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Current Developments of WTO Dispute Settlement Body Findings on the U.S. Antidumping Sunset Review Regime

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CURRENT DEVELOPMENTS OF WTO DISPUTE SETTLEMENT BODY FINDINGS ON THE U.S. ANTIDUMPING SUNSET REVIEW REGIME

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I. INTRODUCTION

The antidumping mechanism by which a country protects its domestic industry from an alleged dumping[1] by foreign producers has always been a trade remedy-of-choice utilized by U.S. trade authorities.[2] This aspect is aptly demonstrated by the number of U.S. antidumping duty orders imposed upon foreign producers which currently stands at 229.[3] With such a large number of antidumping duties being imposed, it is natural for those countries subject to the orders to explore ways to curtail them. Such position has materialized in various WTO fora, in particular, through numerous cases that were brought to the WTO Dispute Settlement Body ("DSB") challenging the consistency of the U.S. antidumping duty impositions since 1995 when the DSB adjudication procedure was stipulated into the WTO system.[4] Complex as is the antidumping regime,[5] the DSB cases address almost every technical issue that is involved in the decision making process of the antidumping duty determination. However, one area that had

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[1] A product is considered to be dumped if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 2.1 [hereinafter AD].

[2] *See* BRINK LINDSEY ET AL., ANTIDUMPING EXPOSED, THE DEVILISH DETAILS OF UNFAIR TRADE LAW (2003).

[3] Current as of June 2005. World Trade Organization Anti-Dumping Gateway, Antidumping Measures: By Exporting Country, at http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (last visited Oct. 23, 2006).

[4] The DSB cases on the U.S. antidumping number 25. Dispute Settlement Gateway, World Trade Organization, at http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (last visited Oct. 23, 2006).

[5] *See* LINDSEY, *supra* note 2, at xi.

been noticeably absent from the issues analyzed by the DSB pertained to the sunset review regime. This is due to the temporal aspect of sunset reviews which requires a mandatory review of the antidumping duty after five years from its original imposition. Therefore, it was only after 1998 that the first U.S. sunset review was initiated in accordance with the U.S. rules and regulations implementing WTO law[6] and that the cases were subsequently brought to the DSB disputing their WTO consistency.

This article surveys the WTO DSB's decisions regarding the U.S. antidumping sunset review process. The first part of the article summarizes the WTO provisions on antidumping sunset reviews and the relevant U.S. law. The second part surveys various sunset review issues that were raised by the cases brought to the DSB. Three DSB cases, namely *US – OCTG (Mexico)*, *US – OCTG (Argentina)*, and *US – Carbon Steel*, addressed sunset review issues.[7] From these findings by the DSB, fourteen main issues are surveyed in this article. The issues are divided into two types: "as such" issues and "as applied" issues. The former refers to the issues addressing the WTO consistency of the U.S. sunset review rules and regulations and the latter refers to the issues addressing the WTO consistency of the actual implementation of the rules and regulations, "as applied." The third part of the article examines the U.S. implementation of the DSB findings which pertains to the findings in *US – OCTG (Argentina)*. Finally, some comments and policy considerations are suggested with regard to the case law examined in the previous sections. The DSB findings on the fourteen issues are summarized below:

"As Such" Issues

1. Sunset Policy Bulletin (63 Fed. Reg. 18,871): Consistent
2. Likelihood factors (19 U.S.C. § 1675a(c)(1)): Consistent
3. Meaning of "likely" (19 U.S.C. § 1675a(a)(1)): Consistent
4. Likelihood timeframe (19 U.S.C. §1675a(a)(5)): Consistent

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[6] Transition Orders: Final Schedule and Grouping of Five-Year Reviews, 63 Fed. Reg. 29,372, 29,374 (Apr. 16, 1998); Antidumping, Steel Jacks, et al., 63 Fed. Reg. 36,389 (July 6, 1998). For the U.S. law, see section II.3. of this article.

[7] Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R (Nov. 2, 2005) and Panel Report, WT/DS282/R (June 20, 2005) [hereinafter *US — OCTG (Mexico)*]; Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R (Nov. 29, 2004) and Panel Report, WT/DS268/R (July 16, 2004) [hereinafter *US — OCTG (Argentina)*]; Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat products from Japan*, WT/244/AB/R (Dec. 15, 2003) and Panel Report, WT/244/R (Aug. 14, 2003) [hereinafter *US—Carbon Steel*].

5. Cumulation (19 U.S.C. § 1675a(a)(7)):	Consistent
6. Automatic initiation (19 U.S.C. § 1675(c)(2)):	Consistent
7. *De minimis* rule (19 C.F.R. § 351.106(c)):	Consistent
8. Order-wide determination (SPB § II.A.2):	Consistent
9. Waiver (19 U.S.C. § 1675(c)(4)(B)):	*Inconsistent*
10. Causation rule (19 U.S.C. § 1675(c))[8]:	Consistent

"As Applied" Issues

11. Likelihood of dumping:	*Inconsistent* (*US — OCTG (Mexico)*)
	Inconsistent (*US — OCTG (Argentina)*)
	Consistent (*US — Carbon Steel*)
12. Likelihood of injury:	Consistent (*US — OCTG (Mexico)*)
	Consistent (*US — OCTG (Argentina)*)
13. Likelihood timeframe:	Consistent (*US — OCTG (Argentina)*)
14. Zeroing:	Judgment Declined (*US — Carbon Steel*)

II. ANTIDUMPING SUNSET REVIEW LAW

1. Overview of Antidumping Sunset Reviews

Antidumping sunset reviews establish mandatory reviews of antidumping duties after five years from the initial imposition. The rationale behind the review is that "anti-dumping duties should remain in force only so long as they [are] generally necessary to counteract dumping which [is] causing or threatening material injury to a domestic industry."[9] Article 11.3 of the AD which stipulates the threshold duration of five years signifies this presumption that five years is enough to counteract the dumping. Sunset reviews will determine whether the antidumping duty should be continued. Unless the antidumping authorities determine that "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury," the antidumping measure will be terminated.[10] The sunset review provision was incorporated into the WTO antidumping regime after the Uruguay Round, when member states signed the GATT Final Act Em-

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[8] *See infra* note 84.

[9] JOSEPH E. PATTISON, WTO ANTIDUMPING AND SUBSIDY AGREEMENTS 6 (2005); *see also*, AD art. 11.1.

[10] AD, *supra* note 1, at art. 11.3.

bodying the Results of the Uruguay Round of Multilateral trade Negotiations on April 15, 1994.[11]

2. WTO Law

Article 11.3 of the AD addresses antidumping sunset reviews. It is stated as follows:

> Notwithstanding the provisions of paragraphs 1 and 2 [of Article 11], any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review. (footnote omitted).[12]

There are few AD provisions that describe in detail the actual procedure and substantive analysis that the investigating authority must observe. Article 11.4 states that provisions of Article 6 regarding evidence and procedure shall be applied to sunset reviews.[13] Article 18.3.2 provides transitory measures for the antidumping duty orders imposed before the date of entry into force of the WTO Agreement.[14] In this respect, sunset reviews differ from original investigations that is governed by extensive legal and procedural framework provided in Articles 3 and 5 of the AD.

3. U.S. Law

(a) Statutory Provisions

Consistent with the WTO provisions, the Uruguay Round Agreements Act ("URAA")[15] provides the statutory foundation that governs the antidumping sunset review process. The relevant provision is as follows:

5 years after the date of publication of—

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[11] PATTISON, *supra* note 9, at 30, 31.
[12] AD, art. 11.3.
[13] *Id.*
[14] *Id.* at art 18.3.2.
[15] Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (Dec. 8, 1994) (codified in scattered sections of 7, 17, 18, 19, 29 U.S.C.).

> (A) . . . an antidumping duty order, . . . the administering authority and the [International Trade] Commission shall conduct a review to determine, in accordance with section 1675a of this title, whether revocation of the . . . antidumping duty order . . . would be likely to lead to continuation or recurrence of dumping . . . and of material injury.[16]

More detailed rules and regulations on sunset reviews are provided in 19 U.S.C. § 1675a and 19 C.F.R. § 351.218. Additionally, there is "The Uruguay Round Agreement Act Statement of Administrative Action" ("SAA")[17] which provides an "authoritative expression by the United States of its views concerning the interpretation and application of the [law]."[18]

(b) Administrative Guideline

There is also an administrative guideline called the Sunset Policy Bulletin ("SPB")[19] which is "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."[20] It delineates a detailed guideline as to how sunset reviews should be administered. For example, section II of the Bulletin covers the determination of likelihood of continuation or recurrence of dumping[21] and the magnitude of the margin of dumping that is likely to prevail.[22] Factors such as the weighted-average dumping margins determined in the investigations and the volume of imports must be considered by the Department of Commerce ("DOC") in implementing sunset reviews.[23]

III. DSB FINDINGS ON U.S. ANTIDUMPING SUNSET REVIEW PROVISIONS "AS SUCH"

1. The SPB is not inconsistent with Article 11.3 of the AD.

(a) The SPB is a "measure" that is subject to a WTO challenge.

A "measure" is mentioned in Article 3.3 of the "Understanding on Rules and Procedures Governing the Settlement of Disputes"

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[16] *Id.* at 4861.
[17] H.R. Doc. No. 103-316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040.
[18] *Id.* at 4054.
[19] Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, 63 Fed. Reg. 18,871 (Apr. 16, 1998).
[20] *Id.* at 18,872.
[21] *Id.* at 18,872-73.
[22] *Id.* at 18,873-74.
[23] *Id.* at 18,872.

("DSU"),[24] which refers to "situations in which a [WTO] Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member." Reversing the Panel decision in *US — Carbon Steel* which held that the SPB does not constitute a "measure" under the DSU, the Appellate Body ("AB") found that a broad range of measures could be brought to a DSB Panel[25] as long as the measure "nullifies or impairs benefits accruing to it under the AD."[26] The AB further cited Article 18.4 of the AD, and held that laws, regulations, and administrative procedures of the Article "seem to encompass the entire body of generally applicable rules, norms, and standards adopted by [a WTO] Member in connection with the conduct of anti-dumping proceedings."[27] The U.S. argument that the SPB is not a mandatory rule thus not binding on the investigating authority was held to be irrelevant faced with the "comprehensive nature of the right of [WTO] Members to resort to dispute settlement to preserve rights and obligations."[28] Other cases have subsequently followed the *US — Carbon Steel* finding.[29]

(b) The SPB is not inconsistent with Article 11.3 of the AD.

The AB in *US - OCTG (Mexico)* held that the SPB is not inconsistent with Article 11.3 of the AD because the Bulletin does not establish an irrefutable presumption in sunset reviews. Article 11.3 requires that the review "be made on a sufficient factual basis, taking into consideration the circumstances of the case at issue," and "cannot be based on presumptions that establish outcomes . . . to the exclusion of a full examination of the factual circumstances."[30] The SPB stipulates three scenarios that Mexico alleged to establish irrefutable presumptions. The scenarios are stated in section II. A.3 of the SPB as follows:

> 3. Likelihood of Continuation or Recurrence of Dumping
> . . . the [DOC] normally will determine that revocation of an antidumping duty order . . . is likely to lead to continuation or recurrence of dumping where -

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[24] Uruguay Round Agreements, Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3.3, *available at* http://www.wto.org/english/docs_e/legal_e/legal_e.htm (last visited Oct. 9, 2006) [hereinafter DSU].

[25] *US — Carbon Steel*, *supra* note 7, ¶ 85.

[26] *Id.* ¶ 86. *See also* DSU *supra* note 24, arts. 17.3 to .4.

[27] *US — Carbon Steel*, ¶ 87.

[28] *Id.* ¶ 90.

[29] *See, e.g., US — OCTG (Argentina)*, *supra* note 7, ¶¶ 182-189.

[30] Panel Report, *US — OCTG (Mexico)*, *supra* note 7, ¶ 7.25; *see also*, Appellate Body Report, *US — Carbon Steel*, *supra* note 7, ¶ 114.

> (a) dumping continued at any level above *de minimis* after the issuance of the order or the suspension agreement, as applicable;
> (b) imports of the subject merchandise ceased after issuance of the order or the suspension agreement, as applicable; or
> (c) dumping was eliminated after the issuance of the order or the suspension agreement, as applicable, and import volumes for the subject merchandise declined significantly.[31]

The Panel in *US – OCTG (Mexico)* first analyzed whether the text of section II. A.3 of the SPB mandated an irrebutable presumption as alleged by Mexico, but found it to be inconclusive.[32] The Panel then proceeded to "extend the analysis to consider what the evidence of the [DOC's] application of the SPB reveals about the [DOC's] view of what the SPB envisions in sunset reviews."[33] The Panel relied on the qualitative analysis of 21 applicable U.S. sunset review cases, examining factors that were used in the sunset reviews and determined that the DOC had been unwilling "to actually undertake an analysis of evidence other than evidence of import volumes and dumping margins," thus inconsistent with Article 11.3 which requires a sufficient factual basis for the likelihood determinations.[34] The AB, however, disagreed with the Panel's finding after re-examining the Panel's qualitative analysis.[35] The AB determined that the Panel's qualitative analysis overlooked the possibility that the DOC might have considered factors other than the SPB scenarios and that the Panel did not offer any definite evidence denying this possibility, instead relying on mere conjectures that were not supported by facts.[36] Therefore, the Panel's qualitative analysis was held to be improperly conducted and was consequently reversed.

2. Likelihood factors enumerated in 19 U.S.C. § 1675a(c)(1) are not inconsistent with Article 11.3 of the AD.

The Panel in *US — OCTG (Mexico)* held that 19 U.S.C. § 1675a(c)(1) is not inconsistent with Article 11.3 of the AD because factors enumerated in the provision do not carry conclusive weight in

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[31] Policies Regarding the Conduct of Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, 63 Fed. Reg. 18, 871 (April 16, 1998).
[32] Panel Report, *US — OCTG (Mexico)*, ¶ 7.45.
[33] *Id.*
[34] *Id.* ¶ 7.59.
[35] Appellate Body Report, *US — OCTG (Mexico)*, *supra* note 7, ¶ 210.
[36] *See id.*, ¶¶ 206, 207.

determining the outcome of sunset reviews.[37] If the factors are determinative or conclusive it is inconsistent with Article 11.3.[38] If the factors are treated as merely indicative however, it is not inconsistent.[39] The U.S. provision is stated as follows:

> (c) Determination of likelihood of continuation or recurrence of dumping
> (1) In general. In a review conducted under [19 U.S.C. § 1675(c)], the administering authority shall determine whether revocation of an antidumping duty order . . . would be likely to lead to continuation or recurrence of sales of the subject merchandise at less than fair value. The administering authority shall consider –
> (A) the weighted average dumping margins determined in the investigation and subsequent reviews, and
> (B) the volume of imports of the subject merchandise for the period before and the period after the issuance of the anti-dumping duty order or acceptance of the suspension agreement.[40]

Mexico argued that this provision, if read in conjunction with the SAA and the SPB, will result in the factors being treated as determinative or conclusive.[41] The Panel disagreed with Mexico stating that the text of 19 U.S.C. § 1675a(c)(1) does not present any determinative or conclusive weight to the enumerated factors.[42] The Panel further held that the language of the SAA, which only resorted to language such as "illustrative" and "case-by-case basis," indicates clearly that "these factors are to be treated as important indicators of the likelihood of continuation or recurrence of dumping, but not as determinative or conclusive on that issue."[43]

3. "Likely" in 19 U.S.C. § 1657a(a)(1) is not inconsistent with Article 11.3 of the AD.

The Panel in *US — OCTG (Mexico)* held that 19 U.S.C. § 1675a(a)(1) is not inconsistent with Article 11.3 of the AD. The U.S. provision is stated as follows:

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[37] Panel Report, *US — OCTG (Mexico)*, *supra* note 7, ¶ 7.38.
[38] *Id.* ¶ 7.30.
[39] *Id.*
[40] 19 U.S.C. § 1675(a)(c)(1) (2006).
[41] Panel Report, *US — OCTG (Mexico)*, *supra* note 7, ¶ 7.35.
[42] *Id.* ¶ 7.33.
[43] *Id.* ¶ 7.36. The Panel did not address the SPB because unlike the SAA, the SPB was deemed subordinate to the statute, merely complementing it thus cannot "fundamentally change the meaning of the statute." *See id.* ¶ 7.40.

> (a) Determination of likelihood of continuation or recurrence of material injury
> (1) In general
> In a review conducted under . . . [19 U.S.C. § 1675(c)], the [International Trade] Commission shall determine whether revocation of an order, or termination of a suspended investigation, would be *likely* to lead to continuation or recurrence of material injury within a reasonably foreseeable time. The [International Trade] Commission shall consider the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked or the suspended investigation is terminated. (emphasis added).[44]

The ordinary meaning of "likely" in Article 11.3 was held to be "probable" rather than "possible."[45] Mexico presented the Panel with evidence that despite the U.S. contention that it relies on the "probable" standard, the U.S. has actually conceded that it resorts to the "possible" standard during a NAFTA litigation.[46] The Panel, however, rejected the relevance of the U.S. position stated in another forum and instead relied on the U.S. court decision which equated "likely" with "probable,"[47] holding that the U.S. court's decision can be construed as the U.S. position, thus not inconsistent with the AD.[48] In *US - OCTG (Argentina)*, the AB, faced with a similar "as applied" argument, acknowledged the wide discretion that a Panel enjoys in weighing different evidences, thus affirming the Panel's decision not to resort to the NAFTA litigation evidence.[49]

4. The timeframe rule (19 U.S.C. § 1657a(a)(5)) is not inconsistent with Article 11.3 of the AD.

The AB in *US — OCTG (Argentina)* held that the timeframe rule stipulated in 19 U.S.C. § 1675a(a)(5) is not inconsistent with Articles 11.3 of the AD. The U.S. provision is stated as follows:

> (5) Basis for determination
> The presence or absence of any factor which the [International Trade] Commission is required to consider under this subsection shall not necessarily give decisive gui-

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[44] 19 U.S.C. §1675(a)(a)(1) (2006).
[45] Panel Report, *US — OCTG (Mexico), supra* note 7, ¶ 7.96.
[46] *Id*; *see also, id.* Annex C-1 ¶ 14 (Executive Summary of the Second Submissions of Mexico).
[47] *NMB Singapore Ltd. v. United States*, 288 F. Supp.2d 1306, 1351 (Ct. Int'l Trade 2003).
[48] Panel Report, *US — OCTG (Mexico)*, ¶ 7.97.
[49] Appellate Body Report, *US — OCTG (Argentina)*, ¶¶ 306, 312, 313.

> dance with respect to the [International Trade] Commission's determination of whether material injury is likely to continue or recur within a *reasonably foreseeable time* if the order is revoked or the suspended investigation is terminated. In making that determination, the [International Trade] Commission shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time. (emphasis added).

Argentina argued that the timeframe allowed under Article 11.3 should be based upon a finding of likely injury upon expiry of the order and argued that the timeframe stipulated in Articles 3.7, "clearly foreseen and imminent," should be applied.[50] Argentina relied on footnote 9 of Article 3 of the AD which arguably equates "injury" used in original investigations with that of sunset reviews.[51] The AB rejected Argentina's argument by holding that Article 3 is inapplicable to sunset reviews "[g]iven the absence of textual cross-references, and given the different nature and purpose of thee two determinations."[52] The Panel made a similar finding in *US – OCTG (Mexico)*, holding that : (1) Articles 11.1 and 11.3 do not specify any timeframe for sunset reviews;[53] and (2) Articles 3.7 and 3.8, which govern investigation procedure, serve a different purpose than the review process.[54]

5. The cumulation rule (19 U.S.C. § 1675a(a)(7)) is not inconsistent with Articles 3.3 and 11.3 of the AD.

The AB in *US — OCTG (Argentina)* held that the "cumulation" stipulated in 19 U.S.C. § 1675a(a)(7) is not inconsistent with Articles 3.3 and 11.3 of the AD. The U.S. provision is stated as follows:

> (7) Cumulation
> For purposes of this subsection, the [International Trade] Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which reviews under . . . [19 U.S.C. § 1675(c)] of this title were initiated on the same day, if such imports would be likely to compete with each other and with domestic like products in the United States market. The [International Trade] Commission shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it

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[50] *Id.* ¶ 357.
[51] *Id.* ¶ 358.
[52] *Id.* ¶¶ 280, 358.
[53] Panel Report, *US — OCTG (Mexico)*, *supra* note 7, ¶ 7.103.
[54] *Id.* ¶ 7.105.

> determines that such imports are likely to have no discernible adverse impact on the domestic industry.

Cumulation is a process where imports are aggregated to assess their combined injurious effect. Such process is warranted when individual import has a negligible effect, but may have significant impact if aggregated.[55] Argentina argued that the usage of word "duty," rather than "duties" in Article 11.3 implied that the drafters intended to treat the import individually, rather than cumulatively.[56] Argentina further argued that the difference between an original investigation and a sunset review process warranted the denial of the applicability of cumulation since the cumulation is only stipulated in Article 3.3, without any cross-reference to Article 11.3. The AB disagreed with Argentina and held that: (1) the usage of singular and plural form of "duty" does not have any significance within the AD;[57] (2) the objective of cumulation in an original investigation procedure which is to protect the domestic producers from dumped imports of several countries through cumulative effect, "is equally applicable to likelihood-of-injury determinations in sunset reviews."[58]

The cumulation for sunset reviews need not conform to Article 3.3 which requires the investigating authority to demonstrate that imports from a particular country are not negligible before it can cumulate those imports from other countries. In *US - Carbon Steel*, the Panel held that "Article 3.3, by its own terms, is limited in application to [original] investigations and does not apply to sunset reviews."[59]

6. The automatic self-initiation rule (19 U.S.C. § 1675(c)(2)) is not inconsistent with Article 11.3 of the AD.

The Panel in *US — Carbon Steel* held that the automatic self-initiation provision stipulated in 19 U.S.C. § 1675(c)(2) is not inconsistent with Article 11.3 of the AD. The U.S. provision is stated as follows:

> (2) Notice of initiation of review: Not later than 30 days before the fifth anniversary of the date described in paragraph (1), the administrating authority shall publish in the Federal Register a notice of initiation of a review under this subsection.

Japan argued that "Article 11.3 creates a presumption of termination of an anti-dumping order after five years of application. Therefore, the

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[55] PATTISON, *supra* note 9, at 136.
[56] Appellate Body Report, *US — OCTG (Argentina)*, *supra* note 7, ¶ 290.
[57] *Id.* ¶ 293.
[58] *Id.* ¶ 296.
[59] Panel Report, *US — Carbon Steel*, supra note 7, ¶ 7.101.

decision to continue the imposition [of additional anti-dumping duty] is equivalent to deciding to impose the order in an original investigation."[60] Such reasoning leads to the conclusion that the evidentiary standard that is used for the initiation of original investigations as stipulated in Article 5.6 is also applicable to Article 11.3 sunset review initiations. This means that the U.S. provision must stipulate the evidentiary standard equivalent to that of the original investigation. The Panel disagreed by noting that Article 11.3 does not mention in any way the applicability of evidentiary standards used in the original investigation and no cross-reference is provided that links Article 11.3 with Article 5.6.[61] The Panel held that "the text of Article 5.6 gives no indication that its evidentiary standards apply to anything but the self-initiation of investigations."[62] The AB in the same case stated that "[the] appeal did not raise any issues concerning the initiation of sunset review"[63] but nevertheless appears to agree with the Panel by noting the difference between original investigations and sunset reviews thus indirectly supporting the inapplicability of the evidentiary standard in sunset reviews.[64]

7. The de minimis *rule (19 C.F.R. § 351.106(c)) is not inconsistent with Article 11.3 of the AD.*

The Panel in *US — Carbon Steel* held the *de minimis* provision stipulated in 19 C.F.R. § 351.106(c) is not inconsistent with Article 11.3 of the AD. The U.S. provision is stated as follows:

> (c) Reviews and other Determinations
> (1) In general. In making any determination other than a preliminary or final antidumping or countervailing duty determination in an investigation, the Secretary [of Commerce] will treat as *de minimis* any weighted-average dumping margin or countervailable subsidy rate that is less than 0.5% *ad valorem*, or the equivalent specific rate.

Japan argued that instead of 0.5%, the 2% *de minimis* standard in Article 5.8 should be applied to sunset reviews.[65] As in the case of automatic self-initiation of sunset reviews, the Panel noted the absence of any explicit provision that mandated the application of *de minimis* standard in Article 11.3 or any cross-reference between Article 11.3

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[60] *Id.* ¶ 7.11.
[61] *Id.* ¶¶ 7.26, 7.27.
[62] *Id.* ¶ 7.36.
[63] Appellate Body Report, *US — Carbon Steel*, *supra* note 7, ¶ 105 fn. 115.
[64] *Id.* ¶ 106.
[65] Panel Report, *US — Carbon Steel*, ¶ 7.58.

and Article 5.8.[66] The Panel further noted the qualitative difference between sunset reviews and original investigations and subsequently held the *de minimis* provision of Article 5.8 is not applicable to sunset reviews.[67] The AB in the same case did not explicitly address the issue, but did indirectly affirm the Panel's decision by pronouncing the AB finding in *US — Carbon Steel (Germany),*[68] which addressed countervailing duty ("CVD") sunset reviews, will be applied, *mutatis mutandis*.[69] Because *US — Carbon Steel (Germany)* holds that the *de minimis* provision in the Agreement on Subsidy and Countervailing Measures is not applicable to CVD sunset reviews,[70] the AB has in effect indirectly held that the equivalent provision of Article 5.8 is also not applicable in the antidumping sunset review context.

8. The order-wide determination rule (Section II.A.2 of the SPB) is not inconsistent with Articles 6.10 and 11.3 of the AD.

The AB in *US — Carbon Steel* held that the "order-wide determination" provision stipulated in section II.A.2 of the SPB is not inconsistent with Article 6.10 and 11.3 of the AD. Section II.A.2 states "the [DOC] will make its determination of likelihood on an order-wide basis." The "order-wide determination" differs from the "company-specific determination;" the former refers to the revocation of the antidumping duty *order* imposed on all relevant exporters, and the latter refers to the revocation of the antidumping duty on a *specific* exporter. Japan argued that because Article 6.10 requires investigating authority to determine an individual dumping margin, and that Article 6 is incorporated into Article 11 through the cross-reference provision in Article 11.4,[71] the Article 11.3 sunset review also mandates "company-specific determination."[72] The AB disagreed, first noting that Article 11.3 "contains no express reference to individual exporters, producers, or interested parties," and that "on its face, Article 11.3 therefore does not oblige investigating authorities in a sunset review to make 'company-specific' likelihood determinations."[73] The AB then held that Article 6.10's individual dumping margin calculation "do[es] not require that the determination of likelihood of continuation or re-

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[66] *Id.* ¶¶ 7.67, 7.71.
[67] *Id.* ¶ 7.85.
[68] Appellate Body Report, United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Products from Germany, WT/DS213/AB/R (Nov. 28, 2002) [hereinafter *US — Carbon Steel (Germany)*].
[69] Appellate Body Report, *US — Carbon Steel*, ¶ 104 n. 114.
[70] Appellate Body Report, *US — Carbon Steel (Germany)*, ¶ 68.
[71] Article 11.4 provides that "the provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article."
[72] *See* Appellate Body Report, *US — Carbon Steel*, ¶¶ 151-54.
[73] *Id.* ¶ 149.

currence of dumping under Article 11.3 be made on a company-specific basis,"[74] since there is "no obligation [ ] imposed on investigating authorities to calculate or rely on dumping margins in a sunset review."[75] The decision was reaffirmed by the AB in *US — OCTG (Argentina)*.[76]

9. The waiver provisions in 19 U.S.C. § 1675(c)(4)(B) and 19 C.F.R. § 351.218(d)(2)(iii) are inconsistent with Articles 6.1, 6.2 and 11.3 of the AD.

The AB in *US — OCTG (Argentina)* held that the waiver provisions stipulated in 19 U.S.C. § 1675(c)(4)(B) and 19 C.F.R. § 351.218(d)(2)(iii) are inconsistent with Articles 6.1, 6.2, and 11.3 of the AD. The U.S. provisions are stated as follows:

> 19 U.S.C. § 1675(c)(4)(B) Effect of waiver
> In a review in which an interested party waives its participation pursuant to this paragraph, the administering authority shall conclude that revocation of the order or termination of the investigation would be likely to lead to continuation or recurrence of dumping . . . with respect to that interested party.[77]
> 19 C.F.R. § 351.218(d)(2) Waiver of response by a respondent interested party to a notice of initiation –
> (iii) No response from a respondent interested party. The Secretary [of Commerce] will consider the failure by a respondent interested party to file a complete substantive response to a notice of initiation . . . as a waiver of participation in a sunset review before the [DOC].[78]

Argentina argued that the waiver provisions stipulating an affirmative waiver and a deemed waiver[79] prevent the U.S. investigating authority to undertake a substantive review warranted under Article 11.3.[80] The AB agreed with Argentina by first noting that the opera-

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[74] *Id.* ¶ 155.

[75] *Id.* ¶ 123. But in case where a dumping margin that was previously calculated was used for the likelihood determination in a sunset review, the margin must be calculated in a manner consistent with Article 2.4. *Id.* ¶ 127. *See infra* note 112.

[76] Appellate Body Report, *US — OCTG (Argentina)*, ¶ 231.

[77] 19 U.S.C.S. § 1675(c)(4)(B).

[78] 19 C.F.R. § 351.218(d)(2)(iii) (2005)

[79] An affirmative waiver occurs when an interested party explicitly waives participation by filing a statement of waiver with the DOC. A deemed waiver occurs when an interested party is "deemed" to have waived its participation by filing incomplete substantive response to the notice of initiation of a sunset review. Panel Report, *US — OCTG (Argentina)*, ¶ 7.83.

[80] Appellate Body Report, *US — OCTG (Argentina)*, ¶ 224.

tion of the waiver provision results in the DOC's arrival "at affirmative company-specific determinations without regard to any evidence on record, . . . merely assumptions made by the agency, rather than findings supported by evidence."[81] The AB then held that because subsequent order-wide determinations will be at least partly based on the company-specific determination that has been made without any evidence on record, the final determination lacks a reasoned conclusion and positive evidence.[82] As for the waiver's inconsistency with Article 6.1 and 6.2, the AB held that the DOC's complete disregard of *any* information submitted by a respondent in an incomplete response is incompatible with the "ample" and "full" opportunities to defend their right as stipulated in Articles 6.1 and 6.2.[83]

10. No requirement for causation between dumping and injury (19 U.S.C. § 1675(c)) is not inconsistent with Article 11.3 of the AD.

The AB in *US – OCTG (Mexico)* held that there is no requirement to establish the existence of a causal link between likely dumping and likely injury under Article 11.3 of the AD.[84] The AB compared the relevant provisions in Article VI of the GATT 1994 and Article 11.3 of the AD and determined that "the 'review' contemplated in Article 11.3 is a 'distinct' process with a 'different' purpose from the original investigation."[85] Then, the AB resorted to a textual analysis of Article 11.3 and concluded that the essential aspect of Article 11.3 "is proof of likelihood of continuation or recurrence of dumping and injury, if the duty expires,"[86] and that the requirement of causal link is not to be found in the provision. The AB noted that the application of the causal link to a sunset review would in effect "[convert] the review into an original investigation, which cannot be justified."[87]

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[81] *Id.* ¶ 234.

[82] *Id.*

[83] *Id.* ¶¶ 245-46.

[84] The AB did not indicate the relevant U.S. provision that would be subject to this issue. The reasonable choice would be 19 U.S.C. § 1675(c), the provision based on which the International Trade Commission made its likelihood determination. *See* Oil Country Tubular Goods from Argentina, Italy, Korea, Japan, and Mexico, 66 Fed. Reg. 35,997 (July 10, 2001).

[85] Appellate Body Report, *US — OCTG (Mexico)*, *supra* note 7, ¶ 118.

[86] *Id.* ¶ 123.

[87] *Id.*

IV. DSB FINDINGS ON U.S. ANTIDUMPING SUNSET REVIEW PROVISIONS "AS APPLIED"

1. The DOC's Determination of the Likelihood of Continuation or Recurrence of Dumping

The Panel in *US — OCTG (Mexico)* held that the DOC's determination of the likelihood of continuation or recurrence of dumping ("LCRD") in the sunset review was inconsistent with Article 11.3 of the AD. The Panel there held that the investigating authority administering sunset reviews "must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination."[88] In accordance with the standard, the Panel then examined the DOC's determination and found that the DOC had ignored the data submitted by Mexican exporters and relied "exclusively on the basis of a decline in import volumes."[89] The Panel concluded that the DOC was required "to at least consider [the] information and take it into account before making its determination."[90] The Panel noted that where the DOC failed to incorporate any information submitted by the exporters, it had failed to support its decision by a reasoned and adequate conclusion as mandated by Article 11.3. The Panel's finding was not appealed.[91]

The Panel in *US — OCTG (Argentina)* also held that the DOC's determination of the LCRD in the sunset review was inconsistent with Article 11.3 of the AD. The Panel first noted that the investigating authority has an obligation to make a "reasoned finding on the positive evidence" in determining the likelihood of dumping.[92] It then found that the DOC used two factual findings that the dumping continued over the life of the measure and that the import volumes declined following the antidumping duty imposition.[93] For the former finding, the DOC was found to have only relied on the original dumping margin to determine the continued dumping over the life of the measure.[94] The Panel held that "the original determination of dumping by itself cannot represent a sufficient factual basis . . . . . to conclude that dump-

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[88] Panel Report, *US — OCTG (Mexico)*, *supra* note 7, ¶ 7.74.
[89] *Id.* ¶ 7.78.
[90] *Id.* ¶ 7.79.
[91] *See* Appellate Body Report, *US - OCTG (Mexico)*, *supra* note 7, ¶ 220.
[92] Panel Report, *US — OCTG (Argentina)*, *supra* note 7, ¶ 7.211.
[93] *Id.* ¶ 7.221.
[94] *Id.* ¶ 7.219.

ing is likely to continue or recur after the expiry of the order."[95] The Panel's finding was not appealed.[96]

In contrast, the AB in *US — Carbon Steel* held that the DOC's determination of LCRD in the sunset review was not inconsistent with Article 11.3. Japan argued that "the DOC failed to make a proper, prospective likelihood determination . . . . . and based its determination exclusively on historical data relating to dumping and the volume of dumped imports."[97] The AB, however, found that the DOC had in fact considered the information submitted by the Japanese exporter and that the DOC was entitled to reject the information submitted in an untimely fashion.[98] Ultimately, the AB held that there were sufficient justifications for the DOC's reliance on dumping margins and import levels, thus the determination was not inconsistent with Article 11.3.[99]

2. The ITC's Determination of the Likelihood of Continuation or Recurrence of Injury

The Panel in *US — OCTG (Mexico)* held that the International Trade Commission's ("ITC") determination of the likelihood of continuation or recurrence of injury ("LCRI") in the sunset review was not inconsistent with Articles 3.1, 3.2, and 11.3 of the AD. Mexico first argued that the ITC must undergo a detailed injury determination process that is provided in Article 3.[100] The Panel, however, disagreed and denied the applicability of Article 3 process in sunset reviews because the determination was made "regarding the likelihood of. . . injury rather than. . . injury."[101] The Panel then noted that the ITC had based its determination on a proper establishment of facts and an unbiased and objective evaluation of [the] facts,[102] by presenting five reasons why the likely volume of import after the revocation of the dumping duty would be significant to cause injury.[103] The Panel deemed such explanation of the ITC to satisfy the requirement of Arti-

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[95] *Id.*

[96] *See* Notification of an Appeal, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/5 (Aug. 31, 2004).

[97] Appellate Body Report, *US — Carbon Steel*, *supra* note 7, ¶ 192.

[98] *Id.* ¶ 202.

[99] *Id.* ¶ 205.

[100] *See* Panel Report, *US — OCTG (Mexico)*, *supra* note 7, ¶¶ 7.120-.121.

[101] *Id.* ¶ 7.121.

[102] *See id.* ¶ 7.122.

[103] The five reasons stated are; (1) market share, (2) incentive of producers, (3) prices, (4) whether being subject to other import barriers, (5) extent of dependence on exports. *See id.* ¶ 7.124.

cle 11.3. This issue was not appealed but it was indirectly affirmed through the AB's finding on the causation issue.[104]

Similarly, the AB in *US — OCTG (Argentina)* held that the ITC's determination of the LCRI in the sunset review was not inconsistent with Article 11.3 of the AD. Argentina argued that the panel erred in its determination of the following three issues: (1) the likely volume of dumped imports; (2) the likely price effects of dumped imports; and (3) the likely impact of dumped imports on the U.S. industry.[105] On all three accounts, the AB held that the ITC presented a sufficient factual basis for determining the LCRI.[106] With regard to the likely volume of dumped imports, the following five factors were held sufficient to support the ITC's conclusion: (1) the importance of the U.S. market; (2) the profitability of the products concerned; (3) the price level of the products concerned; (4) the existence of import restrictions faced by the interested party; and (5) the level of export dependency.[107] The AB noted that "positive evidence" does not mean incontrovertible evidence, and that the standard may be satisfied even when "the inferences drawn from the evidence on record are projections into the future."[108]

3. The ITC's Determination of the Likelihood of Continuation or Recurrence of Injury within a Reasonably Foreseeable Time

The AB in *US — OCTG (Argentina)* held that the ITC's basis for the determination of the likelihood of continuation or recurrence of injury in the sunset was not inconsistent with Article 11.3 of the AD.[109] Argentina argued that the failure to "specify the relevant timeframe for the injury determination is not a 'properly reasoned and supported determination' and does not have a 'firm evidentiary foundation.'"[110] The AB disagreed and held that Article 11.3 textually does not provide any requirement for the specification of timeframe and that the lack of timeframe can still provide the properly reasoned and sufficient factual basis required for the likelihood of continuation or recurrence of injury.[111]

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[104] *See supra* Part III.10.

[105] Appellate Body Report, *US — OCTG (Argentina)*, *supra* note 7, ¶ 319.

[106] *Id.* ¶¶ 342, 348, 352 (upholding the findings in Panel Report, ¶¶ 7.298, 7.306, 7.312).

[107] *Id.* ¶¶ 330, 341.

[108] *Id.* ¶ 341.

[109] Id. ¶ 362.

[110] *Id.* ¶ 363.

[111] *Id.* ¶ 364.

4. Zeroing used in Sunset Reviews

The AB in *US — Carbon Steel* noted that the investigating authority's determination of the likelihood of continuation or recurrence of injury, relying on dumping margins that resorted to "zeroing" methodology,[112] was inconsistent with Article 11.3 of the AD. As for its application to the actual case, however, the AB declined to rule on the consistency of the DOC's determination because the factual basis was insufficient to determine whether the DOC had actually resorted to the zeroing as defined in *EC – Bed Linen*.[113] The AB added that "Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review."[114] Therefore, Article 2, which specifies the methodology of calculating dumping margin, needs not be applied to sunset reviews. Nevertheless, the AB held that "should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4."[115] The AB reasoned that "[i]f these margins [that resorted to 'zeroing'] were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the [AD]."[116]

V. THE U.S. IMPLEMENTATION OF THE DSB FINDINGS IN *US – OCTG (ARGENTINA)*

For those issues that were held to be inconsistent with WTO law by the Panel and the AB in *US — OCTG (Argentina)*, the U.S. has so far made limited progress in implementing the findings. Argentina and the U.S. underwent an arbitration process under Article 21.3(c) of the DSU, and the reasonable period of time for the U.S. to implement

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[112] Zeroing is a dumping margin calculation method where negative difference between export price and normal value is treated as zero. For example, when a product under antidumping investigation has different product models, a dumping margin for each model has to be calculated and then accumulated to obtain the representative dumping margin for the product. In the process, some models may exhibit negative dumping margin where the export price is higher than the normal value. This margin was assigned zero, rather than a negative value, skewing the accumulation process. Appellate Body Report, *European Communities – Anti-dumping Duties on Import of Cotton-type Bed Linen from India*, ¶ 47, WT/DS141/AB/R (Mar. 1, 2001) [hereinafter *EC – Bed Linen*]. Zeroing has been held to be inconsistent with Article 2.4 of the AD. *Id.* ¶ 66.

[113] Appellate Body Report, *US — Carbon Steel*, ¶ 137.

[114] *Id.* ¶ 123.

[115] *Id.* ¶ 127.

[116] *Id.*

the findings was determined to be twelve months from December 17, 2004, the date on which the DSB adopted the Panel and AB Reports. The expiration date, therefore, was December 17, 2005.[117] With the deadline already passed, the U.S. has yet to fulfill its obligation in bringing its measures into conformity with the DSB findings.[118]

With regard to the inconsistency of the waiver provision, the DOC proposed the amendment of the relevant regulations on August 15, 2005 and invited public comments.[119] Two amendments were subsequently made to the relevant regulations. First, 19 C.F.R. § 351.218(d)(2)(iii) was deleted.[120] Second, the requirements for a statement of waiver were revised by adding a statement where the waiving respondent party in effect pronounces that it is likely to dump in case the antidumping order is revoked.[121] These amendments were made effective on October 31, 2005 thus complying with the above deadline.[122] The DOC denied the need to amend 19 U.S.C. § 1675(c)(4)(B), by stating that "[b]y modifying [the] waiver provisions, the [DOC] has eliminated the possibility that its order-wide likelihood determinations would be based on assumptions about likelihood of continuation or recurrence of dumping . . . due to interested parties' waiver of participation in sunset reviews."[123] This is a foregone conclusion since the waiving parties would already have pronounced that they are likely to dump if the antidumping order were revoked. The DOC has not yet initiated a new sunset review that will determine the

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[117] Award of the Arbitrator, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, ¶ 53, WT/DS268/12 (June 7, 2005).

[118] The U.S. measure found to be inconsistent with WTO law cannot be challenged within the U.S. without an act of implementation domestically. Section 102(a)(1) of the Uruguay Round Agreements Act, (19 U.S.C. § 3512(a)(1) (2000), provides that U.S. law will prevail in conflict and that "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect."

[119] Procedures for Conducting Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, 70 Fed. Reg. 47,738 (Aug. 15, 2005) (codified at 19 C.F.R. pt. 351).

[120] *Id.* at 47,739.

[121] 19 C.F.R. § 351.218(d)(2)(1) (2006). The relevant provision reads: "Every statement of waiver must include a statement indicating that the respondent interested party waives participation in the sunset review before the [DOC]; a statement that the respondent interested party is likely to dump . . . if the order is revoked or the investigation is terminated." *Id.*

[122] Procedures for Conducting Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, 70 Fed. Reg. 62,061 (Oct. 28, 2005) (codified at 19 C.F.R. pt. 351).

[123] *Id.* at 62,062-63.

revised likelihood of continuation or recurrence of dumping that would be consistent with Article 11.3.[124]

VI. COMMENTS

The three cases that the DSB addressed with regard to the sunset reviews follow roughly two prongs of legal reasoning. The first prong focuses on the difference between original investigations and sunset reviews. As held by the DSB numerous times, sunset reviews as governed by Article 11.3 of the AD are procedurally different from original investigations.[125] Examples of this reasoning can be found in most of the "as such" issues like the timeframe, cumulation, automatic self-initiation, and *de minimis* topics previously mentioned. The second prong relates to the requirement of a sufficient factual basis for the determination of the continuation of the duty order. Examples of this reasoning are found in the waiver and "as applied" issues discussed above. The combination of the two prongs results in an interesting synthesis. The first prong leads to a simple corollary that the antidumping authority enjoys discretion in determining the LCRDI. Although Article 11.3 does not offer any cross-reference clause that links it with other articles of the AD, such as Articles 3 and 5 which govern original investigations and any mention of rules or standards for the determination, this is an acceptable formulation. Under such a formulation, the role of the second prong is to provide the outer contour of that discretion, which is aptly framed as the requirement of a sufficient factual basis. The DSB at this point has an opportunity to set the evidentiary standard of what constitutes a sufficient factual basis. The standard spans the range from the highest level where the burden of the authority is to prove beyond doubt that there is the LCRDI, to the lowest level where the burden of the authority is to provide minimal evidence which would be enough to establish the LCRDI.

The first prong establishes that original investigations and sunset reviews are two distinct processes and the antidumping authority administering the sunset review enjoys wide discretion. The important point is that although the second prong does provide a limitation to this discretion, it does not apply to the discretion in selecting the methodologies used to determine the LCRDI. It is only at the applica-

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[124] Although no sunset review has been initiated, it is interesting to note that the DOC did initiate the (annual) administrative review on antidumping duty imposed on Oil Country Tubular Goods from Argentina. The notification does not indicate that the review is initiated as a new sunset review. Initiation of Antidumping and Countervailing Duty Reviews and Request for Revocation in Part, 70 Fed. Reg. 56,631 (Sept. 28, 2005).

[125] *See, e.g.*, Appellate Body Report, *US — OCTG (Mexico)*, *supra* note 7, ¶ 118

tion stage of the methodology chosen that the second prong kicks in.[126] This is why the cases hold that the U.S. antidumping authority enjoys a free hand in selecting any procedures (such as the cumulation rule in Article 3.3) that will support the continuation of the antidumping duty and dispense with procedures (such as the *de minimis* rule in Article 5.8) that will support the termination. With Article 11.3 providing the textual basis for such discretion, the DSB is obliged to give deference to antidumping authorities in their choice of the LCRDI determination methodologies.

A balancing issue arises at this junction. It is true that the text of Article 11.3 does not provide any detailed guideline as to how the LCRDI determination should proceed. But the textual structure of Article 11.3 does present two conflicting interests. One is the revocation of the antidumping duty after five years. The language of Article 11.3 implies that the termination should be the default position.[127] The other is the determination of LCRDI that warrants the continuation of the duty order. The negotiation history of Article 11.3 during the Uruguay Round also provides the relevant background of this tension and of a balance reached in the negotiation process. The draft of Article 11.3 proceeded from the New Zealand and Dunkel versions. Both contained the language "necessary to offset" or "necessary to prevent" requiring the antidumping authority to verify the necessity of the antidumping duty in order to continue the measure.[128] The word "likely" was also absent from the text. The combination of the two meant that the objective of sunset reviews, which was to terminate the antidumping duty order after five years, would be procedurally and substantively protected from abuse by those seeking to continue the measure. This is because the antidumping authority would have to prove the continuation or recurrence, not its mere *likelihood*, and would have to provide a rationale for the necessity of the duty order. The U.S. objected to the Dunkel Draft language and proposed the deletion of the word "necessary" and the insertion of the more flexible

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[126] For an analogous rationale, see Appellate Body Report, *US — Carbon Steel*, *supra* note 7, ¶¶ 123-27.

[127] Michael Moore, *Department of Commerce Administration of Antidumping Sunset Reviews: A First Assessment*, 36 J. WORLD TRADE 675, 677 (2002).

[128] The relevant passage of Article 11.3 from the New Zealand Draft reads, ". . .that the continued imposition of the duty is necessary to offset dumping and prevent the continuation or recurrence of the injury." The relevant passage from the Dunkel Draft reads, ". . . that the continued imposition of the duty is necessary to prevent the continuation or recurrence of injury by dumped imports." TERRENCE P. STEWART & AMY S. DWYER, WTO ANTIDUMPING AND SUBSIDY AGREEMENTS: A PRACTITIONER'S GUIDE TO "SUNSET" REVIEWS IN AUSTRALIA, CANADA, THE EUROPEAN UNION, AND THE UNITED STATES Appendix I (Kluwer Law International, The Hague, 1998).

term, "good cause," which would be deemed sufficient to justify the continuation of the duty order.[129] It appears that a compromise was reached when the word "necessary" was deleted and the word "likely" was inserted. The negotiating parties paid attention to the "exception" clause of Article 11.3, which demonstrates that the termination and the continuation interests were of equal significance.

With the two conflicting interests apparent in both the text and the history of Article 11.3, the DSB must ensure that some balance is reached. The first prong clearly supports whatever objective that antidumping authorities seek, which is usually to continue the antidumping duty in order to protect domestic producers[130]. The authority has large discretion, as warranted by Article 11.3 and is free to choose whatever methodology it sees fit[131]. The DSB must respect that discretion, as held by numerous cases examined above. Thus, the DSB has little role to play with regard to the first prong. Then the DSB's role is to rely on the second prong in order to balance the two interests. This is achieved through an adjustment of the evidentiary standard in determining the LCRDI.[132] An examination of the DSB findings does not indicate that the DSB has considered the balancing rationale as is proposed here. The DSB simply confers the antidumping authority deference where as long as the authority has relied on some reasonable evidence – without simply relying on conjecture lacking any evidence – the determination would be deemed acceptable. The inconsistency finding for the LCRD determinations in *US — OCTG (Mexico)*, *US — OCTG (Argentina)*, and the waiver issue demonstrate the level of evidence that does not satisfy the sufficient factual basis. These cases hold that the antidumping authority cannot base its likelihood determination on a mere conjecture with no evidentiary basis[133]. The consistency finding for the LCRDI determination in *US — OCTG (Argentina)* demonstrates that as long as the antidumping authority considers some relevant factors, the determination is deemed to satisfy the sufficient factual basis.[134]

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[129] The relevant passage from the U.S. draft reads, ". . . that there is good cause for the continued imposition of the duty is necessary to prevent the continuation or recurrence of injury by the dumped imports. *Id.* at 62.

[130] Raj Bhala, *Rethinking Antidumping Law*, 29 GEO.WASH. J. INT'L L. & ECON. 1, 115 (1995) (stating that the "purpose of an antidumping order is to provide relief from imported goods that are unfairly competing in one's domestic market.").

[131] *See id.* at 117-19.

[132] *See* Michael Y. Chung, *U.S. Antidumping Laws: A Look at the New Legislation*, 20 N.C.J. INT'L L. & COM. REG. 495, 521 (1995).

[133] *See* Appellate Body Report, *US — OCTG (Mexico)*, *supra* note 7, Annex. I, ¶ 2; Appellate Body Report, *US — OCTG (Argentina)*, *supra* note 7, ¶180.

[134] Appellate Body Report, *US — OCTG (Argentina)*, ¶210. The SPB issue in *US — OCTG (Mexico)* is not directly related to the evidentiary standard discussed

The above position of the DSB is reasonable if the finding for each issue is considered separately. But, when the balancing requirement is brought into the picture, it is clear that the findings favor the possibility of continuation of the antidumping duty measure over the possibility of termination. Every sunset review case that is brought to the DSB will inevitably contain issues that pertain to either the first prong or the second prong. The DSB must ensure that the termination and the continuation interest be balanced. The DSB must also recognize the need for a stronger evidentiary standard that will balance wide discretion that the antidumping authority enjoys in selecting the method to determine the LCRDI. The standard that the DSB has set in the three cases, although *per se* reasonable, is weaker than is warranted. Antidumping authorities should administer a more rigorous review – although not necessarily amounting to the complete procedure of original investigations – that satisfies the evidentiary standard of beyond doubt of the likelihood of continuation or recurrence of dumping and injury. For example, more weight should be conferred to evidence denying the LCRDI than is the case under the current evidentiary standard.

A somewhat related issue with the above evidentiary standard has to do with the burden of proof. The widely accepted WTO rule is that a party which makes an affirmative claim, whether it is the complaining party or the defending party, bears the burden of proof.[135] This means that by lowering the burden of proof that must be overcome by a party to successfully establish a *prima facie* case – for example, in the context of sunset review cases, a complaining party claiming inconsistency of the antidumping authorities LCRDI determination – the jurisprudential tilt which currently favors the continuation of antidumping duty orders can be alleviated. Nevertheless, the DSB appears to be reluctant to take this route as demonstrated by the SPB issue. The AB in *US — OCTG (Mexico)* did not address the burden of proof issue while discussing the SPB.[136] Nevertheless, by denying that

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here, since it pertained to the Panel's requirement of qualitative analysis for the SPB's consistency. The evidentiary standard there had to do with the standard that had to be met by the Panel, not the DOC. *See* Appellate Body Report, *US — OCTG (Mexico)*, ¶ 58.

[135] *See*, MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS C. MAVROIDIS, THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 38 (Oxford University Press 2003) (citing Appellate Body Report,*United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, ¶ 14, WT/DS33/AB/R (April 25, 1997)). *See also*, Panel Report, *US — OCTG (Mexico)*, *supra* note 7, ¶ 7.8.

[136] The U.S. did raise the burden of proof issue, but the AB chose to rely on the "legal characterization of fact" under Article 11 of the DSU which requires an objective assessment by the Panel irrespective of the burden of proof allocation. Appellate Body Report, *US — OCTG (Mexico)* ¶¶ 64, 195 (citing Appellate Body

the Panel's qualitative analysis was based on fact, the AB has effectively ruled that Mexico did not establish a *prima facie* case, despite the extensive evidence provided to the Panel, thus significantly raising the burden of proof of the complaining party.[137]

Sunset reviews currently face heavy criticisms for being abused by antidumping authorities where far too many antidumping duty orders are continued after sunset reviews through the exception clause of Article 11.3 of the AD.[138] Rough statistics show that for those antidumping duty orders imposed by developed countries between 1995 and 1999, an average of 40% of them is not terminated.[139] WTO member states have brought numerous proposals to the WTO Negotiating Group on Rules to improve the sunset review system. For example, Korea suggests an "automatic sunset," the outright termination of the antidumping duty order after five years.[140] Canada proposes the explicit enumeration of factors within the AD that antidumping authorities must consider in making the LCRDI decision.[141] These pro-

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Report, *EC – Meat and Meat Products (Hormones)*, ¶ 116, WT/DS48/AB/R (Jan. 16, 1998)). *See also*, Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, ¶ 145, WT/DS98/AB/R (Dec. 14, 1999) (stating that there is "no provision in the DSU. . .that requires a panel to make an explicit ruling on whether the complainant has established a *prima facie* case of violation before a panel may proceed to examine the respondent's defence and evidence.").

[137] *See* Panel Report, *US — OCTG (Mexico)*, ¶ 7.52. Nevertheless, the increased burden of proof may be narrowly interpreted, as being only applicable to the qualitative analysis methodology. This could be understandable given that the inconsistency finding of the SPB "as such" can have a far reaching effect, which "would have meant that [the DOC's] determination in every sunset review it had performed since the adoption of the SPB had been decided in violation of WTO rules." *U.S. Sunset Policy Bulletin Found Not to Be WTO Inconsistent*, 23 INSIDE U.S. TRADE, Nov. 4, 2005, *available at* http://www.wtonewsstand.com/ (search for "Sunset Policy Bulletin" and "November 4, 2005").

[138] *See, e.g.*, WTO Negotiating Group on Rules, *Paper from Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; Thailand* and Turkey, Proposal on Sunset, TN/RL/W/76 (Mar. 19, 2003).

[139] WTO Negotiating Group on Rules, *Communication from Chile; Hong Kong; China; Japan; Korea, Rep. Of; Norway; Switzerland; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand, Further Submission of Proposals on Sunset*, TN/RL/GEN/74, Annex I (Oct. 17, 2005). Another report states that 54% of antidumping duty orders imposed by the U.S. between July 1998 and March 2003 still remain in place after sunset reviews. WTO Negotiating Group on Rules, *Korea's View on the Improvement of the Sunset System, Submission of the Republic of Korea*, TN/RL/W/111 (May 27, 2003).

[140] *See supra* note 130, *Submission of the Republic of Korea.*

[141] WTO Negotiating Group on Rules, *Communication from Canada, Sunset Reviews*, TN/RL/ GEN/61 (Sept. 15, 2005).

posals emphasize the goal of sunset reviews, which is to terminate antidumping duty measures after five years. But it is also true that the attempt on the outright amendment of Article 11.3 will face a stiff opposition from the U.S., which is against any changes made to the WTO antidumping regime.[142] In this respect, a "judicial" construction of the antidumping sunset review regime that balances the interest of the termination and the continuation of sunset reviews by the DSB will provide another venue to address the concerns of the WTO Member States.

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[142] *See, e.g.*, Senate Concurrent Resolution 55 – Expressing the Sense of the Congress Regarding the Conditions for the United States to Become a Signatory to any Multilateral Agreement on Trade Resulting from the World Trade Organization's Doha Development Agenda Round, S. Con. Res. 55, 109th Cong. (2005), 151 Cong. Rec. S10760-02 (Sept. 29, 2005) (stating that it has been "[r]esolved by the Senate (the House of Representatives concurring), [t]hat it is the sense of the Congress that – (1) the United States should not be a signatory to any agreement or protocol with respect to the Doha Development Round of the World Trade Organization negotiations, or any other bilateral or multilateral trade negotiations, that – (A) adopts any proposal to lessen the effectiveness of domestic and international disciplines on unfair trade or safeguard provisions, including proposals – (i) mandating that unfair trade orders terminate after a set number of years even if unfair trade and injury are likely to recur.").