United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods From Argentina (WT/DS268)

Answers of the United States of America to Questions from the Panel to the Parties in connection with the First Substantive Meeting

January 8, 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 percent threshold prescribed under US law?

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

2. Second, taking into account all of the responses received as part of the first step, including deemed and affirmative waivers, Commerce normally evaluates whether the exporters submitting complete substantive responses account for 50 percent of the total imports of subject

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[1] 19 C.F.R. 351.218(d)(3) (Exhibit ARG-3).
[2] 771(9) of the Tariff Act of 1930 (19 U.S.C. 1677(9).
[3] 19 C.F.R. 351.218(d) (Exhibit ARG-3).
[4] 19 C.F.R. 351.218(d)(3)(ii) (Exhibit ARG-3).
[5] 19 C.F.R. 351.218(d)(2)(iii) (Exhibit ARG-3).
[6] Section 751(c)(4) of the Tariff Act (19 U.S.C. 1675(c)(4)) (Exhibit ARG-1)

merchandise to the United States over the five calendar years preceding the initiation of the review ("50 percent threshold").[7] If the responses do not meet the 50 percent threshold, Commerce will normally conduct an expedited review to make an order-wide determination of the likelihood of continuing or recurring dumping (an order-wide likelihood determination).[8]

3. The likelihood finding with regard to one company under the first step is not dispositive of the results of the order-wide likelihood determination under the second step. Even if Commerce finds that dumping is likely with regard to one company, Commerce still must decide whether to conduct a full or expedited review to determine order-wide likelihood. The decision whether to expedite depends on the other respondent interested party responses.

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

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

5. Yes.

(c) If the DOC carries out an expedited sunset review in cases of an affirmative or deemed waiver as well, please explain whether there are any differences in the procedural rules that apply to these two sets of

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

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

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

expedited sunset reviews, i.e. expedited reviews that result from a waiver and those that result from the submission of an inadequate response.

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

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

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

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 "<u>any</u> 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

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

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

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]

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

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[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.

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

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

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.***

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

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

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[18] 19 C.F.R. 351.218(e)(ii)(C)(2) (Exhibit ARG-3).
[19] 19 C.F.R. 351.309(e) (Exhibit US-27).
[20] 19 C.F.R. 351.308(f)(2) (Exhibit US-27).

incomplete submission will preclude it from participating further, the evidence and information contained therein will be used at a minimum as part of facts available, if facts available is applied.[21]

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:***
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> ***"(B) Effect of waiver***
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> ***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)***

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[21] 19 C.F.R. 351.308(f)(2) (Exhibit US-27).
[22] *Ceramic Floor Tiles,* para 6.125.
[23] 19 U.S.C. § 1675(c)(4) (Exhibit ARG-1 at 1152).

(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 percent threshold.

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

[24] *Japan Sunset*, paras. 156-57.

or incomplete) if an expedited review is conducted. Notably, respondent interested parties are entitled to include *any* relevant information in those responses. Additionally, Commerce may consider information from prior determinations (such as administrative reviews) in assessing order-wide likelihood.

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

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

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

> ***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.***
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> ***(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.***

[25] Section 351.218(d)(ii)(C)(2) (Exhibit ARG-3).
[26] 19 C.F.R. 351.308(f)(2) (Exhibit US-27).

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 antidumping duty order five years after publication of the antidumping 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 U.S. law or regulation mandates an order-wide affirmative likelihood determination in a sunset review based on the waiver of a single exporter.

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

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

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

information from incomplete and complete substantive responses.[28] Thus, U.S. 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 U.S. law would result. The statute requires only that likelihood be found with respect to the company that waived; it does not mandate that likelihood be found on an order-wide basis. As noted above, Commerce, even if using facts available, will consider information from prior proceedings and from all substantive responses, complete or otherwise.

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

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

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

32. Article 6.8 of the AD Agreement provides that "[i]n cases which any interested party refuses access to, or otherwise does not provide, necessary information" a Member may make its determination on the basis of "facts available." In an expedited sunset review, respondent interested parties representing more than 50 percent of the imports of the subject merchandise have affirmatively waived participation, filed an incomplete substantive response, or have failed to respond to the notice of initiation in any respect. In this context, Commerce normally uses the facts available to make its final sunset determination because the respondent interested parties

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

have collectively failed to provide the necessary information. Nevertheless, paragraph 3 of Annex II to the AD Agreement provides that, when applying the facts available pursuant to Article 6.8, all properly submitted, verifiable information should be taken into account when the determination at issue is made. Section 351.308(f)(2) provides for consideration of this information when submitted in an interested party's substantive response, whether that substantive response is complete or incomplete.

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

33. Section 351.308(f) of the *Sunset Regulations* states that Commerce normally will base its final sunset determination on prior agency determinations and the information submitted in the parties' substantive responses. The use of the word "normally" in section 351.308(f) provides Commerce with the discretion to find that the factual circumstances in a particular case warrant Commerce's reliance on other or additional information when making the final order-wide sunset determination.

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

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

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

determination.

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

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

Q7. (a) Please explain the significance of the language "without further investigation" in Section 351.218(e)(1)(ii)(C)(2) of the DOC's Regulations. What does it imply? Does it mean that the DOC will not accept any submission of evidence by foreign exporters in expedited sunset reviews in addition to their responses considered to be inadequate? Or does it imply that the evidence submitted by interested parties will not be evaluated or otherwise tested?

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

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

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

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)***
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> > ***(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?***

40. When a respondent interested party submits an incomplete substantive response, Commerce will find that the incomplete response is the equivalent of no response from that respondent interested party for the purposes of determining likelihood on a company-specific basis.

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[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).

41. Commerce does not reject incomplete submissions *per se*. The evaluation concerning the completeness of a substantive response depends on the individual circumstances and is done on a case-by-case basis.[33] In addition, Commerce has general authority to waive deadlines for good cause, unless expressly precluded by statute.[34] Therefore, if a response were incomplete, Commerce could extend the 30 day deadline to permit the respondent interested party to complete the submission.

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

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

> ***"A determination that the aggregate response to the notice of initiation is inadequate can be based on the respondent interested parties electing waiver, or failing to respond, or in providing inadequate substantive responses, or on any combination of these scenarios."***
>
> ***(a) Please explain whether the 50 percent test is the sole basis for a determination of inadequacy, or whether, as the United States points out in the above-quoted paragraph, the respondents' response can be deemed inadequate in cases where there is an affirmative or deemed waiver, but the share of the cooperating respondents in total imports is above 50 percent.***

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

44. The 50 precent threshold is the normal basis for determining whether Commerce will conduct an full sunset review or a expedited sunset review. However, as noted above, Commerce has made an exception where the respondent interested party provided information indicating that complete substantive responses not meeting the 50 percent threshold were nevertheless adequate. Commerce has not made a finding of inadequacy when the complete substantive responses met the 50 percent threshold. Therefore, if a sufficient number of respondent interested parties (or just one, if it meets the 50 percent threshold) simply adhere to

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

[34] 19 C.F.R. 351.302(b) (Exhibit US-3).

the criteria set forth in the regulations, they can virtually ensure that a full review will be conducted. In other words, in practical terms it is up to the respondent interested parties to decide whether they want a full or expedited review.

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

45. The election of waiver and the adequacy assessment are two distinct procedures. An affirmative or deemed waiver does not automatically result in a finding that the substantive responses were inadequate. Instead, Commerce will normally assess whether the complete substantive responses to the notice of initiation are sufficient to meet the 50 percent threshold. Other exporters meeting the 50 percent 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 percent threshold to the total import volumes represented by all the respondent interested parties who filed a complete or adequate company-specific substantive response to determine whether the aggregate response to the notice of initiation is "adequate." Commerce then uses the results to determine whether to conduct a full or expedited sunset review.

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

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

substantive responses were adequate, and therefore a full review would normally be conducted.

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

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

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

49. Article 11.4 of the AD Agreement stipulates that the Article 6 provisions "regarding evidence and procedure" shall apply to reviews under Article 11. Thus, not all of the provisions of Article 6 are applicable to Article 11 reviews; rather, only the provisions of Article 6 regarding evidence and procedure are so applicable. The Appellate Body in *Japan Sunset* recently confirmed that Article 11.3 does not prescribe substantive rules for the administration of sunset reviews.[35]

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

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

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

[35] *Japan Sunset,* para 123.

> ***"In the instant sunset reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation."***[36]
>
> ***Is the Panel to understand that the DOC deemed Siderca to have waived its right to participate in this sunset review? If so, on what basis under US law? If your response is in the negative, please explain what meaning the Panel should give to this sentence.***

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

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

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

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

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

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

regard was that Commerce should apply the *de minimis* standard found in Article 5.8 of the AD Agreement and, as a consequence, should revoke the order. In addition, section 351.218(d)(3)(iv)(B) provides interested parties the opportunity to submit any other relevant information or argument the interested party would like considered in the sunset review. Siderca made no other arguments or submission of factual information.[39]

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

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

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

57. At no time did Siderca provide any statements or assertions that it would not dump in the future if the order were revoked, offer any explanations why it had ceased shipments of the subject merchandise after imposition of the duty, or submit any allegations that information submitted in the sunset review proceeding of OCTG from Argentina was inaccurate or incorrect. In this proceeding, the First Written Submission of Argentina implies that Siderca was the only producer of OCTG in Argentina during the sunset review and that Siderca's lack of shipments contradicts the data indicating that Argentine OCTG was in fact exported to the United States

[39] *See* Siderca's Substantive Response at 2-3 (Exhibit ARG-57).
[40] *See Adequacy Memorandum* at (Exhibit ARG-50)

during the period of review. Siderca made similar statements in its complete substantive response to the notice of initiation. However, there is a second Argentine producer of OCTG: Acindar. The United States has conducted administrative reviews of Acindar since 2001, and as recently as March 19, 2003, Commerce found Acindar to have a dumping margin of 60.73 percent.[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 antidumping 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 percent 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 U.S. 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

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

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 antidumping duty order on OCTG from Argentina until the sunset review.

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

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

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

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

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[42] *See* Exhibit US- 23.

[43] *See* Exhibit US- 23.

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

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

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

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

69. In the administrative review initiated for the period August 1, 1997-July 31, 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 August 1, 1998-July 31, 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

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

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

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

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

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

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 undeterrmined 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 percent 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 percent 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 percent 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 Antidumping Agreement does not require Members to expend resources to unearth information that is being withheld.

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?

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[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).

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

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

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

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

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

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

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

79. No.

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

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

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

OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING

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

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

81. A Commerce administrative practice is neither a "measure" within the meaning of the relevant WTO agreements, nor a "mandatory" measure within the meaning of the mandatory/discretionary distinction. A "measure" – which can give rise to an independent violation of WTO obligations – must constitute an instrument with a functional life of its own – *i.e.,* it must *do* something concrete, independently of any other instruments. It is well-established that a "practice" is not a measure.[54] Indeed, a practice under U.S. law consists of nothing more than individual applications of the U.S. 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 U.S. statute and regulations.[55] In contrast to the U.S. statute and regulations, which clearly function as "measures", no general, *a priori* conclusions about the conduct of sunset reviews under U.S. 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

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

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

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

rules on the allocation of the burden of proof, it is up to the complaining party to demonstrate that the challenged measure mandates WTO-inconsistent action or precludes WTO-consistent action.[57] "Practice" is *not* binding on Commerce, and, under U.S. administrative law, Commerce may depart from its precedent in any particular case, so long as it explains the reasons for doing so. Therefore, this "practice" does not mandate WTO-inconsistent action or preclude WTO-consistent action.

(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 U.S. 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 U.S. antidumping 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 U.S. 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 U.S. 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

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Round Agreements Act, WT/DS221/R, adopted 30 August 2002, para. 6.22.

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

[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 U.S. 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.

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*.

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

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

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 percent 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.

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 Antidumping 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]

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

[63] *Notice of Final Results and Recision in Part of Antidumping Duty Administrative Review; Oil Country Tubular Goods, Other Than Drill Pipe, from Argentina*, 68 Fed. Reg. 13262, 13263 (March 19, 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).

[67] *Japan Sunset*, para. 123.

92. The United States notes that cumulation in antidumping 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 Antidumping Code was silent on the subject. If the negotiators of the Uruguay Round had intended to limit the practice of cumulation to investigations, it seems unlikely that they would have made no mention of the subject in Article 11.3.

REQUEST FOR PRELIMINARY RULINGS

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

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

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

OTHER

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

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

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 U.S. law. Commerce is bound by the statute – e.g., there is no higher law except for the U.S. 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.

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[70] See, for example, First Written Submission of the United States paras. 193-195.
[71] *US-Export Restraints* para. 8.91.

> 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 U.S. international obligations and domestic law. Furthermore, the Administration understands that it is the expectation of the Congress 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 U.S. 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 U.S. antidumping 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 U.S. law. The regulations contain both mandatory and discretionary directives. The regulations have force and effect of law and must be followed where the language of the specific provision leaves no discretion. The regulations, however, have provisions that provide for the exercise of discretion by the applicable decision-maker. The regulations are issued in accordance with U.S. federal agency rule-making procedures and are accorded controlling weight by U.S. courts unless they are arbitrary, capricious, or manifestly contrary to the statute.[74] Thus, the regulations have an independent operational life of their own.[75]

(iv) Sunset Review Policy Bulletin.

100. Under U.S. law, the *Sunset Policy Bulletin* is considered a non-binding statement, providing Commerce's general understanding of sunset-related issues not explicitly addressed by

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

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

[74]*See, e.g.,* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842, 81 L. Ed. 2d 694, 104 S. Ct. 2778-845 (1984).

[75]*US Export Restraints*, paras. 8108 - 8.113.

the statute and regulations.[76] In this regard, the *Sunset Policy Bulletin* has a legal status comparable to that of agency precedent. As with its administrative precedent, Commerce may depart from its policy bulletin in any particular case, so long as it explains the reasons for doing so.[77] The *Sunset Policy Bulletin* does nothing more than provide Commerce and the public with guidance as to how Commerce may interpret and apply the statute and its regulations in individual cases. The *Sunset Policy Bulletin* does not "do something concrete" for which it could be subject to independent legal challenge under the WTO agreements.

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.

[76] *Sunset Policy Bulletin*, 63 FR at 18871 ("This policy bulletin proposes *guidance* regarding the conduct of sunset reviews. As described below, the proposed policies are intended to complement the applicable statutory and regulatory provisions by providing *guidance* on methodological or analytical issues not explicitly addressed by the statute and regulations.") (Emphasis added) (Exhibit ARG-35).

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