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Determinations of Adequacy in Sunset Reviews of Antidumping Orders in the United States

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DETERMINATIONS OF ADEQUACY IN SUNSET REVIEWS OF ANTIDUMPING ORDERS IN THE UNITED STATES

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INTRODUCTION

In July 1998, the United States initiated the first of over 320 five-year "sunset" reviews of existing antidumping and countervailing duty orders¹ and suspension agreements² in force as of the beginning

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1. Antidumping and countervailing duty laws provide domestic companies

of 1995. These reviews of "transition orders" will be completed by the year 2001.³ Beginning in December 1999, sunset reviews of all orders and suspension agreements imposed after December 31, 1994 will be initiated no later than thirty days before their fifth anniversary.⁴ A critical step in these sunset reviews is the early determination by the United States Department of Commerce ("Commerce") and the United States International Trade Commission ("ITC" or "Commission")⁵ of the adequacy of interest by foreign and domestic

with an opportunity to petition the government for relief in the form of special additional duties on imports that are sold at less than fair value ("dumped") or that benefit from subsidies provided by foreign governments ("subsidized"). *See* Tariff Act of 1930 secs. 701, 731, 19 U.S.C. secs. 1671, 1673 (amended 1994) (authorizing upon successful petition the imposition of antidumping and countervailing duty orders).

2. Parties involved, through mutual agreement, may suspend antidumping and countervailing duty investigations before a final determination is made. Details of suspension agreements vary, but must include an agreement by exporters of the foreign merchandise to eliminate the unfair practice. *See* 19 U.S.C. sec. 1673(b)-(c) (amended 1994) (pertaining to agreements to completely eliminate sales at less than fair value or to cease exports of merchandise, and to agreements eliminating injurious effects).

3. *See* Transition Orders: Final Schedule and Grouping of Five-Year ("Sunset") Reviews, 63 Fed. Reg. 29,372, 29,374-82 (1998) (listing 320 scheduled sunset reviews). "Transition orders" refer to those antidumping or countervailing duty orders or suspension agreements originally imposed prior to 1995 and still enforced at the time the Uruguay Round Agreements Act ("URAA") took effect on January 1, 1995. All transition orders are treated as having been issued on January 1, 1995 for purposes of starting the five-year clock, at the end of which a review must be conducted. Due to the large number of transition orders (401 as of January 1995), the statute granted the United States Department of Commerce ("Commerce") and the United States International Trade Commission ("ITC" or "Commission") a three-year period to review such orders, beginning in July 1998. These orders, which by mid-1998 had fallen to 320 in number, are grouped according to similarities in products or for administrative efficiency. These groups are being initiated in weighted average chronological order. *See* Transition Orders: Final Schedule and Grouping of Five-Year ("Sunset") Reviews, 63 Fed. Reg. 29,372, 29,374-82 (1998) (listing all transition orders and groupings). Commerce and the Commission will begin their reviews of non-transition orders in December 1999.

4. *See* Tariff Act of 1930 sec. 751(c)(1)-(2), 19 U.S.C. sec. 1675(c)(1)-(2) (amended 1994) (requiring a review of a countervailing or antidumping duty order five years after the order is published and that the review be initiated no later than the fifth anniversary).

5. The ITC is a quasi-judicial independent federal agency consisting of six commissioners.

parties.⁶ If there is adequate interest in a review, it will proceed to a full year-long investigation.⁷ If there is inadequate interest, the review may proceed on an expedited basis.⁸ This article examines determinations of adequacy in sunset reviews at Commerce and the ITC from three different perspectives.⁹ First, the article provides a roadmap of the statutory language and legislative history that underlies determinations of adequacy by each of the two agencies. Second, it examines how the two agencies have explained their practices in their respective published rules and practices. Finally, the article explores agency voting patterns, published determinations, and statements of analysis regarding the sixty-one reviews initiated between

6. See 19 U.S.C. sec. 1675(c)(3)(B) (amended 1994) (granting authority to the agencies to make their respective final determinations on an expedited schedule if interested parties provide inadequate responses to a notice of initiation); Procedures for Conducting Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, 19 C.F.R. pt. 351.218 (1998) (requiring a determination of adequacy of response from respondent interested parties to a notice of initiation by Commerce); United States International Trade Commission, Rules of Practice and Procedure, 63 Fed. Reg. 30,599, 30,608 (to be codified at 19 C.F.R. pt. 207.62(c)-(d)) (1998) [hereinafter ITC, Rules of Practice and Procedure]; see also 19 U.S.C. sec. 1677(9) (amended 1994) (defining interested parties as, among others, domestic and foreign producers, trade associations, importers, exporters, and unions involved in the production or shipment of imports under investigation or the corresponding domestic product, as well as foreign governments). Consistent with Commerce and ITC practices, this article refers to foreign interested parties and United States importers as "respondent" interested parties. See ITC, Rules of Practice and Procedure, *supra*, 63 Fed. Reg. at 30,601 (explaining the ITC's description of interested parties in sunset reviews); 19 C.F.R. pt. 218(d)(i)-(iii) (explaining required responses by type of interested party); see also *infra* note 53.

7. See 19 C.F.R. pt. 351.218(e)(1)(i)-(ii) (providing for a full sunset review where both domestic interested parties and respondent interested parties provide adequate responses to Commerce's notice of initiation); ITC, Rules of Practices and Procedure, *supra* note 6, 63 Fed. Reg. at 30,608 (to be codified at 19 C.F.R. pt. 207.62(c)) (providing for a full sunset review where both domestic interested parties and respondent interested parties provide adequate responses to the ITC's notice of institution).

8. See 19 C.F.R. pt. 351.218(e)(1)(ii) (providing for an expedited sunset review where respondent interested parties provided inadequate responses to a notice of initiation); ITC, Rules of Practice and Procedure, *supra* note 6, 63 Fed. Reg. at 30,608 (to be codified at 19 C.F.R. pt. 207.62(d)) (allowing for an expedited review where interested parties provided inadequate responses to a notice of initiation).

9. This article also examines agency decision-making regarding whether to expedite a review if responses are inadequate.

July 1998 and December 1998 for which adequacy determinations have been made. In the process, this article identifies analytical approaches, procedural biases, trends in voting, and other issues that will assist in the assessment of future determinations of adequacy.

I. BACKGROUND

The use of antidumping and countervailing duty laws is becoming increasingly pervasive among members of the world trading community.¹⁰ In 1995, countries bound to the General Agreements on Tariffs and Trade ("GATT") Antidumping Code numbered only twenty-five.¹¹ By the end of 1997, the number of countries notifying the World Trade Organization ("WTO") of their antidumping legislation reached fifty-five.¹² In terms of actual use, an annual average of sixteen countries reported taking definitive antidumping measures to the WTO from 1995 until 1997, up from an average of eleven countries from 1992 until 1994, and only seven countries on average from 1987 until 1989 under the GATT.¹³ The United States, which has had

10. See generally Philip A. Akakwan, *The Standard of Review in the 1994 Antidumping Code: Circumscribing the Role of GATT Panels in Reviewing National Antidumping Determinations*, 5 MINN. J. GLOBAL TRADE 227 (1996) (noting the heightened use of antidumping measures in the past decade).

11. U.S. INT'L TRADE COMM'N, *THE YEAR IN TRADE 1997: OPERATION OF THE TRADE AGREEMENTS PROGRAM 49TH REPORT*, USITC Pub. 3103, at 45 n.129 (May 1998).

12. See *id.* at 45 (stating that in 1997, fifty-five member countries reported domestic antidumping laws and regulations to the WTO Committee on Anti-Dumping Practices). Under the Uruguay Round Agreements, the WTO Antidumping and Subsidies Agreements apply to all WTO members. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 14, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. 1, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 145; Agreement on Subsidies and Countervailing Measures, Apr. 14, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, arts. 31-32, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 229. In contrast, contracting parties to the GATT were not automatic signatories to the previous Tokyo Round Agreement on Implementation of Article VI (the antidumping code). Therefore, the pre-URA and post-URA numbers are not strictly comparable.

13. See Jorge Miranda et al., *The International Use of Antidumping: 1987-1997*, 32 J. WORLD TRADE, Oct. 1998, at 5, 34 (providing data on antidumping measures by country).

an antidumping law in place since 1916,¹⁴ has significantly increased its use of the law. During the twenty-five-year period between 1955 and 1979, the United States initiated 223 antidumping investigations.¹⁵ During the subsequent twenty-five-year period from 1980 to 1994, the number of antidumping investigations initiated by the United States had risen to 724.¹⁶ The number of outstanding antidumping, countervailing duty orders, and suspension agreements in the United States increased as well. By the end of 1979, there were 123 orders and suspension agreements in place against foreign imports.¹⁷ By the end of 1994, this number had risen to 401,¹⁸ and the United States established itself as the most frequent user of the antidumping provision.¹⁹ Moreover, once the United States implemented an order, it did not limit its life span.²⁰ Some orders subject to sunset reviews have been in effect for over twenty-five years, thereby providing trade protection for industries that may have changed dramatically.²¹

14. See Antidumping Act of 1916, 19 U.S.C. secs. 160-71 (repealed 1979).

15. See Memorandum from Lynn Featherstone, Director of Investigations, United States International Trade Commission (Oct. 2, 1998) (on file with Lynn Featherstone, USITC) [hereinafter Featherstone Memorandum] (providing data on the case history of antidumping investigations over the past several decades). Reliable data for countervailing duty investigations initiated from 1955-79 were not available, therefore no data regarding initiations of countervailing duty ("CVD") investigations are cited here.

16. See *id.* at 15.

17. Data is a computation derived from Operation of the Trade Agreements Program, USITC Pub. 1307 (1982), USITC Pub. 1308 (1982), USITC Pub. 1414 (1983), USITC Pub. 1535 (June 1984), USITC Pub. 1995 (July 1987), USITC Pub. 2894 (July 1995).

18. By the end of 1997, there were 368 outstanding orders and suspension agreements. See U.S. INT'L TRADE COMM'N, *supra* note 11, Tables A-23, A-25, at 183 (listing all outstanding antidumping orders and countervailing duty orders).

19. See Miranda, *supra* note 13, at 34 (listing data on the most frequent users of antidumping measures).

20. See Tariff Act of 1930 secs. 701, 731, 19 U.S.C. secs. 1671, 1673 (amended 1994) (providing no time limit for antidumping and countervailing duty orders).

21. See Bicycle Speedometers from Japan, USITC Inv. No. AA1921-98 (review initiated July 1998) (providing an example of an order that has been in effect for over twenty-five years). On November 22, 1972, the Department of the Treasury issued an antidumping duty order on imports of bicycle speedometers from Ja-

The concept of periodic reviews of outstanding antidumping orders²² first appeared in the 1967 GATT Antidumping Agreement and was subsequently reinforced by the 1979 GATT Antidumping Agreement.²³ It was not until 1994, however, following the successful multilateral negotiation of the Uruguay Round Agreements ("the Agreements"),²⁴ which established the World Trade Organization and the accompanying Agreement on Antidumping ("WTO Antidumping Agreement"),²⁵ that the concept of automatic and mandatory reviews became fully integrated into the WTO/GATT and the national legislation of all member countries employing antidumping laws.²⁶ For the United States, the enactment of the Uruguay Round Agreements Act ("URAA") in December 1994 established, for the first time, a mechanism for automatic and mandatory review or termination of existing United States antidumping orders.²⁷

pan. 37 Fed. Reg. 24,807, 24,826 (1972). See, e.g., *Elemental Sulfur from Canada*, USTIC Inv. No. AA1921-127 (review initiated Jan. 1999) [hereinafter *Elemental Sulfur*] (providing an example of an industry that has changed dramatically in nature). These orders were among the very first "transition orders" to be initiated for sunset review in July 1998.

22. For convenience, the term "antidumping orders" used throughout this article refers to antidumping, countervailing duty orders, and suspension agreements, unless otherwise noted.

23. See Gary Horlick, Remarks at The Brookings Conference, in *SHEDDING LIGHT ON ANTIDUMPING SUNSET REVIEWS* 1, 4 (1997) (on file with author) (describing briefly the events that led up to the United States' acceptance of the 1994 sunset review language). Horlick explains that the United States implementation of Article 9.1 of the 1979 Agreements was limited to an on-request review, which placed the burden of persuasion on parties seeking revocation. See *id.* at 3.

24. Marrakesh Agreement Establishing the World Trade Organization, Apr. 14, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations 145, 33 I.L.M. 1125 (1994).

25. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, *supra* note 12.

26. See Horlick, *supra* note 23, at 3-4, 8 (discussing the frequency of use regarding antidumping laws and the full integration of automatic reviews at the national and international level); see also Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, *supra* note 12, art 11.3. Three of the four historically largest users of antidumping laws, Australia, Canada, and the European Union—the United States being the absent fourth—already had sunset review-type laws in place prior to the 1994 Agreements.

27. See Tariff Act of 1930, sec. 751(b), 19 U.S.C. sec. 1675(b) (amended 1994) (stating that the "changed circumstances" provision provides a mechanism

The URAA fundamentally changed the antidumping and countervailing duty section of the amended United States Tariff Act of 1930 by requiring Commerce to:

revoke a countervailing duty order or an antidumping order or finding, or terminate a suspended investigation, unless—(A) [Commerce] makes a determination that dumping or a countervailable subsidy, as the case may be, would be likely to continue or recur, and (B) the Commission makes a determination that material injury would be likely to continue or recur. . . .²⁸

Thus, statutory responsibility for making sunset review determinations is bifurcated between Commerce and the ITC.²⁹ The amended Tariff Act of 1930 requires that sunset reviews be completed within one year unless either Commerce, the ITC, or both determine that a review is “extraordinarily complicated,” in which case a review can be extended for up to a total of six months.³⁰ Generally speaking, a review must be completed no later than six-and-a-half years after a

for exporters or producers of subject merchandise under order to request that the ITC review an order). This section provides for an analysis nearly identical to that in sunset reviews. The party requesting the review clearly has the burden of persuasion and must initially provide evidence that there are changed circumstances sufficient to warrant revocation. *See id.* sec. 1675(b)(3) (discussing the elements of the changed circumstances provision of the Act). Similarly, Section 751(b) provides for a “changed circumstances” review by Commerce. *See id.* Again, the burden is on the party, usually foreign, requesting the revocation of the order. *See id.*

28. 19 U.S.C. sec. 1675(d)(2) (1994).

29. *See id.* sec. 1675(c) (describing the respective responsibilities of Commerce and the ITC in sunset reviews). Each review has two identifying investigation numbers, one for Commerce and one for the ITC.

30. *See id.* sec. 1675(c)(5)(B)-(C) (outlining the sunset review procedures for extraordinarily complicated cases).

final antidumping order is first published,³¹ thus providing a specific "sunset" date for an antidumping order.³²

II. INITIATION OF REVIEW AND EVALUATION OF ADEQUACY

The critical first steps in a United States sunset review are the initiation of the review and the initial assessment of the adequacy of interest shown by respondent and domestic interested parties in the review.

United States statute requires Commerce to automatically initiate sunset reviews no later than thirty days before the fifth anniversary of the antidumping order by publishing a notice of initiation in the *Federal Register*.³³ The statute requires interested parties in their response to this notice to submit:

31. See *id.* sec. 1675(c) (providing deadline requirements for sunset reviews). Duties can remain in effect for nearly seven years, sometimes more, before a five-year sunset review is completed. Preliminary antidumping duties are often imposed within four months of the filing of an original investigation, and an investigation can take up to seven additional months before an order becomes final. The five-year-review clock does not start until the order is finalized. Approximately four years and eleven months after an order is finalized, a sunset review is initiated, which typically takes 360 days to complete, or longer in some extraordinarily complicated cases. See *id.*

32. See *id.* sec. 1675(c)(6)(A)(ii) (providing that "[a] review of a transition order shall be completed not later than 18 months after the date such review is initiated. Reviews of all transition orders shall be completed not later than eighteen months after the fifth anniversary of the date such orders are issued.").

33. See 19 U.S.C. sec. 1675(c)(2) (amended 1994) ("Not later than 30 days before the fifth anniversary, . . . the administering authority shall publish in the Federal Register a notice of initiation of a review. . . ."). The House report on the URAA states that "[n]ew section 751(c)(1) [of the Tariff Act of 1930] requires Commerce and the Commission to conduct a review no later than five years after the issuance of an antidumping duty order. . . ." H.R. DOC. NO. 103-826, pt. 1, at 56 (1994).

In contrast, the only "automatic" requirement in the WTO Antidumping Agreement is that an antidumping order:

[S]hall be terminated on a date not later than five years from its imposition . . . unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.

(A) a statement expressing their willingness to participate in the review by providing information requested by the administering authority and the Commission, (B) a statement regarding the likely effects of revocation of the order or termination of the suspended investigation, and (C) such other information or industry data as [Commerce] or the Commission may specify.³⁴

In practice, initiation begins with the simultaneous publication of the Commerce Notice of Initiation and the Commission Notice of Institution of the sunset review in the *Federal Register*, which requests that interested parties provide the information to each agency specified in the respective notices.³⁵ The statute stipulates that if there is no response by a domestic interested party to the Commerce notice,

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, *supra* note 12, art. 11.3. Moreover, Article 11.2 states that:

[T]he authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.

Id. art. 11.2. By constructing a system of automatic reviews, the United States has implicitly determined that reviews are "warranted" in every case.

34. 19 U.S.C. sec. 1675(c)(2) (amended 1994).

35. While Commerce has the responsibility for initiating a review, the ITC publishes its own institution of the review simultaneously with Commerce's initiation notice. Commerce and the ITC request different amounts of information in response to their notices. *Compare* Prestressed Concrete Steel Wire Strand from Japan, USITC Pub. 3156, Inv. No. AA-1921-188, at 3 (review initiated Feb. 1999) [hereinafter *Prestressed Steel Wire*] (specifying the Commission's notice of initiation), *with* Notice of Five-Year ("Sunset") Reviews, 63 Fed. Reg. 46,385, 46,410 (1998) (describing Commerce's notice of initiation of its sunset review of *Steel Wire Strand from Japan*). The statute authorizes both agencies to make information requests and to make independent decisions whether to expedite their respective parts of a review. *See* 19 U.S.C. sec. 1675(c)(2)-(3) (amended 1994) (authorizing Commerce and the Commission to undertake sunset reviews). In addition, the SAA also states that "[b]ecause Commerce and the Commission may require different information from different sources to conduct reviews, the agencies may decide separately whether the responses are inadequate. . . ." H.R. DOC. NO. 103-316, at 879-80 (1994). The Senate Report similarly states that the Senate Finance Committee "intends that the two agencies evaluate independently the adequacy of responses and whether to issue a determination based on the facts available without further fact-gathering, since each agency will be relying on different information from different sources to conduct its reviews." S. REP. NO. 103-412, at 46 (1994).

the order under review shall be revoked.³⁶ If the domestic industry satisfies this minimal standard, but responses are received only from some but not all domestic and respondent interested parties, the agencies must each assess whether interested parties have provided adequate responses.³⁷ The assessment of adequacy is a critical step in a review because when responses to an agency's information requests are inadequate, the statute provides each agency with the option to expedite its respective portion of a review. The statute states that "[i]f interested parties provide inadequate responses to a notice of initiation, [Commerce] . . . or the Commission . . . may issue, without further investigation, a final determination based on the facts available. . . ."³⁸ Both agencies assess adequacy on an order-specific basis, and in the case of the ITC, on a domestic product basis when appropriate.³⁹ For example, when there are multiple sunset reviews involving one type of product imported from multiple countries, each

36. See 19 U.S.C. sec. 1675(c)(3)(A) (amended 1994) (stating that "[i]f no interested party responds to the notice of initiation. . . [Commerce] shall issue a final determination, within 90 days after the initiation of a review, revoking the order or terminating the suspended investigation to which such notice relates."). This paragraph pertains only to responses by "domestic interested parties." *Id.*

37. See Procedures for Conducting Five-Year ("Sunset") Review Antidumping and Countervailing Duty Orders, 19 C.F.R. pt. 351.218(e)(i) (1998) (setting forth Department guidelines for determining whether interested parties' substantive responses to a Notice of Initiation are adequate); ITC, Rules of Practice and Procedure, *supra* note 6, 63 Fed. Reg. at 30,602-06 (to be codified at 19 C.F.R. 207.62) (setting forth ITC guidelines for determining whether interested party responses to a Notice of Institution are adequate).

38. 19 U.S.C. sec. 1675(c)(3)(B) (amended 1994).

39. See Procedures for Conducting Five-Year ("Sunset") Review Antidumping and Countervailing Duty Orders, 19 C.F.R. pt. 351.218 (1998) (explaining Commerce's rules and regulations pertaining to sunset reviews); see also ITC, Rules of Practice and Procedure, *supra* note 6, 63 Fed. Reg. at 30,605 (to be codified at 19 C.F.R. pt. 207.62(a)) (explaining the ITC's rules and regulations pertaining to sunset reviews). The ITC rule states that: "[t]he Commission will assess the adequacy of aggregate interested party responses to the notice of institution with respect to each order or suspension agreement under review and, where the underlying affirmative Commission determination found multiple domestic like products, on the basis of each domestic like product." *Id.* The domestic like product is that product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to investigation. See 19 U.S.C. sec. 1677(10) (amended 1994) (defining domestic like product).

subject to an antidumping order, adequacy for each order is assessed independently.

While there is no statutory language regarding what constitutes adequacy, the legislative history provides guidelines for Commerce and the ITC to consider when assessing adequacy. First, the agencies should assess whether there is sufficient willingness among interested parties to participate and whether there is an adequate indication they will submit information requested throughout the proceeding.⁴⁰ Second, agencies should assess what proportion of the interested parties responded and what their likely share of the market would be if the order were to be revoked.⁴¹ Furthermore, the legislative history states that expedited reviews,⁴² in which a finding of in-

40. See H.R. DOC. NO. 103-316, at 880 (1994) (discussing adequacy in response to notices of initiation). Adequacy should be a measure of a "sufficient willingness to participate and adequate indication that parties will submit information requested throughout the proceeding." *Id.*

41. See *id.* Where there are mixed responses with some, but not all, interested parties responding, "the agencies, in making this decision [whether the responses are adequate to warrant a full-fledged review], will consider the proportion of parties that respond and their likely share of the market if the order were revoked or the suspended investigation terminated." *Id.* The Senate Report adds a cautionary note that the agencies should "approach these expedited reviews with caution. . . . The standard for judging the adequacy of information should not be so high as to lead the agencies to disregard fairly complete information submitted by parties clearly willing to participate." S. REP. NO. 103-412, at 46 (1994). The Senate Report echoes the House Report in stating that when there are mixed responses, Commerce and the ITC should:

carefully evaluate the shares of the market represented by the responding parties in deciding whether the responses are adequate to warrant a full-fledged review. The Committee does not intend to establish a strict numerical test for determining adequacy. Rather, the agencies should evaluate the responses on a case-by-case basis.

Id. The House Report does not provide any guidance regarding the proportion of responses.

42. The term "expedited review" applies to those sunset reviews conducted under 120 and 150 day schedules at Commerce and the ITC, respectively, based on the facts available, according to the Tariff Act of 1930. The term "full review" applies to those reviews conducted under full-fledged 240- and 360-day schedules at Commerce and the ITC, respectively. See ITC, Rules of Practice and Procedure, *supra* note 6, 63 Fed. Reg. at 30,608 (to be codified at 19 C.F.R. pt. 207.60(b)-(c)) (defining the terms expedited and full reviews); 19 C.F.R. pt. 351.102(b) (defining the terms expedited and full reviews). Full reviews include full investigatory activities by the Commission. H.R. DOC. NO. 103-316, at 879-80 (1994). The same statutory standards apply to determinations in expedited and full reviews, though

adequacy is a necessary prerequisite, should promote administrative efficiency and ease the burden on the agencies by eliminating needless reviews while meeting the requirements of the Agreements.⁴³

III. ADEQUACY ASSESSMENT AT COMMERCE AND THE ITC: SIMILARITIES

It is instructive to look at how the two agencies have applied this very general statutory guidance in their regulations and stated practices regarding adequacy.⁴⁴ Consistent with the statute⁴⁵ and the leg-

they are subject to different standards of judicial review. *See* 19 U.S.C. sec. 1675a(a)(1) (amended 1994) (citing statutory standards in sunset reviews, including both expedited and full reviews); *see also id.* sec. 1516A(a)(1)-(b)(1)(B) (outlining standards of review in expedited and full reviews).

43. *See* H.R. DOC. NO. 103-316, at 880 (stating that "[n]ew section 751(c)(3) is intended to eliminate needless reviews," and that "[t]his section will promote administrative efficiency and ease the burden on the agencies by eliminating needless reviews while meeting the requirements of the Agreements.").

44. *See* 63 Fed. Reg. 13,516, 13,520-25 (1998) (to be codified at 19 C.F.R. pt. 351) (outlining Commerce's interim final rules); Commerce Regulations, 19 C.F.R. pt. 351.218(d)-(e) (1998) (citing Commerce regulations on adequacy). No subsequent revisions of these interim final rules have been published. It is not uncommon for Commerce to operate under interim final rules for extended periods of time. For ITC rules and regulations pertaining to sunset reviews, *see* ITC, Rules of Practice and Procedure, *supra* note 6. The typical schedule for assessing adequacy at the ITC is as follows:

- Day 1: Notice of institution of the review is published in the *Federal Register*.
- Day 20: ITC receipt of Commerce notification of no domestic interested party response to initiation (if applicable).
- Day 21: Entries of appearance and administrative protective order ("APO") applications by interested parties due. These provide parties with procedural rights and permit counsel to interested parties to view business proprietary information of other parties.
- Day 26: Issuance of public and APO service lists.
- Day 40: Receipt of Commerce notification of inadequate domestic interested party response to initiation (if applicable).
- Day 50: (1) Responses to ITC notice of institution and party service of these responses due, and (2) ITC receipt of Commerce notification of inadequate respondent interested party response to initiation (if applicable).
- Days 50-65: ITC notices of deficiencies to responding interested parties and opportunity to cure (if applicable).
- Day 65: Factual record closes.

islative history, Commerce regulations provide a mechanism to quickly eliminate "needless reviews" if there is no response to a Commerce notice. The regulations state that if no domestic interested party files a simple "notice of intent to participate" with Commerce within fifteen days of initiation,⁴⁶ Commerce so notifies the ITC on

Day 67: ITC release of APO documents and other data assembled by the ITC.

Day 75: Comments from parties on adequacy and the appropriateness of an expedited review are due.

Day 85: Internal agency memos are distributed for consideration by the Commission.

Day 94: ITC ruling regarding adequacy of interested party responses and whether to expedite a review.

See ITC, Rules of Practice and Procedure, *supra* note 6, 63 Fed. Reg. at 30,611 (outlining abbreviated ITC schedule for sunset reviews).

The typical schedule for assessing adequacy at Commerce is as follows:

Day 1: Notice of initiation of review is published in the *Federal Register*.

Day 15: Domestic notices of intent to participate are due.

Day 20: Notification to the ITC that no domestic interested party has responded to the notice of initiation (if applicable).

Day 30: Substantive responses by interested parties to the notice of initiation due.

Day 35: Rebuttals to the substantive responses are due.

Day 40: Notification to the ITC that no domestic interested party has responded to the notice of initiation (based on inadequate response from domestic interested parties), if applicable.

Day 50: Notification to the ITC that respondent interested parties provided inadequate responses to the notice of initiation (if applicable).

Day 70: Comments due on the adequacy of response and appropriateness of an expedited review.

Day 90: Final determination revoking an order where no domestic interested party responds to the notice (if applicable).

Day 110: If Commerce finds responses to be inadequate, it will typically issue this conclusion along with a preliminary result of a full sunset review.

Day 120: If no such preliminary finding is issued, then Commerce will issue its final results of its expedited review along with an explanation of its inadequacy conclusion.

See 63 Fed. Reg. 13,516, 13,524-25 (listing Commerce's schedule for sunset review).

45. 19 U.S.C. sec. 1675(c)(3)(A) (amended 1994).

46. See 19 C.F.R. pt. 351.218 (d)(1)(ii) (1998).

the twentieth day of the review by public letter. This letter further notifies the ITC of Commerce's intent to issue a final determination revoking the antidumping order within ninety days of initiation. No further substantive work should be undertaken by either Commerce or the ITC.⁴⁷ The substantive responses by interested parties to the Commerce and ITC notices are not due until Day Thirty and Day

Every notice of intent to participate in a sunset review must include a statement expressing the domestic interested party's intent to participate in the sunset review and the following information: (A) . . . the statutory basis (under section 771(9) of the Act) for interested party status; (B) A statement indicating whether the domestic producer: (1) is related to a foreign producer or to a foreign exporter under section 771(4)(B) of the Act; or (2) is an importer of the subject merchandise or is related to such an importer under section 771(4)(B) of the Act; (C) The name, address, and phone number of legal counsel or other representative, if any; (D) The subject merchandise and country subject to the sunset review; and (E) The citation and date of publication in the *Federal Register* of the notice of initiation.

Id.

The preamble to Commerce's regulations states that the notice of intent to participate procedure "is intended to alleviate the burden on parties of having to prepare substantive responses in cases where there is no domestic party interest in a particular case." 63 Fed. Reg. 13,517, 13,520-21 (1998).

47. See Notice of Institution, 63 Fed. Reg. 58,619, 58,709 (1998) (indicating the actual initiation of a sunset review for *Brass Fire Protection Equipment*). See e.g., Letter from Barbara E. Tillman, Department of Commerce, International Trade Administration, to Lynn Featherstone, Director of Investigations, United States International Trade Commission (Nov. 20, 1998) (on file with Lynn Featherstone, United States International Trade Commission) (regarding Commerce's intent to issue a final determination revoking the antidumping order on Brass Fire Protection Equipment from Italy, USITC Inv. No. 731-TA-165 (review initiated Nov. 1998) [hereinafter *Brass Fire Protection*]). On Jan. 14, 1999, Commerce published a notice that it was revoking this order because no domestic interested party responded to its notice of initiation by the applicable deadline. See Notice of Final Results and Revocation, 64 Fed. Reg. 2,471 (1999). Following this notice, the Commission, pursuant to its Rules of Practice and Procedure, issued a termination notice. See ITC, Rules of Practice and Procedure, *supra* note 6, 63 Fed. Reg. at 30,609 (to be codified at 19 C.F.R. pt. 207.69); see also Refrigeration Compressors From Singapore: Termination of Five-Year Reviews, 64 Fed. Reg. 4,123 (1999) (providing notice of termination of ITC's sunset review of *Brass Fire Protection*); *Brass Fire Protection*, *supra*. It is possible that Commerce could reverse its intent to revoke before the ninety-day period expires if it reverses its finding that no domestic interested party responded adequately. In such case, Commerce and the ITC would be compelled to restart their review activity. If necessary, they could invoke the "extraordinarily complicated" clause of the statute and extend the deadlines for their respective activities. See 19 U.S.C. sec. 1675(c)(5)(C) (amended 1994) (outlining circumstances under which the deadlines may be extended).

Fifty, respectively, following initiation. Accordingly, the initial screening of domestic industry interest via the notice of intent allows parties and the agencies to save resources. If even one domestic interested party files a notice of intent to participate, however, the review continues along two separate tracks at Commerce and the ITC. Here, each agency makes its own threshold findings on the adequacy of interested party responses to their respective notices. If an agency finds responses to its notice to be inadequate, it must further determine whether to proceed with an expedited or a full review. Although Commerce and the ITC are both guided in their consideration of adequacy by identical language in the statute,⁴⁸ they need not agree on whether to expedite their respective determinations in a review. This is because each agency makes its own finding under different regulations and practices and the responses from parties are tailored to each agencies' notice.⁴⁹

In making their respective determinations as to whether to proceed to an expedited or a full review, Commerce and the ITC have adopted similar three-stage analytical approaches.⁵⁰ First, each agency makes an assessment as to the adequacy of each individual interested party's response to its respective notice of initiation. Second, using only those responses that are individually adequate, each agency considers the adequacy of respondent interested parties in the aggregate ("respondent group adequacy") and the adequacy of domestic interested parties ("domestic group adequacy") in the aggregate. Third, if an agency finds that one or both group responses to its notice are inadequate, it then decides whether to proceed with an expedited or a full review. The second and third stages of the building

48. See 19 U.S.C. sec. 1675(c)(3)(B) (amended 1994).

49. For example, Commerce, using its own information requirements and thresholds, could find that respondent responses are inadequate and proceed with a 120-day expedited review, while the Commission, using different thresholds and different responses, could find that domestic and respondent responses are adequate, thus automatically proceeding with a full 360-day review.

50. See 63 Fed. Reg. 13,517, 13,523 (1998) (explaining Commerce's analysis of adequacy); *Prestressed Steel Wire*, *supra* note 35 (providing a description of the ITC's three-stage approach in the views of the Commission). See also ITC, Rules of Practice and Procedures, *supra* note 6, 63 Fed. Reg. at 30,602-05 (to be codified at C.F.R. pt. 207.62) (describing the ITC's approach to assessing adequacy).

block approach are handled somewhat differently by Commerce⁵¹ and the ITC, but each agency takes one of two paths if it finds a group response to be inadequate: an expedited or full review.

IV. ADEQUACY ASSESSMENT AT COMMERCE AND THE ITC: DIFFERENCES

A closer look at the two agencies' adopted adequacy procedures reveals that, despite the similar three-stage analytical approaches to assessing adequacy, there are stark differences between the two agencies' practices. This discussion is organized along the lines of the three-stage analyses conducted by the two agencies, with a side-by-side comparison of each agency's practice at each stage.

A. INDIVIDUAL ADEQUACY

Responses to each agency's notice provide: (1) an indication of an interested party's willingness to participate in a review by providing requested information, and (2) a minimal amount of information for decision-makers in the event the review is expedited.⁵² The information requested in the responses is a subset of the information that would be requested if a full review were conducted.⁵³

There are a number of differences between the analysis of individual adequacy at Commerce and the ITC. First, the amount of infor-

51. Commerce will only make these decisions when it determines the respondent group response is inadequate since an adequate response by a single domestic interested party is considered an adequate response by the entire domestic group. 19 C.F.R. pt. 351.218(e) (1998) (stipulating adequacy of response to a notice of initiation).

52. During the ITC's period of public comment on its notice of proposed rule-making for sunset reviews, one commentator argued that nothing in the statute required the ITC to use detailed data requests as a test of the willingness of interested parties to participate in a full review. See Letter from Terence Stewart et al., Law Offices of Stewart & Stewart, to Donna Koehnke, Secretary, United States International Trade Commission, 3, 6-7, (Jan. 21, 1998). The Commission, however, found it useful to do so.

53. Compare Roller Chain from Japan, USITC Inv. No. AA1921-111 (review initiated July 1998) [hereinafter *Roller Chain*] (specifying ITC Notice of Institution of a five-year review concerning antidumping duty order), with ITC Full Review Questionnaires, *Roller Chain* (1999). See also *infra* note 60 (discussing additional information considered by Commerce in full reviews as compared with expedited reviews).

mation Commerce requests of respondent and domestic interested parties,⁵⁴ respectively, is highly unbalanced⁵⁵ while the ITC requests essentially the same information from both types of interested parties.⁵⁶ The amount of information requested of interested parties by

54. *See* Procedures for Conducting Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, 19 C.F.R. pt. 351.218(d) (1998). Commerce lists specific criteria for only three types of interested parties: domestic producers, foreign producers, and foreign governments.

55. Commerce requires that both respondent and domestic interested parties, at a minimum, provide the following information: (1) basic contact information, (2) identification of the subject merchandise and countries involved in the review, (3) a statement regarding their willingness to participate, including a summary of historical participation in Commerce proceedings related to the order, (4) a statement regarding the likely effects of revocation, (5) factual information regarding the likely dumping margins or countervailing duty rates if the order is revoked, (6) a summary of Commerce's findings regarding duty absorption, if any, and (7) any relevant scope information. *See generally* Antidumping and Countervailing Duty Procedures, 19 C.F.R. pt. 351.218(d) (1998). In addition to providing the same information as domestic interested parties, respondent interested parties are required by Commerce to provide the following information: (1) the party's individual current and historical antidumping margins, (2) the party's volume and value of exports to the United States for the preceding five years, (3) the party's percentage, on a volume or value basis, of total exports shipped to the United States, (4) the volume and value of the party's exports to the United States the year preceding initiation of the original investigation, (5) interim data for the party's exports to the United States, specifically the two fiscal quarters of exports for the period preceding the month of initiation, during each of the three years preceding initiation of the review. Commerce also permits parties to answer several optional questions. *See* 19 C.F.R. pt. 351.218(d) (1998). In reviews involving countervailing duty orders, Commerce also requires that foreign governments respond. *See* 19 C.F.R. pt. 351.218(d) (1998). In CVD reviews, foreign governments are required to submit the following: (1) statement regarding the likely effects of revocation; (2) factual information regarding the likely countervailing duty rates if the order is revoked; (3) any relevant scope information; (4) the original CVD rate and rates in subsequent reviews; and (5) the volume and value of subject merchandise exports to the United States for the preceding five years. *See* 19 C.F.R. pt. 351.218 (d) (1998).

56. *See generally* ITC, Rules of Practice and Procedure, *supra* note 6 (discussing the Commission's request for information from interested parties in sunset review cases). The ITC requests that each interested party, both respondent and domestic, provide: (1) basic contact information; (2) a statement indicating whether it is willing to participate in the review by providing information requested by the Commission; (3) a statement of the likely effects of the revocation of the order, with specific reference to the statutory factors to be considered by the ITC, including likely volume, price effects, and impact if the order is revoked; (4) a list of all known and currently operating United States producers of the domestic like product, including the identity of any known related parties; (5) a list of all known

the ITC falls between Commerce's low requirements for domestic interested party information and high requirements for respondent information. The difference in information gathered reflects the different analytical approaches taken by each agency in making their respective final sunset review determinations, whether in an expedited or a full review. Though beyond the scope of this article, a brief examination of the factors used in Commerce's decision-making regarding the likelihood of dumping indicates that Commerce's primary focus is on foreign behavior,⁵⁷ with only a secondary focus on

and currently operating United States importers and foreign producers of the subject merchandise; (6) a description of significant changes, if any, in the supply and demand conditions or business cycle in the United States and subject foreign markets since the original order was imposed, and significant changes, if any, that are likely to occur within a reasonably foreseeable time (attention to specific supply and demand factors is requested); and (7) an optional statement whether or not, and why, the interested party agrees with the given definitions of the domestic like product and domestic industry, with possible alternative definitions, if any. *See id.* The ITC asks one additional question each of domestic producers/unions/trade associations, United States importers or importer trade association, and foreign producers or trade association. Domestic producers are requested to provide quantity and value of production and shipments as well as an estimate of total domestic shipments by all producers. United States importers are requested to provide quantity and value information for imports and United States shipments of these imports, as well as an estimate of total imports from subject sources. Foreign producers are requested to provide quantity and value information for production and exports to the United States, as well as an estimate of total subject producer production and total subject exports. The ITC specifies that an interested party that cannot furnish the information should explain why. *See id.* 63 Fed. Reg. at 30,610.

57. *See* 19 U.S.C. sec. 1675a(c)(1) (amended 1994). This section states that, in making its determination in reviews of antidumping orders, Commerce "shall [in general] 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." H.R. DOC. NO. 103-316, at 889-90 (1994) (describing important factors relating to foreign behavior, such as trends in exports to the United States); S. REP. NO. 103-412, at 52 (1994) (explaining that Commerce should focus on the relationship between dumping margins and import volumes both before and after issuance of the original order). In its published expedited review determinations, Commerce has focused on trends in import volume and the history of dumping margins during the life of the order. *See e.g.*, Polychloroprene Rubber from Japan, 63 Fed. Reg. 67,656 (1998) (final admin. review) (providing an example of a final determination in an expedited review that dumping is likely to recur based on a cessation of imports after imposition of the order and continuing positive margins during the life of the order).

other statutory factors.⁵⁸ On the other hand, the ITC focuses its inquiry on broader market information from both domestic interested parties and respondent interested parties in determining whether there is a likelihood of material injury.⁵⁹ In expedited reviews, Commerce's regulations go even further in the direction of focusing attention on foreign behavior, stating that it will not normally consider other statutory factors such as price, cost, market, or other economic factors when it conducts an expedited review.⁶⁰

Second, there are differences in the stated individual adequacy thresholds applied by each agency, though in practice both agencies appear to have fairly low thresholds. The ITC states in its *Rules of Practice and Procedure* that it intends to evaluate individual interested party responses to its notice "on a case-by-case basis, rather than providing specific guidance at this time."⁶¹ Commerce defines an individually adequate response as consisting of a complete substantive response to a notice of initiation. A complete substantive response is defined by Commerce as one containing all the information required of interested parties by the notice of initiation.⁶² Commerce considers an inadequate domestic response to be equivalent to no response from that party.⁶³

58. See 19 U.S.C. sec. 1675a(c)(2) (1994). This section states that "[i]f good cause is shown, [Commerce] shall also consider such other price, cost, market, or economic factors as it deems relevant." *Id.*; see H.R. DOC. NO. 103-316, at 890 (1994); S. REP. NO. 103-412, at 52 (1994).

59. See 19 U.S.C. sec. 1675a(a)(1)-(6) (1994).

60. Commerce regulations state that "[Commerce] normally will consider such other factors only where it conducts a full sunset review. . . ." Antidumping and Countervailing Duty Procedures, 19 C.F.R. pt. 351.218(e) (1998).

61. ITC, Rules on Practice and Procedure, *supra* note 6, 63 Fed. Reg. at 30,602.

62. See Procedures for Conducting Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, 63 Fed. Reg. 13,516, 13,518 (1998) (to be codified at 19 C.F.R. pt. 351).

63. Thus, if the only domestic response received in a review is deemed to be inadequate, Commerce will automatically revoke the order based on a determination of no response from domestic interested parties. Commerce may also find that an individually adequate domestic response is essentially inadequate if it is submitted by a domestic related party; i.e., a domestic producer that is related to a respondent interested party. See 63 Fed. Reg. 13, 516, 13,522 (1998).

A third difference between the analysis of individual adequacy at Commerce and the ITC relates to the consequences to individual interested parties of not responding at all to an agency's notice. The consequences of not responding can be significantly different for domestic and respondent interested parties at Commerce, but roughly the same at the ITC, as discussed below in more detail in the evaluation of adequacy practices section.

One would expect that the different adequacy approaches taken by the agencies would be reflected in the breakdown of responses to each agency's notice from respondent and domestic interested parties. At Commerce, given the high information burden for individual respondent interested parties and the low potential payoff from participation,⁶⁴ one would expect to see a relatively low response rate from respondents. In contrast, given the low information burden and the potential benefits from continuation of the order to domestic interested parties, one would expect to see a relatively higher response rate on the domestic side at Commerce. As seen in Table 1 below, in the thirty-two reviews initiated from July 1998 through December 1998 that proceeded beyond the initial screening stage at Commerce, only ten⁶⁵ respondent interested party responses covering eight different reviews were submitted to Commerce. On the domestic side, Commerce has received thirty-four responses covering thirty-two reviews.⁶⁶ In contrast to Commerce, the ITC has received fifty-three re-

64. One practitioner stated that there is a very clear perception among respondents of an institutional bias at Commerce against respondents, and therefore there is a great reluctance to expend resources toward presenting their case at Commerce. See Interview with Attorney Representing Respondent Interests (Apr. 30, 1999); see also discussion *infra* Part V.

65. In one of these reviews, a respondent interested party received a response but Commerce did not announce a determination of respondent group adequacy since it found that sole domestic response to be inadequate, thus triggering revocation of the order. See Canned Bartlett Pears from Australia, Commerce Inv. A-602-039 (review initiated July 1998) [hereinafter *Canned Bartlett Pears-Commerce*].

66. Commerce did not receive any domestic notices of intent to participate in twenty-nine of the sixty-one reviews initiated between July 1998 and December 1998. See *supra* note 46 (identifying the ramifications of not filing a "notice of intent to participate"). Since the Commerce deadline for substantive responses from domestic and respondent interested parties comes after Commerce's decision to revoke, the interests of respondent interested parties cannot be measured in these reviews. The only data available for comparison between Commerce and the ITC is for the thirty-two reviews for which at least one domestic interested party has

sponses from respondent interested parties covering twelve different reviews⁶⁷ and fifty-five responses from domestic interested parties covering twenty-eight reviews.⁶⁸ The greater similarity in the levels of responses from respondent and domestic interested parties at the ITC may be reflective of the relatively greater similarity in standards for assessing group adequacy at the ITC.⁶⁹ Overall, as illustrated in Tables 1 and 2, the ITC has received responses from respondent interested parties in thirty-nine percent of all relevant reviews compared to a twenty-five percent response rate at Commerce.

Despite differences in the two agencies' analyses of individual adequacy, they have one thing in common: both have found nearly all individual responses by both respondent and domestic interested parties to be adequate.⁷⁰ As illustrated in Table 1, of the nine responses received by Commerce from individual respondent interested parties, Commerce found all nine to be adequate. Furthermore, Commerce found thirty-three of the thirty-four individual domestic interested party responses to be adequate. Similarly, as seen in Table 2, the Commission has found all fifty-three responses from individual respondent interested parties to be adequate and all fifty-five domestic interested party responses to be adequate.⁷¹ The Commission

already expressed some minimal interest via its notice of intent to participate. In this sense, this sample of thirty-two reviews is somewhat biased regarding domestic interest, but can provide useful measures of respondent interested party interest, particularly on a comparative basis between the two agencies.

67. In grouped reviews, respondents may be submitting fewer responses to the ITC than would otherwise be the case if they could not "free ride" on complete responses from interested parties in other countries. See *infra* note 133 and accompanying text (discussing adequacy determinations in grouped reviews and their outcome).

68. See *infra* Table 2, at p. 1304.

69. See *infra* Parts IV-V (discussing assessment of group adequacy at Commerce and the ITC).

70. The ITC attempts to notify responding interested parties of any perceived deficiencies in their responses to the ITC notice, consistent with ITC rules. ITC, Rules of Practice and Procedure, *supra* note 6, 63 Fed. Reg. at 30,603. Commerce does not attempt to notify responding interested parties of any deficiencies in their responses to the Commerce notice but does accept new information from parties in their rebuttal comments which are due five days after their substantive response are submitted. See 19 C.F.R. pt. 351.218(d)(4).

71. See *Commission Adequacy Vote Sheets* (visited Apr. 20, 1999) <<http://205.197.120.60/oinv/sunset.nsf/Web%5CSunset+Cases>>. See also *Notices*

has been, for the most part, in agreement regarding individual adequacy, though several individual Commissioners have found that certain individual responses were inadequate.⁷² In practice,⁷³ responses that the Commission has determined to be individually adequate have typically contained all the requested company and market data, but have contained widely varying responses to the narrative questions⁷⁴ regarding likely effects of revocation of an order and the relevant supply and demand conditions in the ITC notice. Likewise, responses that Commerce has received from interested parties have typically contained all the requested data, but have contained widely varying responses to the Commerce notice's narrative question⁷⁵ regarding the likely effects of revocation.⁷⁶

of *Final Results of Expedited Reviews* (visited Mar. 6, 1999) <http://www.ita.doc.gov/import_admin/records/sunset/schedule.htm> (describing all reviews initiated between July 1998 and December 1999).

72. See *infra* Table 2, at p. 1304. The statute and legislative history are silent regarding the outcome of a tie vote on individual adequacy. Section 771(11) of the Act, which addresses the consequences of tie votes in other Commission determinations, is not applicable to a Commission decision on whether to expedite a review. Absent specific guidance, the Commission has adopted the practice that when the Commission is evenly divided regarding the adequacy of an individual response, that response shall be deemed adequate. See 19 U.S.C. sec. 1677(11) (1994) (outlining Commission practice on tie votes, but not in sunset reviews).

73. For example, in *Iron Construction Castings* from Canada, Brazil, and China, the sole domestic industry respondent, Municipal Castings Fair Trade Council, provided an eleven-page response regarding likely effects and a four-page response regarding supply and demand conditions. See *Iron Construction Castings* from Canada, Brazil, and China, USITC Inv. Nos. 731-TA-262-3, 731-TA-262-5 (reviews initiated Nov. 1998) [hereinafter *Iron Construction Castings*]; Respondent's Brief at 8-18, 25-28, *Iron Construction Castings* (Dec. 12, 1998). In *Roller Chain*, Japanese respondent Sugiyama Chain Company provided a two-page response to the likely effects and one page response regarding supply and demand. See *Roller Chain*, Respondent's Brief at 2-3, 7 (Aug. 25, 1998).

74. See *supra* note 56 (identifying questions asked by the ITC in its notice of institution).

75. See *supra* note 55 (identifying questions asked by Commerce in its notice of initiation).

76. For example, in *Synthetic Methionine-Commerce*, the domestic industry respondents, Degussa Corporation, Rhone Puulenc, and Novus International, in a joint response, provided a fifteen-page response to Commerce regarding likely effects of a revocation order. *Synthetic Methionine* from Japan, ITA, Inv. No. A-588-041 (review initiated Aug. 1998) [hereinafter *Synthetic Methionine-Commerce*]; Respondent's Brief at 5-21, *Synthetic Methionine-Commerce* (Sept. 3,

Table 1
COMMERCE ADEQUACY DETERMINATIONS
 For Sunset Reviews Initiated Between July 1998 and December 1998

<i>Description</i>	<i>#</i>	<i>(%)</i>
Number of Sunset Reviews Initiated by Commerce	61	
Number of Sunset Reviews Proceeding to Substantive Response Stage	31	51% (31/61)
RESPONDENT (FOREIGN) ADEQUACY		
Number of Reviews with No Individual Foreign Responses	24	75% (24/32)
Number of Reviews with Individual Foreign Responses	8*	25% (8/32)
Total Number of Individual Foreign Responses in All Reviews	10*	
Total Number of Individual Foreign Responses Found to be Adequate in All Reviews	9	100%* (9/9)
Total Number of Reviews Where Adequate Individual Foreign Responses Were Received but Respondent Group Response Found Inadequate	2	
Total Number of Reviews Where Respondent Group Responses Found Inadequate (no response or partial response)	26	84% (26/31)
DOMESTIC ADEQUACY		
Number of Sunset Reviews with No Domestic Response	29	48% (29/61)
Number of Sunset Reviews with Domestic Responses	32	52% (32/61)
Total Number of Individual Domestic Responses in All Reviews	34	
Total Number of Individual Domestic Responses Found to be Inadequate	1	3% (1/34)
Total Number of Individual Domestic Responses Found to be Adequate	33	97% (33/34)
Total Number of Reviews Where Individual Domestic Responses were Received but Found to be Inadequate*	1	3% (1/32)
SUMMARY		
Number of Reviews (orders) Automatically Revoked Due to No or Inadequate Domestic Responses	30	49% (30/61)
Number of Expedited Commerce Reviews (Based on Respondent Group Inadequacy) **	26	84% (26/31)
Number of Full Commerce Reviews	5	16% (5/31)

Source: Department of Commerce

* In one of these Commerce reviews, *Canned Bartlett Pears-Commerce*, a response was received by a respondent interested party but Commerce did not announce a determination regarding respondent group adequacy since it found the sole domestic response to be inadequate, thus triggering revocation of the order. See *supra* note 65 (discussing revocation of an order based on a finding of an inadequate response).

** Because Commerce finds that a single substantive response from a domestic interested party qualifies as an adequate domestic group response, there is strictly speaking no "evaluation" of domestic group adequacy and no circumstance in which Commerce would expedite based on domestic group inadequacy. If Commerce, however, finds that all individual domestic responses that have been received are inadequate, it acts as if no domestic response has been received at all and proceeds to revoke the order.

1998). Conversely, the sole domestic industry respondent in *Roller Chain-Commerce*, the American Chain Association, provided a brief page and a half response to the likely effects of revocation. See *Roller Chain from Japan, Inv. No. A-588-028*, 63 Fed. Reg. 63,026 (1998) (final admin. review) [hereinafter *Roller Chain-Commerce*]; *Roller Chain*, Respondent's Brief at 5-6 (Aug. 5, 1998).

Table 2
ITC ADEQUACY DETERMINATIONS
For Sunset Reviews Initiated Between July 1998 and December 1998

Description	Commission	%	Commissioners (6x)		%
Total Number of Reviews Instituted	61		NA		
Number of Reviews Continued Past Initial Commerce Stage	31		182*		
RESPONDENT ADEQUACY					
Total Number of Individual Respondent (foreign and U.S. Importer) Responses in All ITC Reviews	53		NA		
Total Number of Individual Respondent Responses Found to be Adequate in All ITC Reviews	53	100% (53/53)	179	98% (179/182)	
Number of Reviews with No Respondent Responses at All	19	61% (19/31)	NA		
Number of Reviews with at Least One Respondent Response	12	39% (12/31)	NA		
Number of Reviews With More Than One Individually Adequate Respondent Response but Group Response Inadequate	1	8% (1/12)	6		
Total Number of Respondent Group Responses Found to be Inadequate (no response or inadequate group response)	20	65% (20/31)	120**	66% (120/182)	
DOMESTIC ADEQUACY					
Total Number of Individual Domestic Responses in All ITC Reviews	55***		NA		
Total Number of Domestic Individual Responses found to be Adequate in All ITC Reviews	55	100% (55/55)	180	99% (180/182)	
Number of Reviews with No Domestic Responses at All	3	10% (3/31)	NA		
Number of Reviews with at Least One Domestic Response	28	90% (28/31)			
Number of Reviews With More Than One Individually Adequate Domestic Response but Group Response Inadequate	2	7% (2/28)	15		
Total Number of Domestic Group Responses Found to be Inadequate (no response or inadequate group response)	5	16% (5/31)	33**	18% (33/182)	
SUMMARY					
Total Number of Reviews with Either Group Inadequate	20	65% (20/31)	120		
Number of Votes to Expedite ITC Reviews	10****	50% (10/20)	90	75% (90/120)	
Based on Respondent Group Inadequacy	10	50% (10/20)	71	59% (71/120)	
Based on Domestic Group Inadequacy	1	20% (1/5)	18	55% (18/33)	
Number of Votes to Proceed to Full ITC Reviews	10	50% (10/20)	50	42% (50/120)	
Despite Respondent Group Inadequacy	10	50% (10/20)	48	40% (48/120)	
Despite Domestic Group Inadequacy	4	20% (4/20)	15	45% (15/33)	
Both Group Responses Adequate	11	5% (11/31)	62	34% (62/182)	

Source: ITC "NA" = Not Applicable

* This represents the total number of votes cast by the six sitting ITC Commissioners in the 31 reviews initiated between July 1998 and December 1998 that proceeded past the initial Commerce screening stage, minus four votes to account for nonparticipation in selected reviews.

** Commissioner Askey refrained from voting on group adequacy in Roller Chain from Japan.

*** Single domestic response filed for multiple countries with same subject imports are counted as one submission (otherwise count would be 77).

**** Reviews may be expedited based on inadequacies for both groups.

Table 3
COMMERCE - ITC COMPARISONS

For Sunset Reviews Initiated Between July 1998 and December 1999

<i>Description</i>	COMMERCE	ITC
Total Number of Reviews Initiated	61	61
Number Proceeding to Substantive Response Stage at Commerce and ITC	32	31
RESPONDENT (FOREIGN)		
Total Number of Individual Respondent Responses in All Reviews	10	53
Total Number of Individual Respondent Responses Found Inadequate in All Reviews	0	0
Total Number of Reviews with more than one Respondent Response	8	12
Number of Inadequate Group Responses	2	1
Number of Adequate Group Responses	5	11
Number of Reviews Where Respondent Group Responses Found Inadequate	26	20
Partial Response	2	1
No Response	24	19
DOMESTIC		
Total Number of Individual Domestic Responses in All Reviews	34	55
Total Number of Individual Domestic Responses Found Inadequate	1	0
Total Number of Reviews with more than one Domestic Response	32	28
Number of Inadequate Group Responses	NA	2
Number of Adequate Group Responses	NA	26
Number of Reviews Where Domestic Group Responses Found Inade-	NA	5
Partial Response	NA	2
No Response	NA	3
SUMMARY		
Number of Reviews with Domestic or Respondent Group Inadequate	26*	20
Number of Reviews Automatically Revoked Due to No Domestic Response	30	NA
Number of Expedited Reviews	26	10
Based on Respondent Group Inadequacy	26	10
Based on Domestic Group Inadequacy	NA	1
Number of Full Reviews	5	21
Despite Respondent Group Inadequacy	0	10
Despite Domestic Group Inadequacy	NA	4
Both Group Responses Adequate	5	11

Sources: Commerce and ITC

"NA" = Not Applicable

* Because Commerce finds that a single substantive response from a domestic interested party qualifies as an adequate domestic group response, there is strictly speaking no "evaluation" of domestic group adequacy and no circumstance in which Commerce would expedite based on domestic group inadequacy.

B. GROUP ADEQUACY⁷⁷

In assessing the adequacy of group responses, both agencies consider only individually adequate responses.⁷⁸ Beyond this similarity, the two agencies have taken decidedly different approaches. At Commerce, the stated thresholds for evaluating the adequacy of responses from each group are highly unbalanced while those at the ITC are relatively balanced. At Commerce, a finding that the domestic group response is adequate requires only one individually adequate response by a domestic producer, regardless of this producer's current or likely share of overall production.⁷⁹ For respondent interested parties, however, Commerce states that it will make its determination of group adequacy on a case-by-case basis, but that it will "normally" find a respondent group response to be adequate only when individually adequate responses are received from foreigners

77. In assessing group adequacy, the ITC relies on all available information on record, including information from the original investigation, responses to the notice of initiation by interested parties and other parties and nonparties, including industrial users and consumers, as well as information collected by ITC staff experts. ITC Commissioners also receive internal agency memos, based upon information on the record, from: (1) the Office of Investigations, which includes staff recommendations on individual adequacy, as well as discussions of group adequacy and whether to expedite a review, and (2) the Office of the General Counsel which contains a discussion of pertinent legal issues. Commerce relies on information from the original investigation, any subsequent reviews, new submissions of interested parties, submissions of industrial users and consumers, and possibly other data. *See* Procedure for Conducting Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, 63 Fed. Reg. 13,516, 13,520 (1998) (noting specifically the discussion related to 19 C.F.R. pts. 351.308 and 351.312).

78. *See* Procedures for Conducting Five-Year ("Sunset") Review Antidumping and Countervailing Duty Orders, 63 Fed. Reg. 13,516, 13,518 (1998) (stating that in addressing the adequacy of responses in the aggregate, Commerce only considers those responses that are considered individually adequate); Sorbitol from France, USITC Pub. 3165, Inv. No. 731-TA-44, at 3 (review initiated Oct. 1998) [hereinafter *Sorbitol*] (stating that the Commission makes its group adequacy determination based on those responses deemed individually adequate).

79. Because Commerce finds that a single substantive response from a domestic interested party qualifies as an adequate domestic group response, there is strictly speaking no "evaluation" of domestic group adequacy and no circumstance in which Commerce would expedite based on domestic group inadequacy. If Commerce, however, finds that all individual domestic responses that have been received are inadequate, it acts as if no domestic response has been received at all and proceeds to revoke the order. *See* 19 C.F.R. pt. 351.218(e)(1)(i) (1998).

accounting, on average, for more than fifty percent of the total exports of subject merchandise to the United States over the five calendar years preceding the review.⁸⁰ Commerce provides no other guidance regarding its respondent group adequacy standards or what information it relies on for its decision making, and its published determinations regarding respondent group adequacy provide no additional guidance beyond the fifty percent threshold.⁸¹

In the sunset reviews initiated between July and December 1998, Commerce received responses from respondent interested parties in a total of eight of the thirty-two reviews that proceeded beyond the initial Commerce screening phase. As shown in Table 1 above, two of these eight reviews were expedited based on inadequate respondent group responses, while five reviews proceeded to full reviews

80. See 19 C.F.R. pt. 351.218(e)(1)(ii) (1998) (explaining Commerce's requirements for an adequate group response for respondents). Commerce has adhered to the Senate Report's admonishment against establishing a strict numerical test in evaluating adequacy for domestic interested parties, but normally applies a numerical threshold for evaluating the adequacy of respondent interested party responses. See S. REP. NO. 103-412, at 46 (1994) (admonishing against a numerical tests to assess the adequacy of interested party responses).

81. Commerce has received responses from respondent interested parties in eight reviews, of which it found adequate respondent group responses in five reviews and made no finding in one review. See *supra* note 65 (discussing the revocation of the order pertaining to *Canned Bartlett Pears from Australia*). Commerce has published the reasons underlying its assessment of adequacy in two of these seven reviews. See *Roller Chain-Commerce*, *supra* note 76 (discussing respondents' group response, which was found to be inadequate based on less than fifty percent representation, review expedited); *Stainless Steel Plate from Sweden*, 63 Fed. Reg. 67,658 (1998) (final admin. review) (discussing respondents' group response, found to be inadequate based on less than fifty percent representation, review expedited). The other six reviews are: *Canned Bartlett Pears-Commerce*, *supra* note 65 (no finding made regarding respondent group adequacy); *Sugar from the European Union*, ITA, Inv. No. C-408-046 (review initiated Oct. 1998) [hereinafter *Sugar from the European Union-Commerce*] (specifying Commerce's determination that respondent group response was adequate and is proceeding with a full review); *Sugar and Syrups from Canada*, Dept. of Commerce Inv. No. A-122-085 (review) (specifying Commerce's determination that respondent group response was adequate and is proceeding with a full review); *Carbon Steel Wire Rod from Argentina*, Dept. of Commerce Inv. Nos. C-357-004 (review) and A-357-007 (review) (specifying Commerce's determinations that respondent group responses were adequate and is proceeding with full reviews); *Live Swine from Canada*, Dept. of Commerce Inv. No. C-122-404 (specifying Commerce's determination that respondent group response was adequate and is proceeding with a full review).

based on adequate respondent group responses.⁸² In the remaining review, Commerce found the sole domestic response inadequate, thus automatically leading to revocation of the review.⁸³ In the two expedited cases, Commerce's only stated reason for finding the respondent group responses to be inadequate was the failure to meet the fifty percent respondent group adequacy threshold.⁸⁴ In spite of the emphasis by Commerce on numerical representation,⁸⁵ domestic and respondent interested parties' submissions to Commerce regarding adequacy have not focused considerable attention on this issue.⁸⁶

In contrast, the ITC explicitly rejected a single response group adequacy standard, stating that "a single domestic interested party or respondent interested party . . . [filing] an adequate response to the notice of institution is not per se sufficient indication that either pertinent group of interested parties as a whole is interested in a full review."⁸⁷ It has also eschewed strict numerical tests in favor of: (1) the

82. See *supra* Table 1, at p. 1303.

83. See *Canned Bartlett Pears-Commerce*, *supra* note 65 (discussing outcome of Commerce's finding that domestic response was inadequate).

84. See *supra* note 76 and *infra* note 86 and accompanying text (identifying Commerce's findings of inadequacy in reviews of *Roller Chain from Japan* and *Stainless Steel Plate from Sweden*).

85. Numerical representation means the percentage of the industry that is represented by parties who have submitted responses to a notice of initiation by Commerce or a notice of institution by the ITC.

86. See, e.g., *Roller Chain-Commerce*, *supra* note 76; *Stainless Steel Plate from Sweden*, ITA, Inv. No. A-401-040 (review initiated Aug. 1998); *Sugar from the European Union-Commerce*, *supra* note 81; *Sugar and Syrups from Canada*, ITA, Inv. No. A-122-085 (review initiated Oct. 1998); *Carbon Steel Wire Rod from Argentina*, ITA, Inv. No. A-357-007 (review initiated Nov. 1998); *Live Swine from Canada*, ITA, Inv. No. C-122-404 (review initiated Dec. 1998) (showing that respondents did not focus attention on the numerical representation of those respondent interested parties that responded). Cf. Memorandum from Scott E. Smith, Office of Policy, United States Department of Commerce, International Trade Administration (Sept. 22 1998) (on file with Central Records Unit, United States Department of Commerce) (indicating that respondent's percentage of United States imports "falls significantly below the fifty percent threshold that the Department normally will consider to be an adequate response" as provided in section 351.218(e)(1)(ii)(A) of Commerce's rules).

87. ITC, Rules of Practice and Procedure, *supra* note 6, 63 Fed. Reg. at 30,603. The lower raw number of domestic responses in all reviews at Commerce relative to the ITC—34 versus 55—as shown in Table 3, is reflective of the relatively lower domestic group threshold at Commerce. See *supra* Table 3, at p. 1304.

general criterion of a demonstration of a sufficient willingness to participate and provide information requested, and (2) at least seven specific criteria that it finds can be relevant to its analysis of group adequacy.⁸⁸

The first specific criterion is the level of interested party responses.⁸⁹ In applying this criterion in its evaluation of the domestic group response, the ITC focuses on the share of domestic production represented by the domestic interested party responses, with adequate responses by worker groups being counted as equal to the production of the firms at which the workers are employed.⁹⁰ In applying the first criterion in its evaluation of the respondent group response,

88. See ITC, Rules of Practice and Procedure, *supra* note 6, 63 Fed. Reg. at 30,603-04 (listing criteria one through five).

89. See *id.* The SAA directs the agencies to "consider the proportion of parties that respond and their likely share of the market if the order were revoked." H.R. DOC. NO. 103-316, at 880 (1994). The Senate Report directs the agencies to focus on existing shares in the market. See S. REP. NO. 103-412, at 46 (1994). In practice, Commerce and the ITC appear to have focused on actual shares rather than "likely" shares. See, e.g., *Explanation of Commission Determinations on Adequacy*, Iron Metal Castings from India, USITC Inv. No. 303-TA-13 (review initiated Nov. 1998), Heavy Iron Construction Castings from Brazil, USITC Inv. No. 701-TA-249 (review initiated Nov. 1998), *Iron Construction Castings*, *supra* note 73 (demonstrating the ITC's use of actual shares); *Roller Chain-Commerce*, *supra* note 76 (demonstrating Commerce's use of actual shares); *Stainless Steel Plates from Sweden*, 63 Fed. Reg. 67,658 (1998) (final admin. review) (demonstrating Commerce use of actual shares).

90. Such "equal" treatment of worker groups can create difficulties for the Commission in: (1) assessing the willingness to participate and provide information among domestic interested party producers, which are critical to any review, and (2) making determinations in expedited reviews. See ITC, Rules of Practice and Procedure, *supra* note 6, 63 Fed. Reg. at 30,603-04 (discussing adequacy requirements for sunset reviews). It is not clear that worker groups can provide even the basic data on domestic production and shipments requested since they may not have access to such data. Interested parties are requested by the ITC's notice of initiation to submit the specified information only if "known." When information cannot be provided, interested parties are merely asked to provide an explanation as to why and in what alternative form the information can be provided. See *id.* at 30,610. These information deficiencies will be particularly salient in expedited reviews where respondent interested parties submit inadequate responses and domestic interested parties, based on worker group submissions, provide "adequate," though incomplete, responses. Under such circumstances, the Commission may have little information other than the original determination and minimal ITC staff research on which to base its determination. In reviews initiated between July 1998 and January 1999, no responses have been received from worker groups.

the ITC focuses on the share of imports, foreign production, or exports of the subject merchandise represented by respondent interested parties. Although it is somewhat unclear from the *ITC Rules of Practice and Procedure* which respondent interested parties must respond in order to meet ITC respondent group adequacy requirements, in practice the ITC has found that adequate levels of responses from either importers or foreign producers/exporters alone can be sufficient to meet group respondent adequacy.⁹¹

The remaining six specific ITC group adequacy criteria are all essentially modifiers of the "level of response" criterion. First, the ITC examines the "structure of the industries in question" in both the United States and in the foreign country to evaluate, for example, whether responses would be expected to be high or low due to concentrated or fragmented industry structures.⁹² A relatively low level of responses in a fragmented industry might still be considered adequate. Second, the ITC examines the prevalence of related parties. If a domestic interested party is related to a foreign firm under the order, it may have an incentive to forego responding, in the hope that its nonresponse will lead the ITC to view the domestic group response as inadequate. This criterion is designed to take into account such incentives and to discount nonresponses from such related parties. Third, the ITC examines whether foreign producers are able to export to the United States. If they cannot, they would not be expected to respond since they have no economic interest in removal of the order. Fourth, the ITC examines the extent to which subject imports have been excluded from the United States market by the order

91. In *Melamine from Japan*, the ITC found that the single response from United States importer Taiyo America, Inc. was both individually adequate and represented an adequate "group" response on behalf of respondent interested parties. There were no responses from foreign producers, or exporters or other respondent interested parties in this review. See *Melamine from Japan*, USITC Inv. No. AA1921-162 (review initiated Aug. 1998). In *Potassium Permanganate from Spain*, the ITC found that the single response from foreign producer Industrial Quimica del Nalon was both individually adequate and represented an adequate "group" response on behalf of respondent interested parties. There were no responses from importers or other responded interested parties. See *Potassium Permanganate from Spain*, USITC Inv. No. 731-TA-126 (review initiated Nov. 1998).

92. See, e.g., *Live Swine from Canada*, USITC Inv. No. 701-TA-224 (review initiated Dec. 1998) (Statement of the Commission) (explaining that the Commission considered the fragmented structure of the swine industry).

or suspension agreement. This factor has been interpreted in two different fashions: (1) to explain why even a one hundred percent response rate by importers does not always provide an adequate picture of respondent interested parties' willingness to participate; and (2) to explain that even a small number of respondent interested party responses, particularly importers, can indicate a sufficient willingness to participate, since more importers would have responded if they were not blocked by the order.⁹³ Fifth, the ITC examines related party relationships of foreign producer interested parties in evaluating non-responses of foreign producer interested parties. If foreign producer interested parties are related to producers in the United States, they may have an incentive to maintain the order to minimize competition for their United States affiliate. By not responding, the order would have a higher likelihood of remaining in place. This criterion is designed to take into account such incentives and to discount non-responses from such foreign interested parties. Sixth, submissions by coalitions, ad hoc industry groups, or trade associations that claim to represent a given proportion of the domestic or foreign industry may be discounted. Certain Commissioners have indicated that responses from such interested parties are not necessarily one-for-one substitutes for responses by individual member interested parties.⁹⁴ The majority of the Commission, however, appears to accept individually

93. Because an importer must import subject merchandise in order to qualify as an interested party, prohibitive duties that reduce or eliminate subject imports can reduce or eliminate this category of interested party. *See* 19 U.S.C. sec. 1677 (9)(A) (1997).

94. To date, only Commissioners Bragg, Crawford, and Koplan have commented publicly on whether such responses by interested party associations of producers can be offered in lieu of individual interested party producer responses. All three have stressed the need for responses to include information allowing the Commission to assess whether individual interested parties have a sufficient willingness to participate in the review. *See e.g.*, Stainless Steel Plate from Sweden, USITC Inv. No. AA1921-114 (review initiated Nov. 1998) (statements of Chairman Lynn M. Bragg and Commissioners Carol T. Crawford and Stephen Koplan) (explaining their views on adequacy). Of the three, only Commissioner Crawford has stated that she may place less weight on such joint responses, absent clear indicia that the individual members are willing to participate and provide information; Greige Polyester Printcloth from China, USITC Inv. No. 731-TA-101 (review initiated Feb. 1999) (statement of Commissioner Carol T. Crawford). All Commissioner statements are available at the ITC's homepage on the Internet at <<http://www.usitc.gov>>.

adequate filings by trade associations or groups of producers⁹⁵ as essentially an equivalent to individual interested party responses for purposes of assessing group adequacy.⁹⁶

In practice, domestic and respondent parties to reviews and the Commission have focused considerable attention on the numerical representation of responses by interested parties in each group and less attention to discussing the "modifier" factors when addressing group adequacy considerations.⁹⁷ In the twenty-one statements on adequacy and five opinions issued by Commissioners for reviews

95. In the thirty-one reviews initiated between July and December 1998 for which Commerce did not announce its intention to revoke due to no initial domestic notices of intent to participate or no adequate domestic response at Commerce, there have been six responses by trade associations or industry groups representing either domestic or respondent interests to the ITC notice, with no corresponding individual interested party responses from producers. *See supra* note 81 (discussing adequacy determinations). In all six cases, the trade association responses have been found by the majority of the Commission to be individually adequate and have been found to represent an adequate group response. *See id.*

96. Chairman Bragg has applied yet another "modifier." In Chairman Bragg's adequacy statement on *Melamine from Japan*, she indicates that it would be appropriate to base her analysis of adequacy on domestic open market sales alone, rather than all sales (including both open and captive sales). It is not clear whether she intends to apply this modifier to domestic producers only or whether she would also apply this modifier to foreign producers. *See Melamine from Japan, supra* note 91 (statement of Chairman Lynn M. Bragg) (explaining her view on adequacy).

97. ITC, Rules of Practice and Procedure, *supra* note 6, 63 Fed. Reg. at 30,603. In several reviews, domestic interested parties have argued that Commerce "standing" domestic industry representation requirements in new antidumping petition filings are an appropriate starting point for group adequacy. *See e.g.*, Submission of the National Pork Producers Council, Feb. 3, 1999, Live Swine from Canada, USITC Inv. No. 701-TA-224, at 3 (review initiated Dec. 1998) (affirming that the analysis of group adequacy should begin with an examination of the domestic industry representation requirements). In filing new antidumping petitions, the domestic industry must demonstrate that the domestic producers or workers who support the petition have "standing." To have standing, the petitioning parties must account for at least twenty-five percent of the total production of the domestic like product, and the domestic producers or workers who support the petition must account for more than fifty percent of the production produced by that portion of the industry expressing some position for the petition (opposition or support). *See* 19 U.S.C. sec. 1673a(c)(4)(A) (amended 1994). The Commission has explicitly rejected such analogies between standing requirements in original investigations and group adequacy in sunset reviews in both the its Rules of Practice and Procedure, and in recent cases. *See e.g., Elemental Sulfur, supra* note 21, at 5 n.11 (discussing rejection of the analogy).

initiated between July and December 1998, eighteen of twenty-one statements and four-of-five opinions discuss specific or approximate representation as part of the adequacy analysis,⁹⁸ while only eight statements and none of the opinions discuss "modifier" factors.⁹⁹

98. For ITC statements, see, e.g., Anhydrous Sodium Metasilicate from France, USITC Inv. No. 731-TA-25 (review initiated Oct. 1998) [hereinafter *Anhydrous*]; Sorbitol, *supra* note 78, at 1 (statement by Commissioner Koplan); Carbon Steel Wire Rod from Argentina, USITC Inv. Nos. 701-TA-A and 731-TA-157, at 1 (review initiated Nov. 1998) (statement of the Commission); Chloropicrin from China, USITC Inv. No. 731-TA-130, at 1 (review initiated Nov. 1998) (statement of Commission); *Elemental Sulfur*, *supra* note 21, at 1 (statement of Chairman Bragg); Greige Polyester Printcloth from China, *supra* note 94, at 1 (statement of Commission); Iron Metal Castings from India, USITC Inv. No. 303-TA-12 (review initiated Nov. 1998) (statement of the Commission); Heavy Iron Construction Castings from Brazil, Canada, and China, USITC Inv. Nos. 701-TA-249, 731-TA-262, 263, 265, at 1-2 (reviews initiated Nov. 1998) (statement of the Commission); Melamine from Japan, *supra* note 91, at 1-2 (statements by Chairman Bragg and Commissioner Crawford); Polychloroprene Rubber from Japan, USITC Inv. No. AA1921-129, at 1 (review initiated Aug. 1998); Potassium Permanganate from Spain, *supra* note 91, at 1 (statement of Commission); Stainless Steel Plate from Sweden, *supra* note 94, at 2 (statement by Chairman Bragg); Sugar from the European Union, Belgium, France, and Germany, and Sugar and Syrups from Canada, USITC Inv. Nos. 104-TAA-7, AA1921-198-200, 731-TA-3, at 1-3 (review initiated Oct. 1998) (statement of the Commission) [hereinafter *Sugar from Five Countries*]; Synthetic Methionine from Japan, USITC Inv. No. AA1921-115, at 1 (review initiated Aug. 1998) (statement of Chairman Bragg) (providing adequacy requirement information regarding representation in sunset reviews) [hereinafter *Synthetic Methionine*]; Live Swine from Canada, *supra* note 92, at 1-2 (review initiated Dec. 1998) (statement of the Commission); Frozen Concentrated Orange Juice from Brazil, USITC Inv. No. 731-TA-326, at 1-2 (review initiated Dec. 1998) (statement of the Commission) [hereinafter *Orange Juice from Brazil*]; Barbed and Barbless Wire Strand from Argentina, USITC Inv. No. 731-TA-208, at 1 (review initiated Dec. 1998) (statement of the Commission); Sebacic Acid from China, USITC Inv. No. 731-TA-653 (review initiated Dec. 1998). For ITC opinions, see, e.g., *Prestressed Steel Wire*, *supra* note 35, at 34 (explaining the Commission's views); *Elemental Sulfur*, *supra* note 21, at 3 (explaining the Commission's views); Pressure Sensitive Tape from Italy, USITC Pub. 3157, Inv. No. AA1921-167, at 3-4 (Feb. 1999) (explaining the Commission's views); Barium Chloride from China, USITC Pub. 3163, Inv. No. 731-TA-149, at 3-4 (Mar. 1999) (explaining the Commission's views).

99. See *Roller Chain*, *supra* note 53, at 1-4 (statement of Commissioner Crawford) (regarding trade associations); Melamine from Japan, *supra* note 91, at 1-2 (statements of Commissioner Crawford and Chairman Bragg) (regarding, respectively, foreign ownership and extent to which imports have been excluded - as it relates to specialty production, and open market sales); *Synthetic Methionine*, *supra* note 98, at 2 (statement of Chairman Bragg) (regarding related parties); *Iron Construction Castings*, *supra* note 73, at 1 & n.1 (dissenting footnote by Commis-

Overall, Commissioners have shown considerable agreement in their determinations regarding group adequacy. As illustrated in Table 4 below, in the thirty-one reviews for which Commissioners have made group adequacy determinations, Commissioners have been unanimous in twenty-two instances regarding domestic group adequacy, with only one Commissioner dissenting in eight of the remaining nine reviews. Agreement was even stronger regarding respondent group adequacy. As indicated in Table 5 below, Commissioners were unanimous in twenty-nine of thirty-one instances regarding respondent group adequacy.¹⁰⁰ About two-thirds of these adequacy determinations, however, have been based on zero or near-one hundred percent response rates. Few reviews have involved "gray area" response rates. Nonetheless, given the focus on numerical representation in adequacy determinations to date, it would be useful to identify what numerical thresholds the Commission might typically rely on, if any. Although it is too early to identify a definitive pattern, a preliminary examination of the group response levels by interested parties and the voting patterns of the ITC regarding group adequacy, as shown in Tables 4 and 5, suggests that the Commission will be reluctant to find group responses to be inadequate when the response rate is above approximately one-third.¹⁰¹

sioner Crawford in statement of Commission) (regarding trade associations); Greige Polyester Printcloth from China, *supra* note 94, at 1 (statement of Commissioner Crawford) (regarding trade associations); *Live Swine from Canada*, *supra* note 92, at 1-2 (review initiated Dec. 1998) (statement of the Commission) (discussing the fragmented industry); *Orange Juice from Brazil*, *supra* note 98, at 2-3 (dissent by Commissioner Crawford in statement of the Commission) (regarding trade associations).

100. See U.S. Int'l Trade Comm'n, *Five-Year (Sunset) Reviews* (visited June 4, 1999) <<http://205.197.120.60/oinv/sunset.nsf>> (providing a list of the vote summaries for adequacy determinations for sunset reviews). The statute and legislative history provide no direction regarding tie votes on group adequacy. Absent guidance, the Commission has adopted the practice that when the Commission is evenly divided regarding the adequacy of a group response, that group's response shall be deemed adequate. See also *supra* note 75 and accompanying text (showing that Commerce nearly always finds responses adequate).

101. See *infra* Tables 4 and 5, at pp. 1320-23; see also Interviews with United States International Trade Commission Officials (May 10, 1999) (expressing agreement with this tentative conclusion).

C. EXPEDITED OR FULL REVIEW

When one or both group responses have been found to be inadequate, the two agencies treat the question of whether to proceed to an expedited or full review differently. The Commerce sunset rules state that Commerce will “normally” conduct an expedited review when it determines that respondent interested parties have provided inadequate responses.¹⁰² Commerce has not, however, articulated any circumstances in which it would proceed with a full review when it has found that the respondent group response is inadequate. As shown in Table 3, Commerce has expedited all twenty-six reviews in which it has found the respondent group response to be inadequate.¹⁰³ Given this early experience, it remains to be seen whether Commerce will ever choose to proceed to a full review when it determines that the respondent group response is inadequate. The question of whether to proceed to a full review is not relevant to Commerce’s analysis of domestic group adequacy since Commerce sunset rules require only a single individually adequate domestic response to find the domestic group adequate. When there is no adequate individual domestic response to Commerce’s notice, the review is automatically terminated.¹⁰⁴

In contrast, the process at the ITC has been relatively transparent, if not fully vetted. In its *Rules of Practice and Procedure*, the ITC articulated two circumstances in which it may exercise its discretion to conduct a full review notwithstanding inadequate group responses. First, in grouped reviews involving several countries, “where aggre-

102. Commerce rules state that if it determines that respondent interested parties provided inadequate responses to a notice of initiation, it will “[n]ormally conduct an expedited sunset review. . . .” 19 C.F.R. pt. 351.218(e)(1)(ii)(C) (1998). As noted, the statute merely provides the discretion to proceed to a full review, even if responses are inadequate and does not provide any preferred outcome. *Id.* However, Commerce’s practices comport with the SAA, which states that “if there is inadequate response to a notice of initiation by foreign and domestic interested parties, Commerce and the Commission *will* conduct an expedited review based on the facts available . . .” H.R. DOC. NO. 103-316, at 879 (1994) [emphasis added].

103. See *supra* Table 3, at p. 1305; U.S. Dep’t of Commerce, *Sunset Schedule* (visited June 3, 1999) <http://www.ita.doc.gov/import_admin/records/sunset/schedule.htm> (posting sunset reviews issued by Commerce).

104. See discussion *supra* note 63 (describing situations under which Commerce could find inadequate domestic response and the consequences of such a finding).

gate domestic responses are not inadequate and responses from the respondent interested parties are adequate with respect to some of the countries in the group but inadequate with respect to others, the Commission will normally conduct full reviews for all countries in the group.”¹⁰⁵ Second, where there are significant domestic like product issues in a review, “[s]hould the Commission determine that there is a need in the five-year review to re-examine the domestic like product definition made in the original determination, it may determine to conduct a full review even in circumstances when domestic and/or respondent interested party responses are inadequate.”¹⁰⁶ There is also a third circumstance, somewhat related to the like product issue, that has been considered by at least one Commissioner and raises an important issue, namely, whether a lack of information is grounds for proceeding to a full review despite inadequate responses.¹⁰⁷

The first circumstance (“mixed responses circumstance”) has been applied ostensibly to “promote administrative efficiency.” For example, in *Potassium Permanganate from China*, the Commission majority found that, despite inadequate responses by respondent interested parties, “[t]he Commission . . . determined to conduct a full review . . . because conducting a full review would promote administrative efficiency in light of the Commission’s decision to conduct a full review with respect to *Potassium Permanganate from Spain*.”¹⁰⁸ The ITC’s intention to “normally” proceed to full reviews

105. ITC, Rules of Practice and Procedure, *supra* note 6, 63 Fed. Reg. at 30,604.

106. *Id.*

107. See *Sorbitol*, *supra* note 78, at 1; *Anhydrous*, *supra* note 98, at 1 (statement of Commissioner Stephen Koplan) (explaining his view on adequacy for *Sorbitol* and *Anhydrous*).

[Commissioner Koplan] voted to conduct a full review in these investigations in order to be able to consider information excluded from the record because it was untimely filed. Specifically, in both investigations, a response to our notice of institution filed on behalf of a large domestic producer was rejected because it was filed one business day late.”

Anhydrous, *supra* note 98, at 1.

108. See *Potassium Permanganate from Spain*, *supra* note 91 (Statement of Commission) (explaining its determinations on adequacy, which are available at the Office of the Secretary, ITC, and at <http://www.usitc.gov>); *Potassium Permanganate from China*, USITC Inv. No. 731-TA-125 (review initiated Nov. 1998).

in grouped reviews with mixed respondent group responses can have an ambiguous impact on domestic and foreign interests as well as on the ITC. It unequivocally preserves the ability of the Commission to cumulate subject imports in such multi-country grouped reviews.¹⁰⁹ Cumulation allows subject imports from each country to be considered collectively for purposes of assessing the likely effects of revocation of the grouped orders, thus raising the likelihood of an affirmative determination resulting in continuation of the orders to the benefit of domestic interested parties. Since cumulation is discretionary in sunset reviews,¹¹⁰ the inclusion of the "mixed responses circumstance" suggests that the ITC at a minimum wants to preserve its ability to invoke its discretion to consider cumulation.

Conducting full reviews when respondent group responses are mixed in multi-country reviews will likely lead to, relative to expedited reviews, greater participation by domestic and especially respondent interested parties, as well as the collection of more information for decision-making since the ITC conducts a detailed investigation in a full review. Increased opportunities to participate for respondent interested parties initially inclined to forgo participation might be beneficial to them by allowing an opportunity to reconsider their involvement. This opportunity to reconsider is not similarly available to domestic interested parties, except in certain grouped transition reviews, since this circumstance is only invoked where an adequate domestic group response has been received, but the adequacy of respondent group responses are mixed across re-

109. If one review in a multi-country grouped review is expedited and Commerce and the Commission determine that the order should be revoked, it is not clear that "likely" imports from this country can be cumulated with "likely" imports from the remaining countries in the subsequent full reviews. The statute states that:

the Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which reviews under section 751 (b) or (c) were initiated on the same day, if such imports would be likely to compete with each other and with domestic like products in the United States market. The Commission shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry.

19 U.S.C. sec. 1675a(a)(7) (amended 1994).

110. *See id.* (stating that the Commission "may" cumulatively assess subject imports).

views in the group. Overall, increased opportunities to participate and the collection of additional information, as well as a consistent record for all reviews in a group, minimize the risk of successful legal challenges to ITC determinations. For example, if the ITC splits two grouped reviews and makes a final expedited determination to revoke one order based on a minimal record and subsequently makes an affirmative determination in the other review based on a broader record collected in a full review, there could be some questions regarding the appropriateness of the ITC's decision to split the reviews into expedited and full reviews.

The possibility that the Commission will normally conduct full reviews for all orders in a grouped review even when only some, perhaps even a minority, of the respondent group responses are adequate will decrease the use of expedited reviews. Since grouped reviews cover eighty-one percent of all transition orders, and, as an indicator of the composition of future reviews, seventy-one percent of all new orders imposed from 1995 through 1997 involved cumulated multi-country cases,¹¹¹ application of the "mixed responses circumstance" significantly increases the likelihood that the Commission will conduct a large number of full reviews in cases where inadequate responses have been received.¹¹²

It remains to be seen whether conducting full reviews when responses in grouped reviews are mixed will promote administrative efficiency. Conducting an expedited review involves little or no additional compilation of new data by the ITC, while adding a country to a full review incurs the additional expense of identifying additional interested parties and requesting and processing information

111. See U.S. Dep't of Commerce, *Schedule of Sunset Reviews* (visited Apr. 26, 1999) <http://www.ita.doc.gov/import_admin/records/sunset/workplan.htm> (providing information on data regarding transition orders); Featherstone Memorandum, *supra* note 15 (regarding orders from 1995 through 1997).

112. As the ITC practices in this area become established, this policy may also lead to a gaming process in which only one country's respondent interested parties respond to the notice, with the expectation by respondent interested parties from other countries in the group of orders that all the associated reviews will proceed to a full review. In this manner, the "mixed response" policy can potentially lead to an inequitable situation where the domestic industry must come forward in a fully adequate group fashion, while foreign producers or United States importer groups from only one country of the several grouped countries have to come forward in order to proceed to a full review.

from their involvement in all stages of a full review, including completion of questionnaires, participation at hearings, and general correspondence. For the interested parties that did not show sufficient interest in the review during the adequacy phase of the review—including foreign producers and exporters and United States importers—proceeding to a full review is likely to result in a higher burden.¹¹³

From the information presented in Tables 4 and 5 below, and from recent statements by Commissioners,¹¹⁴ it appears that the ITC intends to regularly conduct full reviews when there are mixed responses in grouped reviews.¹¹⁵ As seen in Tables 4 and 5, there have been three sets of grouped reviews involving twelve separate orders among reviews initiated between July and December 1998.¹¹⁶ Of the twelve separate reviews, the ITC determined that respondent groups had responded inadequately in nine of them. Each grouped review, however, included one review in which the ITC determined that the respondent group was adequate.¹¹⁷ As a result, the ITC voted to conduct full reviews in all twelve reviews.¹¹⁸

113. In addition, when a case proceeds to a full review, United States importers face possible subpoenas, which can force responses. See 19 U.S.C. sec. 1677f(7) (1994) (authorizing ITC to issue subpoenas to United States importers to force responses). *But cf.* H.R. DOC. 103-316, at 868 (1994) (stressing the importance of the evaluation by the facts available given the incentive to respond to the ITC as opposed to subpoena power).

114. See, e.g., Potassium Permanganate from Spain, *supra* note 91, at 1 (statement by the Commission) (explaining its decision to proceed with full reviews for *Potassium Permanganate from Spain* and *Potassium Permanganate from China*, despite an inadequate respondent group response in *Potassium Permanganate from China*); *Iron Construction Castings*, *supra* note 73, at 1-3 (statement of the Commission) (explaining its decision to proceed with full reviews for all investigations, despite inadequate respondent group responses in three of the four grouped reviews); *Sugar from Five Countries*, *supra* note 98, at 2 (statement of the Commission) (explaining the ITC's decision to proceed with full reviews for all sugar investigations based on mixed group responses and like product issues).

115. See *infra* Tables 4 and 5, at pp. 1320-23.

116. See *Iron Construction Castings*, *supra* note 73 (involving five reviews); *Potassium Permanganate from Spain*, *supra* note 91 (involving two reviews); *Sugar from Five Countries*, *supra* note 98 (involving five reviews).

117. See *infra* Tables 4 and 5, at pp. 1320-23.

118. See *id.*

Table 4 (continued from p. 1320)
DOMESTIC GROUP ADEQUACY VOTES IN ITC SUNSET REVIEWS
Reviews Instituted July 1998 through December 1998

REVIEW	Domestic Production Represented	Commissioner Bragg Miller	Crawford	Hillman	Koplan	Askey	Commission Adequacy Vote (A,I)	Commission Expedite or Full	Basis for Expedite (D, R, Both)
Greige Printcloth from China	"7 of 9 producers"	A	NP	A	A	A	A (5A, 0I)	Expedite	Respondent
Carbon SWRod from Argentina-AD	97.80%	A	A	A	A	A	A (6A, 0I)	Full	
Carbon SWRod from Argentina-CVD	97.80%	A	A	A	A	A	A (6A, 0I)	Full	
Potassium Permanganate from China	100%	A	A	A	A	A	A (6A, 0I)	Full	
Potassium Permanganate from Spain	100%	A	A	A	A	A	A (6A, 0I)	Full	
Chloropierin from China	100%	A	A	A	A	A	A (6A, 0I)	Expedite	Respondent
Iron Metal Castings from India	80%	A	A	A	A	A	A (6A, 0I)	Full	
Iron Constr. Castings from Canada	80%	A	A	A	A	A	A (6A, 0I)	Full	
Iron Constr. Castings from Brazil	80%	A	A	A	A	A	A (6A, 0I)	Full	
Iron Constr. Castings from China	80%	A	A	A	A	A	A (6A, 0I)	Full	
Heavy Iron Constr. Castings from Brazil	80%	A	A	A	A	A	A (6A, 0I)	Full	
Sebacic Acid from China	100%	A	A	A	A	A	A (6A, 0I)	Expedite	Respondent
Barbed & Barbed Wire from Argentina	60%-70%	A	A	A	A	A	A (6A, 0I)	Expedite	Respondent
Frozen Orange Juice from Brazil	24%-P, 62%-G	NP	A	I - Exp	A	A	A (4A, 1I)	Expedite	Respondent
Live Swine from Canada	"overwhelming majority"	A	A	NP	A	A	A (4A, 1I)	Full	
Total		27A, 3I 25A, 5I	22A, 8I	26A, 5I	27A, 4I	22A, 8I	26A, 5I	21Full, 10Exp	

* Data confidential. Derived from submissions and Commission publications

** Confidential Data

"Exp" = Expedite Review

"A" = Adequate, "I" = Inadequate

"P" = Processors, "G" = Growers

"NP" = Not Participating

Source: ITC Case Files

Table 5 (continued on p. 1323)
RESPONDENT GROUP ADEQUACY VOTES IN ITC SUNSET REVIEW
Reviews Instituted July 1998 through December 1998

REVIEW	Foreign Production Represented	Foreign Imports Represented	Commissioner Bragg Miller	Crawford Hillman	Koplan	Askey	Commission Adequacy Vote (A,I)	Commission Expedite or Full	Commission Basis for Expedite (D, R, Both)
Roller Chain from Japan	97%	90%	A	A	A	NP	A (5A, 0I)	Full	
Stainless Steel Plate from Sweden	100%	**	A	A	A	A	A (6A, 0I)	Full	
Elemental Sulfur from Canada	15.9%	20%	I-Full	I-Exp	A	I-Exp	I (1A, 5I)	Expedite	Both
Melamine from Japan	0%	100%	A	I-Exp	A	A	A (4A, 2I)	Full	
Polychloroprene Rubber from Japan	"1 of 3"	0%	A	A	A	A	A (6A, 0I)	Full	
Synthetic Methionine from Japan	"1 of 2"	0%	A	A	A	A	A (6A, 0I)	Full	
Pressure Sensitive Tape from Italy	0%	0%	I-Exp	I-Exp	I-Exp	I-Exp	I (0A, 6I)	Expedite	Respondent
Prestressed Concrete SWS from Japan	0%	0%	I-Exp	I-Exp	I-Exp	I-Exp	I (0A, 6I)	Expedite	Respondent
Barium Chloride from China	0%	0%	I-Exp	I-Exp	I-Exp	I-Exp	I (0A, 6I)	Expedite	Respondent
Sorbitol from France	0%	0%	I-Exp	I-Exp	I-Exp	I-Exp	I (0A, 6I)	Expedite	Respondent
Anhydrous Sodium Metasilicate France	0%	0%	I-Exp	I-Exp	I-Exp	I-Exp	I (0A, 6I)	Full	
Sugar from the EU	0%	0%	I-Full	I-Exp	I-Full	I-Full	I (0A, 6I)	Full	
Sugar from Belgium	0%	0%	I-Full	I-Exp	I-Full	I-Exp	I (0A, 6I)	Full	
Sugar from France	0%	0%	I-Full	I-Exp	I-Full	I-Exp	I (0A, 6I)	Full	
Sugar from Germany	0%	0%	I-Full	I-Exp	I-Full	I-Exp	I (0A, 6I)	Full	
Sugar and Syrups from Canada	0%	137%	A	A	A	A	A (6A, 0I)	Full	
Total			11A, 10A, 19I	9A, 21I	11A, 20I	12A, 19I	10A, 11A, 20I	21Full, 10Exp	

* Exact data confidential. Producer counts derived from parties' submissions and Commission publications

** Confidential Data

"A"=Adequate, "I"=Inadequate
NP = Not Participating

Table 5 (continued from p. 1322)
RESPONDENT GROUP ADEQUACY VOTES IN ITC SUNSET REVIEW
Reviews Instituted July 1998 through December 1998

REVIEW	Foreign Production	Foreign Imports	Commissioner	Hillman	Koplan	Askey	Commission Adequacy	Commission Expedite or Full	Basis for Expedite (D, R, Both)
Greige Printcloth from China	0%	0%	I-Exp NP	I-Exp	I-Full	I-Exp	I (0A, 5I)	Expedite	Respondent
Carbon SWRod from Argentina-AD	100%	0%	A	A	A	A	A (6A, 0I)	Full	
Carbon SWRod from Argentina-CVD	100%	0%	A	A	A	A	A (6A, 0I)	Full	
Potassium Permanganate from China	0%	0%	I-Full I-Full	I-Exp	I-Full	I-Full	I (0A, 6I)	Full	
Potassium Permanganate from Spain	100%	0%	A	A	A	A	A (6A, 0I)	Full	
Chloropierin from China	0%	0%	I-Exp I-Exp	I-Exp	I-Exp	I-Exp	I (0A, 6I)	Expedite	Respondent
Iron Metal Castings from India	101%	0%	A	A	A	A	A (6A, 0I)	Full	
Iron Constr. Castings from Canada	0%	0%	I-Full I-Full	I-Full	I-Full	I-Full	I (0A, 6I)	Full	
Iron Constr. Castings from Brazil	0%	0%	I-Full I-Full	I-Full	I-Full	I-Full	I (0A, 6I)	Full	
Iron Constr. Castings from China	0%	0%	I-Full I-Full	I-Full	I-Full	I-Full	I (0A, 6I)	Full	
Heavy Iron Constr. Castings from Brazil	0%	0%	I-Full I-Full	I-Full	I-Full	I-Full	I (0A, 6I)	Full	
Sebacic Acid from China	0%	0%	I-Exp I-Exp	I-Exp	I-Exp	I-Exp	I (0A, 6I)	Expedite	Respondent
Barbed & Barbless Wire from Argentina	0%	0%	I-Exp I-Exp	I-Exp	I-Exp	I-Exp	I (0A, 6I)	Expedite	Respondent
Frozen Orange Juice from Brazil	0%	0%	NP	I-Exp	I-Exp	I-Exp	I (0A, 5I)	Expedite	Respondent
Live Swine from Canada	55%	41%	A	A	A	A	A (5A, 0I)	Full	
Total			11A, 10A, 9A, 21I 19I 20I	11A, 20I 12A, 19I	10A, 21I	10A, 21I	11A, 20I	21Full, 10 Exp	

A=Adequate, *I*=Inadequate
NP = Not Participating

**Confidential Data

* Exact data confidential. Producer counts derived from parties' submissions and Commission publications

Source: ITC Case Files

The second circumstance in which the ITC has stated it may exercise its discretion to conduct a full review notwithstanding inadequate group responses is when there are significant like product issues. It is important that like product issues be considered carefully in sunset reviews, since market conditions and decision-makers will often have changed since the original determination or, in the case of transition reviews, like products in reviews that have been grouped together may be somewhat different. The "like product circumstance" has been invoked by the ITC in several recent adequacy determinations involving differences in like products across reviews that have been grouped together and where changes in the market since the original order(s) were imposed have led some Commissioners to believe that the original like product definition(s) may have to be altered.¹¹⁹ The basic rationale behind the "like product circumstance" is that, typically, there will be insufficient information on the record in an expedited review to deviate significantly from the like product and domestic industry definitions used in the original investigation. Since changes in like product definitions can be outcome dispositive, the belief is that it may be appropriate to proceed to a full review where there are significant like product considerations. Such a belief seems reasonable on its face but nevertheless raises an important concern.¹²⁰ The like product issue represents an

119. See, e.g., *Elemental Sulfur*, *supra* note 21 (statement of Chairman Bragg) (explaining her decision to proceed to a full review based on a fundamental ambiguity regarding the like product used in the original determination); *Sugar from Five Countries*, *supra* note 98, at 1-3 (statement of the Commission). With Commissioners Crawford and Askey dissenting, the Commission majority's decision was to proceed to a full investigation in all grouped reviews based in part on the significant like product issues raised by the differences in like products among the grouped reviews. See *id.*

120. It may be appropriate to proceed with a full review, for example, when the Commission is contemplating a possible expansion of the original like product, since an expansion of the like product to include other products can also lead to an expansion of the class of domestic interested parties. Though such an expansion would not be inconsistent with the statute, it might be damaging to domestic interested parties both by diluting the effect of imports and by the lack of notice to that portion of the industry producing in the expanded part of the like product definition. A decision by the ITC to expand the like product in an expedited review would not typically be made until the final determination is made. Since the ITC's notice of initiation typically relies on the like product definition from the original investigation, the "potential" domestic interested parties are not asked by the notice

instance where the ITC has exercised its discretion to proceed to a full review based on a perceived lack of information regarding what the appropriate like product is, despite determining that one or both groups responded inadequately.¹²¹ Though perhaps appropriate in the context of some like product questions, it raises the possibility that discretion to proceed to a full review, notwithstanding a finding that interested party responses are inadequate, will be exercised based on a broader principle of the "need" for or likelihood of receiving additional information. This seems inappropriate since it is the lack of information, i.e., inadequate responses, that is the statutory premise for conducting expedited reviews.¹²² At least one Commissioner has voted to proceed to a full review, notwithstanding inadequate group responses, based on a perceived need for additional information unrelated to like product issues.¹²³ This appears to be the minority view,

to respond and, by not responding, are denied the right to review and comment. Therefore, it is unlikely that the "newly created" domestic interested parties will have an opportunity to defend their interests in expedited review where the like product is expanded. A decision to proceed to a full review, while not eliminating this problem, allows for additional time to consider like product questions and for potential domestic interested parties to submit information and participate.

121. The Commission's Notice of Institution contains only an optional like product question requesting that responding parties state whether they agree with the original definition of domestic like product and domestic industry, and if not, explain why and provide alternative definitions. No provision is made to provide data for alternative definitions. See ITC, Rules of Procedure and Practice, *supra* note 6, 63 Fed. Reg. at 30,610 (stating that the Commission's Notice of Institution contains only an optional question requesting that responding parties state whether they agree with the original definition of domestic like product and the domestic industry).

122. Under the statutory scheme and the legislative history, interested parties must show a sufficient willingness to participate and to submit requested information to warrant a full review. See discussion *supra* Part II. If interested parties provide inadequate responses, it is an indication that they do not have sufficient interest in a particular review to warrant conducting a full review. In these circumstances, the Commission would logically be expected to conduct an expedited review. Although the possibility exists that the Commission would obtain more information if it conducts a full review, it is the lack of information due to inadequate responses that is the premise for conducting an expedited review.

123. See Greige Polyester Printcloth from China, *supra* note 94, at 1 (statement of Commissioner Koplan). Commissioner Koplan believed that conducting a full review would better enable him to assess the likely impact of a textile trade agreement between China and the United States if the order were revoked and would help resolve any apparent discrepancies concerning the volume of subject imports. See *id.* In two other reviews:

however, since in each such instance, the majority has voted to proceed to an expedited review.¹²⁴

An examination of ITC adequacy voting patterns shows that the ITC has been in greater disagreement, relative to individual and group adequacy determinations, over when to expedite a review when one or both groups have provided inadequate responses. As shown in Table 5 above, for all reviews initiated between July 1998 through December 1998, there are twenty instances in which a majority of Commissioners have determined that the respondent group response was inadequate.¹²⁵ The Commission resolved to expedite the review based on the inadequate respondent group response in ten of twenty instances, seven of which were unanimous votes.¹²⁶ In the remaining ten instances, however, the Commission voted to proceed to a full review, in divided votes in each instance, despite the inadequate respondent group response. On the domestic side, the Commission found domestic group responses to be inadequate in five reviews.¹²⁷ One of these reviews was expedited on a divided vote. The other four reviews proceeded to full reviews on evenly split votes. Overall, the ITC has expedited ten of thirty-one reviews, nine of which were based on respondent inadequacy and one on inadequate responses by both groups. Of the twenty-one ITC reviews that proceeded to full reviews, the ITC found that ten of them had inadequate responses by one or both groups.

Commerce has expedited twenty-six of the thirty-two reviews proceeding beyond the initial review stage, all of which were, by virtue of Commerce's procedures, based on respondent group inade-

[Commissioner Koplan] voted to conduct a full review in these investigations in order to be able to consider information excluded from the record because it was untimely filed. Specifically, in both investigations, a response to our notice of institution filed on behalf of a large domestic producer was rejected because it was filed one business day late.

Sorbitol, *supra* note 78, at 1; *Anhydrous*, *supra* note 98, at 1 (statement of Commissioner Stephen Koplan) (explaining his view on adequacy for this case and *Sorbitol*).

124. *See id.*; *see also supra* Tables 4 and 5, at pp. 1320-23.

125. *See supra* Table 5, at pp. 1322-23.

126. *See id.*

127. *See supra* Table 4, at pp. 1320-21.

quacy.¹²⁸ Thus far, there has not been an instance where Commerce proceeded with a full review for its portion of the investigation and the ITC decided to expedite its portion.¹²⁹

Finally, the adequacy voting structure adopted by the ITC increases the likelihood of proceeding to full reviews. Under the three-stage system, a Commissioner's vote to expedite a review based on a given group's inadequacy only counts if it is part of a majority of Commissioners that agree on the inadequacy of that particular group response.¹³⁰ This structural bias is best illustrated in the adequacy voting data, as presented in Table 2 above. Table 2 indicates that the Commission as a whole has voted to expedite fifty percent of those cases in which it found one or both groups inadequate. An examination of individual Commissioner votes, however, shows that Commissioners voted to expedite in seventy-five percent of the cases in which they found one or both groups to be inadequate.¹³¹

128. See *supra* Table 3, at 1305.

129. Such a scenario would create a dilemma for the ITC, since it would have to base its final determination without the benefit of a "likelihood of dumping" finding by Commerce.

130. The statute and legislative history provide no direction regarding tie votes on the decision to expedite. Absent guidance, the Commission has adopted the practice that a majority of the Commission must be in agreement to vote to expedite based on inadequacy of one or both groups. For example, if three Commissioners vote to expedite a review based on domestic group inadequacy only, and the other three Commissioners vote to expedite based on respondent group inadequacy only, this review fails to meet the majority required to expedite the review, despite a total of six votes to expedite. Only if four Commissioners agree as to a particular group's inadequacy and vote to proceed to an expedited review based on that group's inadequacy can a review be expedited. See *supra* note 100 (describing the Commission's voting practices).

131. There has been some disagreement among Commissioners at the ITC as to how to implement the adequacy voting at the ITC. The ITC settled on a three-stage approach. Two Commissioners, however, have openly questioned whether the adequacy assessment procedures adopted by the ITC are an accurate reflection of the statute. In *Elemental Sulfur*, Commissioner Askey notes that "the group adequacy approach adopted by the Commission to decide whether or not interested party responses are adequate to warrant full sunset review is not suggested by the Uruguay Round Agreements Act (URAA) or the Statement of Administrative Action (SAA)." *Elemental Sulfur*, *supra* note 21, at 5 n.5. Commissioner Crawford "concurs with Commissioner Askey that the multi-step 'group inadequacy' voting process recently adopted by the Commission to decide whether to expedite a review does not reflect the statute." *Id.* at 5 n.6. Both Commissioners believe the relevant decision is whether or not to expedite a review. By requiring a sequential

V. EVALUATION OF ADEQUACY PRACTICES AT COMMERCE AND THE ITC

Although both agencies are under the guidance of the same statutory language, there are stark differences in how the two agencies have chosen to implement their adequacy determinations and in the transparency of their respective processes. The ITC has vague criteria for assessing individual adequacy, but has relatively clear criteria for assessing group adequacy and for deciding when to conduct a full review in spite of an inadequate group response finding. The ITC places roughly the same information burdens on individual domestic and respondent interested parties, and uses the same basic criteria and thresholds for its analysis of each group's adequacy.¹³² It does not render automatic judgments under any stated circumstances and has no discernible burden of persuasion on either interested party group at the adequacy stage. Though some ITC practices can be viewed as favoring one side or the other, there is no pattern of unequal treatment.¹³³

three-stage voting procedure, a Commissioner may not be able to exercise his or her right to vote to proceed to an expedited review unless he or she is in a group of majority Commissioners finding a particular group response to be inadequate.

132. During the ITC's rulemaking comment process, some commentators that have traditionally represented domestic interests before the ITC expressed their interest in a two-stage system for submitting information in ITC reviews which are ultimately expedited. See Comments on the Commission's Notice of Proposed Rules, Dec. 22, 1997, submitted by Eugene L. Stewart of Stewart & Stewart, at 9-11; Rebuttal Comments Regarding the Commission's Notice of Proposed Rules, Jan. 22, 1998, submitted by Eugene L. Stewart of Stewart and Stewart, at 6-7. They proposed that interested parties be allowed to submit an abbreviated response to the notice of institution, and if the Commission decides to expedite the review, submit more detailed responses with data relevant to final review determinations. This was rejected by the ITC in favor of a schedule that creates incentives for parties to disclose early in the process their willingness to participate in a given review. This single submission mechanism prevents parties from manipulating the system by sandbagging opponents. One observer, however, has noted that the system chosen by the ITC might be inconsistent with the United States' WTO obligations. See Larry Walders, Transcript of *The Past and Future of Sunset in Anti-Dumping*, in *SHEDDING LIGHT ON ANTIDUMPING*, *supra* note 23, at 62. Walders notes that expedited review procedures which cut off the ability of parties to present information that is relevant to a decision on revocation may in effect deny a member country its right to a full sunset review. See *id.*

133. Some ITC practices can work in favor of respondent interested parties. For example, invocation of the mixed responses circumstance in grouped reviews pro-

Commerce provides relatively less guidance regarding its analysis of adequacy. It has one stated criterion for assessing individual adequacy and simple criteria for group adequacy. There is, however, no guidance as to its exercise of discretion in conducting either an expedited or full review when the respondent group response is inadequate beyond the "normally proceed to an expedited review" language. Commerce places highly unbalanced information burdens on domestic and respondent interested parties, and uses different criteria and thresholds for its analysis of the adequacy of each group's responses. The Commerce procedures also raise a question regarding whether there is some form of a burden of persuasion on one side or the other in sunset reviews, since the consequences of not responding to Commerce's notice of initiation are different for most domestic and respondent interested parties.

There are only two circumstances in which the statute sanctions automatic judgments against interested parties in sunset reviews. The first is an automatic judgment by Commerce against domestic interested parties when there is no initial response by any domestic interested party.¹³⁴ The second is an automatic judgment by Commerce against respondent interested parties that elect to file "waiver of participation" notices with Commerce.¹³⁵ Commerce's interim rules,

vides non-responding respondent interested parties with an opportunity to avoid an expedited review in which their interests are not represented. Moreover, ITC rules in one sense give more chances to respondents, since United States importer, exporter, or foreign producer groups can all respond independently on behalf of respondents, whereas domestic interested parties have essentially two options: producers or workers representing production. On the other hand, there are advantages to domestic interested parties as well. Domestic unions can serve as proxies for producers, without the same information burdens to the extent the requested data is not available to them. Further, it could be argued that equal requests from domestic and respondent interested parties for purposes of assessing adequacy is not entirely appropriate since foreign producers are typically not required to provide as much information as their domestic counterparts, e.g., financial data, in full reviews.

134. See 19 U.S.C. sec. 1675(c)(3)(A) (amended 1994) (stating that if no domestic interested party responds to the notice of initiation, Commerce will revoke the order). Commerce considers inadequate substantive domestic responses and, at Commerce's discretion, responses by related parties to be equivalent to no response. See *supra* note 63.

135. See 19 U.S.C. sec. 1675(c)(4)(B) (amended 1994) (stating that if any respondent interested party waives its participation, Commerce shall make an affirmative determination with respect to that respondent interested party). Commerce regulations pertaining to sunset reviews state that any respondent interested

however, expand the application of such automatic judgments or presumptions against respondent interests to areas outside those provided by the statute and, in one instance, the legislative history. First, when a respondent interested party fails to respond at all or fails to provide an individually adequate, substantive response to its notice, Commerce treats the lack of a response from that respondent interested party as equivalent to a waiver of participation and therefore makes an automatic affirmative judgment with respect to that respondent interested party.¹³⁶ The end result is that anything less than a substantially complete individual response by a respondent interested party results in an automatic judgment against that party. Neither the statute nor the legislative history directs Commerce to engage in such a practice. Second, consistent with the legislative history,¹³⁷ Commerce interim rules state that Commerce will “normally” render an affirmative judgment against all respondent interested parties in a countervailing duty review if the relevant foreign government fails to respond adequately or at all. This rule is applied even if all respondent interested parties, except the foreign government, file individually adequate responses with Commerce.¹³⁸ They are treated as if they had not responded at all.¹³⁹ Domestic interested

parties have the right to “waive” their participation in a sunset review before Commerce. See 19 C.F.R. pt. 351.218(d)(2)(i) (1998).

136. See 19 C.F.R. pt. 351.218(d)(2)(iii) (1998).

137. See H.R. DOC. NO. 103-316 (1994), at 881; S. REP. NO. 103-412, at 46 (1994); H.R. REP. NO. 103-826, at 57 (1994).

138. See 19 C.F.R. pt. 351.218(d)(2)(iv) (1998) (explaining the effects of various responses to initiation of sunset review by parties). Commerce states that if a foreign government waives participation, whether explicitly by letter or implicitly by an inadequate or no response, Commerce will “normally” make an affirmative determination for *all* respondent interested parties. Thus, even if all non-government respondent interested parties respond adequately in a countervailing duty review, Commerce will normally make an affirmative finding against all of them if the foreign government does not respond adequately. See *id.* (explaining adequacy requirements for respondent interested parties and the foreign government and the effects of their responses on the outcome of the adequacy finding). In those exceptional CVD cases where the foreign government does not respond and an automatic judgment is not immediately rendered, Commerce is instructed to ignore all information provided by any responding respondent interested parties and to “rely on evidence provided by the domestic industry.” H.R. DOC. NO. 103-316, at 880 (1994).

139. It is not clear whether such automatic judgments against respondent interested parties are contemplated under the WTO Antidumping Agreement. Nowhere

parties face no such catch all provisions or automatic adverse judgments, as long as at least *one* responds with an initial notice of intent to participate and at least one subsequently submits a substantive response.¹⁴⁰ The relative treatment by Commerce of domestic and respondent interested parties, although in part consistent with the Statute and the legislative history, may provide some basis for the criticism often heard among outside observers that Commerce's procedures are sometimes biased in favor of the domestic industry.¹⁴¹ It is not clear that respondent interested parties gain very much by participating in Commerce reviews and avoiding automatic judgments. The statute, the legislative history, and Commerce rules make it highly likely that Commerce will find a likelihood of dumping and will simply rely on the results of the original investigation.¹⁴² Commerce will probably arrive at the same conclusions regardless of foreign participation.¹⁴³ In light of this and the high information burden

in the WTO Antidumping Agreement does it state that agencies may make automatic judgments against non-responding or, for that matter, responding parties in sunset reviews. Both the WTO Antidumping Agreement and the statute provide for judgments against interested parties based on the facts available in a review, which under United States law includes the use of the "adverse inferences" clause under the United States statute, if an interested party does not provide necessary information. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, *supra* note 12, arts. 6.6, 6.8, 11.4; 19 U.S.C. sec. 1675(c)(3)(B) (1994); 19 U.S.C. sec. 1677e (amended 1994). This is not, however, license to render automatic judgment. Even judgments based on "facts available" require analysis of those facts before rendering judgment.

140. The WTO Antidumping Agreement does not impose a burden of proof on either side in reviews that are self-initiated by "the authorities" (national governments). In contrast, when a review is requested by any interested party, it must submit "positive information substantiating the need for a review." Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, *supra* note 12, art. 11.2. Section 751(b) of the Tariff Act of 1930 as amended (Changed Circumstances Reviews) satisfies the latter obligation. See 19 U.S.C. sec. 1675b (amended 1994).

141. See, e.g., *Down in the Dumps*, ADMINISTRATION OF THE UNFAIR TRADE LAWS (Richard Boltuck and Robert Litan eds., 1991)

142. See 19 C.F.R. pt. 351.218(e)(2)(i) (1998) ("[O]nly under the most extraordinary circumstances will the Secretary [of Commerce] rely on a countervailing duty rate or a dumping margin other than those it calculated and published in its prior determinations.").

143. See Michael O. Moore & Michael H. Stein, *The Past and Future of Sunset in Anti-Dumping*, in SHEDDING LIGHT ON ANTIDUMPING, *supra* note 23, at 1 (explaining that there are only a few circumstances in which Commerce could make a

on respondent interested parties,¹⁴⁴ there is a clear incentive for respondent interested parties to forego participation at Commerce. In fact, most respondent interested parties have simply not responded in the majority of reviews initiated to date. As can be seen in Table 1, only nine responses from respondent interested parties have been received to date.¹⁴⁵

CONCLUSION

There are several major points that emerge in this article. First, while there are structural similarities in the general approach each agency takes in assessing adequacy, there are significant differences in their application. Second, the ITC rules and practices are biased in favor of proceeding to full reviews while Commerce practices are biased in favor of proceeding to expedited reviews. Commerce has expedited two-and-one-half times as many reviews as the ITC. Third, the evidence suggests that the standards for individual adequacy are relatively easy to meet at both agencies. Both agencies have found

negative finding).

144. One participant at the *Brookings Conference* commented that the agencies are likely to impose large information burdens on the parties "in the hope that the parties will decide that it is too expensive." See Michael Stein, Transcript of *The Past and Future of Sunset in Anti-Dumping*, in SHEDDING LIGHT ON ANTIDUMPING, *supra* note 23, at 18. In his prepared remarks delivered at the November 1997 *Brookings Conference*, Michael H. Stein stated that the sunset provision makes antidumping investigations more expensive and discourages use of the antidumping statute by domestic parties. See Outline of Remarks, in SHEDDING LIGHT ON ANTIDUMPING, *supra* note 23, at 1. Another option for respondent interested parties seeking revocation of an order by Commerce is to request periodic reviews by Commerce of dumping margins. If Commerce finds zero margins for three years in a row, as well as the far more difficult to meet test of "no likelihood that dumping will recur," then the order may be revoked. Otherwise, the order remains in place. In contrast, in sunset reviews Commerce must demonstrate that there is a likelihood that dumping will continue or recur, otherwise the order is revoked. The "no likelihood" standard would appear to be a higher standard than "likelihood of dumping" in the sense that "no likelihood" is more difficult to prove. In practice, given the procedural biases described above, sunset reviews at Commerce may lead to relatively fewer revocations, notwithstanding the lower "likelihood of dumping" standard.

145. The overall differences in the sunset review procedures between Commerce and the ITC are in part why several participants at a November 1997 conference discussing the then-upcoming sunset reviews said that the ITC is "where the action is going to be." Transcript of *The Past and Future of Sunset in Anti-Dumping*, in SHEDDING LIGHT ON ANTIDUMPING, *supra* note 23, at 19, 29, 87.

nearly all responses by domestic and respondent interested parties to be adequate to date. Fourth, both agencies have adopted numerical thresholds for representation of responses as the primary focus of their group adequacy analyses. Moreover, where parties have responded, both agencies have found most group responses to be adequate. Fifth, the ITC appears to have relatively balanced practices in assessing the adequacy of domestic and respondent interested party responses, while Commerce practices appear to favor the domestic industry. Sixth, expedited reviews at both agencies have been based primarily on respondent group inadequacy. At the ITC, Commissioners have been less than unanimous in their determinations whether to expedite or proceed with a full review when one or both group responses are found to be inadequate. Of the ten reviews expedited by the ITC, nine were based upon respondent group adequacy alone and the tenth on inadequate responses by both groups. Alternatively, Commerce has expedited every review in which it has found the respondent group response to be inadequate. Seventh, there is a lack of full transparency at Commerce and to a lesser extent at the ITC regarding their adequacy practices which creates uncertainty for parties attempting to participate in sunset reviews. Finally, the early rates of revocation have been fairly high, but are slowing down as the oldest orders are cleared out.¹⁴⁶

146. By comparison, Canada's overall revocation rate in its sunset reviews by the Canadian International Trade Tribunal ("CITT") when it first started its reviews in the 1980s was about fifty percent, but later dropped to about thirty percent a year. See *Transcript of The Past and Future of Sunset in Anti-Dumping*, *supra* note 145, at 231 (comments of Kathleen MacMillan). Even higher rates of "sunset" revocations, seventy-three percent, were reported by another historically large user of antidumping laws, the European Union. See *id.*; Horlick, *supra* note 23, at 5-7 (discussing the occurrence rates of sunset reviews).