United States – Sunset Review of Antidumping Measures on Oil Country Tubular Goods from Argentina (WT/DS268)

Answers of the United States of America to Written Questions from Argentina in Connection with the First Substantive Meeting

January 8, 2004

The Department's Sunset Review of OCTG from Argentina

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

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

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

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

In this case:

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

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[1] *See United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, Report of the Appellate Body, adopted December 15, 2003 ("*Japan Sunset"),* at para. 123.

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

[3] 19 U.S.C. § 1671(c)(4)(B) (Exhibit ARG-1).

3. Yes.

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

4. In the sunset review of OCTG from Argentina, Commerce considered these findings along with all the information on the record of the sunset review, including the prior agency determinations, the substantive and rebuttal responses of the domestic interested parties, and the substantive response of the only Argentine respondent interested party to file a complete substantive response, Siderca, in accordance with section 751(c)(3)(B) of the Act and section 351.308(f) of the *Sunset Regulations*.[4]

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

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

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

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

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

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

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

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

7. No.

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

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

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

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

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

Q4. The United States asserts that, under the waiver provisions, "there are two methods for a respondent interested party to waive its right to participate in a sunset review: (1) submit a statement affirmatively waiving participation; or (2) fail to submit a substantive response to Commerce's notice of initiation and allow Commerce to deem its non-response as a waiver of its right to participation." (U.S. First Submission, para. 213). This reading, however, fails to acknowledge the regulation's instruction that Commerce "will consider the

[6] *See Decision Memorandum* at 4-5 (Exhibit ARG-51) and *Sunset Policy Bulletin*, 65 Fed. Reg. at 18872 (Exhibit ARG-35).

failure by a respondent interested party to file a complete substantive response . . . as a waiver of participation . . . .” (19 C.F.R. § 351.218(d)(2)(iii) (emphasis added)). Accordingly, the Department will deem a respondent interested party to have waived its participation where it files an incomplete substantive response. How is such a deemed waiver consistent with Articles 11.3?

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

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

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

Q6. In its first submission, the United States asserts that “‘current information’ is not the issue in a sunset review conducted pursuant to Article 11.3. Rather, the issue under Article 11.3 is whether dumping and injury are likely to continue or recur in the event of the expiry of the duty, an inherently forward-looking inquiry.” (U.S. First Submission, para. 265). How can a prospective determination of whether dumping is likely to continue, if there is no analysis of whether it exists currently? How does the United States support its statement in the Issues and Decision Memorandum that dumping continued throughout the order?

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

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

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

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

The Commission's Sunset Review of OCTG from Argentina:

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

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

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

the statute and the SAA.[7]

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

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

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

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

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

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

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

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

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

Article 11.3?

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

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

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

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

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

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

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

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

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

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

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

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

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

27. Article 11.3 does not prescribe the methodology Members use in conducting sunset reviews. The ITC found that revocation of the antidumping duty orders from the five subject countries, and the countervailing duty order on imports of casing and tubing from Italy, would be likely to lead to continuation *or* recurrence of material injury to an industry in the United States.[16] Such a finding is consistent with Article 11.3.[17] There is no obligation under Article 11 to determine that injury would be likely to recur as opposed to likely to continue, as there is no requirement for a determination that the dumping duties have eliminated the injury. Further, a finding that either injury is likely to recur or continue, when coupled with a similar finding

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[13] *ITC Report* at 21.

[14] *ITC Report* at 21.

[15] *ITC Report* at II-17-18.

[16] *ITC Report* at 1.

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

regarding dumping, is adequate to permit retention of the antidumping duty order.