UNITED STATES – ANTI-DUMPING MEASURES ON OIL COUNTRY TUBULAR GOODS FROM MEXICO
(DS282)

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

June 18, 2004

Questions to United States:

> ***Q21. At paragraph 146 of its first submission, the United States asserts that "U.S. law also provides for an additional review mechanism, an administrative review on a company-specific basis, which goes beyond the WTO obligations of the United States." Assuming that such reviews are not required under the WTO AD Agreement, could the United States indicate whether it has any obligations under the WTO AD Agreement in the conduct of such reviews and the resulting determinations, and if so, what those obligations are?***

1. The only issue considered and decided in a company-specific revocation proceeding is whether or not to revoke the duty with respect to a particular company. Because Article 11.2 of the AD Agreement does not require company-specific proceedings and determinations, the decision of the United States to conduct such a proceeding cannot give rise to any obligations under the AD Agreement with respect to how such proceedings are conducted or the resulting determinations. More specifically, because there is no obligation to revoke on a company-specific basis, a determination not to revoke an order with respect to a particular company can not be inconsistent with the AD Agreement, regardless of what requirements are established to initiate the proceeding, what procedures are followed, or what factors are considered in making the decision. We are not suggesting that Members can avoid obligations in the AD Agreement to conduct certain proceedings by establishing other proceedings that are not required. The United States, in fact, fulfills its obligations in the AD Agreement by providing for order-wide revocation proceedings conducted in accordance with the obligations in Article 11 of the AD Agreement. Because nothing more is required, however, no *additional* opportunities for revocation that authorities may provide can give rise to any breach under the AD Agreement. By doing more than is required under the Agreement, a Member does not create for itself obligations that do not otherwise exist.

> ***Q22. Could the United States indicate whether the right under US law to request a company-specific annual review of the amount of the duty (annual administrative review), and to request revocation in the context of such reviews, may be exercised concurrently with the right to request the revocation review required to be provided for by Article 11.2 of the AD Agreement?***

2. Yes. In conjunction with an annual administrative review, Commerce can also examine whether the measure as a whole remains necessary or whether it should be revoked, provided that such an examination is "warranted." Specifically, such an examination can be made in accordance with either section 351.222(b)(1) or section 351.222(g) of Commerce's regulations. With respect to the fourth review of the order on OCTG from Mexico, however, no interested party requested such an examination, and no demonstration was made that such an examination was warranted. To the contrary, TAMSA and Hylsa each requested only company-specific revocation.[1] This choice on the part of the requesting companies ensured that, if TAMSA and/or Hylsa were to achieve revocation from the antidumping order, the benefit would be restricted to that party or parties, rather than being extended to other Mexican competitors in the U.S. OCTG market.

Q23. Could the United States indicate how often, in Commerce's experience since the coming into force of the WTO Agreement, Article 11.2 "changed circumstances" reviews have been requested together with, or in addition to, the "non-WTO" company-specific reviews provided for under US law?

3. Nothing in U.S. law prohibits one or more interested parties from requesting a changed circumstances review with, or in addition to, the company-specific revocation reviews provided for under section 351.222(b)(2) of Commerce's regulations. In Commerce's experience, however, companies do not normally request both a company-specific revocation proceeding and an order-wide changed circumstance review. Instead, such parties normally seek either one or the other. Unless a company has a domestic monopoly on exports to the United States of the product covered by an antidumping order, for example, it is often in that company's business interest to seek company-specific revocation. In addition to the companies that have achieved revocation under section 351.222(b), many Article 11.2 changed circumstances reviews have been requested to consider whether an order should be revoked entirely and have resulted in such revocations.

Q24. How does the analysis set forth in the SPB, quoted in paragraph 94 of Mexico's first submission and paragraph 96 of the US first submission, reconcile with the statement of the Appellate Body in United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan ("US – Corrosion-Resistant Steel Sunset Review "), WT/DS244/AB/R, at paragraph 105 that "[t]he likelihood determination is a prospective determination. In other words, the authorities must undertake a forward-looking analysis and seek to resolve the issue of what would be likely to occur if the duty were terminated."

[1] *See* U.S. First Written Submission, para. 150 and the exhibits cited therein.

4. There is no discrepancy between the analytical guidance outlined in the *Sunset Policy Bulletin* and the findings of the Appellate Body in *Japan Sunset*. As the Panel in *Japan Sunset* noted, "to the extent it will rest upon a factual foundation, the prospective likelihood determination will inevitably rest upon a factual foundation relating to the past and present."[2] The United States agrees, believing that past behavior is indicative of future behavior. In predicting whether dumping is likely to continue or recur, Commerce begins with an assessment of whether companies subject to the order have been able to participate meaningfully in the market without dumping. If they have been unable to do so – either they have continued to have margins during the life of the order or their exports have dropped significantly – then this actual behavior is evidence of what future behavior may be if the order is terminated.

5. In *Japan-Sunset* the Appellate Body further stated "[w]e see no problem, in principle, with the United States instructing its investigating authorities to examine, in every sunset review, dumping margins and import volumes. These two factors will often be pertinent to the likelihood determination . . . ."[3] The Appellate Body in *Japan-Sunset* found that evidence of past behavior, in that case dumping margins and depressed import volumes, can form an adequate basis for an affirmative likelihood determination under Article 11.3.[4] Accordingly, here, Commerce's examination of all the record evidence, including import volumes, is pertinent and supports Commerce's affirmative likelihood determination.

Q25. Regarding paragraph 99 of the US first submission, could the United States explain how Commerce can evaluate whether exporting firms are "capable of competing fairly" if the determination is based solely on the volume of the imports?

6. Paragraph 135 of the U.S. first submission refers to a determination made "solely" on the volume of the imports, but that statement was intended to indicate that, in this case, Commerce did not rely on the existence of dumping margins in concluding that dumping was likely to continue or recur. As is clear from that paragraph, the statement was not intended to indicate that this was the only evidence examined. Commerce evaluates all of the evidence on the record to assess whether firms are "capable of competing fairly." In this case, the evidence on the record indicated that the drop in import volumes indeed meant that dumping was likely to continue or recur.

Q26. In paragraph 112 of its first submission, the United States asserts that "Commerce may depart from its policy bulletin in any particular case so long as it

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[2] *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R (*"Japan Sunset Panel"*), para. 7.279.

[3] *See United-States Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan,* WT/DS244/AB/R, adopted January 9, 2004 *("Japan Sunset AB")*, para. 175.

[4] *Japan Sunset AB*, para. 205.

explains the reasons for doing so". Could the United States provide examples of sunset reviews where Commerce has departed from the policy bulletin?

7. In fact, there are few sunset reviews where interested parties have submitted argument and information concerning factors other than historical dumping margins and import volumes. In *Canada-Sugar*, however, Commerce did not base its likelihood determination on dumping margins or import volume data. Rather, it based the final affirmative likelihood determination on a dumping calculation using production costs, pricing data, and other information (some current, some predicted) submitted by the interested parties. The *Canada-Sugar* sunset review is discussed more fully in the U.S. response to Panel question 31 below.

8. In addition, in the sunset review of *Brass Sheet and Strip from the Netherlands,* Commerce had preliminarily made a negative likelihood determination because the exporter argued convincingly that its newly acquired U.S. subsidiary (which produced the subject merchandise) and its unique position in the U.S. market served to explain why the exporter did not have pre-order levels of imports since imposition of the order. Although Commerce ultimately made an affirmative likelihood determination based on additional evidence, this case serves to illustrate that the likelihood of dumping analysis undertaken by Commerce may include more than dumping margins and import volume data when information regarding other factors is submitted by an interested party in a sunset review.

Q27. What is the relevance of the margin reported by Commerce to the ITC in the determination of likelihood of continuation or recurrence of injury?

9. The "margin likely to prevail" is a construct of U.S. law. Section 752(c)(3) of the Act directs that Commerce "shall provide" to the ITC a "margin likely to prevail" in the event of revocation. Section 752(a)(6) of the Act, however, provides that the ITC "may consider" the "margin likely to prevail" in making the likelihood of continuation or recurrence of injury determination. Thus, the statute leaves it to the ITC's discretion whether to consider or use the reported likely margin in its analysis.[5]

10. The "margin likely to prevail" has not been used in any degree as a basis for the determination whether it is likely dumping will continue or recur if the order were revoked. Rather, Commerce has first made the likelihood determination, then determined the "margin likely to prevail" in the event of an affirmative order-wide likelihood determination.

Q28. Is the Panel correct in its understanding that a single company can, under applicable US law and regulations, request order-wide revocation? If so, can such order-wide revocation be requested by a single company only in the context of a

[5] *See* SAA at 890-91 (Exhibit MEX-26).

changed circumstances review, or can it be requested by a single company in the context of a periodic review of the amount of duty (annual administrative review)?

11. Yes, a single company can, under U.S. law and regulations, request order-wide revocation under section 351.222(g) of the regulations (changed circumstances review). Furthermore, a single company can request order-wide revocation, pursuant to section 351.222(b)(1) of the regulations, in the context of a request for an annual assessment review. Normally, however, an order-wide request under section 351.222(b)(1) would only occur if the industry in the exporting country consisted of a single company or group of companies. Like requests for company-specific revocation, such requests must comply with the terms of section 351.222(d) and (e) of the regulations.[6] In the course of considering a request for order-wide revocation under section 351.222(b)(1), Commerce would have to consider "[w]hether all exporters and producers covered at the time of revocation by the order or the suspension agreement have sold the subject merchandise at not less than normal value for a period of at least three consecutive years; and [w]hether the continued application of the antidumping duty order is otherwise necessary to offset dumping."

Q29. Could the United States explain the status of the Sunset Policy Bulletin under US law, and its role and function in the conduct and determination of sunset reviews?

12. Under U.S. law, the *Sunset Policy Bulletin* is a non-binding statement that provides the general understanding of Commerce's Assistant Secretary for Import Administration of issues not expressly addressed by the sunset review statute and regulations. The Assistant Secretary is the decision-maker at Commerce for antidumping and countervailing duty cases.

13. The *Sunset Policy Bulletin* does nothing other than provide guidance as to how the Assistant Secretary anticipates exercising the discretion provided in the statute and its regulations (and the Antidumping Agreement). Neither the Assistant Secretary nor Commerce as a whole is bound to follow the guidance in the *Sunset Policy Bulletin.* By contrast, under U.S. law, Commerce is bound to follow the requirements of statutes and regulations.

14. Significantly, the *Sunset Policy Bulletin* was issued prior to the actual conduct of any sunset reviews – in other words, it was issued before the public could draw guidance from how Commerce had already conducted these reviews. Recognizing that the statute provided Commerce with discretion that could be exercised in a number of ways, the Assistant Secretary considered it useful, as a matter of transparency, to provide the public with guidance on his thinking with respect to a variety of issues, in light of the lack of case results that would typically provide such guidance. Its role and function in the conduct and determination of sunset reviews

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[6] *See e.g., Notice of Preliminary Results of Antidumping Duty Administrative Review and Intent to Revoke Order: Brass Sheet and Strip from the Netherlands*, 64 FR 48760 (September 8, 1999) and *Notice of Final Results of Antidumping Duty Administrative Review and Intent Not to Revoke Order: Brass Sheet and Strip from the Netherlands*, 65 FR 742 (January 6, 2000) (Exhibit MEX-62).

is to provide interested parties with a guide as to how Commerce may evaluate certain facts and therefore to provide those parties with an opportunity to anticipate and respond to what Commerce "may" or "normally will" do. It also provides a convenient reference point for the Assistant Secretary when making decisions that follow the principles set forth in the *Sunset Policy Bulletin*, in lieu of restating in each decision the logic underpinning the principles set forth in the *Sunset Policy Bulletin*.

15. It should be noted that if there were no *Sunset Policy Bulletin,* the results of each sunset review would be the same; the *Sunset Policy Bulletin* and the decision in each review reflect the Assistant Secretary's thinking – the *Sunset Policy Bulletin* does not dictate the Assistant Secretary's thinking in general or in a particular review.

Q30. Could the United States please provide a table or chart setting forth all the "review" provisions of US law, with a reference for each as to what provisions of the AD Agreement, if any, each such provision is intended to implement?

16. Attached as Exhibit US-28.

Q31. The Panel notes that, in the Canada-Sugar sunset review, the Department of Commerce appears to have estimated a future dumping margin and taken that into account in concluding that Canadian producers could not sell in the US market without dumping and that therefore there was a likelihood of continuation or recurrence of dumping. Could the United States explain why a similar analysis was not undertaken in the case at hand, where it appears that the United States was the largest single market for OCTG in the world, with relatively higher prices than other markets, which would seem to indicate that dumping in the US market was not likely?

17. In the *Canada-Sugar* sunset review, interested parties, both domestic and respondent, submitted argument and factual information concerning the likelihood that Canadian producers could sell sugar in the United States without dumping if the duty were to be removed. This factual information and analysis concerned, *inter alia*, the respondent interested party's costs for producing the subject merchandise, pricing data from the respondent interested party, the U.S. Sugar program's two-tiered tariff-rate-quota system, and an analysis of past and future world sugar prices.[7]

18. Interested parties, both domestic and respondent, have submitted additional factual information in only a handful of sunset reviews, even though Commerce's *Sunset Regulations* provide for the submission of argument and factual information concerning the likely effects of

[7] *See Final Results of Full Sunset Review: Sugar and Syrups from Canada*, 64 Fed. Reg. 48362 (September 3, 1999) (Exhibit MEX-62).

revocation and for the submission of any other information an interested party may choose to submit.[8] Notwithstanding the handful of other sunset reviews in which additional information was submitted, the *Canada-Sugar* sunset review is unique with respect to the volume and complexity of the additional information, analysis, and argument supplied by the interested parties in that sunset review.

19. In the sunset review of OCTG from Mexico, none of the interested parties availed themselves of the opportunities to provide such information or to make any arguments regarding the market conditions for OCTG in the United States. Therefore, there was no basis in this case to conduct an analysis like that undertaken in *Canada-Sugar*.

Q32. The Panel notes that statement of the United States at paragraph 246 of its submission that

> ***"(i) "material injury," (ii) "threat of material injury," (iii) "material retardation of the establishment of a domestic industry," and (iv) the likelihood of "continuation or recurrence of . . . injury" are each separate conditions, with separate elements, some of which are specified in the AD Agreement and some of which are implied. The drafters of the AD Agreement had the option of including the "likelihood of continuation or recurrence of injury" condition in footnote 9, but chose not to do so."***

Could the United States clarify whether, in its view, continuation or recurrence of injury is, in effect, another kind or category of injury? Further, could the Unites States explain whether, in its view, "injury" as used in Article 11.3, is conceptually the same as "injury" as defined in footnote 9 of the AD Agreement, and it is the concept of "continuation or recurrence" that distinguishes the Article 11.3 determination from a determination under Article 3?

20. Footnote 9 indicates that injury should be interpreted to include the three categories recognized in Article VI of GATT 1994 "unless otherwise specified." The contextual reference in Article 11.3 to the "continuation or recurrence of dumping and injury" constitutes such a specification.

21. Footnote 9 derives from the Article 3 heading "Determination of Injury." Consistent with the heading of Article 3, Article 3.1 begins by referring to "[a] determination of injury for purposes of Article VI of GATT 1994." In turn, Article VI of GATT 1994 contemplated only original determinations of dumping and injury. The requirement for investigating authorities to

[8] See section 351.218(d)(3)(ii)(F) and section 351.218(d)(iv)(B) of Commerce's *Sunset Regulations* (Exhibit MEX-25).

conduct sunset reviews was first imposed in the WTO Agreement, specifically by Article 11.3 of the AD Agreement. The "definition" of injury set out in footnote 9 lists the three types of injury that were recognized under GATT 1994: Present material injury, threat of material injury, and material retardation to the establishment of a domestic industry. *See* Article VI.1, GATT 1994 ("dumping . . . is to be condemned if it causes or threatens material injury to an established industry in the territory of a contacting party or materially retards the establishment of an industry").

22. While present injury, threat of injury, and material retardation are each a possible basis for establishing injury, for purposes of Article 3, each of those findings is different and involves, at least in part, some distinct considerations. For example, the requirements of Article 3.7 apply only to threat of injury determinations. The various categories of injury/injury determinations cannot be considered identical, with the one exception that any of the three findings can provide the basis, when combined with a finding of dumping, for the issuance of an antidumping duty order.

23. By providing a "definition" of injury, footnote 9 provides a concise shorthand that is used in place of restating in each applicable instance "material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry." The text of various provisions of the Agreement demonstrates, however, that the shorthand spelled out in footnote 9 is not intended to be substituted in every instance in which the Agreement uses the term "injury." If the shorthand provided by footnote 9 were extended to apply in every such instance, this would result in some obvious absurdities.

24. For example, Article 3.7, which discusses the criteria for a determination of threat of material injury, contains the language that "[t]he change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent." (Emphasis supplied). If one were to blindly apply the three-fold definition of injury set out in footnote 9, this sentence would come to mean that there can be a threat of a threat of material injury to the domestic industry, or a threat of material retardation to the establishment of a domestic industry. Such notions plainly are out of the purview of Article VI of GATT 1994 and would not form a sustainable basis for issuance of an original affirmative injury determination. The rote application of the footnote 9 definition of injury to Article 11.3 sunset reviews would create similar difficulties.

25. The text of the Agreement suggests that the determination contemplated by Article 3 is different from the determination contemplated by Article 11.3. It follows that the nature of the injury that is assessed in each respective type of determination reflects the same differences. Just as there are three types of injury findings that support a determination of injury in an original investigation, there is a fourth type of injury finding that supports a determination of likely continuation or recurrence of injury in a sunset review. Each of the three types of injury noted in footnote 9 is distinguished by various factors, including some with temporal dimensions. Thus, a determination of injury may be based on a finding of present material injury to an established domestic industry, an "imminent" threat of material injury to an established

domestic industry (see Article 3.7), or material retardation to the establishment of a new industry. The concept of "continuation or recurrence . . . of injury" addressed in Article 11.3 refers to a fourth type of analysis, one which is counterfactual in nature in that the investigating authorities look not to see if trends in economic factors and indices will continue or accelerate, but instead what the effect would be of changing a condition of competition, *i.e.*, the discipline imposed by the order.

Q33. If the United States accepts that "injury" as used in Article 11.3, is conceptually the same as "injury" as defined in footnote 9 of the AD Agreement, could it explain how it reconciles this view with the argument that neither threat of material injury nor material retardation of the establishment of a domestic industry can form the basis of a decision that there is a likelihood of continuation or recurrence of injury in a sunset review?

26. As discussed in response to question 32, the United States is of the view that "injury" as used in Article 11.3 is conceptually different from that addressed in Article 3.

Q34. The arguments of the EC in connection with the two "aspects " of US periodic assessment of duty proceedings appear to indicate that the EC considers those proceedings to be consistent with Article 9.3.1 of the AD Agreement insofar as they concern the assessment of duties on shipments during the period reviewed, but inconsistent with either Article 11.2, or Article 2, or both, insofar as they concern the establishment of a cash deposit rate for future shipments. Assuming this understanding is correct, could the United States explain its views with respect to this argument?

27. Consistent with Article 9.3.1 of the AD Agreement, as explained in the answer to question 30, Commerce conducts a periodic administrative review under section 751(a) of the Act for retrospective assessment to determine the final liability for antidumping duties after merchandise is imported. The amount of duties to be assessed is determined in a review covering a discrete period of time. Based on the actual shipments during the period of review, Commerce calculates an appropriate assessment rate for each customer or importer of subject imports during that period. In an administrative review, Commerce calculates the assessment rate on an importer-specific basis by dividing the aggregate of the dumping margins found on the export transactions (determined consistent with Article 2.4 of the AD Agreement) by the entered value of such merchandise for normal customs purposes. Commerce uses an aggregate of the producer/exporter specific results to set a new cash deposit rate for future shipments of subject merchandise into the United States.

28. In accordance with Article 11.2 of the AD Agreement, Commerce considers requests for revocation on an order-wide basis in the context of either a changed circumstances review or an administrative review. Order-wide revocation was not requested in the fourth review of OCTG

from Mexico; instead, TAMSA and Hylsa each requested a company-specific revocation under section 351.222(b)(2) of Commerce's regulations. Accordingly, as requested, Commerce only considered whether company-specific revocation, which is not governed by Article 11.2 of the AD Agreement, was warranted.

29. In this fourth review of OCTG from Mexico, Commerce conducted an administrative review to determine duties to be assessed on imports of the subject merchandise during the period of August 1, 1998, through July 31, 1999. The review was conducted consistent with the obligations in Article 9.3.1 and Article 2.4 of the AD Agreement, and Mexico has made no claims to the contrary.

30. Commerce will consider a company-specific revocation request, which is not required by the Agreement, during an administrative review rather than requiring a separate proceeding. By utilizing a single proceeding for two distinct inquiries, however, Commerce does not create obligations that do not exist in the Agreement. As discussed previously in response to question 21, because the Agreement does not require company-specific revocation, the United States is not in violation of its WTO obligations in considering a company-specific revocation request, regardless of whether it did so concurrently with an Article 9.3.1 assessment proceeding or in a separate proceeding.

31. Commerce's calculation of the cash deposit rate is part of its retrospective assessment process, which is the subject of Article 9.3.1, not Article 11.2. The EC's attempt to base an argument about the calculation of cash deposits on Article 11.2 is entirely without foundation. Nothing in Article 11.2, which is the sole basis for Mexico's claim, has any bearing whatsoever on setting cash deposits in a retrospective system. The calculation of the assessment and cash deposit rates are therefore beyond the scope of the Panel's terms of reference.

Q35. Could the United States address, with reference to Table 1 of the EC's submission, whether the "Zeroing by transaction" it considers that this column sets out the amounts by which normal value exceeded export price on the respective shipments? Does the United States consider that these figures represent amounts by which these sales were dumped? If yes, could the United States respond to the proposition that, if zeroing is prohibited, a Member assessing duties on the basis of the calculation represented in that column would not be entitled to collect duties in the amounts of actual dumping, but must offset actual dumping during the period of existence of an order by the amounts by which normal value was exceeded on other sales?

32. The "Zeroing by transaction" column in Table 1 of the EC's submission sets out a transaction-specific comparison of export price to normal value; where the normal value exceeds export price, that represents a margin of dumping consistent with the definition of dumping in Article 2.1 of the AD Agreement.

33. In accordance with Article 9.3 of the AD Agreement, the United States ensures that the antidumping duty collected from importers does not exceed the actual margin of dumping. The United States is entitled to assess the margin of dumping on a retrospective basis pursuant to Article 9.3.1 of the AD Agreement. Commerce calculates the appropriate margin of dumping consistent with the applicable Article 2 provisions of the AD Agreement, *e.g.*, the fair comparison requirement of Article 2.4.

34. As noted in the United States' answer to question 34, the United States assesses antidumping duties on an importer-specific basis, and thus would aggregate the last column in Table 1 on an importer/customer specific-basis. For example, the United States would collect dumping duties from importer/customer 1 in total equal to 25 (5+15+5). By contrast, sales to customer 4, not dumped, would be assessed at zero, and Customs would return to importer/customer 4, with interest, any deposits made.

35. Neither Mexico nor the EC cites to any language in the AD Agreement that requires a reduction or offset to the antidumping duties properly assessed on importer/customer 1's entries to reflect the fact that importer/customer 4 paid more than normal value for its imports.

Questions to both:

> ***Q36. At paragraph 247 of its first submission, the United States asserts that "Article 11.3 does not contemplate determinations of a continuation or recurrence of threat or material retardation as a basis for continuing to apply an antidumping duty after a sunset review." Does Mexico agree with this position? Do the parties consider that the basis of the finding of injury in the original investigation, that is, present material injury, threat of material injury, or material retardation of the establishment of a domestic industry, has consequences for the evaluation, in a sunset review, of the likelihood of continuation or recurrence of injury?***

36. The United States does not consider that the basis for the finding of injury in the original investigation distinguishes the type of examination that should be conducted during the sunset review. Irrespective of the original basis for the determination, the investigating authorities will in a sunset review be examining the conditions that exist after the order has been in place for five years and the likely impact that revocation of that order will have on the domestic industry.

> ***Q37. Looking only at the provisions of Article 11, is there any requirement in that Article regarding causation in the context of reviews? Could an investigating authority decide to continue the measure solely on the basis that there is a likelihood of continuation or recurrence of dumping and injury, without considering whether the continuation or recurrence of injury is through the effects of continued or recurred dumping?***

37. Under Article 11.3, an order can be maintained only if there is a link between the expiry of the duty and the likelihood of continuation or recurrence of both dumping and injury. Under U.S. law, as demonstrated by its analysis in the OCTG sunset review, the ITC meets this obligation by examining the likely volumes, price effects, and impact of likely dumped imports if the orders were revoked.

Q38. Mexico argues at paragraph 98 of its first submission, citing the Appellate Body's views in, US – Corrosion-Resistant Steel Sunset Review, that "provisions that create irrebuttable presumptions run the risk of being found inconsistent with an obligation to make a particular determination in each case using positive evidence." Would the parties consider that a provision that creates a rebuttable presumption may be inconsistent with an obligation to make a particular determination in each case based on positive evidence? Please explain your views.

38. The United States notes at the outset that, unlike Article 3 of the AD Agreement, there is no "positive evidence" standard in Article 11.3. Nevertheless, the existence of a rebuttable presumption and the an obligation to make a determination based on positive evidence are not incompatible. Certain factual scenarios may reasonably give rise to presumptions, but if the decision in a particular case is made based on the facts of that case – the positive evidence on the record – then a rebuttable presumption is not inconsistent with an obligation to make a particular determination based on positive evidence.

Q39. In the recently adopted report of the Panel in United States – Investigation of the International Trade Commission in Softwood Lumber from Canada (WT/DS277/R), adopted 26 April 2004, at paragraphs 7.104-7.112, the Panel found that, in a threat of material injury case, the investigating authority is not required to conduct a predictive analysis of the Article 3.4 factors in assessing threat. Could the parties please address the implications of this decision in the context of the Article 11.3 determination of likelihood of continuation or recurrence of injury?

39. The panel report in *ITC Lumber* reinforces the view of the United States that the Agreement contemplates several different types of injury and determinations of injury, each of which must be viewed in its own unique context. Just as the context and textual references to a determination of threat of injury distinguish that type of injury determination from a determination of present injury, a determination of likelihood of continuation or recurrence of injury under Article 11.3 is distinguished both textually and contextually from a determination of either present injury or threat of injury.

40. In *ITC Lumber*, the panel found that "the text, context, object and purpose of the relevant provisions do not lead to" the interpretation that Articles 3.2 and 3.4 of the Antidumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement apply directly in the context of threat of injury, such that a predicted "impact" with respect to each of the listed factors must be

assessed.[9] The panel noted that, for the purposes of an investigation, consideration of ADA Article 3.4 factors was necessary in order to establish a background against which the authorities could evaluate whether imminent further dumped imports would affect the industry's condition in such a manner as to threaten it with material injury as defined by the Agreement in Article 3.7.[10] As the panel found, there is nothing in the text of the Agreement "setting out an obligation to conduct a second analysis of the injury factors in cases involving threat of material injury."[11]

41. The reasoning of the *ITC Lumber* Panel with respect to the absence of any requirement to conduct a second analysis of the Articles 3.2 and 3.4 factors for the purposes of finding threat of material injury applies all the more in the context of a sunset review. First, as explained in the first written submission of the United States at paras. 310-316, there is nothing in the text of the Agreement to suggest that authorities are required to consider Article 3.4 factors even once in conducting sunset reviews. Nonetheless, in this respect, the United States notes that its sunset statute requires the ITC to conduct the equivalent of an Article 3.4 examination, as relevant to sunset reviews. *See* 19 U.S.C. § 1675a(a)(4). As applied in the OCTG review, the ITC conducted the required statutory analysis of the relevant economic factors likely to have a bearing on the state of the domestic OCTG industry, and against this background, assessed the likely impact of future dumped imports.

42. Aside from consideration of the relevant economic factors concerning the current condition of the domestic industry, the *ITC Lumber* report reinforces that there most certainly is nothing in the text of the Agreement that would require the authorities to conduct "an assessment of the likely impact of future imports by reference to a consideration of projections regarding each of the [Article 3.4] factors."[12] This reasoning applies equally whether the future imports are those likely to result from expiry of the duty in the context of a sunset review or those likely to continue to enter unchecked in the imminent future relevant to an original investigation. Indeed, the textual argument applies all the more in the context of a sunset review given the lack of cross-reference in Article 11.3 to the Article 3 requirements.

43. In addition to the textual demonstration of why application of an Article 3.4 examination is not required in future-looking assessments, the *ITC Lumber* report further explains that the information necessary to conduct an Article 3.4 analysis would not be available in many instances. The *ITC Lumber* reports cites, as examples, the likely absence of necessary information concerning projected productivity, return on investment, and projected cash flow.[13] The reasoning of the *ITC Lumber* panel in this respect is even more on point in the context of a sunset review, given the counterfactual nature of a review. In a review, not only is much of the data concerning Article 3.4 factors unavailable in any meaningful fashion; even the projected

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[9] *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, Report of the Panel, WT/DS277/R, adopted 26 April 2004 ("*ITC Lumber,* Panel Report"), para. 7.104.

[10] *ITC Lumber*, Panel Report, paras.7.105-7.107.

[11] *ITC Lumber*, Panel Report, para. 7.105.

[12] *ITC Lumber*, Panel Report, para. 7.105.

[13] *ITC Lumber*, Panel Report, para. 7.105.

data that can be provided reflects conditions during a time when the restraining effects of the antidumping duty order are in place, making it that much more difficult to extrapolate to the likely conditions that would prevail upon expiry of the duty.

44. The findings of the *ITC Lumber* panel concerning the inapplicability of Article 3.2 factors to threat determinations also fully support the view of the United States that such factors do not apply directly to sunset reviews. The *ITC Lumber* panel found that the provisions of Article 3.2 "require the investigating authorities to consider events in the past, during the period investigated, in making a determination regarding present material injury."[14] As the panel explained, Article 3.2 refers to consideration of whether there "has been" a significant increase in imports, whether there "has been" significant price undercutting, or whether the effect of imports is otherwise to depress prices or prevent price increases that otherwise "would have occurred." These considerations allow the authorities to examine the effects of the dumped imports during the period where they were unchecked by the antidumping duty order. The focus of the Article 3.2 text on conditions that have occurred during the past period demonstrates not only the inapplicability of an Article 3.2 analysis to the future-looking threat determination, but also to sunset reviews.

45. Finally, the *ITC Lumber* panel noted that, in an original investigation, "consideration of the Article 3.2/15.2 factors forms part of the background against which the investigating authorities can evaluate the effects of future dumped and/or subsidized imports."[15] In the view of the United States, consideration of Article 3.2 factors is not necessarily required even as background for the purposes of a sunset review. Nonetheless, the U.S. statute requires the ITC in conducting a sunset review to examine likely volumes and price effects, as well as to consider the original determination, in which an examination under Article 3.2 would have been conducted. As demonstrated in our first written submission, at paras. 268-293 (volume) and 294-305 (price effects), the ITC made its OCTG sunset determination in a manner that took these factors into account to the extent applicable in a sunset review.

Q40. In its recent decision in European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 of the DSU by India, WT/DS141/AB/RW, the Appellate Body addressed the question of how an investigating authority is to determine what proportion of imports attributable to foreign producers or exporters for which a dumping margin was not calculated during the investigation is to be considered as "dumped imports" in the injury analysis. The Appellate Body concluded that there must be a determination, based on positive evidence and an objective examination, of the volume of dumped imports. The Appellate Body stated that evidence of dumping margins established for other producers is relevant positive evidence, and noted that there may be different and

[14] *ITC Lumber*, panel report, para. 7.111.
[15] *ITC Lumber*, panel report, para. 7.111.

additional types of evidence that properly could be considered as positive evidence and relied upon in making the required determination of the volume of dumped attributable to such producers. In this context, the Appellate Body noted that evidence such as witness testimony and different types of documentary evidence about critical aspects of the market, conditions of competition, production characteristics, and statistical data relating to the volume, prices, and effects of imports, could form part of the "positive evidence" that an investigating authority might properly take into account when determining whether or not imports from non-examined producers are being dumped. (See paragraphs 129-130 and fn. 162). Could the parties address the implications, if any, of this finding in the context of whether evidence other than the calculation of a margin of dumping consistent with the requirements of Article 2 of the AD Agreement might suffice as positive evidence in making a determination as to the likelihood of continuation or recurrence of dumping under Article 11.3?

46. The Appellate Body in *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 of the DSU by India* observed that in some anti-dumping investigations, there could be evidence, such as market conditions, prices, sales volumes, and others, that was probative of the existence of dumping by non-examined producers. While the issue of the dumping margins of non-examined producers is not applicable here, and although *Bed Linen* related to an original investigation, it supports the principle that inferences may be drawn from existing facts in order to draw a conclusion about something which is not known. There is an added level of complexity in a sunset review because the administering authority must use the existing facts to make predictions, not just about unknown facts, but concerning facts that are likely to exist in the future. The administering authority in a sunset review must necessarily draw inferences about future conduct on the basis of past and present information because the inquiry is necessarily forward-looking or predictive. Thus, the Appellate Body's reasoning supports the conclusion that relevant information for the determination of likelihood in a sunset review is not limited to dumping margins calculated in accordance with Article 2 of the AD Agreement. To the contrary, other information on costs, prices, import volumes and other market conditions may also provide a reasonable basis for a likelihood of dumping determination. Section 751 (c)(2) of the Act provides for the examination of other factors, such as price, cost, and market conditions in a sunset review and section 351.218(d)(2)(iv)(B) of Commerce's *Sunset Regulations* provides interested parties the opportunity to submit this type of information for consideration in a sunset review.

Q41. Do the parties agree with the proposition that it is within a Panel's purview to examine municipal law to determine its meaning in assessing its consistency with a Members' obligations under the relevant WTO Agreements?

47. The Appellate Body has noted the need for panels to examine municipal law in order to determine the meaning of a measure, for the purpose of assessing the measure's compliance with

a Member's WTO obligations.[16] Indeed, in cases in which the meaning of the measure is central to the issue of whether a Member is meeting its WTO obligations, not only is it within the Panel's purview to examine municipal law, but in fact a Panel generally must examine municipal law. To do otherwise risks making an erroneous finding with respect to that Member's compliance with its WTO obligations (because such a finding would be based on an erroneous understanding of the measure at issue).

48. Questions concerning municipal law, such as the meaning of the *Sunset Policy Bulletin*, are questions of fact. As the party advancing claims concerning the meaning of the *Sunset Policy Bulletin*, Mexico bears the burden of proving its assertions. Mexico has failed to do so. It has offered no evidence that the *Sunset Policy Bulletin* is an instrument with legal effect. For this reason, Mexico resorts to arguing that the allegedly consistent application of the *Sunset Policy Bulletin* is evidence that it is a measure that mandates a breach.

49. The Panel cannot properly evaluate Mexico's argument, however, without examining the status of the *Sunset Policy Bulletin* under U.S. law. Under U.S. law, even if the *Sunset Policy Bulletin* were referred to *ad infinitum* in numerous reviews, this would not be sufficient to transform it into a measure that mandates a breach. It is not a measure because it has no operational life of its own; whether it is applied once or a thousand times, it has no legal effect.[17] Mexico has not, and cannot, demonstrate that the *Sunset Policy Bulletin* itself has legal force. As such, Mexico has not sustained its burden of proving that the *Sunset Policy Bulletin* is a measure.

50. In addition, under U.S. law, the *Sunset Policy Bulletin* does not and cannot mandate a breach. As noted above, regardless of the terms of the *Sunset Policy Bulletin*, the nature of this document under U.S. law is such that it simply cannot mandate a breach. It has no legal authority to mandate anything at all. Instead, by its very terms, it provides guidance as to general factual situations. The principles reflected in the *Bulletin* are applied in the context of the specific facts of each case. Again, Mexico resorts to evidence of agency practice – the outcomes of X number of cases – to argue that the *Sunset Policy Bulletin* mandates a breach. However, as a matter of U.S. law, this evidence does not and cannot prove that the *Sunset Policy Bulletin* mandates anything that might or might not constitute a WTO breach. The outcomes in

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[16] *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, Report of the Appellate Body, para. 66.

[17] Thus, the panel in *U.S. - Steel Plate* concluded that U.S. antidumping "practice" is not a measure, reasoning that "repetition" does not turn a "practice into a 'procedure,' and hence into a measure." *United States - Anti-Dumping and Countervailing Measures on Steel Plate from India,* WT/DS206/R, Report of the Panel adopted 29 July 2002, para. 7.22 (citation omitted). The panel went on to note,

> That a particular response to a particular set of circumstances has been repeated, and may be predicted to be repeated in the future, does not, in our view, transform it into a measure . . . . Moreover, we do not consider that merely by repetition, a Member becomes obligated to follow its practice.

Id.

any number of cases are simply outcomes. In essence, all Mexico has offered is evidence that the *Sunset Policy Bulletin* accurately and transparently describes Commerce's current thinking; this is perfectly logical, given that the decision-maker in those cases is the decision-maker who decides whether to keep, modify, or withdraw the *Sunset Policy Bulletin.* What Mexico has not done is demonstrate that the *Sunset Policy Bulletin* mandated the outcomes in question. Mexico cannot do so; the *Sunset Policy Bulletin* does not dictate what the Assistant Secretary, or Commerce, must do.

51. If the Panel examines municipal law, it will find that Mexico cannot prove that the *Sunset Policy Bulletin* is a measure, nor does it mandate a breach. To find otherwise would be an error of fact with respect to U.S. law.

> ***Q42. The Panel notes that US law states that the Department of Commerce "shall consider" certain factors in making its determination in sunset reviews, inter alia, the margin of dumping determined in the original investigation. The Panel also notes that the United States argues that the Department of Commerce did not, in the sunset review at issue here, "rely" on the margin of dumping determined in the original investigation. Could the parties explain what, in their view, is the distinction between the concepts of "consider" and "rely" in this context?***

52. Commerce "considers" or "examines" all the evidence on the administrative record when making a determination in any proceeding, whether an administrative review or a sunset review. In making a determination, Commerce may "rely" or base its determination on certain facts in evidence. "Consider" means "to look at attentively; survey; scrutinize."[18] "Rely" means "to be dependent on."[19] Therefore, Commerce is statutorily obligated to "look attentively" at the margin, but Commerce's determination need not be "dependent on" that margin. In Commerce's determinations, including this one, Commerce's finding with regard to likelihood is not "dependent" on the margin. In this case, for example, other record evidence, including the depressed import volumes, led Commerce to conclude that continuation or recurrence of dumping was likely. In other words, Commerce relied upon the fact that import volumes had significantly declined after the imposition of the duty and remained depressed throughout the five-years sunset review period as the basis for the affirmative likelihood determination. We note in this regard that the Appellate Body has found that administering authorities are not obligated to make a finding about a particular magnitude of dumping,[20] but simply whether dumping is likely to continue or recur.

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[18] *New Shorter Oxford English Dictionary,* p. 485 (Exhibit US-29).
[19] *New Shorter Oxford English Dictionary,* p. 2539 (Exhibit US-30).
[20] *See Japan Sunset AB,* para 123.