

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[77]U.S. Answers to the First Set of Panel Questions, paras. 40-42 (response to question 8) (emphasis added).

> 12. A foreign interested party is required to file a substantive response that contains all of the information required by sections 351.218(d)(3)(ii) and (iii) of the *Sunset Regulations*. If a foreign interested party fails to provide all the information required by sections 351.218(d)(3)(ii) and (d)(3)(iii) of the *Sunset Regulations*, Commerce normally will find that substantive response to be "incomplete." If the substantive response is incomplete, then the foreign interested party who submitted the incomplete substantive response is deemed to have waived its right to participate in the sunset review pursuant to section 351.218(d)(2)(iii) of the *Sunset Regulations*.
>
> 13. *Notwithstanding the above, Commerce may find a substantive response which does not contain all the information required by sections 351.218(d)(3)(iii) and (d)(3)(iii) of the Sunset Regulations to be "complete," despite the missing information, when the foreign interested party provides a reasonable explanation why it is unable to report the information. See Preamble, 63 Fed. Reg. at 13518. If Commerce found that the substantive response was "complete" despite missing information, the foreign interested party submitting this substantive response would not be deemed to have waived its right to participate in the sunset review*. Although the cited section of the Preamble specifically references section 351.218(d)(3) of the *Sunset Regulations*, the text discusses both the determination concerning the "completeness" of a substantive response (reporting requirements of section 351.218(d)(3)) and the determination concerning the "adequacy" of the over-all response to the notice of initiation (section 351.218(d)). [78]

74. Thus, the United States again submitted evidence and argument that "completeness" is considered on a case-by-case basis. Furthermore, the United States explained that a response could be considered complete even if it did not contain *all* the information required under Commerce's *Sunset Regulations*.

75. The Panel, however, ignored all of this relevant evidence. Instead, the Panel simply decided – contrary to the evidence before it – that Commerce would find a response to be complete only if it contained "all" of the information set forth in the regulations.[79] Furthermore,

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[78]U.S. Answers to the Second Set of Panel Questions, paras. 12-13 (emphasis added; footnotes omitted).

[79]Panel Report, paras. 7.84 and 7.92.

Argentina never adduced any evidence or argument contravening the U.S. explanation, although it did state that the U.S. explanations were "not convincing."[80] Argentina's statement that U.S. arguments are not convincing is insufficient for Argentina to meet its burden of proof. Argentina bears the burden of coming forward with argument and evidence that establish a *prima facie* case of a violation.[81] In this case, Argentina neither established a *prima facie* case, nor rebutted the U.S. explanation.

76. In sum, the Panel never explained the evidentiary basis for its interpretation; nor did it take issue with the U.S. unrefuted evidence and explanation. In so doing, the Panel willfully ignored the relevant evidence altogether; its failure to take into account the record evidence and U.S. arguments is particularly egregious because the issue concerned the meaning of U.S. law, and was supported by citations to relevant U.S. legal materials, and the facts were never disputed by Argentina. The Panel's findings have no basis in the record. As such, the Panel failed to objectively assess the facts in accordance with Article 11 of the DSU.

### D. Argentina Failed to Meet its Burden of Proof Regarding its Claims that Section 751(c)(4)(B) of the Act and section 351.218(d)(2)(iii) of Commerce's Regulations are WTO-Inconsistent "As Such."

77. The Panel found section 751(c)(4)(B) of the Act and section 351.218(d)(2)(iii) of

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[80]Argentina's Comments on the United States' Responses to the Second Set of Panel Questions, para. 12.

[81]*See, e.g., United States - Measures Affecting Imports of Woven Shirts and Blouses from India*, WT/DS33/AB/R, Report of the Appellate Body, adopted 23 May 1997, p. 17; *EC - Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body, adopted 13 February 1998, para. 104; and *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, Report of the Panel, as modified by the Appellate Body, adopted 12 January 2000, para. 7.24.

Commerce's regulations WTO-inconsistent "as such."[82] With respect to "as such" challenges, the Appellate Body has found that,

> [A] responding Member's law will be treated as WTO-*consistent* until *proven* otherwise. The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case.[83]

78. In this case Argentina failed to provide any such evidence to satisfy its burden. The one case cited by Argentina, where Commerce found respondent interested parties to have provided incomplete responses, cannot serve as conclusive evidence of Commerce practice, let alone the true meaning of the measures at issue.[84] As the Appellate Body stated in the context of another dispute involving the United States sunset regime, "We are not persuaded that the conduct of a single sunset review can serve as conclusive evidence of USDOC practice, and, thereby, of the meaning of United States law."[85] Yet the Panel's analysis of Argentina's Articles 11.3 and 6.1/6.2 "as such" claims concerning waivers based on incompleteness is premised upon how one particular review supposedly provided the definitive meaning of "complete" for purposes of the particular measure at issue.[86]

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[82]Panel Report, paras. 7.103 and 7.128.

[83]*US - German Steel*, para. 157 (emphasis in original; citation omitted).

[84]*US - German Steel,* para. 148.

[85]*US - German Steel*, para. 148.

[86]*See* Panel Report, paras. 7.91-7.93 and 7.100-7.103 (Article 11.3 claims); and paras. 7.120-7.127 and 7.128 (Articles 6.1 and 6.2 claims).

79. The Panel took it upon itself to fill in the gaps in Argentina's claim, relieving Argentina of its burden to make a *prima facie* case. In response to the Panel's questions, the United States explained how Commerce analyzes and considers completeness. Argentina never adduced evidence or arguments contravening the United States' explanations. Nevertheless, the Panel completely and willfully ignored the evidence and arguments provided by the United States and devised its own definition of "complete" with no basis in the panel record and contradicted by evidence and argument on the panel record.[87]

80. Thus, the Panel failed to objectively assess the facts in accordance with Article 11 of the DSU. The Appellate Body should reverse all of the Panel's findings and conclusions that derive from the Panel's unsupported and incorrect definition of completeness.[88]

## IV. The Panel Erred in Denying the U.S. Preliminary Ruling Requests

81. The Panel should not have even reached some of the erroneous conclusions discussed above, as some of the claims, *e.g.,* those regarding the SPB, were not even within the terms of reference of this dispute.

82. Article 6.2 of the DSU sets forth the requirements for panel requests. It requires the complaining Member to identify the specific measures at issue and to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. The requirements of Article 6.2 are, as the Appellate Body has noted, designed to provide the defending party with a

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[87]It is well-established that panels cannot rule in favor of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it. *See, e.g., Japan - Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, paras. 125-131.

[88]Panel Report, paras. 7.91-7.93 and 7.100-7.103 (Article 11.3 claims); and paras. 7.120-7.127 and 7.128 (Articles 6.1 and 6.2 claims).

measure of due process: that party is "entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence."[89] Argentina's panel request, even under the most generous reading, does not meet the requirements of Article 6.2, and the Panel erred in denying the U.S. preliminary ruling requests.

A. Overview of the Defects in Argentina's Panel Request

83. A review of Argentina's panel request reveals that Argentina was primarily challenging the Commerce and ITC determinations in the OCTG sunset review. Section A is captioned:

> The Department's Determination to Expedite and the Department's Sunset Determination are inconsistent with the Antidumping Agreement and the GATT 1994:

Section B is captioned:

> The Commission's Sunset Determination was inconsistent with the Antidumping Agreement and the GATT 1994:

Each of these sections has numbered points beneath that set forth the specific claims.

84. After these two sections, Argentina presented additional paragraphs (referred to as "Page Four" for lack of any other readily available means of identifying them) in which Argentina stated that it "also considers that certain aspects of . . . U.S. laws, regulations, policies, and procedures are inconsistent with U.S. WTO obligations, to the extent that any of these measures mandate action . . . that is inconsistent with U.S. WTO obligations or preclude . . . [the United States] from complying with U.S. WTO obligations . . . ." Argentina subsequently lists certain U.S. statutes, the Statement of Administrative Action, the SPB, and the Commerce and ITC

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[89] *Thailand - Anti-Dumping Duties on Angles, Shape and Section of Iron or Non-Alloy Steel H-Beams from Poland,* WT/DS122/AB/R, Report of the Appellate Body, adopted 5 April 2001, para. 88.

regulations, eventually stating that Argentina"considers" the agencies' determinations "and the above mentioned U.S. laws, regulations, policies, and procedures" to be inconsistent with certain provisions of the WTO agreements.

85. The relationship between "Page Four" and the rest of the panel request is murky at best. "Page Four" appears to be part of section B; yet section B is a discussion of the ITC determination, and the discussion on "Page Four" is broader than that. Further, the language used in "Page Four" indicates that Argentina itself was not clear as to its purpose. As noted above, the Page Four discussion provides that "Argentina also *considers certain aspects* of the . . . laws . . . inconsistent . . . . *to the extent* that they mandate action . . . inconsistent with U.S. WTO obligations." (Emphasis added). Whereas sections A and B concisely aver that the OCTG determinations were WTO-inconsistent, the plain language of "Page Four" reads as a hedging and hortatory essay, rather than as a series of new claims regarding new "measures" not covered by sections A or B. This interpretation is bolstered by context – Argentina's panel request was in the form of a letter, and the "Page Four" discussion was in effect the closing of that letter.

86. Notably, Argentina agreed that the captioned portions of the panel request – *i.e.*, the panel request minus "Page Four" – constituted the whole of the claims, stating that it was Argentina's "intention (*as the panel request clearly provided*) to set forth the particular claims in the paragraphs contained in Sections A and B of the document."[90] Therefore, Argentina confirmed the U.S. reading of "Page Four" as ruminations, rather than as claims.

87. On this basis, the United States proceeded with preparing its defense and was surprised at

[90]WT/DSB/M/150 (1 July 2003), para. 32 (emphasis added).

Argentina's first submission, where it became clear that for purposes of drafting its submission, Argentina was abandoning its previous, explicit clarification that sections A and B were the exclusive source of claims and measures, and instead – for the first time – relying on the vague statements in "Page Four" to expand some of the claims (it is not even clear which claims, from the face of the panel request) in sections A and B to the "measures" in "Page Four."

88. In addition to the problems with "Page Four," the United States complained that the panel request failed to comply with Article 6.2 of the DSU because section B lists entire articles of the Antidumping Agreement, without specifying the obligations within those articles Argentina was challenging. More specifically, sections B.1 and B.2 allege an inconsistency with Article 6 as a whole and section B.3 alleges an inconsistency with Article 3 as a whole. Given that each of these articles contains multiple paragraphs with multiple obligations, the United States argued that Argentina's failure to identify which obligations it was challenging constitutes a failure to present the problem clearly. As the Appellate Body has noted, mere listing of articles may not suffice to meet the standards of Article 6.2.[91] In this dispute, it did not. Article 6 contains *fourteen* paragraphs and an annex. Article 3, likewise, contains *eight* paragraphs, none of which even applies to sunset reviews.

89. The United States made note of the defects in Argentina's panel request at the first meeting of the DSB at which the request was on the agenda, stated at that time that it did not understand the substance of Argentina's complaint, and requested that Argentina submit a new panel request that complied with Article 6.2 of th DSU.[92] Argentina refused.

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[91]*Korea Dairy Safeguard,* para. 124.
[92]First Written Submission of the United States, para. 99.

90. Therefore, the United States filed a preliminary ruling request with the Panel regarding the inconsistency of the panel request with Article 6.2.[93]

B. The Panel Erred in Failing to Grant the Preliminary Ruling Request

91. The Panel denied certain ruling requests and exercised judicial economy with respect to the remaining ones. This appeal focuses on the denials of these certain requests.

1. Claims Regarding the "Irrefutable Presumption," the SPB, the Statute, and the Statement of Administrative Action

92. The United States was surprised to find, in Argentina's first submission, a claim that the SPB, the sunset review statute, and the Statement of Administrative Action ("SAA") were all being challenged "as such" for creating an "irrefutable presumption" that dumping would be likely to continue or recur after termination of an antidumping order. First, the plain language of the panel request indicates that Argentina was challenging Commerce's determination in this sunset review, not "U.S. law" as such. The phrase "virtually irrefutable presumption" appears under the section of the panel request entitled "The Department's Determination to Expedite and the Department's Sunset Determination . . . .," and the sentence in which the phrase is found begins "*The Department's Sunset Determination is inconsistent* with Article 11.3 . . . because it was based on a virtually irrefutable presumption under U.S. law as such . . . ."[94] (Emphasis added.) This sentence makes clear that it is the determination, rather than "U.S. law", that is

[93]First Written Submission of the United States, paras. 79-114.

[94]The United States also notes that a "virtually irrefutable" presumption is not the same as an "irrefutable presumption," and Argentina's use of that phrase in the panel request – but not in its written submissions – further obscured the notion that its claim related to the *Sunset Policy Bulletin* and its alleged requirement that Commerce make an affirmative determination in "every" sunset review.

alleged to be inconsistent with Article 11.3. Second, the "U.S. law" upon which this presumption is based is not specified; Argentina did not identify the statute, the SAA, or the SPB as the source of this alleged presumption. If this reference is sufficient to identify the measure at issue and present the problem clearly, then presumably the entire U.S. Code, U.S. regulations, and U.S. judicial decisions are included in the scope of Argentina's panel request.[95]

93. In section A.4 of its request, Argentina goes on to state that the "unlawful presumption" is "*evidenced* by the consistent practice of the Department in sunset reviews (which practice *is based on* U.S. law and the Department's Sunset Policy Bulletin)." (Emphasis added). Thus, the consistent practice is evidence – not a claim by itself – of this virtually irrefutable presumption, and the SPB is the basis for the evidence relating to the actual claim: that the *determination* was inconsistent. Again, nothing in this paragraph indicates that the consistent practice, U.S. law, or the SPB are themselves being challenged as such.

94. The Panel claimed that in issuing its preliminary ruling request, it looked at the panel request "as a whole."[96] In fact, the Panel did just the opposite. The Panel seems to have relied on the vagaries of "Page Four" to bolster its view that the panel request provided for an irrefutable presumption challenge based on the statute, the SAA, and the Sunset Policy Bulletin as such, and that picking out the new "measures" identified in "Page Four" and reading them into

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[95]Much as the Appellate Body recently concluded that a panel should not be expected to comb through an entire piece of legislation to discern a party's argument – in other words, the party bears the burden of affirmatively making its argument – the responding party should not be expected to prepare a defense on the assumption that every single law in its legal code is included within the terms of reference. *See Canada - Measures Relating to Wheat and Treatment of Imported Grain,* WT/DS276/AB/R, Report of the Appellate Body, circulated 30 August 2004, para. 191.

[96]Panel Report, para. 7.14.

section A of the panel request constitutes looking at the panel request as a whole. Yet the Panel ignored the fact that "Page Four" expressly states that Argentina "*also*" considers certain aspects the provisions set forth therein to possibly be WTO-inconsistent; in other words, whatever is "claimed" on "Page Four" is *in addition to* and not a *clarification of* what is claimed in section A.4. Viewing the panel request as a whole, then, means that the "measures" set forth in "Page Four" cannot be used to expand the scope established in section A.4, especially in light of the particular words used by Argentina in describing "Page Four" of its panel request.

95. In addition, the Panel ignored the more concrete parts of the panel request that indicated the challenge in section A.4 was limited to this particular sunset determination. For example, the Panel found that section A.4 "takes issue with US law's provisions relating to the likelihood of continuation or recurrence of dumping determinations;" that, together with the fact that "the mentioned section also cites the SPB and the USDOC's practice in this regard" means that the section was "sufficiently clear to inform the United States that Argentina may pursue a claim to challenge the provisions of US law regarding the alleged irrefutable presumption under US law . . . ."[97] However, the Panel passed over the fact that Argentina captioned the section as an "as applied" challenge and framed the paragraph as an "as applied" claim. Indeed, a review of the panel request "as a whole" makes it clear – as confirmed by Argentina's own statements – that in section A.4, Argentina was challenging the determination in OCTG and not "U.S. law" as such.

96. While the Panel ignored, with respect to section A, that the heading in some way provides guidance as to the claims being advanced, the Panel applied just the opposite logic to conclude

[97]Panel Report, para. 7.27.

that an "as applied" claim was included in section B.3. Section B.3, for example, "[o]n its face . . . seems to be limited to . . . US statutory provisions."[98] However, having rejected the relevance of the section heading with regard to section A, the Panel finds that the section heading for section B is dispositive: "[T]he heading of section B refers to the USITC's determinations in this sunset review. Therefore, we consider that the text of section B, including the heading, is sufficiently clear to inform the United States that Argentina may challenge the application of the cited statutory provisions in the sunset review at issue."[99] Surely the Panel cannot have it both ways; either the section heading is material to the claims identified within the heading, or it is not.[100]

97. The United States is unable to reconcile this apparent double standard with the principle that the "complaining party, as the party in control of the drafting of a panel request, should bear the risk of any lack of precision in the panel request."[101] Instead, the Panel seems to have relied on a standard in which a complaining party need not provide a brief summary of the legal basis of the complaint. The complaining party need only "refer to" a particular measure somewhere in its panel request, and a particular claim somewhere else in the request (regardless of context), and that would be sufficient to "present the problem clearly." For example, the Panel relies on a

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[98]Panel Report, para. 7.32.

[99]Panel Report, para. 7.32.

[100]In section A.4, both the heading and the paragraph state that the claim is an "as applied" claim. By contrast, in section B.3, the heading suggests an as applied claim, whereas B.3 states an as such claim. Given that the burden of clarity in a panel request is on the complaining party, the Panel should not have used the headings to expand the claims set forth in the panel request.

[101]*Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain,* WT/DS276/12, Preliminary Ruling by the Panel ("*Canada - Wheat Preliminary Ruling*"), 21 July 2003, para. 25.

"general reference," a "cite," other "references" and "two clear references" in support of its findings with respect to section A.4,[102] as well as the fact that the heading of section B "refers to" the ITC determination in support of its findings regarding Argentina's as applied claim. Thus, reviewing the panel request "as a whole" means looking only for key words in the panel request, without regard to the structure or syntax of the document, and essentially requiring one to guess which claim is directed at which measure. Unfortunately, in this dispute, it is the United States, rather than Argentina, that bore the risk of Argentina's lack of precision.

98. The Panel's conclusions, if upheld, have disturbing implications for due process. A complaining party can apparently pepper its panel request with "references" of measures and claims in any order, regardless of the context of those "references," (e.g., preceding a reference with any qualifications, such as burying an "as such claim" within a section and paragraph clearly specifying an "as applied" claim), and by virtue of that "reference" the responding party will be on notice that any of the phrases used constitutes a claim to another measure, as such or as applied. Those references can be imprecise ("virtually irrefutable" when the complaining party means "completely irrefutable"), vague ("U.S. law"), and incoherent (see above regarding "as such" claims in an "as applied" discussion), yet the responding party will be expected to know the case it has to answer. As the Appellate Body has noted, the "procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt, and effective resolution of trade disputes."[103] The Panel's approach in

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[102]Panel Report, paras. 7.27, 7.39.

[103]*United States - Tax Treatment of "Foreign Sales Corporations",* WT/DS108/AB/R, adopted 20 March 2000, para. 166.

this case promotes, rather than discourages, such techniques.

99. Rather than giving effect to Article 6.2, this approach will strip it of meaning. Complaining parties will have every incentive to make their panel requests as vague, imprecise, incoherent, and confusing as possible, and responding parties will have no recourse. It is impossible to reconcile Article 6.2 with this standard.

100. More perplexing still is the fact that a very simple remedy was available. Argentina merely needed to resubmit the panel request, cured of the defects the United States identified. Instead, however, the Panel nullified the safeguards of Article 6.2 by permitting Argentina to advance a panel request the claims and measures of which were only clear after the first submission was filed. As a result, the Panel's findings with respect to the SPB should be overturned.[104]

2. Contingent Section B Claims

101. Should Argentina appeal the Panel's substantive findings with respect to the as such and as applied claims regarding injury, the Appellate Body must first address whether Argentina properly raised those claims in the first instance. If Argentina does appeal those aspects of the Panel's report, the United States requests that the Appellate Body reverse the Panel's findings regarding the consistency of some of those claims with Article 6.2.

102. As noted above, the error with Argentina's "section B" claims is that they failed to

[104]The United States specified which claims were uniquely found in Argentina's written submissions, rather than the panel request, in response to the Question 22 from the Panel in its second set of questions. With respect to some of these claims, the Panel exercised judicial economy; with respect to others, the Panel found that the measure in question was not inconsistent with U.S. WTO obligations. Should any of these findings be reversed, the United States renews its objections that such claims are beyond the terms of reference of the Panel.

present the problem clearly by including wholesale references to articles with multiple obligations. Section B.3 proved to be the only paragraph in which Argentina pursued the claims for which this issue arose. In challenging the ITC's statute regarding a "reasonably foreseeable time," Argentina cited all of Article 3. The Panel found that "although Argentina cited various subparagraphs of Article 3 in support of its claim challenging US law's provisions," Argentina only developed arguments under paragraphs 7 and 8 thereof. The Panel therefore framed the question as "whether section B.3 of Argentina's panel request was sufficiently clear to inform the United States that Argentina could invoke Articles 3.7 and 3.8 as part of this claim."[105]

103. This fact undermines, rather than supports, the Panel's conclusion that the panel request was sufficiently clear. Articles 3.7 and 3.8 concern determinations regarding the threat of material injury. Even if the United States agreed that it were possible to have a threat of material injury determination in a sunset review, the simple fact is that there was no such determination here. The ITC evaluated whether injury was likely to continue or recur if the order were terminated, not whether a *threat* of injury was likely to continue or recur.

104. Again, the Panel relies on mere "references" to support the consistency of the panel request with DSU Article 6.2. The Panel notes that a "comparison of the text of Article 3.7 with section B.3 of Argentina's panel request reveals certain textual similarities. For instance, the use of certain words or phrases such as 'imminent,' 'within a reasonably foreseeable time' and 'over a longer period of time' in section B.3 . . . demonstrates that the panel request was sufficiently clear to allow the United States to expect that Argentina could be relying on Articles 3.7 and 3.8

[105]Panel Report, paras. 7.47.

in its submissions to the Panel in this regard."[106] The United States is not able to follow the logic of this argument. The Panel seems to be implying that the language of the panel request mimics or suggests the language of Article 3.7, thus providing sufficient notice that the claims were pursuant thereto. The Panel neglected to identify the alleged "textual similarities" between the two. In this regard, the United States notes that, of the phrases quoted by the Panel, the only one that appears both in section B.3 and Article 3.7 is "imminent." This is not surprising because the panel request, rather than mimicking Article 3.7, is simply quoting the U.S. statute that was allegedly being challenged. It is difficult to see how merely quoting the alleged measure *per se* constitutes a challenge of a WTO provision on an entirely different topic.

105. In short, under even the most liberal interpretation possible, section B.3 simply was not "sufficiently clear to inform the United States that Argentina could invoke Articles 3.7 and 3.8 as part of this claim."

3. The Panel Erred in Finding a Lack of Prejudice

106. The Panel noted that "the United States has not shown . . . that it had been prejudiced in its right to defend itself in these proceedings . . . . In several instances, the United States argued that it did not know what case it had to answer because of the lack of precision with respect to certain parts of Argentina's panel request. However, we consider that without supporting arguments, this simple allegation can not be taken to establish prejudice."

107. First, the Panel cited no authority in support of a requirement that the United States must demonstrate prejudice.

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[106]Panel Report, para. 7.47.

108. Second, the panel request in this dispute was so misleading as to be inherently prejudicial. Contrary to the Panel's finding, the United States argued that it suffered prejudice beyond just not knowing what case it had to answer; the United States explained that its ability to prepare its defense was delayed as a result. As noted in the preliminary ruling request, the United States did not, for example, even know "the specific WTO provision(s) with which the unidentified section(s) allegedly are inconsistent, and it is unreasonable to expect the United States to have begun preparing defenses against all the possible combinations of measures/claims that Argentina might possibly set forth in its first written submission."[107] This claim, when advanced by Canada in the Wheat Board dispute, sufficed to render the panel request inconsistent with Article 6.2.[108]

109. Furthermore, in this dispute, Argentina *encouraged* the United States to believe that the totality of claims was found exclusively in sections A and B.[109] Surely when a complaining party changes its mind on the meaning of an ambiguous panel request in the middle of the proceedings, the "merits" and "attendant circumstances" support rejection of the claims in question.

110. Third, the United States provided further concrete evidence of prejudice. The United States stated that its preparation suffered because it did not know the legal basis of Argentina's claim, compromising the ability to research fully the issues at hand and assign proper personnel to work on the dispute.[110] Even more specifically, the United States noted that "we were rushed

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[107]U.S. First Submission, para. 97.

[108]*Canada - Wheat Preliminary Ruling*, para. 28. "[The panel request] creates significant uncertainty regarding the identity of the precise measures at issue and thus impairs Canada's ability to 'begin preparing its defence' in a meaningful way." (Citations omitted).

[109]First Written Submission of the United States, para. 101.

[110]U.S. Answers to First Set of Panel Questions, para. 94.

to complete our first submission, which caused us to neglect to address until the first Panel meeting Argentina's improper request for a specific remedy from the Panel . . . ."[111]

111. Therefore, the Panel erred in finding that the deficiencies of the panel request were not prejudicial.

## V. Conclusion

112. This dispute began with a defective panel request. Argentina pursued a raft of claims that were not included in the Panel's terms of reference. The Panel erred in not rejecting these claims at the outset. The Panel then compounded its error by employing superficial and elliptical analytical techniques and failing to assess the evidence before it objectively. As a result, the Panel concluded that the SPB is a measure, which it is not; that Commerce "perceives" the SPB to be mandatory, which is irrelevant; and that the SPB mandates a breach, which it does not. Given these errors, the Panel's findings in this regard should be overturned.

[111]U.S. Second Opening Statement, para. 41.