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 Second Substantive Meeting

February 13, 2004

Volume of imports

Q1.There are discrepancies in precise import volumes. Argentina submitted Chart 4 to its second oral statement to represent the Department's determinations in the four concluded annual reviews regarding the import volume. This chart shows that the Department had confirmed at least 154 MT of imports over the period. Argentina also takes the point from the Appellate Body that the authority cannot draw any presumption from the sole fact that there was a decline in import volume after the imposition of the order. The Appellate Body stated: "[A] case-specific analysis of the factors behind a cessation of imports or a decline in import volumes (when dumping is eliminated) will be necessary to determine that dumping will recur if the duty is terminated." (para. 177) With this background, did the United States undertake a case-specific analysis of the factors behind the decline in import volumes in this case? If so, please provide a detailed explanation of that analysis.

1. Notwithstanding Argentina's selective recitation of portions of the AB report in Japan Sunset and the misrepresentations contained in Chart 4, Commerce confirmed the import statistics using two different sources, the Census Bureau IM-145 import statistics and the ITC Trade Database. No respondent interested party, including Siderca, commented on Commerce's use of these import statistics during the sunset review of OCTG from Argentina despite being given the opportunity to do so.

Substantive Basis for the Department's Likelihood Determination

Q2. In its February 3 opening statement (para. 11), the United States confirmed that the Department's likelihood of dumping determination was based on the existence of entries that established a decline in volume and that dumping continued during period of the order. The Appellate Body said that procedures or "provisions" that create "presumptions" or "predetermine" a particular result "run the risk of being found inconsistent with this type of obligation." (Japan Sunset, para. 178)

> ***a. Did the Department presume from the payment of duties that dumping (as defined by Article 2) had continued during the period of the order?***

2. The United States uses a retrospective system and does not calculate a margin of dumping unless it conducts an administrative review. Where there is no such administrative review, the United States assesses dumping duty liability at the cash deposit rate in effect for particular

subject merchandise at the time of entry. In this case, the deposit rate for OCTG from Argentina at the time of entry for all the periods prior to the sunset review was 1.36 percent because no annual reviews were completed. The United States believes that the existence of dumping and a reduction in the volume of imports since the imposition of a duty is probative of the likelihood of the continuation or recurrence of dumping. In the sunset review of OCTG from Argentina, neither Siderca nor any other respondent interested party submitted evidence contrary to this probative evidence.

b. Does the United States consider that this constitutes positive evidence that dumping (as defined by Article 2) would be likely to continue or recur in the event of revocation?

3. The United States believes that the existence of dumping and a reduction in the volume of imports since the imposition of a duty is probative of the likelihood of the continuation or recurrence of dumping. In the sunset review of OCTG from Argentina, neither Siderca nor any other respondent interested party submitted evidence contrary to this probative evidence.

c. Would the United States agree that in some cases there may be circumstances where it would be commercially unreasonable to undertake an administrative review to obtain a small refund of deposits?

4. A finding that it would be commercially reasonable to request an administrative review in a particular case would depend on the factual circumstances established in that case. The scenario posited by Argentina is not relevant to the present dispute because it supposes facts not in evidence in this case.

Q3. The United States has modified its position with regard to its basis for determining that dumping continued throughout the order. In the Issues and Decisions Memorandum the Department stated: "the Department finds the existence of dumping margins after the issuance of the orders is highly probative of the likelihood of continuation or recurrence of dumping." In its First Submission (para. 54) and its Second Submission (paras. 56), the United States indicated (consistent with the U.S. statute) that it considered "dumping margins." In the second substantive meeting, the United States indicated that the basis for the Department's finding that dumping continued was based on the collection of antidumping duties. Is there a distinction between the existence of a dumping margin – whether from the original investigation or a review – and the payment of a duties at the deposit rate?

5. The United States has not modified its position with regard to Commerce's finding that dumping continued throughout the like of the dumping order on OCTG from Argentina. There is no difference between the existence of a dumping margin and the payment of duties at the deposit rate for the purposes of determining whether dumping has continued throughout the life of an order in a sunset review.

Q4. Please, compare paragraph 54 of the U.S. First Submission with paragraph 23 of the

U.S. Opening Statement of February 3 and explain the contradiction.

6. There is no contradiction between these two statements. Commerce did not rely on the magnitude of the margin, but rather on the existence of dumping and the depressed import volumes throughout the life of the antidumping duty order on OCTG from Argentina.

Waiver

Q5. What is the information on the record in the sunset review regarding the non-respondent respondents?

7. The import statistics, verified by the Commerce's Census Bureau IM-145 import statistics and the ITC Trade Database, confirmed the existence of one or more non-responding respondents. These interested parties failed to respond to the notice of initiation of the sunset review for OCTG from Argentina.

Q6. Is the likelihood of dumping determination for the non-responding respondents based solely on their non-participation?

8. The facts in the sunset review of OCTG from Argentina establish that there were imports of Argentina OCTG during the five year period preceding the sunset review and that Siderca did not export OCTG during this period. This means that there were one or more exporters of Argentine OCTG who failed to respond to the notice of initiation of the sunset review. Therefore, based on the evidence of Argentine OCTG imports and the failure of certain Argentine exporters to respond, Commerce found that there was a likelihood of continuation or recurrence of dumping with respect to these non-responding respondents.

Q7. During the second substantive meeting, the United States indicated that there was nothing on the record to contradict Siderca's statement that Siderca was the only Argentine producer of OCTG. Nonetheless, the United States indicated that the imports statistics showed that there were other exporters of Argentine OCTG, which may have been produced by Siderca.

> ***a. How does the Department reconcile these statements with its findings in the Issues and Decision Memorandum (at page 5) that "there have been above de minimis margins for the investigated companies throughout the history of the orders"?***

9. There were no administrative reviews of OCTG from Argentina, so the dumping margin calculated for Siderca in the original investigation continued to apply and continues to apply to Siderca. In addition, the "all others" rate (1.36 percent), also calculated during the original investigation, was applied to all imports of Argentine OCTG during the period preceding the sunset review.

b. Does the United States agree that the only "investigated compan[y]" in this case was Siderca?

10. Siderca was the only company investigation in the original investigation of OCTG from Argentina.

c. Could the United States explain how imports into the United States of Siderca-produced OCTG, which exports were made by other exporters of potentially different nationalities, is probative of the issue of whether dumping is likely to continue or recur?

11. Siderca ceased shipping OCTG almost immediately after the imposition of the order, which is probative evidence that Siderca could not sell OCTG in the United States absent dumping. Siderca had the opportunity to explain why this factual situation was not probative in the sunset review, but failed to do so. Also, there were imports of OCTG from Argentina during the life of the order for which dumping duties were paid. The domestic interested parties placed evidence of these imports on the administrative record of the sunset review and Commerce verified the statistics. Siderca's only statement in this regard made during the sunset review was that it had not exported OCTG to the United States. It did not allege that these exports came from anywhere other than Argentina or that these exports were or were not produced by Siderca. Therefore, based on the evidence of Argentine OCTG imports and the failure of the Argentine exporters to respond, Commerce found that there was a likelihood of continuation or recurrence of dumping with respect to these non-responding respondents.

Q8. During the second substantive meeting, the United States indicated that it typically notifies the parties on the interested party list of the proceedings. Can the United States provide a copy of the notice in this case and explain who the interested parties are, to the extent that they are not obvious from the interested party list?

12. Commerce created a web-site for sunset reviews that contains each antidumping and countervailing duty order. Each order has an interested party list appended which lists every interested party who has participated in an administrative proceeding covering the respective order since the imposition of the order. This list is updated with each subsequent proceeding, including administrative reviews. Therefore, the interested party list for the antidumping duty order on OCTG from Argentina will necessarily be longer at present than it would have been at the time the sunset review was conducted, because administrative reviews have been conducted since the sunset review. The list as it currently stands can be found at the Department of Commerce website, www.doc.gov.

Q9. The Department's Issues and Decisions Memorandum, the U.S. First Submission, and U.S. responses to questions indicate that the Department determined that the Argentine non-responding respondents were deemed to have waived participation. The Department also confirmed that Siderca did not ship during the relevant period. The Department confirmed

that the waiver of the non-responding respondents meant that they would be likely to dump (response to question 2(a))? Based on the Department's determined that Siderca did not ship to the U.S. market. How could the Department's waiver of the non-responding respondents not have had an impact on the order wide analysis?

13. Please see the answers of the United States to Panel Questions 4(b) and 4(c).

Facts Available/Expedited Review

Q10. The United States agreed in the first hearing that Article 6.8 and Annex II apply to Article 11.3 reviews.

a. Does the United States continue to hold this view?

14. Yes.

b. Does the United States continue to agree that Siderca filed a complete response and offered to cooperate fully?

15. Yes.

Q11. Did Siderca's conduct justify use of facts available within the meaning of Article 6.8 and Article II?

16. Commerce did not apply "facts available within the meaning of Article 6.8 and Annex II" to Siderca in the sunset review of OCTG from Argentina.

Q12. The United States says that "facts available" has no negative connotation (US Second Submission at para. 24).D

a. Does the United States agree that section 351.218(d)(3) requires respondent interested parties to supply past dumping margins and historical import volume data in their substantive response?

b. Does section 19 U.S.C. section 1675a(c)(1) mandate that the Department "shall consider (A) the weighted average dumping margins determined in the investigation and subsequent reviews, and (B) the volume of imports of the subject merchandise for the period before and the period after the issuance of the antidumping duty order or acceptance of the suspension agreement" in making the likelihood determination?

17. In the context of a sunset review, section 351.308(f) defines "the facts available" as prior agency determinations, information submitted by the interested parties, and any information on the administrative record of the sunset review, including the likelihood determinations

concerning the non-responding respondents. In the sunset review of OCTG from Argentina, Commerce considered all the evidence on the administrative record including the prior agency determinations and any information submitted by the interested parties in accordance with section 351.308(f) of the *Sunset Regulations*.

Q13. The statute (1675(c)(3)(B)) and regulation 351.218(e)(1)(C)(2) state that, in an expedited review, the Department will "issue, without further investigation, final results of review based on the facts available . . .." In light of your response to question 3, how is this consistent with the Appellate Body's statement that the authorities are required to make a "fresh determination, based on credible evidence" when the facts available are limited to the margin from the original investigation and the volume decline?

18. In the context of a sunset review, section 351.308(f) defines "the facts available" as prior agency determinations, information submitted by the interested parties, and any information on the administrative record of the sunset review, including the likelihood determinations concerning the non-responding respondents. In the sunset review of OCTG from Argentina, Commerce made a fresh determination by considering all the information on the administrative record, including the information submitted by the domestic interested parties and Siderca, as well as prior agency determinations and the information collected by Commerce, in light of the new standard of likelihood of continuation or recurrence of dumping.

Zeroing

Q14. Does the United States agree that the 1.36 percent dumping margin cited in the Department's sunset determination resulted from the division of a numerator of 125,478.93 by a denominator of 9,240,392.64, as represented in Exhibit ARG – 52 to Argentina's First Submission?

> ***a. Does the United States agree that the net price of some of Siderca's US sales exceeded the weighted-average price to China for the matching product?***
>
> ***b. Does the U.S. agree that the extent to which the net price of sales to the United States exceeded the weighted-average net price to China is not reflected in the numerator of this calculation?***
>
> ***c. Does the United States believe that CONNUM 1 (used in the example in paras. 141-142 Argentina's Second Submission) was "dumped" within the meaning of Article 2.***

19. Article 17.5(ii) of the AD Agreement provides that the panel is to examine the matter based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member." The record of the sunset review which is before this panel contains only that information which was placed on the record by Argentina, Siderca, Commerce, or any other interested party that chose to participate in the review. As discussed below, the

record of the sunset review contains the final determination of Commerce in the original investigation, and does not contain the information pertinent to Argentina's questions.

Q15. Does the United States agree with Argentina's description of the calculation methodology in paragraphs 137 - 144 of Argentina's Second Submission? If not, please explain the basis for your answer.

20. The United States does not agree with Argentina's description of the calculation methodology in paragraphs 137-144 of Argentina's second written submission. That discussion contains a number of legal and factual assertions, the basis for which Argentina has failed to establish and/or which are not properly before this Panel pursuant to Article 17.5(ii) of the AD Agreement.

Q16. Does the United States agree with the calculation in ARG – 66A to the extent that it shows that the addition of the positive and negative "margins" would yield a negative $402,159.45? If not, why not?

21. Exhibit ARG-66A contains computer output which was not on the record of the sunset review. The computer programming used to create the output contained in ARG-66A is neither on the record of the sunset review, nor is it contained in the exhibit itself. Consequently, the United States does not agree with, and is not in any position to evaluate, anew, in the context of this dispute, the contents of Argentina's exhibit.

Q17. Paragraph 54 of the U.S. First Submission indicates that the dumping margin from the original investigation was the only indicator available to the Department. In light of this, does the United States dispute that the margin that was calculated in the original investigation was part of the record from the sunset proceedings?

22. Commerce reported the margin from the original investigation, 1.36 percent, to the International Trade Commission as the "margin likely to prevail" in the event the antidumping order on OCTG from Argentina was revoked.

23. Thus, the record in the sunset review contained the final determination of Commerce which stated that the margin calculated in that determination was 1.36 percent. However, Siderca's detailed questionnaire responses and computerized cost and sales information, supplemental questionnaires issued by Commerce, verification findings, legal briefs, and other relevant documents and memoranda supporting the final determination in the original investigation were not placed on the record of the sunset review by Argentina, Siderca, or any other party.

Q18. Was the 1.36 percent margin relied on by the Department for purposes of its likelihood determination in the sunset review established on the basis of a fair comparison in light of the Appellate Body's decisions in Bed – Linens (paras. 55, 61, 62) and Japan Sunset (paras. 126-

132)? If so, please explain how a "fair comparison" was established given that a negative margin of 4.536 would have been the result of the calculation without the use of zeroing?

24. First, Commerce did not rely on the 1.36 percent calculated in the original investigation in making its likelihood determination in the sunset review of OCTG from Argentina. Rather, Commerce found that the existence of dumping and depressed import volumes since the imposition of the order was highly probative that dumping would be likely to continue or recur if the antidumping duty order on OCTG from Argentina were revoked.

25. With respect to the remainder of Argentina's question, the answer is yes. Although the calculation methodology used to establish the 1.36 percent margin was not on the record of the sunset review, the United States confirms that the methodology was different from that used in EC – Bed Linen. Argentina has not explained the legal basis for its claims with respect to the United States' methodology to the extent that the methodology differs from that involved in EC – Bed Linen.

Q19. Under Article 17.6(i), the Panel is charged with assessing whether the Department's "assessment of the facts was proper and whether their evaluation of those facts was unbiased and objective." In the recent compliance panel appeal in the Bed Linens case, the Appellate Body provided additional guidance on the applicable standard under Article 17.6(i):

In US – Hot-Rolled Steel, we stated that "[a]lthough the text of Article 17.6(i) is couched in terms of an obligation on panels . . . the provision, at the same time, in effect defines when investigating authorities can be considered to have acted inconsistently with the Anti-Dumping Agreement." We further explained that the text of Article 17.6(i) of the Anti-Dumping Agreement, as well as that of Article 11 of the DSU, "requires panels to 'assess' the facts and this . . . clearly necessitates an active review or examination of the pertinent facts." ***(Appellate Body Report, Recourse to Article 21.5, Bed Linen from India, para. 163)***

In light of this:

> ***a. What did the Department do to "assess" whether the 1.36 percent margin that the Department relied on for its likelihood of dumping determination could serve as a "proper" basis for that determination?***

26. As discussed above, Commerce did not rely on the 1.36 percent calculated in the original investigation in making its likelihood determination in the sunset review of OCTG from Argentina. Rather, Commerce found that the existence of dumping and depressed import volumes since the imposition of the order was highly probative that dumping would be likely to continue or recur if the antidumping duty order on OCTG from Argentina were revoked.

27. With respect to Article 17.6(i) of the AD Agreement, that provision states that, "If the establishment of the facts was proper and the evaluation was unbiased and objective, [...], the

evaluation shall not be overturned." Thus, the starting point for any review of Commerce's actions is, initially, Commerce's procedures for establishing facts, then Commerce's evaluation of those facts. In this case, the antidumping duty margin referenced by Commerce in its sunset review was placed on the record of the sunset review as part of the final determination from the antidumping duty investigation. The results of that investigation were unchallenged/unchanged. Although they had the opportunity available to them procedurally, neither Argentina, nor Siderca, placed any information or argument on the record of the sunset review seeking to call into question the validity of the margin calculation. Thus, the fact of the 1.36 percent margin as the result of the initial investigation was not challenged on the record. Consequently, there was no reason for the United States, acting in an unbiased and objective manner, to question the validity of that margin.

b. Given that the margin was calculated in the original investigation on the basis of zeroing, how does the Department defend it's "evaluation" of the 1.36 percent margin as "unbiased and objective" in using that margin as the basis for its conclusion that "dumping" (as defined by Article 2) was likely to continue or recur ?

28. It has not been established before this Panel or elsewhere that the margin calculated for Siderca in the original investigation of OCTG from Argentina was determined using a methodology not consistent with the obligations of Article 2; otherwise, see U.S. answer above.

The Commission's Likely Standard

Q20. Does the United States consider to be accurate the Commission's description to a NAFTA panel of the likely standard applied to the OCTG sunset review (excerpt included as Exhibit ARG - 67 to Argentina's Second Submission)?

29. See the response to the question below.

Q21. Does the United States agree that the description expresses the view that "likely" does not mean "probable"?

30. Two of the Commissioners, Vice Chairman Hillman and Commissioner Koplan, both of whom participated in the OCTG sunset reviews, consistently have applied the "probable standard or its equivalent,[1] since the commencement of the first U.S. sunset reviews.[2] The description in

[1]Vice Chairman Hillman has interpreted "likely" to mean "more likely than not."

[2] *Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, the Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom*, Inv. Nos. AA-1921-197 (Remand), 701-TA-231, 319-320, 322, 325-328, 340, 342, and 348-350 (Remand), and 731-TA-573-576, 578, 582-587, 604, 607-608, 612, and 614-618 (Remand), USITC Pub. 3526 (July 2002) at *Separate Views of Vice Chairman Jennifer A. Hillman Regarding the Interpretation of the Term "Likely,"* and *Dissenting Views of Commissioner Stephen Koplan Regarding the Interpretation of the Term "Likely."* (Exhibit US-31.)

the NAFTA panel brief concerning the approach taken by some other members of the ITC was based on their understanding that the term "probable" connoted a very high degree of certainty. *See, e.g.*, the discussion of this issue in the July 2002 *Usinor* submission (Exhibit ARG-56 at 6). As it became apparent from subsequent opinions of the U.S. court, however, there are different connotations associated with the word "probable." Since the NAFTA panel brief was filed (in February 2002), at least two judges in a U.S. court have implied that the term "probable" does not indicate a requirement for any particular level of certainty, let alone a high level of certainty. *Usinor Industeel v. United States*, Slip Op. 02-152 at 6 n.6 (Dec. 20, 2002) ("the court has not interpreted 'likely' to imply any particular degree of certainty") (Exhibit US-18); *Indorama Chemicals (Thailand) Ltd. et al v. United States International Trade Commission*, Slip Op. 02-105 at 20-21 (Sep. 4, 2002) ("standard is based on a 'likelihood' of continuation or recurrence of injury, not a certainty") (Exhibit US-32). This guidance from the U.S. court was not available to the ITC when the brief to the NAFTA panel was drafted. Once the court clarified what it meant by the statement that "probable" was synonymous with the statutory term "likely," it became clear that the views of individual Commissioners as to the standard applicable in sunset reviews (including the standard applied in the OCTG sunset review) were either identical to that articulated by the court or indistinguishable from it. The U.S. court recognized this point in affirming the ITC's unchanged affirmative remand determination in *Usinor*. For these reasons, the views of participating Commissioners in the OCTG sunset review remain consistent with the "likely" standard as that term has been defined by the U.S. courts.

Evidentiary Basis

Q22. Paragraph 56 of the U.S. Second Submission states that the margins reported by the Department to the Commission are relevant to the Commission's sunset determination? Does the United States believe that the 1.36 percent margin was relevant to the Commission's sunset determination? Did the Commission consider that margin in its likelihood of injury analysis?

31. Paragraph 56 of the U.S. second written submission does *not* state that the margins reported by Commerce to the ITC are relevant to the Commission's sunset determination.

32. The staff report accompanying the ITC's determination simply noted the margins (ranging from 1.36 percent to 49.78 percent) reported to the ITC by Commerce.[3] The ITC also noted these margins in its views[4] but did not discuss them further.

Q23. If so, did the Commission consider whether this margin had been "tainted" by the practice of zeroing?

33. As noted above, the ITC did not evaluate the margin specific to subject imports from

[3]ITC Report, p. I-14.
[4]ITC Report, p. 9 n.51.

Argentina as part of its likelihood of injury analysis.

Q24. Does the United States agree that if Article 3 applies to Article 11.3 reviews, then the failure to consider the margin would violate Articles 11.3 and 3.4?

34. The United States does not agree that Article 3 applies to Article 11.3 reviews. Additionally, the United States notes that Article 3.4 provides only for consideration of the magnitude of the duty and provides that no one factor is dispositive.

Q25. The Appellate Body in Steel from Germany (para. 88) stated that: "Where the level of subsidization at the time of the review is very low, there must be persuasive evidence that revocation of the duty would nevertheless lead to injury to the domestic industry." With respect to the obligation under Article 11.3, does the United States believe it was necessary for the Commission to consider the magnitude of the margin in determining whether revocation of the order on OCTG from Argentina would be likely to lead to continuation or recurrence of injury?

35. Article 11.3 does not impose an obligation to consider the magnitude of the margins as part of the analysis of whether revocation of the order would be likely to lead to continuation or recurrence of injury. If the ITC had evaluated the margins, it would have considered the margins from all five countries whose imports were cumulated in these sunset reviews, margins that ranged from 1.36 to 49.78 percent.

Cumulation

Q26. Does the US agree that Article 3.3 contains substantive disciplines on the use of cumulation? In the US view, are these substantive disciplines restricted to Article 5 investigations?

36. The United States agrees that Article 3.3 contains substantive disciplines on the use of cumulation, and that these disciplines are restricted to Article 5 investigations.

Q27. In the view of the US, is there any substantive discipline on the use of cumulation in an 11.3 review?

37. No.

Q28. If not, what is the US view as to why the Agreement would be disciplined in the context of an Article 5 investigation, but not in an Article 11.3 review?

38. The United States does not wish to speculate on the negotiating background to specific provisions of the AD Agreement. The United States notes, however, that there is a fundamental difference between investigations and sunset reviews that might explain why cumulation is

disciplined in the former but not in the latter case. This difference is that in sunset reviews the imports being examined are restrained by the effects of an antidumping measure, and this may also explain why it was decided not to apply *de minimis* and negligibilty conditions on the use of cumulation in sunset reviews. Indeed, the Appellate Body made a similar observation (in the countervailing duty context) when it stated that "[q]ualitative differences [between investigations and sunset reviews] may also explain the absence of a requirement to apply a specific *de minimis* standard in a sunset review.[5]

Q29. Does the US have any textual support for its view that cumulation is permitted in Article 11.3 reviews?

39. As the United States explained in its first submission (para. 363), the genesis of any obligation or right arising under the WTO Agreement is the text of the relevant provision, and absent a textual basis, the rights of Members cannot be circumscribed. The question, therefore, is whether Argentina has any textual support for its view that cumulation is *not* permitted in sunset reviews. As the United States also explained in that submission (paras. 364-365), a prohibition on cumulation would run counter to the overall object and purpose of the AD Agreement.

[5] *US–German Steel*, AB Report, para. 87.