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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 2-3, 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 <u>send</u> 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

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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

Argentina's Response:

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:

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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 renter the US market, they would have to

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-Japan

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.

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.)

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*

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.

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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*

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 24, 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?

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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 c -0adu howeral,ommerce manducted seaull sunset reviews n th 50Tj 3 027 TD 0.2813 Tc 0 Tw (anti) Tj

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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 response[17] 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 [illegible]

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.

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[22] *Ceramic Floor Tiles,*

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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

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 5.25 TD /F0 11.5on an orde525 TD / Tc 28R34 7493TD -0.0

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

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?

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[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).

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," Commence 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 "adeq1875 2fm,muall81 T TD ani0u woud -0.125w (affirmativ or dsomelly exsu2ormal2 wo1

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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

(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. Fi

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.

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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 07 (calledTj 0 -e hipmenthe 6Tj -357.orded) Tj -119.2 xports oed subject

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.

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[48] *See Oil Country Tubular Goods from Argentina; Rescission of Anti-Dumping Duty Administrative Review*

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.

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.[575] TD /F0 6.75 Tf 0.035 Tc (56) Tj fsa92Ti52es WTO

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(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.*

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[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.

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[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 t9 6 h a t
27.9

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.

full or expedited review to determine order-

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 presented with all of the facts as they are presented to the authority, as well as arguments made about these facts.[15]

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[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 response[17] 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] 92 Tc 0.1592a2t(Tj -152.25 -12.75 TD -0. Tj 0 -12.75 TD 0.375 Tc 0 Tw (1) T

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

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 eval.75 TD -0.0823 TcTatled (Ar4dcbevant ielik6mw pro75 Too00et reB2o5a in th D 0 eval.75 TD -5tsk6h5 a waiof 06T5tsk6 Tci0e lim-12.75 TD1.0346 Tw (revv) Tsroa75 .Fo0..109 Tc 1.8434 Tw (The United States does not believe that its sunset 085 Tc 0.282

Q5.

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-hin sunbase its final,n a susunset dei1439 Tc 933317 Tw (facts ava35terminattiv(B) pr0.

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 lua39uafcty iw (s te of the languagw (Comm222submistantiveubmissions s nofounto rebe Tj
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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

(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

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.

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[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.

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.

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[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-

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 tech35ni- law 3451t action.

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(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.

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.

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[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*231 j 2.25 0 TD /F2 9.75 Tf 0.239 31t4875

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

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

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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

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

(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 <u>complete</u> substantive response . . . as a waiver of

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* s[illegible] *T6.25 144 ir0f TD -0.0364 Tc (dumping)utir057*

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" CommerceD -0.02-0.07070707l

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

(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

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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?

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[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

ANNEX E-7

ANSWERS OF MEXICO TO QUESTIONS OF ARGENTINA
– THIRD PARTIES SESSION

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 TAMSA's 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": TAMSA 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 TAMSA's 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 TAMSA 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

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

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

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 re Ad90796

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).

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 ---

previous submissions,

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.

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 proce877 Twthe final sunset

(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 revoked[4] *(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

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 -66B[8] 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.

08 -8-12.75 so
average

detailed in the chart accompanying paragraph 347 of the United States' first submission[10] 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 A tn1le 3.4

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, .69, 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 claims[16]

- 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:

- 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, of the An. 3.75he 2nii186 Tc 0.3061 Tw (et Determination" ii186

(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 ..081 Tc umstances established in that c*

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.

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.

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 it's "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.

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[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 view[4] 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?

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*

ANNEX E-11

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 automati9utoril3.75 0 TDe Tj 2at3stata Tw tori be a

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

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 Tj

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 an 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 hai[illegible]

IV. ZEROING

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.

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

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."

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[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 "

Id
1) "ad is.139s412.8 T087 is.139;"g06