

ANNEX E

QUESTIONS AND ANSWERS

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¹ Pursuant to the explanations provided by the United States at the beginning of the second substantive meeting of the Panel with parties, the United States provided a revised version of its written answers to the questions of the Panel in connection with the first substantive meeting of the Panel with parties. In this revised version, the full text of paragraph 14 of the original document dated 8 January 2004, as well as similar sentences found in paragraph 17 (the penultimate sentence), paragraph 41 (the second sentence), and paragraph 44 (the latter part of the third sentence) were deleted.

² Pursuant to the explanations provided by the United States at the beginning of the second substantive meeting of the Panel with parties, the United States provided a revised version of its written answers to the questions of Argentina in connection with the first substantive meeting of the Panel with parties. In this revised version, edits were made to paragraph 14 of the original document dated 8 January.

ANNEX E-1

ANSWERS OF ARGENTINA TO QUESTIONS OF THE PANEL – FIRST MEETING

EXPEDITED REVIEWS/WAIVER PROVISIONS

ARGENTINA

1. Is Argentina basing its "as such" claim regarding expedited reviews/waiver provisions of the US law also on the provisions of US law regarding the adequacy of responses to the notice of initiation, i.e. the 50 per cent rule? Please clarify.

Argentina's Response:

First, Argentina clarifies that it is not challenging the expedited review provisions, 19 USC. § 1675(c)(3)(B) and 19 C.F.R. § 351.218(e)(1)(ii), "as such." Rather, Argentina chose to limit its challenge to the expedited review provisions "as applied" in the sunset review of OCTG from Argentina (see Argentina's First Submission, section VII.C).

With respect to Argentina's challenge to the waiver provisions (19 USC. § 1675(c)(4) and 19 C.F.R. § 351.218(d)(2)(iii)), Argentina has challenged these provisions "as such" and "as applied" (see Argentina's First Submission, sections VII.A and C). The "as such" claim is not based on the US adequacy provision, 19 C.F.R. § 351.218(e)(1)(ii)(A), although the adequacy provision is relevant to the waiver claim. Specifically, the adequacy provision is relevant to the mechanics of the "deemed" waiver under 19 C.F.R. § 351.218(d)(2)(iii), because, pursuant to the deemed waiver provision, the Department will deem a respondent to waive its participation where it receives no response or an incomplete response to a notice of initiation. In addition, the Department has treated a response that is "inadequate" by virtue of 19 C.F.R. § 351.218(e)(1)(ii)(A) (which contains the 50 per cent rule) as a waiver of participation in a sunset review, which is what the Department's Issues and Decision Memorandum said that the Department did to Siderca in this case. (ARG-51, at 4-5) (See also, e.g., *Issues and Decision Memorandum for Seamless Pipe from Argentina, Brazil, Germany, and Italy* (31 October 2000) at 3, 5 (deeming the "inadequate" response from an Italian respondent to constitute a waiver)(ARG-63, Tab 212); *Issues and Decision Memorandum for Cut-to-Length Carbon Steel Plate from Belgium* (March 29, 2000) at 23, 5 (deeming the "inadequate" responses from two respondent interested parties to constitute waivers of participation)(ARG-63, Tab 82))

The waiver provisions are inconsistent with Articles 11.3, 6.1, and 6.2, because they preclude the Department from conducting a "review" and making a "determination" of the likelihood of dumping, and because they deny respondent interested parties the opportunity to present evidence and defend their interests. The fact that the United States now claims that the waiver provisions are limited to a "company-specific" finding does not (a) reflect what is set forth in the Issues and Decision Memorandum in this case, and (b) excuse the violation of Articles 11.3, 6.1, and 6.2. In certain circumstances, such as those present in this case, company-specific waivers inevitably lead directly to an "order-wide" likelihood determination.

BOTH PARTIES

15.

- (a) **Does the cross-reference in Article 11.4 of the Agreement incorporate all provisions of Article 6 in Article 11.3? Does the same cross-reference also incorporate Annex II in Article 11.3?**

Argentina's Response:

The cross-reference in Article 11.4 expressly incorporates all provisions of Article 6 into Article 11.3. Article 11.4 states that “[t]he provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article[.]” without any limiting language. (Emphasis added.) As the Appellate Body determined in *Sunset Review of Steel from Japan*, however, certain provisions of Article 6 – while incorporated into Article 11.3 by virtue of Article 11.4 – may not be relevant to all sunset reviews conducted under Article 11.3. (See Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, para. 155.) Argentina submits that the provisions of Article 6 for which it has brought claims in the instant dispute – Articles 6.1, 6.2, 6.8, 6.9, and Annex II – are relevant to sunset reviews under Article 11.3, and therefore apply to Article 11.3 reviews.

The cross-reference in Article 11.4 to Article 6 incorporates Annex II. Article 11.4 expressly incorporates all provisions of Article 6 into Article 11.3, including Article 6.8. Article 6.8, in turn, instructs that the “provisions of Annex II shall be observed in the application of this paragraph.” Accordingly, by virtue of the cross-reference in Article 11.4, Annex II applies to sunset reviews under Article 11.3.

- (b) **If you are of the view that the cross-reference in Article 11.4 makes article 6.1 of the Agreement applicable to sunset reviews, does Article 6.1 – together with its subparagraphs - require that the investigating authority send questionnaires to exporters in sunset reviews?**

Argentina's Response:

As recognized by the Appellate Body in *Sunset Review of Steel from Japan*, Article 6.1 applies to sunset reviews under Article 11.3 by virtue of the cross-reference contained in Article 11.4. (See Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, para. 152.) Argentina does not argue, however, that Article 6.1 – together with its subparagraphs – requires that the investigating authority send questionnaires to exporters in all sunset reviews under Article 11.3. Under Article 11.3, however, the “[investigating] authorities have a duty to seek out relevant information” in sunset reviews. (*Id.* at para. 199) Sending questionnaires would be one way for the authorities to discharge this obligation, but Argentina does not believe that it is the only way.

In the sunset review before this Panel, Argentina's claim does not depend on the Department's failure to send questionnaires. However, Argentina does contend that the Department failed to satisfy its obligation to conduct a “review,” undertake a “rigorous examination” and make a “determination” or, as the Appellate Body recently stated, to “seek out relevant information and to evaluate it in an objective manner.” (Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, para. 199).

Part of the obligation in Article 6.1 requires that “[a]ll interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require” In this case, the Department considered that there could be other Argentine exporters and that the existence and non-response of these exporters could influence the type of sunset proceeding that the Department would conduct. The Department had an obligation to seek out the information it required and to do so consistently with the Anti-Dumping Agreement.

Therefore, while Article 6.1 *may* not *require* that the investigating authority issue questionnaires to exporters in a sunset review, the authority may be obligated to do so in a particular sunset review in order to ensure that it makes the likelihood determination on a “sufficient factual basis,” as required by Article 11.3. (Panel Report, *Sunset Review of Steel from Japan*, DS244, para. 7.177). A “sufficient factual basis” is required by the Anti-Dumping Agreement.

In the absence of evidence – whether submitted by the parties or gathered by the authority – of likely dumping, the authorities must terminate an anti-dumping measure.

- (c) **What significance, if any, should be given to the use of the word "investigation" in paragraphs 1 and 6 of Annex II, and to the use of the word "should" rather than "shall" in all of its paragraphs?**

Argentina's Response:

In addressing the applicability of paragraphs 1 and 6 of Annex II to sunset reviews under Article 11.3, the use of the word “investigation” in these paragraphs should not be assigned any particular significance. As explained above, the cross-reference in Article 11.4 expressly incorporates Annex II into Article 11.3. Therefore, paragraphs 1 and 6 of Annex II apply to sunset reviews under Article 11.3. Moreover, the Appellate Body in *Sunset Review of Steel from Japan* stated that Article 11.3 reviews are investigatory in nature. (See Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, para. 111 (“This language in Article 11.3 makes clear that it envisages a process combining *both* investigatory and adjudicatory aspects.”)) Thus, the use of the word “investigation” in paragraphs 1 and 6 of Annex II should not be interpreted as indication that these provisions do not apply to Article 11.3 reviews. That the Appellate Body in *Sunset Review of Steel from Japan* found that Article 6.1 applies to Article 11.3 reviews despite that provision’s use of the term “investigation” provides further support for this conclusion. (See *id.* at para. 152)

The use of “should” rather than “shall” in Annex II is also not significant. In *Steel Plate from India*, the Panel held that, despite the use of the word “should,” the provisions of Annex II are mandatory:

We note that there is disagreement between the parties as to whether the provisions of Annex II, which are largely phrased in the conditional tense (“should”) are mandatory. We consider that Article 6.8 itself answers this question. Article 6.8 explicitly provides that “The provisions of Annex II **shall** be observed in the application of this paragraph” (emphasis added). In our view, the use of the word “shall” in this context establishes that the provisions of Annex II are mandatory. Indeed, this would seem a necessary conclusion. The alternative reading would mean that investigating authorities are required (“shall”) to apply provisions which are not themselves required, an interpretation that makes no sense. Moreover, the provisions of Annex II, while worded in the conditional, give specific guidance to investigating authorities regarding certain aspects of their determinations which, without more, clearly establish the operational requirements. Thus, we consider that the provisions of Annex II are mandatory, not because of the wording of those provisions themselves, but because of the obligation to observe them set out in Article 6.8.

(Panel Report, *Steel Plate from India*, DS206, para. 7.56; see also Panel Report, *Argentina – Ceramic Tiles*, DS189, paras. 6.74, 6.79-6.80 (treating the provisions of Annex II as mandatory obligations).

Given the mandatory language of Article 6.8, Argentina considers that there can be little question that the obligations of Article 6, and specifically 6.8 and Annex II, apply in sunset reviews, and that they reflect obligations of the Members.

16. In this sunset review, did Siderca attempt to submit additional evidence to the DOC after its substantive response to the notice of initiation? If so, how did the DOC respond to such attempts?

Argentina's Response:

Siderca did not attempt to submit additional evidence to the Department after its substantive response to the notice of initiation. Having submitted a "complete substantive response" that met all of the Department's regulatory requirements and having offered to cooperate fully in the sunset review, under Article 6.1, 6.8 and Annex II, it was the Department's obligation to "specify in detail the information required" from Siderca in order for the Department to undertake a review and make the required determination under Article 11.3. Siderca could not reasonably be expected to know that any additional information was necessary in order to have the Department undertake a meaningful review and make a substantive likelihood determination. The Department determined that Siderca's response was inadequate, however, and never requested any additional information from Siderca.

Once the decision to expedite had been taken, that meant that the Department's likelihood determination was pre-ordained – likely dumping – for the non-responding respondents accounting for 100 per cent of the Argentine exports and for Siderca.

In addition, although the Department's sunset regulations afford respondents the opportunity to comment on the adequacy determination, these comments "may not include any new factual information or evidence" (19 C.F.R. § 351.309(e)). Consequently, Siderca did not comment on the Department's adequacy determination, because the regulation precluded it from submitting any new evidence with respect to that determination.

17. What is the significance of the word "may" in section 1675(c)(3)(B) of the Tariff Act of 1930?

Argentina's Response:

Through the use of the word "may," section 1675(c)(3)(B) authorizes the Department and the Commission to make their respective likelihood determinations without further investigation on the basis of the facts available (which in the Department's consistent practice is limited to the existence of any one of the three checklist criteria prescribed by the SAA and *Sunset Policy Bulletin*), where interested party responses to the notice of initiation are inadequate. Argentina takes this opportunity to reiterate that it has not challenged this provision of US law "as such" (please refer to Argentina's response to question 1).

OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING

ARGENTINA

18. The Panel notes Argentina's assertion in paragraph 189 of its first written submission that the reporting by the DOC of the original dumping margin to the ITC as the likely margin violated Articles 2 and 11.3 of the Agreement. Please explain whether Argentina submits that the original dumping margins can not be used at all in sunset reviews, or whether they can not establish the sole basis of investigating authorities' sunset determinations.

Argentina's Response:

Argentina's view is that the original dumping margins can be considered as one of the many factors by the authority in making the likelihood of dumping determination. In Argentina's view, original dumping margins cannot establish the sole basis – or event the preponderant basis – for a determination of likelihood of continuation or recurrence of dumping. The original dumping determination alone simply cannot constitute a sufficient basis upon which the authority can make a determination that dumping would be likely to continue or recur upon expiry of the duty. Indeed, the very fact that there is a sunset review means that there was a dumping margin from the original investigation. It follows that if the original dumping margin were to be given decisive weight, then the authorities would always make a determination that dumping would be likely. Nor can the original dumping margin coupled with consideration of import volumes – with no more – be considered sufficient for purposes of the likelihood determination. Yet this is precisely what the Department does when it applies the checklist criteria in the SAA and Section II.A.3 of the *Sunset Policy Bulletin*.

The SAA and the *Sunset Policy Bulletin* limit the Department's so-called likelihood "analysis" solely to a consideration of: (1) the existence of dumping margins from the original investigation and subsequent administrative reviews; (2) whether imports of the subject merchandise ceased after issuance of the order; and (3) whether dumping was eliminated after imposition of the order and import volumes declined significantly. As the Appellate Body recently explained in *Sunset Review of Steel from Japan*, however, the issue is not whether dumping margins and import volumes might be relevant, but "whether Section II.A.3 goes further and instructs USDOC to attach decisive or preponderant weight to these two factors in every case." (DS244, para. 176)(emphasis added).

In Argentina's view, these factors are not merely disproportionately weighted in Department sunset reviews; they are the sole factors relied on by the Department, and hence preordain the result of an affirmative likelihood determination in all Department sunset reviews in which the domestic industry participates. The Appellate Body explained that it did not believe that either factor (dumping margins or import volumes) could always be presumed to constitute sufficient evidence of likely dumping:

We would have difficulty accepting that dumping margins and import volumes are always "highly probative" in a sunset review by USDOC if this means that either or both of these factors are presumed, by themselves, to constitute sufficient evidence that the expiry of the duty would be likely to lead to continuation or recurrence of dumping. Such a presumption might have some validity when dumping has *continued* since the duty was imposed (as in the first scenario identified in Section II.A.3 of the *Sunset Policy Bulletin*), particularly when such dumping has continued with significant margins and import volumes. However, the second and third scenarios in Section II.A.3 relate to the situation where there is *no dumping* (either because imports ceased or because dumping was eliminated after the duty was imposed). The cessation of imports in the second scenario and the decline in import volumes in the third scenario could well have been caused or reinforced by changes in the competitive conditions of the market-place or strategies of exporters, rather than by the imposition of the duty alone. Therefore, a case-specific analysis of the factors behind a cessation of imports or a decline in import volumes (when dumping is eliminated) will be necessary to determine that dumping will recur if the duty is terminated. (DS244, para. 177)

The Appellate Body's statement applies directly to this case. Imports stopped, or at the very least were significantly less, after the imposition of the anti-dumping measure. And there was no evidence of continued dumping during the life of the anti-dumping measure. Thus, the Department could not simply presume that, because the Department calculated a 1.36 per cent dumping margin in

the original investigation (based on the practice of zeroing), dumping would be likely to continue. As demonstrated in Argentina's First and Second Submissions, without zeroing, there would be no dumping margin. (See Argentina's First Submission, para. 189, Exhibit ARG-52; Argentina's Second Submission, paras. 138-145, Exhibits ARG-66A & B)

19. The Panel notes Argentina's arguments in paragraphs 181, 189 and 192 of its first written submission regarding the DOC's alleged use of the zeroed-out dumping margin in the instant sunset review. Is Argentina arguing that the DOC zeroed-out the likely dumping margin in this sunset review, or, is it arguing that the use of the originally zeroed-out margin rendered the DOC's likelihood determinations WTO-inconsistent? If the latter, please explain whether in your view the original dumping margin in question, alone or together with some other facts, constituted the basis of the DOC's likelihood determinations in this sunset review?

Argentina's Response:

Argentina considers that the Department's application of the waiver provisions resulted in a mandatory determination of likely dumping in the sunset review of OCTG from Argentina.

Assuming *arguendo* that waiver was not applied to either Siderca or to Argentina in this case, Argentina's view is that the Department identified only two facts in its likelihood of dumping determination: (1) the dumping margin of 1.36 per cent from the original investigation; and (2) the decline in import volumes (See Issues and Decision Memorandum at 5 (ARG-51)).

With respect to the dumping margin from the original investigation, in the words of the Appellate Body in *Sunset Review of Steel from Japan*, this is precisely one of those cases where zeroing affects not only the degree of the dumping margin, but also changes the outcome of no dumping (within the meaning of Article 2) to one of dumping. (DS244, para. 135) It is clear that in calculating the dumping margin during the original investigation, the Department employed the practice of zeroing negative margins. This can be seen clearly by Exhibit ARG-52 to Argentina's First Submission, and the further supporting information submitted with Argentina's Second Submission. This evidence shows that, without the zeroing of negative margins, the results of the Department's calculations in the original investigation would have been a negative 4.35 per cent. Argentina's position is that the Department's reliance on the 1.36 per cent margin from the original investigation (a margin calculated on the basis of zeroing) and the decline in import volume as the sole factors in rendering its determination that dumping would be likely to continue was inconsistent with US WTO obligations.

In addition, Argentina takes the position that the Department's reporting of the 1.36 per cent margin to the Commission violates Articles 11.3 and Article 2. Even though Article 11.3 may not require an authority to calculate a dumping margin or report a margin of dumping in connection with the likelihood determination, once an authority undertakes to either calculate a margin or rely on a margin for purposes of the likelihood of injury determination, or report a "likely" margin of dumping for use in the likelihood of injury analysis, then the authority must act consistently with the requirements of Article 2 (See Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, para. 130).

20. The Panel notes Argentina's arguments in paragraphs 124-147 of its first written submission regarding the alleged irrefutable presumption under US law/practice regarding likelihood determinations in sunset reviews. Please respond to the following questions:

- (a) Is Argentina basing its claim on the US law or the DOC's practice in sunset reviews, or both?**

Argentina's Response:

Both. Argentina is challenging US law as such. To support its as such challenge to US law, Argentina is relying on the text of the instruments, as well as the Department's consistent practice in applying these instruments, in determining the meaning of US law. In addition, Argentina is also challenging as a separate claim the Department's consistent practice as such.

The US statute, the Statement of Administrative Action (SAA), and the *Sunset Policy Bulletin* (SPB), *operating together*, establish a presumption in favour of finding likely dumping. This WTO-inconsistent presumption is demonstrated in the Department's consistent practice in all sunset reviews in which the domestic industry participates. Indeed, the Department relies exclusively on the authority of the statute, the SAA and the SPB in making its likelihood "determinations."

As noted in Section VII.B of Argentina's First Submission, 19 USC. §§ 1675(c) and 1675a(c) establish the statutory standard for determining the likelihood of continuation or recurrence of dumping. The SAA clarifies this standard by outlining the instances in which the Department should determine that dumping is likely to continue or recur. The SPB provides further direction to the Department as to the three factors that it will rely on and the weight that should be given to those factors in deciding whether termination of the order would likely lead to continuation or recurrence of dumping.

To understand how these three instruments function, and the cumulative effect they have in establishing the WTO-inconsistent presumption, they need to be read together. Indeed, it should be emphasized that in drafting these three instruments, the United States intended for them to operate in a complementary manner in sunset reviews.

In the end, the SPB is a distillation of the statute and the SAA, and establishes the criteria forming the presumption that no respondent party has ever been able to refute.

- (b) If Argentina is basing its claim on the US law, please identify the legal instruments [e.g. the Statute, the Regulations, the SPB, the Statement of Administrative Action ("SAA") etc.] that constitute the basis of Argentina's as such claim? In particular, please indicate, if any, the provisions in the US statute that contains the alleged irrefutable presumption of likelihood of continuation or recurrence of dumping.**

Argentina's Response:

The legal instruments establishing the presumption are those set out in Argentina's Panel Request, and explained in Argentina's First Submission. They are: 19 USC. §§ 1675(c) and 1675a(c), the SAA (particularly pages 888 to 890) and the SPB (particularly Section II.A.3).

19 USC. § 1675a(c)(1) requires the Department to consider "(A) the weighted average dumping margins determined in the investigations 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 the acceptance of the suspension agreement."

The referenced portions of the SAA, in turn, outline the many instances in which, under US law, the Department will determine – based solely on the factors of dumping margins and import volumes – that dumping is likely to continue or recur:

[The Bill] establishes standards for determining the likelihood of continuation or recurrence of dumping. Under section [1675a(c)(1)], Commerce will examine the relationship between dumping margins, or the absence of margins, and the volume of imports of the subject merchandise, comparing the periods before and after the issuance of an order or the acceptance of a suspension agreement. For example, *declining import volumes* accompanied by the continued existence of dumping margins after the issuance of an order may provide a strong indication that, absent an order, dumping would be likely to continue, because the evidence would indicate that the exporter needs to dump to sell at pre-order volumes. If imports cease after the order is issued, it is reasonable to assume that the exporters could not sell in the United States without dumping and that, to reenter the US market, they would have to resume dumping.

. . . .

The Administration believes that existence of *dumping margins after the order*, or the *cessation of imports after the order*, is highly probative of the likelihood of continuation or recurrence of dumping. If companies *continue to dump* with the discipline of an order in place, it is reasonable to assume that dumping would continue if the discipline were removed. . . .

[T]he existence of zero or de minimis dumping margins at any time while the order was in effect shall not in itself require Commerce to determine that there is no likelihood of continuation or recurrence of dumping. Exporters may have ceased dumping because of the existence of an order or suspension agreement. Therefore, the present absence of dumping is not necessarily indicative of how exporters would behave in the absence of the order or agreement. (SAA at 889-890)(emphasis added)

Under Section II.A.3 of the SPB, the Department “normally will” determine that dumping is likely to continue or recur where:

- (a) dumping continued at any level above *de minimis* [(i.e., above 0.5 per cent)] after the issuance of the order or the suspension agreement, as applicable;
- (b) imports of the subject merchandise ceased after the 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.

The provisions of the statute, the SAA, and SPB – when read together – establish the presumption of likely dumping. The operation of this presumption can be seen through the consistent practice of the Department. These provisions (as evidenced by the practice) make clear that the sole factors dispositive for the likelihood of dumping determination are (1) the existence of dumping margins from the original investigation and subsequent administrative reviews; (2) whether imports of the subject merchandise ceased after issuance of the order; and (3) whether dumping was eliminated after imposition of the order and import volumes declined significantly. (See US Department of Commerce Sunset Reviews, ARG-63 and ARG-64)

BOTH PARTIES

- (c) **Please explain how you identify "practice" and how you distinguish practice from law? In light of the WTO jurisprudence, please explain your views as to whether practice as such is challengeable under WTO law or not.**

Argentina's Response:

For present purposes, Argentina would note that a "law" provides the legislative or regulatory framework within which a Member may implement its WTO obligations, while a "practice" may refer to the actual application of such laws or regulations by the administering authorities. There is no question that laws, regulations, administrative procedures, and practices are all subject to WTO dispute settlement proceedings.

This point was made forcefully by the Appellate Body in *Sunset Review of Steel from Japan* (DS244).

The Appellate Body began its analysis by asking itself this question: "does the type of instrument itself – be it a *law, regulation, procedure, practice, or something else* – govern whether it may be subject to WTO dispute settlement?" (Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, para. 78)(emphasis added) It went on to answer this question by noting that:

In the practice under the GATT, most of the measures subject, as such, to dispute settlement, were *legislation*. We nevertheless observed in *Guatemala – Cement I* that, in fact, a broad range of measures could be submitted, as such, to dispute settlement:

In the practice established under the GATT 1947, a "measure" may be *any* act of a Member, whether or not legally binding, and it can include even non-binding administrative guidance by a government (*see Japan – Trade in Semi-Conductors*, adopted 4 May 1988, BISD 35S/116).

The provisions of the Anti-Dumping Agreement setting forth a legal basis for matters to be referred to consultations and thus to dispute settlement, are also cast broadly. . . . There is no threshold requirement, in Article 17.3, that the measure in question be of a certain type. (*Id.* at paras. 85-86)(footnote omitted)

The Appellate Body added that Article 18.4 of the Anti-Dumping Agreement demonstrated that, "[t]aken as a whole, the phrase 'laws, regulations and administrative procedures' seems to us to encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings. If some of these types of measure could not, as such, be subject to dispute settlement under the Anti-Dumping Agreement, it would frustrate the obligation of 'conformity' set forth in Article 18.4." (*Id.* at para. 87)

This analysis led the Appellate Body to conclude that:

[T]here is no basis, either in the practice of the GATT and the WTO generally or in the provisions of the Anti-Dumping Agreement, for finding that only certain types of measure can, as such, be challenged in dispute settlement proceedings under the Anti-Dumping Agreement. (*Id.* at para. 88)

It therefore found that the Panel erred in law when it found that the SPB, as such, could not be inconsistent with the Anti-Dumping Agreement because it is not a mandatory legal instrument. (*Id.* at para. 100)

The Appellate Body's decision in *Sunset Review of Steel from Japan* is consistent with the Appellate Body decision in *US – Countervailing Measures*. As noted in Argentina's First Submission, in that case the Appellate Body treated practice – specifically, a practice of the US Department of Commerce – as a measure for the purposes of WTO dispute settlement. It noted that “[t]he European Communities challenges the *administrative practice* followed by the USDOC when examining whether a ‘benefit’ continues to exist following a change in ownership. This *administrative practice* is called the ‘same person’ method.” (Appellate Body Report, *US – Countervailing Measures*, DS212, para. 86)(emphasis added) After finding this practice to be WTO-inconsistent, the Appellate Body recommended to the DSB that it request the United States “to bring its measures *and administrative practice* (the “same person” method) . . . into conformity with its obligations” (*Id.* at para. 162)

As a result of these two unambiguous Appellate Body decisions, there is no doubt that practice is “challengeable under WTO law.”

- (d) **What, in your view, is the relationship between “practice” on the one hand and “the SPB” and “the SAA” on the other? Could the SPB and the SAA be considered as legal instruments that embody the US practice with regard to sunset reviews?**

Argentina's Response:

As indicated above, the statute, the SAA and the SPB must be read together, not separately, for the purposes of assessing whether the United States has implemented its obligations under Article 11.3 of the Agreement.

The SAA, by its own terms, represents “an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretations of those agreements included in this Statement carry particular authority.” (SAA at 656)

As the Appellate Body noted, the SPB “forms part of the overall framework within which ‘sunset’ reviews of anti-dumping or countervailing duties are conducted in the United States.” (Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, para. 73)

Argentina would not agree, however, that “the SPB and the SAA [could] be considered as legal instruments that embody the US practice with regard to sunset reviews.” These instruments pre-date even the first US sunset review. Rather, the statute, the SAA, and the SPB, operating together, provide the basic framework for sunset reviews and establish a presumption in favour of affirmative findings that dumping is likely to continue or recur. The Department applies these instruments in its practice, which practice has been consistent in finding a likelihood of continuation or recurrence of dumping (based on the three SAA/SPB criteria) in every case in which domestic industry participates in the sunset review.

21. Do Articles 2 and 3 of the Agreement apply to sunset reviews? If your response is in the affirmative, do these articles apply to sunset reviews in the same manner in which they apply to original investigations, or in a different manner? Please elaborate on the basis of the provisions of the Agreement and the relevant WTO case law.

Argentina's Response:

Articles 2 and 3 of the Anti-Dumping Agreement apply to sunset reviews.

As noted in Argentina's First Submission, Article 2.1 defines dumping "[f]or the purpose of this Agreement." Any possible doubt about this issue was resolved definitively by the Appellate Body in *Sunset Review of Steel from Japan*:

We agree with Japan that the words "[f]or the purpose of this Agreement" in Article 2.1 indicate that this provision describes the circumstances in which a product is to be considered as being dumped *for purposes of the entire Anti-Dumping Agreement, including Article 11.3*. This interpretation is supported by the fact that Article 11.3 does not indicate, either expressly or by implication, that "dumping" has a different meaning in the context of sunset reviews than in the rest of the Anti-Dumping Agreement. Therefore, Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 suggest that the question for investigating authorities, in making a likelihood determination in a sunset review pursuant to Article 11.3, is whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping of the product subject to the duty (that is, to the introduction of that product into the commerce of the importing country at less than its normal value). (Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, para. 109)(emphasis added))

Argentina's First Submission also demonstrated that Article 3 applies to reviews conducted under Article 11, essentially for the same textual reasons as those advanced under Article 2.

As indicated above, Article 2.1 defined dumping "for the purpose of this Agreement." Similarly, footnote 9 of the Anti-Dumping Agreement uses a virtually identical formulation, defining injury "under this Agreement." Although the Appellate Body was not called upon to pronounce whether footnote 9 defined injury for all purposes of the Agreement, including Article 11.3, the same principles it enunciated with respect to Article 2 apply equally to Article 3.

Indeed, as noted in Argentina's First Submission, this was the approach taken by the Panel in *Sunset Review of Steel from Japan*, which stated footnote 9:

[S]eems to demonstrate that the term "injury" as it appears throughout the Anti-Dumping Agreement – including Article 11 – is to be construed in accordance with this footnote, unless otherwise specified. This would seem to support the view that the provisions of Article 3 concerning injury may be generally applicable throughout the Anti-Dumping Agreement and are not limited in application to investigations. Article 11 does not seem to explicitly specify otherwise in the case of sunset reviews. (Panel Report, *Sunset Review of Steel from Japan*, DS244, para. 7.99)

Argentina also recalls the statement of the Appellate Body in *H-Beams from Poland* that "the obligations in Article 3.1 apply to *all* injury determinations undertaken by Members." (Appellate Body Report, *H-Beams from Poland*, DS122, para. 114)

Thus, it is clear that both Article 2 and Article 3 apply to sunset review determinations under Article 11.3.

22. The Panel notes Argentina's statements in paragraphs 132, 184, 190 and 192 of its first written submission. In your view, does Article 11.3 require an investigating authority to calculate the likely dumping margin in a sunset review? If your response is in the negative, does Article 11.3 at least require some kind of comparison between the future export price and the future normal value? Please explain on the basis of the relevant provisions in the Agreement.

Argentina's Response:

In Argentina's view, Article 11.3 does not *require* an investigating authority to calculate the likely dumping margin in a sunset review. If, however, the authority relies on a dumping margin as a basis for its likelihood determination or calculates or reports the likely dumping margin in a sunset review, then that margin must conform to the disciplines of Article 2. (Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, para. 127).

Article 11.3 does not necessarily require a comparison between the future export price and the future normal value, although this information would certainly be relevant to the likelihood of dumping determination.

The essential point is that the authority must terminate the measure unless it develops a sufficient evidentiary basis to support the conclusion that dumping is likely to continue or recur. What the authority may not do is continue the measure without a sufficient factual basis to establish that dumping is likely to continue or recur. If the authority cannot establish such evidence, the order must be terminated.

OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF INJURY

ARGENTINA

25. The Panel notes Argentina's assertion in paragraph 273 of its first written submission that the statutory provisions under US law that require the ITC to inquire whether the revocation of a measure is likely to lead to continuation or recurrence of injury within a reasonably foreseeable time are inconsistent with Articles 3.7 and 3.8 of the Agreement. Is Argentina arguing that Articles 3.7 and 3.8 apply to sunset reviews and therefore add to the substantive obligations of investigating authorities in sunset reviews? If so, please cite the provisions of the Agreement that can support this assertion. Or, is Argentina citing these two articles as a side argument without asserting that they are directly applicable to sunset reviews? Please elaborate.

Argentina's Response:

The likelihood of injury analysis under Article 11.3 necessarily entails elements of Articles 3.7 and 3.8. Article 3 defines "injury" as that term is used throughout the Anti-Dumping Agreement. Thus, an authority's determination under Article 11.3 of whether "injury" would be likely to continue or recur must satisfy the requirements of Article 3. Footnote 9 states: "Under this Agreement the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article." The Appellate Body used the SCM Agreement's equivalent of this very footnote as an illustration of how the injury concept applies throughout the Agreement, including in sunset reviews. (See Appellate Body Report, *Steel from Germany*, DS213, para. 69 n.59.)

Article 11.3 provides that the relevant time frame for the likelihood of injury determination is at the “expiry of the duty.” This time period does not equal “reasonably foreseeable time.” Moreover, that the Article 11.3 inquiry relates to termination of the duty being “likely to lead to continuation or recurrence” does not mean the time frame has no parameters.

Argentina agrees with the United States that the prospective nature of the injury determination under Article 11.3 creates certain similarities with the threat of injury analysis. Threat of injury determinations are governed by Article 3.7, which provides that such determinations must be “based on facts and not merely on allegation, conjecture or remote possibility.” Article 3.7 also requires the circumstances under which injury would occur to be imminent. US law does not define, nor has the Commission articulated, what constitutes “a reasonably foreseeable time.” The complete discretion of the Commission in making its determinations as to whether injury is likely to continue or recur conflicts with the requirements of the Anti-Dumping Agreement. Speculation by an investigating authority about market conditions several years into the future is inconsistent with Article 11.3 and Article 3. Similarly, US law imposes an obligation on the Commission inconsistent with the mandate of Article 3.8, which provides that, “[w]ith respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be considered and decided with special care.”

The challenged provisions of US law are inconsistent with the temporal requirements of Articles 11.3, 3.7, and 3.8 of the Anti-Dumping Agreement and their treatment of future injury determinations. By extending the period of time outward (with no limitations) within which the Commission must consider whether domestic producers might be injured, the statutory provisions fail to satisfy the “likely” analysis mandated by Articles 11.3, 3.1, 3.2, 3.4, 3.5, 3.7, and 3.8 of the Anti-Dumping Agreement.

CUMULATION

BOTH PARTIES

26. Would cumulation be generally allowed (i.e. both in original investigations and reviews) in the absence of Article 3.3 of the Agreement? What provision, if any, of the Agreement would cumulation violate in the absence of Article 3.3? In other words, in your view, is Article 3.3 an authorization for the use of cumulation, or, is it rather a provision that imposes certain restrictions on the use of cumulation in investigations? Please elaborate on the basis of the relevant provisions of the Agreement.

Argentina’s Response:

Cumulation was not previously subject to disciplines under the GATT. The WTO Anti-Dumping Agreement addressed cumulation for the first time, and authorized the use of cumulation only in certain circumstances. Article 3.3 provides a very limited exception for the use of cumulation, and then only under specified conditions. First, cumulation is limited to “anti-dumping investigations.” In *Steel from Germany*, the Appellate Body ruled that the use of “investigation” in Article 11.9 of the SCM Agreement indicated that the *de minimis* rule of that provision did not extend beyond the original investigation to sunset reviews. (See Appellate Body Report, *Steel from Germany*, DS213, paras. 68-69, 92). Accordingly, the use of “investigations” in Article 3.3 must similarly limit the conditioned application of cumulation to original investigations, and not to sunset reviews under Article 11.3. Second, its use is further confined to those investigations “where imports of a product from more than one country are simultaneously subject to anti-dumping investigations.” Third, only if the first two criteria are satisfied, can the authority in an investigation “cumulatively assess the effects of such imports,” and even then “only if” the authority makes additional findings, including: 1) that “the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5;” and 2) that “the volume of imports from each country is not negligible.” Finally, the authorities must also determine whether “a cumulative

assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the like domestic product.”

Article 11.3 provides a good example of a provision that would be violated if a cumulative injury assessment were undertaken in a sunset review. The specific reference in the text of Article 11.3 to “an anti-dumping duty” is singular and not plural, which on its face refers to one measure, and not multiple anti-dumping measures. Indeed, as the Appellate Body explained in *Sunset Review of Steel from Japan*:

The United States argues that the meaning of the word “duty” in Article 11.3 is explained in Article 9.2 of the Anti-Dumping Agreement, which “makes clear that the definitive duty is imposed on a product-specific (i.e., order-wide) basis, not a company-specific basis.” As the United States points out, Article 9.2 refers to the imposition of “an anti-dumping duty . . . in respect of any product”, rather than the imposition of a duty in respect of individual exporters or producers. We agree that this reference in Article 9.2 informs the interpretation of Article 11.3. We also note that Article 9.2 allows investigating authorities, in imposing a duty in respect of a product, to “name the supplier or suppliers of the product concerned” or, in certain circumstances, “the supplying country concerned.” This suggests that authorities may use a single order to impose a “duty”, even though the amount of the duty imposed on each exporter or producer may vary. Therefore, Article 9.2 confirms our initial view that Article 11.3 does not require investigating authorities to make their likelihood determination on a company-specific basis. (Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, para. 150)(footnotes omitted)

This passage also confirms that the use of duty in the singular means that the duty subject to review in Article 11.3 is a single measure, and not multiple measures.

Moreover, in addition to the text of Article 11.3, the text of Article 3.3 makes clear that cumulation is permitted only in investigations. There is no cross-reference in Article 3.3 to Article 11.3. Nor is there any explicit cross-reference to either cumulation or to Article 3.3 in the immediate context of Article 11 (i.e., Articles 11.1, 11.2, 11.4, or 11.5) or in the broader context of the Anti-Dumping Agreement.

Finally, the reasoning of the Appellate Body in *Steel from Germany* suggests that it understands that the injury analysis in a sunset review is not conducted on a cumulated basis: “Thus, in our view, the terms ‘subsidization’ and ‘injury’ each have an independent meaning in the SCM Agreement which is not derived by reference to the other. It is *unlikely* that very low levels of subsidization could be demonstrated to cause ‘material’ injury.” (Appellate Body Report, *Steel from Germany*, DS213, para. 81) Such a statement would be true only where the injury analysis is not conducted on a cumulated basis.

OTHER

ARGENTINA

28. In paragraph 40 of Argentina's oral statement, Argentina referred to the statement of the Appellate Body in *US-Carbon Steel* that "while it would be difficult for a single case to serve as conclusive evidence of the Department's practice as such violating US WTO obligations, a comprehensive examination of all US sunset reviews and an analysis of the methodology used by the Department in those reviews might provide such an evidentiary basis." Is Argentina arguing that the consistent use of a specific methodology could amount to a measure in law which can be challenged in a WTO dispute settlement proceeding?

Argentina's Response:

Yes. Argentina takes the position that the consistent use of a specific methodology (i.e., consistent practice) can be challenged as such. (See Appellate Body Report, *Sunset Review of Steel from Japan*, DS244, paras. 85-87; see also Appellate Body Report, *US – Countervailing Measures*, DS212, paras. 150, 151, 162)) Argentina believes that the Appellate Body's report in *US – Carbon Steel* further supports the conclusion that consistent practice may be challenged as such. (See Appellate Body Report, *US – Carbon Steel*, DS213, para. 148).

* * *

Additional Note referred to the questions posed by the European Communities:

By letter to the Chairman dated 11 December 2003, the European Communities submitted a written version of the questions posed at the 10 December meeting.

The written questions attached to the European Communities' letter to the Chairman indicate that the questions are directed only to the United States. Therefore, at this stage, Argentina limits itself to the following general comment on the question, in line with the explanation provided in Argentina's First and Second Submissions.

At the outset, Argentina understands that the series of questions posed by the European Communities addresses both the specific issue of "zeroing" in sunset reviews, and the broader issue of whether the substantive requirements of "dumping" contained in Article 2 apply to an Article 11.3 determination of whether "dumping" is likely to continue or recur.

Both the specific issue and the broader issue have been addressed by the Appellate Body in *Steel from Japan*.

With respect to the specific issue, the Appellate Body 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." (*Id.* at para. 127; see also *id.* at 130) Also, the Appellate Body reaffirmed its holding in *EC – Bed Linen* that use of a zeroing methodology tends to impermissibly inflate the dumping margin, and is thus inconsistent with Article 2.4's requirement to make a "fair comparison" between the export price and normal value. (See Appellate Body Report, *Steel from Japan*, paras. 134-135) Therefore, in making a determination of likely dumping, the reliance on – or calculation of – a margin based on the practice of zeroing is inconsistent with Article 11.3.

With respect to the broader issue, the Appellate Body held that the substantive requirements of Article 2 apply to sunset reviews under Article 11.3. (See Appellate Body Report, *Steel from Japan*, para. 128 ("It follows that we disagree with the Panel's view that the disciplines in Article 2 regarding the calculation of dumping margins do not apply to the likelihood determination to be made in a sunset review under Article 11.3."))

As a result, Argentina believes that the Appellate Body decision in *Steel from Japan* resolves the "zeroing" issue presented by Argentina in this dispute. By relying on the 1.36 per cent margin calculated in the original investigation as the evidentiary basis for its determination that dumping was likely to continue, the Department had an obligation to ensure that the 1.36 per cent margin was in fact evidence of "dumping" as defined in Article 11.3 and Article 2. If the Panel finds that the 1.36 per cent margin was based on a calculation that is not consistent with Article 2.4, then the Department could not rely upon this margin as evidence that dumping was likely to continue or recur. If the Department did rely upon this margin, then its decision is inconsistent with Article 11.3.

The information submitted in Exhibit ARG-52 demonstrates that the anti-dumping margin relied upon by the United States in this sunset review was calculated in a manner that is not consistent with Article 2.4 of the Anti-Dumping Agreement. The additional details being provided in section II.C.3.b of Argentina's Second Written Submission provide further proof that the 1.36 per cent margin was calculated in a manner inconsistent with Article 2.4, and therefore could not be relied upon in an Article 11.3 review as evidence that dumping was likely to continue or recur.

ANNEX E-2

ANSWERS OF THE UNITED STATES TO QUESTIONS OF THE PANEL – FIRST MEETING

8 January 2004

EXPEDITED REVIEWS/WAIVER PROVISIONS

Q2. Please respond to the following questions regarding "expedited sunset reviews" under the US law?

- (a) **In what circumstances does the DOC decide to conduct an expedited sunset review? More specifically, does the US law require or allow the DOC to conduct an expedited sunset review in cases where there is an affirmative or deemed waiver as well? Or, are expedited reviews limited only to cases where the respondent interested parties' substantive response to the notice of initiation is found inadequate because their share in the total imports falls below the 50 per cent threshold prescribed under US law?**

1. The US Department of Commerce (Commerce) decides whether to conduct a full or expedited sunset review based on a two-part procedure. First, Commerce solicits substantive responses from interested parties after publication of the notice of initiation of the review in the Federal Register.¹ Respondent interested parties, which include foreign exporters and governments,² have several options: They may (1) file a substantive response; (2) elect to waive their rights to participate in the review ("affirmative waiver"); or (3) refuse to provide a substantive response.³ Commerce will determine whether each response received is "complete" per the criteria set forth in the regulations.⁴ No response, or an incomplete substantive response, is considered a waiver ("deemed waiver").⁵ Parties waiving their rights to participate in the review are considered likely to dump (a company-specific likelihood finding).⁶

2. Second, taking into account all of the responses received as part of the first step, including deemed and affirmative waivers, Commerce normally evaluates whether the exporters submitting complete substantive responses account for 50 per cent of the total imports of subject merchandise to the United States over the five calendar years preceding the initiation of the review ("50 per cent threshold").⁷ If the responses do not meet the 50 per cent threshold, Commerce will normally conduct an expedited review to make an order-wide determination of the likelihood of continuing or recurring dumping (an order-wide likelihood determination).⁸

3. The likelihood finding with regard to one company under the first step is not dispositive of the results of the order-wide likelihood determination under the second step. 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. The decision whether to expedite depends on the other respondent interested party responses.

¹ 19 C.F.R. 351.218(d)(3) (Exhibit ARG-3).

² 771(9) of the Tariff Act of 1930 (19 USC. 1677(9)).

³ 19 C.F.R. 351.218(d) (Exhibit ARG-3).

⁴ 19 C.F.R. 351.218(d)(3)(ii) (Exhibit ARG-3).

⁵ 19 C.F.R. 351.218(d)(2)(iii) (Exhibit ARG-3).

⁶ Section 751(c)(4) of the Tariff Act (19 USC. 1675(c)(4)) (Exhibit ARG-1).

⁷ 19 C.F.R. 351.218(e)(1)(ii)(A) (Exhibit ARG-3).

⁸ 19 C.F.R. 351.218(e)(1)(ii)(C) (Exhibit ARG-3).

4. (Please note that the 50 per cent threshold is not dispositive. Commerce may take other factors into account and has conducted several full sunset reviews under the anti-dumping and countervailing duty laws in which the aggregate response did not represent more than 50 per cent of imports. Most of these involved analyses of subsidization where the relevant government's participation is essential given the nature of the sunset review in the countervailing duty context. In at least one case, however, Commerce conducted a full sunset review in an anti-dumping case in which the aggregate response to the notice of initiation did not represent more than 50 per cent of imports for the five year period. In *Pineapple from Thailand*, the only respondent interested party to file a complete substantive response did not represent more than 50 per cent of the imports during the five year period preceding the sunset review.⁹ Commerce nonetheless conducted a full sunset review because the respondent interested party was a significant exporter of the subject merchandise, was a respondent in the original investigation, represented nearly 50 per cent of the imports during the five year period (on average), and accounted for more than 50 per cent of the imports for the two years preceding the sunset review.)

- (b) **The Panel notes that the provisions relating to a deemed waiver, i.e. the presumption that a respondent interested party that submits an incomplete substantive response is deemed to have waived its right to participate, are found in the Regulations only. This matter does not seem to be dealt with under the Tariff Act. Would the United States agree that the only provisions of the US law relating to deemed waivers are contained in the Regulations?**

5. Yes.

- (c) **If the DOC carries out an expedited sunset review in cases of an affirmative or deemed waiver as well, please explain whether there are any differences in the procedural rules that apply to these two sets of expedited sunset reviews, i.e. expedited reviews that result from a waiver and those that result from the submission of an inadequate response.**

6. There is only one "type" of expedited review.

7. There is no difference in the treatment of a respondent interested party in an expedited sunset review conducted by Commerce whether that particular party waives its right to participate pursuant to an election (section 751(C)(4)(A)) or is deemed to have waived because it failed to respond or its substantive response to the notice of initiation was found to be inadequate.¹⁰

- (d) **Please explain the differences, if any, between expedited and full sunset reviews regarding the procedural rules that are followed by the DOC. Please explain for instance whether interested parties, especially the foreign exporters, in expedited sunset reviews have the right to submit evidence in addition to, and apart from, their response to the notice of initiation; whether they have the right to request a hearing; and whether the DOC issues a final disclosure as stated in Article 6.9 of the Agreement. Please respond in detail by referring to the relevant provisions of the US law in conjunction with Article 6 and Annex II of the Agreement.**

⁹ See *Preliminary Results of Full Sunset Review; Canned Pineapple Fruit from Thailand*, 65 Fed. Reg. 58509 (29 September 2000).

¹⁰ See 19 C.F.R. 351.218(e)(2)(ii) (Exhibit ARG-3).

8. The Appellate Body in *Japan Sunset* has confirmed that Article 11.3 does not prescribe the methodology – or methodologies – that Members may use in conducting sunset reviews.¹¹ Article 11.4 ensures that the general procedural and evidentiary provisions of Article 6 apply in sunset reviews to give respondent interested parties basic due process. Expedited reviews are consistent with Article 11.3 and Article 6 as incorporated therein.

9. Whether the sunset review is full or expedited, Commerce's *Sunset Regulations* provide the due process and evidentiary requirements found in Article 6. Specifically:

- (a) Section 351.218(d)(3) provides that interested parties will have 30 days from the notice of initiation of the review to submit complete substantive responses. In addition to identifying information that is required of interested parties, section 351.218(d)(3)(iv)(B) provides that parties may provide "any other relevant information or argument that the party would like [Commerce] to consider." (Emphasis added.)
- (b) Section 351.218(d)(4) affords interested parties the opportunity to rebut evidence and argument submitted in other parties' substantive responses within five days of the submission of those responses.
- (c) In cases where Commerce finds that the aggregate response to the notice of initiation from the respondent interested parties is inadequate, section 351.309(e) of Commerce's *Sunset Regulations* affords interested parties the opportunity to comment on whether an expedited review is appropriate.

10. Therefore, Commerce's regulations expressly provide parties – in both full and expedited reviews – with multiple opportunities to provide Commerce with any relevant information, to rebut any relevant information and argument submitted by other parties, and to comment on the appropriateness of conducting an expedited review even when the substantive responses have been inadequate. Section 351.308(f)(2) of Commerce's *Sunset Regulations* provides that Commerce normally will consider the substantive submissions – not just the complete ones – of all interested parties in making the order-wide likelihood determination in an expedited sunset review.

11. The differences between a full and an expedited sunset review are timing (the final sunset determination in an expedited sunset review is issued 120 days after the notice of initiation, rather than the full sunset review's 240 days)¹² and the fact that case briefs are not filed in an expedited case. Because as a rule hearings are tied to the contents of the case briefs,¹³ hearings are generally not held in an expedited proceeding. It should be noted that the deadline for the submission of factual information is the same for both an expedited and a full sunset review proceeding and normally is no later than the deadline for the submission of the interested party rebuttal briefs.¹⁴

12. Article 6.9 requires that interested parties be informed of the essential facts. This requirement does not impose a particular means of disclosure. The United States has established an investigative and review process that allows interested parties to be presented with all of the facts as they are presented to the authority, as well as arguments made about these facts.¹⁵

¹¹ *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, 15 December 2003 ("*Japan Sunset*"), paras 149 and 158.

¹² 19 C.F.R. 351.218(e)(ii)(2), 19 C.F.R. 351.218(f)(3) (Exhibit ARG-3).

¹³ 19 C.F.R. 351.310(c) (Exhibit US-27).

¹⁴ See 19 C.F.R. 351.218(d)(4) (Exhibit ARG-3).

¹⁵ *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, Report of the Panel, adopted 28 September 2001 ("*Ceramic Floor Tiles*"), para 6.125.

13. Consistent with paragraph 1 of Annex II, the Commerce regulations set forth in detail the requirements for the submission of a complete substantive response and specify that interested parties may submit other information.¹⁶ The regulations also make clear that respondent interested parties have 30 days to provide a complete substantive response¹⁷ and if the collective responses are considered inadequate, an expedited review will normally be conducted and facts available used.¹⁸ Consistent with paragraphs 5 and 6, Commerce does not require the information provided to be ideal; as noted above, parties are provided the opportunity to explain why they cannot provide particular information. Further, all evidence or information is accepted, even for incomplete substantive responses, pursuant to section 351.308(f) of the *Sunset Regulations*.

- (e) **Please explain whether exporters who submitted an incomplete response to the notice of initiation of a sunset review, and therefore are deemed to have waived their right to participate under Section 351.218(d)(2) (iii) of the DOC's Sunset Regulations, have the right to submit evidence in addition to, and apart from, their response to the notice of initiation; whether they have the right to request a hearing; and whether the DOC issues a final disclosure as stated in Article 6.9 of the Agreement. Please respond in detail by referring to the relevant provisions of the US law in conjunction with Article 6 and Annex II of the Agreement.**

14. Commerce has never found a substantive response to be incomplete.

15. If an exporter in fact submitted an incomplete substantive response – a hypothetical situation – that exporter would be deemed to have waived its right to participate in the sunset review, pursuant to section 351.218(d)(2)(iii). Therefore, the exporter would not have the right to submit additional evidence or request a hearing.

16. The US sunset review procedures meet Article 6 requirements. A notice of initiation is published in the *Federal Register*, respondent interested parties have 30 days to provide a complete substantive response and any other information they wish to provide, they are afforded the opportunity to respond to the adequacy determination (if they provided a complete substantive response),¹⁹ and even if facts available is applied, the information in both incomplete and complete responses is taken into account.²⁰

17. The sunset review procedures conform to the norms in Annex II. For example, the information required from respondent interested parties in a substantive response is set forth in the regulations and therefore precedes the notice of initiation, providing greater rights than those suggested under paragraph 1 of Annex II. Similarly, the regulations make clear that facts available may be used if information is not supplied within a reasonable time. Article 5 suggests that all information should be accepted and that authorities should not disregard any properly submitted, verifiable information. As noted above, even when expedited reviews are conducted and facts available are used, Commerce will consider the information provided in complete and incomplete substantive responses. Additionally, as noted above, Commerce has never made a finding that a substantive submission was incomplete. Similarly, even though a respondent interested party's incomplete submission will preclude it from participating further, the evidence and information contained therein will be used at a minimum as part of facts available, if facts available is applied.²¹

¹⁶ 19 C.F.R. 351.218(d)(iv) (Exhibit ARG-3).

¹⁷ 19 C.F.R. 351.218(d)(3) (Exhibit ARG-3).

¹⁸ 19 C.F.R. 351.218(e)(ii)(C)(2) (Exhibit ARG-3).

¹⁹ 19 C.F.R. 351.309(e) (Exhibit US-27).

²⁰ 19 C.F.R. 351.308(f)(2) (Exhibit US-27).

²¹ 19 C.F.R. 351.308(f)(2) (Exhibit US-27).

18. Article 6.9 requires that interested parties be informed of the essential facts. This requirement does not impose a particular means of disclosure. The United States has established an investigative and review process that allows interested parties to be presented with all of the facts as they are presented to the authority, as well as arguments made about these facts.²²

Q3. The Panel notes that under US law the effect of failure to submit a complete substantive response is a deemed waiver, in which case the DOC is directed to find likelihood of continuation or recurrence of dumping. The effect of submitting an inadequate substantive response, however, seems to be the DOC's resort to facts available. In the latter case, will the DOC also find likelihood without further investigation? In other words, is there a difference between these two effects? Is it correct to state that the DOC is directed to find likelihood as a matter of US law only in the case of an incomplete substantive response, or does that also apply to complete but inadequate substantive responses?

19. As noted above, the assessment of likelihood may occur twice in a sunset review, but with different implications. First, a respondent interested party's waiver of participation, deemed or affirmative, will lead to a finding with regard to that party that the party is likely to continue to dump (or that dumping by that party will recur). Commerce will subsequently determine whether dumping is likely to continue or recur on an order-wide basis, i.e., taking into account the activities of all the companies that export the subject merchandise, including information provided in substantive responses. In other words, one company's failure to submit a complete substantive response results in a finding of likelihood with respect to that company, and not on an order-wide basis; Commerce could still, in light of other submissions and facts on the record, conclude that there is no order-wide likelihood of dumping.

Q4. The Panel notes that Section 1675(c)(4) of the Tariff Act of 1930 reads:

"(B) Effect of waiver

In a review in which an interested party waives its participation pursuant to this paragraph, the administering authority shall conclude that revocation of the order or termination of the investigation would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) with respect to that interested party."²³ (emphasis added)

(a) Does this provision mean that the DOC will make no substantive analysis but will automatically determine that there is a likelihood of continuation or recurrence of dumping? How does the United States explain it in light of the obligation to determine under Article 11.3? In other words, is it the view of the United States that not carrying out any substantive determination in cases of an affirmative or deemed waiver discharges the investigating authority from its obligation to make a likelihood determination under Article 11.3?

20. No. As noted above, the assessment of likelihood may occur twice in a sunset review. The statute requires a finding of company-specific likelihood in the case of an affirmative waiver but does not mandate a determination of order-wide likelihood. Commerce will take the waiver into account for purposes of the 50 per cent threshold.

²² *Ceramic Floor Tiles*, para 6.125.

²³ 19 USC. § 1675(c)(4) (Exhibit ARG-1 at 1152).

21. Article 11.3 does not mandate a particular methodology for Members conducting sunset reviews. The Appellate Body in *Japan Sunset* concluded that Members are free to structure sunset review proceedings as they wish, provided those proceedings are consistent with the obligations of Article 6.²⁴ Thus, the "determination" referenced therein need not be made with respect to each company subject to the order; instead, for the United States, the determination is made for the order as a whole.

22. The United States does not believe that its sunset reviews result in "not carrying out any substantive determination in cases of an affirmative or deemed waiver." The application of facts available, which includes information provided by the parties in their substantive responses, even if incomplete, assures that the determination is based on the facts on the administrative record, including prior dumping determinations (such as administrative reviews), as well as any information the parties wish to make available. It bears repeating that parties are entitled to include *any* relevant information in their substantive responses, and not just the information set forth under section 351.218(d)(ii). As a result, Commerce does make a substantive determination, and the sunset review procedures of the United States conform to the limited requirements of Article 11.3.

- (b) **For instance, in a case of a waiver, does the US law preclude the DOC from evaluating, as part of its likelihood determination, imports statistics and the results of administrative reviews – if any-- or any other piece of information that might be available to the DOC or that might have been submitted by the domestic interested parties?**

23. The United States wishes to reiterate that a waiver does not result in an order-wide likelihood determination. Regardless of whether a company has waived its right to participate, with regard to the order-wide likelihood determination, Commerce is authorized to take into account facts available, including the information in the substantive responses (whether complete or incomplete) if an expedited review is conducted. Notably, respondent interested parties are entitled to include *any* relevant information in those responses. Additionally, Commerce may consider information from prior determinations (such as administrative reviews) in assessing order-wide likelihood.

- (c) **Hypothetically, in a sunset review where all of the interested foreign exporters submitted incomplete responses to the notice of initiation, would the above-quoted section of the Tariff Act require that the DOC find likelihood of continuation without considering the information contained in these incomplete responses? Please elaborate by referring to the relevant provisions of the US law.**

24. No. As noted above, there is a difference between a company-specific likelihood finding and an order-wide likelihood determination. The Tariff Act requires a company-specific likelihood finding when that company has elected to waive participation. However, the Tariff Act does not mandate a particular order-wide likelihood determination.

25. If all of the respondent interested parties submitted incomplete responses, the regulations provide that Commerce will normally consider the collective response to be inadequate, and Commerce will normally proceed to an expedited review and use facts available.²⁵ In using facts available, Commerce will consider all of the information provided in the incomplete responses and information from prior proceedings to reach the order-wide likelihood determination.²⁶

²⁴ *Japan Sunset*, paras. 156-57.

²⁵ Section 351.218(d)(ii)(C)(2) (Exhibit ARG-3).

²⁶ 19 C.F.R. 351.308(f)(2) (Exhibit US-27).

Q5. The Panel notes that Section 1675(c)(4)(B) of the Tariff Act of 1930 provides that when an interested party waives its participation in a sunset review, the DOC will find likelihood of continuation or recurrence of dumping with respect to that interested party. The Panel also notes that Section 351.218(d)(2) (iii) of the DOC's Sunset Regulations state that failure to submit a complete substantive response to the notice of initiation of sunset review will be deemed a waiver of that exporter's right to participate in that sunset review. Finally, the Panel notes the United States' statement in paragraph 235 of its first written submission that the DOC carries out its likelihood determinations in sunset reviews on an order-wide basis.

- (a) The United States mentions in footnote 250 of its first written submission that the *Sunset Policy Bulletin* ("SPB") requires the DOC to make its likelihood determinations on an order-wide basis. Please specify whether there is any other provision in any other legal instruments under US law (e.g. the Statute or the Regulations) which requires that likelihood of continuation or recurrence of dumping determinations in sunset reviews be carried out on an order-wide basis.

26. Footnote 250 is a citation to the statement in the text that an "adequate" number of responses is normally required.²⁷ Footnote 250 does not state that the SPB requires Commerce to make its likelihood determinations on an order-wide basis.

27. Section 751(c)(1)(A) of the Act provides the Commerce shall conduct a sunset review of an anti-dumping duty order five years after publication of the anti-dumping duty order. The SAA, as the authoritative interpretive tool for the statute, makes it clear that section 751(c) requires Commerce to make the sunset determination on an order-wide basis.

- (b) Given the US statement in paragraph 235 of its first written submission that the DOC is required to carry out its likelihood determinations in sunset reviews on an order-wide basis, what meaning should be given to the language "with respect to that interested party" in Section 1675(c)(4)(B) of the Tariff Act of 1930? If the US law requires that the DOC make its sunset determinations on an order-wide basis, what happens when one of the exporters waives its right to participate or fails to submit a complete response, which seems to lead to a deemed-waiver? Would the statutory provision that mandates a positive finding with regard to the waiving exporter also determine the overall likelihood determination to be made for the country concerned on an order-wide basis?

28. No; neither section 751(c)(4)(B) nor any other provision of US law or regulation mandates an order-wide affirmative likelihood determination in a sunset review based on the waiver of a single exporter.

- (c) Suppose that exporter A, one of the exporters involved in a sunset review initiated against country X, submits an incomplete response to the notice of initiation and therefore is deemed to have waived its right to participate pursuant to Section 351.218(d)(2) (iii) of the DOC's Sunset Regulations. Would the DOC have to find likelihood for country X on an order-wide basis because it has to find likelihood as a matter of law for exporter A submitting incomplete response? In other words, would the affirmative finding with regard to exporter A also determine the overall order-wide determination for country X in this case? Please elaborate by referring to the relevant provisions under the US law.

29. No. As noted above, Commerce may make a company-specific likelihood finding and will subsequently make an order-wide likelihood determination. If an expedited review is conducted and

²⁷ First Written Submission of the United States, para. 235.

facts available are used, then the regulations provide that all of the factual information on the record will be applied in making the order-wide determination, including information from incomplete and complete substantive responses.²⁸ Thus, US law does not mandate that a likelihood finding with respect to one company result in a likelihood determination for the entire order.

- (d) **If your response to question (c) is in the negative, please 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, which requires that the DOC make a positive determination for exporter A which submitted an incomplete response to the notice of initiation?**

30. No violation of 751(c)(4)(B) or any other provision of US 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.

Q6. The Panel notes that section 351.308(f) of the DOC's Regulations sets out the facts to be used by the DOC when applying facts available in a sunset review.

- (a) **Does this section define or limit the scope of facts available in sunset reviews? In other words, does this section allow the DOC to consider facts other than those set out therein when using facts available in a sunset review? Please respond in detail by referring to the relevant provisions of the US law in conjunction with Article 6 and Annex II of the Agreement.**

31. Section 751(c)(3)(B) provides that Commerce will base its final sunset determination on the facts available if the order-wide response from respondent interested parties, in the aggregate, is found to be inadequate. Section 351.308(f) of the *Sunset Regulations* provides that, when Commerce is making the final sunset determination on the basis of the facts available, Commerce normally will rely upon prior agency determinations and information from the interested party substantive responses. The latter may include *any* information the respondent interested party considers relevant to the proceedings.

32. Article 6.8 of the AD Agreement provides that "[i]n cases which any interested party refuses access to, or otherwise does not provide, necessary information" a Member may make its determination on the basis of "facts available." In an expedited sunset review, respondent interested parties representing more than 50 per cent of the imports of the subject merchandise have affirmatively waived participation, filed an incomplete substantive response, or have failed to respond to the notice of initiation in any respect. In this context, Commerce normally uses the facts available to make its final sunset determination because the respondent interested parties have collectively failed to provide the necessary information. Nevertheless, paragraph 3 of Annex II to the AD Agreement provides that, when applying the facts available pursuant to Article 6.8, all properly submitted, verifiable information should be taken into account when the determination at issue is made. Section 351.308(f)(2) provides for consideration of this information when submitted in an interested party's substantive response, whether that substantive response is complete or incomplete.

- (b) **What is the significance of the word "normally" in this section?**

33. Section 351.308(f) of the *Sunset Regulations* states that Commerce normally will base its final sunset determination on prior agency determinations and the information submitted in the parties' substantive responses. The use of the word "normally" in section 351.308(f) provides

²⁸ 19 C.F.R. 351.308(f)(2) (Exhibit US-27).

Commerce with the discretion to find that the factual circumstances in a particular case warrant Commerce's reliance on other or additional information when making the final order-wide sunset determination.

- (c) **What is the legal significance of the cross-reference in Section 351.308(f) of the Regulations to 752(b) and 752(c) of the Act? Given that the Statute does not have any provision about the inadequacy of substantive responses, does this cross-reference suggest that the provisions of Section 351.308(f) of the Regulations apply only in cases of an affirmative or deemed waiver, but not in cases where the substantive response is complete but inadequate because the exporters' share is below 50 per cent? Please respond in conjunction with the statements of the United States in paragraphs 156 and 170 of its first submission.**

34. As noted above, there are two steps in assessing whether to conduct a full or expedited sunset review. The first is to evaluate whether the substantive responses (there may well be more than one exporter, for example) to the notice of initiation are complete or whether parties have waived their right to participate in the proceedings. These decisions are then folded into the second step, which is to determine whether the complete substantive responses represent 50 per cent of imports. Then, if Commerce decides to proceed with an expedited review, Commerce normally will apply facts available, as described in Section 351.308(f). Thus, it is entirely possible that there will be waivers and complete substantive responses in one proceeding, both of which are taken into account in determining whether to expedite and, correspondingly, use facts available.

35. The cross-reference to sections 752(b) and 752(c) of the Act is found in section 351.308(f) because these statutory provisions contain the mandatory elements Commerce "shall" consider in making an order-wide likelihood determination a sunset review. Commerce will consider any additional information in the parties' substantive response in light of the statutory requirements contained in sections 752(b) and 752(c) when making the final sunset determination.

- (d) **Please explain whether in a sunset review where the respondent interested party/parties account for less than 50 per cent of total exports of the subject product into the US market the DOC would take into account the information and evidence submitted by the respondent interested parties in their substantive responses to the notice of initiation of the sunset review? If so, explain why Section 351.218(e)(1)(ii)(C)(2) of the Regulations provides that the DOC would base its determinations on facts available in such cases. In other words, if the DOC is to take into account evidence submitted by the respondent interested parties to the notice of initiation no matter what their share in the total exports of the subject product into the US market is, why is it that the Regulations direct the DOC to resort to facts available if the respondent's share falls below 50 per cent?**

36. In a sunset review in which the respondent interested party or parties do not meet the 50 per cent threshold, and Commerce has made a determination that the aggregate response to the notice of initiation was inadequate, Commerce would consider the information and evidence submitted by the respondent interested parties in their substantive responses when making the final sunset determination in accordance with section 351.308(f) of the *Sunset Regulations*.

Q7.

- (a) **Please explain the significance of the language "without further investigation" in Section 351.218(e)(1)(ii)(C)(2) of the DOC's Regulations. What does it imply? Does it mean that the DOC will not accept any submission of evidence by foreign exporters in expedited sunset reviews in addition to their responses considered to**

be inadequate? Or does it imply that the evidence submitted by interested parties will not be evaluated or otherwise tested?

37. Section 351.218(e)(1)(ii)(C)(2) of the *Sunset Regulations* provides that Commerce will normally base its final sunset determination on "the facts available" without further investigation in a case where the aggregate respondent interested parties is inadequate. However, Commerce may exercise its discretion and conduct further investigation.²⁹ The use of the language "without further investigation" of section 351.218(e)(1)(ii)(C)(2) provides that Commerce is not required to request additional information.

38. Commerce normally will not accept additional submissions from any interested party, whether domestic or respondent, after that interested party's substantive submission is found to be "incomplete." Nevertheless, any information submitted by an interested party in its substantive response is considered by Commerce when Commerce makes the final determination in an expedited sunset review, even in cases where that substantive response was found to be "incomplete."³⁰

- (b) **More generally, would it be correct to state that in terms of procedural rules, the only difference between a statutory finding of likelihood in a case of waiver and an expedited review in cases where the response is found to be inadequate is the fact that in the latter case the DOC will consider the information submitted by the foreign exporter in its complete substantive response to the notice of initiation?**

39. Commerce will consider all information on the administrative record of the sunset proceeding, including information in the substantive responses and rebuttal responses of the domestic interested parties, prior agency determinations, and any other information received by Commerce, as well as the information submitted by foreign interested parties in their substantive and rebuttal responses.³¹ If a respondent interested party submitted a statement of waiver, then, obviously, there would be no information from that party to consider.

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."³² (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?**

²⁹ See SAA at 879-880 (Exhibit US-11).

³⁰ 19 C.F.R. 351.308(f)(2) (Exhibit US-27).

³¹ See section 351.318(f)(1) of the *Sunset Regulations* (Exhibit US-27) (definition of "the facts available").

³² 19 C.F.R. § 351.218(d)(2) (Exhibit ARG-3).

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.

41. Commerce does not reject incomplete submissions *per se*. In fact, Commerce has never rejected a submission as incomplete. 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.

Q9. The Panel notes the statement of the United States in paragraph 242 of its first written submission that:

"A determination that the aggregate response to the notice of initiation is inadequate can be based on the respondent interested parties electing waiver, or failing to respond, or in providing inadequate substantive responses, or on any combination of these scenarios."

- (a) Please explain whether the 50 percent test is the sole basis for a determination of inadequacy, or whether, as the United States points out in the above-quoted paragraph, the respondents' response can be deemed inadequate in cases where there is an affirmative or deemed waiver, but the share of the cooperating respondents in total imports is above 50 per cent.**

43. The term "inadequate" in the quoted part of the submission in fact refers to the completeness of the each substantive response submitted in response to the notice of initiation, rather than the adequacy of the aggregate responses.

44. The 50 per cent threshold is the normal basis for determining whether Commerce will conduct an full sunset review or a expedited sunset review. However, as noted above, Commerce has made an exception where the respondent interested party provided information indicating that complete substantive responses not meeting the 50 per cent threshold were nevertheless adequate. Commerce has not made a finding of inadequacy when the complete substantive responses met the 50 per cent threshold, nor has Commerce ever found a substantive response to be incomplete. Therefore, if a sufficient number of respondent interested parties (or just one, if it meets the 50 per cent threshold) simply adhere to the criteria set forth in the regulations, they can virtually ensure that a full review will be conducted. In other words, in practical terms it is up to the respondent interested parties to decide whether they want a full or expedited review.

- (b) Please explain whether there have been cases where an inadequacy decision was based on the interested party's electing waiver, or failing to respond, rather than its share in total imports.**

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).

45. The election of waiver and the adequacy assessment are two distinct procedures. An affirmative or deemed waiver does not automatically result in a finding that the substantive responses were inadequate. Instead, Commerce will normally assess whether the complete substantive responses to the notice of initiation are sufficient to meet the 50 per cent threshold. Other exporters meeting the 50 per cent threshold may have filed complete substantive responses, or may have submitted information sufficient to allow Commerce to conduct a full sunset review.

46. More specifically, if a respondent interested party submits a substantive response to the notice of initiation that does contain all the information required by section 351.218(d)(3) of the *Sunset Regulations*, then it has submitted a "complete" substantive response. If a respondent interested party submits a substantive response to the notice of initiation that does not contain all the information required by section 351.218(d)(3), then "normally" that party will be considered to have submitted an "incomplete" substantive response. Likewise, if a respondent interested party affirmatively waives its right to participate or fails to respond to the notice of initiation, then its response is also considered "incomplete".

47. Once Commerce has determined which company-specific substantive responses are "complete," Commerce then normally applies the 50 per cent threshold to the total import volumes represented by all the respondent interested parties who filed a complete or adequate company-specific substantive response to determine whether the aggregate response to the notice of initiation is "adequate." Commerce then uses the results to determine whether to conduct a full or expedited sunset review.

- (c) **More generally, please explain whether under US sunset reviews law, "an affirmative or deemed waiver" and "an inadequate response" are two situations that are mutually exclusive. In other words, would it be accurate to state that under US law, certain circumstances lead exclusively to an affirmative or deemed waiver and some others exclusively to an inadequate response?**

48. No; the existence of deemed or affirmative waivers is included in the consideration of the 50 per cent threshold to assess the adequacy of the aggregate substantive responses. For example, one exporter may have waived its right to participate, while another will have filed a complete substantive submission. If the latter meets the 50 per cent threshold or provides information as to why the 50 per cent threshold is not appropriate, then Commerce could find that the complete substantive responses were adequate, and therefore a full review would normally be conducted.

Q10. The Panel notes the US statement in paragraph 162 of its first written submission:

"[T]hat the United States may afford parties expanded opportunities to submit evidence and argument in a full sunset review is a matter of US policy, not an obligation under the AD Agreement, and is not grounds to find fault with the evidentiary and procedural rules governing expedited sunset reviews."

- (a) **In the view of the United States, does Article 6 apply to sunset reviews in its entirety? Or, are there some provisions in this article that may not be applicable in the context of sunset reviews? Please respond in conjunction with the provisions of Article 11.4, especially the language "regarding evidence and procedure" contained therein.**

49. Article 11.4 of the AD Agreement stipulates that the Article 6 provisions "regarding evidence and procedure" shall apply to reviews under Article 11. Thus, not all of the provisions of Article 6 are applicable to Article 11 reviews; rather, only the provisions of Article 6 regarding evidence and

procedure are so applicable. The Appellate Body in *Japan Sunset* recently confirmed that Article 11.3 does not prescribe substantive rules for the administration of sunset reviews.³⁵

- (b) **If it is the view of the United States that Article 6 – either entirely or partially-applies to sunset reviews, where in Article 6 or elsewhere in the Agreement does the United States find support for its proposition that giving interested parties expanded procedural rights in full sunset reviews compared with expedited sunset reviews is not WTO-inconsistent?**

50. As noted above, the Appellate Body in *Japan Sunset* confirmed that Article 11.3 does not prescribe the methodology Members may use in conducting sunset reviews. Therefore, unless the US sunset review procedures are in conflict with Article 6 or Article 11.3, these procedures are permitted under the Anti-Dumping Agreement. Nothing in the Anti-Dumping Agreement prohibits the United States from giving parties expanded procedural rights in full sunset reviews compared with expedited sunset reviews. The United States notes that the parties themselves effectively decide whether they want "expanded procedural rights."

Q11. The Panel notes the following part of the DOC's Issues and Decision Memorandum in the instant sunset review:

"In the instant sunset reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation ."³⁶

Is the Panel to understand that the DOC deemed Siderca to have waived its right to participate in this sunset review? If so, on what basis under US law? If your response is in the negative, please explain what meaning the Panel should give to this sentence.

51. No; Commerce found that Siderca had filed a complete substantive response and, consequently, would not have been found to have waived its right to participate in the sunset review proceeding.³⁷ The Decision Memorandum for the sunset review of OCTG from Argentina includes the final sunset determinations for the sunset reviews of OCTG from Italy, Japan and Korea also. In each of these other three sunset reviews, respondent interested parties failed to respond to the notice of initiation in any respect. Therefore, the above quoted passage is a reference to the failure of the respondent interested parties in the sunset reviews of OCTG from Italy, Japan, and Korea.

52. The Issues and Decision Memorandum demonstrates that Commerce made two findings – that Siderca had filed a complete substantive response and that no other respondent interested party had filed a substantive response in any of the sunset reviews covered by the Decision Memorandum.³⁸

Q12. The Panel notes the argument of the United States, in paragraph 237 of its first written submission, that "Siderca did not avail itself of the opportunities made available by the Sunset Regulations for such defence in an expedited sunset review."

³⁵ *Japan Sunset*, para 123.

³⁶ *Issues and Decision Memorandum for the Sunset Reviews of the AD Orders on Oil Country Tubular Goods from Argentina, Italy, Japan, and Korea* (Dept's Comm., 31 Oct. 2000) (final results) ("*Decision Memorandum*") (Exhibit ARG-51 at 5).

³⁷ See *Decision Memorandum* at 3 (Exhibit ARG-51) and *Adequacy of Respondent Interested Party Response to the Notice of Initiation*, A-357-810 (Dept's Comm., 22 August 2000) ("*Adequacy Memorandum*") at 1-2 (Exhibit ARG-50).

³⁸ *Decision Memorandum* at 3-4 (Exhibit ARG-51).

(a) Please explain at which point(s) of time during the instant sunset review Siderca was given further opportunities to defend itself under US law but failed to do so.

53. Siderca had a number of opportunities to submit argument and information in support of its rights in the expedited sunset review of OCTG from Argentina. First, when a respondent interested party files a substantive response, one of the requirements of section 351.218(d)(3) is a statement from the submitter regarding the likely effects of revocation which includes any information, argument, and reasons supporting the statement. Siderca's entire claim in this regard was that Commerce should apply the *de minimis* standard found in Article 5.8 of the AD Agreement and, as a consequence, should revoke the order. In addition, section 351.218(d)(3)(iv)(B) provides interested parties the opportunity to submit any other relevant information or argument the interested party would like considered in the sunset review. Siderca made no other arguments or submission of factual information.³⁹

54. Second, each interested party is afforded the opportunity to submit a response in rebuttal (a "rebuttal response"), pursuant to section 351.218(d)(3)(vi)(4) of the *Sunset Regulations*, to challenge any argument or information contained in the substantive responses of the other interested parties. Siderca did not file any rebuttal response despite the fact that the domestic interested parties had made allegations, supported by statistics, that there were shipments of Argentine OCTG in four of the five years preceding the sunset review. Siderca did not challenge these statistics or any other information in the domestic interested parties substantive responses, although it was provided the opportunity to do so.

55. Finally, as discussed in the US first written submission and in the US answers above, Commerce determines whether to conduct a full or expedited sunset review based on the adequacy of the aggregate response to the notice of initiation. In making this determination, Commerce determines whether the imports from the respondent interested parties who filed a complete substantive response, on an aggregate basis, represent more than 50 per cent of the imports of the subject merchandise during the five years preceding the sunset review. Commerce then issues an Adequacy Memorandum which announces the decision and the factual bases underlying the decision. This determination is subject to challenge by the interested parties, pursuant to section 351.309(e) of the *Sunset Regulations*.

56. Commerce issued its adequacy determination in the sunset review of OCTG from Argentina and based the determination on the import statistics provided by the domestic interested parties after verifying them using the ITC Trade Database.⁴⁰ (Commerce re-verified the import statistics for the final sunset determination using Commerce's Census Bureau IM-145 import statistics; see *Decision Memorandum* at 4-5 (Exhibit ARG-51)). Siderca did not challenge Commerce's adequacy determination, as it had the right to do pursuant to section 351.309(e) of the *Sunset Regulations*.

57. At no time did Siderca provide any statements or assertions that it would not dump in the future if the order were revoked, offer any explanations why it had ceased shipments of the subject merchandise after imposition of the duty, or submit any allegations that information submitted in the sunset review proceeding of OCTG from Argentina was inaccurate or incorrect. In this proceeding, the First Written Submission of Argentina implies that Siderca was the only producer of OCTG in Argentina during the sunset review and that Siderca's lack of shipments contradicts the data indicating that Argentine OCTG was in fact exported to the United States during the period of review. Siderca made similar statements in its complete substantive response to the notice of initiation. However, there is a second Argentine producer of OCTG: Acindar. The United States has conducted administrative reviews of Acindar since 2001, and as recently as 19 March 2003, Commerce found

³⁹ See Siderca's Substantive Response at 2-3 (Exhibit ARG-57).

⁴⁰ See *Adequacy Memorandum* at (Exhibit ARG-50).

Acindar to have a dumping margin of 60.73 per cent.⁴¹ Moreover, it is the understanding of the United States that Acindar produces welded OCTG, whereas Siderca produces seamless OCTG (both are covered by the anti-dumping order). It is not beyond the realm of possibility that Siderca did not challenge the import statistics used during the sunset review because it was aware that another Argentine producer had begun to ship OCTG to the United States during the period of review and that Commerce's adequacy finding based on the 50 per cent threshold was in fact accurate.

58. To permit Argentina to raise factual issues now that neither it nor Siderca raised during the underlying sunset review would permit respondent interested parties to manipulate the system. Consistent with the general principles in Article 6, the United States afforded all Argentine exporters – and the Argentine government – the opportunity to present sufficient information to warrant a full sunset review. Siderca and Argentina declined to do so.

59. Therefore, in spite of Argentina's complaint, Commerce's likelihood determination was in fact correct, as evidenced by the dumping margin found with regard to Acindar after the sunset review.

- (b) **Which provisions of the DOC's Regulations, or other relevant legal instruments under US law, give interested exporters the right to defend their interests? Please respond in conjunction with the language "without further investigation" in section 351.218(e)(1)(ii)(C)(2) of the DOC's Regulations. What meaning should be given to this provision if the Regulations give interested exporters the right to defend their interests?**

60. Please see US Answer to Question 7(a) above.

61. Section 751(c)(3)(B) provides that Commerce will base its final sunset determination on the facts available if the aggregate response from respondent interested parties, in the aggregate, is found to be inadequate. Section 351.218(e)(1)(ii)(C)(2) of the *Sunset Regulations* provides that Commerce "normally" will issue a final determination in a sunset review "without further investigation" when insufficient interest in participation is demonstrated by the interested parties. The provision for a final sunset determination "without further investigation" is intended to expedite the sunset review process. Nevertheless, Commerce has the discretion not to expedite and, even in cases where the sunset review is expedited, interested parties who supplied complete substantive responses may still submit rebuttal responses, a challenge to Commerce's adequacy determination, and have the right to supply any argument and information that interested party wishes Commerce to consider in the sunset review.

Q13.

- (a) **What was the amount of exports of the subject product by Argentine exporters other than Siderca during the five-year period of application of this measure? Who were the exporters that made such exports? What was the source of these statistics?**

62. The domestic interested parties submitted import statistics in their substantive responses indicating that there were imports of the subject merchandise into the United States in each year, except 1996, from the imposition of the order until the sunset review.⁴² These statistics show that there were approximately 45,000 net tons prior to the initiation of the original investigation, 26,000 net tons entered during the investigation, and an average of less than 900 net tons in each year from the imposition of the anti-dumping duty order on OCTG from Argentina until the sunset review.

⁴¹ *Notice of Final Results and Rescission in Part of Anti-Dumping Duty Administrative Review; Oil Country Tubular Goods, Other Than Drill Pipe, from Argentina*, 68 Fed. Reg. 13262, 13263 (19 March 2003).

⁴² See Exhibit US-23.

63. The domestic interested parties supplied import statistics concerning imports of OCTG for the five year period prior to the sunset review.⁴³ These statistics were verified during the sunset review by using two independent sources: (1) ITC Trade Database; and (2) Commerce's Census Bureau IM-145 import data.⁴⁴

64. Also, through administrative review procedures, the United States has identified Acindar as another Argentine producer of OCTG, and one that may have shipped OCTG to the United States during the period of review, as described above.

(b) The Panel notes Argentina's assertion in paragraph 43 of its first oral submission that the DOC's determination that there were exports of the subject product from Argentina into the United States during the period of imposition of the measure at issue was flawed because the DOC incorrectly recorded non-consumption entries as consumption entries. Please explain whether the so called "non-consumption entries" are those products in transit which are not destined for ultimate consumption in the United States?

65. First, the panel should be aware Siderca did not raise this issue during the underlying sunset review. Second, as detailed below, Argentina's assertion concerning the nature of these shipments and their effect on the accuracy of the import statistics used in the sunset review is significantly exaggerated.

66. In order to assist the Panel, however, we provide an accurate reiteration of the facts on this issue. During the five year period, there were four administrative reviews initiated for Siderca at the request of domestic interested parties. Commerce terminated each of these administrative reviews because Commerce determined that there were no consumption entries of OCTG from Argentina exported by Siderca during these periods.

67. In the administrative review initiated for the period 25 June 1995 – 31 July 1996, Commerce found that, although there were entries of Argentine OCTG during the period, there were no consumption entries of OCTG made by Siderca and, consequently, Commerce terminated the administrative review for Siderca.⁴⁵ Domestic interested parties claimed that Siderca made seven shipments of OCTG during the period that were not included in the import statistics. Commerce determined that six of the shipments were FTZ or TIB entries destined for re-export. For the seventh entry, "Siderca surmised that this shipment of [Argentine OCTG] involved parties other than itself."⁴⁶ The US Customs Service verified that there were no shipments of OCTG made by Siderca during the period under review. There was no assertion made by Siderca nor did Commerce find in this administrative review that the import statistics contained an error or errors.

68. In the administrative review initiated for the period 1 August 1996 – 31 July 1997, Commerce found that the one entry directly attributed to Siderca was destined for re-export and, consequently, Commerce terminated the administrative review for Siderca.⁴⁷ There was no finding that there were no consumption entries of OCTG made during the period. The only finding was that there were no entries of OCTG during the period under review exported by Siderca and that the one entry reportedly made by Siderca was in error.

⁴³ See Exhibit US-23.

⁴⁴ See *Adequacy Memorandum* at 2 (Exhibit ARG-50) and *Decision Memorandum* at 3 (Exhibit ARG-51), respectively.

⁴⁵ See *Oil Country Tubular Goods from Argentina; Rescission of Anti-Dumping Duty Administrative Review*, 62 Fed. Reg. 18747, 18748 (April 17, 1998) (Exhibit ARG-29).

⁴⁶ 62 Fed. Reg. at 18748 (Exhibit ARG-29).

⁴⁷ See *Oil Country Tubular Goods from Argentina; Rescission of Anti-Dumping Duty Administrative Review*, 63 Fed. Reg. 49089, 49090 (September 14, 1998) (Exhibit ARG-36).

69. In the administrative review initiated for the period 1 August 1997 – 31 July 1998, Commerce found that the one shipment of Argentine OCTG made during the period was entered for consumption in the United States, but that the shipment was not exported by Siderca.⁴⁸ Consequently, Commerce terminated the administrative review for Siderca.

70. Finally, in the administrative review initiated for the period 1 August 1998 – 31 July 1999, Commerce found that there were no entries of OCTG made by Siderca and, consequently, Commerce terminated the administrative review for Siderca.⁴⁹ There was no finding that there were no consumption entries of OCTG made during the period. In fact, Commerce determined that there was at least one entry of OCTG for consumption made during the period, but that Siderca was not the exporter.

71. Therefore, in the administrative proceeding covering the 1996-1997 period, Commerce determined that there was a minor error concerning one entry in the statistical reporting of the import statistics and, in the administrative review covering the 1998-1999 period, there was an undetermined amount of mechanical tubing misclassified as OCTG, but at least one entry of OCTG for consumption. Again, the Panel should note that Siderca did not raise this issue in either its substantive response or by filing a challenge to Commerce's adequacy determination in the sunset review where it could have been addressed in the context of the sunset proceeding and not for the first time before this Panel.

(c) Did the United States base its adequacy determination in the instant sunset review on these statistics?

72. Yes, as verified by the statistics compiled in the ITC's Trade Database and Commerce's Census Bureau IM-145 import statistics.⁵⁰

Q14. Is there a legal basis for the 50 per cent threshold that determines the adequacy of the foreign exporter's response to the questionnaire in a sunset review?

73. Section 752(c)(3) of the Act leaves to Commerce's discretion the choice of methodology for determining when the response from interested parties to the notice of initiation is "adequate" for the purposes of conducting a full sunset review.⁵¹ Consequently, Commerce promulgated section 351.218(e)(1)(ii) of the *Sunset Regulations* to codify the 50 per cent threshold to give effect to section 752(c)(3) of the Act.⁵²

74. The context of sunset reviews is important in understanding the 50 per cent threshold. While an original investigation requires a factual assessment of dumping, a sunset review requires a counterfactual finding of "likelihood" of future dumping when a finding of dumping has already been made. Article 11.3 does not prescribe the methodology for conducting sunset reviews; instead, it requires that parties be given general procedural and evidentiary rights in accordance with Article 6. The Anti-Dumping Agreement does not require Members to expend resources to unearth information that is being withheld.

⁴⁸ See *Oil Country Tubular Goods from Argentina; Rescission of Anti-Dumping Duty Administrative Review*, 64 Fed. Reg. 4069, 4070 (27 January 1999) (Exhibit ARG-38).

⁴⁹ See *Oil Country Tubular Goods from Argentina; Rescission of Anti-Dumping Duty Administrative Review*, 65 Fed. Reg. 8948 (23 February 2000) (Exhibit ARG-43).

⁵⁰ See *Adequacy Memorandum* at 2 (Exhibit ARG-50) and *Decision Memorandum* at 3 (Exhibit ARG-51), respectively.

⁵¹ See SAA at 880 (Exhibit ARG-5) (in many cases, some but not all parties will respond; nevertheless, where parties demonstrate a "sufficient willingness to participate," the agency will conduct a full sunset review).

⁵² See Preamble, 63 Fed. Reg. at 13518 (Exhibit US-3).

Q15.

- (a) **Does the cross-reference in Article 11.4 of the Agreement incorporate all provisions of Article 6 in Article 11.3? Does the same cross-reference also incorporate Annex II in Article 11.3?**

75. No, the cross-reference in Article 11.4 specifically incorporates only those provisions of Article 6 regarding "evidence and procedure." Please see the answer to Question 10(a) above.

76. The reference in Article 6 to Annex II incorporates Annex II into Article 11.3. However, Annex II is only applicable to the same extent as Article 6.

- (b) **If you are of the view that the cross-reference in Article 11.4 makes article 6.1 of the Agreement applicable to sunset reviews, does Article 6.1 – together with its subparagraphs – require that the investigating authority send questionnaires to exporters in sunset reviews?**

77. No. Article 6.1 requires that interested parties be given notice of the information the authorities require in respect of the investigation in question. It does not require that a "questionnaire" be sent. Commerce published its "sunset questionnaire" and made the reporting requirements part of its regulations.⁵³

- (c) **What significance, if any, should be given to the use of the word "investigation" in paragraphs 1 and 6 of Annex II, and to the use of the word "should" rather than "shall" in all of its paragraphs?**

78. The use of the word "investigation" means that the obligations contained in Annex II are limited to original investigations. The cross-reference in Article 11.4 concerning the application Article 6 to sunset reviews makes the obligations of Article 6 regarding evidence and procedure and, consequently, the obligations in Annex II regarding evidence and procedure applicable in sunset reviews also. The use of the word "should" indicates that the requirement is directory or recommended, rather than mandatory.

Q16. In this sunset review, did Siderca attempt to submit additional evidence to the DOC after its substantive response to the notice of initiation? If so, how did the DOC respond to such attempts?

79. No.

Q17. What is the significance of the word "may" in section 1675(c)(3)(B) of the Tariff Act of 1930?

80. The use of the word "may" means that Commerce has the discretion not to base the final sunset determination on "the facts available" if Commerce determines that other information is more appropriate. In other words, Commerce is not bound by the statute to use "the facts available" in every case where there is an inadequate response to the notice of initiation.

⁵³ See section 351.218(d) (Exhibit US-3).

OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING

Q20. The Panel notes Argentina's arguments in paragraphs 124-147 of its first written submission regarding the alleged irrefutable presumption under US law/practice regarding likelihood determinations in sunset reviews. Please respond to the following questions [. . .]

- (c) **Please explain how you identify "practice" and how you distinguish practice from law? In light of the WTO jurisprudence, please explain your views as to whether practice as such is challengeable under WTO law or not.**

81. A Commerce administrative practice is neither a "measure" within the meaning of the relevant WTO agreements, nor a "mandatory" measure within the meaning of the mandatory/discretionary distinction. A "measure" – which can give rise to an independent violation of WTO obligations – must constitute an instrument with a functional life of its own – i.e., it must *do* something concrete, independently of any other instruments. It is well-established that a "practice" is not a measure.⁵⁴ Indeed, a practice under US law consists of nothing more than individual applications of the US AD law in the context of sunset reviews. While Commerce, like many other administrative agencies in the United States, uses the term "practice" to refer collectively to its past precedent, "practice" has neither a "functional life of its own" nor operates "independently of any other instruments" because the term only refers to individual applications of the US statute and regulations.⁵⁵ In contrast to the US statute and regulations, which clearly function as "measures", no general, *a priori* conclusions about the conduct of sunset reviews under US law can be drawn from an examination of "practice."

82. Moreover, even if "practice" could be considered a measure (and the United States' position is that it cannot), in order for any measure, as such, to be found WTO-inconsistent, the measure must be "mandatory", i.e., it must require WTO-inconsistent action or preclude WTO-consistent action. The Appellate Body and several Panels have explained the distinction between mandatory and discretionary measures. A Member may challenge, and a WTO panel may find against, a measure as such only if the measure "mandates" action that is inconsistent with WTO obligations, or "precludes" action that is WTO-consistent.⁵⁶ In accordance with the normal WTO rules on the allocation of the burden of proof, it is up to the complaining party to demonstrate that the challenged measure mandates WTO-inconsistent action or precludes WTO-consistent action.⁵⁷ "Practice" is *not* binding on Commerce, and, under US administrative law, Commerce may depart from its precedent in any particular case, so long as it explains the reasons for doing so. Therefore, this "practice" does not mandate WTO-inconsistent action or preclude WTO-consistent action.

⁵⁴ See, e.g., *United States – Measures Treating Export Restraints as Subsidies*, WT/DS194/R, Report of the Panel, adopted 29 June 2001 ("US Export Restraints").

⁵⁵ Japan's definition of "practice" does not comport with its status in US law. Japan describes practice as "administrative procedures", which it defines as "a detailed guideline that the administrating [sic] authority follows when implementing certain statutes and regulations." Japan's First Submission, para. 8. We define "administrative procedures" and "guidelines" in our answer to Question 82.

⁵⁶ Appellate Body Report, *US – Carbon Steel*, para. 162; *United States – Anti-Dumping Act of 1916 ("1916 Act")*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, paras. 88-9; Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 2 February 2002, para. 259; see also *US – Export Restraints*, paras. 8.77-9; Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, adopted 30 August 2002, para. 6.22.

⁵⁷ Panel Report, *Brazil – Export Financing Programme for Aircraft – Second Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW/2, adopted 23 August 2001, para. 5.50.

- (d) **What, in your view, is the relationship between "practice" on the one hand and "the SPB" and "the SAA" on the other? Could the SPB and the SAA be considered as legal instruments that embody the US practice with regard to sunset reviews?**

83. Neither the SAA nor the *Sunset Policy Bulletin* can be challenged as independent violations of the AD Agreement because they do not mandate or preclude actions subject to the AD Agreement. The SAA is a type of legislative history which, under US law, provides authoritative interpretative guidance in respect of the statute. Thus, the SAA operates only in conjunction with (and as an interpretive tool for) the US anti-dumping statute, and cannot be independently challenged as WTO-inconsistent.

84. Nor can the *Sunset Policy Bulletin* be challenged independently as a violation of WTO obligations. Under US law, the *Sunset Policy Bulletin* is a non-binding statement, providing Commerce's general understanding of sunset-related issues not explicitly addressed by the statute and regulations.⁵⁸ In this regard, the *Sunset Policy Bulletin* has a legal status comparable to that of agency precedent: Commerce may depart from its policy bulletin in any particular case, so long as it explains the reasons for doing so.⁵⁹ The *Sunset Policy Bulletin* does nothing more than provide Commerce and the public with a guide as to how Commerce may interpret and apply the statute and its regulations in individual cases. Absent application in a particular case, and in conjunction with US sunset laws and regulations, the *Sunset Policy Bulletin* does not "do something concrete" for which it could be subject to independent legal challenge under the WTO agreements.

Q21. Do Articles 2 and 3 of the Agreement apply to sunset reviews? If your response is in the affirmative, do these articles apply to sunset reviews in the same manner in which they apply to original investigations, or in a different manner? Please elaborate on the basis of the provisions of the Agreement and the relevant WTO case law.

85. No. In a sunset review, Commerce is analyzing whether dumping is likely to continue or recur in the absence of the discipline of the duty. An analysis of the likelihood of dumping under Article 11.3 does not require a determination of the magnitude of the margin of dumping because the amount of dumping is not relevant to the issue of whether dumping will continue or recur if the discipline is removed. In other words, the issue in an Article 11.3 sunset review is not *how much* the exporters may dump in the future, but simply *whether* they will dump in the future if the order were to be revoked. Given that there is no obligation under Article 11.3 to calculate a margin of dumping, the provisions of Article 2 relevant to the calculation of a margin of dumping are not applicable to sunset reviews. Indeed, the Appellate Body in *Japan Steel Sunset* concluded that the investigating authority is not required to calculate dumping margins in making a likelihood determination in a sunset review under Article 11.3.⁶⁰

86. The United States explained its position that Article 3 does not apply to sunset reviews in paragraphs 287-302, 304-307, 344-346, and 348-354 of its first written submission, and in its second written submission in paragraph 44 *et seq.*

⁵⁸ *Sunset Policy Bulletin*, 63 FR at 18871 ("This policy bulletin proposes *guidance* regarding the conduct of sunset reviews. As described below, 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.") (emphasis added) (Exhibit ARG-35).

⁵⁹ As a matter of US administrative law, Commerce practice cannot be binding because Commerce is not obliged to follow its own precedent so long as it explains departures from such precedent. Thus, as a matter of law, Commerce practice cannot transform a discretionary measure into a mandatory measure.

⁶⁰ See *Japan Sunset*, paras. 123-124, 155.

Q22. The Panel notes Argentina's statements in paragraphs 132, 184, 190 and 192 of its first written submission. In your view, does Article 11.3 require an investigating authority to calculate the likely dumping margin in a sunset review? If your response is in the negative, does Article 11.3 at least require some kind of comparison between the future export price and the future normal value? Please explain on the basis of the relevant provisions in the Agreement.

87. No.⁶¹

Q23. The Panel notes that the DOC's Issues and Decision Memorandum in the instant sunset review mentions that it was determined that dumping continued over the life of the measure in question and that the margin of dumping did not decline in the same period. Please explain the factual basis of that determination, in particular, please indicate whether the DOC calculated a dumping margin for Siderca or any other Argentine exporter after the imposition of the original measure.

88. As noted above, the Appellate Body in *Japan Sunset* confirmed that Article 11.3 does not require the calculation of a dumping margin. Commerce did not calculate a dumping margin in the sunset review for Siderca or any other Argentine exporter of OCTG during the five years preceding the sunset review because Siderca had ceased shipping to the United States during that time. In the sunset review, Commerce found that dumping continued to exist during the five years preceding the sunset review because there were shipments of Argentine OCTG during four of those five years and dumping duties were assessed on those same imports.⁶² (In a subsequent administrative review, Commerce found a dumping margin of 60.73 per cent for Acindar, an Argentine producer of OCTG that the United States believes began to ship OCTG to the United States in 1997.)⁶³

Q24. What was the factual basis of the DOC's likelihood of continuation or recurrence of dumping determination in this sunset review? What factual information was collected by the DOC and from what sources?

89. Commerce found that dumping was likely to continue or recur based on the existence of dumping and the continued depressed import volumes since the imposition of the OCTG order.⁶⁴ Both the domestic interested parties and Siderca supplied complete substantive responses which contained the factual information required by section 351.218(d)(3) of the *Sunset Regulations*. In addition, domestic interested parties each supplied Argentine OCTG import statistics in their substantive responses, which indicated that Siderca was not the only exporter of Argentina OCTG to the United States.⁶⁵ Commerce used both the ITC Trade Database and the Commerce's Census Bureau statistics to verify the OCTG import statistics submitted by the domestic interested parties.⁶⁶

CUMULATION

Q26. Would cumulation be generally allowed (i.e. both in original investigations and reviews) in the absence of Article 3.3 of the Agreement? What provision, if any, of the Agreement would cumulation violate in the absence of Article 3.3? In other words, in your view, is Article 3.3 an authorization for the use of cumulation, or, is it rather a provision that imposes certain restrictions on the use of cumulation in investigations? Please elaborate on the basis of the relevant provisions of the Agreement.

⁶¹ See US Answer to Panel Question 21 and *Japan Sunset*, paras. 123-124, 155.

⁶² See *Decision Memorandum* at 5 (Exhibit ARG-51).

⁶³ *Notice of Final Results and Rescission in Part of Anti-Dumping Duty Administrative Review; Oil Country Tubular Goods, Other Than Drill Pipe, from Argentina*, 68 Fed. Reg. 13262, 13263 (19 March 2003).

⁶⁴ See *Decision Memorandum* at 4-5 (Exhibit ARG-51).

⁶⁵ See Exhibit US-23.

⁶⁶ See *Adequacy Memorandum* at 2 (ARG-50) and *Decision Memorandum* at 4-5 (Exhibit ARG-51).

90. In the view of the United States, cumulation is generally allowed in both investigations and reviews. Article 3.3 is a provision that imposes certain restrictions on the use of cumulation in investigations, but not in reviews.

91. Nothing in the Anti-Dumping Agreement prevents a Member from cumulating imports. In the absence of a restriction, the measure is permissible and must be found to be in conformity with the Agreement. This is particularly true for sunset reviews, for which no methodology is prescribed.⁶⁷

92. The United States notes that cumulation in anti-dumping investigations was a widespread practice among GATT contracting parties prior to the adoption of Article 3.3 in the Uruguay Round, even though the Tokyo Round Anti-Dumping Code was silent on the subject. If the negotiators of the Uruguay Round had intended to limit the practice of cumulation to investigations, it seems unlikely that they would have made no mention of the subject in Article 11.3.

REQUEST FOR PRELIMINARY RULINGS

Q27. The Panel notes the statement of the United States in paragraph 52 of its oral submission that it was prejudiced in its right to defend itself in these proceedings because of the alleged defects in Argentina's panel request. Please explain in what ways the United States was prejudiced with respect to each alleged inconsistency that the United States is raising in its request for preliminary rulings.

93. The *Understanding on Rules and Procedures Governing Disputes* ("DSU") provides carefully-established procedures to ensure that all parties to the proceeding are afforded due process. These procedures include deadlines calibrated to ensure that the proceeding moves expeditiously while providing parties adequate time to prepare its defence. The lack of due process in the early part of the proceeding, if not cured, is of particular concern because it risks tainting the remaining proceeding.

94. The violation in question is Argentina's failure pursuant to DSU Article 6.2 to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Argentina's failure to do so initially, and its failure to cure the defect, deprived the United States of the opportunity to prepare defence; the United States did not know the legal basis of Argentina's specific claims. From panel establishment through panel selection through preparation of submissions, the United States has not been afforded the full measure of due process required under the DSU, compromising its ability to research the issues at hand, assign personnel, etc. As the Appellate Body has explained, "A defending 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 This requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings."⁶⁸ Indeed, "it is a corollary of the due process objective inherent in Article 6.2 that a complaining party, as the party in control the drafting of a panel request, should bear the risk of any lack of precision in the panel request."⁶⁹

⁶⁷ *Japan Sunset*, para. 123.

⁶⁸ *Thailand – Anti-Dumping Duties on Angles, Shapes and Section of Iron or Non-Alloy Steel H-Beams from Poland*, WT/DS122/AB/R, Report of the Appellate Body adopted 28 September 2000, para. 88.

⁶⁹ *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276, Preliminary Ruling on the Panel's jurisdiction under Article 6.2 of the DSU, 25 June 2003, para. 25.

OTHER

Q29. During the five-year period of imposition of the anti-dumping duty at issue in this case, did any exporter other than Siderca ask for an administrative review for its own duty?

95. During the five years preceding the sunset review, no exporter or producer of Argentine OCTG requested an administrative review of its assigned margin of dumping, including Siderca. As explained in the US answer to question 13(b) from the Panel, the domestic interested parties requested administrative reviews of Siderca for each of three periods (1995-1996; 1996-1997; 1997-1998) prior to the sunset review. These administrative reviews were terminated after Commerce determined, for each of the relevant periods, that Siderca had no imports of OCTG for consumption in the United States. Notably, since the sunset review, another Argentina exporter of OCTG has participated in an administrative review.

Q30. The United States argues that certain US legal instruments such as the SPB cited by Argentina is not a measure that can be challenged as such under the WTO Agreements.⁷⁰ Please provide the Panel with detailed information regarding the legal status and interrelationships, if any, of the following instruments under US law, and in particular whether they are mandatory or discretionary. In particular, in light of the relevant WTO dispute settlement reports, the Panel would like to know whether each of these instruments have an operational life of their own under US law, and whether the DOC and the ITC are required to follow their provisions in sunset reviews.

(i) Tariff Act of 1930 (as amended by the URAA).

96. The Tariff Act of 1930, as amended (the statute or "the Act") is US law. Commerce is bound by the statute – e.g., there is no higher law except for the US Constitution. Consequently, the statute has an operational life of its own.⁷¹ Many of the provisions in the statute are mandatory, although certain provisions are discretionary.

(ii) Statement of Administrative Action,

97. The SAA was prepared and submitted with the Uruguay Round Agreements Act. The function of the SAA is set forth in the SAA itself, as follows:

This Statement describes significant administrative actions proposed to implement the Uruguay Round agreements. In addition, incorporated into this Statement are two other statements required under section 1103: (1) an explanation of how the implementing bill and proposed administrative action will change or affect existing law; and (2) a statement setting forth the reasons why the implementing bill and proposed administrative action are necessary or appropriate to carry out the Uruguay Round agreements.

As is the case with earlier Statements of Administrative Action submitted to the Congress in connection with fast-track bills, this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law. Furthermore, the Administration understands that it is the expectation of the Congress

⁷⁰ See, e.g., First Written Submission of the United States, paras. 193-195.

⁷¹ US – *Export Restraints* para. 8.91.

that future Administrations will observe and apply the interpretations and commitments set out in this Statement. Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretations of those agreements included in this Statement carry particular authority.⁷²

98. In other words, the SAA is a type of legislative history. In the United States, legislative history is often considered for purposes of ascertaining the meaning of a statute, but cannot change the meaning of, or override, the statute to which it relates. It provides authoritative interpretative guidance in respect of the statute. The status granted to the SAA under the US system, however, is only in respect to its interpretive authority *vis à vis* the statute. Thus, the SAA operates only in conjunction with (and as an interpretive tool for) the US anti-dumping statute has no operational life of its own.⁷³ In addition, the SAA is not mandatory.

(iii) Sunset Regulations (Both the DOC's and the ITC's regulations), and

99. These regulations are US law. The regulations contain both mandatory and discretionary directives. The regulations have force and effect of law and must be followed where the language of the specific provision leaves no discretion. The regulations, however, have provisions that provide for the exercise of discretion by the applicable decision-maker. The regulations are issued in accordance with US federal agency rule-making procedures and are accorded controlling weight by US courts unless they are arbitrary, capricious, or manifestly contrary to the statute.⁷⁴ Thus, the regulations have an independent operational life of their own.⁷⁵

(iv) Sunset Review Policy Bulletin.

100. Under US law, the *Sunset Policy Bulletin* is considered a non-binding statement, providing Commerce's general understanding of sunset-related issues not explicitly addressed by the statute and regulations.⁷⁶ In this regard, the *Sunset Policy Bulletin* has a legal status comparable to that of agency precedent. As with its administrative precedent, Commerce may depart from its policy bulletin in any particular case, so long as it explains the reasons for doing so.⁷⁷ The *Sunset Policy Bulletin* does nothing more than provide Commerce and the public with guidance as to how Commerce may interpret and apply the statute and its regulations in individual cases. The *Sunset Policy Bulletin* does not "do something concrete" for which it could be subject to independent legal challenge under the WTO agreements.

⁷² SAA, page 656 (Exhibit US-11). The reference to "section 1103" is to section 1103 of the Omnibus Trade and Competitiveness Act of 1988 ("1988 Act"). Among other things, the 1988 Act provided the Administration with fast-track negotiating authority with respect to the Uruguay Round.

⁷³ *US Export Restraints*, paras. 8.98 - 8.100.

⁷⁴ See, e.g., *Chevron USA, Inc. v. Natural Resources Defence Council, Inc.*, 467 US 837, 842, 81 L. Ed. 2d 694, 104 S. Ct. 2778-845 (1984).

⁷⁵ *US Export Restraints*, paras. 8.108 - 8.113.

⁷⁶ *Sunset Policy Bulletin*, 63 FR at 18871 ("This policy bulletin proposes *guidance* regarding the conduct of sunset reviews. As described below, 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.") (Emphasis added) (Exhibit ARG-35).

⁷⁷ As a matter of US administrative law, Commerce practice cannot be binding in the sense that Commerce is not obliged to follow its own precedent so long as it explains departures from such precedent. Thus, as a matter of law, Commerce practice cannot transform a discretionary measure into a mandatory measure.

Q31.

(a) **Are "the SPB" and "the SAA" binding legal instruments under the US law?**

101. No.

(b) **If not, please explain the legal status of these two legal instruments under the US law and the purpose of having them?**

102. Please see our responses to questions 30(ii) and 30(iv), as well as 20(d).

(c) **Can the US administration depart from the provisions of the SAA and the SPB without formally amending them?**

103. Both the SAA and the *Sunset Policy Bulletin* are forms of guidance and are not mandatory. Consequently, it is inapposite to discuss the SAA or the *Sunset Policy Bulletin* in terms of "departing" from them.

(d) **Have the SAA and the SPB ever been amended?**

104. No. There is no mechanism for amending the SAA.

ANNEX E-3

ANSWERS OF THE UNITED STATES TO QUESTIONS OF THE PANEL – FIRST MEETING (REVISED VERSION)

27 February 2004

EXPEDITED REVIEWS/WAIVER PROVISIONS

Q2. Please respond to the following questions regarding "expedited sunset reviews" under the US law?

- (a) In what circumstances does the DOC decide to conduct an expedited sunset review? More specifically, does the US law require or allow the DOC to conduct an expedited sunset review in cases where there is an affirmative or deemed waiver as well? Or, are expedited reviews limited only to cases where the respondent interested parties' substantive response to the notice of initiation is found inadequate because their share in the total imports falls below the 50 per cent threshold prescribed under US law?**

1. The US Department of Commerce (Commerce) decides whether to conduct a full or expedited sunset review based on a two-part procedure. First, Commerce solicits substantive responses from interested parties after publication of the notice of initiation of the review in the Federal Register.¹ Respondent interested parties, which include foreign exporters and governments,² have several options: They may (1) file a substantive response; (2) elect to waive their rights to participate in the review ("affirmative waiver"); or (3) refuse to provide a substantive response.³ Commerce will determine whether each response received is "complete" per the criteria set forth in the regulations.⁴ No response, or an incomplete substantive response, is considered a waiver ("deemed waiver").⁵ Parties waiving their rights to participate in the review are considered likely to dump (a company-specific likelihood finding).⁶

2. Second, taking into account all of the responses received as part of the first step, including deemed and affirmative waivers, Commerce normally evaluates whether the exporters submitting complete substantive responses account for 50 per cent of the total imports of subject merchandise to the United States over the five calendar years preceding the initiation of the review ("50 per cent threshold").⁷ If the responses do not meet the 50 per cent threshold, Commerce will normally conduct an expedited review to make an order-wide determination of the likelihood of continuing or recurring dumping (an order-wide likelihood determination).⁸

3. The likelihood finding with regard to one company under the first step is not dispositive of the results of the order-wide likelihood determination under the second step. Even if Commerce finds that dumping is likely with regard to one company, Commerce still must decide whether to conduct a

¹ 19 C.F.R. 351.218(d)(3) (Exhibit ARG-3).

² 771(9) of the Tariff Act of 1930 (19 USC. 1677(9)).

³ 19 C.F.R. 351.218(d) (Exhibit ARG-3).

⁴ 19 C.F.R. 351.218(d)(3)(ii) (Exhibit ARG-3).

⁵ 19 C.F.R. 351.218(d)(2)(iii) (Exhibit ARG-3).

⁶ Section 751(c)(4) of the Tariff Act (19 USC. 1675(c)(4)) (Exhibit ARG-1).

⁷ 19 C.F.R. 351.218(e)(1)(ii)(A) (Exhibit ARG-3).

⁸ 19 C.F.R. 351.218(e)(1)(ii)(C) (Exhibit ARG-3).

full or expedited review to determine order-wide likelihood. The decision whether to expedite depends on the other respondent interested party responses.

4. (Please note that the 50 per cent threshold is not dispositive. Commerce may take other factors into account and has conducted several full sunset reviews under the anti-dumping and countervailing duty laws in which the aggregate response did not represent more than 50 per cent of imports. Most of these involved analyses of subsidization where the relevant government's participation is essential given the nature of the sunset review in the countervailing duty context. In at least one case, however, Commerce conducted a full sunset review in an anti-dumping case in which the aggregate response to the notice of initiation did not represent more than 50 per cent of imports for the five year period. In *Pineapple from Thailand*, the only respondent interested party to file a complete substantive response did not represent more than 50 per cent of the imports during the five year period preceding the sunset review.⁹ Commerce nonetheless conducted a full sunset review because the respondent interested party was a significant exporter of the subject merchandise, was a respondent in the original investigation, represented nearly 50 per cent of the imports during the five year period (on average), and accounted for more than 50 per cent of the imports for the two years preceding the sunset review.)

- (b) **The Panel notes that the provisions relating to a deemed waiver, i.e. the presumption that a respondent interested party that submits an incomplete substantive response is deemed to have waived its right to participate, are found in the Regulations only. This matter does not seem to be dealt with under the Tariff Act. Would the United States agree that the only provisions of the US law relating to deemed waivers are contained in the Regulations?**

5. Yes.

- (c) **If the DOC carries out an expedited sunset review in cases of an affirmative or deemed waiver as well, please explain whether there are any differences in the procedural rules that apply to these two sets of expedited sunset reviews, i.e. expedited reviews that result from a waiver and those that result from the submission of an inadequate response.**

6. There is only one "type" of expedited review.

7. There is no difference in the treatment of a respondent interested party in an expedited sunset review conducted by Commerce whether that particular party waives its right to participate pursuant to an election (section 751(C)(4)(A)) or is deemed to have waived because it failed to respond or its substantive response to the notice of initiation was found to be inadequate.¹⁰

- (d) **Please explain the differences, if any, between expedited and full sunset reviews regarding the procedural rules that are followed by the DOC. Please explain for instance whether interested parties, especially the foreign exporters, in expedited sunset reviews have the right to submit evidence in addition to, and apart from, their response to the notice of initiation; whether they have the right to request a hearing; and whether the DOC issues a final disclosure as stated in Article 6.9 of the Agreement. Please respond in detail by referring to the relevant provisions of the US law in conjunction with Article 6 and Annex II of the Agreement.**

⁹ See *Preliminary Results of Full Sunset Review; Canned Pineapple Fruit from Thailand*, 65 Fed. Reg. 58509 (29 September 2000).

¹⁰ See 19 C.F.R. 351.218(e)(2)(ii) (Exhibit ARG-3).

8. The Appellate Body in *Japan Sunset* has confirmed that Article 11.3 does not prescribe the methodology – or methodologies – that Members may use in conducting sunset reviews.¹¹ Article 11.4 ensures that the general procedural and evidentiary provisions of Article 6 apply in sunset reviews to give respondent interested parties basic due process. Expedited reviews are consistent with Article 11.3 and Article 6 as incorporated therein.

9. Whether the sunset review is full or expedited, Commerce's *Sunset Regulations* provide the due process and evidentiary requirements found in Article 6. Specifically:

- (a) Section 351.218(d)(3) provides that interested parties will have 30 days from the notice of initiation of the review to submit complete substantive responses. In addition to identifying information that is required of interested parties, section 351.218(d)(3)(iv)(B) provides that parties may provide "any other relevant information or argument that the party would like [Commerce] to consider." (Emphasis added.)
- (b) Section 351.218(d)(4) affords interested parties the opportunity to rebut evidence and argument submitted in other parties' substantive responses within five days of the submission of those responses.
- (c) In cases where Commerce finds that the aggregate response to the notice of initiation from the respondent interested parties is inadequate, section 351.309(e) of Commerce's *Sunset Regulations* affords interested parties the opportunity to comment on whether an expedited review is appropriate.

10. Therefore, Commerce's regulations expressly provide parties – in both full and expedited reviews – with multiple opportunities to provide Commerce with any relevant information, to rebut any relevant information and argument submitted by other parties, and to comment on the appropriateness of conducting an expedited review even when the substantive responses have been inadequate. Section 351.308(f)(2) of Commerce's *Sunset Regulations* provides that Commerce normally will consider the substantive submissions – not just the complete ones – of all interested parties in making the order-wide likelihood determination in an expedited sunset review.

11. The differences between a full and an expedited sunset review are timing (the final sunset determination in an expedited sunset review is issued 120 days after the notice of initiation, rather than the full sunset review's 240 days)¹² and the fact that case briefs are not filed in an expedited case. Because as a rule hearings are tied to the contents of the case briefs,¹³ hearings are generally not held in an expedited proceeding. It should be noted that the deadline for the submission of factual information is the same for both an expedited and a full sunset review proceeding and normally is no later than the deadline for the submission of the interested party rebuttal briefs.¹⁴

12. Article 6.9 requires that interested parties be informed of the essential facts. This requirement does not impose a particular means of disclosure. The United States has established an investigative and review process that allows interested parties to be presented with all of the facts as they are presented to the authority, as well as arguments made about these facts.¹⁵

¹¹ *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, 15 December 2003 ("*Japan Sunset*"), paras 149 and 158.

¹² 19 C.F.R. 351.218(e)(ii)(2), 19 C.F.R. 351.218(f)(3) (Exhibit ARG-3).

¹³ 19 C.F.R. 351.310(c) (Exhibit US-27).

¹⁴ See 19 C.F.R. 351.218(d)(4) (Exhibit ARG-3).

¹⁵ *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, Report of the Panel, adopted 28 September 2001 ("*Ceramic Floor Tiles*"), para 6.125.

13. Consistent with paragraph 1 of Annex II, the Commerce regulations set forth in detail the requirements for the submission of a complete substantive response and specify that interested parties may submit other information.¹⁶ The regulations also make clear that respondent interested parties have 30 days to provide a complete substantive response¹⁷ and if the collective responses are considered inadequate, an expedited review will normally be conducted and facts available used.¹⁸ Consistent with paragraphs 5 and 6, Commerce does not require the information provided to be ideal; as noted above, parties are provided the opportunity to explain why they cannot provide particular information. Further, all evidence or information is accepted, even for incomplete substantive responses, pursuant to section 351.308(f) of the *Sunset Regulations*.

- (e) **Please explain whether exporters who submitted an incomplete response to the notice of initiation of a sunset review, and therefore are deemed to have waived their right to participate under Section 351.218(d)(2) (iii) of the DOC's Sunset Regulations, have the right to submit evidence in addition to, and apart from, their response to the notice of initiation; whether they have the right to request a hearing; and whether the DOC issues a final disclosure as stated in Article 6.9 of the Agreement. Please respond in detail by referring to the relevant provisions of the US law in conjunction with Article 6 and Annex II of the Agreement.**

14.

15. If an exporter in fact submitted an incomplete substantive response – a hypothetical situation – that exporter would be deemed to have waived its right to participate in the sunset review, pursuant to section 351.218(d)(2)(iii). Therefore, the exporter would not have the right to submit additional evidence or request a hearing.

16. The US sunset review procedures meet Article 6 requirements. A notice of initiation is published in the *Federal Register*, respondent interested parties have 30 days to provide a complete substantive response and any other information they wish to provide, they are afforded the opportunity to respond to the adequacy determination (if they provided a complete substantive response),¹⁹ and even if facts available is applied, the information in both incomplete and complete responses is taken into account.²⁰

17. The sunset review procedures conform to the norms in Annex II. For example, the information required from respondent interested parties in a substantive response is set forth in the regulations and therefore precedes the notice of initiation, providing greater rights than those suggested under paragraph 1 of Annex II. Similarly, the regulations make clear that facts available may be used if information is not supplied within a reasonable time. Article 5 suggests that all information should be accepted and that authorities should not disregard any properly submitted, verifiable information. As noted above, even when expedited reviews are conducted and facts available are used, Commerce will consider the information provided in complete and incomplete substantive responses. Similarly, even though a respondent interested party's incomplete submission will preclude it from participating further, the evidence and information contained therein will be used at a minimum as part of facts available, if facts available is applied.²¹

¹⁶ 19 C.F.R. 351.218(d)(iv) (Exhibit ARG-3).

¹⁷ 19 C.F.R. 351.218(d)(3) (Exhibit ARG-3).

¹⁸ 19 C.F.R. 351.218(e)(ii)(C)(2) (Exhibit ARG-3).

¹⁹ 19 C.F.R. 351.309(e) (Exhibit US-27).

²⁰ 19 C.F.R. 351.308(f)(2) (Exhibit US-27).

²¹ 19 C.F.R. 351.308(f)(2) (Exhibit US-27).

18. Article 6.9 requires that interested parties be informed of the essential facts. This requirement does not impose a particular means of disclosure. The United States has established an investigative and review process that allows interested parties to be presented with all of the facts as they are presented to the authority, as well as arguments made about these facts.²²

Q3. The Panel notes that under US law the effect of failure to submit a complete substantive response is a deemed waiver, in which case the DOC is directed to find likelihood of continuation or recurrence of dumping. The effect of submitting an inadequate substantive response, however, seems to be the DOC's resort to facts available. In the latter case, will the DOC also find likelihood without further investigation? In other words, is there a difference between these two effects? Is it correct to state that the DOC is directed to find likelihood as a matter of US law only in the case of an incomplete substantive response, or does that also apply to complete but inadequate substantive responses?

19. As noted above, the assessment of likelihood may occur twice in a sunset review, but with different implications. First, a respondent interested party's waiver of participation, deemed or affirmative, will lead to a finding with regard to that party that the party is likely to continue to dump (or that dumping by that party will recur). Commerce will subsequently determine whether dumping is likely to continue or recur on an order-wide basis, i.e., taking into account the activities of all the companies that export the subject merchandise, including information provided in substantive responses. In other words, one company's failure to submit a complete substantive response results in a finding of likelihood with respect to that company, and not on an order-wide basis; Commerce could still, in light of other submissions and facts on the record, conclude that there is no order-wide likelihood of dumping.

Q4. The Panel notes that Section 1675(c)(4) of the Tariff Act of 1930 reads:

"(B) Effect of waiver

In a review in which an interested party waives its participation pursuant to this paragraph, the administering authority shall conclude that revocation of the order or termination of the investigation would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) with respect to that interested party."²³ (emphasis added)

(a) Does this provision mean that the DOC will make no substantive analysis but will automatically determine that there is a likelihood of continuation or recurrence of dumping? How does the United States explain it in light of the obligation to determine under Article 11.3? In other words, is it the view of the United States that not carrying out any substantive determination in cases of an affirmative or deemed waiver discharges the investigating authority from its obligation to make a likelihood determination under Article 11.3?

20. No. As noted above, the assessment of likelihood may occur twice in a sunset review. The statute requires a finding of company-specific likelihood in the case of an affirmative waiver but does not mandate a determination of order-wide likelihood. Commerce will take the waiver into account for purposes of the 50 per cent threshold.

²² *Ceramic Floor Tiles*, para 6.125.

²³ 19 USC. § 1675(c)(4) (Exhibit ARG-1 at 1152).

21. Article 11.3 does not mandate a particular methodology for Members conducting sunset reviews. The Appellate Body in *Japan Sunset* concluded that Members are free to structure sunset review proceedings as they wish, provided those proceedings are consistent with the obligations of Article 6.²⁴ Thus, the "determination" referenced therein need not be made with respect to each company subject to the order; instead, for the United States, the determination is made for the order as a whole.

22. The United States does not believe that its sunset reviews result in "not carrying out any substantive determination in cases of an affirmative or deemed waiver." The application of facts available, which includes information provided by the parties in their substantive responses, even if incomplete, assures that the determination is based on the facts on the administrative record, including prior dumping determinations (such as administrative reviews), as well as any information the parties wish to make available. It bears repeating that parties are entitled to include *any* relevant information in their substantive responses, and not just the information set forth under section 351.218(d)(ii). As a result, Commerce does make a substantive determination, and the sunset review procedures of the United States conform to the limited requirements of Article 11.3.

- (b) **For instance, in a case of a waiver, does the US law preclude the DOC from evaluating, as part of its likelihood determination, imports statistics and the results of administrative reviews – if any-- or any other piece of information that might be available to the DOC or that might have been submitted by the domestic interested parties?**

23. The United States wishes to reiterate that a waiver does not result in an order-wide likelihood determination. Regardless of whether a company has waived its right to participate, with regard to the order-wide likelihood determination, Commerce is authorized to take into account facts available, including the information in the substantive responses (whether complete or incomplete) if an expedited review is conducted. Notably, respondent interested parties are entitled to include *any* relevant information in those responses. Additionally, Commerce may consider information from prior determinations (such as administrative reviews) in assessing order-wide likelihood.

- (c) **Hypothetically, in a sunset review where all of the interested foreign exporters submitted incomplete responses to the notice of initiation, would the above-quoted section of the Tariff Act require that the DOC find likelihood of continuation without considering the information contained in these incomplete responses? Please elaborate by referring to the relevant provisions of the US law.**

24. No. As noted above, there is a difference between a company-specific likelihood finding and an order-wide likelihood determination. The Tariff Act requires a company-specific likelihood finding when that company has elected to waive participation. However, the Tariff Act does not mandate a particular order-wide likelihood determination.

25. If all of the respondent interested parties submitted incomplete responses, the regulations provide that Commerce will normally consider the collective response to be inadequate, and Commerce will normally proceed to an expedited review and use facts available.²⁵ In using facts available, Commerce will consider all of the information provided in the incomplete responses and information from prior proceedings to reach the order-wide likelihood determination.²⁶

²⁴ *Japan Sunset*, paras. 156-57.

²⁵ Section 351.218(d)(ii)(C)(2) (Exhibit ARG-3).

²⁶ 19 C.F.R. 351.308(f)(2) (Exhibit US-27).

Q5. The Panel notes that Section 1675(c)(4)(B) of the Tariff Act of 1930 provides that when an interested party waives its participation in a sunset review, the DOC will find likelihood of continuation or recurrence of dumping with respect to that interested party. The Panel also notes that Section 351.218(d)(2) (iii) of the DOC's Sunset Regulations state that failure to submit a complete substantive response to the notice of initiation of sunset review will be deemed a waiver of that exporter's right to participate in that sunset review. Finally, the Panel notes the United States' statement in paragraph 235 of its first written submission that the DOC carries out its likelihood determinations in sunset reviews on an order-wide basis.

- (a) The United States mentions in footnote 250 of its first written submission that the *Sunset Policy Bulletin* ("SPB") requires the DOC to make its likelihood determinations on an order-wide basis. Please specify whether there is any other provision in any other legal instruments under US law (e.g. the Statute or the Regulations) which requires that likelihood of continuation or recurrence of dumping determinations in sunset reviews be carried out on an order-wide basis.**

26. Footnote 250 is a citation to the statement in the text that an "adequate" number of responses is normally required.²⁷ Footnote 250 does not state that the SPB requires Commerce to make its likelihood determinations on an order-wide basis.

27. Section 751(c)(1)(A) of the Act provides the Commerce shall conduct a sunset review of an anti-dumping duty order five years after publication of the anti-dumping duty order. The SAA, as the authoritative interpretive tool for the statute, makes it clear that section 751(c) requires Commerce to make the sunset determination on an order-wide basis.

- (b) Given the US statement in paragraph 235 of its first written submission that the DOC is required to carry out its likelihood determinations in sunset reviews on an order-wide basis, what meaning should be given to the language "with respect to that interested party" in Section 1675(c)(4)(B) of the Tariff Act of 1930? If the US law requires that the DOC make its sunset determinations on an order-wide basis, what happens when one of the exporters waives its right to participate or fails to submit a complete response, which seems to lead to a deemed-waiver? Would the statutory provision that mandates a positive finding with regard to the waiving exporter also determine the overall likelihood determination to be made for the country concerned on an order-wide basis?**

28. No; neither section 751(c)(4)(B) nor any other provision of US law or regulation mandates an order-wide affirmative likelihood determination in a sunset review based on the waiver of a single exporter.

- (c) Suppose that exporter A, one of the exporters involved in a sunset review initiated against country X, submits an incomplete response to the notice of initiation and therefore is deemed to have waived its right to participate pursuant to Section 351.218(d)(2) (iii) of the DOC's Sunset Regulations. Would the DOC have to find likelihood for country X on an order-wide basis because it has to find likelihood as a matter of law for exporter A submitting incomplete response? In other words, would the affirmative finding with regard to exporter A also determine the overall order-wide determination for country X in this case? Please elaborate by referring to the relevant provisions under the US law.**

29. No. As noted above, Commerce may make a company-specific likelihood finding and will subsequently make an order-wide likelihood determination. If an expedited review is conducted and

²⁷ First Written Submission of the United States, para. 235.

facts available are used, then the regulations provide that all of the factual information on the record will be applied in making the order-wide determination, including information from incomplete and complete substantive responses.²⁸ Thus, US law does not mandate that a likelihood finding with respect to one company result in a likelihood determination for the entire order.

- (d) **If your response to question (c) is in the negative, please 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, which requires that the DOC make a positive determination for exporter A which submitted an incomplete response to the notice of initiation?**

30. No violation of 751(c)(4)(B) or any other provision of US 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.

Q6. The Panel notes that section 351.308(f) of the DOC's Regulations sets out the facts to be used by the DOC when applying facts available in a sunset review.

- (a) **Does this section define or limit the scope of facts available in sunset reviews? In other words, does this section allow the DOC to consider facts other than those set out therein when using facts available in a sunset review? Please respond in detail by referring to the relevant provisions of the US law in conjunction with Article 6 and Annex II of the Agreement.**

31. Section 751(c)(3)(B) provides that Commerce will base its final sunset determination on the facts available if the order-wide response from respondent interested parties, in the aggregate, is found to be inadequate. Section 351.308(f) of the *Sunset Regulations* provides that, when Commerce is making the final sunset determination on the basis of the facts available, Commerce normally will rely upon prior agency determinations and information from the interested party substantive responses. The latter may include *any* information the respondent interested party considers relevant to the proceedings.

32. Article 6.8 of the AD Agreement provides that "[i]n cases which any interested party refuses access to, or otherwise does not provide, necessary information" a Member may make its determination on the basis of "facts available." In an expedited sunset review, respondent interested parties representing more than 50 per cent of the imports of the subject merchandise have affirmatively waived participation, filed an incomplete substantive response, or have failed to respond to the notice of initiation in any respect. In this context, Commerce normally uses the facts available to make its final sunset determination because the respondent interested parties have collectively failed to provide the necessary information. Nevertheless, paragraph 3 of Annex II to the AD Agreement provides that, when applying the facts available pursuant to Article 6.8, all properly submitted, verifiable information should be taken into account when the determination at issue is made. Section 351.308(f)(2) provides for consideration of this information when submitted in an interested party's substantive response, whether that substantive response is complete or incomplete.

- (b) **What is the significance of the word "normally" in this section?**

33. Section 351.308(f) of the *Sunset Regulations* states that Commerce normally will base its final sunset determination on prior agency determinations and the information submitted in the parties' substantive responses. The use of the word "normally" in section 351.308(f) provides

²⁸ 19 C.F.R. 351.308(f)(2) (Exhibit US-27).

Commerce with the discretion to find that the factual circumstances in a particular case warrant Commerce's reliance on other or additional information when making the final order-wide sunset determination.

- (c) **What is the legal significance of the cross-reference in Section 351.308(f) of the Regulations to 752(b) and 752(c) of the Act? Given that the Statute does not have any provision about the inadequacy of substantive responses, does this cross-reference suggest that the provisions of Section 351.308(f) of the Regulations apply only in cases of an affirmative or deemed waiver, but not in cases where the substantive response is complete but inadequate because the exporters' share is below 50 per cent? Please respond in conjunction with the statements of the United States in paragraphs 156 and 170 of its first submission.**

34. As noted above, there are two steps in assessing whether to conduct a full or expedited sunset review. The first is to evaluate whether the substantive responses (there may well be more than one exporter, for example) to the notice of initiation are complete or whether parties have waived their right to participate in the proceedings. These decisions are then folded into the second step, which is to determine whether the complete substantive responses represent 50 per cent of imports. Then, if Commerce decides to proceed with an expedited review, Commerce normally will apply facts available, as described in Section 351.308(f). Thus, it is entirely possible that there will be waivers and complete substantive responses in one proceeding, both of which are taken into account in determining whether to expedite and, correspondingly, use facts available.

35. The cross-reference to sections 752(b) and 752(c) of the Act is found in section 351.308(f) because these statutory provisions contain the mandatory elements Commerce "shall" consider in making an order-wide likelihood determination a sunset review. Commerce will consider any additional information in the parties' substantive response in light of the statutory requirements contained in sections 752(b) and 752(c) when making the final sunset determination.

- (d) **Please explain whether in a sunset review where the respondent interested party/parties account for less than 50 per cent of total exports of the subject product into the US market the DOC would take into account the information and evidence submitted by the respondent interested parties in their substantive responses to the notice of initiation of the sunset review? If so, explain why Section 351.218(e)(1)(ii)(C)(2) of the Regulations provides that the DOC would base its determinations on facts available in such cases. In other words, if the DOC is to take into account evidence submitted by the respondent interested parties to the notice of initiation no matter what their share in the total exports of the subject product into the US market is, why is it that the Regulations direct the DOC to resort to facts available if the respondent's share falls below 50 per cent?**

36. In a sunset review in which the respondent interested party or parties do not meet the 50 per cent threshold, and Commerce has made a determination that the aggregate response to the notice of initiation was inadequate, Commerce would consider the information and evidence submitted by the respondent interested parties in their substantive responses when making the final sunset determination in accordance with section 351.308(f) of the *Sunset Regulations*.

Q7.

- (a) **Please explain the significance of the language "without further investigation" in Section 351.218(e)(1)(ii)(C)(2) of the DOC's Regulations. What does it imply? Does it mean that the DOC will not accept any submission of evidence by foreign exporters in expedited sunset reviews in addition to their responses considered to**

be inadequate? Or does it imply that the evidence submitted by interested parties will not be evaluated or otherwise tested?

37. Section 351.218(e)(1)(ii)(C)(2) of the *Sunset Regulations* provides that Commerce will normally base its final sunset determination on "the facts available" without further investigation in a case where the aggregate respondent interested parties is inadequate. However, Commerce may exercise its discretion and conduct further investigation.²⁹ The use of the language "without further investigation" of section 351.218(e)(1)(ii)(C)(2) provides that Commerce is not required to request additional information.

38. Commerce normally will not accept additional submissions from any interested party, whether domestic or respondent, after that interested party's substantive submission is found to be "incomplete." Nevertheless, any information submitted by an interested party in its substantive response is considered by Commerce when Commerce makes the final determination in an expedited sunset review, even in cases where that substantive response was found to be "incomplete."³⁰

- (b) **More generally, would it be correct to state that in terms of procedural rules, the only difference between a statutory finding of likelihood in a case of waiver and an expedited review in cases where the response is found to be inadequate is the fact that in the latter case the DOC will consider the information submitted by the foreign exporter in its complete substantive response to the notice of initiation?**

39. Commerce will consider all information on the administrative record of the sunset proceeding, including information in the substantive responses and rebuttal responses of the domestic interested parties, prior agency determinations, and any other information received by Commerce, as well as the information submitted by foreign interested parties in their substantive and rebuttal responses.³¹ If a respondent interested party submitted a statement of waiver, then, obviously, there would be no information from that party to consider.

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."³² (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?**

²⁹ See SAA at 879-880 (Exhibit US-11).

³⁰ 19 C.F.R. 351.308(f)(2) (Exhibit US-27).

³¹ See section 351.318(f)(1) of the *Sunset Regulations* (Exhibit US-27) (definition of "the facts available").

³² 19 C.F.R. § 351.218(d)(2) (Exhibit ARG-3).

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.

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.

Q9. The Panel notes the statement of the United States in paragraph 242 of its first written submission that:

"A determination that the aggregate response to the notice of initiation is inadequate can be based on the respondent interested parties electing waiver, or failing to respond, or in providing inadequate substantive responses, or on any combination of these scenarios."

- (a) Please explain whether the 50 percent test is the sole basis for a determination of inadequacy, or whether, as the United States points out in the above-quoted paragraph, the respondents' response can be deemed inadequate in cases where there is an affirmative or deemed waiver, but the share of the cooperating respondents in total imports is above 50 per cent.**

43. The term "inadequate" in the quoted part of the submission in fact refers to the completeness of the each substantive response submitted in response to the notice of initiation, rather than the adequacy of the aggregate responses.

44. The 50 per cent threshold is the normal basis for determining whether Commerce will conduct an full sunset review or a expedited sunset review. However, as noted above, Commerce has made an exception where the respondent interested party provided information indicating that complete substantive responses not meeting the 50 per cent threshold were nevertheless adequate. Commerce has not made a finding of inadequacy when the complete substantive responses met the 50 per cent threshold. Therefore, if a sufficient number of respondent interested parties (or just one, if it meets the 50 per cent threshold) simply adhere to the criteria set forth in the regulations, they can virtually ensure that a full review will be conducted. In other words, in practical terms it is up to the respondent interested parties to decide whether they want a full or expedited review.

- (b) Please explain whether there have been cases where an inadequacy decision was based on the interested party's electing waiver, or failing to respond, rather than its share in total imports.**

45. The election of waiver and the adequacy assessment are two distinct procedures. An affirmative or deemed waiver does not automatically result in a finding that the substantive responses

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).

were inadequate. Instead, Commerce will normally assess whether the complete substantive responses to the notice of initiation are sufficient to meet the 50 per cent threshold. Other exporters meeting the 50 per cent threshold may have filed complete substantive responses, or may have submitted information sufficient to allow Commerce to conduct a full sunset review.

46. More specifically, if a respondent interested party submits a substantive response to the notice of initiation that does contain all the information required by section 351.218(d)(3) of the *Sunset Regulations*, then it has submitted a "complete" substantive response. If a respondent interested party submits a substantive response to the notice of initiation that does not contain all the information required by section 351.218(d)(3), then "normally" that party will be considered to have submitted an "incomplete" substantive response. Likewise, if a respondent interested party affirmatively waives its right to participate or fails to respond to the notice of initiation, then its response is also considered "incomplete".

47. Once Commerce has determined which company-specific substantive responses are "complete," Commerce then normally applies the 50 per cent threshold to the total import volumes represented by all the respondent interested parties who filed a complete or adequate company-specific substantive response to determine whether the aggregate response to the notice of initiation is "adequate." Commerce then uses the results to determine whether to conduct a full or expedited sunset review.

- (c) **More generally, please explain whether under US sunset reviews law, "an affirmative or deemed waiver" and "an inadequate response" are two situations that are mutually exclusive. In other words, would it be accurate to state that under US law, certain circumstances lead exclusively to an affirmative or deemed waiver and some others exclusively to an inadequate response?**

48. No; the existence of deemed or affirmative waivers is included in the consideration of the 50 per cent threshold to assess the adequacy of the aggregate substantive responses. For example, one exporter may have waived its right to participate, while another will have filed a complete substantive submission. If the latter meets the 50 per cent threshold or provides information as to why the 50 per cent threshold is not appropriate, then Commerce could find that the complete substantive responses were adequate, and therefore a full review would normally be conducted.

Q10. The Panel notes the US statement in paragraph 162 of its first written submission:

"[T]hat the United States may afford parties expanded opportunities to submit evidence and argument in a full sunset review is a matter of US policy, not an obligation under the AD Agreement, and is not grounds to find fault with the evidentiary and procedural rules governing expedited sunset reviews."

- (a) **In the view of the United States, does Article 6 apply to sunset reviews in its entirety? Or, are there some provisions in this article that may not be applicable in the context of sunset reviews? Please respond in conjunction with the provisions of Article 11.4, especially the language "regarding evidence and procedure" contained therein.**

49. Article 11.4 of the AD Agreement stipulates that the Article 6 provisions "regarding evidence and procedure" shall apply to reviews under Article 11. Thus, not all of the provisions of Article 6 are applicable to Article 11 reviews; rather, only the provisions of Article 6 regarding evidence and

procedure are so applicable. The Appellate Body in *Japan Sunset* recently confirmed that Article 11.3 does not prescribe substantive rules for the administration of sunset reviews.³⁵

- (b) **If it is the view of the United States that Article 6 – either entirely or partially-applies to sunset reviews, where in Article 6 or elsewhere in the Agreement does the United States find support for its proposition that giving interested parties expanded procedural rights in full sunset reviews compared with expedited sunset reviews is not WTO-inconsistent?**

50. As noted above, the Appellate Body in *Japan Sunset* confirmed that Article 11.3 does not prescribe the methodology Members may use in conducting sunset reviews. Therefore, unless the US sunset review procedures are in conflict with Article 6 or Article 11.3, these procedures are permitted under the Anti-Dumping Agreement. Nothing in the Anti-Dumping Agreement prohibits the United States from giving parties expanded procedural rights in full sunset reviews compared with expedited sunset reviews. The United States notes that the parties themselves effectively decide whether they want "expanded procedural rights."

Q11. The Panel notes the following part of the DOC's Issues and Decision Memorandum in the instant sunset review:

"In the instant sunset reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation ."³⁶

Is the Panel to understand that the DOC deemed Siderca to have waived its right to participate in this sunset review? If so, on what basis under US law? If your response is in the negative, please explain what meaning the Panel should give to this sentence.

51. No; Commerce found that Siderca had filed a complete substantive response and, consequently, would not have been found to have waived its right to participate in the sunset review proceeding.³⁷ The Decision Memorandum for the sunset review of OCTG from Argentina includes the final sunset determinations for the sunset reviews of OCTG from Italy, Japan and Korea also. In each of these other three sunset reviews, respondent interested parties failed to respond to the notice of initiation in any respect. Therefore, the above quoted passage is a reference to the failure of the respondent interested parties in the sunset reviews of OCTG from Italy, Japan, and Korea.

52. The Issues and Decision Memorandum demonstrates that Commerce made two findings – that Siderca had filed a complete substantive response and that no other respondent interested party had filed a substantive response in any of the sunset reviews covered by the Decision Memorandum.³⁸

Q12. The Panel notes the argument of the United States, in paragraph 237 of its first written submission, that "Siderca did not avail itself of the opportunities made available by the Sunset Regulations for such defence in an expedited sunset review."

³⁵ *Japan Sunset*, para 123.

³⁶ *Issues and Decision Memorandum for the Sunset Reviews of the AD Orders on Oil Country Tubular Goods from Argentina, Italy, Japan, and Korea* (Dept's Comm., 31 Oct. 2000) (final results) ("*Decision Memorandum*") (Exhibit ARG-51 at 5).

³⁷ See *Decision Memorandum* at 3 (Exhibit ARG-51) and *Adequacy of Respondent Interested Party Response to the Notice of Initiation*, A-357-810 (Dept's Comm., 22 August 2000) ("*Adequacy Memorandum*") at 1-2 (Exhibit ARG-50).

³⁸ *Decision Memorandum* at 3-4 (Exhibit ARG-51).

(a) Please explain at which point(s) of time during the instant sunset review Siderca was given further opportunities to defend itself under US law but failed to do so.

53. Siderca had a number of opportunities to submit argument and information in support of its rights in the expedited sunset review of OCTG from Argentina. First, when a respondent interested party files a substantive response, one of the requirements of section 351.218(d)(3) is a statement from the submitter regarding the likely effects of revocation which includes any information, argument, and reasons supporting the statement. Siderca's entire claim in this regard was that Commerce should apply the *de minimis* standard found in Article 5.8 of the AD Agreement and, as a consequence, should revoke the order. In addition, section 351.218(d)(3)(iv)(B) provides interested parties the opportunity to submit any other relevant information or argument the interested party would like considered in the sunset review. Siderca made no other arguments or submission of factual information.³⁹

54. Second, each interested party is afforded the opportunity to submit a response in rebuttal (a "rebuttal response"), pursuant to section 351.218(d)(3)(vi)(4) of the *Sunset Regulations*, to challenge any argument or information contained in the substantive responses of the other interested parties. Siderca did not file any rebuttal response despite the fact that the domestic interested parties had made allegations, supported by statistics, that there were shipments of Argentine OCTG in four of the five years preceding the sunset review. Siderca did not challenge these statistics or any other information in the domestic interested parties substantive responses, although it was provided the opportunity to do so.

55. Finally, as discussed in the US first written submission and in the US answers above, Commerce determines whether to conduct a full or expedited sunset review based on the adequacy of the aggregate response to the notice of initiation. In making this determination, Commerce determines whether the imports from the respondent interested parties who filed a complete substantive response, on an aggregate basis, represent more than 50 per cent of the imports of the subject merchandise during the five years preceding the sunset review. Commerce then issues an Adequacy Memorandum which announces the decision and the factual bases underlying the decision. This determination is subject to challenge by the interested parties, pursuant to section 351.309(e) of the *Sunset Regulations*.

56. Commerce issued its adequacy determination in the sunset review of OCTG from Argentina and based the determination on the import statistics provided by the domestic interested parties after verifying them using the ITC Trade Database.⁴⁰ (Commerce re-verified the import statistics for the final sunset determination using Commerce's Census Bureau IM-145 import statistics; see *Decision Memorandum* at 4-5 (Exhibit ARG-51)). Siderca did not challenge Commerce's adequacy determination, as it had the right to do pursuant to section 351.309(e) of the *Sunset Regulations*.

57. At no time did Siderca provide any statements or assertions that it would not dump in the future if the order were revoked, offer any explanations why it had ceased shipments of the subject merchandise after imposition of the duty, or submit any allegations that information submitted in the sunset review proceeding of OCTG from Argentina was inaccurate or incorrect. In this proceeding, the First Written Submission of Argentina implies that Siderca was the only producer of OCTG in Argentina during the sunset review and that Siderca's lack of shipments contradicts the data indicating that Argentine OCTG was in fact exported to the United States during the period of review. Siderca made similar statements in its complete substantive response to the notice of initiation. However, there is a second Argentine producer of OCTG: Acindar. The United States has conducted administrative reviews of Acindar since 2001, and as recently as 19 March 2003, Commerce found

³⁹ See Siderca's Substantive Response at 2-3 (Exhibit ARG-57).

⁴⁰ See *Adequacy Memorandum* at (Exhibit ARG-50).

Acindar to have a dumping margin of 60.73 per cent.⁴¹ Moreover, it is the understanding of the United States that Acindar produces welded OCTG, whereas Siderca produces seamless OCTG (both are covered by the anti-dumping order). It is not beyond the realm of possibility that Siderca did not challenge the import statistics used during the sunset review because it was aware that another Argentine producer had begun to ship OCTG to the United States during the period of review and that Commerce's adequacy finding based on the 50 per cent threshold was in fact accurate.

58. To permit Argentina to raise factual issues now that neither it nor Siderca raised during the underlying sunset review would permit respondent interested parties to manipulate the system. Consistent with the general principles in Article 6, the United States afforded all Argentine exporters – and the Argentine government – the opportunity to present sufficient information to warrant a full sunset review. Siderca and Argentina declined to do so.

59. Therefore, in spite of Argentina's complaint, Commerce's likelihood determination was in fact correct, as evidenced by the dumping margin found with regard to Acindar after the sunset review.

- (b) **Which provisions of the DOC's Regulations, or other relevant legal instruments under US law, give interested exporters the right to defend their interests? Please respond in conjunction with the language "without further investigation" in section 351.218(e)(1)(ii)(C)(2) of the DOC's Regulations. What meaning should be given to this provision if the Regulations give interested exporters the right to defend their interests?**

60. Please see US Answer to Question 7(a) above.

61. Section 751(c)(3)(B) provides that Commerce will base its final sunset determination on the facts available if the aggregate response from respondent interested parties, in the aggregate, is found to be inadequate. Section 351.218(e)(1)(ii)(C)(2) of the *Sunset Regulations* provides that Commerce "normally" will issue a final determination in a sunset review "without further investigation" when insufficient interest in participation is demonstrated by the interested parties. The provision for a final sunset determination "without further investigation" is intended to expedite the sunset review process. Nevertheless, Commerce has the discretion not to expedite and, even in cases where the sunset review is expedited, interested parties who supplied complete substantive responses may still submit rebuttal responses, a challenge to Commerce's adequacy determination, and have the right to supply any argument and information that interested party wishes Commerce to consider in the sunset review.

Q13.

- (a) **What was the amount of exports of the subject product by Argentine exporters other than Siderca during the five-year period of application of this measure? Who were the exporters that made such exports? What was the source of these statistics?**

62. The domestic interested parties submitted import statistics in their substantive responses indicating that there were imports of the subject merchandise into the United States in each year, except 1996, from the imposition of the order until the sunset review.⁴² These statistics show that there were approximately 45,000 net tons prior to the initiation of the original investigation, 26,000 net tons entered during the investigation, and an average of less than 900 net tons in each year from the imposition of the anti-dumping duty order on OCTG from Argentina until the sunset review.

⁴¹ *Notice of Final Results and Decision in Part of Anti-Dumping Duty Administrative Review; Oil Country Tubular Goods, Other Than Drill Pipe, from Argentina*, 68 Fed. Reg. 13262, 13263 (19 March 2003).

⁴² See Exhibit US-23.

63. The domestic interested parties supplied import statistics concerning imports of OCTG for the five year period prior to the sunset review.⁴³ These statistics were verified during the sunset review by using two independent sources: (1) ITC Trade Database; and (2) Commerce's Census Bureau IM-145 import data.⁴⁴

64. Also, through administrative review procedures, the United States has identified Acindar as another Argentine producer of OCTG, and one that may have shipped OCTG to the United States during the period of review, as described above.

(b) The Panel notes Argentina's assertion in paragraph 43 of its first oral submission that the DOC's determination that there were exports of the subject product from Argentina into the United States during the period of imposition of the measure at issue was flawed because the DOC incorrectly recorded non-consumption entries as consumption entries. Please explain whether the so called "non-consumption entries" are those products in transit which are not destined for ultimate consumption in the United States?

65. First, the panel should be aware Siderca did not raise this issue during the underlying sunset review. Second, as detailed below, Argentina's assertion concerning the nature of these shipments and their effect on the accuracy of the import statistics used in the sunset review is significantly exaggerated.

66. In order to assist the Panel, however, we provide an accurate reiteration of the facts on this issue. During the five year period, there were four administrative reviews initiated for Siderca at the request of domestic interested parties. Commerce terminated each of these administrative reviews because Commerce determined that there were no consumption entries of OCTG from Argentina exported by Siderca during these periods.

67. In the administrative review initiated for the period 25 June 1995 – 31 July 1996, Commerce found that, although there were entries of Argentine OCTG during the period, there were no consumption entries of OCTG made by Siderca and, consequently, Commerce terminated the administrative review for Siderca.⁴⁵ Domestic interested parties claimed that Siderca made seven shipments of OCTG during the period that were not included in the import statistics. Commerce determined that six of the shipments were FTZ or TIB entries destined for re-export. For the seventh entry, "Siderca surmised that this shipment of [Argentine OCTG] involved parties other than itself."⁴⁶ The US Customs Service verified that there were no shipments of OCTG made by Siderca during the period under review. There was no assertion made by Siderca nor did Commerce find in this administrative review that the import statistics contained an error or errors.

68. In the administrative review initiated for the period 1 August 1996 – 31 July 1997, Commerce found that the one entry directly attributed to Siderca was destined for re-export and, consequently, Commerce terminated the administrative review for Siderca.⁴⁷ There was no finding that there were no consumption entries of OCTG made during the period. The only finding was that there were no entries of OCTG during the period under review exported by Siderca and that the one entry reportedly made by Siderca was in error.

⁴³ See Exhibit US-23.

⁴⁴ See *Adequacy Memorandum* at 2 (Exhibit ARG-50) and *Decision Memorandum* at 3 (Exhibit ARG-51), respectively.

⁴⁵ See *Oil Country Tubular Goods from Argentina; Rescission of Anti-Dumping Duty Administrative Review*, 62 Fed. Reg. 18747, 18748 (17 April 1998) (Exhibit ARG-29).

⁴⁶ 62 Fed. Reg. at 18748 (Exhibit ARG-29).

⁴⁷ See *Oil Country Tubular Goods from Argentina; Rescission of Anti-Dumping Duty Administrative Review*, 63 Fed. Reg. 49089, 49090 (September 14, 1998) (Exhibit ARG-36).

69. In the administrative review initiated for the period 1 August 1997 – 31 July 1998, Commerce found that the one shipment of Argentine OCTG made during the period was entered for consumption in the United States, but that the shipment was not exported by Siderca.⁴⁸ Consequently, Commerce terminated the administrative review for Siderca.

70. Finally, in the administrative review initiated for the period 1 August 1998 – 31 July 1999, Commerce found that there were no entries of OCTG made by Siderca and, consequently, Commerce terminated the administrative review for Siderca.⁴⁹ There was no finding that there were no consumption entries of OCTG made during the period. In fact, Commerce determined that there was at least one entry of OCTG for consumption made during the period, but that Siderca was not the exporter.

71. Therefore, in the administrative proceeding covering the 1996-1997 period, Commerce determined that there was a minor error concerning one entry in the statistical reporting of the import statistics and, in the administrative review covering the 1998-1999 period, there was an undetermined amount of mechanical tubing misclassified as OCTG, but at least one entry of OCTG for consumption. Again, the Panel should note that Siderca did not raise this issue in either its substantive response or by filing a challenge to Commerce's adequacy determination in the sunset review where it could have been addressed in the context of the sunset proceeding and not for the first time before this Panel.

(c) Did the United States base its adequacy determination in the instant sunset review on these statistics?

72. Yes, as verified by the statistics compiled in the ITC's Trade Database and Commerce's Census Bureau IM-145 import statistics.⁵⁰

Q14. Is there a legal basis for the 50 per cent threshold that determines the adequacy of the foreign exporter's response to the questionnaire in a sunset review?

73. Section 752(c)(3) of the Act leaves to Commerce's discretion the choice of methodology for determining when the response from interested parties to the notice of initiation is "adequate" for the purposes of conducting a full sunset review.⁵¹ Consequently, Commerce promulgated section 351.218(e)(1)(ii) of the *Sunset Regulations* to codify the 50 per cent threshold to give effect to section 752(c)(3) of the Act.⁵²

74. The context of sunset reviews is important in understanding the 50 per cent threshold. While an original investigation requires a factual assessment of dumping, a sunset review requires a counterfactual finding of "likelihood" of future dumping when a finding of dumping has already been made. Article 11.3 does not prescribe the methodology for conducting sunset reviews; instead, it requires that parties be given general procedural and evidentiary rights in accordance with Article 6. The Anti-Dumping Agreement does not require Members to expend resources to unearth information that is being withheld.

⁴⁸ See *Oil Country Tubular Goods from Argentina; Rescission of Anti-Dumping Duty Administrative Review*, 64 Fed. Reg. 4069, 4070 (27 January 1999) (Exhibit ARG-38).

⁴⁹ See *Oil Country Tubular Goods from Argentina; Rescission of Anti-Dumping Duty Administrative Review*, 65 Fed. Reg. 8948 (23 February 2000) (Exhibit ARG-43).

⁵⁰ See *Adequacy Memorandum* at 2 (Exhibit ARG-50) and *Decision Memorandum* at 3 (Exhibit ARG-51), respectively.

⁵¹ See SAA at 880 (Exhibit ARG-5) (in many cases, some but not all parties will respond; nevertheless, where parties demonstrate a "sufficient willingness to participate," the agency will conduct a full sunset review).

⁵² See Preamble, 63 Fed. Reg. at 13518 (Exhibit US-3).

Q15.

- (a) **Does the cross-reference in Article 11.4 of the Agreement incorporate all provisions of Article 6 in Article 11.3? Does the same cross-reference also incorporate Annex II in Article 11.3?**

75. No, the cross-reference in Article 11.4 specifically incorporates only those provisions of Article 6 regarding "evidence and procedure." Please see the answer to Question 10(a) above.

76. The reference in Article 6 to Annex II incorporates Annex II into Article 11.3. However, Annex II is only applicable to the same extent as Article 6.

- (b) **If you are of the view that the cross-reference in Article 11.4 makes article 6.1 of the Agreement applicable to sunset reviews, does Article 6.1 – together with its subparagraphs – require that the investigating authority send questionnaires to exporters in sunset reviews?**

77. No. Article 6.1 requires that interested parties be given notice of the information the authorities require in respect of the investigation in question. It does not require that a "questionnaire" be sent. Commerce published its "sunset questionnaire" and made the reporting requirements part of its regulations.⁵³

- (c) **What significance, if any, should be given to the use of the word "investigation" in paragraphs 1 and 6 of Annex II, and to the use of the word "should" rather than "shall" in all of its paragraphs?**

78. The use of the word "investigation" means that the obligations contained in Annex II are limited to original investigations. The cross-reference in Article 11.4 concerning the application Article 6 to sunset reviews makes the obligations of Article 6 regarding evidence and procedure and, consequently, the obligations in Annex II regarding evidence and procedure applicable in sunset reviews also. The use of the word "should" indicates that the requirement is directory or recommended, rather than mandatory.

Q16. In this sunset review, did Siderca attempt to submit additional evidence to the DOC after its substantive response to the notice of initiation? If so, how did the DOC respond to such attempts?

79. No.

Q17. What is the significance of the word "may" in section 1675(c)(3)(B) of the Tariff Act of 1930?

80. The use of the word "may" means that Commerce has the discretion not to base the final sunset determination on "the facts available" if Commerce determines that other information is more appropriate. In other words, Commerce is not bound by the statute to use "the facts available" in every case where there is an inadequate response to the notice of initiation.

⁵³ See section 351.218(d) (Exhibit US-3).

OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING

Q20. The Panel notes Argentina's arguments in paragraphs 124-147 of its first written submission regarding the alleged irrefutable presumption under US law/practice regarding likelihood determinations in sunset reviews. Please respond to the following questions [. . .]

- (c) **Please explain how you identify "practice" and how you distinguish practice from law? In light of the WTO jurisprudence, please explain your views as to whether practice as such is challengeable under WTO law or not.**

81. A Commerce administrative practice is neither a "measure" within the meaning of the relevant WTO agreements, nor a "mandatory" measure within the meaning of the mandatory/discretionary distinction. A "measure" – which can give rise to an independent violation of WTO obligations – must constitute an instrument with a functional life of its own – i.e., it must *do* something concrete, independently of any other instruments. It is well-established that a "practice" is not a measure.⁵⁴ Indeed, a practice under US law consists of nothing more than individual applications of the US AD law in the context of sunset reviews. While Commerce, like many other administrative agencies in the United States, uses the term "practice" to refer collectively to its past precedent, "practice" has neither a "functional life of its own" nor operates "independently of any other instruments" because the term only refers to individual applications of the US statute and regulations.⁵⁵ In contrast to the US statute and regulations, which clearly function as "measures", no general, *a priori* conclusions about the conduct of sunset reviews under US law can be drawn from an examination of "practice."

82. Moreover, even if "practice" could be considered a measure (and the United States' position is that it cannot), in order for any measure, as such, to be found WTO-inconsistent, the measure must be "mandatory", i.e., it must require WTO-inconsistent action or preclude WTO-consistent action. The Appellate Body and several Panels have explained the distinction between mandatory and discretionary measures. A Member may challenge, and a WTO panel may find against, a measure as such only if the measure "mandates" action that is inconsistent with WTO obligations, or "precludes" action that is WTO-consistent.⁵⁶ In accordance with the normal WTO rules on the allocation of the burden of proof, it is up to the complaining party to demonstrate that the challenged measure mandates WTO-inconsistent action or precludes WTO-consistent action.⁵⁷ "Practice" is *not* binding on Commerce, and, under US administrative law, Commerce may depart from its precedent in any particular case, so long as it explains the reasons for doing so. Therefore, this "practice" does not mandate WTO-inconsistent action or preclude WTO-consistent action.

⁵⁴ See, e.g., *United States – Measures Treating Export Restraints as Subsidies*, WT/DS194/R, Report of the Panel, adopted 29 June 2001 ("US Export Restraints").

⁵⁵ Japan's definition of "practice" does not comport with its status in US law. Japan describes practice as "administrative procedures", which it defines as "a detailed guideline that the administering [sic] authority follows when implementing certain statutes and regulations." Japan's First Submission, para. 8. We define "administrative procedures" and "guidelines" in our answer to Question 82.

⁵⁶ Appellate Body Report, *US – Carbon Steel*, para. 162; *United States – Anti-Dumping Act of 1916* ("1916 Act"), WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, paras. 88-9; Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 2 February 2002, para. 259; see also *US – Export Restraints*, paras. 8.77-9; Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, adopted 30 August 2002, para. 6.22.

⁵⁷ Panel Report, *Brazil – Export Financing Programme for Aircraft – Second Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW/2, adopted 23 August 2001, para. 5.50.

- (d) **What, in your view, is the relationship between "practice" on the one hand and "the SPB" and "the SAA" on the other? Could the SPB and the SAA be considered as legal instruments that embody the US practice with regard to sunset reviews?**

83. Neither the SAA nor the *Sunset Policy Bulletin* can be challenged as independent violations of the AD Agreement because they do not mandate or preclude actions subject to the AD Agreement. The SAA is a type of legislative history which, under US law, provides authoritative interpretative guidance in respect of the statute. Thus, the SAA operates only in conjunction with (and as an interpretive tool for) the US anti-dumping statute, and cannot be independently challenged as WTO-inconsistent.

84. Nor can the *Sunset Policy Bulletin* be challenged independently as a violation of WTO obligations. Under US law, the *Sunset Policy Bulletin* is a non-binding statement, providing Commerce's general understanding of sunset-related issues not explicitly addressed by the statute and regulations.⁵⁸ In this regard, the *Sunset Policy Bulletin* has a legal status comparable to that of agency precedent: Commerce may depart from its policy bulletin in any particular case, so long as it explains the reasons for doing so.⁵⁹ The *Sunset Policy Bulletin* does nothing more than provide Commerce and the public with a guide as to how Commerce may interpret and apply the statute and its regulations in individual cases. Absent application in a particular case, and in conjunction with US sunset laws and regulations, the *Sunset Policy Bulletin* does not "do something concrete" for which it could be subject to independent legal challenge under the WTO agreements.

Q21. Do Articles 2 and 3 of the Agreement apply to sunset reviews? If your response is in the affirmative, do these articles apply to sunset reviews in the same manner in which they apply to original investigations, or in a different manner? Please elaborate on the basis of the provisions of the Agreement and the relevant WTO case law.

85. No. In a sunset review, Commerce is analyzing whether dumping is likely to continue or recur in the absence of the discipline of the duty. An analysis of the likelihood of dumping under Article 11.3 does not require a determination of the magnitude of the margin of dumping because the amount of dumping is not relevant to the issue of whether dumping will continue or recur if the discipline is removed. In other words, the issue in an Article 11.3 sunset review is not *how much* the exporters may dump in the future, but simply *whether* they will dump in the future if the order were to be revoked. Given that there is no obligation under Article 11.3 to calculate a margin of dumping, the provisions of Article 2 relevant to the calculation of a margin of dumping are not applicable to sunset reviews. Indeed, the Appellate Body in *Japan Steel Sunset* concluded that the investigating authority is not required to calculate dumping margins in making a likelihood determination in a sunset review under Article 11.3.⁶⁰

86. The United States explained its position that Article 3 does not apply to sunset reviews in paragraphs 287-302, 304-307, 344-346, and 348-354 of its first written submission, and in its second written submission in paragraph 44 *et seq.*

⁵⁸ *Sunset Policy Bulletin*, 63 FR at 18871 ("This policy bulletin proposes *guidance* regarding the conduct of sunset reviews. As described below, 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.") (emphasis added) (Exhibit ARG-35).

⁵⁹ As a matter of US administrative law, Commerce practice cannot be binding because Commerce is not obliged to follow its own precedent so long as it explains departures from such precedent. Thus, as a matter of law, Commerce practice cannot transform a discretionary measure into a mandatory measure.

⁶⁰ See *Japan Sunset*, paras. 123-124, 155.

Q22. The Panel notes Argentina's statements in paragraphs 132, 184, 190 and 192 of its first written submission. In your view, does Article 11.3 require an investigating authority to calculate the likely dumping margin in a sunset review? If your response is in the negative, does Article 11.3 at least require some kind of comparison between the future export price and the future normal value? Please explain on the basis of the relevant provisions in the Agreement.

87. No.⁶¹

Q23. The Panel notes that the DOC's Issues and Decision Memorandum in the instant sunset review mentions that it was determined that dumping continued over the life of the measure in question and that the margin of dumping did not decline in the same period. Please explain the factual basis of that determination, in particular, please indicate whether the DOC calculated a dumping margin for Siderca or any other Argentine exporter after the imposition of the original measure.

88. As noted above, the Appellate Body in *Japan Sunset* confirmed that Article 11.3 does not require the calculation of a dumping margin. Commerce did not calculate a dumping margin in the sunset review for Siderca or any other Argentine exporter of OCTG during the five years preceding the sunset review because Siderca had ceased shipping to the United States during that time. In the sunset review, Commerce found that dumping continued to exist during the five years preceding the sunset review because there were shipments of Argentine OCTG during four of those five years and dumping duties were assessed on those same imports.⁶² (In a subsequent administrative review, Commerce found a dumping margin of 60.73 per cent for Acindar, an Argentine producer of OCTG that the United States believes began to ship OCTG to the United States in 1997.)⁶³

Q24. What was the factual basis of the DOC's likelihood of continuation or recurrence of dumping determination in this sunset review? What factual information was collected by the DOC and from what sources?

89. Commerce found that dumping was likely to continue or recur based on the existence of dumping and the continued depressed import volumes since the imposition of the OCTG order.⁶⁴ Both the domestic interested parties and Siderca supplied complete substantive responses which contained the factual information required by section 351.218(d)(3) of the *Sunset Regulations*. In addition, domestic interested parties each supplied Argentine OCTG import statistics in their substantive responses, which indicated that Siderca was not the only exporter of Argentina OCTG to the United States.⁶⁵ Commerce used both the ITC Trade Database and the Commerce's Census Bureau statistics to verify the OCTG import statistics submitted by the domestic interested parties.⁶⁶

CUMULATION

Q26. Would cumulation be generally allowed (i.e. both in original investigations and reviews) in the absence of Article 3.3 of the Agreement? What provision, if any, of the Agreement would cumulation violate in the absence of Article 3.3? In other words, in your view, is Article 3.3 an authorization for the use of cumulation, or, is it rather a provision that imposes certain restrictions on the use of cumulation in investigations? Please elaborate on the basis of the relevant provisions of the Agreement.

⁶¹ See US Answer to Panel Question 21 and *Japan Sunset*, paras. 123-124, 155.

⁶² See *Decision Memorandum* at 5 (Exhibit ARG-51).

⁶³ *Notice of Final Results and Rescission in Part of Anti-Dumping Duty Administrative Review; Oil Country Tubular Goods, Other Than Drill Pipe, from Argentina*, 68 Fed. Reg. 13262, 13263 (19 March 2003).

⁶⁴ See *Decision Memorandum* at 4-5 (Exhibit ARG-51).

⁶⁵ See Exhibit US-23.

⁶⁶ See *Adequacy Memorandum* at 2 (ARG-50) and *Decision Memorandum* at 4-5 (Exhibit ARG-51).

90. In the view of the United States, cumulation is generally allowed in both investigations and reviews. Article 3.3 is a provision that imposes certain restrictions on the use of cumulation in investigations, but not in reviews.

91. Nothing in the Anti-Dumping Agreement prevents a Member from cumulating imports. In the absence of a restriction, the measure is permissible and must be found to be in conformity with the Agreement. This is particularly true for sunset reviews, for which no methodology is prescribed.⁶⁷

92. The United States notes that cumulation in anti-dumping investigations was a widespread practice among GATT contracting parties prior to the adoption of Article 3.3 in the Uruguay Round, even though the Tokyo Round Anti-Dumping Code was silent on the subject. If the negotiators of the Uruguay Round had intended to limit the practice of cumulation to investigations, it seems unlikely that they would have made no mention of the subject in Article 11.3.

REQUEST FOR PRELIMINARY RULINGS

Q27. The Panel notes the statement of the United States in paragraph 52 of its oral submission that it was prejudiced in its right to defend itself in these proceedings because of the alleged defects in Argentina's panel request. Please explain in what ways the United States was prejudiced with respect to each alleged inconsistency that the United States is raising in its request for preliminary rulings.

93. The *Understanding on Rules and Procedures Governing Disputes* ("DSU") provides carefully-established procedures to ensure that all parties to the proceeding are afforded due process. These procedures include deadlines calibrated to ensure that the proceeding moves expeditiously while providing parties adequate time to prepare its defence. The lack of due process in the early part of the proceeding, if not cured, is of particular concern because it risks tainting the remaining proceeding.

94. The violation in question is Argentina's failure pursuant to DSU Article 6.2 to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Argentina's failure to do so initially, and its failure to cure the defect, deprived the United States of the opportunity to prepare defence; the United States did not know the legal basis of Argentina's specific claims. From panel establishment through panel selection through preparation of submissions, the United States has not been afforded the full measure of due process required under the DSU, compromising its ability to research the issues at hand, assign personnel, etc. As the Appellate Body has explained, "A defending 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 This requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings."⁶⁸ Indeed, "it is a corollary of the due process objective inherent in Article 6.2 that a complaining party, as the party in control the drafting of a panel request, should bear the risk of any lack of precision in the panel request."⁶⁹

⁶⁷ *Japan Sunset*, para. 123.

⁶⁸ *Thailand – Anti-Dumping Duties on Angles, Shapes and Section of Iron or Non-Alloy Steel H-Beams from Poland*, WT/DS122/AB/R, Report of the Appellate Body adopted 28 September 2000, para. 88.

⁶⁹ *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276, Preliminary Ruling on the Panel's jurisdiction under Article 6.2 of the DSU, 25 June 2003, para. 25.

OTHER

Q29. During the five-year period of imposition of the anti-dumping duty at issue in this case, did any exporter other than Siderca ask for an administrative review for its own duty?

95. During the five years preceding the sunset review, no exporter or producer of Argentine OCTG requested an administrative review of its assigned margin of dumping, including Siderca. As explained in the US answer to question 13(b) from the Panel, the domestic interested parties requested administrative reviews of Siderca for each of three periods (1995-1996; 1996-1997; 1997-1998) prior to the sunset review. These administrative reviews were terminated after Commerce determined, for each of the relevant periods, that Siderca had no imports of OCTG for consumption in the United States. Notably, since the sunset review, another Argentina exporter of OCTG has participated in an administrative review.

Q30. The United States argues that certain US legal instruments such as the SPB cited by Argentina is not a measure that can be challenged as such under the WTO Agreements.⁷⁰ Please provide the Panel with detailed information regarding the legal status and interrelationships, if any, of the following instruments under US law, and in particular whether they are mandatory or discretionary. In particular, in light of the relevant WTO dispute settlement reports, the Panel would like to know whether each of these instruments have an operational life of their own under US law, and whether the DOC and the ITC are required to follow their provisions in sunset reviews.

(i) Tariff Act of 1930 (as amended by the URAA).

96. The Tariff Act of 1930, as amended (the statute or "the Act") is US law. Commerce is bound by the statute – e.g., there is no higher law except for the US Constitution. Consequently, the statute has an operational life of its own.⁷¹ Many of the provisions in the statute are mandatory, although certain provisions are discretionary.

(ii) Statement of Administrative Action,

97. The SAA was prepared and submitted with the Uruguay Round Agreements Act. The function of the SAA is set forth in the SAA itself, as follows:

This Statement describes significant administrative actions proposed to implement the Uruguay Round agreements. In addition, incorporated into this Statement are two other statements required under section 1103: (1) an explanation of how the implementing bill and proposed administrative action will change or affect existing law; and (2) a statement setting forth the reasons why the implementing bill and proposed administrative action are necessary or appropriate to carry out the Uruguay Round agreements.

As is the case with earlier Statements of Administrative Action submitted to the Congress in connection with fast-track bills, this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law. Furthermore, the Administration understands that it is the expectation of the Congress

⁷⁰ See, e.g., First Written Submission of the United States, paras. 193-195.

⁷¹ US – Export Restraints para. 8.91.

that future Administrations will observe and apply the interpretations and commitments set out in this Statement. Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretations of those agreements included in this Statement carry particular authority.⁷²

98. In other words, the SAA is a type of legislative history. In the United States, legislative history is often considered for purposes of ascertaining the meaning of a statute, but cannot change the meaning of, or override, the statute to which it relates. It provides authoritative interpretative guidance in respect of the statute. The status granted to the SAA under the US system, however, is only in respect to its interpretive authority *vis à vis* the statute. Thus, the SAA operates only in conjunction with (and as an interpretive tool for) the US anti-dumping statute has no operational life of its own.⁷³ In addition, the SAA is not mandatory.

(iii) Sunset Regulations (Both the DOC's and the ITC's regulations), and

99. These regulations are US law. The regulations contain both mandatory and discretionary directives. The regulations have force and effect of law and must be followed where the language of the specific provision leaves no discretion. The regulations, however, have provisions that provide for the exercise of discretion by the applicable decision-maker. The regulations are issued in accordance with US federal agency rule-making procedures and are accorded controlling weight by US courts unless they are arbitrary, capricious, or manifestly contrary to the statute.⁷⁴ Thus, the regulations have an independent operational life of their own.⁷⁵

(iv) Sunset Review Policy Bulletin.

100. Under US law, the *Sunset Policy Bulletin* is considered a non-binding statement, providing Commerce's general understanding of sunset-related issues not explicitly addressed by the statute and regulations.⁷⁶ In this regard, the *Sunset Policy Bulletin* has a legal status comparable to that of agency precedent. As with its administrative precedent, Commerce may depart from its policy bulletin in any particular case, so long as it explains the reasons for doing so.⁷⁷ The *Sunset Policy Bulletin* does nothing more than provide Commerce and the public with guidance as to how Commerce may interpret and apply the statute and its regulations in individual cases. The *Sunset Policy Bulletin* does not "do something concrete" for which it could be subject to independent legal challenge under the WTO agreements.

⁷² SAA, page 656 (Exhibit US-11). The reference to "section 1103" is to section 1103 of the Omnibus Trade and Competitiveness Act of 1988 ("1988 Act"). Among other things, the 1988 Act provided the Administration with fast-track negotiating authority with respect to the Uruguay Round.

⁷³ *US Export Restraints*, paras. 8.98 - 8.100.

⁷⁴ See, e.g., *Chevron USA, Inc. v. Natural Resources Defence Council, Inc.*, 467 US 837, 842, 81 L. Ed. 2d 694, 104 S. Ct. 2778-845 (1984).

⁷⁵ *US Export Restraints*, paras. 8.108 - 8.113.

⁷⁶ *Sunset Policy Bulletin*, 63 FR at 18871 ("This policy bulletin proposes *guidance* regarding the conduct of sunset reviews. As described below, 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.") (Emphasis added) (Exhibit ARG-35).

⁷⁷ As a matter of US administrative law, Commerce practice cannot be binding in the sense that Commerce is not obliged to follow its own precedent so long as it explains departures from such precedent. Thus, as a matter of law, Commerce practice cannot transform a discretionary measure into a mandatory measure.

Q31.

(a) Are "the SPB" and "the SAA" binding legal instruments under the US law?

101. No.

(b) If not, please explain the legal status of these two legal instruments under the US law and the purpose of having them?

102. Please see our responses to questions 30(ii) and 30(iv), as well as 20(d).

(c) Can the US administration depart from the provisions of the SAA and the SPB without formally amending them?

103. Both the SAA and the *Sunset Policy Bulletin* are forms of guidance and are not mandatory. Consequently, it is inapposite to discuss the SAA or the *Sunset Policy Bulletin* in terms of "departing" from them.

(d) Have the SAA and the SPB ever been amended?

104. No. There is no mechanism for amending the SAA.

ANNEX E-4

ANSWERS OF THE UNITED STATES TO QUESTIONS OF ARGENTINA – FIRST MEETING

8 January 2004

The Department's Sunset Review of OCTG from Argentina

Q1. Does Article 11.3 require countries to export to the United States in order to obtain termination of the measure? In a case where there are no exports, how would the Department make its determination of likelihood of dumping?

1. Article 11.3 of the AD Agreement does not provide criteria for making a likelihood determination in a sunset review.¹ The *Sunset Policy Bulletin* states that "normally" Commerce would find that a cessation of exports after the imposition of the order is highly probative that it would be likely dumping would continue or recur. Nevertheless, the likelihood determination ultimately would be based on all the facts present on the administrative record in a particular case.²

Q2. If there are some exports, but the company or companies representing 100 percent exports to the United States during the 5 year period do not participate, what is the Department's conclusion regarding this company or companies? Does the statute mandate a likely dumping determination for this company or companies? What is the effect of this finding for the measure as a whole?

2. The statute mandates that Commerce make a company-specific likelihood finding with respect to a respondent interested party that has waived its right to participate in the sunset proceeding.³ However, Commerce's final likelihood determination is made on an order-wide basis. In making that determination, Commerce will take into consideration all the facts present on the administrative record for that sunset review proceeding.

In this case:

(a) Did the Department conclude that the non-responding respondents were likely to dump?

3. Yes.

(b) What was the effect on the decision for the measure as a whole?

4. In the sunset review of OCTG from Argentina, Commerce considered these findings along with all the information on the record of the sunset review, including the prior agency determinations, the substantive and rebuttal responses of the domestic interested parties, and the substantive response

¹ 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 15 December 2003 ("Japan Sunset"), at para. 123.

² See *Sunset Policy Bulletin*, Section II.A, 63 Fed. Reg. at 18872 (Exhibit ARG-35).

³ 19 USC. § 1671(c)(4)(B) (Exhibit ARG-1).

of the only Argentine respondent interested party to file a complete substantive response, Siderca, in accordance with section 751(c)(3)(B) of the Act and section 351.308(f) of the *Sunset Regulations*.⁴

(c) Given that the Department assumed that non-responding respondents represented 100 percent of the exports, what opportunity did Siderca have to affect the outcome of the determination for the measure as a whole?

5. It is not known to the United States what may have been the effect, on the final sunset determination in the sunset review of OCTG from Argentina, of statements Siderca could have made or of any information Siderca may have provided because Siderca chose to participate minimally in the sunset review proceeding. In its substantive response, Siderca did not provide any argument or information beyond its assertions concerning the *de minimis* rate to be applied in a sunset review; nor did Siderca submit a rebuttal response, as provided in section 351.218(d)(4) of the *Sunset Regulations*. In addition, Siderca did not submit any comments on the adequacy determination generally or on the import statistics Commerce used to make the adequacy determination, as provided for in section 351.309(e) of the *Sunset Regulations*. In other words, Siderca failed to avail itself of several opportunities to affect the outcome of the determination.

(d) Under this scenario, what is the evidence that dumping is likely to continue?

6. As stated in the *Final Sunset Determination* and the *Decision Memorandum*, Commerce found that there was a likelihood of continuation or recurrence of dumping in the sunset review of OCTG from Argentina because there was evidence of dumping since the imposition of the order (i.e., there were entries of subject merchandise for which dumping duties were paid). Furthermore, Commerce considered that import volumes were reduced significantly and had remained depressed since the imposition of the order.⁵

Q3. In this case, did DOC attach any relevance to:

(a) the fact that Siderca was the only Argentine exporter ever investigated?

7. No.

(b) the errors that it had discovered in its own statistics in the no-shipment reviews?

8. No. For the administrative reviews initiated and later terminated for Siderca (periods of review ("POR"), 1995-1996, 1996-1997, and 1997-1998), only the administrative review for the 1996-1997 POR had no shipments of OCTG from Argentina. For the other two administrative reviews, although errors were discovered in the DOC's Census Bureau IM-145 import statistics with respect to Siderca's shipments of OCTG to the United States during these reviews, there were other shipments of OCTG from Argentina during these PORs. More importantly, Commerce's adequacy determination in the sunset review of OCTG from Argentina was made using the USITC's Trade Database, not the Census IM-145 data.

9. Notwithstanding Argentina's claims regarding the import statistics, neither Siderca nor any other interested party alleged, during the sunset review, that there were errors in the statistics Commerce used to make its aggregate adequacy determination. Notably, as the only respondent interested party to participate in the sunset review, Siderca did not file comments on the adequacy determination, as provided for in section 351.309(e) of the *Sunset Regulations*.

⁴ See *Issues and Decision Memorandum for the Sunset Reviews of the AD Orders on Oil Country Tubular Goods from Argentina, Italy, Japan, and Korea* (Dep't Comm., 31 Oct. 2000) (final results) ("Decision Memorandum") at 4-5 (Exhibit ARG-51).

⁵ See *Decision Memorandum* at 7 (Exhibit ARG-51).

- (c) **the fact that, even if some of the statistics represented Argentine OCTG, these exports were minuscule and commercially meaningless?**

10. As discussed above, neither Siderca nor any other respondent interested party presented any arguments or comments in the sunset review of OCTG from Argentina concerning the import statistics Commerce used to determine the adequacy of the aggregate response and the effect the order had on shipments to the United States of Argentine OCTG. Notwithstanding Argentina's characterization of the import volumes ("minuscule and commercially meaningless"), the significant reduction and continued depressed condition of the Argentina OCTG imports for the five year period preceding the sunset review formed part of Commerce affirmative likelihood determination in the sunset review of OCTG from Argentina.⁶

Q4. The United States asserts that, under the waiver provisions, "there are two methods for a respondent interested party to waive its right to participate in a sunset review: (1) submit a statement affirmatively waiving participation; or (2) fail to submit a substantive response to Commerce's notice of initiation and allow Commerce to deem its non-response as a waiver of its right to participation." (US First Submission, para. 213). This reading, however, fails to acknowledge the regulation's instruction that Commerce "will consider the failure by a respondent interested party to file a complete substantive response . . . as a waiver of participation" (19 C.F.R. § 351.218(d)(2)(iii) (emphasis added)). Accordingly, the Department will deem a respondent interested party to have waived its participation where it files an incomplete substantive response. How is such a deemed waiver consistent with Articles 11.3?

11. In the sunset review of OCTG from Argentina, the respondent interested parties' response to the notice of initiation could only be characterized in two ways. First, Argentine respondent interested parties who filed a complete substantive response, namely Siderca. Second, the Argentine exporters of OCTG who collectively failed to respond to the notice of initiation at all. No respondent interested party filed an incomplete substantive response in the sunset review of OCTG from Argentina. Consequently, the relevance of this question to the present dispute is not clear to the United States. Furthermore, regardless of whether an interested party is considered to have waived participation, Commerce considers any and all information submitted during the sunset review in making the final sunset determination.

Q5. The United States argues that, "although Commerce used the facts available to make the final sunset determination of likelihood, Commerce did not apply facts available to the issue of whether there was a likelihood that dumping would continue or recur if the order were revoked with respect to Siderca specifically, because the sunset determination is made on an order-wide basis, not a company-specific basis." (US First Submission, para. 214). The United States thus suggests that the Department considered whether Siderca alone would be likely to dump upon termination of the order. What was the positive evidence that Siderca was likely to dump if the order were terminated?

12. Commerce makes its likelihood determination on an order-wide basis in all sunset reviews it conducts. In its final determination in the sunset review of OCTG from Argentina, Commerce did not base its finding of likelihood on Siderca alone.

Q6. In its first submission, the United States asserts that "'current information' is not the issue in a sunset review conducted pursuant to Article 11.3. Rather, the issue under Article 11.3 is whether dumping and injury are likely to continue or recur in the event of the expiry of the

⁶ See *Decision Memorandum* at 45 (Exhibit ARG-51) and *Sunset Policy Bulletin*, 65 Fed. Reg. at 18872 (Exhibit ARG-35).

duty, an inherently forward-looking inquiry." (US First Submission, para. 265). How can a prospective determination of whether dumping is likely to continue, if there is no analysis of whether it exists currently? How does the United States support its statement in the Issues and Decision Memorandum that dumping continued throughout the order?

13. Nothing in Article 11.3 or elsewhere in the AD Agreement states how the Members are to determine likelihood in a sunset review. It is not clear to the United States how a current margin of dumping is necessarily indicative of future dumping. The AD Agreement recognizes this fact in providing footnote 9.

14. Since the affirmative preliminary determination in the original anti-dumping investigation of OCTG from Argentina, the United States has been collecting cash deposits on all entries of the subject merchandise. There have been no administrative reviews of the order. Therefore, for all imports of OCTG entered since the affirmative preliminary determination, the United States has been assessing and collecting dumping duties on OCTG from Argentina.

Q7. Does the United States agree that the determination in the original investigation was made on the basis of the practice of zeroing? Does the United States agree with Argentina's assertion that, without the practice of zeroing, Siderca would not have had a positive dumping margin? Leaving aside the question of whether zeroing was proper at the time of the investigation in 1994/95, does the United States believe that a margin calculated on the basis of zeroing can be relied upon as the evidence of likely continuation or recurrence of dumping in an 11.3 review?

15. The term "zeroing" is not found in the AD Agreement. It arose in the *EC – Bed Linen* dispute and involved the EC's calculation of dumping margins in an original investigation on an average-to-average basis. The Appellate Body found in that dispute determined that the EC's methodology was "inconsistent with Article 2.4.2 of the AD Agreement. Argentina has neither claimed nor demonstrated – nor does the United States agree – that the methodology Commerce used to calculate a dumping margin for Siderca in the original investigation is the same methodology considered by the Appellate Body in *EC Bed Linen*.

The Commission's Sunset Review of OCTG from Argentina

Q1. The United States argues that the Commission applies a "likely" standard in its sunset determinations. The United States supports this statement, in part, by referring to the fact that its national courts ultimately approved the Commission's remand determination in the Usinor litigation. Is it the United States' position that it applied the same standard ("likely") in the remand determination as it applied in the original sunset determination in that case?

16. No. The US International Trade Commission ("ITC") did not apply the same standard in the Usinor remand determination as it had in its original sunset determination in that case. As the ITC explained in its remand determination:

For the purpose of the Commission's determinations on remand in these reviews we follow the Court's instructions to apply the meaning of "likely" as "probable," not "possible." To the extent the Court uses "probable" to impute to "likely" a higher level of certainty of result than "likely," we also apply that standard, but only for purposes of this remand, as we find such standard to be inconsistent with the statute and the SAA.⁷

⁷ *Usinor Remand Determination* at 14 (USITC July 2002) (Exhibit US-19).

17. Later events made it clear that the ITC in the Usinor remand determination applied a "likely" standard that was more stringent than the US Court of International Trade actually construed US domestic law to require. This became evident when the Court subsequently stated in affirming the ITC's remand determination that the Court did not interpret "likely" to "imply any degree of certainty."⁸ Moreover, there was no question on the Court's part that some of the Commissioners in the original determination had construed the term "likely" in a manner consistent with the US statutory requirements.⁹ Indeed, apart from the uncertainty on the part of other Commissioners as to whether the Court's equating the meaning of the term "likely" with the word "probable" required application of a higher standard in sunset reviews, it is fair to say that there would have been little or no disagreement about the standard to be applied in such proceedings.

Q2. Does the United States believe that there is a difference between the term "injury" as used in Article 11.1 and the term "injury" as used in Article 11.3? Does the United States believe that the term "injury" as used in Article 11.1 is different from the term "injury" as used in Article 3?

18. The more appropriate question is whether there is a difference between the *determinations* called for in Articles 11.1 and 11.3. The United States submits that the analysis provided for in Article 11.1 is different than that required by paragraph 3 of Article 11. More specifically, paragraph 1 of Article 11 speaks of existing "injury," using the present tense of the verb "to be," i.e., "dumping which is causing injury." Paragraph 3, on the other hand, speaks of the likelihood of the "continuation or recurrence of . . . injury." These provisions have a different focus and involve entirely different determinations, as the Appellate Body has recognized on more than one occasion.¹⁰

19. As suggested by the response to the first part of Argentina's question, the United States also does not contend that there is a difference in the term "injury" as used in Article 3 and Article 11.1 of the Anti-Dumping Agreement.

Q3. In the sunset review of Argentine OCTG, did the Commission ever consider Argentine exports on an individual basis, that is, without cumulating the Argentine exports with those of other countries? If not, does the United States consider that Argentina has an independent right to termination under Article 11.3?

20. The ITC considered Argentine exports on an individual basis only in connection with its analysis of whether it was appropriate to cumulate the volume and effect of imports from the five countries subject to the sunset reviews. The ITC found that there likely would be a reasonable overlap of competition between the subject imports (including imports from Argentina) and domestically produced casing and tubing, and among the subject imports themselves, sufficient to warrant cumulation.

21. The United States does not consider that Argentina has a right to termination under Article 11.3 premised on the examination only of whether the revocation of the anti-dumping duty order relating to subject imports from Argentina will lead to a continuation or recurrence of injury. As discussed in the United States' second written submission, Article 11.3 does not confer such a right. Moreover, since imports from a group of countries may cumulatively cause injury even though imports from individual countries in this group do not,¹¹ it would be illogical to require that sunset

⁸ *Usinor Industeel v. United States*, Slip Op. 02-152 at 6 (CIT 20 December 2002) (Exhibit US-18).

⁹ *Usinor Industeel v. United States*, Slip Op. 02-152 at 6 (CIT 20 December 2002) (Exhibit US-18); see also, *Indorama Chemicals v. USITC*, Slip Op. 02-105 at 20 (CIT 4 September 2002) (sunset standard based on "likelihood," not certainty) (Exhibit US-26).

¹⁰ *US-German Steel*, AB Report, para. 87, *US-Japan Sunset*, AB Report, para. 106

¹¹ See *European Communities - Anti-dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, Report of the Appellate Body, adopted 22 July 2003, para. 116.

reviews be conducted only on a country-specific basis. Such a requirement would permit anti-dumping duties to expire even though the expiry of the duty would be likely to lead to continuation or recurrence of injury.

Q4. On the facts of this case, could the Commission have rendered an affirmative likelihood of injury determination without conducting a cumulative analysis?

22. The ITC declines to speculate on what the outcome of the sunset review of casing and tubing from Argentina would have been in the absence of cumulation.

Q5. In certain portions of the determination, the Commission refers to "Tenaris." Did the Commission make any allowance for the fact that Tenaris included companies that were not subject to the orders under review? If so, please indicate where the record reflects any consideration of this fact.

23. The ITC recognized that one of the five companies that formed Tenaris (the producer Algoma in Canada) was not located in the five subject countries.¹²

Q6. Does any of the evidence relating to the likely price effects of imports and the likely impact of increased imports relate to Argentina? If so, was this evidence sufficient to demonstrate that injury was likely to continue or recur if the order applicable to Argentine OCTG were terminated?

24. Because the ITC cumulated the likely volume and impact of subject imports from the five countries involved, it did not generally focus on the likely price effects or impact of imports from any single country.

25. Some of the evidence relating to likely price effects relates to casing and tubing from Argentina. For example, in reviewing pricing data from the original investigation, the ITC noted that "[p]urchasers repeatedly stated that subject imports from Argentina, Italy, Korea, Japan, and Mexico exerted downward pressure on domestic prices."¹³ Also, the ITC noted that subject imports were highly substitutable for domestic casing and tubing, and based this conclusion on questionnaire responses from producers, importers and purchasers of casing and tubing.¹⁴ These questionnaire responses sometimes singled out casing and tubing from Argentina.¹⁵ In analyzing the likely impact of subject imports, the ITC did not single out any of the five subject countries.

26. The ITC declines to speculate on what the outcome of the sunset review of casing and tubing from Argentina would have been if the data relating to casing and tubing from Argentina had been examined in isolation.

Q7. In this case, did the Commission consider that injury was likely to continue or likely to recur? If the decision was based on the likelihood of a recurrence of injury, what was the positive evidence that imports from the individual countries would have an impact on the US market at the same time? If there was no positive evidence to support the proposition that imports from the countries would have an impact on the domestic industry at the same time, what is the basis for considering that the cumulated imports were likely to cause a recurrence of injury?

¹² *Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico*, USITC Pub. 3434, Inv. Nos. 701-TA-364, 731-TA-711, and 713-716 (June 2001) ("*ITC Report*") at 16 (Exhibit ARG-54)

¹³ *ITC Report* at 21.

¹⁴ *ITC Report* at 21.

¹⁵ *ITC Report* at II-17-18.

27. Article 11.3 does not prescribe the methodology Members use in conducting sunset reviews. The ITC found that revocation of the anti-dumping duty orders from the five subject countries, and the countervailing duty order on imports of casing and tubing from Italy, would be likely to lead to continuation *or* recurrence of material injury to an industry in the United States.¹⁶ Such a finding is consistent with Article 11.3.¹⁷ There is no obligation under Article 11 to determine that injury would be likely to recur as opposed to likely to continue, as there is no requirement for a determination that the dumping duties have eliminated the injury. Further, a finding that either injury is likely to recur or continue, when coupled with a similar finding regarding dumping, is adequate to permit retention of the anti-dumping duty order.

¹⁶ *ITC Report* at 1.

¹⁷ *See, United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon-Quality Line Pipe From Korea*, WT/DS202/AB/R, Report of the Appellate Body, adopted 8 March 2002, para. 167 (unnecessary to make a discrete finding of "serious injury" or "threat of serious injury" when making a determination whether to apply a safeguard measure).

ANNEX E-5

ANSWERS OF THE UNITED STATES TO QUESTIONS OF ARGENTINA – FIRST MEETING (REVISED VERSION)

27 February 2004

The Department's Sunset Review of OCTG from Argentina

Q1. Does Article 11.3 require countries to export to the United States in order to obtain termination of the measure? In a case where there are no exports, how would the Department make its determination of likelihood of dumping?

1. Article 11.3 of the AD Agreement does not provide criteria for making a likelihood determination in a sunset review.¹ The *Sunset Policy Bulletin* states that "normally" Commerce would find that a cessation of exports after the imposition of the order is highly probative that it would be likely dumping would continue or recur. Nevertheless, the likelihood determination ultimately would be based on all the facts present on the administrative record in a particular case.²

Q2. If there are some exports, but the company or companies representing 100 percent exports to the United States during the 5 year period do not participate, what is the Department's conclusion regarding this company or companies? Does the statute mandate a likely dumping determination for this company or companies? What is the effect of this finding for the measure as a whole?

2. The statute mandates that Commerce make a company-specific likelihood finding with respect to a respondent interested party that has waived its right to participate in the sunset proceeding.³ However, Commerce's final likelihood determination is made on an order-wide basis. In making that determination, Commerce will take into consideration all the facts present on the administrative record for that sunset review proceeding.

In this case:

(a) Did the Department conclude that the non-responding respondents were likely to dump?

3. Yes.

(b) What was the effect on the decision for the measure as a whole?

4. In the sunset review of OCTG from Argentina, Commerce considered these findings along with all the information on the record of the sunset review, including the prior agency determinations, the substantive and rebuttal responses of the domestic interested parties, and the substantive response

¹ 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 15 December 2003 ("Japan Sunset"), at para. 123.

² See *Sunset Policy Bulletin*, Section II.A, 63 Fed. Reg. at 18872 (Exhibit ARG-35).

³ 19 USC. § 1671(c)(4)(B) (Exhibit ARG-1).

of the only Argentine respondent interested party to file a complete substantive response, Siderca, in accordance with section 751(c)(3)(B) of the Act and section 351.308(f) of the *Sunset Regulations*.⁴

(c) Given that the Department assumed that non-responding respondents represented 100 percent of the exports, what opportunity did Siderca have to affect the outcome of the determination for the measure as a whole?

5. It is not known to the United States what may have been the effect, on the final sunset determination in the sunset review of OCTG from Argentina, of statements Siderca could have made or of any information Siderca may have provided because Siderca chose to participate minimally in the sunset review proceeding. In its substantive response, Siderca did not provide any argument or information beyond its assertions concerning the *de minimis* rate to be applied in a sunset review; nor did Siderca submit a rebuttal response, as provided in section 351.218(d)(4) of the *Sunset Regulations*. In addition, Siderca did not submit any comments on the adequacy determination generally or on the import statistics Commerce used to make the adequacy determination, as provided for in section 351.309(e) of the *Sunset Regulations*. In other words, Siderca failed to avail itself of several opportunities to affect the outcome of the determination.

(d) Under this scenario, what is the evidence that dumping is likely to continue?

6. As stated in the *Final Sunset Determination* and the *Decision Memorandum*, Commerce found that there was a likelihood of continuation or recurrence of dumping in the sunset review of OCTG from Argentina because there was evidence of dumping since the imposition of the order (i.e., there were entries of subject merchandise for which dumping duties were paid). Furthermore, Commerce considered that import volumes were reduced significantly and had remained depressed since the imposition of the order.⁵

Q3. In this case, did DOC attach any relevance to:

(a) the fact that Siderca was the only Argentine exporter ever investigated?

7. No.

(b) the errors that it had discovered in its own statistics in the no-shipment reviews?

8. No. For the administrative reviews initiated and later terminated for Siderca (periods of review ("POR"), 1995-1996, 1996-1997, and 1997-1998), only the administrative review for the 1996-1997 POR had no shipments of OCTG from Argentina. For the other two administrative reviews, although errors were discovered in the DOC's Census Bureau IM-145 import statistics with respect to Siderca's shipments of OCTG to the United States during these reviews, there were other shipments of OCTG from Argentina during these PORs. More importantly, Commerce's adequacy determination in the sunset review of OCTG from Argentina was made using the USITC's Trade Database, not the Census IM-145 data.

9. Notwithstanding Argentina's claims regarding the import statistics, neither Siderca nor any other interested party alleged, during the sunset review, that there were errors in the statistics Commerce used to make its aggregate adequacy determination. Notably, as the only respondent interested party to participate in the sunset review, Siderca did not file comments on the adequacy determination, as provided for in section 351.309(e) of the *Sunset Regulations*.

⁴ See *Issues and Decision Memorandum for the Sunset Reviews of the AD Orders on Oil Country Tubular Goods from Argentina, Italy, Japan, and Korea* (Dep't Comm., 31 Oct. 2000) (final results) ("Decision Memorandum") at 4-5 (Exhibit ARG-51).

⁵ See *Decision Memorandum* at 7 (Exhibit ARG-51).

- (c) **the fact that, even if some of the statistics represented Argentine OCTG, these exports were minuscule and commercially meaningless?**

10. As discussed above, neither Siderca nor any other respondent interested party presented any arguments or comments in the sunset review of OCTG from Argentina concerning the import statistics Commerce used to determine the adequacy of the aggregate response and the effect the order had on shipments to the United States of Argentine OCTG. Notwithstanding Argentina's characterization of the import volumes ("minuscule and commercially meaningless"), the significant reduction and continued depressed condition of the Argentina OCTG imports for the five year period preceding the sunset review formed part of Commerce affirmative likelihood determination in the sunset review of OCTG from Argentina.⁶

Q4. The United States asserts that, under the waiver provisions, "there are two methods for a respondent interested party to waive its right to participate in a sunset review: (1) submit a statement affirmatively waiving participation; or (2) fail to submit a substantive response to Commerce's notice of initiation and allow Commerce to deem its non-response as a waiver of its right to participation." (US First Submission, para. 213). This reading, however, fails to acknowledge the regulation's instruction that Commerce "will consider the failure by a respondent interested party to file a complete substantive response . . . as a waiver of participation" (19 C.F.R. § 351.218(d)(2)(iii) (emphasis added)). Accordingly, the Department will deem a respondent interested party to have waived its participation where it files an incomplete substantive response. How is such a deemed waiver consistent with Articles 11.3?

11. In the sunset review of OCTG from Argentina, the respondent interested parties' response to the notice of initiation could only be characterized in two ways. First, Argentine respondent interested parties who filed a complete substantive response, namely Siderca. Second, the Argentine exporters of OCTG who collectively failed to respond to the notice of initiation at all. No respondent interested party filed an incomplete substantive response in the sunset review of OCTG from Argentina. Consequently, the relevance of this question to the present dispute is not clear to the United States. Furthermore, regardless of whether an interested party is considered to have waived participation, Commerce considers any and all information submitted during the sunset review in making the final sunset determination.

Q5. The United States argues that, "although Commerce used the facts available to make the final sunset determination of likelihood, Commerce did not apply facts available to the issue of whether there was a likelihood that dumping would continue or recur if the order were revoked with respect to Siderca specifically, because the sunset de termination is made on an order-wide basis, not a company-specific basis." (US First Submission, para. 214). The United States thus suggests that the Department considered whether Siderca alone would be likely to dump upon termination of the order. What was the positive evidence that Siderca was likely to dump if the order were terminated?

12. Commerce makes its likelihood determination on an order-wide basis in all sunset reviews it conducts. In its final determination in the sunset review of OCTG from Argentina, Commerce did not base its finding of likelihood on Siderca alone.

Q6. In its first submission, the United States asserts that "'current information' is not the issue in a sunset review conducted pursuant to Article 11.3. Rather, the issue under Article 11.3 is whether dumping and injury are likely to continue or recur in the event of the expiry of the

⁶ See *Decision Memorandum* at 45 (Exhibit ARG-51) and *Sunset Policy Bulletin*, 65 Fed. Reg. at 18872 (Exhibit ARG-35).

duty, an inherently forward-looking inquiry." (US First Submission, para. 265). How can a prospective determination of whether dumping is likely to continue, if there is no analysis of whether it exists currently? How does the United States support its statement in the Issues and Decision Memorandum that dumping continued throughout the order?

13. Nothing in Article 11.3 or elsewhere in the AD Agreement states how the Members are to determine likelihood in a sunset review. It is not clear to the United States how a current margin of dumping is necessarily indicative of future dumping. The AD Agreement recognizes this fact in providing footnote 9.

14. Since the issuance of the anti-dumping duty order following original anti-dumping investigation of OCTG from Argentina, the United States has been collecting cash deposits on all entries of the subject merchandise. There have been no administrative reviews of the order. Therefore, for all imports of OCTG entered since the anti-dumping duty order, the United States has been assessing and collecting dumping duties on OCTG from Argentina.

Q7. Does the United States agree that the determination in the original investigation was made on the basis of the practice of zeroing? Does the United States agree with Argentina's assertion that, without the practice of zeroing, Siderca would not have had a positive dumping margin? Leaving aside the question of whether zeroing was proper at the time of the investigation in 1994/95, does the United States believe that a margin calculated on the basis of zeroing can be relied upon as the evidence of likely continuation or recurrence of dumping in an 11.3 review?

15. The term "zeroing" is not found in the AD Agreement. It arose in the *EC – Bed Linen* dispute and involved the EC's calculation of dumping margins in an original investigation on an average-to-average basis. The Appellate Body found in that dispute determined that the EC's methodology was "inconsistent with Article 2.4.2 of the AD Agreement. Argentina has neither claimed nor demonstrated – nor does the United States agree – that the methodology Commerce used to calculate a dumping margin for Siderca in the original investigation is the same methodology considered by the Appellate Body in *EC Bed Linen*.

The Commission's Sunset Review of OCTG from Argentina

Q1. The United States argues that the Commission applies a "likely" standard in its sunset determinations. The United States supports this statement, in part, by referring to the fact that its national courts ultimately approved the Commission's remand determination in the Usinor litigation. Is it the United States' position that it applied the same standard ("likely") in the remand determination as it applied in the original sunset determination in that case?

16. No. The US International Trade Commission ("ITC") did not apply the same standard in the Usinor remand determination as it had in its original sunset determination in that case. As the ITC explained in its remand determination:

For the purpose of the Commission's determinations on remand in these reviews we follow the Court's instructions to apply the meaning of "likely" as "probable," not "possible." To the extent the Court uses "probable" to impute to "likely" a higher level of certainty of result than "likely," we also apply that standard, but only for purposes of this remand, as we find such standard to be inconsistent with the statute and the SAA.⁷

⁷ *Usinor Remand Determination* at 14 (USITC July 2002) (Exhibit US-19).

17. Later events made it clear that the ITC in the Usinor remand determination applied a "likely" standard that was more stringent than the US Court of International Trade actually construed US domestic law to require. This became evident when the Court subsequently stated in affirming the ITC's remand determination that the Court did not interpret "likely" to "imply any degree of certainty."⁸ Moreover, there was no question on the Court's part that some of the Commissioners in the original determination had construed the term "likely" in a manner consistent with the US statutory requirements.⁹ Indeed, apart from the uncertainty on the part of other Commissioners as to whether the Court's equating the meaning of the term "likely" with the word "probable" required application of a higher standard in sunset reviews, it is fair to say that there would have been little or no disagreement about the standard to be applied in such proceedings.

Q2. Does the United States believe that there is a difference between the term "injury" as used in Article 11.1 and the term "injury" as used in Article 11.3? Does the United States believe that the term "injury" as used in Article 11.1 is different from the term "injury" as used in Article 3?

18. The more appropriate question is whether there is a difference between the *determinations* called for in Articles 11.1 and 11.3. The United States submits that the analysis provided for in Article 11.1 is different than that required by paragraph 3 of Article 11. More specifically, paragraph 1 of Article 11 speaks of existing "injury," using the present tense of the verb "to be," i.e., "dumping which is causing injury." Paragraph 3, on the other hand, speaks of the likelihood of the "continuation or recurrence of . . . injury." These provisions have a different focus and involve entirely different determinations, as the Appellate Body has recognized on more than one occasion.¹⁰

19. As suggested by the response to the first part of Argentina's question, the United States also does not contend that there is a difference in the term "injury" as used in Article 3 and Article 11.1 of the Anti-Dumping Agreement.

Q3. In the sunset review of Argentine OCTG, did the Commission ever consider Argentine exports on an individual basis, that is, without cumulating the Argentine exports with those of other countries? If not, does the United States consider that Argentina has an independent right to termination under Article 11.3?

20. The ITC considered Argentine exports on an individual basis only in connection with its analysis of whether it was appropriate to cumulate the volume and effect of imports from the five countries subject to the sunset reviews. The ITC found that there likely would be a reasonable overlap of competition between the subject imports (including imports from Argentina) and domestically produced casing and tubing, and among the subject imports themselves, sufficient to warrant cumulation.

21. The United States does not consider that Argentina has a right to termination under Article 11.3 premised on the examination only of whether the revocation of the anti-dumping duty order relating to subject imports from Argentina will lead to a continuation or recurrence of injury. As discussed in the United States' second written submission, Article 11.3 does not confer such a right. Moreover, since imports from a group of countries may cumulatively cause injury even though imports from individual countries in this group do not,¹¹ it would be illogical to require that sunset

⁸ *Usinor Industeel v. United States*, Slip Op. 02-152 at 6 (CIT 20 December 2002) (Exhibit US-18).

⁹ *Usinor Industeel v. United States*, Slip Op. 02-152 at 6 (CIT 20 December 2002) (Exhibit US-18); see also, *Indorama Chemicals v. USITC*, Slip Op. 02-105 at 20 (CIT 4 September 2002) (sunset standard based on "likelihood," not certainty) (Exhibit US-26).

¹⁰ *US-German Steel*, AB Report, para. 87, *US-Japan Sunset*, AB Report, para. 106

¹¹ See *European Communities - Anti-dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, Report of the Appellate Body, adopted 22 July 2003, para. 116.

reviews be conducted only on a country-specific basis. Such a requirement would permit anti-dumping duties to expire even though the expiry of the duty would be likely to lead to continuation or recurrence of injury.

Q4. On the facts of this case, could the Commission have rendered an affirmative likelihood of injury determination without conducting a cumulative analysis?

22. The ITC declines to speculate on what the outcome of the sunset review of casing and tubing from Argentina would have been in the absence of cumulation.

Q5. In certain portions of the determination, the Commission refers to "Tenaris." Did the Commission make any allowance for the fact that Tenaris included companies that were not subject to the orders under review? If so, please indicate where the record reflects any consideration of this fact.

23. The ITC recognized that one of the five companies that formed Tenaris (the producer Algoma in Canada) was not located in the five subject countries.¹²

Q6. Does any of the evidence relating to the likely price effects of imports and the likely impact of increased imports relate to Argentina? If so, was this evidence sufficient to demonstrate that injury was likely to continue or recur if the order applicable to Argentine OCTG were terminated?

24. Because the ITC cumulated the likely volume and impact of subject imports from the five countries involved, it did not generally focus on the likely price effects or impact of imports from any single country.

25. Some of the evidence relating to likely price effects relates to casing and tubing from Argentina. For example, in reviewing pricing data from the original investigation, the ITC noted that "[p]urchasers repeatedly stated that subject imports from Argentina, Italy, Korea, Japan, and Mexico exerted downward pressure on domestic prices."¹³ Also, the ITC noted that subject imports were highly substitutable for domestic casing and tubing, and based this conclusion on questionnaire responses from producers, importers and purchasers of casing and tubing.¹⁴ These questionnaire responses sometimes singled out casing and tubing from Argentina.¹⁵ In analyzing the likely impact of subject imports, the ITC did not single out any of the five subject countries.

26. The ITC declines to speculate on what the outcome of the sunset review of casing and tubing from Argentina would have been if the data relating to casing and tubing from Argentina had been examined in isolation.

Q7. In this case, did the Commission consider that injury was likely to continue or likely to recur? If the decision was based on the likelihood of a recurrence of injury, what was the positive evidence that imports from the individual countries would have an impact on the US market at the same time? If there was no positive evidence to support the proposition that imports from the countries would have an impact on the domestic industry at the same time, what is the basis for considering that the cumulated imports were likely to cause a recurrence of injury?

¹² *Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico*, USITC Pub. 3434, Inv. Nos. 701-TA-364, 731-TA-711, and 713-716 (June 2001) ("*ITC Report*") at 16 (Exhibit ARG-54)

¹³ *ITC Report* at 21.

¹⁴ *ITC Report* at 21.

¹⁵ *ITC Report* at II-17-18.

27. Article 11.3 does not prescribe the methodology Members use in conducting sunset reviews. The ITC found that revocation of the anti-dumping duty orders from the five subject countries, and the countervailing duty order on imports of casing and tubing from Italy, would be likely to lead to continuation *or* recurrence of material injury to an industry in the United States.¹⁶ Such a finding is consistent with Article 11.3.¹⁷ There is no obligation under Article 11 to determine that injury would be likely to recur as opposed to likely to continue, as there is no requirement for a determination that the dumping duties have eliminated the injury. Further, a finding that either injury is likely to recur or continue, when coupled with a similar finding regarding dumping, is adequate to permit retention of the anti-dumping duty order.

¹⁶ *ITC Report* at 1.

¹⁷ *See, United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon-Quality Line Pipe From Korea*, WT/DS202/AB/R, Report of the Appellate Body, adopted 8 March 2002, para. 167 (unnecessary to make a discrete finding of "serious injury" or "threat of serious injury" when making a determination whether to apply a safeguard measure).

ANNEX E-6

QUESTION OF THE EUROPEAN COMMUNITIES TO THE UNITED STATES – THIRD PARTIES SESSION

Does the United States consider that the phrase “during the investigation phase” in Article 2.4.2 *AD Agreement* means that Article 2.4.2 does not apply in an Article 11.3 review?

If so, does the United States consider that the word “investigation” in Article 2.4.2 *AD Agreement* refers only to initial or original investigations within the meaning of Article 5 *AD Agreement*, or does it also refer to an investigation as that word is used in Article 6 *AD Agreement* – and if not the latter, why not?

Taking into account the fact that 11.4 *AD Agreement*, unlike 11.5, does not use the term *mutatis mutandis*, does the United States consider that an Article 11.3 review does not involve an investigation within the meaning of Article 6 *AD Agreement*, notwithstanding the repeated use of the word “investigation” in Article 6, and if so, why?

Would the United States explain the consistency of its position with the use in WTO anti-dumping law, in United States legislation and in the United States documents relating to the contested determination, of the terms : definition of dumping; anti-dumping proceedings; initial or original investigation; and review investigation – with particular regard to the instances identified in footnotes 43, 46, 47 and 48 of the European Communities’ written submission?

Having regard, in particular, to the *EC – Bed Linen* case, does the United States consider that, under the current *AD Agreement*, zeroing such as that used in the original dumping calculation in the present case would constitute a “fair comparison” within the meaning of Article 2.4 *AD Agreement*, and if so, why?

ANNEX E-7

ANSWERS OF MEXICO TO QUESTIONS OF ARGENTINA – THIRD PARTIES SESSION

In its oral statement to the Panel on 10 December, Mexico referred to the Sunset Review of Oil Country Tubular Goods (OCTG) from Mexico, included as Exhibit ARG-63, Tab-179, in Argentina's First Submission. Would Mexico indicate the type of review that was conducted and the result? Would Mexico indicate the nature and content of the information that it supplied to the Department of Commerce? Would Mexico please describe whether the information that Mexico provided to the Department of Commerce was relied upon by the Department in making its determination? Would Mexico please describe the basis for the Department's determination in that case?

This document contains the following replies to the clarifications requested by the Government of Argentina:

1. Type of review and results

In the sunset review of oil country tubular goods (OCTG) from Mexico, the Department of Commerce (hereafter the "Department") conducted a "full review" as defined in United States legislation. The decision to conduct a "full review" is mentioned in the documents included in Exhibit ARG-63, Tab-179, which includes the Department's Final and Preliminary Determinations in the sunset review. The result of the "full" review in this case was a decision that revocation would be likely to lead to a recurrence of dumping.

2. Nature and content of the information provided during the review

The two major Mexican exporters of OCTG took part in the review.

As described in the *Issues and Decisions Memorandum* accompanying both the Final Determination and the Preliminary Determination included in Exhibit ARG-63, Tab-179, both companies explained in detail that they had participated in annual reviews and that the Department had concluded that the two countries had not engaged in dumping. Particularly, in the case of TAMSA, the fact that for three consecutive reviews the margin of dumping was zero was the best evidence that dumping was not likely to continue or recur. Additionally, with regard to the fact that the Department used the margin of the original investigation (21.7 per cent, which was a result of a disputed claim that TAMSA withheld certain information related to the company's financial expenses during the sharp devaluation of the Mexican peso in 1994), TAMSA provided evidence to show that such rate from the original investigation could no longer be applicable owing to two significant changes since the time of the original investigation five years earlier. First, the company's level of foreign currency indebtedness had been significantly reduced. Second, the stability of the Mexican peso meant that there had been no major risk of a devaluation of the peso, similar to that used as the basis for the "best information available" calculation in the original investigation.

In the case of the other Mexican company, Hylsa explained that, because it had not been investigated in the original 1994/1995 investigation and, in the only annual review in which it had participated it was found not to be dumping, there was no factual basis to consider that it was ever dumping or that dumping was likely to continue or recur.

3. The Department's consideration of the information provided by the Mexican companies and the basis for the Department's determination

With regard to the question whether the Department relied upon the Mexican exporters' information and the basis for the Department's determination, the Preliminary and Final Determinations show that the Department totally ignored the information provided by the exporters. In fact, both determinations demonstrate that the Department relied systematically on the statute, the Statement of Administrative Action and the *Sunset Policy Bulletin* as the basis for its determination, without taking into account the information submitted by the exporters. Thus, the sole basis for determining that dumping was likely to continue or recur was import volumes.

This conclusion can be drawn from the *Issues and Decision Memorandum* included in Exhibit ARG-63, Tab-179. The Memorandum summarizes the arguments presented in the parties' case and rebuttal briefs, including TAMSAs argument that the Preliminary Determination "relied too heavily on 'inferences' when it determined that dumping is likely to recur" and Hylsa's argument that the information it submitted showed that dumping was not likely to recur. Notwithstanding this and other evidence submitted by the Mexican companies, the response to these arguments appears on page 4 of the Memorandum, demonstrating the following decision-making process:

- (i) The statute, the Statement of Administrative Action and *Sunset Policy Bulletin* provide "guidance on methodological and analytical issues, including the basis for likelihood determinations". Particularly, the *Sunset Policy Bulletin* states that the Department "normally will determine that revocation of an anti-dumping order is likely to lead to continuation or recurrence of dumping where dumping was eliminated after the issuance of the order and import volumes of the subject merchandise declined significantly"; and
- (ii) given the fact that there was a decrease in import volumes after the imposition of the anti-dumping measure in 1995;¹
- (iii) the Department concluded that "Because we continue to find that Mexican export volumes in the post-order period were significantly lower than pre-order levels, we also continue to find that a recurrence of dumping of OCTG from Mexico is likely if the order were to be revoked". Thus, the Department determined that, if the order were removed, it "would be likely to lead to continuation or recurrence of dumping at the following percentage weighted-average margins": TAMSAs 27.70 per cent, Hylsa 21.70 per cent; "all others" 21.70 per cent. *Issues and Decision Memorandum*, included in Exhibit ARG-63, Tab-179.

¹ It is important to note that, responding to TAMSAs explanation of why the import volumes had decreased, the Department stated that the business justification for the lower volume "in no way conflicted with the Department's inference; if it became 'prudent and necessary' to make fewer sales at more fairly traded prices while the discipline of the order was in place, it is reasonable to infer that dumping would be likely to resume if such disciplines ceased to exist and it was not longer 'necessary' for TAMSAs and other Mexican exporters to maintain the same business strategy".

ANNEX E-8

ANSWERS OF ARGENTINA TO QUESTIONS OF THE PANEL – SECOND MEETING

13 February 2004

1. The Panel notes "Heading A" on page 36 of Argentina's first written submission and Argentina's statements in paragraph 120 of its first written submission and paragraph 51 of its second written submission. Please clarify whether Argentina's claim challenging the US law's waiver provisions under Articles 11.3, 6.1 and 6.2 of the Agreement are limited to "deemed waivers", or, whether they also take issue with "affirmative waivers".

Response:

Argentina believes that both forms of waivers – “deemed waivers” and “affirmative waivers” – are inconsistent with Article 11.3 of the Agreement. The statute and the regulations mandate an affirmative determination of likelihood of dumping in the event of a waiver, whether resulting from an affirmative statement of waiver, no response, an incomplete response, or the 50 per cent threshold test. In Argentina’s view, the notion of a statute and regulation mandating an affirmative determination of likelihood of dumping without any analysis is inconsistent with Article 11.3.

If a party does not cooperate (for example, through an affirmative waiver), the Anti-Dumping Agreement permits the investigating authority to render its determination on the basis of facts available, subject to the disciplines of Article 6.8 and Annex II. However, in no circumstance is the authority relieved from the obligation of conducting an investigation and making a determination based on evidence.

Argentina’s challenge with respect to Articles 6.1 and 6.2 is limited to the “deemed waiver.” Under the deemed waiver provision,¹ the Department considers an individual respondent to have waived participation where the respondent submits a substantive response that is inadequate – either because it is incomplete or because the respondent does not satisfy the 50 per cent threshold test.² By requiring the Department to render an affirmative likelihood determination for a respondent that submits a substantive response, the deemed waiver provision violates Articles 6.1 and 6.2.

As to Argentina’s “as applied” argument, the only waiver(s) in the case of the Department’s sunset review of the anti-dumping measure on Argentine OCTG would be classified as “deemed waiver(s).” No party affirmatively stated that it would not participate, and in fact the only response received indicated that the principal Argentine producer/exporter (Siderca) would cooperate fully. The deemed waiver(s) arose because (1) the Department considered Siderca’s substantive response to be “inadequate”³ and/or (2) the Department believed that other exporters should have responded. Either way, the statute and regulation then mandated that the Department render an affirmative likelihood determination. As explained in Argentina’s brief, the deemed waiver led directly to an affirmative likelihood determination for Argentina in this case.

¹ 19 C.F.R. § 351.218(d)(2)(iii).

² See 19 C.F.R. § 351.218(e)(1)(ii)(A)(requiring “complete” responses from exporters representing 50 per cent of total exports); 19 C.F.R. § 351.218(d)(2)(iii)(stating that incomplete responses will constitute waiver); and 19 USC. § 1675(c)(4)(B)(stating that waiver mandates an affirmative determination of likely dumping).

³ See *Determination to Expedite* at 2 (ARG-50); *Issues and Decision Memorandum* at 3, 5, 7 (ARG-51).

2. The Panel notes that in sections VII.C.2 and VII.C.3 of its first written submission, Argentina challenges the application of the US waiver provisions to Siderca whereas in the following part of paragraph 6 of its second oral statement it also takes issue with the application of these provisions to Argentina:

Indeed, the Department's application of the waiver provisions to Siderca (or, at a minimum, to Argentina) is plainly indicated in the Department's Issues and Decision Memorandum.

Please clarify the scope of Argentina's claim. More particularly, please explain whether, in the view of Argentina, the alleged application of the US waiver provisions in this sunset review impaired the rights of Argentina or Siderca.

Response:

Argentina's First Submission presents the waiver claim as it arises from the *Issues and Decision Memorandum*, which indicates that a waiver was applied to the "respondent interested parties,"⁴ which Argentina reasonably interpreted to include Siderca. Nothing in the *Issues and Decision Memorandum* indicates that Argentina's understanding of the application of the waiver provision to Siderca was incorrect. The phrase "non-responding respondents" is never mentioned. Based on the description in the *Issues and Decision Memorandum*, Argentina considered that the waiver provisions were applied to Siderca, and therefore claimed that the application of the waiver provisions to Siderca was unjustified, violated Articles 11.3, 6.1, and 6.2 of the Agreement, and impaired Argentina's right under Article 11.3 to termination of the measure applied to its exports.

It was not until the US First Written Submission that the term "non-responding respondents" was used, and that the United States offered the argument that it did not apply the waiver provision to Siderca.⁵ Argentina submits that accepting this argument by the United States would require the Panel to disregard the words used in the *Issues and Decision Memorandum*, which the Panel cannot do. Consistent with the statutory and regulatory scheme providing for "deemed waivers,"⁶ the *Determination to Expedite* and the *Issues and Decision Memorandum* unambiguously state that the Department found Siderca's substantive response to be "inadequate," and that because the Department "did not receive an adequate response from respondent interested parties[,] . . . [t]his constitutes a waiver of participation."⁷

Even if the Panel accepts the US *ex post facto* justification, Argentina believes that the application of the waiver provisions to the so-called non-responding respondents also violates Articles 11.3, 6.1, and 6.2. With respect to Siderca, despite having offered to cooperate fully, the application of the waiver provision to the non-responding respondents mandated an affirmative likelihood determination, which prevented any type of "investigation" or "determination" based on an analysis of facts and arguments. With respect to Argentina, it deprived Argentina of termination of the measure without the type of substantive analysis that is required by Article 11.3, and without affording Argentina's principal OCTG producer and exporter, Siderca, the right to participate.

⁴ *Issues and Decision Memorandum* at 5 (ARG-51).

⁵ US First Submission, para. 216.

⁶ See 19 C.F.R. § 351.218(e)(1)(ii)(A); 19 C.F.R. § 351.218(d)(2)(iii); and 19 USC. § 1675(c)(4)(B).

⁷ *Determination to Expedite* at 2 (ARG-50); *Issues and Decision Memorandum* at 3, 5, 7 (ARG-51).

11. The Panel notes Argentina's allegation in its first written submission that in this sunset review the DOC failed to use the "likely" standard and applied a different standard instead.⁸

(a) The Panel notes that Argentina did not mention this claim in its second written submission. Please clarify whether Argentina is still pursuing this claim.

Response:

Argentina would like to clarify that it continues to make this claim. Argentina's claim is summarized in Heading D on page 58 of its First Written Submission. This claim contains several arguments including: (1) that Article 2 disciplines apply to Article 11.3 reviews; (2) that Article 11.3 reviews are prospective in nature and require fresh information; (3) that dumping must be "probable"; (4) that reviews are subject to the evidentiary requirements of Article 6; and (5) that the likely determination must be based on positive evidence. Argentina's claim, developed in Section D of its First Written Submission, is that the Department failed to satisfy each of these obligations and that its decision therefore violated the provisions of Articles 6 and 11.3.

In its Second Written Submission, Argentina developed the same arguments in Section III.C.3, beginning on page 40 (paragraphs 131-136). Paragraph 133 states: "The Department's reliance on such flawed and dated information necessarily resulted in speculation as to whether or not dumping would be likely to continue or recur were the order to be terminated, rather than a determination based on positive evidence."

In addition, Argentina's oral statement in the Panel's second substantive meeting with the Parties continues the development of this argument in paragraphs 20-23. In paragraph 22, Argentina speaks to the standard, stating: "Also, the United States still has never offered a logical explanation of what the 1.36 per cent rate says about future dumping, let alone the likelihood of future dumping. The rate is historic, with no relationship whatsoever to the forward-looking determination required to invoke the exception of Article 11.3 and continue the measure."

Finally, and equally important, throughout these proceedings, Argentina has argued that the Department employs a WTO-inconsistent presumption in all sunset reviews.⁹ Operating together, the statute, the SAA, and Section II.A.3 of the *Sunset Policy Bulletin* direct the Department to treat historical dumping margins and past import volumes as decisive evidence of likely dumping in every sunset review, and ARG-63 and ARG-64 demonstrate that the Department, in fact, treats these factors as decisive in every case in which the domestic industry participates. In *Sunset Review of Steel from Japan*, the Appellate Body declared that giving these two factors alone decisive weight in every case would violate Article 11.3.¹⁰ The US provisions thus prevent the Department from basing its likelihood determination on a factual basis sufficient to demonstrate that dumping would be likely to continue in the event of termination of the order. Therefore, through the application of the WTO-inconsistent presumption in the sunset review of Argentine OCTG, the Department failed to use the "likely" standard required by Article 11.3.

Argentina has argued consistently that the Department only considers domestic industry participation, import volume, and historical dumping margins in sunset reviews. Accordingly, the only manner in which the Department's determination can be upheld is if "likely" means something other than its common and ordinary meaning (i.e., "probable"), and if the type of analysis permitted to establish a likelihood is something other than required by the standards of Article 11.3, as reaffirmed

⁸ Argentina's First Submission, para. 186.

⁹ Argentina's First Submission, Sec. VII.B; Argentina's First Oral Statement, paras. 32-33, 36, 77-83; Argentina's Second Submission, Sec. III.B; Argentina's Second Oral Statement, paras. 57-67.

¹⁰ See Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 176-178, 191.

by the Appellate Body.

- (b) **Please refer to the relevant part(s) of the record of this sunset review where this inconsistent standard can be found.**

Response:

Whether reading its express terms or viewed in the light most favourable to the United States, the *Issues and Decision Memorandum* demonstrates that the Department failed to apply the correct “likely” standard.

In the first instance, the *Issues and Decision Memorandum* provides that waiver served as the basis for the Department’s affirmative likelihood determination:

*[S]ection 751(c)(4)(B) of the Act provides that the Department shall determine that revocation of an order is likely to lead to continuation or recurrence of dumping where a respondent interested party waives its participation in the sunset review. In the instant reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation.*¹¹

Argentina submits that the Department’s application of the waiver provision conclusively demonstrates that it did not apply the correct “likely” standard in the sunset review of Argentine OCTG. In discussing the “likely” standard under Article 11.3, the Appellate Body has stated that “an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be probable if the duty were terminated”¹² The Appellate Body has further held that a likelihood determination requires a “forward-looking analysis,” the ultimate determination of which must be based on a “rigorous examination” of “all relevant evidence.”¹³ A statutorily-mandated finding of likely dumping is patently inconsistent with this exacting standard.

Assuming *arguendo* that waiver did not serve as the basis for the Department’s likelihood determination, the *Issues and Decision Memorandum*, at best, indicates that the Department followed the direction of the statute, the SAA, and the *Sunset Policy Bulletin* and based its affirmative likelihood determination solely on two factors: (1) the existence of the 1.36 per cent margin from the original investigation, and (2) the decline in import volumes.¹⁴ Under the guidance of the Appellate Body’s decision in *Sunset Review of Steel from Japan*, the Department’s decisive reliance on these two factors represents a presumption that dumping was likely to continue or recur.¹⁵ A presumption of likely dumping cannot constitute positive evidence of likely dumping within the meaning of Article 11.3, the evidentiary standards of Article 6, and the interpretations of these provisions by the Appellate Body.¹⁶ Therefore, the record demonstrates that the Department did not apply the likely standard required by Article 11.3 in this case.

¹¹ *Issues and Decision Memorandum* at 4-5 (ARG-51)(emphasis added).

¹² Appellate Body Report, *Sunset Review of Steel from Japan*, para. 111 (emphasis added).

¹³ *Id.* at paras. 105, 113, 191.

¹⁴ *Issues and Decision Memorandum* at 4-5 (ARG-51)(“In the Argentine case, there has been no decline in dumping margins coupled with an increase in imports. Rather, absent an administrative review, the dumping margin from the original investigation is the only indicator available to the Department with respect to the level of dumping. Because 1.27 [sic] per cent is above the 0.5 per cent *de minimis* standard applied in sunset reviews, we find that dumping has continued over the life of the Argentine order and is likely to continue if the order were revoked.”).

¹⁵ Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 176-178.

¹⁶ *See id.* at paras. 178, 191.

12. The Panel notes that, in its second written submission, Argentina did not address its claim under Article 12.2 of the Agreement. Please clarify whether Argentina is still pursuing this claim.

Response:

Argentina has not abandoned its claim with respect to Article 12.2, which was set forth in paragraphs 177-180 of its First Written Submission. In Argentina's view, Article 12.2 is a substantive obligation with which the United States must comply in an Article 11.3 review by virtue of the explicit cross-reference in Article 12.3 stating that the provisions of Article 12 apply *mutatis mutandis* to Article 11 reviews.

The violation of Article 12 is made more clear in this case by the continuing changes in the position of the United States on several core issues, including whether Siderca's response was "adequate," to whom the Department applied the waiver provisions, the basis for the Department's determination that dumping continued over the life of the order, and the basis for the Department's likelihood determination. The United States has also indicated that a few key portions of its underlying decisions were "inartfully drafted." When the Panel cuts through all of these explanations and *ex post facto* justifications, the underlying decision cannot meet the substantive requirements of Article 12.2.

17. What is the supporting evidence in the record of this sunset review for your allegation that the Commission failed to apply the "likely" standard of Article 11.3 of the Agreement in this sunset review?

Response:

In *Sunset Review of Steel from Japan*, the Appellate Body confirmed that "likely" under Article 11.3 must be interpreted according to its ordinary meaning of "probable."¹⁷ Although the US statute uses the word "likely," and the Commission used the term in its sunset determination of Argentine OCTG, mere reference to the word "likely" does not mean that the Commission applied the correct standard.

Two levels of evidence support Argentina's claim that, in the sunset review of Argentine OCTG, the Commission did not interpret likely by its ordinary meaning of probable and thus failed to apply the likely standard of Article 11.3: (1) admissions by the Commission itself; and (2) portions of the record from the Commission's sunset review demonstrating that it was not, in fact, applying a "likely" standard.

On at least two separate occasions, the Commission has admitted that it did not interpret "likely" to mean probable in the sunset review of OCTG from Argentina. In the *Usinor* remand, the Commission stated that in all of the sunset review decisions it considered as of 1 July 2002 (including the sunset review of Argentine OCTG), it followed the SAA and consistently interpreted "likely" as "a concept that falls in between 'probable' and 'possible' on a continuum of relative certainty."¹⁸ More directly, the Commission expressly stated before a NAFTA panel reviewing the same sunset determination of Argentine OCTG that "likely" does not – and under the SAA cannot – mean "probable."¹⁹ Therefore, the Commission has admitted that it did not consider "likely" to mean "probable," and that the standard that it applied in this case is less than "probable."

¹⁷ *Id.* at para. 111.

¹⁸ *Usinor Remand Determination* at 5, 6 (ARG-56 bis).

¹⁹ ITC Brief, *Oil Country Tubular Goods from Mexico, Results of Five-Year Review* (8 Feb. 2002) at 43 (excerpt included as Exhibit ARG-67).

In addition, as Argentina has consistently argued throughout these proceedings,²⁰ the record of the sunset review demonstrates that the Commission did not apply the correct likely standard. The Commission based its conclusion that termination of the orders would be likely to lead to continuation or recurrence of injury on its findings with respect to the likely volume, price effects, and impact of the subject imports.²¹ With respect to each of these factors, however, the Commission based its findings on speculation and conjecture, rather than on positive evidence that certain outcomes would be likely (*i.e.*, probable or more likely than not). Specifically:

Volume: Despite positive evidence that showed that the likely volume of subject imports orders would not be significant upon termination of the orders, the Commission concluded that subject producers had “incentives” to devote more of their output to the US market and thus the likely volume would be significant.²² Each of the alleged incentives, however, was based on evidence of possibility, rather than on positive evidence of likelihood.²³

Price: In paraphrasing the basis for the Commission’s finding on price effects, the United States stated that “evidence from the original investigation strongly supports a finding that imports can drive down domestic prices even during a period of strong demand” and that this means therefore that “imports would drive down or suppress the price of the domestic like product if the orders were revoked.”²⁴ This statement demonstrates the significance attached to the analysis in the original investigation, rather than positive evidence developed in the sunset review to support a “likely” injury determination. In fact, the Commission admitted in its decision that it had little record evidence upon which to draw conclusions regarding the likely price effect.²⁵ Yet the Commission, summarizing its decision on price effects, stated:

*Given the likely volume of subject imports, the high level of substitutability between the subject imports and domestic like product, the importance of price in purchasing decisions, the volatile nature of US demand, and the underselling by the subject imports in the original investigations and during the current review period, we find that in the absence of the orders, casing and tubing from Argentina, Italy, Japan, Korea, and Mexico likely would compete on the basis of price in order to gain additional market share. We find that such price-based competition by subject imports likely would have significant depressing or suppressing effects on the prices of the domestic like product.*²⁶

Impact: The Commission found that the domestic industry’s condition had “improved” and that it was not “currently vulnerable.”²⁷ Yet despite these findings of a healthy domestic industry, the Commission concluded that the subject imports would likely have a significant adverse impact on the domestic industry. As support for this conclusion, the Commission once again referred to its findings from the

²⁰ See Argentina’s First Submission, paras. 231-232, 243-254; Argentina’s First Oral Statement, paras. 116-126; Argentina’s Second Submission, paras. 169-178; Argentina’s Second Oral Statement, paras. 79-89.

²¹ Commission’s Sunset Determination at 17-23 (ARG-54).

²² See *id.* at 19.

²³ See Argentina’s First Submission, paras. 244-246; Argentina’s First Oral Statement, paras. 116-125; Argentina’s Second Submission, paras. 169-171; Argentina’s Second Oral Statement, paras. 179-83.

²⁴ US First Submission, para. 339 (emphasis added).

²⁵ *Commission’s Sunset Determination* at 21 (ARG-54) (“While direct selling comparisons are limited because the subject producers had a limited presence in the US market during the period of review, the few direct comparisons that can be made indicate that subject casing and tubing generally undersold the domestic like product especially in 1999 and 2000.”).

²⁶ *Id.*

²⁷ *Id.* at 22.

original investigation: “in the original investigations, subject imports captured market share and caused price effects despite a significant increase in apparent consumption in 1993 and 1994 as compared to 1992.”²⁸ Thus, the Commission determined on the basis of possibility (in this case, demonstrated by events seven years earlier) that an outcome would be “likely.” Such reasoning further shows that the Commission did not apply the “likely” standard required by Article 11.3 in this case.

In sum: (1) the Commission has expressly admitted that it did not in fact interpret likely to mean probable in this very case, and (2) the Commission’s specific findings demonstrate that it did not apply the “likely” standard of Article 11.3 in the sunset review of OCTG from Argentina.

18. The Panel notes Argentina's allegations in paragraphs 183 and 185 of its second written submission that in the OCTG sunset review the Commission failed to carry out the causal link analysis required under Article 3.5 of the Agreement. Please clarify the basis of this claim. More specifically, please indicate whether there were some potential factors, other than likely dumped imports, that could have contributed to the likely injury and were not evaluated by the Commission in its sunset determinations.

Response:

Argentina firmly believes, and reiterates, its view that the “causal link” requirement of Article 3.5 applies to all injury determinations, including the injury determination in Article 11.3 reviews. The notion that a causal link is required between the dumped imports or between dumping and injury is present in Article VI of the GATT 94, and has been a constant feature of the regulation of dumping at the international level through the Kennedy, Tokyo, and Uruguay Round Anti-Dumping Agreements. There is no textual support for the view that the causation requirement was removed from the injury analysis required by Article 11.3. To the contrary, the statement in footnote 9 that injury “shall be interpreted in accordance with the provisions of this Article” can only be interpreted to mean that the basic requirement of a causal link between “likely” dumping and “likely” injury must be shown in all injury determinations under the Anti-Dumping Agreement, including those in Article 11 reviews.

With respect to the Panel’s specific question, Argentina points out that its argument with respect to Article 3.5 was contained not only in paragraphs 183 and 185, but also 184. Paragraph 184 reiterates the basic proposition first explained in Section VIII.B.4 (beginning on page 82) of Argentina’s First Written Submission. As explained in both briefs, and consistent with the Appellate Body’s approach in *Hot-Rolled Steel from Japan*,²⁹ Argentina’s position with respect to Article 3.5 is that: (1) the Commission was required to demonstrate a causal link between the likely dumping and the likely injury; and (2) that the Commission failed to analyze and distinguish the likely effects of other factors that could have contributed to any likely injury. Much of this occurs in the context in which the Commission found that the US industry was not currently vulnerable to injury,³⁰ and that other factors have a direct impact on the condition of the industry,³¹ especially the demand for oil and drilling activities. Also, the Commission noted that non-subject imports had captured market share from the domestic industry,³² and never explained how it distinguished the likely impact of these non-subject imports from the likely impact of the subject imports. Therefore, as explained in Argentina’s

²⁸ *Id.* at 22 (emphasis added); *see also* US First Submission at para. 342 (“The ITC noted that in the original investigation, a significant increase in demand had not precluded subject imports from gaining market share and having adverse price effects.”).

²⁹ Appellate Body Report, *Hot-Rolled Steel from Japan*, paras. 222-223.

³⁰ *Commission’s Sunset Determination* at 22 (ARG-54).

³¹ *See id.* at 14-16, II-9, II-10, and II-13.

³² *See id.* at 22.

previous submissions,³³ while mentioning other factors, the Commission did not separate their likely effects from the potentially injurious effect of the likely subject imports.

³³ See Argentina's First Submission at paras. 267-269; Argentina's Second Submission, paras. 182-185.

ANNEX E-9

ANSWERS OF THE UNITED STATES TO QUESTIONS OF THE PANEL – SECOND MEETING

13 February 2004

Q3. The Panel notes the US response to Questions 2(a) and 3 from the Panel and the US statements in paragraph 21 of its second written submission. Does the US law require an individual likelihood determination only in respect of respondent interested parties that waive their right to participate in a sunset review?

1. Yes.

Q4. The Panel notes the following statement in the response of the United States to Question 3 from the Panel:

In other words, one company's failure to submit a complete substantive response results in a finding of likelihood with respect to that company, and not on an order-wide basis; Commerce could still, in light of other submissions and facts on the record, conclude that there is no order-wide likelihood of dumping.

(a) Please explain whether this scenario has ever happened. In other words, has there ever been a sunset review in which although the DOC had made a positive likelihood determination with respect to certain individual exporter(s) who had waived their right to participate, and later on in the final order-wide likelihood determination the DOC found no likelihood for the country as a whole, including the exporter(s) for which it had already found likelihood?

2. No. This scenario has never occurred.

(b) If, as the United States argues, the individual likelihood determination for exporters that waive their right to participate does not affect the final order-wide basis likelihood determination, then why is it that the US law requires that individual determinations be made for exporters who waive their right to participate?

3. The United States has not argued that a waiver "does not affect" the final order-wide likelihood determination. While the individual affirmative likelihood determinations may affect the order-wide likelihood determination, they do not determine, in and of themselves, the ultimate outcome of the order-wide analysis. Commerce considers all the information on the administrative record, including prior agency determinations and the information submitted by the interested parties or collected by Commerce, as well as any individual affirmative likelihood determinations, when making the order-wide likelihood determination.

(c) In the OCTG sunset review, did the application of the waiver provisions to Argentine exporters other than Siderca affect/determine the final outcome of the sunset review with respect to Argentina? Please respond in light of the fact that Siderca's share in the total imports of the subject product in the five-year period of application of the order at issue was zero.

4. The application of the waiver provisions did not determine the final outcome of the sunset review with respect to Argentina. Commerce's final affirmative likelihood determination in the sunset review of OCTG from Argentina was based on the existence of dumping and depressed import volumes over the life of the anti-dumping duty order on OCTG from Argentina. *See Decision Memorandum* at 4-5.

Q5. The Panel notes the US response to Question 4(c) from the Panel. On the basis of the scenario referred to in the mentioned Question, please respond to the following:

- (a) **Would Section 1675(c)(4)(B) of the Tariff Act of 1930 require that the DOC find likelihood with respect to the exporters that submit an incomplete response to the notice of initiation? If your response is in the negative, please explain the reasons thereof on the basis of the relevant provisions of the US law.**

5. Section 1675(c)(3)(B) of the Act requires that where Commerce has an inadequate response from the respondent interested parties to the notice of initiation (order-wide response), then Commerce may issue the final sunset determination on the basis of the facts available. (Section 1675(c)(4)(B) requires a finding of likelihood with respect to a party that has affirmatively waived participation.) Section 351.308(f) of the *Sunset Regulations* defines "the facts available" in a sunset review as the prior agency determinations and any information submitted by the interested parties during the sunset review. Neither Section 1675(c)(3) nor section 1675(c)(4) of the Act addresses the issue of the "completeness" of a particular exporter's substantive response, but rather section 1675(c)(3) focuses on the response from the respondent interested parties, in the aggregate, to the notice of initiation.

- (b) **If your response to the question in (a) is in the affirmative, i.e. if the Statute would require a finding of likelihood with respect to the exporters that waive their right to participate in the mentioned sunset review, please explain whether in such a sunset review the DOC would nevertheless carry out an expedited sunset review to make an order-wide likelihood determination even though the DOC would have already found likelihood with respect to all exporters. If so, on what factual basis would the DOC base its order-wide determination?**

6. Section 1675(c)(3)(B) of the Act requires that where Commerce has an inadequate response from the respondent interested parties to the notice of initiation (order-wide response), then Commerce may issue the final sunset determination on the basis of the facts available. Where the order-wide response is inadequate – which is not necessarily a function of the application of waiver provisions – Commerce would conduct an expedited review and "normally" base the final determination on "the facts available" in accordance with sections 351.218(e)(1)(ii)(C)(2) and 351.308(f) of the *Sunset Regulations*. Section 351.308(f) provides that "the facts available" include prior agency determinations and any information submitted by the interested parties. Thus, Commerce would base the final sunset determination in this scenario on all the information on the administrative record, whether submitted by the interested parties or collected by Commerce, and prior agency determinations. It should be noted that the substantive text of sections 351.218(e)(1)(ii)(C)(2) and 351.308(f) of the *Sunset Regulations* are prefaced with the word "normally" and provide Commerce with the discretion to deviate from requirements of these regulatory provisions where circumstances in a particular case warrant.

Q6. The Panel notes the US statement in paragraph 24 of its second written submission and the US response to Question 2(e) from the Panel. If the DOC does not consider the information submitted in an incomplete substantive response submitted by an exporter for purposes of the individual likelihood determination for that particular exporter, then for what purpose does the DOC take that information into account in the final order-wide determination?

7. Commerce considers all the information on the administrative record in making the order-wide likelihood determination in a sunset review, including information contained in an incomplete substantive response, but the relevance of the information submitted in an incomplete substantive response to the order-wide likelihood determination would depend on the nature of the information. For example, a respondent interested party might offer information and argument to explain depressed import volumes. Even if that party's response were incomplete, Commerce would take that information and argument into account in making the order-wide determination.

Q7. The Panel notes the following statement in the US response to Question 2(d) from the Panel:

The differences between a full and an expedited sunset review are timing (the final sunset determination in an expedited sunset review is issued 120 days after the notice of initiation, rather than the full sunset review's 240 days) and the fact that case briefs are not filed in an expedited case. Because as a rule hearings are tied to the contents of the case briefs, hearings are generally not held in an expedited proceeding. It should be noted that the deadline for the submission of factual information is the same for both an expedited and a full sunset review proceeding and normally is no later than the deadline for the submission of the interested party rebuttal briefs. (*footnotes omitted, emphasis added*)

- (a) Please explain the role of case briefs in full sunset reviews under the US law. What is their content? At what stage during the full sunset review are they submitted to the DOC?**

8. As the United States noted in its first written submission, full sunset reviews may afford parties expanded opportunities to submit evidence and argument.¹ Case briefs provide such an opportunity. They normally contain a recitation of the issues parties consider to be relevant to the determinations Commerce must make in a sunset review and the parties' arguments concerning those issues. The case briefs provide the parties an additional opportunity to convince the administering authority of the correctness of their position on particular issues of import. Rebuttal briefs are the parties' responses to the arguments raised in the case briefs submitted by the other parties participating in the sunset review. Case briefs normally are due on day 160 (50 days after the preliminary sunset determination); rebuttal briefs normally are due on day 165 (5 days after the filing of case briefs). See sections 351.309(c)(1)(i) and 351.309(d)(1) of the Sunset Regulations respectively. Extensions of these deadlines may be requested pursuant to section 351.302(b) of Commerce's Regulations.

- (b) Please explain whether there are any differences between full and expedited sunset reviews under the US law as to whether the following rights provided for in the Agreement can be used by exporters:**
- (i) The right to see the evidence submitted by other interested parties, as provided under Article 6.1.2 of the Agreement,**
 - (ii) The right to see the full text of the application, as provided under Article 6.1.3 of the Agreement,**
 - (iii) The right to submit information orally, as provided in Article 6.2 of the Agreement.**

9. There are no differences between a full and an expedited sunset review with respect to the obligations contained in the cited obligations from Article 6 of the AD Agreement. Interested parties

¹ First Written Submission of the United States, para. 162.

are required to serve all submissions on the other interested parties in a sunset review, whether full or expedited. *See* section 351.303(f) of Commerce's *Regulations*. All documents submitted to or produced by the administering authority form the administrative record in any sunset review and are available in the public reading room in the Central Record Unit located at the US Department of Commerce. *See* sections 351.103 and 351.104 of Commerce's *Regulations*. In addition, meetings with the decision-maker in a sunset review, as well as other Commerce officials, can be requested and are routinely held, but if factual material is presented, the factual material also must be submitted in writing in accordance with section 351.309 of Commerce's *Regulations*. This requirement is in keeping with the obligation of Article 6.3 that oral information be reduced to writing prior to consideration by the authorities.

10. With respect to Article 6.1.3, the United States notes that under US law, sunset reviews are automatically initiated by the administering authority, not in response to the filing of an application. (The notice of initiation is published in the Federal Register and is therefore publicly available.)

Q8. Under the US law, in a sunset review in which some of the exporters have waived their right to participate (be it an affirmative or a deemed waiver), does the order-wide analysis to be carried out for the country as a whole entail any elements in addition to what is being examined in the context of company-specific determinations regarding the exporters that have waived their right to participate in the sunset review? Put differently, does the order-wide analysis entail any analysis that would not have been carried out at the company-specific level regarding the exporters that have waived their right to participate in the sunset review?

11. As noted in response to Question 5, the existence of waivers does not automatically result in an expedited review. Commerce normally considers the existence of dumping and the depressed import volumes to be highly probative evidence that dumping will likely continue or recur if the discipline of an order were removed. However, these factors are not necessarily company-specific. Therefore, any information on the record rebutting the probative value of these factors – e.g., reasons other than the anti-dumping order explaining why import volumes were depressed, or conditions in the country as a whole that explain why dumping is not likely to continue or recur – will be considered. In this regard, all the information on the administrative record of the sunset review including the information and arguments submitted by the interested parties and information collected by Commerce, as well as prior agency determinations, is considered in making the final sunset determination. For example, in the sunset review of OCTG from Argentina, Commerce addressed Siderca's comment concerning the applicability of the *de minimis* standard found in Article 5.8 of the AD Agreement in sunset reviews. *See Decision Memorandum* at 3-4.

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 information² In this respect, the United States referred to section 351.218(d)(3) of the DOC's Regulations and to the preamble of the Regulations³ 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.

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

² Response of the United States to Question 8 from the Panel and footnote 33 thereto.

³ Footnote 33 to the Response of the United States to Question 8 from the Panel.

(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)).

Q10. Please explain whether anyone of the Argentine exporters subject to the OCTG sunset review other than Siderca affirmatively waived their right to participate, or whether they were deemed as having waived their right to participate in the OCTG sunset review. If there was a deemed waiver, please specify the grounds thereof.

14. No Argentine producer or exporter of OCTG affirmatively waived its right to participate in the sunset review of OCTG from Argentina. Commerce determined that there were exports of OCTG during the five-year period preceding the sunset review based on the import statistics provided by the domestic interested parties and verified by the Census Bureau's IM-145 import statistics and the ITC Trade Database. These non-responding respondents were deemed to have waived their rights to participate due to their failure to respond to the notice of initiation of the sunset review. See section 351.218(d)(2)(iii) of the *Sunset Regulations*.

OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING

Q13. The Panel notes the following statement in the DOC's Issues and Decision Memorandum in the OCTG sunset review:

Because 1.27 per cent is above the 0.5 per cent *de minimis* standard applied in sunset reviews, we find that dumping has continued over the life of the Argentine order and is likely to continue if the order were revoked⁴ (*underline emphasis added*)

Please explain whether the 1.27 per cent indicated in the memorandum is a typo and should therefore be read as 1.36 per cent. If not, please explain what this margin means.

15. The 1.27 per cent in the *Decision Memorandum* is a typographical error. The correct number is 1.36 per cent. See *Final Determination*, 65 Fed. Reg. at 66703; and *Decision Memorandum* at 1 and 3.

⁴ *Issues and Decision Memorandum* (Exhibit ARG-51 at 5).

Q14. The Panel notes the statistics provided by Argentina in Exhibits ARG-63 and ARG-64 regarding the alleged consistent application of the provisions of sections II.A.3 and II.A.4 of the *Sunset Policy Bulletin* by the DOC. The Panel also notes the US statements in paragraphs 183-186 of its first written submission regarding these statistics.

- (a) **Please explain whether in your view the statistics provided by Argentina are factually correct or not. Please limit your response in this respect to whether or not the information submitted by Argentina in these two exhibits is flawed or not. If in your view these statistics are not factually correct, please explain in detail the reasons thereof.**

16. The United States has not examined each and every sunset review cited by Argentina in Exhibit ARG-63 and Exhibit ARG-64. To the extent that the United States has addressed these exhibits in its written submissions, the United States has no reason to believe that the overall total of sunset reviews conducted and the ultimate outcomes in those sunset reviews as alleged by Argentina is significantly flawed.

- (b) **Please explain your views as to whether these statistics can be used by the Panel in inquiring whether the DOC perceives the provisions of the cited sections of the *Sunset Policy Bulletin* as determinative/conclusive for purposes of its sunset determinations.**

17. These statistics have no bearing on whether the cited sections of the *Sunset Policy Bulletin* are determinative/conclusive for purposes of sunset determinations. That question can be answered solely on the basis of the status of the *Sunset Policy Bulletin* under US law, since Commerce must follow the requirements of US law, and not artificial and non-existent "presumptions" implied by Argentina from statistics. The status of the *Sunset Policy Bulletin* is clear and unequivocal. It is simply a transparency tool published by Commerce to provide guidance to interested parties as to Commerce's current thinking on how it might exercise its discretion under US law when conducting sunset reviews. The document has no independent legal status under US law and imposes no requirements whatsoever on Commerce to actually follow the methodologies set forth in the Bulletin in a particular sunset review, and Argentina has cited no provision of US law which suggests otherwise. The only requirements concerning the conduct of sunset reviews which Commerce must follow are set forth in the relevant statutory and regulatory provisions.

18. Moreover, in offering these statistics, Argentina focuses only on the result, and not on the legal and factual circumstances of each review which lead to that result. Again, Argentina can point to nothing on the record of any of these sunset reviews, or in US law generally, which indicates that the *Sunset Policy Bulletin* required any result in any case. And Argentina ignores the particular factual circumstances of these disputes which underpinned Commerce's ultimate findings.

19. Finally, these statistics at best indicate a "repeated pattern of similar responses to a set of circumstances."⁵ As the United States discussed in its First Written Submission, and as a WTO panel has already found, such a pattern does not indicate that a "Member becomes obligated to follow its practice."⁶ Therefore, the statistics do not indicate whether the *Sunset Policy Bulletin* is, as a matter of US law, determinative/conclusive as to how Commerce must act in a given review.

Q15. The Panel notes the US statements in paragraphs 15 and 23 of its second oral submission that neither the DOC nor the ITC relied on the original dumping margin in relation to their

⁵ *United States - Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R, Report of the Panel adopted 29 July 2002, para. 722.

⁶ *Id.* For full discussion, see First Written Submission of the United States at para. 198.

determinations the OCTG sunset review. The Panel also notes the following part of the DOC's Issues and Decision Memorandum:

Therefore, consistent with the *Sunset Policy Bulletin*, the Department determines that the margin calculated in the original investigation is probative of the behaviour of Siderca if the order were revoked as it is the only rate that reflects the behaviour of Siderca without the discipline of the order. As such, the Department will report to the commission the rate of 1.36 per cent from the original investigation for Siderca and all other exporters from Argentina.

Consistent with section II.B.1 of the *Sunset Policy Bulletin* and the SAA at 890, we determine that the rates from the original investigations are probative of the behaviour of producers and exporters of OCTG from Argentina. Therefore, we will report to the Commission the company-specific and "all others" rates from the original investigations.⁷

- (a) The Panel notes that in its responses to Questions 23 and 24 from the Panel concerning the factual basis of the DOC's likelihood determination in the OCTG sunset review, the United States submitted that the DOC's determination was based on the existence of imports from Argentina and the continued collection of the anti-dumping duty on the imports of the subject product from Argentina in the five-year period of application of the subject order. Please explain how these statements can be reconciled with the above-quoted text of the DOC's Memorandum in as much as the DOC's alleged reliance on the original dumping margin is concerned.

20. The above quoted passages refer to the "margin likely to prevail" reported by Commerce to the ITC in the event the order were revoked. The "margin likely to prevail" is a construct of US law. The "margin likely to prevail" is the best evidence of the potential pricing behaviour of exporters if the order were revoked because it was the only evidence on the administrative record of OCTG from Argentina of the pricing behaviour of OCTG exporters without the discipline of the anti-dumping duty order in place. The "margin likely to prevail" is not used in any degree as a basis for the determination whether it is likely dumping will continue or recur if the order were revoked. Rather, Commerce first makes the likelihood determination, then determines the "margin likely to prevail" in the event of an affirmative order-wide likelihood determination. See SAA at 889 ("Likelihood of Dumping") and 890 ("Provision to the Commission of Dumping Margins").

21. Section 752(c)(3) of the Act directs that Commerce "shall provide" to the ITC a "margin likely to prevail" in the event of revocation. Section 752(a)(6) of the Act, however, provides that the ITC "may consider" the "margin likely to prevail" in making the likelihood of injury determination, but the statute leave the decision whether to use the "margin likely to prevail" in the injury analysis to the ITC's discretion. See SAA at 890-91.

- (b) Please explain what meaning the Panel should give to the above-cited parts of the Memorandum in light of the US statement that the DOC did not rely on the original dumping margin in its sunset determination in this sunset review.

22. As discussed in the US answer to Panel Question 15(a), the "margin likely to prevail" is a construct of US law and is reported to the ITC as such. It is not used by Commerce in making the likelihood determination. Indeed, Commerce must first determine whether dumping is likely to continue or recur before it is required to report the magnitude of the margin of dumping likely to prevail. The magnitude of dumping, however, whether past, present, or future, has no bearing on Commerce's likelihood determination. The magnitude of the dumping is immaterial because the

⁷ *Issues and Decision Memorandum* (Exhibit ARG-51 at 7-8).

obligations of Article 11.3 require a determination of the likelihood of dumping and not a calculation of how much dumping is likely to continue or recur.

Q16. The Panel notes Argentina's allegations in Section III.C.3.b of its second written submission and Exhibits ARG-52, ARG-63a and ARG-63b regarding the methodology by which the DOC calculated the 1.36 per cent dumping margin in the original OCTG investigation.

23. As a preliminary matter, the United States notes that there are several procedural concerns with Argentina's Exhibits ARG-52, -66A, and -66B⁸. As discussed at the second substantive panel meeting, none of these exhibits are part of or based on the record compiled by the United States in order to make its sunset determination. Pursuant to Article 17.5(ii) of the AD Agreement, the basis of this Panel's examination of the matter before it is the "facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member." Because neither Argentina nor Siderca placed this factual information on the record, these documents are not properly before the Panel.

24. Furthermore, the United States notes that paragraph 14 of the working procedures for this Panel provides that parties are to submit "all factual information to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals or answers to questions." Argentina did not submit Exhibits ARG-66A and -66B until its second written submission, nor is it submitting these exhibits "for purposes of rebuttals or answers to questions." Further pursuant to paragraph 14 of the Panel's working procedures, Argentina has not shown that there was any "good cause" to justify this belated submission and, because these exhibits are basic to Argentina's claims, Argentina cannot now seek to claim that these documents were prepared for purposes of rebutting arguments presented by the United States. While the United States responds as follows to the Panel's questions related to these documents, the United States respectfully requests that the Panel give effect to Article 17.5 of the AD Agreement and paragraph 14 of the Panel's working procedures by not considering these documents.

- (a) **Please explain on the basis of which methodology (e.g. weighted average to weighted average, transaction to transaction or weighted average to transaction) the DOC compared the normal value with the export price in this original investigation.**

25. First of all, taking into account Article 18.3 of the AD Agreement, it must be noted that the record makes clear that the original investigation of OCTG from Argentina was initiated prior to the effective date of the AD Agreement. Furthermore, although the record of the sunset review does not specify the methodology that was used in the original investigation, the United States confirms that the original investigation did not utilize the weighted-average-to-weighted-average comparison methodology examined in *EC – Bed Linen*. Specifically, the United States used a weighted-average-to-transaction methodology in the original investigation of OCTG from Argentina.

- (b) **Please comment on Argentina's allegations regarding the alleged use of the so-called zeroing methodology in this original investigation. In particular, explain whether, as Argentina alleges, the DOC ignored export sales transactions that were not dumped in the calculation of the 1.36 per cent original dumping margin.**

26. The record of the sunset review does not contain information responsive to this question. Nevertheless, the United States confirms that the 1.36 per cent margin was based on the results of comparisons of all export transactions.

⁸ Based on the citation to Argentina's second submission, the United States understands the reference in the Panel's question to indicate Exhibit ARG-66A and -66B, rather than ARG-63a and -63b.

- (c) **Please explain whether the DOC reassessed, in the context of the instant sunset review, the conformity of the calculation methodology that had given rise to the 1.36 per cent dumping margin in the original OCTG investigation.**

27. The United States did not reassess the calculation methodology and had no reason to reassess the calculation methodology in this sunset review because the magnitude of the margin did not form any part of Commerce's final likelihood determination in the sunset review of OCTG from Argentina. The record of the sunset review contained the final determination from the original investigation. The record contained no information challenging or even questioning that final determination. The final determination had not been previously challenged and neither Argentina nor Siderca placed information on the record calling into question the final determination. Moreover, the information necessary to reassess the final determination (Siderca's sales and cost information, the computerized transaction information, Commerce's verification findings, any legal briefs submitted to Commerce, and any other information which was pertinent to the final determination in the original investigation) was not part of Commerce's sunset review record. Consequently, there was no reason for an unbiased and objective administering authority to "reassess" the 1.36 per cent margin from the original investigation.

- (d) **Please explain your views about Argentina's assertion that had zeroing not been used in the calculation of the original dumping margin the result would have been a negative dumping margin of 4.35 per cent.⁹**

28. Argentina's assertion appears to be based on Argentina's calculations, the output of which was presented to the Panel in Exhibit ARG-66A. Not only was this exhibit not based on source information contained in Commerce's sunset review record, Argentina has failed to identify any of the computer programming by which it manipulated Siderca's data to arrive at the output contained in Exhibit ARG-66A.

29. Beyond these substantive and procedural defects with Argentina's assertion, Argentina's assertion is legally flawed. Not only does the United States not concede that Exhibit ARG-66A demonstrates that Siderca's information could have supported the output contained in that exhibit, the exhibit itself appears to be based on weighted-average-to-transaction comparisons, whereas the Appellate Body report in *EC – Bed Linen* addressed only the weighted average-to-weighted-average comparison methodology employed by the EC in that case, and explicitly found that, with respect to that methodology only, there could be no "two stage" calculation. *EC – Bed Linen*, at para. 53. *EC – Bed Linen* did not address any weighted-average-to-transaction methodologies, or any other methodology in which a two-stage calculation would be both appropriate and necessary. Other than citation to *EC – Bed Linen* and *Japan Sunset*, neither of which addressed the methodology used in the original investigation of OCTG from Argentina, Argentina has failed to provide any factual or legal basis for its claim that the methodology used in the original investigation was WTO-inconsistent.

OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF INJURY

Q19. Would the United States agree, as a factual matter, that the ITC did not consider some of the injury factors set out in Article 3.4 of the Agreement in its likelihood of continuation or recurrence of injury determinations in the instant sunset review?

30. As the United States has noted, Article 3, and thus Article 3.4, do not apply in sunset reviews. Nevertheless, the ITC considered all of the Article 3.4 injury factors. Data concerning each of the injury factors is contained in the report that accompanies the views of the ITC Commissioners, as

⁹ See Second Written Submission of Argentina, para. 140.

detailed in the chart accompanying paragraph 347 of the United States' first submission¹⁰ This report (consisting of four parts, and running from page I-1 to E-6) is prepared by the ITC staff for the Commissioners and is made available to the parties before the Commissioners make their determinations. The ITC Commissioners review and approve the report before making their determinations and, thus, have considered all of the information in the report in reaching their determinations, even though in their views they may identify only certain of the injury factors as particularly relevant to their determinations. This approach is consistent with the text of Article 3.4 which states that the "list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

Q20. The Panel notes the distinction the United States makes between a determination of injury and a determination of the likelihood of continuation or recurrence of injury.

- (a) Is the United States of the view that there is a fourth category of injury that applies in the context of sunset reviews in addition to the three mentioned in footnote 9 of the Agreement?**

31. The United States is of the view that "the likelihood of continuation or recurrence of . . . injury" is a fourth type of determination regarding injury, separate from the three other types named in footnote 9. The three types of determinations in footnote 9 relate to a "determination of injury." A sunset review does not involve such a determination; rather, it involves a determination of continuation or recurrence of injury.

32. It is clear that "injury" cannot be defined in the same way in Article 11.3 as it is in footnote 9. If it were, then the inquiry in a sunset review would become whether expiry of the duty would be likely to lead to *continuation or recurrence of* material injury to a domestic industry, *threat of material injury to a domestic industry or material retardation of the establishment* of such an industry. Article 11.3 does not contemplate determinations of a continuation or recurrence of threat or material retardation as a basis for continuing to apply an anti-dumping duty after a sunset review.

- (b) Would the United States agree that in a sunset review involving recurrence, as opposed to continuation, the investigating authority would have to satisfy itself about the likely recurrence of injury in the same manner in which it would determine injury in an investigation. Please elaborate.**

33. No. A determination of injury in an investigation is quite different than a determination as to the likely recurrence of injury in a sunset review. They are, in the words of the Appellate Body "distinct processes with different purposes."¹¹ The analysis and the factors relevant to the two types of inquiry are not the same.

34. In an original anti-dumping investigation authorities examine the current condition of an industry and the current effect of imports that are not subject to anti-dumping duties. This is true whether the authorities are evaluating material injury, threat of material injury, or material retardation of the establishment of an industry.

35. In a sunset review, on the other hand, authorities examine the likely volume of imports in the future that may have been restrained by an anti-dumping duty order and the likely impact in the future of that volume on a domestic industry that has enjoyed the benefit of an anti-dumping order for the past five years. There may not be any current imports; these imports might not be dumped; and the domestic industry may or may not be currently injured or threatened with injury. In short, in a sunset

¹⁰ There is one correction that needs to be made to this chart. The location in the ITC report of information on the margins of dumping is p. I-14, not p. V-1.

¹¹ *US – German Steel*, para. 87.

review the investigating authority must engage in counterfactual analysis to determine whether a prospective change in the status quo – *i.e.*, revocation of the order – would be likely to lead to continuation or recurrence of injury.

36. That said, the United States notes that there is no obligation under Article 11.3 for authorities to specify whether it has determined that injury would be likely to recur, as opposed to or that injury is likely to continue.

REQUEST FOR PRELIMINARY RULINGS

Q21. The Panel notes the US statement in paragraph 35 of its first oral statement that the United States has never argued that Argentina's panel request had failed to identify the contested measures in its request for establishment. The Panel also notes the US assertion in paragraph 90 of its first written submission and paragraph 37 of its second oral statement that Argentina's description of the measure at issue in the context of its page four claims is also vague. Please clarify whether the United States is also alleging that Argentina failed to identify the measure at issue, in the context of its page four claims.

37. It has never been clear to the United States what purpose, if any, Page Four serves, but the United States is not claiming that Argentina has failed to identify the measures at issue. Rather, the reference to "certain aspects" of the challenged measures contributes to Argentina's failure to "present the problem clearly," a requirement of Article 6.2 of the DSU. It is this that the United States is challenging.

Q22. The Panel notes the following statement in paragraph 82 of the US first written submission:

The United States, therefore, requests that the Panel accept Argentina's proposed clarification at face value and find that the claims falling within this category are not within the Panel's terms of reference due to Argentina's failure to comply with Article 6.2 of the DSU. (*emphasis added*)

What portions, if any, of the claims raised in Argentina's written submissions to the Panel find their basis exclusively in page four of Argentina's request for establishment? In other words, which claims, if any, that Argentina has raised during these panel proceedings have to be found by the Panel to be outside its terms of reference because of the alleged ambiguity of page four of Argentina's panel request?

38. The claims identified in Sections A and B of the Panel Request are limited to:

As such claims:

- 19 USC. 1675(c)(4), in violation of Articles 11.1, 11.3, 11.4, 2.1, 2.2, 2.4, 6.1, 6.2, 6.6, 6.8, 6.9, 6.10, 12.2, 12.3, and Annex II of the Anti-Dumping Agreement;¹²
- 19 C.F.R. 351.218(e), in violation of Articles 11.1, 11.3, 11.4, 2.1, 2.2, 2.4, 6.1, 6.2, 6.6, 6.8, 6.9, 6.10, 12.2, 12.3, and Annex II of the Anti-Dumping Agreement;¹³
- 19 USC. 1675a(a)(1), in violation of Articles 11.1, 11.3, and 3 of the Anti-Dumping Agreement;¹⁴

¹² Section A.1.

¹³ Section A.1.

¹⁴ Section B.3.

- 19 USC. 1675a(a)(5), in violation of Articles 11.1, 11.3, and 3 of the Anti-Dumping Agreement;¹⁵

As applied claims¹⁶

- the Department of Commerce's alleged application of waiver provisions to Siderca in the sunset review of OCTG from Argentina, in violation of Articles 11.1, 11.3, 11.4, 2.1, 2.2, 2.4, 6.1, 6.2, 6.6, 6.8, .69, 6.10, 12.2, 12.3, and Annex II of the Anti-Dumping Agreement;¹⁷
- the Department of Commerce 's alleged failure to conduct a review, in violation of Article 11.3 of the Anti-Dumping Agreement;¹⁸
- the Department of Commerce 's alleged failure to make a "determination" in violation of Article 11.3 of the Anti-Dumping Agreement;¹⁹
- the Department of Commerce 's Determination to Expedite based on the 50 per cent threshold;²⁰
- the allegedly "virtually irrefutable presumption" of likelihood of continuation or recurrence of dumping, in violation of Article 11.3 of the Anti-Dumping Agreement and Article X:3(a) of the GATT 1994;²¹
- the Department of Commerce 's alleged application of a zeroing methodology, in violation of Articles 11.1, 11.3, 2.1, 2.2, and 2.4 of the Anti-Dumping Agreement;²²
- the International Trade Commission's application of the "likely" standard, in violation of Articles 11.1, 11.3, 11.4, 3.1, 3.2, 3.3, 3.4, 3.5, and 6 of the Anti-Dumping Agreement;²³
- the International Trade Commission's alleged failure to conduct an objective examination of the record and to base its determination on "positive evidence, "with respect to the volume of imports, price effects on domestic like products, and impact of imports of the domestic industry, in violation of Articles 11.1, 11.3, 11.4, 3.1, 3.2, 3.3, 3.4, 3.5, and 6 of the Anti-Dumping Agreement;²⁴
- the International Trade Commission's use of cumulation, in violation of Articles 11.1, 11.3, 3.1, 3.2, 3.3, 3.4, and 3.5 of the Anti-Dumping Agreement.²⁵

37. Argentina's written submissions, however, include claims beyond those listed in Sections A and B of the Panel Request. Moreover, Argentina has not argued that these additional claims are based on the listing of measures on Page Four (and indeed the lack of description of measures on Page Four certainly would make any such argument difficult to ascertain). These additional claims – not properly before the Panel because they are not within the Panel's terms of reference as established by Argentina's panel request – are found in Argentina's submissions as follows:

¹⁵ Section B.3

¹⁶ By "as applied," the United States means "as applied" in the sunset review of OCTG from Argentina.

¹⁷ Section A.2

¹⁸ Section A.2

¹⁹ Section B.2

²⁰ Section A.3

²¹ Section A.4

²² Section A.5

²³ Section B.1

²⁴ Section B.2

²⁵ Section B.4

First Written Submission:

- Section VII.A: This section makes claims regarding the waiver provisions under Section 351.218(d)(2)(iii) of the regulations (deemed waivers). Section A of Argentina's Panel Request refers only to Section 351.218(e) of the regulations (adequacy of response to notice of initiation);²⁶
- Section VII.B.2: This section makes claims regarding 19 USC. 1675(c) and 1675a(c), the SAA, and the *Sunset Policy Bulletin*. Section A of the Panel Request refers to 19 USC. 1675(c)(4) only and does not refer to the other provisions of 19 USC. 1675(c), 19 USC. 1675a(c), the SAA, or the *Sunset Policy Bulletin*. The only basis for a claim under these provisions would be their listing on Page Four;
- Section VII.E.1: This section makes a claim regarding US administration of its laws, regulations, decisions, and rulings with respect to sunset reviews in violation of Article X:3(a) of the GATT 1994. However, Section A.4 of the Panel Request only challenges the sunset determination of OCTG from Argentina in this regard, not all US laws, regulations, decisions, and rulings with respect to all sunset reviews.²⁷ The United States does not find a basis for this claim even in Page Four;
- Section VIII.C.2: This section makes a claim regarding the International Trade Commission's application of 19 USC. 1675a(a)(1) and (5) in the Sunset Review of OCTG from Argentina. However, Section B.3 of the panel request makes no reference to the sunset review from Argentina; instead, it challenges the statute "as such." The only basis for an "as applied" claim, therefore, would be the blanket reference on Page Four to the ITC's "Sunset Determination;"
- Section IX: This Section on its face addresses measures that are only listed on Page Four (Article VI of the GATT 1994; Articles 1 and 18 of the Anti-Dumping Agreement; and Article XVI:4 of the WTO Agreement). The only basis for these claims would be Page Four;
- Section X: The Conclusion states that "US Sunset Review, Statutory, Regulatory, and Administrative Provisions As Such Violate the Anti-Dumping Agreement and the WTO Agreement." However, as noted above, the only measures identified in Sections A and B of the Panel Request are 19 USC. Section 1675(c)(4), 19 C.F.R. Section 351.218(e), Section 1675a(a)(1), and 19 USC. 1675a(a)(5). The only basis for claims regarding any other measures would be the list of measures on Page Four.

Second Written Submission:

- Section III.A: As in its First Submission, Argentina makes a claim regarding 19 C.F.R. Section 351.218(d)(2)(iii) (deemed waiver). Section A of the Panel Request only refers to Section 351.218(e);²⁸

²⁶ The United States has stated that the extension of Argentina's claim to Section 351.218(d)(2)(iii) did not result in sufficient prejudice to warrant an objection because Argentina in its "brief description" under Section A.1 at least indicated that it intended to challenge the waiver provisions. See US First Written Submission, n.103.

²⁷ It should further be noted that Argentina has argued that use of the phrase "as such" in Section A.4 of the Panel Request makes the entire claim an "as such" claim. However, the language of the claim indicates that it is only the Sunset Determination in this case that is being challenged, and the underlying law and other sunset determinations are merely evidence in support of the "as applied" claim.

²⁸ See n. 26 above.

- Section III.B: This Section makes a claim regarding 19 USC. Section 1675a(c)(1), the Statement of Administrative Action, and the *Sunset Policy Bulletin* and argues that US law as such result in an irrefutable presumption of likelihood. Yet Section A.4 of Argentina's Panel Request only makes a claim that the irrefutable presumption as applied in this sunset determination. The only basis for an "as such" claim regarding the statute, the Statement of Administrative Action, and the *Sunset Policy Bulletin* would be Page Four;
- Section III.D.2: Argentina makes a claim regarding the ITC's application of the statutory provisions regarding time frame. Yet the Panel Request only contains an "as such" claim. The only basis for an "as applied" claim would be the blanket reference to the ITC's "Sunset Determination" on Page Four;
- Section V: This Section makes claims regarding "consequential" violations, and, as discussed above, these Articles (Article VI of the Anti-Dumping Agreement, Articles 1 and 18 of the Anti-Dumping Agreement, and Article XVI:4 of the WTO Agreement) are only found on Page Four.

ANNEX E-10

ANSWERS OF THE UNITED STATES TO QUESTIONS FROM ARGENTINA – SECOND MEETING

13 February 2004

Volume of imports

Q1. There are discrepancies in precise import volumes. Argentina submitted Chart 4 to its second oral statement to represent the Department's determinations in the four concluded annual reviews regarding the import volume. This chart shows that the Department had confirmed at least 154 MT of imports over the period. Argentina also takes the point from the Appellate Body that the authority cannot draw any presumption from the sole fact that there was a decline in import volume after the imposition of the order. The Appellate Body stated: "[A] case-specific analysis of the factors behind a cessation of imports or a decline in import volumes (when dumping is eliminated) will be necessary to determine that dumping will recur if the duty is terminated." (para. 177) With this background, did the United States undertake a case-specific analysis of the factors behind the decline in import volumes in this case? If so, please provide a detailed explanation of that analysis.

1. Notwithstanding Argentina's selective recitation of portions of the AB report in Japan Sunset and the misrepresentations contained in Chart 4, Commerce confirmed the import statistics using two different sources, the Census Bureau IM-145 import statistics and the ITC Trade Database. No respondent interested party, including Siderca, commented on Commerce's use of these import statistics during the sunset review of OCTG from Argentina despite being given the opportunity to do so.

Substantive Basis for the Department's Likelihood Determination

Q2. In its 3 February opening statement (para. 11), the United States confirmed that the Department's likelihood of dumping determination was based on the existence of entries that established a decline in volume and that dumping continued during period of the order. The Appellate Body said that procedures or "provisions" that create "presumptions" or "predetermine" a particular result "run the risk of being found inconsistent with this type of obligation." (*Japan Sunset*, para. 178)

(a) Did the Department presume from the payment of duties that dumping (as defined by Article 2) had continued during the period of the order?

2. The United States uses a retrospective system and does not calculate a margin of dumping unless it conducts an administrative review. Where there is no such administrative review, the United States assesses dumping duty liability at the cash deposit rate in effect for particular subject merchandise at the time of entry. In this case, the deposit rate for OCTG from Argentina at the time of entry for all the periods prior to the sunset review was 1.36 per cent because no annual reviews were completed. The United States believes that the existence of dumping and a reduction in the volume of imports since the imposition of a duty is probative of the likelihood of the continuation or recurrence of dumping. In the sunset review of OCTG from Argentina, neither Siderca nor any other respondent interested party submitted evidence contrary to this probative evidence.

- (b) **Does the United States consider that this constitutes positive evidence that dumping (as defined by Article 2) would be likely to continue or recur in the event of revocation?**

3. The United States believes that the existence of dumping and a reduction in the volume of imports since the imposition of a duty is probative of the likelihood of the continuation or recurrence of dumping. In the sunset review of OCTG from Argentina, neither Siderca nor any other respondent interested party submitted evidence contrary to this probative evidence.

- (c) **Would the United States agree that in some cases there may be circumstances where it would be commercially unreasonable to undertake an administrative review to obtain a small refund of deposits?**

4. A finding that it would be commercially reasonable to request an administrative review in a particular case would depend on the factual circumstances established in that case. The scenario posited by Argentina is not relevant to the present dispute because it supposes facts not in evidence in this case.

Q3. The United States has modified its position with regard to its basis for determining that dumping continued throughout the order. In the *Issues and Decisions Memorandum* the Department stated: “the Department finds the existence of dumping margins after the issuance of the orders is highly probative of the likelihood of continuation or recurrence of dumping.” In its First Submission (para. 54) and its Second Submission (paras. 56), the United States indicated (consistent with the US statute) that it considered “dumping margins.” In the second substantive meeting, the United States indicated that the basis for the Department’s finding that dumping continued was based on the collection of anti-dumping duties. Is there a distinction between the existence of a dumping margin – whether from the original investigation or a review – and the payment of a duties at the deposit rate?

5. The United States has not modified its position with regard to Commerce’s finding that dumping continued throughout the life of the dumping order on OCTG from Argentina. There is no difference between the existence of a dumping margin and the payment of duties at the deposit rate for the purposes of determining whether dumping has continued throughout the life of an order in a sunset review.

Q4. Please, compare paragraph 54 of the US First Submission with paragraph 23 of the US Opening Statement of February 3 and explain the contradiction.

6. There is no contradiction between these two statements. Commerce did not rely on the magnitude of the margin, but rather on the existence of dumping and the depressed import volumes throughout the life of the anti-dumping duty order on OCTG from Argentina.

Waiver

Q5. What is the information on the record in the sunset review regarding the non-respondent respondents?

7. The import statistics, verified by the Commerce’s Census Bureau IM-145 import statistics and the ITC Trade Database, confirmed the existence of one or more non-responding respondents. These interested parties failed to respond to the notice of initiation of the sunset review for OCTG from Argentina.

Q6. Is the likelihood of dumping determination for the non-responding respondents based solely on their non-participation?

8. The facts in the sunset review of OCTG from Argentina establish that there were imports of Argentina OCTG during the five year period preceding the sunset review and that Siderca did not export OCTG during this period. This means that there were one or more exporters of Argentine OCTG who failed to respond to the notice of initiation of the sunset review. Therefore, based on the evidence of Argentine OCTG imports and the failure of certain Argentine exporters to respond, Commerce found that there was a likelihood of continuation or recurrence of dumping with respect to these non-responding respondents.

Q7. During the second substantive meeting, the United States indicated that there was nothing on the record to contradict Siderca's statement that Siderca was the only Argentine producer of OCTG. Nonetheless, the United States indicated that the imports statistics showed that there were other exporters of Argentine OCTG, which may have been produced by Siderca.

- (a) **How does the Department reconcile these statements with its findings in the *Issues and Decision Memorandum* (at page 5) that “there have been above *de minimis* margins for the investigated companies throughout the history of the orders”?**

9. There were no administrative reviews of OCTG from Argentina, so the dumping margin calculated for Siderca in the original investigation continued to apply and continues to apply to Siderca. In addition, the "all others" rate (1.36 per cent), also calculated during the original investigation, was applied to all imports of Argentine OCTG during the period preceding the sunset review.

- (b) **Does the United States agree that the only “investigated compan[y]” in this case was Siderca?**

10. Siderca was the only company investigation in the original investigation of OCTG from Argentina.

- (c) **Could the United States explain how imports into the United States of Siderca-produced OCTG, which exports were made by other exporters of potentially different nationalities, is probative of the issue of whether dumping is likely to continue or recur?**

11. Siderca ceased shipping OCTG almost immediately after the imposition of the order, which is probative evidence that Siderca could not sell OCTG in the United States absent dumping. Siderca had the opportunity to explain why this factual situation was not probative in the sunset review, but failed to do so. Also, there were imports of OCTG from Argentina during the life of the order for which dumping duties were paid. The domestic interested parties placed evidence of these imports on the administrative record of the sunset review and Commerce verified the statistics. Siderca's only statement in this regard made during the sunset review was that it had not exported OCTG to the United States. It did not allege that these exports came from anywhere other than Argentina or that these exports were or were not produced by Siderca. Therefore, based on the evidence of Argentine OCTG imports and the failure of the Argentine exporters to respond, Commerce found that there was a likelihood of continuation or recurrence of dumping with respect to these non-responding respondents.

Q8. During the second substantive meeting, the United States indicated that it typically notifies the parties on the interested party list of the proceedings. Can the United States provide

a copy of the notice in this case and explain who the interested parties are, to the extent that they are not obvious from the interested party list?

12. Commerce created a web-site for sunset reviews that contains each anti-dumping and countervailing duty order. Each order has an interested party list appended which lists every interested party who has participated in an administrative proceeding covering the respective order since the imposition of the order. This list is updated with each subsequent proceeding, including administrative reviews. Therefore, the interested party list for the anti-dumping duty order on OCTG from Argentina will necessarily be longer at present than it would have been at the time the sunset review was conducted, because administrative reviews have been conducted since the sunset review. The list as it currently stands can be found at the Department of Commerce website, www.doc.gov.

Q9. The Department's *Issues and Decisions Memorandum*, the US First Submission, and US responses to questions indicate that the Department determined that the Argentine non-responding respondents were deemed to have waived participation. The Department also confirmed that Siderca did not ship during the relevant period. The Department confirmed that the waiver of the non-responding respondents meant that they would be likely to dump (response to question 2(a))? Based on the Department's determined that Siderca did not ship to the US market. How could the Department's waiver of the non-responding respondents not have had an impact on the order wide analysis?

13. Please see the answers of the United States to Panel Questions 4(b) and 4(c).

Facts Available/Expedited Review

Q10. The United States agreed in the first hearing that Article 6.8 and Annex II apply to Article 11.3 reviews.

(a) Does the United States continue to hold this view?

14. Yes.

(b) Does the United States continue to agree that Siderca filed a complete response and offered to cooperate fully?

15. Yes.

Q11. Did Siderca's conduct justify use of facts available within the meaning of Article 6.8 and Article II?

16. Commerce did not apply "facts available within the meaning of Article 6.8 and Annex II" to Siderca in the sunset review of OCTG from Argentina.

Q12. The United States says that "facts available" has no negative connotation (US Second Submission at para. 24).D

(a) Does the United States agree that section 351.218(d)(3) requires respondent interested parties to supply past dumping margins and historical import volume data in their substantive response?

(b) Does section 19 USC. section 1675a(c)(1) mandate that the Department "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” in making the likelihood determination?

17. In the context of a sunset review, section 351.308(f) defines "the facts available" as prior agency determinations, information submitted by the interested parties, and any information on the administrative record of the sunset review, including the likelihood determinations concerning the non-responding respondents. In the sunset review of OCTG from Argentina, Commerce considered all the evidence on the administrative record including the prior agency determinations and any information submitted by the interested parties in accordance with section 351.308(f) of the Sunset Regulations.

Q13. The statute(1675(c)(3)(B)) and regulation 351.218(e)(1)(C)(2) state that, in an expedited review, the Department will “issue, without further investigation, final results of review based on the facts available . . .” In light of your response to question 3, how is this consistent with the Appellate Body’s statement that the authorities are required to make a “fresh determination, based on credible evidence” when the facts available are limited to the margin from the original investigation and the volume decline?

18. In the context of a sunset review, section 351.308(f) defines "the facts available" as prior agency determinations, information submitted by the interested parties, and any information on the administrative record of the sunset review, including the likelihood determinations concerning the non-responding respondents. In the sunset review of OCTG from Argentina, Commerce made a fresh determination by considering all the information on the administrative record, including the information submitted by the domestic interested parties and Siderca, as well as prior agency determinations and the information collected by Commerce, in light of the new standard of likelihood of continuation or recurrence of dumping.

Zeroing

Q14. Does the United States agree that the 1.36 percent dumping margin cited in the Department’s sunset determination resulted from the division of a numerator of 125,478.93 by a denominator of 9,240,392.64, as represented in Exhibit ARG-52 to Argentina’s First Submission?

- (a) **Does the United States agree that the net price of some of Siderca’s US sales exceeded the weighted-average price to China for the matching product?**
- (b) **Does the US agree that the extent to which the net price of sales to the United States exceeded the weighted-average net price to China is not reflected in the numerator of this calculation?**
- (c) **Does the United States believe that CONNUM 1 (used in the example in paras.141-142 Argentina’s Second Submission) was “dumped” within the meaning of Article 2.**

19. Article 17.5(ii) of the AD Agreement provides that the panel is to examine the matter based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member." The record of the sunset review which is before this panel contains only that information which was placed on the record by Argentina, Siderca, Commerce, or any other interested party that chose to participate in the review. As discussed below, the record of the sunset review contains the final determination of Commerce in the original investigation, and does not contain the information pertinent to Argentina’s questions.

Q15. Does the United States agree with Argentina's description of the calculation methodology in paragraphs 137-144 of Argentina's Second Submission? If not, please explain the basis for your answer.

20. The United States does not agree with Argentina's description of the calculation methodology in paragraphs 137-144 of Argentina's second written submission. That discussion contains a number of legal and factual assertions, the basis for which Argentina has failed to establish and/or which are not properly before this Panel pursuant to Article 17.5(ii) of the AD Agreement.

Q16. Does the United States agree with the calculation in ARG-66A to the extent that it shows that the addition of the positive and negative "margins" would yield a negative \$402,159.45? If not, why not?

21. Exhibit ARG-66A contains computer output which was not on the record of the sunset review. The computer programming used to create the output contained in ARG-66A is neither on the record of the sunset review, nor is it contained in the exhibit itself. Consequently, the United States does not agree with, and is not in any position to evaluate, anew, in the context of this dispute, the contents of Argentina's exhibit.

Q17. Paragraph 54 of the US First Submission indicates that the dumping margin from the original investigation was the only indicator available to the Department. In light of this, does the United States dispute that the margin that was calculated in the original investigation was part of the record from the sunset proceedings?

22. Commerce reported the margin from the original investigation, 1.36 per cent, to the International Trade Commission as the "margin likely to prevail" in the event the anti-dumping order on OCTG from Argentina was revoked.

23. Thus, the record in the sunset review contained the final determination of Commerce which stated that the margin calculated in that determination was 1.36 per cent. However, Siderca's detailed questionnaire responses and computerized cost and sales information, supplemental questionnaires issued by Commerce, verification findings, legal briefs, and other relevant documents and memoranda supporting the final determination in the original investigation were not placed on the record of the sunset review by Argentina, Siderca, or any other party.

Q18. Was the 1.36 per cent margin relied on by the Department for purposes of its likelihood determination in the sunset review established on the basis of a fair comparison in light of the Appellate Body's decisions in *Bed Linens* (paras. 55, 61, 62) and *Japan Sunset* (paras. 126-132)? If so, please explain how a "fair comparison" was established given that a negative margin of 4.536 would have been the result of the calculation without the use of zeroing?

24. First, Commerce did not rely on the 1.36 per cent calculated in the original investigation in making its likelihood determination in the sunset review of OCTG from Argentina. Rather, Commerce found that the existence of dumping and depressed import volumes since the imposition of the order was highly probative that dumping would be likely to continue or recur if the anti-dumping duty order on OCTG from Argentina were revoked.

25. With respect to the remainder of Argentina's question, the answer is yes. Although the calculation methodology used to establish the 1.36 per cent margin was not on the record of the sunset review, the United States confirms that the methodology was different from that used in *EC – Bed Linen*. Argentina has not explained the legal basis for its claims with respect to the United States' methodology to the extent that the methodology differs from that involved in *EC – Bed Linen*.

Q19. Under Article 17.6(i), the Panel is charged with assessing whether the Department's "assessment of the facts was proper and whether their evaluation of those facts was unbiased and objective." In the recent compliance panel appeal in the *Bed-Linens* case, the Appellate Body provided additional guidance on the applicable standard under Article 17.6(i):

In *US – Hot-Rolled Steel*, we stated that “[a]lthough the text of Article 17.6(i) is couched in terms of an obligation on *panels* . . . the provision, at the same time, in effect defines when *investigating authorities* can be considered to have acted inconsistently with the Anti-Dumping Agreement.” We further explained that the text of Article 17.6(i) of the Anti-Dumping Agreement, as well as that of Article 11 of the DSU, “requires panels to ‘assess’ the facts and this . . . clearly necessitates an active review or examination of the pertinent facts.” (Appellate Body Report, Recourse to Article 21.5, *Bed Linen from India*, para. 163)

In light of this:

- (a) What did the Department do to “assess” whether the 1.36 percent margin that the Department relied on for its likelihood of dumping determination could serve as a “proper” basis for that determination?**

26. As discussed above, Commerce did not rely on the 1.36 per cent calculated in the original investigation in making its likelihood determination in the sunset review of OCTG from Argentina. Rather, Commerce found that the existence of dumping and depressed import volumes since the imposition of the order was highly probative that dumping would be likely to continue or recur if the anti-dumping duty order on OCTG from Argentina were revoked.

27. With respect to Article 17.6(i) of the AD Agreement, that provision states that, "If the establishment of the facts was proper and the evaluation was unbiased and objective, [...], the evaluation shall not be overturned." Thus, the starting point for any review of Commerce's actions is, initially, Commerce's procedures for establishing facts, then Commerce's evaluation of those facts. In this case, the anti-dumping duty margin referenced by Commerce in its sunset review was placed on the record of the sunset review as part of the final determination from the anti-dumping duty investigation. The results of that investigation were unchallenged/unchanged. Although they had the opportunity available to them procedurally, neither Argentina, nor Siderca, placed any information or argument on the record of the sunset review seeking to call into question the validity of the margin calculation. Thus, the fact of the 1.36 per cent margin as the result of the initial investigation was not challenged on the record. Consequently, there was no reason for the United States, acting in an unbiased and objective manner, to question the validity of that margin.

- (b) Given that the margin was calculated in the original investigation on the basis of zeroing, how does the Department defend its “evaluation” of the 1.36 percent margin as “unbiased and objective” in using that margin as the basis for its conclusion that “dumping” (as defined by Article 2) was likely to continue or recur?**

28. It has not been established before this Panel or elsewhere that the margin calculated for Siderca in the original investigation of OCTG from Argentina was determined using a methodology not consistent with the obligations of Article 2; otherwise, see US answer above.

The Commission's Likely Standard

Q20. Does the United States consider to be accurate the Commission's description to a NAFTA panel of the likely standard applied to the OCTG sunset review (excerpt included as Exhibit ARG-67 to Argentina's Second Submission)?

29. See the response to the question below.

Q21. Does the United States agree that the description expresses the view that "likely" does not mean "probable"?

30. Two of the Commissioners, Vice Chairman Hillman and Commissioner Koplan, both of whom participated in the OCTG sunset reviews, consistently have applied the "probable standard or its equivalent,"¹ since the commencement of the first US sunset reviews.² The description in the NAFTA panel brief concerning the approach taken by some other members of the ITC was based on their understanding that the term "probable" connoted a very high degree of certainty. *See, e.g.*, the discussion of this issue in the July 2002 Usinor submission (Exhibit ARG-56 at 6). As it became apparent from subsequent opinions of the US court, however, there are different connotations associated with the word "probable." Since the NAFTA panel brief was filed (in February 2002), at least two judges in a US court have implied that the term "probable" does not indicate a requirement for any particular level of certainty, let alone a high level of certainty. *Usinor Industeel v. United States*, Slip Op. 02-152 at 6 n.6 (20 Dec. 2002) ("the court has not interpreted 'likely' to imply any particular degree of certainty") (Exhibit US-18); *Indorama Chemicals (Thailand) Ltd. et al v. United States International Trade Commission*, Slip Op. 02-105 at 20-21 (4 Sep. 2002) ("standard is based on a 'likelihood' of continuation or recurrence of injury, not a certainty") (Exhibit US-32). This guidance from the US court was not available to the ITC when the brief to the NAFTA panel was drafted. Once the court clarified what it meant by the statement that "probable" was synonymous with the statutory term "likely," it became clear that the views of individual Commissioners as to the standard applicable in sunset reviews (including the standard applied in the OCTG sunset review) were either identical to that articulated by the court or indistinguishable from it. The US court recognized this point in affirming the ITC's unchanged affirmative remand determination in *Usinor*. For these reasons, the views of participating Commissioners in the OCTG sunset review remain consistent with the "likely" standard as that term has been defined by the US courts.

Evidentiary Basis

Q22. Paragraph 56 of the US Second Submission states that the margins reported by the Department to the Commission are relevant to the Commission's sunset determination? Does the United States believe that the 1.36 per cent margin was relevant to the Commission's sunset determination? Did the Commission consider that margin in its likelihood of injury analysis?

31. Paragraph 56 of the US second written submission does not state that the margins reported by Commerce to the ITC are relevant to the Commission's sunset determination.

¹ Vice Chairman Hillman has interpreted "likely" to mean "more likely than not."

² *Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, the Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom*, Inv. Nos. AA-1921-197 (Remand), 701-TA-231, 319-320, 322, 325-328, 340, 342, and 348-350 (Remand), and 731-TA-573-576, 578, 582-587, 604, 607-608, 612, and 614-618 (Remand), USITC Pub. 3526 (July 2002) at *Separate Views of Vice Chairman Jennifer A. Hillman Regarding the Interpretation of the Term "Likely"*, and *Dissenting Views of Commissioner Stephen Koplan Regarding the Interpretation of the Term "Likely."* (Exhibit US-31.)

32. The staff report accompanying the ITC's determination simply noted the margins (ranging from 1.36 per cent to 49.78 per cent) reported to the ITC by Commerce.³ The ITC also noted these margins in its view⁴ but did not discuss them further.

Q23. If so, did the Commission consider whether this margin had been “tainted” by the practice of zeroing?

33. As noted above, the ITC did not evaluate the margin specific to subject imports from Argentina as part of its likelihood of injury analysis.

Q24. Does the United States agree that if Article 3 applies to Article 11.3 reviews, then the failure to consider the margin would violate Articles 11.3 and 3.4?

34. The United States does not agree that Article 3 applies to Article 11.3 reviews. Additionally, the United States notes that Article 3.4 provides only for consideration of the magnitude of the duty and provides that no one factor is dispositive.

Q25. The Appellate Body in *Steel from Germany* (para. 88) stated that: “Where the level of subsidization at the time of the review is very low, there must be persuasive evidence that revocation of the duty would nevertheless lead to injury to the domestic industry.” With respect to the obligation under Article 11.3, does the United States believe it was necessary for the Commission to consider the magnitude of the margin in determining whether revocation of the order on OCTG from Argentina would be likely to lead to continuation or recurrence of injury?

35. Article 11.3 does not impose an obligation to consider the magnitude of the margins as part of the analysis of whether revocation of the order would be likely to lead to continuation or recurrence of injury. If the ITC had evaluated the margins, it would have considered the margins from all five countries whose imports were cumulated in these sunset reviews, margins that ranged from 1.36 to 49.78 per cent.

Cumulation

Q26. Does the US agree that that Article 3.3 contains substantive disciplines on the use of cumulation? In the US view, are these substantive disciplines restricted to Article 5 investigations?

36. The United States agrees that Article 3.3 contains substantive disciplines on the use of cumulation, and that these disciplines are restricted to Article 5 investigations.

Q27. In the view of the US, is there any substantive discipline on the use of cumulation in an 11.3 review?

37. No.

Q28. If not, what is the US view as to why the Agreement would be disciplined in the context of an Article 5 investigation, but not in an Article 11.3 review?

38. The United States does not wish to speculate on the negotiating background to specific provisions of the AD Agreement. The United States notes, however, that there is a fundamental difference between investigations and sunset reviews that might explain why cumulation is disciplined in the former but not in the latter case. This difference is that in sunset reviews the

³ ITC Report, p. I-14.

⁴ ITC Report, p. 9 n.51.

imports being examined are restrained by the effects of an anti-dumping measure, and this may also explain why it was decided not to apply *de minimis* and negligibility conditions on the use of cumulation in sunset reviews. Indeed, the Appellate Body made a similar observation (in the countervailing duty context) when it stated that "[q]ualitative differences [between investigations and sunset reviews] may also explain the absence of a requirement to apply a specific *de minimis* standard in a sunset review⁵

Q29. Does the US have any textual support for its view that cumulation is permitted in Article 11.3 reviews?

39. As the United States explained in its first submission (para. 363), the genesis of any obligation or right arising under the WTO Agreement is the text of the relevant provision, and absent a textual basis, the rights of Members cannot be circumscribed. The question, therefore, is whether Argentina has any textual support for its view that cumulation is *not* permitted in sunset reviews. As the United States also explained in that submission (paras. 364-365), a prohibition on cumulation would run counter to the overall object and purpose of the AD Agreement.

⁵ *US – German Steel*, AB Report, para. 87.

ANNEX E-11

COMMENTS OF ARGENTINA ON THE UNITED STATES' CLOSING STATEMENT AND THE UNITED STATES' RESPONSES TO THE PANEL'S AND ARGENTINA'S QUESTIONS – SECOND MEETING

20 February 2004

I. WAIVER/EXPEDITED REVIEW

US Position:

1. The United States admits that the waiver provisions of US law affect the order-wide likelihood determination, but the United States asserts that these provisions do not determine the final outcome of its order-wide likelihood determinations. This assertion is made both generally and in the specific case of the sunset review of Argentine OCTG. (US Answers to Second Set of Panel Questions, para. 4).

Argentina's Comment:

2. The US answer is not credible on any level, and the United States carefully avoids answering the difficult questions asked by the Panel.

3. First, the United States admits that there has never been a case in which waiver was applied on the company-specific level (leading to the statutorily-mandated likely dumping determination) and a negative determination was made on an order-wide basis (US Answers to Second Set of Panel Questions, para. 2.). Exhibits ARG-63 and ARG-64 show that waiver was applied 173 times, and each time the Department rendered an affirmative order-wide, likelihood determination. The United States simply cannot rebut the fact, proven by Argentina, that there has never been a negative likelihood of dumping determination in any case in which the waiver provision was applied.

4. Furthermore, in these cases the United States often cites the waiver provisions as the basis for its affirmative, order-wide likelihood decision, even when other exporters have attempted to participate.¹ This is precisely what happened in this case, in which the Department stated:

Therefore, given that dumping continued after issuance of the orders, average imports continued at levels far below pre-order levels from 1995 through 1999, and respondent interested parties waived their right to participate in these reviews or failed to submit adequate substantive responses, we determine that dumping is likely to continue if the orders were revoked.²

¹ For example, the case provided at ARG-63, Tab 165 provides some striking similarities to the review at issue, and provides another reference point from which the Panel can judge the credibility of the U.S. statements about the effect of company-specific waivers. In the full sunset review of mechanical transfer presses from Japan, respondent interested parties provided an adequate aggregate response, and therefore the Department conducted a full review. Nevertheless, the Department based its affirmative likelihood determination in part on the waiver applied to certain of the respondents: “[W]e note that additional producers/exporters waived their right to participate in this review, which also constitutes grounds for likelihood of continuation or the recurrence of dumping should the order be revoked (see section 751(c)(4)(B)).” (*Issues and Decision Memorandum for the Full Sunset Review of MTPs from Japan (Final Results)* at 3 (ARG-63, Tab 165)) (emphasis added).

² *Issues and Decision Memorandum* at 5 (ARG-51) (emphasis added).

This statement, viewed both separately and in the context of the Department's practice, demonstrates that: (1) the Department's system does not, in fact, operate as the bifurcated, two-step process that the United States explains in its answers; and (2) waiver is determinative in every case in which it is applied, including this case.

5. Even if the Panel were to accept the US explanation as a general proposition (i.e. relevant to Argentina's "as such" claim), the Panel must find that in this case the application of the waiver was determinative. Company-specific waivers (even if limited to non-responding respondents), combined with Siderca's zero share, and the "highly probative" value attached to lower export volumes and an assumed existence of dumping determined the outcome.

6. The United States declined to answer the Panel's specific question on this point. Question 4.c specifically asked the United States to answer the question in light of Siderca's zero share of exports. In other words, when company-specific waivers apply to companies accounting for 100 per cent of the exports, and statutorily mandated likelihood findings result for those companies, can there be a different finding on the order-wide level? The United States gave a non-answer and avoided referencing the fact that, in this case, the automaticity of the waiver finding, combined with the decision to expedite the review and make the determination on the basis of waiver and facts available, determined the outcome of this case.

7. The only possible explanation left for the United States is to explain that the result might be different if one of the exporters offers an explanation as to why the import volumes decreased. The United States attempts this explanation at paragraphs 7 and 11 of its response. This explanation is not credible. As Mexico explained in its written response to a question after the first substantive meeting, even in a full review in which its exporters explained the reasons for the lower shipment levels, the Department categorically dismissed the explanations, repeated the SAA/*Sunset Policy Bulletin* mantra of the highly-probative value of the original dumping margins and lower export volumes, and found dumping likely to recur. Argentina asks the Panel to review Mexico's response and the Department's decision at ARG-63, Tab 179, when judging the credibility of the explanation by the United States. And, there are several other examples included as supporting evidence in ARG-63 and ARG-64 to demonstrate the point, including the MTP case referenced in note 1 above.³

8. The US assertion that the Department will consider any information on the record that rebuts the probative value of the existence of dumping and depressed import volumes (US Answers to Second Set of Panel Questions, paras. 7 and 11) also contradicts the statute and the regulations. As Argentina has explained in past submissions, and the United States has never rebutted, under the statute, regulations, and *Sunset Policy Bulletin*, the Department will only consider such other information where "good cause" is shown and, pursuant to the regulation and *Sunset Policy Bulletin*, will do so only in "full reviews."⁴ (Argentina's Second Submission, paras. 76-77; Argentina's Second

³ In *MTPs from Japan*, although post-order import volumes had declined, the respondents explained the reasons for the reduction in volume. Nevertheless, the Department found that "deposit rates above *de minimis* continue[d] in effect for other producers/exporters of MTPs from Japan" and thus determined that dumping would be likely to continue if the order were revoked. (*Issues and Decision Memorandum for the Full Sunset Review of MTPs from Japan (Final Results)* at 3 (ARG-63, Tab 165)).

⁴ 19 C.F.R. § 351.218(e)(2)(iii). For example, in the full sunset review of sugar and syrups from Canada (*Sugar and Syrups from Canada*, 64 Fed. Reg. 48,362 (1999) (ARG-63, Tabs 261)), the Department stated: "The Department's Sunset Policy Bulletin notes that the Department will consider other factors (such as prices and costs) in full sunset reviews where an interested party identifies good cause through the provision of information or evidence that would warrant consideration of such factors." (64 Fed. Reg. at 48,363 (ARG-63, Tab 261)) (emphasis added).

Oral Statement, paras. 53, 64-66) In full reviews, the Department has routinely rejected respondent interested parties' attempts to show "good cause" to consider additional factors.⁵

9. Finally, the United States continues to struggle with its explanations of the "deemed waiver" mechanism that results from US law and the implementing regulations. In question 5(a), the Panel clearly asks whether section 1675(c)(4)(B) requires the Department to find likelihood of dumping for respondents that file an incomplete response. The United States responds by answering that section 1675(c)(3)(B) deals with adequacy determinations and the application of facts available, and then adds parenthetically that section 1675(c)(4)(B) relates to affirmative waivers. (US Answers to Second Set of Panel Questions, para. 5).

10. At this stage of the proceeding, there is no reason for an indirect answer to this question. It is plainly the case that: (1) section 1675(c)(4)(B) of the codified statute mandates an affirmative likelihood determination for parties who have waived ("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 . . . would be likely to lead to continuation or recurrence of dumping . . . with respect to that interested party"); and (2) section 351.218(d)(2)(iii) of the implementing regulation treats parties submitting incomplete responses as having waived their right to participate ("The Secretary will consider the failure by a respondent interested party to file a complete substantive response to a notice of initiation . . . as a waiver of participation . . ."). So, when a party submits an incomplete response, it is deemed to have waived its right to participate, and the statute mandates an affirmative likelihood finding. The United States avoids answering the Panel's question by not mentioning the implementing regulation, but subsequently acknowledges the effect of the regulation in its response to Panel Question 9.⁶ (US Answers to Second Set of Panel Questions, para. 12).

11. In the case under review, the Department found Siderca's response to be "inadequate," (*Issues and Decision Memorandum* at 3,7) (ARG-51) and later justified the invocation of the waiver provisions by stating it had not received complete responses from the respondent interested parties. (*Id.* at 5.) It is hard to understand why the United States is being so indirect with its answers on this point given the clear words of the statute, regulations, and the *Issues and Decision Memorandum* in this case.

12. The US answers to the Panel's questions regarding the waiver and facts available provisions are not convincing. Argentina has established in the proceeding that:

- The waiver provisions of US law and regulations require an automatic determination that dumping is likely to continue or recur. Even if respondents try to participate, they can be deemed to have waived their participation.

⁵ For example, in the preliminary phase of the full sunset review of magnesium from Canada, the respondent, for which the Department had calculated zero margins in the past four administrative reviews, argued that "good cause" existed for the Department to consider exchange rates in making the likelihood of dumping determination. (*Issues and Decision Memo for the Sunset Review of Pure Magnesium from Canada (Preliminary Results)* at 4 (ARG-63, Tab 201)) The Department declined to consider such information, basing its determination instead on a decline in volume: "Given that the Department has conducted numerous administrative reviews and is satisfied that observed patterns regarding import volumes are indicative of the likelihood of continuation or recurrence of dumping, we will not consider good cause arguments in this case." (*Id.* at 7) In the final results, the Department refused to consider the respondent's explanation for the decline in imports. (*Issues and Decision Memo for the Sunset Review of Pure Magnesium from Canada (Final Results)* at 5 (ARG-63, Tab 201)).

⁶ Pursuant to the regulation, the Department in practice deems a respondent that submits an incomplete substantive response to have waived participation in the sunset review. (See, e.g., *Issues and Decision Memo for the Expedited Sunset Review of Cut-to-Length Carbon Steel Plate from Belgium* at 2-3, 5 (ARG-63, Tab 82)).

- In this case, the waiver provisions determined the result.
 - The Department said that Siderca's response was inadequate and that all of the respondents waived their right to participate.
 - Even if the Panel accepts the US explanation that only the "non-responding respondents" waived their right, the deemed waiver in this case determined the outcome.

Article 11.3 does not permit automatic decisions based on "deemed waivers." As seen in this case, the authority abdicated its responsibility to conduct an investigation and render a determination based on positive evidence. By abdicating this responsibility, the Member loses its right to invoke the exception in Article 11.3, and it must honour its obligation to terminate the measure.

II. SUBSTANTIVE BASIS FOR LIKELY DUMPING DETERMINATION

US Position:

The United States confirmed that "Commerce's final affirmative likelihood determination in the sunset review of OCTG from Argentina was based on the existence of dumping and depressed import volumes over the life of the anti-dumping duty order on OCTG from Argentina." (US Answers to Second Set of Panel Questions, para. 4).

A. DECLINE IN VOLUME

US Position:

The United States indicated that "reduction in the volume of imports since the imposition of a duty is probative of the likelihood of the continuation or recurrence of dumping." (US Answers to Argentina's Questions, paras. 2 & 3) The United States also noted that "Siderca ceased shipping OCTG almost immediately after the imposition of the order, which is probative evidence that Siderca could not sell OCTG in the United States absent dumping." (US Answers to Argentina's Questions, para. 11) Elsewhere, the United States asserted that the Department normally considers "depressed import volumes to be highly probative evidence that dumping will likely continue." (US Answers to Second Set of Panel Questions, para. 11) The progression of the US responses leads to the conclusion that the decline in import volumes was given decisive (if not conclusive and determinative) weight by the Department in this case. As noted above, along with the purported existence of dumping (based on the margin from the original investigation), the United States confirmed that "Commerce's final affirmative likelihood determination in the sunset review of OCTG from Argentina was based on . . . depressed import volumes over the life of the anti-dumping duty order on OCTG from Argentina." (US Answers to Second Set of Panel Questions, para. 4).

Argentina's Comment:

13. The Appellate Body said it "would have difficulty accepting that dumping margins and import volumes are always 'highly probative' in sunset reviews" and that such factors could not alone be presumed to constitute sufficient evidence of a likelihood of dumping (Appellate Body Report, *Sunset Review of Steel from Japan*, para. 177).

14. The United States did nothing to examine the reason for the decline. The Appellate Body expressly rejected such a passive approach. The Appellate Body stated that a "decline in import volume could well have been caused or reinforced by changes in the competitive conditions of the market-place or strategies of exporters, rather than by the imposition of the duty alone." Accordingly, the Appellate Body said that "a case-specific analysis of the factors behind a cessation of imports or a

decline in import volumes . . . will always be necessary.” (*Id.*) Here, the Department did nothing, which the United States appears to concede (US Answers to Questions from Argentina, para. 11).

15. ARG-63 and ARG-64 demonstrate that import volume along with the existence of dumping margins is treated by the Department as “conclusive and determinative” of likelihood of dumping in every sunset case. Thus, far from being simply “probative” of likely dumping or even “highly probative” as the United States indicates (echoing the SAA) in its responses, in practice, the Department attaches decisive weight to declines in import volume for purposes of determining the likelihood of dumping in every sunset case.

16. In light of the Department’s consistent practice to treat import volume declines as conclusive and determinative of likely dumping, as evidenced in ARG-63 and ARG-64, it is simply not credible for the United States to argue that Siderca, or any other Argentine exporter for that matter, could have offered any additional information regarding the decline in Argentine OCTG and that such information would have had any effect on the outcome. For example, the Panel should view the US answers in light of two examples taken from ARG-63 and ARG-64:

- The record of the expedited sunset review of the anti-dumping order on stainless steel wire rod from Spain indicated that the dumping margin for the sole respondent declined after the order, and that the subject import volume had risen to pre-order levels. (*Issues and Decision Memo for the Expedited Sunset Review of Stainless Steel Wire Rod from Spain* at 4, 6 (ARG-64, Tab 4)) Under the SAA, this evidence should have led to a finding that continuation or recurrence of dumping would not be likely.⁷ Nevertheless, the Department narrowly focused on the year immediately following the imposition of the order, during which time import volumes declined, and concluded on that limited basis alone that dumping would be likely to continue or recur. (*Id.* at 6)

- In the full sunset review of brass sheet and strip from the Netherlands, the facts showed that after imposition of the order, the sole respondent had obtained zero dumping margins in the three most recent administrative reviews. In addition, this respondent supplied the US market almost exclusively from its newly-purchased US facility, resulting in a decline in import volume. The Department ignored these facts – and the logical reason for the decline in volume – and simply cited the decline in import volume as conclusive evidence that termination would be likely to lead to a continuation or recurrence of dumping. (*Brass Sheet and Strip from the Netherlands (Preliminary Results)* 64 Fed. Reg. 46,637, 46,641, and 65 Fed. Reg. 735, 738 (final results), (ARG-63, Tab 32))

B. DUMPING MARGIN

US Position:

The US answers to questions 15.a. and 15.b. of the Second Set of Panel Questions continue the line, started in its Second Submission, that the Department did not rely on the margin from the original investigation in this case, and that, instead, it relied on the evidence of continued dumping. But in response to Argentina’s question 3, the United States indicates: “There is no difference between the existence of a dumping margin and the payment of duties at the deposit rate for the purposes of determining whether dumping has continued throughout the life of an order in a sunset review.” (US Answers to Second Set of Panel Questions, paras. 21-23).

Argentina’s Comment:

17. The answer is both evasive and contradictory with the US position.

⁷ “[D]eclining (or no) dumping margins accompanied by steady or increasing imports may indicate that foreign companies do not have to dump to maintain market share in the United States and that dumping is less likely to continue or recur if the order were revoked.” SAA at 889-90 (ARG-5).

18. The issue is not whether the United States believes that the existence of a deposit rate based on the original margin, and collection of duties without a review, is evidence of continued dumping. This is, unambiguously, the US position which began in its Second Submission. The issues for the Panel to decide are: (1) is this really evidence of Article 2 dumping? and (2) what does such information say about the likelihood of dumping in the future (is it sufficient evidence of likelihood of dumping for purposes of Article 11.3)? The United States dodges these critical issues in its answers.

19. The statement is also contradictory. If there is no distinction between the existence of a dumping margin and the payment of duties at the deposit rate, how can the United States say that the Department relied on payment of duties at the deposit rate but that it did not rely on the dumping margin? This demonstrates the weakness of the US theory that collection of dumping deposits in a retrospective system can constitute: (1) evidence of dumping within the meaning of Article 2 (it cannot); and (2) positive evidence of likely dumping within the meaning of Article 11.3 (it cannot).

US Position:

The United States asserts that “[t]he magnitude of dumping, . . . whether past, present, or future, has no bearing on Commerce’s likelihood determination.” (US Answers to Second Set of Panel Questions, para. 22).

Argentina’s Comment:

20. The US position is inconsistent with *Sunset Review of Steel from Japan*, in which the Appellate Body indicated that the magnitude of dumping is relevant to the likelihood of dumping determination:

The *degree* to which import volumes of dumping margins have decreased will be relevant in making an inference that dumping is likely to continue or recur. Whether the historical data is recent or not may affect its probative value, and trends in data over time may be significant for an assessment of likely future behaviour. (Appellate Body Report, *Sunset Review of Steel from Japan*, para. 176)

21. Also, the US position misses an obvious point, and one that is also directly relevant to this case. The magnitude of the margin goes directly to the question of the existence of dumping (within the meaning of Article 2). And, the United States considers the existence of a dumping margin to be highly probative in determining whether dumping would be likely to continue or recur in the event of termination of the measure (for purposes of Article 11.3). That the “magnitude of the margin” and the “existence of dumping” are at times inseparable was explicitly recognized by the Appellate Body in *Sunset Review of Steel from Japan* in the context of its “zeroing” discussion, which is also at issue in this case. (See Appellate Body Report, *Sunset Review of Steel from Japan*, para. 135).

22. In addition, the US assertion conflicts with the US statute, 19 USC. § 1675a(c)(1)(A), which states that in making the likelihood of continuation or recurrence of dumping determination, the Department “shall consider – the weighted average dumping margins determined in the investigation and subsequent reviews” (emphasis added) The US position is also inconsistent with the Department’s regulations which, at a minimum, require the Department to determine whether a particular margin is above or below the 0.5 per cent *de minimis* level established by the United States. See 19 C.F.R. § 351.106(c)(1) (requiring the Department “to treat as *de minimis* any weighted average dumping margin or countervailable subsidy rate that is less than 0.5 per cent”). The United States’ statements that the magnitude of dumping “has no bearing” on the likelihood determination are therefore not credible.

III. US POSITION ON ARG-63 AND ARG-64

The United States first concedes that it “has not examined each and every sunset review cited by Argentina in Exhibit ARG-63 and Exhibit ARG-64” and then dismisses the significance of these exhibits. (US Answers to Second Set of Panel Questions, paras. 16-19). The United States went as far to say in its Closing Statement of 3 February 2004, that these exhibits are “meaningless.” (US Second Closing Statement, para. 4)

Argentina’s Comment:

23. Having acknowledged not having reviewed the sunset determinations cited in ARG-63 and ARG-64, the United States cannot credibly make the blanket assertions in its Closing Statement that these exhibits do not “shed any light on the nature of Policy Bulletin” and that ARG-63 and ARG-64 “provide no insights into the facts of those cases with respect to information on dumping and import volumes.” (US Second Closing Statement, para. 4).

24. As Argentina explained, Exhibits ARG-63 and ARG-64 set out the legal and factual basis for the Department’s sunset determination in every case in which the domestic industry participated. Contrary to the US statements, Argentina did in fact examine the factual and legal basis of every one of the Department’s sunset determinations. Argentina digested each case and tabulated the legal and factual basis for the Department’s determination in each case in which the domestic industry participated. Among other information, ARG-63 and ARG-64 set forth the stated basis for the Department’s likelihood of dumping determination and establish that the Department gave “conclusive and determinative” weight to historical dumping margins and import volumes in every single case in which the domestic industry participated. Specifically, ARG-63 and ARG-64 contain the heading entitled “Stated Basis for Likelihood Determination,” under which there are four columns, three of which represent the checklist criteria for the likelihood of dumping determination as outlined in the statute, the SAA, and the *Sunset Policy Bulletin*: (a) the existence of *continued dumping margins* – whether from the original investigation or an administrative review; (b) a finding that *imports ceased*; and (c) a *decline in the volume of imports* after dumping was eliminated. The charts in ARG-63 and ARG-64 also reflect a fourth category, which indicates whether the Department undertook the prospective analysis as required by Article 11.3 of the Anti-Dumping Agreement. This category (highlighted in yellow) has no data in it, as the Department has never undertaken the requisite Article 11.3 analysis.

25. Argentina also submitted all of the written determinations of the Department in every case to substantiate Argentina’s claims and the information set forth in ARG-63 and ARG-64. Throughout this dispute, the United States has confined its arguments relating to ARG-63 and ARG-64 to saying that the only relevant cases are those so-called “contested” sunset reviews in which both the domestic industry and respondents participate. (Even for the so-called contested cases, however, the Department has never made a not likely determination, and the United States has thus failed to rebut Argentina’s prima facie case that the Department’s consistent practice demonstrates a WTO-inconsistent presumption, using whatever numbers – 223/223, 43/43, or 35/35). In fact, the United States has failed to offer a single rebuttal to any of the information in ARG-63 and ARG-64 that Argentina has presented as the basis for the Department’s likelihood of dumping determination in the cases cited in ARG-63 and ARG-64. Rather, the United States indicated that it had no reason to believe that “the overall total of sunset reviews conducted and the ultimate outcomes in those sunset reviews” as presented by Argentina was flawed. (US Response to the Panel’s Questions, para. 16)

26. Argentina has also referenced about a half-dozen other particular sunset reviews conducted by the Department during the course of the proceedings to support Argentina’s claims.⁸ The United

⁸ *Issues and Decision Memo for the Expedited Sunset Review of Stainless Steel Wire Rod from Spain* at 4, 6 (ARG-64, Tab 4); *Industrial Nitrocellulose from Yugoslavia*, 64 Fed. Reg. 57,852, 57,853-54 (1999)(ARG-

States did not respond to Argentina's characterization of those cases, nor did the United States offer any rebuttals to the conclusions that Argentina drew from those specific cases.

27. As a separate matter, US characterizations of the *Sunset Policy Bulletin* and US arguments that the *Sunset Policy Bulletin* is not a measure that can be challenged are directly contrary to the Appellate Body rulings on this point. More importantly, such argumentation does not respond to or in any way rebut the evidence presented by Argentina in ARG-63 and ARG-64 that demonstrates that the Department attached decisive (if not conclusive and determinative) weight to dumping margins and import volumes in every case. The Department's sunset determinations in ARG-63 and ARG-64 provide support for the Appellate Body's observation that the following passage from the *Sunset Policy Bulletin* suggests by negative implication that the Department considers satisfaction of any of the three *Sunset Policy Bulletin* criteria as conclusive of likely dumping in sunset reviews of anti-dumping duty orders: "The Department recognizes that, in the context of a sunset review of a suspended investigation, the data relevant to the criteria under paragraphs (a) through (c), above, [dumping margins and import volumes] *may not be conclusive* with respect to likelihood." (Appellate Body Report, *Sunset Review of Steel from Japan*, para. 179, citing *Sunset Policy Bulletin*, at 18872).

28. Furthermore, the *Sunset Policy Bulletin* itself states that "the legislative history makes clear that continued margins at any level would lead to a finding of likelihood. See Section II.A.3." (*Sunset Policy Bulletin* (ARG-35) at 18872) The *Sunset Policy Bulletin*'s internal cross-citation to the three criteria in Section II.A.3 of the *Sunset Policy Bulletin* further supports Argentina's textual arguments (as confirmed by the Department's practice in ARG-63 and ARG-64) that consistent with the direction of the *Sunset Policy Bulletin*, the existence of dumping margins and volume declines are given conclusive and determinative weight by the Department in all cases.

29. In addition, the Panel should also assess the US position that the Department's consistent practice in ARG-63 and ARG-64 does not prove the existence of a WTO-inconsistent presumption, in light of statements in the US First Submission where the United States indicated that based on the *Sunset Policy Bulletin* criteria, "sometimes Commerce 'normally' will determine likelihood, and at other times it 'normally' will not." (US First Submission, para. 181). However, as the Department's consistent practice reflects, even in those cases where dumping margins declined or dumping was eliminated and imports rose to pre-order volumes – a scenario that the United States says will "normally" result in a not likely determination – the Department nevertheless still determined that dumping would be likely to continue in each such case. (See, e.g., *Issues and Decision Memo for the Expedited Sunset Review of Stainless Steel Wire Rod from Spain* at 4, 6 (ARG-64, Tab 4); *Sugar and Syrups from Canada*, 64 Fed. Reg. 48,362, 48,363-64 (1999) (ARG-63, Tab 261))

30. Finally, Argentina is not arguing that because the Department's practice shows a pattern, that it is therefore obligated to follow its practice. Rather, it is precisely the opposite. Because Section II.A.3 of the *Sunset Policy Bulletin* directs the Department to give decisive weight to these factors, it is not surprising that, in every case, the Department does in fact treat dumping margins and import volume as conclusive or determinative of likely dumping. The Department gives decisive weight to these factors, as demonstrated in this case, and in every case indicated in ARG-63 and ARG-64.

42 and ARG-63, Tab 145); *Sugar and Syrups from Canada*, 64 Fed. Reg. 48,362, 48,363-64 (1999)(ARG-50 and ARG-63, Tab 261); *Issues and Decision Memo for the Sunset Review of Gray Portland Cement and Cement Clinker from Venezuela (Preliminary Results)* at 3-5 (ARG-47 and ARG-63, Tab 125); *Issues and Decision Memo for the Sunset Review of Uranium from Russia* at 15-17 (ARG-48 and ARG-63, Tab 282); *Issues and Decision Memo for the Sunset Review of Uranium from Uzbekistan* at 9-11 (ARG-49 and ARG-63, Tab 284).

IV. ZEROING

US Position:

“The United States did not reassess the calculation methodology and had no reason to reassess the calculation methodology in this sunset review because the magnitude of the margin did not form any part of Commerce’s final likelihood determination in the sunset review of OCTG from Argentina.” (US Answers to Second Set of Panel Questions, para. 27).

Argentina’s Comment:

31. The United States cannot credibly say that the magnitude of the margin is irrelevant. The Appellate Body made clear that if zeroing affected the “magnitude” to the extent that it made the difference between dumping or no dumping as defined in Article 2, it is not only relevant, but it is the investigating authority’s responsibility to ensure that it is “dumping” within the meaning of Article 2.

32. If the United States insists that it will not look at the magnitude, then it is declining to accept this responsibility, in which case it cannot rely on this piece of evidence as evidence of Article 2 dumping.

US Position:

The United States has, at this late stage, raised a number of procedural objections to Argentina’s zeroing claim. (US Answers to Second Set of Panel Questions, paras. 23-24)

Argentina’s Comment:

33. All of the US objections are wrong and should be rejected by the Panel. In stating that ARG-66A and B were only given to the Panel in Argentina’s Second Submission and were not offered as rebuttal evidence (US Answers to Second Set of Panel Questions, para. 24), the United States completely ignores ARG-52 and the arguments in Argentina’s First Submission. The United States responded to Argentina’s First Submission by stating that it did not engage in *Bed Linens* zeroing, so Argentina provided evidence of exactly the type of zeroing that was used to calculate the 1.36 per cent margin relied on by the Department in the sunset review. In addition, the Panel has now asked specific questions to the United States regarding the use of zeroing, so there is little value in the United States arguing that the issue is not properly before the Panel. The fact is that this issue was included in the consultations,⁹ the request for a panel, Argentina’s First Submission, the US First Submission, Argentina’s question to the United States after the first substantive meeting, Argentina’s Second Submission, and now questions from the Panel.

34. Also, the United States complains that “Argentina failed to identify any of the computer programming by which it manipulated Siderca’s data to arrive at the output contained in ARG-66A,” (*Id.*, para. 28) even though footnote 182 of Argentina’s First Submission identified the source of the data as the Department’s 1995 determination, and ARG-66B showed precisely the computer programming used to remove the zeroing effect.

⁹ See Exhibit US – 12 to the U.S. First Submission (written question No. 25 of Argentina to the United States, submitted for the November 14, 2002 consultations).

US Position:

In responding to the Panel's substantive questions, the United States reminds the Panel that the original investigation pre-dated the entry into force of the Anti-Dumping Agreement, implying that the disciplines of Article 2 are not applicable to this sunset review. (US Answers to Second Set of Panel Questions, para. 25).

Argentina's Comment:

35. This is not a credible argument after the Appellate Body decision in *Sunset Review of Steel from Japan*. The Appellate Body clearly established that "dumping," in an Article 11.3 review, is the "dumping" defined in Article 2. Also, while the United States cites Article 18.3 to support its argument, it ignores the fact that Article 18.3 also states that the disciplines of the Anti-Dumping Agreement apply to reviews initiated after entry into force of the agreement, which describes this sunset review. This is perfectly consistent with the Appellate Body's decision that "dumping" in a sunset review is defined by – and only by – Article 2.

36. The answers in paras. 25, 26, and 29 of the US Answers to the Second Set of Panel Questions are non-responsive. The fact that this is not *Bed Linens* zeroing, and that "the 1.36 per cent margin was based on the results of comparisons of all export transactions" are non-answers. (*Id.*) The evidence before the Panel unambiguously shows that: (1) in most of the comparisons of US transactions to weighted-average normal values, the net price to the US exceeded the net normal value (*see* ARG-52, lines 25-58 and ARG-66, lines 98-385); (2) in calculating the PUDD (which is the numerator of the dumping margin calculation), the Department did not recognize the excess of the net US price over the normal value in any of these transactions; and (3) the numerator only included sales comparisons for which the dumping margin was "greater than zero," which effectively assigned a zero value to each of the individual results in which the US price exceeded the normal value (Argentina's Second Submission, para. 143; Exhibit ARG-66B, line 13 of programming).

37. If the Panel believes that it has to compare the results of this method to the type of zeroing done in *Bed Linens* (which Argentina believes is unnecessary), then the Panel would have to conclude that it is worse than *Bed Linens* zeroing. At least in an average-to-average comparison, high-priced US sales have some effect on the numerator of the dumping margin, as the higher priced sales into the importing market increase the weighted average, thereby lessening (or eliminating) the amount of dumping that results from the comparison to the weighted-average normal value. In the methodology at issue in this case, any excess of US price over normal value is ignored and is never considered in the calculation of the total amount of dumping, which is placed in the numerator of the dumping margin calculation.

38. Finally, it is not true that the decisions of the Appellate Body have been narrowly limited to zeroing in a system employing a weighted-average-to-weighted-average method of comparison. In its discussion regarding the distorting effect that zeroing has on establishing a fair comparison as required by Article 2.4, the Appellate Body decision in *Bed Linens* noted that transaction-specific-to-weighted-average comparisons could be used only in very limited circumstances as indicated in Article 2.4.2. (Appellate Body Report, *Bed Linens*, paras. 60-62) The United States has admitted that the 1.36 per cent margin resulted from a transaction-specific-to-weighted-average calculation (US Answers to Second Set of Panel Questions, para. 25), and it has never tried to justify that calculation under the exceptions listed in Article 2.4.2. More importantly, however, the problem, as the Appellate Body explained, is with the zeroing methodology, which is separate and independent from the particular type of comparison used.

39. Also the Appellate Body in *Sunset Review of Steel from Japan* addressed the US practice of zeroing in the context of Article 11.3 reviews, and recognized that the United States used a transaction-specific-to-weighted-average calculation methodology "in which no offset is granted to

the respondent for negative differences between normal value and export price (or constructed export price) of individual transactions.” (para. 136, quoting the US First Submission, para. 125)) The Appellate Body reaffirmed the principle that a zeroing methodology has a distorting effect that is not consistent with the substantive requirements in Article 2.4 for a fair comparison. Thus, the Appellate Body’s focus has not been on the type of zeroing that was done, or the comparison methodology in which the zeroing takes place. Its focus has properly been on the fact that zeroing – by not taking into account the results of comparison (whether on a model or transaction basis) in which the net import prices exceeds the net normal value – always overstates the margin of dumping and, consequently, a margin calculated on the basis of zeroing cannot serve as the basis for a likelihood of dumping determination.

V. INJURY

US Position:

The United States believes that:

- Article 3 does not apply to sunset reviews – not at all. (US Answers to Second Set of Panel Questions, para. 30)
- Despite footnote 9, “injury” as used in Article 11.3 is “a fourth type of determination regarding injury, separate from the other three types named in footnote 9.” (*Id.* at para. 31).
- “Article 11.3 does not contemplate determinations of a continuation or recurrence of threat or material retardation as a basis for continuing to apply an anti-dumping duty after a sunset review.” (*Id.* at para. 32)
- Textual support is not necessary for its view that cumulation is permitted in sunset reviews, and that the use of cumulation is unregulated in sunset reviews. (US Answers to Argentina’s Questions, paras. 36 and 38)

Argentina’s Comment:

40. The US answers demonstrate that the United States and Argentina have fundamentally different views of Articles 11.3 and 3 of the Anti-Dumping Agreement, and the differences relate almost exclusively to textual interpretations of the Agreement. If the United States is wrong about the application of Article 3, it is hard to imagine how the Panel could avoid a finding that the determination in this case is inconsistent with Article 3.

41. Footnote 9 defines “injury,” not determinations of injury. In determining the likelihood of continuation or recurrence of “injury” under Article 11.3, the Anti-Dumping Agreement is clear that “injury” is defined by Footnote 9 and “shall be interpreted in accordance with the provisions of [Article 3].”

42. The United States provides absolutely no support – textual or otherwise – for its assertion that Article 11.3 does not contemplate determinations of a likelihood of continuation or recurrence of threat or material retardation.

43. As Argentina has demonstrated, the text of Articles 11.3 and 3.3 preclude cumulation in sunset reviews. (Argentina’s First Submission, paras. 282-284; Argentina’s Second Submission, paras. 189-190) In arguing that textual support is not necessary for its view that cumulation is permitted – and unregulated – in sunset reviews, the United States apparently relies on the fact that cumulation was used by GATT contracting parties prior to the adoption of Articles 3.3 and 11.3. (US First Submission, para. 370; US Second Submission, para. 56) However, the fact that cumulation was

not regulated prior to the implementation of the Uruguay Round agreements weakens, rather than helps, the US position. Through Article 3.3, the drafters of the Uruguay Round agreement code limited the use of cumulation to “investigations,” and even then only where certain conditions are met.

US Position:

The United States asserts that, although the Article 3.4 factors are not required in a sunset review, in the sunset review of Argentine OCTG the Commission considered them all anyway. (US Answers to Second Set of Panel Questions, para. 30).

Argentina's Comment:

44. This is obviously contradicted by the US response at the Second Meeting of the Parties and in its response to Argentina's questions at paragraphs 30 – 34, in which the United States admitted to not considering the magnitude of the margin, which is one of the Article 3.4 factors. Again, the United States cannot have it both ways.

US Position:

The United States asserts for the first time that “two of the Commissioners, Vice Chairman Hillman and Commissioner Koplan, both of whom participated in the OCTG sunset reviews, consistently have applied the ‘probable standard or its equivalent’ since the commencement of the first US sunset reviews.” (US Answers to Questions from Argentina, para. 30).

Argentina's Comment:

45. First, the Commission, as the US agency responsible for the likely injury determination in this case, submitted a brief (on behalf of Commission) in a NAFTA panel proceeding challenging the same determination in this case. The Commission's brief unequivocally states that the Commission did not apply – and in fact was precluded by the SAA from applying – a “probable” standard in this case. (See ARG-67) Both of the Commissioners noted were members of the Commission at the time that the Commission's NAFTA brief was filed, and there is no indication in the brief that they disagreed with the explanations to the NAFTA panel that likely does not and cannot mean “probable.”

46. Second, the United States itself indicated during the question and answer session of the Panel's First Substantive Meeting with the Parties that the Commission is made up of individual Commissioners, that these individuals often have separate views, and that they come and go from the Commission, and given all of this, it was therefore important for the Panel to only consider what is written in the particular sunset determination that is subject to challenge. Even if there were separate or independent views suggesting that one or two Commissioners viewed “likely” to mean “probable” that does not change the nature of the determination reached by the Commission (as the single US authority responsible for the likelihood of injury determination) in this case.

VI. PRELIMINARY OBJECTIONS

A. GENERAL APPROACH TO DSU ARTICLE 6.2

US Position:

As it has throughout these proceedings, the United States continues its efforts to divorce portions of Argentina's claims from the panel request as a whole. The United States evidently would prefer to the Panel to sever, and then parse, isolated portions of Argentina's request. (See US Answers to Second Set of Panel Questions, para. 38).

Argentina's Comment:

47. Argentina offers two initial observations at the outset. First, the United States has failed to discharge its burden in establishing its claims under DSU Article 6.2. Second, the United States has failed to rebut any of Argentina's textual arguments that demonstrate that all of Argentina's claims are set forth in Argentina's panel request and that they fully comply with the requirements of Article 6.2.

48. As to its specific response, the United States failed to answer the Panel's question. In question 22, the Panel asked "what portions, if any, of the claims raised in Argentina's written submissions to the Panel find their basis exclusively in page four of Argentina's request for establishment?" Notwithstanding the focused nature of the Panel's inquiry – limited to the effect of severing "page four" – the United States used the question as an opportunity to recast Argentina's claims. In so doing, the United States completely misstates the claims advanced by Argentina. Apart from being non-responsive, the US tactic is wholly inappropriate. Accordingly, Argentina respectfully requests that the Panel reject completely the US responses in paragraphs 37 and 38.

49. The United States also addresses an issue not raised by the Panel's question. The US non-responsive response deals with the so-called claims that were allegedly outside the terms of reference. The reason for the lack of a straight-forward response to the direct question of the Panel by the United States is simple – the United States does not have an answer. This is not surprising to Argentina because page four of Argentina's panel request was not intended to – and does not – set forth additional claims. Indeed, there are no new claims on page four of the panel request. Consequently, even were page four to be artificially "severed" from Argentina's Panel Request, the effect would be minimal.

50. Argentina reiterates in the strongest possible terms that the Appellate Body has specifically instructed panels not to read panel requests in the manner requested by the United States. The Appellate Body has made clear that a panel request must be read "as a whole."

51. Argentina's claims are not found exclusively in Section A, or Section B, or on "Page Four." The totality of Argentina's claims are clear when the panel request is read as a whole – the narrative section, Section A, Section B, and page four. The request presents Argentina's claims as a seamless web. One section cannot be read in isolation of the others.

52. Moreover, contrary to the US assertion, the headings used by Argentina its panel request are also of relevance in defining the scope of Argentina's claims. The general headings indicated that Argentina was challenging the Determinations of the Department and the Commission. The individual paragraphs under the headings enumerated whether such challenges were being advanced on an "as such" basis, an "as applied" basis, or both.

53. The use of headings, like any other portion of the panel request, are relevant to the basic question: Was the United States put on notice as to the nature of Argentina's claims? As Argentina

has argued previously, it is clear that the United States was fully aware – at all stages – of the claims Argentina was advancing.

54. As the Appellate Body has made clear, Argentina has a right under the DSU to have its panel request read as a whole, and this US attempt to deviate from well-established jurisprudence should be firmly rejected by the Panel.

B. US INACCURATE CHARACTERIZATION OF ARGENTINA’S CLAIMS

US Position:

The United States asserts that Argentina’s claims in Sections A and B “are limited to” certain measures then enumerated by the United States. (US Answers to Second Set of Panel Questions, para. 28).

55. The panel request, however, must be read in its totality. This means, as Argentina has made clear in its earlier submissions, that Sections A and B need to be read in conjunction with both Page Four and the opening narrative section.

56. Moreover, even the presentation of Argentina’s Section A and B claims by the United States is incomplete and inaccurate. Throughout its comments, the United States sets out Argentina’s claims as narrowly as possible, ignoring the actual language used by Argentina in its panel request. For example, in setting out Argentina’s claims in Section A1, the United States lists only specific references to the US statute and regulations, while ignoring Argentina’s broader references to “US laws, regulations and procedures.”

57. The US answers are even more misguided when they assert that Argentina has challenged the Department’s presumption on an “as applied” basis only. As Argentina demonstrated in its Submission of 4 December 2003, Argentina has challenged the Department’s presumption both “as such” and “as applied.” The US answers inaccurately characterize many of Argentina’s positions. It repeatedly asserts that the “only basis” for a number of Argentina’s claims would be page four. That is inaccurate. In its 4 December Submission, Argentina provided detailed textual argumentation as to why US allegations about the so-called “five additional claims” were unfounded. There are no “additional” claims – all of Argentina’s claims are found in Argentina’s Panel request, and in most cases no reference to page four is necessary. Argentina will not repeat all of those textual arguments here, other than to stress that: (i) the US Comments on these issues is not accurate; and (ii) Argentina stands fully by all of the textual arguments advanced in its earlier submissions to the Panel. The United States has never responded to, let alone rebutted, Argentina’s textual arguments.

C. THE UNITED STATES HAS FAILED TO DEMONSTRATE PREJUDICE

58. Throughout these proceedings, the United States has repeatedly expressed its dissatisfaction with the need to demonstrate that it has sustained prejudice. It would evidently prefer to have its Article 6.2 claims adjudicated in clinical isolation, separated from the broader issue of whether the United States was actually misled as to the nature of Argentina’s claims. However, the Appellate Body has emphatically rejected the narrow approach being advanced by the United States. In the absence of actual, demonstrated prejudice, the US request under Article 6.2 will fail.

59. Even in this final stage of the proceedings, the United States has still not demonstrated any prejudice. Indeed, the United States ignored the very specific request from the panel to indicate how it has suffered prejudice with respect to each of the alleged inconsistencies that the United States raised in its request for preliminary rulings. It instead advanced vague arguments about how the United States was allegedly compromised in “its ability to research the issues at hand, assign personnel, etc.” As Argentina has indicated in its earlier submissions, such nebulous assertions have

been rejected by previous panels as insufficient to rise to the level of a violation of the due process rights of the respondent.

60. After having failed to demonstrate any prejudice whatsoever for the so-called “Page Four” and “Sections B1, B2 and B3” claims, the United States asserted that it did not have to demonstrate any prejudice at all for the so-called “additional claims.” Apart from the fact that the United States cited no authority in support for this proposition, the US comments contradict this position.

61. In footnote 26 of the US answers (as indeed in footnote 103 of the US First Submission), the United States indicated that it would not object to the alleged “extension” of Argentina’s claim regarding Section 351.218(e) of the Department’s regulations to Section 351.218(d)(2)(iii). The United States indicates that it decided not to object to this so-called “additional claim” because “the extension of Argentina’s claim to Section 351.218(d)(2)(iii) did not result in sufficient prejudice to warrant an objection” (emphasis added). Thus, the United States clearly recognizes that the obligation to demonstrate prejudice applies to all of its Article 6.2 claims, including the alleged “additional” claims.

62. Also, with respect to this specific issue, the United States cannot now reverse its position and object to Argentina’s waiver claim related to Section 351.218(d)(2)(iii). The United States conceded that it was on notice regarding Argentina’s waiver challenge, which the United States noted included a challenge to this regulatory provision, as the US First Submission reflects: “[T]he United States is not asserting that the prejudice it experienced thereby was of such a degree as to warrant a preliminary objection.” (US First Submission, note 103) Clearly, the United States cannot now reverse its position under the guise of responding to the Panel’s question about “page four.”

63. In summary, the Panel should have little difficulty in concluding that the United States has demonstrably failed to prove the requisite elements under DSU Article 6.2, and for this reason the US preliminary objections can be dismissed in their entirety.

VII. ARGENTINA’S REQUEST UNDER DSU ARTICLE 19.1

US Position:

In its closing statement to the Panel on February 3, the United States urged the Panel not to make any suggestions under DSU Article 19.1, and stated that “GATT and WTO practice with respect to remedies has been to urge the respondent, where the panel rules against it, to bring the inconsistent measure into conformity with that Member’s WTO obligations.” (US Second Closing Statement, para. 34).

Argentina’s Comment:

64. First, there is nothing improper about Argentina’s request. DSU Article 19.1 specifically authorizes panels to make suggestions with respect to implementation.

65. Second, there have been many instances in which Panels have exercised their discretion to make a suggestion regarding implementation. To cite a few examples:

- in the *Argentina Poultry* case, the Panel suggested that Argentina repeal the measure imposing definitive anti-dumping measures on poultry from Brazil¹⁰;

¹⁰ *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted on 19 May 2003, para. 8.7.

- in the “Byrd Amendment” case, the Panel called for the repeal of the WTO-inconsistent US statute¹¹;
- in the *US – Textiles from Pakistan* case, the Panel called for the prompt removal of the import restriction¹²;
- in the Guatemala Cement dispute, the Panel recommended the revocation of the anti-dumping measure¹³; and
- in the Lead Bars case, the Panel called for a revision of US administrative practices.¹⁴

66. This is a non-exhaustive list. Thus, Argentina’s request is not improper, and it is certainly not unusual. Previous panels have recognized that suggestions under DSU Article 19.1 would be appropriate to help promote the resolution of the dispute, particularly where – as in the present case – the violations of the responding party are fundamental and pervasive.

67. In this case, Argentina’s resort to DSU Article 19.1 is necessary given the right conferred to Argentina by Article 11.3 of the Anti-Dumping Agreement – termination of the anti-dumping measure after five years. Argentina’s right was subject only to a limited exception that could be invoked by the United States only in the event that strict requirements were satisfied, and Argentina has demonstrated that the United States failed to satisfy the requirements necessary for continuing the measure. Consequently, the role of DSU Article 19.1 becomes critical to Argentina’s ability to obtain the right denied by the United States. Argentina therefore respectfully urges the Panel to suggest that the measure be terminated so as to restore the right conferred to Argentina by Article 11.3.

¹¹ *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS 217/234/R, adopted on 27 January 2003, para. 8.6.

¹² *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/R, adopted on 5 May 2001, para. 8.5.

¹³ *Guatemala – Definitive Anti-Dumping Measures on Gray Portland Cement from Mexico*, WT/DS156/R, adopted on 17 November 2000, para. 9.6.

¹⁴ *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R, adopted on 7 June 2000, para. 8.2.

ANNEX E-12

COMMENTS OF THE UNITED STATES ON ARGENTINA'S RESPONSES TO QUESTIONS FROM THE PANEL – SECOND MEETING

20 February 2004

I. EXPEDITED REVIEWS/WAIVER PROVISIONS

1. The Panel notes "Heading A" on page 36 of Argentina's first written submission and Argentina's statements in paragraph 120 of its first written submission and paragraph 51 of its second written submission. Please clarify whether Argentina's claim challenging the US law's waiver provisions under Articles 11.3, 6.1 and 6.2 of the Agreement are limited to "deemed waivers", or, whether they also take issue with "affirmative waivers".

1. Argentina's response further confuses the question of what precisely Argentina is challenging. According to Argentina's response to this question, both affirmative and deemed waivers "mandate an affirmative determination of likelihood of dumping" and "[i]n Argentina's view, the notion of a statute and regulation mandating an affirmative determination of likelihood of dumping without any analysis is inconsistent with Article 11.3." However, while Argentina expresses its "view," it does not explain precisely what claim it is in fact advancing in this proceeding with respect to Article 11.3. While the United States considers that it has fully addressed both the "deemed" and "affirmative" waiver issues, it notes that Argentina's failure to clearly identify the claims it is making also constitutes a failure to make a prima facie case with respect to either issue.

2. Argentina does explicitly state that its challenge with respect to Articles 6.1 and 6.2 "is limited to the 'deemed waiver.'" The United States therefore understands that Argentina's claims with regard to Articles 6.1 and 6.2 do not relate to "affirmative waivers."

2. The Panel notes that in sections VII.C.2 and VII.C.3 of its first written submission, Argentina challenges the application of the US waiver provisions to Siderca whereas in the following part of paragraph 6 of its second oral statement it also takes issue with the application of these provisions to Argentina:

Indeed, the Department's application of the waiver provisions to Siderca (or, at a minimum, to Argentina) is plainly indicated in the Department's Issues and Decision Memorandum.

Please clarify the scope of Argentina's claim. More particularly, please explain whether, in the view of Argentina, the alleged application of the US waiver provisions in this sunset review impaired the rights of Argentina or Siderca.

3. Argentina continues to argue that the waiver provisions were applied to Siderca. The United States has already rebutted this argument. Argentina does not claim that Siderca's rights were impaired as a result but instead states that Argentina's rights under Article 11.3 to termination of the measure were violated. However, as we have already explained, it is simply inaccurate to state that the application of the waiver provisions settle the question of whether an order will be terminated.¹ Inasmuch as Argentina's Article 11.3 claim is premised on this false assumption, Argentina had no "right" to termination in this case.

¹ See, e.g., Answers of the United States to the First Set of Panel Questions, paras. 3 and 19.

4. Argentina then argues that application of the waiver provisions to the non-responding respondents violates Articles 11.3, 6.1, and 6.2 but does not explain how its rights to present facts and arguments and otherwise fully defend its interests were impaired in light of Argentina's non-participation in the review and Siderca's minimalist participation. Argentina does argue that the application of the waiver provisions "prevented any type of 'investigation' or 'determination'," deprived Argentina of termination of the measure under Article 11.3, and did not afford what Argentina refers to as its "principal" OCTG producer (as opposed to "the only producer"²) the right to participate. Again, there is no evidence that the waiver provisions prevented termination of the measure or that they resulted in failure to conduct "any type" of investigation or determination. Further, the only party that deprived Siderca of its right to participate was Siderca, through its failure to file a substantive response that addressed the issue of likelihood of continuation or recurrence of dumping, a rebuttal response, or comments on Commerce's adequacy determination.

II. OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING

11. The Panel notes Argentina's allegation in its first written submission that in this sunset review the DOC failed to use the "likely" standard and applied a different standard instead.³

(a) The Panel notes that Argentina did not mention this claim in its second written submission. Please clarify whether Argentina is still pursuing this claim.

5. Argentina's "clarification" concerning the "likely" standard is nothing more than Argentina's view as to whether there is sufficient evidence on the record to support the affirmative likelihood determination.

(b) Please refer to the relevant part(s) of the record of this sunset review where this inconsistent standard can be found.

6. Argentina's discussion of the record evidence in its answer to this question is misleading. First, the cited statutory provision (19 USC. 1677(c)(4)(B)) and its reference to an affirmative likelihood determination are, by their very terms, limited to non-responding interested parties. In other words, section 1677(c)(4)(B) mandates that Commerce shall find that there is a likelihood of continuation or recurrence of dumping "with respect to that interested party" when the interested party waives its participation in a sunset review.

7. Nothing in this provision or anywhere else in the US statute requires an affirmative likelihood determination on an order-wide basis simply because one or all the interested parties waived participation in the sunset review. As the Appellate Body in *Japan Sunset* noted, although "the authorities have a duty to seek out relevant information . . . Company specific data relevant to a likelihood determination under Article 11.3 can often only be provided by the companies themselves."⁴ Nothing in Article 11.3 or elsewhere in the AD Agreement requires the administering authority to attempt to coerce information from recalcitrant interested parties in order to meet the obligations of the AD Agreement. Second, Commerce based its affirmative likelihood determination on the existence of dumping and the depressed import levels in the sunset review of OCTG from Argentina. Rather than address the probative nature of this evidence, Argentina simply continues to assert that this evidence is not sufficient to support the likelihood finding. Finally, Argentina again has selectively and incorrectly cited to the Appellate Body report in *Japan Sunset* for the proposition that the existence of dumping and depressed import volumes create a impermissible "presumption."

² See discussion in First Written Submission of the United States, note 3.

³ First Written Submission of Argentina, para. 186.

⁴ Appellate Body Report, *United States – Sunset Review of Anti-dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, at para.199.

The Appellate Body in *Japan Sunset* ultimately stated that the record evidence relied upon by Commerce in that case, the existence of dumping and depressed import volumes, were not unreasonable indicators of likely future dumping.⁵ Like the Japanese respondent interested party in *Japan Sunset*, neither Argentina nor Siderca submitted any evidence to address the evidence of the existence of dumping and depressed import volumes since the imposition of the order on OCTG from Argentina.⁶ Rather, the record evidence only demonstrates that neither Siderca nor Argentina raised any issues with respect to whether dumping was likely to continue or recur,⁷ nor did they submit factual evidence to support a conclusion to the contrary.

12. The Panel notes that, in its second written submission, Argentina did not address its claim under Article 12.2 of the Agreement. Please clarify whether Argentina is still pursuing this claim.

8. The United States again asserts, as it did in its first written submission in response to this claim by Argentina, that the Commerce Department did provide notice and detailed explanations of its determinations in the *Final Sunset Determination*, the *Decision Memorandum*, and the *Adequacy Memorandum*, all of which were publicly available.⁸ In addition, Argentina's assertion that the "United States has also indicated that 'a few key portions' of its underlying decision were 'inartfully drafted'" is misleading, in that the United States never stated that "key portions" were inartfully drafted and never suggested that the drafting of the decision prevented participants in the dispute from fully understanding Commerce's actions.

9. Finally, the United States notes Argentina's contentions about so-called "*ex post facto* justifications." Those are simply US responses to arguments which Argentina is advancing for the first time in this proceeding and which were not advanced during the review. Had Argentina or Siderca made these arguments during the review, as they had the opportunity to do, the United States could have addressed them then. To do so now for the first time and allege that by responding the United States is engaging in "*ex post facto* justifications" ignores the responsibility the Anti-Dumping Agreement places on parties to participate in sunset reviews, a responsibility the panel in *Japan Sunset* emphasized.

III. OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF INJURY

17. What is the supporting evidence in the record of this sunset review for your allegation that the Commission failed to apply the "likely" standard of Article 11.3 of the Agreement in this sunset review?

10. Argentina claims that two types of evidence support its claim that the ITC did not properly apply the "likely" standard: (1) "admissions by the Commission;" and (2) the record in the sunset reviews. Argentina's arguments are unpersuasive.

11. With regard to the so-called admissions by the Commission, the United States draws the Panel's attention to paragraph 30 of the 13 February 2004, US answers to Argentina's questions. As explained there, earlier statements by the ITC (such as in the Usinor remand results and the NAFTA panel brief, both of which are cited by Argentina) were based on the understanding of some Commissioners that the term "probable" connoted a very specific and high degree of certainty – a misapprehension which the US courts have since clarified.

⁵ See *id.* at para. 205.

⁶ See *id.* at paras. 203-204.

⁷ Siderca advanced an argument regarding the application of the *de minimis* standard but nothing to address the issue as to whether dumping was likely to continue or recur.

⁸ See First Written Submission of the United States, paras. 238-248.

12. With regard to the record in the sunset reviews, the United States believes that when considered as a whole, it shows that certain outcomes would be likely (or "probable or more likely than not," as Argentina puts it). The United States has discussed the record in detail in its earlier submission and will not reiterate that discussion here.

18. The Panel notes Argentina's allegations in paragraphs 183 and 185 of its second written submission that in the OCTG sunset review the Commission failed to carry out the causal link analysis required under Article 3.5 of the Agreement. Please clarify the basis of this claim. More specifically, please indicate whether there were some potential factors, other than likely dumped imports, that could have contributed to the likely injury and were not evaluated by the Commission in its sunset determinations.

13. Consistent with its arguments throughout this case, Argentina stands one of the key principles of treaty interpretation, reflected in Article 31 of the Vienna Convention, on its head. Argentina asserts that "[t]here is no textual support for the view that the causation requirement was removed from the injury analysis required by Article 11.3." However, it is Argentina that must find textual support for the proposition that a causation requirement of Article 3.5 is required by Article 11.3. There is no such textual support. To the contrary, there are specific textual bases for concluding that the causation requirements of Article 3.5 are not applicable to sunset reviews.⁹

⁹ See First Written Submission of the United States, paras. 287-302 and 352-353.