United States – Sunset Reviews of Anti-dumping Measures on Oil Country Tubular Goods From Argentina
(WT/DS 268)

Answers of the United States to
Questions from the Panel to the Parties in Connection with the
Second Substantive Meeting of the Panel

February 13, 2004

Q3. The Panel notes the US' response to Questions 2(a) and 3 from the Panel and the US' statements in paragraph 21 of its second written submission. Does the US law require an individual likelihood determination only in respect of respondent interested parties that waive their right to participate in a sunset review?

1. Yes.

Q4. The Panel notes the following statement in the response of the United States to Question 3 from the Panel:

In other words, one company's failure to submit a complete substantive response results in a finding of likelihood with respect to that company, and not on an order-wide basis; Commerce could still, in light of other submissions and facts on the record, conclude that there is no order-wide likelihood of dumping.

> ***a. Please explain whether this scenario has ever happened. In other words, has there ever been a sunset review in which although the DOC had made a positive likelihood determination with respect to certain individual exporter(s) who had waived their right to participate, and later on in the final order-wide likelihood determination the DOC found no likelihood for the country as a whole, including the exporter(s) for which it had already found likelihood?***

2. No. This scenario has never occurred.

> ***b. If, as the United States argues, the individual likelihood determination for exporters that waive their right to participate does not affect the final order-wide basis likelihood determination, then why is it that the US law requires that individual determinations be made for exporters who waive their right to participate?***

3. The United States has not argued that a waiver "does not affect" the final order-wide likelihood determination. While the individual affirmative likelihood determinations may affect the order-wide likelihood determination, they do not determine, in and of themselves, the ultimate outcome of the order-wide analysis. Commerce considers all the information on the administrative record, including prior agency determinations and the information submitted by the interested parties or collected by Commerce, as well as any individual affirmative likelihood

determinations, when making the order-wide likelihood determination.

c. In the OCTG sunset review, did the application of the waiver provisions to Argentine exporters other than Siderca affect/determine the final outcome of the sunset review with respect to Argentina? Please respond in light of the fact that Siderca's share in the total imports of the subject product in the five-year period of application of the order at issue was zero.

4. The application of the waiver provisions did not determine the final outcome of the sunset review with respect to Argentina. Commerce's final affirmative likelihood determination in the sunset review of OCTG from Argentina was based on the existence of dumping and depressed import volumes over the life of the antidumping duty order on OCTG from Argentina. *See Decision Memorandum* at 4-5.

Q5. The Panel notes the US' response to Question 4(c) from the Panel. On the basis of the scenario referred to in the mentioned Question, please respond to the following:

a. Would Section 1675(c)(4)(B) of the Tariff Act of 1930 require that the DOC find likelihood with respect to the exporters that submit an incomplete response to the notice of initiation? If your response is in the negative, please explain the reasons thereof on the basis of the relevant provisions of the US law.

5. Section 1675(c)(3)(B) of the Act requires that where Commerce has an inadequate response from the respondent interested parties to the notice of initiation (order-wide response), then Commerce may issue the final sunset determination on the basis of the facts available. (Section 1675(c)(4)(B) requires a finding of likelihood with respect to a party that has affirmatively waived participation.) Section 351.308(f) of the *Sunset Regulations* defines "the facts available" in a sunset review as the prior agency determinations and any information submitted by the interested parties during the sunset review. Neither Section 1675(c)(3) nor section 1675(c)(4) of the Act addresses the issue of the "completeness" of a particular exporter's substantive response, but rather section 1675(c)(3) focuses on the response from the respondent interested parties, in the aggregate, to the notice of initiation.

b. If your response to the question in (a) is in the affirmative, i.e. if the Statute would require a finding of likelihood with respect to the exporters that waive their right to participate in the mentioned sunset review, please explain whether in such a sunset review the DOC would nevertheless carry out an expedited sunset review to make an order-wide likelihood determination even though the DOC would have already found likelihood with respect to all exporters. If so, on what factual basis would the DOC base its order-wide determination?

6. Section 1675(c)(3)(B) of the Act requires that where Commerce has an inadequate response from the respondent interested parties to the notice of initiation (order-wide response),

then Commerce may issue the final sunset determination on the basis of the facts available. Where the order-wide response is inadequate – which is not necessarily a function of the application of waiver provisions – Commerce would conduct an expedited review and "normally" base the final determination on "the facts available" in accordance with sections 351.218(e)(1)(ii)(C)(2) and 351.308(f) of the *Sunset Regulations*. Section 351.308(f) provides that "the facts available" include prior agency determinations and any information submitted by the interested parties. Thus, Commerce would base the final sunset determination in this scenario on all the information on the administrative record, whether submitted by the interested parties or collected by Commerce, and prior agency determinations. It should be noted that the substantive text of sections 351.218(e)(1)(ii)(C)(2) and 351.308(f) of the *Sunset Regulations* are prefaced with the word "normally" and provide Commerce with the discretion to deviate from requirements of these regulatory provisions where circumstances in a particular case warrant.

Q6. The Panel notes the US' statement in paragraph 24 of its second written submission and the US response to Question 2(e) from the Panel. If the DOC does not consider the information submitted in an incomplete substantive response submitted by an exporter for purposes of the individual likelihood determination for that particular exporter, then for what purpose does the DOC take that information into account in the final order-wide determination?

7. Commerce considers all the information on the administrative record in making the order-wide likelihood determination in a sunset review, including information contained in an incomplete substantive response, but the relevance of the information submitted in an incomplete substantive response to the order-wide likelihood determination would depend on the nature of the information. For example, a respondent interested party might offer information and argument to explain depressed import volumes. Even if that party's response were incomplete, Commerce would take that information and argument into account in making the order-wide determination.

Q7. The Panel notes the following statement in the US' response to Question 2(d) from the Panel:

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

> ***a. Please explain the role of case briefs in full sunset reviews under the US law. What is their content? At what stage during the full sunset review are they submitted to the***

DOC?

8. As the United States noted in its first written submission, full sunset reviews may afford parties expanded opportunities to submit evidence and argument.[1] Case briefs provide such an opportunity. They normally contain a recitation of the issues parties consider to be relevant to the determinations Commerce must make in a sunset review and the parties' arguments concerning those issues. The case briefs provide the parties an additional opportunity to convince the administering authority of the correctness of their position on particular issues of import. Rebuttal briefs are the parties' responses to the arguments raised in the case briefs submitted by the other parties participating in the sunset review. Case briefs normally are due on day 160 (50 days after the preliminary sunset determination); rebuttal briefs normally are due on day 165 (5 days after the filing of case briefs). *See* sections 351.309(c)(1)(i) and 351.309(d)(1) of the *Sunset Regulations* respectively. Extensions of these deadlines may be requested pursuant to section 351.302(b) of Commerce's Regulations.

b. Please explain whether there are any differences between <u>full</u> and <u>expedited</u> sunset reviews under the US law as to whether the following rights provided for in the Agreement can be used by exporters:

(i) The right to see the evidence submitted by other interested parties, as provided under Article 6.1.2 of the Agreement,

(ii) The right to see the full text of the application, as provided under Article 6.1.3 of the Agreement,

(iii) The right to submit information orally, as provided in Article 6.2 of the Agreement.

9. There are no differences between a full and an expedited sunset review with respect to the obligations contained in the cited obligations from Article 6 of the AD Agreement. Interested parties are required to serve all submissions on the other interested parties in a sunset review, whether full or expedited. *See* section 351.303(f) of Commerce's *Regulations*. All documents submitted to or produced by the administering authority form the administrative record in any sunset review and are available in the public reading room in the Central Record Unit located at the U.S. Department of Commerce. *See* sections 351.103 and 351.104 of Commerce's *Regulations*. In addition, meetings with the decision-maker in a sunset review, as well as other Commerce officials, can be requested and are routinely held, but if factual material is presented, the factual material also must be submitted in writing in accordance with section 351.309 of Commerce's *Regulations*. This requirement is in keeping with the obligation of Article 6.3 that oral information be reduced to writing prior to consideration by the authorities.

[1]First Written Submission of the United States, para. 162.

10. With respect to Article 6.1.3, the United States notes that under U.S. law, sunset reviews are automatically initiated by the administering authority, not in response to the filing of an application. (The notice of initiation is published in the Federal Register and is therefore publicly available.)

Q8. Under the US law, in a sunset review in which some of the exporters have waived their right to participate (be it an affirmative or a deemed waiver), does the order-wide analysis to be carried out for the country as a whole entail any elements in addition to what is being examined in the context of company-specific determinations regarding the exporters that have waived their right to participate in the sunset review? Put differently, does the order-wide analysis entail any analysis that would not have been carried out at the company-specific level regarding the exporters that have waived their right to participate in the sunset review?

11. As noted in response to Question 5, the existence of waivers does not automatically result in an expedited review. Commerce normally considers the existence of dumping and the depressed import volumes to be highly probative evidence that dumping will likely continue or recur if the discipline of an order were removed. However, these factors are not necessarily company-specific. Therefore, any information on the record rebutting the probative value of these factors – e.g., reasons other than the antidumping order explaining why import volumes were depressed, or conditions in the country as a whole that explain why dumping is not likely to continue or recur – will be considered. In this regard, all the information on the administrative record of the sunset review including the information and arguments submitted by the interested parties and information collected by Commerce, as well as prior agency determinations, is considered in making the final sunset determination. For example, in the sunset review of OCTG from Argentina, Commerce addressed Siderca's comment concerning the applicability of the *de minimis* standard found in Article 5.8 of the AD Agreement in sunset reviews. *See Decision Memorandum* at 3-4.

Q9. The Panel notes the US' statement that the decision concerning the incompleteness of an exporter's substantive response to the notice of initiation is made on a case-by-case basis by the DOC and that the DOC may consider an incomplete substantive response to be complete if the party submitting that response provides explanation as to why it was unable to provide that information.[2] In this respect, the United States referred to section 351.218(d)(3) of the DOC's Regulations and to the preamble of the Regulations.[3] However, the Panel notes that the cited portions of the Regulations deal with the DOC's adequacy determinations rather than waivers. Please clarify whether the cited provisions of the Regulations have any effect on the application of the waiver provisions of the US law to exporters that submit an incomplete response to the notice of initiation in sunset reviews.

12. A foreign interested party is required to file a substantive response that contains all of the

[2] Response of the United States to Question 8 from the Panel and footnote 33 thereto.

[3] Footnote 33 to the Response of the United States to Question 8 from the Panel.

information required by sections 351.218(d)(3)(ii) and (iii) of the *Sunset Regulations.* If a foreign interested party fails to provide all the information required by sections 351.218(d)(3)(ii) and (d)(3)(iii) of the *Sunset Regulations*, Commerce normally will find that substantive response to be "incomplete." If the substantive response is incomplete, then the foreign interested party who submitted the incomplete substantive response is deemed to have waived its right to participate in the sunset review pursuant to section 351.218(d)(2)(iii) of the *Sunset Regulations.*

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

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)***

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

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 percent in the *Decision Memorandum* is a typographical error. The correct number is 1.36 percent. See *Final Determination*, 65 Fed. Reg. at 66703; and *Decision Memorandum* at 1 and 3.

Q14. The Panel notes the statistics provided by Argentina in Exhibits ARG-63 and ARG-64 regarding the alleged consistent application of the provisions of sections II.A.3 and II.A.4 of the Sunset Policy Bulletin by the DOC. The Panel also notes the US statements in paragraphs 183-186 of its first written submission regarding these statistics.

> ***a. Please explain whether in your view the statistics provided by Argentina are factually correct or not. Please limit your response in this respect to whether or not the information submitted by Argentina in these two exhibits is flawed or not. If in your view these statistics are not factually correct, please explain in detail the reasons thereof.***

16. The United States has not examined each and every sunset review cited by Argentina in Exhibit ARG-63 and Exhibit ARG-64. To the extent that the United States has addressed these exhibits in its written submissions, the United States has no reason to believe that the overall total of sunset reviews conducted and the ultimate outcomes in those sunset reviews as alleged by Argentina is significantly flawed.

> ***b. Please explain your views as to whether these statistics can be used by the Panel in inquiring whether the DOC perceives the provisions of the cited sections of the Sunset Policy Bulletin as determinative/conclusive for purposes of its sunset determinations.***

17. These statistics have no bearing on whether the cited sections of the Sunset Policy Bulletin are determinative/conclusive for purposes of sunset determinations. That question can be answered solely on the basis of the status of the Sunset Policy Bulletin under U.S. law, since Commerce must follow the requirements of U.S. law, and not artificial and non-existent "presumptions" implied by Argentina from statistics. The status of the Sunset Policy Bulletin is clear and unequivocal. It is simply a transparency tool published by Commerce to provide guidance to interested parties as to Commerce's current thinking on how it might exercise its discretion under U.S. law when conducting sunset reviews. The document has no independent legal status under U.S. law and imposes no requirements whatsoever on Commerce to actually follow the methodologies set forth in the Bulletin in a particular sunset review, and Argentina has cited no provision of U.S. law which suggests otherwise. The only requirements concerning the conduct of sunset reviews which Commerce must follow are set forth in the relevant statutory and regulatory provisions.

18. Moreover, in offering these statistics, Argentina focuses only on the result, and not on the legal and factual circumstances of each review which lead to that result. Again, Argentina can

point to nothing on the record of any of these sunset reviews, or in U.S. law generally, which indicates that the Sunset Policy Bulletin required any result in any case. And Argentina ignores the particular factual circumstances of these disputes which underpinned Commerce's ultimate findings.

19. Finally, these statistics at best indicate a "repeated pattern of similar responses to a set of circumstances."[5] As the United States discussed in its First Written Submission, and as a WTO panel has already found, such a pattern does not indicate that a "Member becomes obligated to follow its practice."[6] Therefore, the statistics do not indicate whether the Sunset Policy Bulletin is, as a matter of U.S. law, determinative/conclusive as to how Commerce must act in a given review.

Q 15: The Panel notes the US statements in paragraphs 15 and 23 of its second oral submission that neither the DOC nor the ITC relied on the original dumping margin in relation to their determinations the OCTG sunset review. The Panel also notes the following part of the DOC's Issues and Decision Memorandum:

Therefore, consistent with the Sunset Policy Bulletin, the Department determines that the margin calculated in the original investigation is probative of the behaviour of Siderca if the order were revoked as it is the only rate that reflects the behaviour of Siderca without the discipline of the order. As such, the Department will report to the commission the rate of 1.36 per cent from the original investigation for Siderca and all other exporters from Argentina...

Consistent with section II.B.1 of the Sunset Policy Bulletin and the SAA at 890, we determine that the rates from the original investigations are probative of the behaviour of producers and exporters of OCTG from Argentina...Therefore, we will report to the Commission the company-specific and "all others" rates from the original investigations.[7]

> ***a. The Panel notes that in its responses to Questions 23 and 24 from the Panel concerning the factual basis of the DOC's likelihood determination in the OCTG sunset review, the United States submitted that the DOC's determination was based on the existence of imports from Argentina and the continued collection of the anti-dumping duty on the imports of the subject product from Argentina in the five-year period of application of the subject order. Please explain how these statements can be reconciled with the above-quoted text of the DOC's Memorandum in as much as the DOC's alleged reliance on the original dumping margin is concerned.***

20. The above quoted passages refer to the "margin likely to prevail" reported by Commerce

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[5] *United States - Anti-Dumping and Countervailing Measures on Steel Plate from India,* WT/DS206/R, Report of the Panel adopted 29 July 2002, para. 722.

[6] *Id.* For full discussion, *see* First Written Submission of the United States at para. 198.

[7] *Issues and Decision Memorandum* (Exhibit ARG-51 at 7-8).

to the ITC in the event the order were revoked. The "margin likely to prevail" is a construct of U.S. law. The "margin likely to prevail" is the best evidence of the potential pricing behavior of exporters if the order were revoked because it was the only evidence on the administrative record of OCTG from Argentina of the pricing behavior of OCTG exporters without the discipline of the antidumping duty order in place. The "margin likely to prevail" is not used in any degree as a basis for the determination whether it is likely dumping will continue or recur if the order were revoked. Rather, Commerce first makes the likelihood determination, then determines the "margin likely to prevail" in the event of an affirmative order-wide likelihood determination. See SAA at 889 ("Likelihood of Dumping") and 890 ("Provision to the Commission of Dumping Margins").

21. Section 752(c)(3) of the Act directs that Commerce "shall provide" to the ITC a "margin likely to prevail" in the event of revocation. Section 752(a)(6) of the Act, however, provides that the ITC "may consider" the "margin likely to prevail" in making the likelihood of injury determination, but the statute leave the decision whether to use the "margin likely to prevail" in the injury analysis to the ITC's discretion. See SAA at 890-91.

b. Please explain what meaning the Panel should give to the above-cited parts of the Memorandum in light of the US statement that the DOC did not rely on the original dumping margin in its sunset determination in this sunset review.

22. As discussed in the U.S. answer to Panel Question 15(a), the "margin likely to prevail" is a construct of U.S. law and is reported to the ITC as such. It is not used by Commerce in making the likelihood determination. Indeed, Commerce must first determine whether dumping is likely to continue or recur before it is required to report the magnitude of the margin of dumping likely to prevail. The magnitude of dumping, however, whether past, present, or future, has no bearing on Commerce's likelihood determination. The magnitude of the dumping is immaterial because the 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

[8]Based on the citation to Argentina's second submission, the United States understands the reference in the Panel's question to indicate Exhibit ARG-66A and -66B, rather than ARG-63a and -63b.

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 percent margin was based on the results of comparisons of all export transactions.

c. Please explain whether the DOC reassessed, in the context of the instant sunset review, the conformity of the calculation methodology that had given rise to the 1.36 per cent dumping margin in the original OCTG investigation.

27. The United States did not reassess the calculation methodology and had no reason to reassess the calculation methodology in this sunset review because the magnitude of the margin did not form any part of Commerce's final likelihood determination in the sunset review of OCTG from Argentina. The record of the sunset review contained the final determination from the original investigation. The record contained no information challenging or even questioning that final determination. The final determination had not been previously challenged and neither Argentina nor Siderca placed information on the record calling into question the final determination. Moreover, the information necessary to reassess the final determination (Siderca's sales and cost information, the computerized transaction information, Commerce's verification findings, any legal briefs submitted to Commerce, and any other information which was pertinent to the final determination in the original investigation) was not part of Commerce's sunset review record. Consequently, there was no reason for an unbiased and objective administering authority to "reassess" the 1.36 percent margin from the original investigation.

d. Please explain your views about Argentina's assertion that had zeroing not been used in the calculation of the original dumping margin the result would have been a negative dumping margin of 4.35 per cent.[9]

28. Argentina's assertion appears to be based on Argentina's calculations, the output of which was presented to the Panel in Exhibit ARG-66A. Not only was this exhibit not based on source information contained in Commerce's sunset review record, Argentina has failed to identify any of the computer programming by which it manipulated Siderca's data to arrive at the output contained in Exhibit ARG-66A.

29. Beyond these substantive and procedural defects with Argentina's assertion, Argentina's assertion is legally flawed. Not only does the United States not concede that Exhibit ARG-66A demonstrates that Siderca's information could have supported the output contained in that exhibit, the exhibit itself appears to be based on weighted-average-to-transaction comparisons, whereas the Appellate Body report in *EC – Bed Linen* addressed only the weighted average-to-weighted-average comparison methodology employed by the EC in that case, and explicitly found that, with respect to that methodology only, there could be no "two stage" calculation. *EC – Bed Linen*, at para. 53. *EC – Bed Linen* did not address any weighted-average-to-transaction methodologies, or any other methodology in which a two-stage calculation would be both appropriate and necessary. Other than citation to *EC – Bed Linen* and *Japan Sunset*, neither of which addressed the methodology used in the original investigation of OCTG from Argentina, Argentina has failed to provide any factual or legal basis for its claim that the methodology used in the original investigation was WTO-inconsistent.

OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF INJURY

[9] See, Second Written Submission of Argentina, para. 140.

Q19. Would the United States agree, as a factual matter, that the ITC did not consider some of the injury factors set out in Article 3.4 of the Agreement in its likelihood of continuation or recurrence of injury determinations in the instant sunset review?

30. As the United States has noted, Article 3, and thus Article 3.4, do not apply in sunset reviews. Nevertheless, the ITC considered all of the Article 3.4 injury factors. Data concerning each of the injury factors is contained in the report that accompanies the views of the ITC Commissioners, as 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 Article 3.4 which states that the "list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

Q20. The Panel notes the distinction the United States makes between a determination of injury and a determination of the likelihood of continuation or recurrence of injury.

a. Is the United States of the view that there is a fourth category of injury that applies in the context of sunset reviews in addition to the three mentioned in footnote 9 of the Agreement?

31. The United States is of the view that "the likelihood of continuation or recurrence of . . . injury" is a fourth type of determination regarding injury, separate from the three other types named in footnote 9. The three types of determinations in footnote 9 relate to a "determination of injury." A sunset review does not involve such a determination; rather, it involves a determination of continuation or recurrence of injury.

32. It is clear that "injury" cannot be defined in the same way in Article 11.3 as it is in footnote 9. If it were, then the inquiry in a sunset review would become whether expiry of the duty would be likely to lead to *continuation or recurrence of* material injury to a domestic industry, *threat of material injury to a domestic industry or material retardation of the establishment* of such an industry. Article 11.3 does not contemplate determinations of a continuation or recurrence of threat or material retardation as a basis for continuing to apply an antidumping duty after a sunset review.

b. Would the United States agree that in a sunset review involving recurrence, as opposed to continuation, the investigating authority would have to satisfy itself about

[10] There is one correction that needs to be made to this chart. The location in the ITC report of information on the margins of dumping is p. I-14, not p.V-1.

the likely recurrence of injury in the same manner in which it would determine injury in an investigation. Please elaborate.

33. No. A determination of injury in an investigation is quite different than a determination as to the likely recurrence of injury in a sunset review. They are, in the words of the Appellate Body "distinct processes with different purposes."[11] The analysis and the factors relevant to the two types of inquiry are not the same.

34. In an original antidumping investigation authorities examine the current condition of an industry and the current effect of imports that are not subject to antidumping duties. This is true whether the authorities are evaluating material injury, threat of material injury, or material retardation of the establishment of an industry.

35. In a sunset review, on the other hand, authorities examine the likely volume of imports in the future that may have been restrained by an antidumping duty order and the likely impact in the future of that volume on a domestic industry that has enjoyed the benefit of an antidumping order for the past five years. There may not be any current imports; these imports might not be dumped; and the domestic industry may or may not be currently injured or threatened with injury. In short, in a sunset 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

Q. 21 ***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.

[11] *US–German Steel*, para. 87.

Q. 22 ***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 U.S.C. 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 U.S.C. 1675a(a)(1), in violation of Articles 11.1, 11.3, and 3 of the Anti-Dumping Agreement;[14]
- 19 U.S.C. 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]

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[12]Section A.1
[13]Section A.1
[14]Section B.3
[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

- 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 percent 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:

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[18]Section A.2
[19]Section B.2
[20]Section A.3
[21]Section A.4
[22]Section A.5
[23]Section B.1
[24]Section B.2
[25]Section B.4

First Written Submission:

- Section VII.A: This section makes claims regarding the waiver provisions under Section 351.218(d)(2)(iii) of the regulations (deemed waivers). Section A of Argentina's Panel Request refers only to Section 351.218(e) of the regulations (adequacy of response to notice of initiation);[26]

- Section VII.B.2: This section makes claims regarding 19 U.S.C. 1675(c) and 1675a(c), the SAA, and the Sunset Policy Bulletin. Section A of the Panel Request refers to 19 U.S.C. 1675(c)(4) only and does not refer to the other provisions of 19 U.S.C. 1675(c), 19 U.S.C. 1675a(c), the SAA, or the Sunset Policy Bulletin. The only basis for a claim under these provisions would be their listing on Page Four;

- Section VII.E.1: This section makes a claim regarding U.S. administration of its laws, regulations, decisions, and rulings with respect to sunset reviews in violation of Article X:3(a) of the GATT 1994. However, Section A.4 of the Panel Request only challenges the sunset determination of OCTG from Argentina in this regard, not all U.S. laws, regulations, decisions, and rulings with respect to all sunset reviews.[27] The United States does not find a basis for this claim even in Page Four;

- Section VIII.C.2: This section makes a claim regarding the International Trade Commission's application of 19 U.S.C. 1675a(a)(1) and (5) in the Sunset Review of OCTG from Argentina. However, Section B.3 of the panel request makes no reference to the sunset review from Argentina; instead, it challenges the statute "as such." The only basis for an "as applied" claim, therefore, would be the blanket reference on Page Four to the ITC's "Sunset Determination;"

- Section IX: This Section on its face addresses measures that are only listed on Page Four (Article VI of the GATT 1994; Articles 1 and 18 of the Anti-Dumping Agreement; and Article XVI:4 of the WTO Agreement). The only basis for these claims would be Page Four;

- Section X: The Conclusion states that "U.S. Sunset Review, Statutory, Regulatory, and Administrative Provisions As Such Violate the Antidumping Agreement and the WTO Agreement." However, as noted above, the only measures identified in Sections A and B

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[26]The United States has stated that the extension of Argentina's claim to Section 351.218(d)(2)(iii) did not result in sufficient prejudice to warrant an objection because Argentina in its "brief description" under Section A.1 at least indicated that it intended to challenge the waiver provisions. *See* U.S. First Written Submission, n.103.

[27]It should further be noted that Argentina has argued that use of the phrase "as such" in Section A.4 of the Panel Request makes the entire claim an "as such" claim. However, the language of the claim indicates that it is only the Sunset Determination in this case that is being challenged, and the underlying law and other sunset determinations are merely evidence in support of the "as applied" claim.

of the Panel Request are 19 U.S.C. Section 1675(c)(4), 19 C.F.R. Section 351.218(e), Section 1675a(a)(1), and 19 U.S.C. 1675a(a)(5). The only basis for claims regarding any other measures would be the list of measures on Page Four;

Second Written Submission:

- Section III.A: As in its First Submission, Argentina makes a claim regarding 19 C.F.R. Section 351.218(d)(2)(iii) (deemed waiver). Section A of the Panel Request only refers to Section 351.218(e)[28];

- Section III.B: This Section makes a claim regarding 19 U.S.C. Section 1675a(c)(1), the Statement of Administrative Action, and the Sunset Policy Bulletin and argues that U.S. law as such result in an irrefutable presumption of likelihood. Yet Section A.4 of Argentina's Panel Request only makes a claim that the irrefutable presumption as applied in this sunset determination. The only basis for an "as such" claim regarding the statute, the Statement of Administrative Action, and the Sunset Policy Bulletin would be Page Four;

- Section III.D.2: Argentina makes a claim regarding the ITC's application of the statutory provisions regarding time frame. Yet the Panel Request only contains an "as such" claim. The only basis for an "as applied" claim would be the blanket reference to the ITC's "Sunset Determination" on Page Four;

- Section V: This Section makes claims regarding "consequential" violations, and, as discussed above, these Articles (Article VI of the Anti-Dumping Agreement, Articles 1 and 18 of the Anti-Dumping Agreement, and Article XVI:4 of the WTO Agreement) are only found on Page Four.

[28] *See* n. 26 above