

## ANNEX E

### QUESTIONS AND ANSWERS and COMMENTS OF PARTIES ON THE APPELLATE BODY REPORT IN *UNITED STATES – SUNSET REVIEWS OF ANTI-DUMPING MEASURES ON OIL COUNTRY TUBULAR GOODS FROM ARGENTINA* ("ARGENTINA OCTG")

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## ANNEX E-1

### ANSWERS OF MEXICO TO QUESTIONS OF THE PANEL – FIRST MEETING

(18 June 2004)

**Question 1.** At paragraph 135 of its first written statement, the United States asserts that Mexico acknowledges that Commerce did not "rely" on the margins from the original investigation in making the likelihood determination in OCTG. Does Mexico accept this characterization of its position as correct? If not, could Mexico indicate where, in the relevant determination and decision memo, it finds support for the assertion that Commerce DID rely on those margins?

#### Mexico's Response

1. Mexico does not accept the US characterization of its position.
2. Mexico has argued consistently that the Department's reliance on the margin of dumping determined in the original investigation violates Article 11.3 because the original 21.7 per cent margin in this case was not probative of the likelihood of recurrence of dumping, it was not derived from the application of the Anti-Dumping Agreement, it was inconsistent with the Anti-Dumping Agreement, and it had no logical connection whatsoever to Hylsa.
3. Mexico's arguments relating to each of these points are set forth in paragraphs 129-155 of Mexico's First Written Submission. Also, Mexico repeated these arguments in summary form in paragraphs 28 to 30 of its Oral Statement at the First Substantive Meeting of the Panel.
4. The fact that the Department relied on the margin from the original investigation in this case is not surprising because the US system is set up in this manner. First, the statute says that the Department "shall consider" two factors: 1) "the dumping margins determined in the investigation and subsequent reviews"; and 2) the volume of imports. (Section 752(c)(1)). The SAA indicates that the Department will normally select a margin "from the investigation, because that is the only calculated rate that reflects the behavior of exporters without the discipline of an order or suspension agreement in place." (SAA at 890.) The regulations implementing the statute add that: "only under the most extraordinary circumstances will the Secretary rely on a . . . dumping margin other than those it calculated and published in its prior determinations. . . ." (Section 351.218(e)(2)(i))(emphasis added). The Sunset Policy Bulletin confirms "that continued margins at any level would lead to a finding of likelihood." (Section II.A.4.)
5. Thus, the statute and the regulations make clear that the Department must consider dumping margins, the SAA provides that the Department will normally select the margin from the original investigation, and the SPB confirms that the Secretary is to rely on dumping margins. The only open question is which dumping margin the Department will choose to rely upon.
6. To answer this question, Mexico turns to the Department's specific statements in this case, which the Panel has also asked Mexico to identify. The Department states in the *Issues and Decision Memorandum* (page 5-6):

In the Sunset Policy Bulletin, the Department stated that it will normally provide to the Commission the margin that was determined in the final determination in the original investigation. (Emphasis added). . .

The Department continues to find that the margin rates from the original investigation are the appropriate rates to report to the Commission. (Emphasis added). . .

Therefore, the Department will report to the Commission the margins contained in the Final Results of Review section of this decision memo. (Emphasis added). . .

We determine that revocation of the anti-dumping duty order on OCTG from Mexico would be likely to lead to continuation or recurrence of dumping at the following percentage weighted-average margins: [TAMSA, Hylsa, All Others: 21.70 per cent].

7. The record in this case shows that the Mexican exporters provided positive evidence and argument that the dumping margin from the original investigation was not probative of likely dumping, and that the results of the several annual reviews (zero margins) were more probative of future behavior. The Department, however, used the "inference" arising from lower import volumes to disregard this evidence. In doing so, it did not cease to rely on dumping margins; it simply eliminated the possibility of relying on the zero margins, and instead relied on the dumping margin from the original investigation. This is what its law, the SAA, the regulations, and the SPB instruct the Department to do, and this is what it did.

8. Finally, and independently from these arguments, Mexico also has argued that the Department's reliance on a flawed margin also tainted its likelihood decision, and that of the Commission, which relied on the reported margin in its likelihood determination.

**Question 2.** In its request for establishment (WT/DS282/2 at page 2), Mexico lists, as a measure it considers inconsistent with the United States' obligations, "Continuation of Countervailing and Anti-Dumping Duty Orders on Oil Country Tubular Goods from Argentina, Italy, Japan, Korea and Mexico, and Partial Revocation of Those Orders from Argentina and Mexico with Respect to Drill Pipe", Federal Register, Vol. 66, page 38630 (25 July 2001). Could Mexico confirm that it has made no separate claims of violation with respect to the order continuing the application of anti-dumping and countervailing duties on imports of OCTG from Mexico? If Mexico considers that it has made such separate claims of violation with respect to that measure, could Mexico indicate where, in its first submission, it has presented arguments regarding such claims?

#### Mexico's Response

9. Mexico identified as a measure in its Panel Request the "Continuation of Countervailing and Anti-Dumping Duty Orders on Oil Country Tubular Goods from Argentina, Italy, Japan, Korea and Mexico, and Partial Revocation of Those Orders from Argentina and Mexico with Respect to Drill Pipe," 66 Federal Register, 38630 (25 July 2001) ("Notice of Continuation"). Mexico identified this measure in anticipation of possible argumentation that this measure was the measure with the operational or legal effect for continuing the imposition of anti-dumping duties, as opposed to the substantive likelihood of dumping and likelihood of injury determinations of the Department and the Commission, respectively.

10. Mexico confirms that there are no claims that relate only to the Notice of Continuation. Rather all of Mexico's claims related to the Department's Sunset Determination and the Commission's Sunset Determinations also apply to the Notice of Continuation, as this is the instrument through which the United States continued the measure for, at a minimum, an additional six years.

**Question 3.** The United States argues, at paragraph 25 of its first oral statement, that Commerce, in the fourth periodic review of the amount of duty (annual administrative review) concerning TAMSA and Hylsa, did not address the question as to whether the measure should be revoked as to these two companies, because the prerequisites for such review were not met. Could Mexico clarify whether it accepts this characterization of the decision of Commerce in the context of the revocation requests in the fourth periodic review of the amount of duty (annual administrative review)?

Mexico's Response

11. Mexico does not accept the US characterization. The companies representing 100 per cent of Mexican OCTG imports, TAMSA and Hylsa, each requested revocation of the order as it pertained to that company. In response to these separate requests, the Department initiated and conducted only one review. The title of the Department's determination is: "Oil Country Tubular Goods from Mexico: Final Results of Anti-Dumping Duty Administrative Review and Determination Not to Revoke in Part." The title of the measure speaks for itself.

12. Apart from the fact that the Department undertook a single review, and apart from the manner in which the Department characterized its determination (again, as evidenced by its title), the determination itself reveals that the Department conducted an Article 11.2 review. On page 8 of the *Issues and Decision Memorandum*, the Department states: "The Department determined that it could not conclude that future dumping was not likely due to business cycles and the fluctuation of prices." The Department then goes on to analyze TAMSA's statements regarding its commercial policy:

In DRAMS from Korea, 62 Fed. Reg. 39809 (24 July 1997), the Department determined that it could not conclude that future dumping was not likely due to business cycles and the fluctuation of prices. Steel demand and oil prices are, likewise, cyclical. TAMSA further explained its commercial policy: "TAMSA has no interest in shipping significant quantities to a depressed market. See TAMSA's Case Brief at 19-20 (Public Document). As explained in the SAA at 889-90 and the House Report at 63-64, if the volume of imports declines significantly after the issuance of the order and dumping was eliminated, the Department may reasonably infer that dumping would resume if the order were revoked. This same logic also applies on a company-specific basis. The premise that the decline in TAMSA's export levels after the issuance of the order was the result of a depressed market for small amounts of OCTG without dumping in no way conflicts with the Department's inference. If it became necessary to make fewer sales at more fairly traded prices while the discipline of the order was in place, it is reasonable to infer that dumping would be likely to resume if such discipline ceased to exist, especially if TAMSA were to again encounter a 'depressed market' in this very cyclical industry. (*Issues and Decision Memorandum* at 8.)

13. This passage demonstrates that the Department applied the substantive standard of Article 11.2 in determining not to revoke the order on OCTG from Mexico. The specific analogy to *DRAMS from Korea* is further support. As we all know, the Department made a substantive determination in that case, which was later found to violate the Article 11.2 requirements because of the standard applied by the Department in making that determination.

14. In addition, the Department cited the substantive standard of Article 11.2 in explaining that TAMSA did not qualify for revocation: "TAMSA's overall record of sales to the United States during these three years, when viewed in terms of both volume and value, do not provide a reasonable basis for determining that the discipline of the order is no longer necessary to offset dumping."<sup>1</sup> The Department did not say that TAMSA failed to qualify for a review to determine whether the measure should be revoked, but rather that the company "does not qualify for revocation." The Department's ultimate finding is clear: "[W]e find that

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<sup>1</sup> Issues and Decision Memorandum, page 8.

TAMSA does not qualify for revocation of the order on OCTG under 19 CFR 351.222(e)(1)(ii) and 19 CFR 351.222(d)(1)."<sup>2</sup>

15. If the Panel were to accept the US characterization of its decision, Mexico believes that the Panel would nonetheless have to determine whether the Department was justified in not conducting a substantive determination. Article 11.2 does not speak of thresholds or prerequisites such as "commercial quantities," or the requirement of "three consecutive zero margins" in reviews, or two zeroes in the first and third years with shipment in "commercial quantities" in the "intervening year." All of these are constructs of US law. The Panel must determine whether or not the application of these constructs to this specific case are consistent with the international obligations of the United States under Article 11.2. That provision creates the obligation on WTO Members to "review the need for the continued imposition of the duty," and provides interested parties "the right to request the authorities to examine whether continued imposition of the duty is necessary to offset dumping . . ." If the authorities determine that the anti-dumping duty is no longer warranted, "it shall be terminated immediately." Mexico does not see how declaring that one never entered into the substantive analysis can be viewed as a defense against the application of these provisions.

**Question 4.** It appears that, under US law, there are multiple avenues for an exporter to request revocation of an anti-dumping duty order. Thus, revocation may be requested by an individual company in the context of a periodic review of the amount of duty (annual administrative review). Revocation may also be requested in the context of a changed circumstances review, either with respect to a company making the request (company-specific revocation), or with respect to the order as a whole (order wide revocation). Is it Mexico's contention that the United States was obligated to treat the requests for revocation made on behalf of TAMSA and Hylsa individually simultaneously with the requests for the fourth periodic review of the amount of duty (annual administrative review) (Exhibits MEX-10 and MEX-11) as a request for a changed circumstances review or a request for order-wide revocation?

#### Mexico's Response

16. Mexico's contention is this: when interested parties present positive information substantiating the need for a review to determine whether the continued imposition of the duty is necessary to offset dumping, the WTO Member maintaining the measure must conduct a review. The Mexican exporters did precisely that in this case. Mexico's argument is that the Department should have conducted a substantive analysis – consistent with the requirements of Article 11.2 – to determine whether the continued imposition of the duty was necessary to offset dumping.

17. The United States has implemented its Article 11.2 obligation by creating a mechanism to conduct reviews when requested by individual interested parties, and to terminate the measure "in part" whenever certain conditions are satisfied. This system was analyzed in depth in *DRAMS from Korea*, DS99. The US anti-dumping measures challenged by Korea were company-specific in nature. The anti-dumping measure was entitled: "Notice of Final Results of Anti-Dumping Duty Administrative Review and Determination Not to Revoke Order in Part: Dynamic Random Access Memory Semiconductors of One Megabyte or Above From the Republic of Korea" (Emphasis added.) In addition, Korea challenged the US revocation regulation (covering company-specific revocation requests) "as such," and argued, successfully that the regulation violated the substantive requirements of Article 11.2. The United States did not argue in that case that Article 11.2 only creates "order-wide" obligations.

18. In implementing the adverse Panel ruling in *DRAMS from Korea*, the Department explained the reason for modifying the company-specific revocation provision:

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<sup>2</sup> Issues and Decision Memorandum, page 8.

On 29 January 1999, the Panel determined that the Department's standard for revoking an anti-dumping duty order contained in 19 CFR 353.25(a)(2) (the precursor to 19 CFR 351.222(b)) was inconsistent with the United States' obligations under Article 11.2 of the WTO Anti-Dumping Agreement... Specifically, the Panel determined that requiring the Secretary to conclude that "it is not likely" that persons requesting revocation will dump merchandise subject to an anti-dumping duty order in the future did not implement properly Article 11.2 of the Anti-Dumping Agreement.<sup>3</sup>

...

As discussed in the Proposed Rule, in situations where there is an absence of dumping (or subsidization) for three years, the Department intends to presume that an order is not necessary in the absence of additional evidence. We believe that such a presumption is consistent with prior Department practice as well as US obligations under Article 11.2 of the Anti-Dumping Agreement and Article 21.2 of the SCM Agreement. As the Panel recognized, a decision to maintain an order must be substantiated by positive evidence. If the only evidence on the record is a respondent's ability to sell subject merchandise at not less than normal value for three consecutive years, the record would not support a decision to maintain the order in light of the requirement in Article 11.2, as interpreted by the Panel, that there be positive evidence reflecting the continued necessity of the order.<sup>4</sup>

...

We have formulated the final rule in a way that clarifies that the Secretary must make an affirmative finding of necessity in order to retain an anti-dumping or countervailing duty order. While this reformulation does not affect the process by which the Department considers revocation, the reformulated regulation more closely tracks the wording of Article 11.2 of the Anti-Dumping Agreement and Article 21.2 of the SCM Agreement.<sup>5</sup>

19. Through these statements, the United States clarified to its trading partners that it implements its Article 11.2 obligations through the company-specific revocation procedure outlined in 19 CFR 351.222(b). The United States cannot deny these statements and its practice on implementing its Article 11.2 obligations now for the expediency of defending against the Article 11.2 claim brought by Mexico.

**Question 5. Could Mexico specify the evidence it considers to have been submitted in the sunset review, but ignored, i.e. not considered, by Commerce?**

Mexico's Response

20. Mexico summarized this evidence in Exhibit MEX-64, which Mexico attached to its 25 May oral statement.

21. To summarize, Mexico submitted positive evidence demonstrating that the dumping margin from the original investigation was not a reliable measure, given that it resulted from unique circumstances involving the 1994 Mexican peso devaluation and the company's then high US dollar indebtedness. Mexico also provided positive evidence of the company's experience in the US market during the relevant period of the sunset review, which demonstrated that dumping would not be likely. This evidence consisted of the consecutive no dumping determinations by the Department in administrative reviews. The positive evidence also included

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<sup>3</sup> US Department of Commerce, Amended Regulation Concerning the Revocation of Anti-Dumping and Countervailing Duty Orders, Final Rule, 64 Federal Register 51236, 51236-7 (22 September 1999).

<sup>4</sup> 64 Federal Register at 51238.

<sup>5</sup> 64 Federal Register at 51238.

statements by TAMSAs and Hylsa that the companies would not dump in the event the order was terminated. The positive evidence submitted included detailed explanations by TAMSAs why the past dumping would not recur, and a justification why "good cause" existed not to rely on the original dumping margin.

**Question 6.** Assume, for purposes of argument, that, as argued by the United States, Article 11.2 of the AD Agreement does not apply to company-specific revocation reviews of the type at issue in this dispute with respect to TAMSAs and Hylsa. Could Mexico please address whether, in this case, there are any relevant WTO obligations with respect to such reviews? Has Mexico set out claims regarding such obligations?

Mexico's Response

22. Mexico confirms that the claims arising from the Department's decision not to revoke the orders as they apply to TAMSAs and Hylsa were based on Article 11.2 of the Anti-Dumping Agreement. If the Panel finds that Article 11.2 does not obligate WTO Members to terminate the measure with respect to specific companies, then the Panel must determine whether the United States was justified in not considering whether termination of the duty as a whole was warranted in this case. In this context the evidence presented by both TAMSAs and Hylsa – the only known Mexican producers of OCTG – provided the requisite degree of positive information sufficient not merely to warrant a "review" under Article 11.2, but also sufficient to demonstrate that the continued imposition of the duty was no longer "necessary to offset dumping."

**Question 7.** Is Mexico of the view that prerequisites for the conduct of company-specific revocation reviews are precluded by the AD Agreement in general? Is Mexico of the view that the specific prerequisites for the conduct of company-specific revocation reviews at issue in this dispute are precluded by the AD Agreement? Could Mexico please specify the relevant provisions of the AD Agreement upon which it relies in this context.

Mexico's Response

23. The text of Article 11.2 creates affirmative obligations. WTO Members are required to review ("shall review") "the need for the continued imposition of the duty, where warranted ... upon request by an interested party which submits positive information substantiating the need for a review." Article 11.2 does not use the word "prerequisite" anywhere, and it does not establish any "prerequisites" for reviews (other than perhaps, a request supported by "positive information").

24. "Prerequisites" may not be precluded *per se*. However, if prerequisites are applied in such a way as to lessen the party's affirmative obligation under Article 11.2, a prerequisite can infringe another Member's right, and therefore violate the Agreement. Also, if the prerequisites are used in such a manner that the authorities do not properly consider positive evidence, the use of prerequisites can violate the Agreement.

25. Mexico notes that Article 11.2 provides some measure of discretion to WTO Members through the use of the phrase "where warranted" in the first sentence. However, this statement conditions the obligation to conduct the review. Mexico believes that a proper understanding of this phrase would permit the placement of reasonable prerequisites before the authorities are required to expend their resources on a review to determine whether the anti-dumping measure continues to be necessary. However, if such prerequisites are used in a manner to exclude or ignore positive evidence they can again run afoul of the substantive obligations of the Agreement.

26. With respect to the specific prerequisites applied in this case, there were two: 1) the "commercial quantities" requirement applied to TAMSAs; and 2) the requirement of obtaining a zero margin in the third of three annual reviews for Hylsa. With respect to the commercial quantities requirement, Mexico is of the view that this "prerequisite" was based wholly on the presumption that declines in import volumes mean that dumping is likely to continue once the measure is removed. In this case, the Department used this

"prerequisite" to reach a substantive determination that TAMSAs would dump in the future. As stated in response to question 3 above, the Department found that "it is reasonable to infer that dumping would be likely to resume if such disciplines [i.e., the existence of the measure] ceased to exist, especially if TAMSAs were again to encounter a 'depressed market' in this very cyclical industry." (*Issues and Decision Memorandum* at 8.) The Department also made the factual finding that TAMSAs "did not meaningfully participate in the market," and that therefore "its sales during these periods do not provide a reasonable basis for determining that it is unlikely that TAMSAs will dump in the future."

27. Thus, in this case, the commercial quantities requirement was used as the basis for the substantive decision not to revoke the order and not as a prerequisite to conduct the review. This is not permitted by Article 11.2. The Panel in *DRAMS from Korea* found that Article 11.2 decisions must be based on "positive evidence," and that "'necessity' in the context of Article 11.2 requires the need for the continued imposition of an anti-dumping duty being demonstrable on the basis of the evidence adduced." (*DRAMS from Korea*, paras. 6.42 and 6.50).

28. The commercial quantities requirement also suffers several other defects, all of which have been explained in Mexico's First Written Submission. First, the requirement of "commercial quantities" was never defined for the purposes of the revocation reviews (Mexico's First Submission, para. 344.) Second, the meaning given to the "commercial quantities" requirement was fundamentally different than the only definition of "commercial quantities" in US law, referred to a transaction-specific measurement of commercial quantities (Mexico's First Submission at paras. 346-348). Third, the "commercial quantities" requirement was introduced as a requirement for cases in which there was an "intervening third year," a circumstance which did not apply to TAMSAs. (First Submission, paras. 334-343). Fourth, the "commercial quantities" requirement as applied as a "prerequisite for revocation" was introduced after TAMSAs began the process of seeking revocation under established US procedures. (First Submission, paras. 328-343). Fifth, the "commercial quantities" requirement arises from a presumption that volume declines means that the order is necessary to stop future dumping. This is precisely the type of presumption that the Appellate Body has warned against in the context of Article 11.3 reviews, and it applies equally to Article 11.2 reviews.

29. With respect to Hylsa, the Department applied the prerequisite that Hylsa obtain a zero dumping margin in the first and third of the reviews requested by Hylsa. The Department then found that Hylsa had not met this prerequisite because the Department calculated a dumping margin greater than the 0.5 per cent *de minimis* level. However, this above *de minimis* margin was possible only through the use of a "zeroing" calculation methodology. Mexico submits that the use of the zeroing methodology violates Article 2, and, to the extent that it is used as a basis for disqualifying Hylsa from a substantive review, it also violates Article 11.2.

**Question 8. Could Mexico address the United States' argument that, just as Article 11.2 provides that a party requesting a review under that Article must submit positive information substantiating the need for a review, it is permissible for the United States to require evidence of no dumping for three years on sales in commercial quantities as a prerequisite for the conduct a company-specific revocation review?**

Mexico's Response

30. Please refer to Mexico's response to question 7 above. In short, Mexico believes that the analogy does not work. In the case of the requirement that interested parties submit positive evidence, this can be viewed as a neutral prerequisite designed to ensure that the investigating authority is not required to initiate frivolous reviews, or that it will not have a sufficient evidentiary record to evaluate. In the case of the "commercial quantities" requirement it is not neutral, but rather is based on a presumption that predetermines that the measure is necessary. With respect to the third year of no dumping it is not clear to Mexico why three years are necessary (under some circumstances less time, or other proof of the exporters' practices could be sufficient, yet the US system would not allow for a review without complying with the three review



requirement). In any event, the requirement was not applied in a neutral manner in this case, in which the Department used an illegal methodology to find that Hylsa did not qualify for the review.

**Question 9.** Could Mexico please indicate where it presents argument in support of its claims of violations of Article 6 of the AD Agreement, and the specific provisions of that Article alleged to have been violated?

Mexico's Response

31. Mexico's arguments concerning US violations of Article 6 of the AD Agreement are found in paragraphs 153 and 143 of Mexico's First Submission and paragraph 33 of its Oral Statement in the Panel's First Substantive Meeting with the parties.

32. In paragraph 153 of its First Submission, Mexico stated that:

... by mechanically relying on a margin of dumping that was determined in the original investigation (that is, outside the purview of the scope of the WTO Anti-Dumping Agreement), the Department denied Mexico the benefit of a dumping margin calculated in accordance with Article 2 and the opportunity to present evidence and defend its interest in accordance with Article 6 of the Anti-Dumping Agreement. (Emphasis added)

33. In paragraph 143 of the same submission, Mexico also stated that:

... given the Department's rejection of the positive evidence explaining the volume decline, to the extent that the Department relied on other information that was not requested of the Mexican exporters, the Department also violated Article 6.1. To the extent that the Department relied on information that suggested that the economic circumstances from the original investigation would be likely to exist upon termination of the measure, the Department failed to disclose such information in violation of Article 6.9. (Emphasis added)

34. And then, in paragraph 33 of its Oral presentation to the Panel, Mexico further stated that:

The Department's reliance on this margin [the margin of dumping to prevail] violates Article 11.3 because: (a) the margin was not derived from the application of the WTO Anti-Dumping Agreement, in particular Articles 2 and 6, but from a pre-WTO calculation and (b) the margin was extended to a company which has never been found to have been dumping. (Emphasis added)

35. As the above references demonstrate, Mexico's Article 6 claims are based on: the lack of application of the provisions of the WTO Anti-Dumping Agreement, including Article 6; the Department reliance on information that was not requested of the Mexican exporters; and the Department's failure to comply with the evidentiary and procedural provisions of Article 6, as required by Article 11.4.

**Question 10.** Could Mexico indicate how, in its view, an analysis of likelihood of continuation or recurrence of injury could be conducted consistent with the requirements of Article 3? For instance, assume the case where, after the imposition of the anti-dumping measure, there were no further imports from the sources found to be dumping. How in such a case could, for example, the requirement of Article 3.2 regarding consideration of the volume of dumped imports be satisfied?

Mexico's Response

36. Mexico does not see any particular difficulty in applying the requirements of Article 3 to an Article 11.3 injury determination. The key to any such analysis is that the investigating authority is

investigating "injury," which is defined only in Article 3. In the particular context of an Article 11.3 injury determination, additional requirements appear: 1) the investigating authority must find that injury must be a "continuation or recurrence" of an injury; and 2) the "continuation or recurrence" of injury must be "likely" to follow from the expiry of the order and the "likely" "continuation or recurrence" of dumping.

37. The existence of these additional requirements does not change the nature of the inquiry, which is an inquiry regarding "injury." "Injury" is defined only in Article 3 of the Agreement (footnote 9), and footnote 9 requires that "injury" "shall be interpreted in accordance with the provisions of [Article 3]." (See Mexico's response to question 20 below.)

38. In the hypothetical situation posited by the Panel, Mexico considers that the investigating authority must apply Article 3. The absence of imports would require the investigating authority to determine why the imports are absent, and whether imports are likely to return to the market. Also, in order to render an affirmative injury determination in such a case, it seems to Mexico that the investigating authority would have to determine, based on positive evidence, that the imports are likely to be dumped, and that injury is "likely" to continue or recur as a result of the likely dumping that follows the expiry of the measure.

39. It could be difficult for an investigating authority to make such determinations in a circumstance in which there are no imports, but Mexico believes that the WTO Members intended the analysis to be difficult and rigorous. As the Appellate Body has stated, the termination of the measure is the principal obligation of Article 11.3, and continuation based on a finding of likely dumping and likely injury is the exception. Therefore, both the text and the context of Article 11.3 suggest that a determination of likely injury in the example suggested by the Panel would be, and should be, difficult.

40. It is not, however, impossible. For example, it may be the case that the imports disappeared from the market only to be redirected to other markets. It may also be the case that the imports are subject to anti-dumping measures in all of these other markets, which could be a fact that suggests that these particular exporters have a proclivity to dump their products and to injure the domestic industries. Alternatively, it may be the case that there were no dumping measures against these products in other markets, and there is no other information suggesting unfair trade. In either case, these facts can be put before the investigating authority, and the investigating authority would have to assess the facts objectively to determine whether injury is likely to recur if the measure is removed, even though imports had ceased. Mexico offers this only as a hypothetical example, and does not suggest that this is the only possible information that the investigating authority could use in a case in which imports have ceased.

41. No hypothetical fact pattern could change the fundamental concept of what "injury" is. That is established "under this Agreement" by the first part of footnote 9. The factors that should guide the investigating authority in determining whether injury can be found in Article 11.3 are the same as those listed in Article 3, because the WTO Members explicitly stated that they require all injury determinations to be interpreted in accordance with Article 3. The difficulty arising from the circumstances posited by the Panel is the prospective nature of the Article 11.3 injury determination. This arises from the terms of the negotiated text of Article 11.3, not the text of Article 3 or any inherent problem in applying Article 3 to different factual circumstances.

42. That there is no particular conceptual problem in applying the terms of Article 3 to Article 11.3 reviews can be observed in the sunset practice of the Commission, which purportedly performs this analysis in all of its sunset determinations. The Commission first determines the likely volume of imports, then determines the likely price effect of imports, and then makes an assessment of the likely impact of these dumped imports on the US industry. In doing so, the Commission at least purports to apply many of the provisions of Article 3 in reaching its sunset determination. If the Commission were to find that imports had disappeared from the market and that the imports were not likely to return to the market, Mexico imagines that the Commission would find that injury was not likely to recur as a result of the expiry of the measure.

43. Mexico submits that the Commission's injury determination in this case violated Article 3, and that the Commission failed to determine "injury" in accordance with Article 3, as required by footnote 9. The Commission's determination is based on conjecture and a number of possibilities that arise from its analysis. However, these problems are caused by the Commission's failure to apply a "likely" standard, and its failure to assess objectively information on the record. These are not problems arising from the terms of Article 3, or any particular difficulty in applying Article 3 to Article 11.3 reviews.

**Question 11.** Could Mexico specify whether it is seeking separate rulings from the Panel with respect to the consistency with the United States' obligations under the WTO Agreement, GATT 1994, and the Anti-Dumping Agreement, of each of the following: (1) US statutory provisions, (2) US regulatory provisions (3) the United States Statement of Administrative Action accompanying the Uruguay Round Agreements Act, and (4) the Department of Commerce's Sunset Policy Bulletin? Could Mexico specify, with respect to each of the foregoing, which provisions of the WTO Agreement, GATT 1994, and the Anti-Dumping Agreement, are alleged to be violated?

Mexico's Response

44. Mexico understands this question to relate to Mexico's "as such" challenges of the US statute, the SAA, and the Sunset Policy Bulletin. Mexico further understands that the Panel has not asked in this question for clarification of Mexico's "as such" challenge to the Department's "consistent practice" (which is the subject of question 12 from the Panel). Nor has the Panel sought clarification (in this question) of Mexico's "as applied" challenges to the Department's Sunset Determination, the Commission's Sunset Determination, or the Department's Fourth Administrative Review Determination Not to Revoke the Order.

45. Mexico refers the Panel to the chart below, which specifies Mexico's "as such" challenges to the statute, the SAA, and the Sunset Policy Bulletin. Mexico is seeking separate rulings from the panel regarding each measure identified in each box (or group of measures in the case of the first item listed) in the left column.

Measure	Alleged Violations
19 U.S.C. 1675a(c)(1), Statement of Administrative Action (pages 889-890), and SPB (Section II.A.3), collectively.	Articles 1, 11.3, 18.1, and 18.4 of the Anti-Dumping Agreement; Article VI of the GATT; Article XVI:4 of the WTO Agreement.
19 U.S.C. 1675a(c)(1)	Articles 1, 11.3, 18.1, and 18.4 of the Anti-Dumping Agreement; Article VI of the GATT; Article XVI:4 of the WTO Agreement.
19 U.S.C. 1675a(a)(1)	Articles 1, 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 11.1,11.3, 18.1, and 18.4 of the Anti-Dumping Agreement; Article VI of the GATT; Article XVI:4 of the WTO Agreement.
19 U.S.C. 1675a(a)(5).	Articles 1, 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 11.1,11.3, 18.1, and 18.4 of the Anti-Dumping Agreement; Article VI of the GATT; Article XVI:4 of the WTO Agreement.
Statement of Administrative Action (pages 889-890)	Articles 1, 11.3, 18.1, and 18.4 of the Anti-Dumping Agreement; Article VI of the GATT; Article XVI:4 of the WTO Agreement.
Sunset Policy Bulletin, Section II.A.3	Articles 1, 11.3, 18.1, and 18.4 of the Anti-Dumping Agreement; Article VI of the GATT; Article XVI:4 of the WTO Agreement.

**Question 12.** Could Mexico clarify whether it is making a separate claim regarding the Department of Commerce's "consistent practice", as indicated in paragraph 110 of Mexico's submission. If so, could Mexico indicate where, in the request for establishment, that claim is set out?

Mexico's Response

46. In addition to, but separate from, its challenge of the statute, the SAA and the SPB, Mexico also challenges the Department's consistent practice in the conduct of sunset reviews "as such." This claim is set forth explicitly in section VII.B of Mexico's First Submission, paras. 110-120. Mexico's claim is set out in section A.1 of the Panel Request:

The Department's "likely" standard for determining whether termination of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping, the Department's determination in this regard, and the Department's calculation of the "likely" margin of dumping reported to the Commission, are inconsistent, both as such and as applied, with Articles 11.1, 11.3, 2.1, 2.2, 2.4, 6.1, 6.2, 6.4, 6.6, and 6.9 of the Anti-Dumping Agreement.

47. This paragraph makes clear that Mexico is challenging the Department's consistent practice in sunset reviews in determining whether termination would be likely to lead to continuation or recurrence of dumping. The first clause provides that Mexico is challenging the Department's "standard" for determining likelihood of dumping (i.e., 19 U.S.C. 1675a(c)(1), the SAA (pages 889-890), and the SPB (section II.A.3)). The second clause – "the Department's determination in this regard" – means that Mexico is challenging the Department's likelihood determination "as such," which occurs through the Department's practice. Thus, the first and second clauses read together with the remainder of the sentence indicate that both the standard and the Department's "determination in this regard" are being challenged "both as such and as applied."

48. In other words, the Department's standard (the statute, the SAA, and the SPB) is being challenged both as such and as applied. As section A.1 of the Panel Request indicates, the Department's use of the standard in rendering the likelihood determination is also being challenged both as such and as applied. In this context then, the "as applied" challenge relates to the Department's likelihood determination in OCTG from Mexico. Consequently, the "as such" challenge refers to the Department's use of the standard – "in this regard" – in rendering the likelihood of dumping determination in all sunset cases, i.e., the Department's practice.

49. Mexico notes that it has used the Department's consistent practice for three separate and independent purposes in this case. First, Mexico submits that the Department's consistent practice confirms the meaning of section II.A.3 of the Sunset Policy Bulletin. The Department's consistent practice (as set out in MEX-62) demonstrates that section II.A.3 of the Sunset Policy Bulletin directs the Department to give decisive weight to declines in import volumes and historic dumping margins. In this context, the "consistent practice" is used as an element to support the "as such" claim related to the Sunset Policy Bulletin.

50. Second, Mexico has challenged separately the consistent practice of the Department "as such" because the Department always treats satisfaction of at least one of the three Sunset Policy Bulletin criteria ((1) continued dumping margins; (2) cessation of imports; and (3) declining volumes) as conclusive of likely dumping, and thus applies a WTO-inconsistent presumption of likely dumping in violation of Article 11.3.<sup>6</sup> There are no exceptions; the Department's consistent practice (as evidenced by MEX-62) demonstrates that no party ever has overcome the presumption.

51. Third, Mexico argued in the alternative, that if the Panel does not agree with Mexico's claims regarding the WTO-inconsistent presumption established by US law, or that the Department's consistent

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<sup>6</sup> See US Department of Commerce Sunset Reviews (MEX-62).

practice violates as such US WTO obligations, then Mexico submits that the United States failed to administer in an impartial and reasonable manner US anti-dumping laws, regulations, decisions and rulings with respect to the Department's sunset reviews of anti-dumping duty orders, in violation of Article X:3(a) of the GATT 1994. For Mexico, it is not credible to believe that a review based on positive evidence could lead to an affirmative finding of likely dumping in each of the 227 cases in which the US industry requests continuation of the anti-dumping measure.

52. Mexico would also note that the United States has formulated substantive rebuttal arguments to Mexico's challenge to the Department's "consistent practice" "as such."<sup>7</sup> While, the United States argues – albeit unconvincingly – that the Department's "consistent practice" is not a "measure" that can be challenged in WTO dispute settlement, the United States has not argued that Mexico's claim with respect to the Department's "consistent practice" is not properly before the Panel on DSU Article 6.2 grounds.<sup>8</sup>

53. Finally, Mexico notes that in *Japan Sunset*, the Appellate Body evaluated whether "the type of instrument itself – be it a law, regulation, *procedure, practice*, or something else – govern[s] whether it may be subject to WTO dispute settlement[.]"<sup>9</sup> The Appellate Body concluded "that there is no basis, either in the practice of the GATT and the WTO generally or in the provisions of the *Anti-Dumping Agreement*, for finding that only certain types of measure can, as such, be challenged in dispute settlement proceedings under the *Anti-Dumping Agreement*."<sup>10</sup> The Appellate Body's reasoning thus requires the conclusion that agency practice may be challenged as such.

**Question 13. Is Mexico of the view that the text of Article 11.3, taken alone, prohibits cumulation in sunset reviews?**

**Mexico's Response**

54. Yes, Mexico is of the view that the text of Article 3 prohibits cumulation in sunset reviews. (Please refer to Section VIII.E of Mexico's First Submission, especially paragraph 254.) Mexico's view begins with the text of Article 11.3, noting that a Member may continue an anti-dumping measure beyond five years only if "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury." It is significant to Mexico that the obligation is phrased in this manner: the use of the singular "the duty" was not an accident. This is true especially when one considers that Article 3.3 itself demonstrates that the WTO Members specifically contemplated that several duties could result from a single investigation, and therefore WTO Members knew that the Article 11.3 injury determination in many cases would involve several duties applicable to exports from different countries. In Mexico's view, the text of Article 11.3 shows that each WTO Member has the right to termination of a measure affecting its exports unless the investigating authority shows that expiry of the measure applicable to its exports would be likely to lead to continuation or recurrence of dumping or injury.

55. Mexico believes, however, that the Panel should not limit itself to the text of Article 11.3 to determine whether cumulation is prohibited. It should also review the context of Article 11.3, and the object and purpose of the Agreement, including the consequences of an alternative interpretation of Article 11.3 that would permit cumulation in sunset reviews. In this regard, Mexico notes that Article 11.1, which the Appellate Body has referred to as establishing the "over-arching principle" of Article 11 also uses the singular

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<sup>7</sup> See US First Submission, paras. 110-116.

<sup>8</sup> See US First Submission, paras. 110-116.

<sup>9</sup> Appellate Body Report, *Japan Sunset*, para. 78 (emphasis added). See also Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003, paras. 150, 151, 162 ("US – CVDs on EC Products"); *United States – CVDs on EC Products: Status Report by the United States*, WT/DS212/13 (28 Oct. 2003) (stating that the United States/Department changed a methodology to comply with its WTO obligations).

<sup>10</sup> Appellate Body Report, *Japan Sunset*, para. 88.

to talk about the duration of an anti-dumping duty (a duty can remain in force "only as long as and to the extent necessary to counteract dumping which is causing injury"). Also, Article 11.2 requires authorities to "review the need for the continued imposition of the duty," and provides interested parties the right to request an examination of whether "continued imposition of the duty" is necessary. (In fact, the United States cites this particular use of the singular to support its argument that Article 11.2 does not require "company specific" terminations). Thus, the text of Articles 11.1 and 11.2, and the drafting the entire article, demonstrate that WTO Members were granting the right to individual WTO Members (and, in the case of Article 11.2, individual exporters) to the termination of the duty applicable to its exports.

56. There is no suggestion in Article 11 or in any other part of the Agreement that this right is conditioned by the behavior of other exporters from other countries that are subject to other duties. However, as we can see in this case, a cumulative analysis would condition the right in exactly this manner. For example, using the hypothetical that the Panel posed to Mexico in Question 10, it simply would not matter that there were no exports from a particular WTO Member or that exports from a particular WTO Member were not likely to recur. Once the analysis proceeds on a cumulative basis, the behavior of exports from individual countries loses its meaning. It could be argued that an investigating authority could decide not to cumulate if imports from a particular country were not likely to return to the market. However, as the United States has argued in this case, if Article 11.3 does not prohibit cumulation, then there is no regulation of cumulation whatsoever in sunset reviews. Therefore, there is no discipline that would require the investigating authority to make such a determination not to cumulate. The WTO Members could not have intended to allow countries to continue measures on imports from a country that is not likely to resume exports to the market in question.

57. The problem is apparent in this particular case, in which the Commission never even analyzed when imports might return to the market from each of the cumulated sources. That is, there was no positive evidence demonstrating that it would be likely that the imports from the various countries would be simultaneously present in the market and compete with each other and the domestic like product. Such findings are necessary in order to justify a cumulative injury assessment of the impact of imports on the domestic industry.

58. Finally, even if the Panel finds that cumulation is not prohibited by Article 11.3, it cannot find that cumulation can be applied without any disciplines. Such use of cumulation undermines the rights of individual Members under Article 11.3.

**Question 14. Could Mexico explain further its view that the fact that 227 sunset reviews resulted in findings of likelihood of continuation or recurrence of dumping establishes the role and function of the Sunset Policy Bulletin in the decision-making of the Department of Commerce?**

Mexico's Response

59. According to the United States, the Sunset Policy Bulletin "does not 'do' anything. It does not instruct Commerce or even advise Commerce. . ."; and "Commerce is free to disregard it."<sup>11</sup> These descriptions are belied by the facts of the Department's consistent practice. Exhibit MEX-62, and the administrative decisions annexed thereto, demonstrates that the instructions of the Sunset Policy Bulletin led to likely dumping determinations in 100 per cent of the full and expedited sunset reviews.

60. As a starting point, both the "role and function" of the Sunset Policy Bulletin is demonstrated by its terms and by the Department's reliance on the SPB in every single sunset review. First the text of the statute (19 U.S.C. 1675a(c)(1), the SAA pages 889-890), and the SPB (section II.A.3) direct the Department to give decisive weight to reduction in import volumes and the existence of historic dumping margins. At the same time, these instruments place the burden on exporters to convince the Department even to consider any other factors.

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<sup>11</sup> US Opening Statement, para. 7.

61. Hence, the role and function of the Sunset Policy Bulletin (as well as the statute and the SAA) is to direct the Department in the conduct of sunset reviews. Under the terms of the statute, the SAA, and the SPB, import volumes and prior dumping margins are considered to be highly probative of likely dumping, and consideration of "other factors" is contingent upon an interested party providing information or evidence that would warrant consideration of this information.<sup>12</sup> The reversal of the burden to provide information or evidence that would warrant consideration of other relevant factors is by itself inconsistent with the Article 11.3 obligation to undertake a case-specific analysis of the factors other than dumping margins and import volumes that are necessary to determine the likelihood of future dumping. Rather than examining all the factors relevant to the Article 11.3 obligation, the Department requires exporters to provide information or evidence that, subject to the Department's discretion, would warrant consideration of such factors.

62. The role and function, and the meaning of the statute, the SAA, and the SPB are confirmed by the Department's consistent practice in the 227 full and expedited sunset reviews set out in MEX-62. The statute, the SAA, and the SPB do not permit a case-specific analysis of the factors relevant to the determination whether termination of the duty would be likely to lead to the continuation or recurrence of dumping. The Department's consistent reliance on the three SAA/SPB criteria as the sole basis for its likelihood determinations is inconsistent with the Article 11.3 obligation to make a particular determination in each case using positive evidence.

63. The Appellate Body in *Japan Sunset* was not able to decide whether the SPB is inconsistent with Article 11.3 as such. The Appellate Body concluded that, because the Panel had not made any factual findings as to the "consistent application" of Section II.A.3, it could not fully discern that provision's meaning and could not determine whether Section II.A.3 directs the Department to consider the three criteria to be conclusive of likely dumping. Therefore, the Appellate Body determined that evidence of the consistent application of Section II.A.3 was necessary to discern its meaning.

64. Mexico's Exhibit MEX-62 demonstrates that the Department follows the instruction of the statute, the SAA, and the SPB in every sunset review, and every time it finds that at least one of the three criteria of the SPB is satisfied, the Department makes an affirmative finding of likely dumping without considering additional factors. The Department's consistent application of the SPB (and citation to the SPB as support for its determinations in every case) thus demonstrates the role, function, and meaning of the SPB: Section II.A.3 directs the Department to attach decisive weight to historical dumping margins and declining import volumes (or the cessation of imports altogether) in every case. Because Section II.A.3 of the SPB instructs the Department to treat satisfaction of any one of the three criteria as conclusive of likely dumping, the measure is inconsistent with the Article 11.3 obligation to determine on the basis of all relevant evidence whether termination of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping.<sup>13</sup>

65. In 100 per cent of the full and expedited sunset reviews conducted by the Department, the Department cited the authority of the SPB and determined that dumping was likely to continue or recur.

**Question 15.** The Panel notes that Mexico has agreed with the European Communities' argument that the phrase "during the investigation phase" in Article 2.4.2 of the AD Agreement does not limit the application of that provision to original investigations, and that therefore the obligations in that provision apply to sunset reviews. The Panel also notes that Mexico argues that the use of the term "investigations" in Article 3.3 of the AD Agreement limits the application of that provision to original investigations, and that therefore cumulation is prohibited in sunset reviews. Could Mexico explain how it reconciles these two positions?

#### Mexico's Response

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<sup>12</sup> *Sunset Policy Bulletin*, Section II.C, at 18,874 (MEX-32).

<sup>13</sup> See Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 178, 191.

66. Mexico believes that there is difference between the phrase "investigation" as used in Article 3.3 and "investigation phase." Article 3.3 specifically references a circumstance in which "Imports of a product from one or more countries are simultaneously subject to anti-dumping investigations . . .," and then specifically references the *de minimis* standards in Article 5. Article 5, in turn, deals specifically with the initiation of an investigation begins with an application filed by or on behalf of a domestic industry. In Mexico's view, Article 3.3 and the cross-reference to Article 5.8 signifies that the WTO Members had very clearly in mind that they were allowing cumulation during the process of an investigation as described in Article 5.

67. By contrast, the reference in Article 2.4.2 is more general. It states: "The existence of margins of dumping during the investigation phase shall normally be established on the basis of the comparison of weighted-average normal value . . ." There is no reference to Article 5, and the use of the phrase "during the investigation phase" refers to the process of "investigating" the facts necessary to calculate a dumping margin. This investigative process occurs each time an investigating authority calculates a dumping margin, whether in the context of an Article 5 investigation, or an Article 9 or Article 11 review. If the WTO Members intended to limit Article 2.4.2 to an Article 5 investigation, it could have done so in a manner similar to that in Article 3.3.

68. Mexico would like to take this opportunity to remind the Panel that the phrase "during the investigation phase" does not condition in any manner the principal obligation of Article 2.4 that a fair comparison shall be made between the export price and the normal value.

**Question 16. The Panel notes Mexico's view that a dumping margin used in the context of a sunset review must be, itself, consistent with the requirements of the AD Agreement. Is Mexico of the view that, if the dumping margin in an original investigation was calculated consistently with the requirements of the AD Agreement, that dumping margin may be used in the context of a subsequent sunset review?**

Mexico's Response

69. Any dumping margin used in the context of a sunset review must be the result of the application of the WTO Anti-Dumping Agreement, and it also must be consistent with the Agreement. These are two, independent requirements that arise directly from the Agreement.

70. Article 18.3 of the WTO Anti-Dumping Agreement states:

... the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement. (Emphasis added)

71. The fact that the dumping margin used by the Department is not the result of the application of the WTO Anti-Dumping Agreement is clear in this case. The Department stated in its *Issues and Decision Memorandum* :

The Department continues to find that the margin rates from the original investigation are the appropriate rates to report to the Commission. (page 5) (emphasis added).

72. Because the imposition of the anti-dumping duty in this case was the result of an investigation that was initiated prior to the entry into force of the WTO Agreement, it is obvious that the margin of dumping determined at that time cannot be the result of the application of the provisions of the WTO Anti-Dumping Agreement.



73. A separate question is whether a particular dumping margin is consistent with the terms of the Agreement. Article 1 of the Anti-Dumping Agreement requires that any anti-dumping measure must be "pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement." In Mexico's view, Article 1 give rise to a separate obligation that anti-dumping measures must be consistent with the terms of the Agreement.

74. Hypothetically, the margin of dumping from a pre-WTO original investigation may, by coincidence, be consistent with Article 2 of the WTO Anti-Dumping Agreement, even though it did not arise from the application of the Anti-Dumping Agreement (because it preceded the Agreement). In such a case, use of such a margin in an Article 11.3 review would violate both Article 11.3 and Article 18.3. Such a margin is not the result of the application of the WTO AD Agreement, which is required by Article 18.3. "Application" and "consistency" are two different requirements, and any dumping margin relied upon in sunset reviews must satisfy both.

75. In this case, the dumping margin relied upon by Commerce satisfied neither. It was not the result of the application of the Anti-Dumping Agreement, but rather the consequence of the SPB, Section II.B.1 instruction to report to the Commission the margin of dumping that was determined in the original investigation. As indicated at the end of the Memorandum:

Further, as stated in our Policy Bulletin, the investigation rate, reflecting the behavior of exporters without the discipline of an order in place, is the appropriate rate to report regardless of whether it is based on a company's own information or on best information available (i.e., facts available). (Emphasis added)

76. Had the Department determined the margin likely to prevail by applying the provisions of the Agreement (i.e. using any of the margins found in the three post-WTO administrative reviews), it would have found that the margin likely to prevail would be zero. In other words, there was no positive evidence of "continuation" or "recurrence" because dumping was not found in any of the three administrative reviews (lack of continuation) and no other information supported the conclusion that dumping would occur again (that is, nothing suggested recurrence).

77. The 21.7 per cent margin also is inconsistent with the Agreement. By mechanically using a margin of dumping that was determined in the final determination in the original investigation (that is, outside the purview of the scope of the Anti-Dumping Agreement), the Department did not apply the provisions of Article 2 or Article 6, which expressly applies to Article 11 reviews through Article 11.4.

78. The Department's reliance on a flawed margin for purposes of its likelihood of dumping determination, and its reporting of a flawed margin of dumping likely to prevail to the Commission, tainted both the Department's and the Commission's likelihood determinations. As the Appellate Body stated in *Japan Sunset*:

If a likelihood determination is based on a dumping margin calculated using a methodology inconsistent with Article 2.4, then this defect taints the likelihood determination too.

79. In the instant case, the Commission's likelihood determination of injury has been tainted (i.e., rendered inconsistent with Article 11.3), by the WTO-inconsistent dumping margin that was determined and reported to the Commission by the Department as an integral part of the Article 11.3 review. See US First Submission, paras. 315-316.

**Question 17. Could Mexico explain what, in its view, is the alternative to the use of the dumping margin calculated in the original investigation in the context of a sunset review? Is it Mexico's view that an updated or more recently calculated margin must always be used? If so, how would Mexico**

**consider that an investigating authority could conduct a sunset review in a case in which imports from the sources found to be dumping ceased after the imposition of the order?**

Mexico's Response

80. Mexico considers that other information could be relevant to an analysis in an Article 11.3 review. For example, in Question 40, the Panel identifies certain types of information that the Appellate Body considered to constitute "positive evidence" for purposes of an analysis under Articles 3.1 and 3.2. Mexico submits that this kind of information ("critical aspects of the market, conditions of competition, production characteristics, and statistical data relating to the volume, prices, and effects of imports"<sup>14</sup>) might be considered by the administering authority to be relevant to the authority's determination of likelihood in the context of a review under Article 11.3.

81. Mexico does not consider that an updated or more recently calculated dumping margin necessarily must always be used. The point for Mexico is that whatever information is used by the administering authority, that information must be relevant to the question of "likelihood of dumping." In this respect, it may often be the case (although not always) that dumping margins calculated after the original determination are more probative of likelihood of dumping. But other information – whether company-specific data, country-specific information, macro-economic conditions, for example – might be as probative or more probative than dumping margins for a particular sunset review, depending upon the specific facts.

82. At the same time, Mexico would reiterate the Appellate Body's conclusions from *Japan Sunset*, that if an administering authority relies on a margin – whether from the original investigation or a subsequent administrative review – or undertakes to calculate a new margin for purposes of the sunset review, then the administering authority must satisfy itself that any such margin is consistent with the Anti-Dumping Agreement generally, and with Article 2 in particular.<sup>15</sup>

83. Finally, in this case, as Mexico's Exhibit MEX-64 shows, Mexico submitted positive evidence demonstrating that the dumping margin from the original investigation was not a reliable basis given the unique circumstances (peso devaluation and high US dollar indebtedness) that lead to the Department's use of facts available in that case, and the positive evidence provided by the Mexican producers that showed that circumstances would not arise again in the event of termination. (Mexico refers the Panel to its Answer to question 5 above.) In this case, the three zero margins calculated since the original investigation were more probative than the margin from the original investigation with respect to the question of likelihood. Indeed, the only relevant positive evidence before the Department demonstrated that Mexican OCTG was not being dumped. All concluded reviews resulted in findings of no dumping, and there was no other positive evidence suggesting that dumping was likely to recur.

**Question 18. Could Mexico explain why, in its view, it is relevant to the sunset determination that the original anti-dumping measure was imposed on the basis of a dumping calculation based in part on facts available?**

Mexico's Response

84. It is relevant because it highlights the lack of substantive analysis in the Department's likelihood determination. A finding based on extraordinary, historical circumstances, linked to one point in time in the past, was used as evidence of what would be "likely" to occur in the future. The dumping calculation from the original determination was based on the application of facts available that resulted from unique circumstances involving the 1994 Mexico peso devaluation and one company's high US dollar indebtedness.

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<sup>14</sup> See Panel Question 40, citing *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, paras. 129-130 and fn. 162.

<sup>15</sup> See Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 127-132.

Thus, facts available in the original investigation reflected the information available at that time; that is in 1994 and 1995.

85. By contrast, the determination under Article 11.3 must be prospective. This means that the evidence supporting a determination under Article 11.3 must be probative of the likelihood of dumping continuing or recurring in the future.

86. The margin from the original investigation, therefore, should have been given very little (if any) weight for purposes of the Department's likelihood determination. The Mexican exporters provided positive evidence that the application of facts available for the final determination in the original investigation resulted from unique circumstances (the 1994 Mexican peso devaluation coupled with the high US dollar indebtedness of the company) and that these circumstances would not be repeated in the event of termination. Indeed, as the EC Third Party Submission stated: the margin resulted from a "'freak' occurrence."<sup>16</sup> Hence, the dumping margin that resulted from the use of facts available in the original investigation was in no way relevant to the prospective analysis required by Article 11.3.

87. Since the original investigation, the Department conducted three administrative reviews and calculated a zero margin in each of those reviews. The consecutive no dumping determinations is positive evidence which is more recent and is based on the company's sales data and is therefore more probative for purposes of the Department's likelihood determination.

**Question 19.** Does Mexico consider that the determination of "likelihood of continuation or recurrence of injury" under Article 11.3 is identical in nature and scope to the "determination of injury" under Article 3? Could Mexico please address, in this context, the views of the Appellate Body in *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("US – Carbon Steel"), WT/DS213/AB/R, at paragraph 87, that "original investigations and sunset reviews are distinct processes with different purposes" and that the "nature of the determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation"?

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<sup>16</sup> Third Party Submission of the European Communities, para. 3.

Mexico's Response

88. Mexico believes that "injury" is the same in Article 3 and Article 11.3. That is, the scope of an injury determination is injury, and this remains the same whether the need for the injury analysis arises under Article 5 or Article 11.3.

89. As to the determination of the injury, it may be different in an Article 11.3 review than it is another context, such as an Article 5 investigation. For example, if, in an Article 5 investigation an investigating authority is considering whether current material injury exists, it will review information regarding the past and the present to determine whether the information supports the view that injury currently results from the dumped imports. In an Article 11.3 review, the investigating authority will be investigating current and past information to determine whether injury currently exists (which is required in order to determine whether injury is likely to "continue"), or if it does not exist currently, whether it is likely to recur in the future. However, this difference in the nature of the injury inquiry arises from the specific type of injury being reviewed, not from the source of the obligation to demonstrate injury, be it Article 5 or Article 11.3. For example, in Mexico's view, the difference in the nature of the injury investigation diminishes significantly, and may not exist, if the investigating authorities in an Article 5 injury investigation are analyzing the threat of material injury. The inquiry will be similar to that of the injury determination under Article 11.3. Likewise, it is possible that, in the context of an Article 11.3 injury investigation, an authority might analyze whether the specific type of injury known as "threat of injury" might recur in the future. This would be different in nature than the current material injury analysis in an Article 5 injury investigation. However, it does not mean that "injury" is different.

90. Mexico believes that these views are completely consistent with the Appellate Body's statements in the above-referenced quotations. Mexico obviously agrees that original investigations and sunset reviews are distinct processes and that they serve different purposes. As stated above, Mexico also agrees that the nature of the analysis and the determination may differ in an Article 5 injury investigation and in an Article 11.3 injury investigation, although as discussed above, such differences may not be significant (such as in the case in which the investigating authority is reviewing threat of material injury in both contexts, or threat of injury in an Article 5 context and any of the three types of injury in an Article 11.3 review). However, Mexico considers that the Appellate Body was not addressing the specific issue of the injury determination, but rather was commenting on the prospective nature of the analysis that arises from the words "likely" and "continue or recur." This prospective nature of the inquiry is always important to the nature of an Article 11.3 review, and sometimes relevant to an Article 5 investigation.

**Question 20. Footnote 9 of the AD Agreement depends from the title of Article 3, "Determination of Injury". That footnote provides**

**"Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article."**

**Does Mexico consider that the phrase "be interpreted in accordance with the provisions of this Article" means that factors that are set out in the various provisions of Article 3 for "examination" or "consideration" define injury? If so, could Mexico explain how the volume of dumped imports, or the prices of dumped imports, which are elements on which a determination of injury is to be based, are pertinent to the concept of injury? Or is Mexico of the view that only some of the elements set out in Article 3 define the concept of injury? If this is the case, could Mexico specify which elements it considers relevant in the context of sunset reviews?**

### Mexico's Response

91. Mexico does not consider that the phrase "be interpreted in accordance with the provisions of this Article" defines injury. To Mexico, the definition is in the first part of footnote 9, which reads: "Under this Agreement, the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic injury, or material retardation of the establishment of such an industry . . ." This portion of the footnote specifically says what injury is, and therefore defines the term for the purposes of the Anti-Dumping Agreement.

92. In Mexico's view, the phrase that follows the definition in Article 9 – "injury shall be interpreted in accordance with the provisions of this Article" – tells the WTO Members that they must apply Article 3 in any determinations concerning injury (as defined above). Therefore, the requirements of positive evidence and an objective examination found in Article 3 will always be required when determining injury (in any of its forms). Any determination of injury also must be guided by Article 3.1 and include a consideration of the volume of dumped imports and the effect of dumped imports on prices, as stipulated by Article 3.2. Any determination of injury must include an evaluation of the factors listed in Article 3.4. Finally, any determination of injury (in any of its forms) must include a demonstration that dumping is the cause of injury (in any of its forms).

93. As to the second question, Mexico is afraid that it may not understand the question given that the pertinence of the volume and price of dumped imports to the concept of injury cannot be in doubt. In fact, they are required elements of any injury determination under the Agreement under the terms of Articles 3.2, 3.4, 3.5, and footnote 9. Mexico is of the view that the volume of dumped imports and the price of dumped imports are equally pertinent to a determination of injury under Article 11.3 as they are to an injury determination under Article 5. The nature of the injury investigation in Article 11.3 reviews requires the authority, on a prospective basis, to assess the impact of likely volume and likely price effects on the domestic industry. However, as explained above, this does not alter the scope of the "injury," only the nature of the analysis and determination.

94. As to the third and fourth questions, Mexico believes that "injury" is defined by the first part of footnote 9, and that therefore it is well established that there are three types of injury for the purposes of the Anti-Dumping Agreement. As to the elements that Mexico considers relevant in assessing injury under Article 11.3, they are the same factors included in Article 3; that is, volume and price (Article 3.2), all the individual factors relating to the impact of dumped imports (Article 3.4), causation (Article 3.5), and the specific elements required in the case of a threat of injury determination (Article 3.7). Mexico notes that paragraph 7.56 of the recent Panel decision in *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada* (WT/DS277/R) supports Mexico's view that the first part of footnote 9 contains the definition of injury, and that the factors set out in Article 3.4 and 3.7 are elements that must be considered in making the injury determination (para. 7.105).

**Question 36. 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 anti-dumping 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?**

### Mexico's Response

95. As is apparent from Mexico's other responses, Mexico does not agree with this position. In Mexico's view, an injury determination under any part of the Anti-Dumping Agreement may be based on any of the three enumerated types of injury; that is, material injury, threat of material injury, or material retardation of the establishment of a domestic injury. The precise manner in which the analysis may be done for each of these

three types may vary from case to case and may vary depending on the source of the obligation to examine the injury under the Agreement. However, the view that certain types of injury cannot support an injury finding under Article 11.3 simply is contrary to the text of the Anti-Dumping Agreement.

96. As to the second question, Mexico's view is that the phrase "continuation or recurrence" refers to the word "injury" in any of its three forms, and that it does not require a finding that the injury supporting an Article 11.3 injury determination be the precise type of injury found in the original investigation. Once one accepts that the term "injury" refers to injury in any of its three forms (and not exclusively to one of the three), there are no particular interpretive problems posed by the words "continuation or recurrence" in Article 11.3.

**Question 37. 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?**

Mexico's Response

97. Yes. Article 11.1, which establishes the "over-arching principle" of Article 11, specifically states that "anti-dumping duties shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." This specific reference to causation makes complete sense in the context of the fact that the causation requirement has been fundamental to the regulation of dumping in international agreements since 1947.

98. Also, Mexico is of the view that Article 11 should not be interpreted in isolation. Such an interpretation is not consistent with the general principles of treaty interpretation. In this case, the specific terms of footnote 9, which define "injury" under this Agreement, provide important context. Therefore, "injury" in Article 11.3 must be interpreted in accordance with Article 3, as required by footnote 9, and Article 3.5 requires a causal link between the dumping and injury. Also, GATT Article VI is relevant context for all dumping determinations, and the causation requirement is explicit in Article VI:1 and VI:6:

"The contracting parties recognize that dumping . . . is to be condemned if it causes or threatens material injury to an established industry . . . ."

. . .

No contracting party shall levy any anti-dumping . . . duty . . . unless it determines that the effect of dumping . . . is such as to cause or threaten material injury . . . ."

**Question 38. 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.**

Mexico's Response

99. Any presumption would have to be evaluated on a case-by-case basis. For example, the context in which the presumption is employed, the manner in which the presumption shifts the burden of proof, and the nature of the evidentiary burden needed to overcome the presumption all may affect whether the presumption is WTO-inconsistent.

100. In this case, there can be little doubt that the presumption established by the US system for determining likelihood of dumping in sunset reviews is WTO-inconsistent.

101. There are several problems with the presumption created by the statute, SAA, and SPB. First, in responding to the Department's notice of initiation of a sunset review, the Department's sunset regulations require an exporter to supply information regarding its pre- and post-order import volumes and the company's dumping margin from the original investigation and any subsequent administrative reviews.<sup>17</sup> The regulations limit the required substantive information to these two factors, and require a showing of "good cause" to convince the Department to even consider other information.<sup>18</sup> The effect of the Department's "good cause" provision effectively blocks the ability of respondents to overcome the presumption created by the statute, the SAA, and the SPB.

102. Second, in the weight given to these factors, the presumption establishes a very high evidentiary standard by treating the existence of historic dumping margins or post-order volume declines will be "highly probative" that a foreign producer cannot export to the United States without dumping.

103. Third, the reversal of the burden to require the exporters to provide information or evidence that would warrant consideration of other relevant factors is by itself inconsistent with the Article 11.3 obligation to undertake a case-specific analysis of the factors other than dumping margins and import volumes that are necessary to determine the likelihood of future dumping. Indeed, in effect once the presumption is in place, the system then limits the information that the Department will consider. In the end, rather than examining all the factors relevant to the Article 11.3 obligation, the Department requires exporters to provide information or evidence that, subject to the Department's discretion, would warrant consideration of such factors.

104. Finally, under the terms of the statute, the SAA, and the SPB, a decline in import volume after the imposition of an anti-dumping order and the existence of historic dumping margins are considered to be highly probative of likely dumping. MEX-62 demonstrates that, in fact, the presumption is irrebuttable and that in every full and expedited sunset review no party has ever been able to overcome the Sunset Policy Bulletin criteria.

**Question 39. 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?**

#### Mexico's Response

105. The referenced Panel Report confirms Mexico's claim that the Commission violated Article 3.4. There is nothing in the *Softwood Lumber from Canada* Panel Report that contradicts Mexico's claims and arguments as stated in Section VIII.D.4, paragraphs 221 to 238 of Mexico's First Submission.

106. The portion of the Panel's determination in that case that is most relevant to an Article 11.3 review appears in paragraph 7.105. The Panel finds that the investigating authority is not required to analyze the impact of dumped imports twice. The Panel found that the Commission already had analyzed the impact of dumped imports in reaching its finding that imports were not the cause of present material injury to the relevant US industry. Only after that analysis did the Commission proceed to a threat analysis. The Panel considered that the Commission did not need to revisit all of the factors of Article 3.4 and to conduct a

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<sup>17</sup> 19 C.F.R. 351.218(d)(3)(iii).

<sup>18</sup> 19 U.S.C. 1675a(c)(2); 19 C.F.R. 351.218(d)(3)(iv); Sunset Policy Bulletin, Section II.

predictive analysis of those factors because it had already considered those factors in its determination that material injury did not exist.

107. The issue in this case is not whether the Commission must consider the impact of dumped imports twice; rather, it is whether the Commission must examine the impact of imports it has considered are likely to be dumped, and whether it must examine factors mentioned in Article 3.4 as part of that analysis. Mexico believes that the investigating authority does have such an obligation. For this reason, in paragraph 221 Mexico argued that: "The fact that Article 11.3 requires a prospective analysis does not relieve the investigating authority of its obligation to evaluate all the factors and indices contained in Article 3.4 of the Anti-Dumping Agreement."

108. The obligation to consider the Article 3.4 factors arises from the use of the term "injury" in Article 11.3. Nothing in the Panel's Report in DS 277 contradicts this.

**Question 40.** 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 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 imports 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?

Mexico's Response

109. Mexico refers the Panel to its response to question 17.

**Question 41.** 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?

110. Yes, Mexico agrees with this proposition. The Panel is not required to take as "fact" a Member's explanation as to the meaning and/or operation of its municipal law. The DSU rules and the Panel's terms of reference do not require that such deference be accorded. Mexico respectfully submits that the Panel must analyze a challenged measure – including, if needed, municipal law – in discerning whether that measure (by its terms and/or effect) is compatible with WTO obligations.

**Question 42.** 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?**

Mexico's Response

111. In Mexico's view, the Department relied on the margin from the original determination for purposes of its determination of likely injury in the sunset review.

112. Webster' Dictionary defines the word "consider" to mean:

"1. To think seriously. 2. To regard as. 3. To believe after deliberation: Judge. 4. To take into account: bear in mind. 5. To show consideration for. 6. To regard highly: esteem. 7. To look at thoughtfully; To think carefully: reflect."<sup>19</sup>

113. Webster's Dictionary defines the word "rely" to mean:

"1. To depend. 2. To trust confidently."<sup>20</sup>

114. Consistent with these dictionary definitions, for Mexico, "consideration" suggests action. To "consider" something would require the authority to think "seriously," "thoughtfully," and "deliberately" about it, and to form a "judgment" it. Thus, as WTO Panels have confirmed, the mere recitation of facts would not constitute "consideration."<sup>21</sup> That means, for example, in connection with an Article 11.3 review, to "consider" the margin from the original investigation for purposes of the Article 11.3 determination would necessarily entail an exercise by the administering authority to determine whether the margin was probative with respect to the question of likelihood of dumping in the event of termination of the measure. In the end, the amount, if any, of weight to be given to the original margin for purposes of the Department's likelihood determination must be based on the Department's "consideration" of the probative value that that margin has for the likelihood of dumping determination.

115. Reliance means a belief in or confidence in something. While "consideration" suggests an active process, "reliance" is the formation of a belief and or confidence in a particular conclusion. While that belief or confidence can be based on "consideration" of the factors relevant to forming the belief or gaining the confidence, "reliance" can also occur without "consideration" of the factors that one would reasonably expect to be part of an the evaluation. In addition, reliance can occur despite a scenario where "consideration" of the relevant factors would lead to a conclusion not to have confidence in a particular outcome.

116. Thus, with respect to the margin of dumping from the original investigation, the Department's reliance on that margin meant that the Department did nothing to assess whether that margin was probative to the question of likelihood of dumping. Rather the Department used that as a basis for the Article 11.3 determination.

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<sup>19</sup> Webster's II New College Dictionary 241.

<sup>20</sup> Webster's II New College Dictionary 937.

<sup>21</sup> Panel Report, *Thailand – H-Beams*, para. 7.161; Panel Report, United States – Investigation of the International Trade Commission in Softwood Lumber from Canada, DS277. para. 7.61.

117. In fact, the Department's reliance meant that the weight given to the margin proved to be outcome determinative. The Department's reliance was based on the standard established by the statute, the SAA, the regulations, and the SPB. As discussed in several of Mexico's earlier responses, under the terms of the statute, the SAA, the regulations, and the SPB, a decline in import volume after the imposition of an anti-dumping order and the existence of historic dumping margins are considered to be highly probative of likely dumping. "Consideration" of "other factors" is contingent upon an interested party demonstrating "good cause" for the Department to even consider other information or evidence.

## ANNEX E-2

### ANSWERS OF THE UNITED STATES TO QUESTIONS OF THE PANEL – FIRST MEETING

(18 June 2004)

#### Questions to United States:

**Q21. At paragraph 146 of its first submission, the United States asserts that "US 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.<sup>1</sup> This choice on the part of the requesting companies ensured that, if TAMSA and/or

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<sup>1</sup> See US First Written Submission, para. 150 and the exhibits cited therein.

Hylsa were to achieve revocation from the anti-dumping order, the benefit would be restricted to that party or parties, rather than being extended to other Mexican competitors in the US 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 US 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 anti-dumping 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."**

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."<sup>2</sup> 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 . . ."<sup>3</sup> 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.<sup>4</sup> 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?**

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<sup>2</sup> *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.

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

<sup>4</sup> *Japan Sunset AB*, para. 205.

6. Paragraph 135 of the US 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 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 US 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 US subsidiary (which produced the subject merchandise) and its unique position in the US 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 US 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.<sup>5</sup>

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 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 US law and regulations, request order-wide revocation under section 351.222(g) of the regulations (changed circumstances review). Furthermore, a single company can

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<sup>5</sup> See SAA at 890-91 (Exhibit MEX-26).

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.<sup>6</sup> 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 anti-dumping 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 US 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 anti-dumping 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 Anti-Dumping Agreement). Neither the Assistant Secretary nor Commerce as a whole is bound to follow the guidance in the *Sunset Policy Bulletin*. By contrast, under US 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 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.

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

**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 US Sugar programme's two-tiered tariff-rate-quota system, and an analysis of past and future world sugar prices.<sup>7</sup>

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 revocation and for the submission of any other information an interested party may choose to submit.<sup>8</sup> 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 United 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.

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

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

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 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 contracting 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 anti-dumping 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 anti-dumping 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 31 July 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 anti-dumping 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 anti-dumping 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 anti-dumping 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 anti-dumping 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 US 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 Anti-Dumping 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.<sup>9</sup> 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.<sup>10</sup> 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."<sup>11</sup>

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

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<sup>9</sup> *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.

<sup>10</sup> *ITC Lumber*, Panel Report, paras.7.105-7.107.

<sup>11</sup> *ITC Lumber*, Panel Report, para. 7.105.

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."<sup>12</sup> 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.<sup>13</sup> 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 data that can be provided reflects conditions during a time when the restraining effects of the anti-dumping 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."<sup>14</sup> 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 anti-dumping 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."<sup>15</sup> 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 US 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.

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<sup>12</sup> *ITC Lumber*, Panel Report, para. 7.105.

<sup>13</sup> *ITC Lumber*, Panel Report, para. 7.105.

<sup>14</sup> *ITC Lumber*, panel report, para. 7.111.

<sup>15</sup> *ITC Lumber*, panel report, para. 7.111.

**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 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 imports 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.<sup>16</sup> 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

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

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 US law. Under US 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.<sup>17</sup> 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 US 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 US 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 US 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 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 US 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**

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<sup>17</sup> Thus, the panel in *US - Steel Plate* concluded that US anti-dumping "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.*

**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."<sup>18</sup> "Rely" means "to be dependent on."<sup>19</sup> 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<sup>20</sup>, but simply whether dumping is likely to continue or recur.

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<sup>18</sup> *New Shorter Oxford English Dictionary*, p. 485 (Exhibit US-29).

<sup>19</sup> *New Shorter Oxford English Dictionary*, p. 2539 (Exhibit US-30).

<sup>20</sup> *See Japan Sunset AB*, para 123.

## ANNEX E-3

### ANSWERS OF THE UNITED STATES TO QUESTIONS OF MEXICO – FIRST MEETING

(18 June 2004)

#### **The Department's Sunset Review of OCTG from Mexico**

**Q1. How can a WTO Member obtain revocation of an anti-dumping duty in a US sunset proceeding in circumstances in which there are no exports to the United States during the period under review?**

1. As an initial matter, the United States wishes to point out that revocation occurs if either the Department or the ITC makes a negative finding with respect to likelihood. Therefore, revocation will always be possible if the ITC makes a negative determination, notwithstanding any Commerce findings regarding the presence or absence of exports.

2. In conducting sunset reviews under US law, Commerce and the ITC each conduct sunset reviews pursuant to sections 751(c) and 752 of the Act. Commerce has the responsibility for determining whether revocation of an anti-dumping duty order would be likely to lead to continuation or recurrence of dumping. If Commerce makes an affirmative determination of likely dumping, the ITC conducts a review to determine whether revocation of the anti-dumping duty order would be likely to lead to continuation or recurrence of material injury. In a sunset review where there was an absence of imports during the five-year period prior to the sunset review, the likelihood determinations made by Commerce and the ITC respectively would be based on a totality of the circumstances presented in the sunset review and not necessarily on the absence of imports. The United States notes that the "no exports" scenario described by Mexico is not a factual circumstance present in this dispute.

**Q2. There can be no dispute that dumping stopped after the imposition of the anti-dumping order on OCTG from Mexico and that there was no evidence of current dumping during the sunset review period.**

3. Mexico's premise that dumping stopped after the imposition of the order is false. Although Commerce did not consider the Final Results of the Fourth Administrative Review of OCTG from Mexico (1998-1999 period of review) in the sunset review (because the Final Results were issued after the completion of the sunset review), Commerce did find dumping during that period of review, which is within the five-year period examined in the sunset review. See US First Written Submission, para. 43.

(a) **In such circumstances, does the fact of lower export volumes mean that a Member could never obtain revocation?**

4. No.



**(b) If not, please explain how a Member could obtain revocation, even hypothetically.**

5. As explained in the answer to question 1 above, revocation occurs if either Commerce or the ITC makes a negative determination. In a sunset review where there was a significant reduction in imports of the subject merchandise during the five-year period prior to the sunset review, the likelihood determinations made by Commerce and the ITC respectively would be based on a totality of the circumstances presented in the sunset review and not necessarily on the reduction of imports.

**Q3. In paragraph 122 of its First Submission, the United States says that the original margin is the "only" evidence of the behavior of the respondents without the discipline of the anti-dumping order. This statement is consistent with the SAA and the SPB. If the nature of the Article 11.3 analysis is to determine what would happen in the absence of an anti-dumping order, and the United States says that the "only" probative evidence of an exporter's behavior without the discipline of the order is the original margin, then doesn't the US approach guarantee an affirmative determination of likely dumping? If not, can the United States provide an example that shows that this is not always the outcome?**

6. The reference to paragraph 122 in this question ignores the opening statement of that paragraph, in which the United States stated that the margin of dumping determined in the original investigation is only "the starting point for making its likelihood determination in a sunset review" and that Commerce then "examine[s] any subsequent evidence, such as the final results of administrative reviews." This statement makes it clear that the Department takes into account evidence suggesting that what is likely to occur in the future may differ from what has occurred in the past. Commerce makes its determination whether dumping is likely to continue or recur in a sunset review based on all the evidence on the record of that sunset review.

**Q4. The United States seems to argue that the Department does apply certain presumptions in the conduct of sunset reviews, but that these presumptions are rebuttable. In particular, Mexico would point to the United States' treatment of the existence of dumping margins and post-order declines in volume.**

**(a) Have respondents ever been able to overcome the Departments presumptions relating to historic dumping margins and pre-order/post-order volume comparisons?**

7. Commerce does not apply presumptions in making its likelihood of dumping determination in a sunset review. Commerce considers all the evidence, including any information submitted by interested parties, on the record of the sunset review in making the likelihood of dumping determination.

8. In its Panel Request and its First Written Submission, Mexico advanced arguments regarding Commerce's alleged application of a presumption in favor of continuing an anti-dumping order, which the United States has refuted. Mexico now asserts that the United States "seems to argue" that the Department applies certain presumptions, without explaining what these presumptions may be or providing a citation thereto, and then poses the question based on that assumption. In the absence of more concrete references to the "presumptions" about which the United States "seems to argue" it "applies," the United States is unable to address this question more fully.

**(b) The Department's regulations shift the burden of considering additional information (apart from margins and volume) on the exporter. What is the basis in for doing so? How is this consistent with the Appellate Body reaffirmation of the Article 11.3 obligation to conduct a review, undertake a "rigorous examination" of the record, and make a determination of likelihood on the basis of positive evidence?**

9. Nothing in Commerce's Sunset Regulations "shift[s] the burden of considering additional information" to an exporter. Commerce's Sunset Regulations provide all interested parties with the opportunity to address the likely effects of revocation. Interested parties may include any factual information, argument, and reason to support such statements. See section 351.218(d)(3)(ii)(F) of Commerce's Sunset Regulations. In addition, any interested party, domestic or respondent, may submit any information it chooses in a sunset review, as provided by section 351.218(d)(3)(iv)(B) of Commerce's Sunset Regulations. Commerce then bases its likelihood determination on all the record evidence in every sunset review. As the Appellate Body in Japan Sunset found, Commerce's analysis in the sunset review of Corrosion-Resistant Steel from Japan, based solely on historical dumping margins and import volumes, was not inconsistent with the obligations of Article 11.3.<sup>1</sup>

- (c) **The United States also takes the position that Article 11.3 contains few substantive disciplines – only those in Article 11.3, and that authority therefore is free to make its likely determination in any manner it considers appropriate. Combining this interpretation of Article 11.3 together with the presumptions employed by the Department, and the Department's placement of the burden on exporters to convince the Department to consider information apart from historic dumping margins and volume, under what circumstances will the Department determine that dumping would not be likely to continue or recur?**

10. Mexico's question is prefaced with assertions for which Mexico has provided no citations and which have little, if any, basis in the record of this dispute. Nevertheless, the likelihood determination in each sunset review is based on the facts developed in the particular sunset review. Therefore, Commerce will make a negative likelihood determination whenever the record evidence in a sunset review supports such a determination.

**Q5. It is clear that the Department requires that import volume be at pre-order levels. But in the US retrospective system of duty assessment, the importer assumes the risk of assessment. Mexico asks whether it is not reasonable to assume that importers would reduce the volume that they purchase in order to lower their risk? How does the Department take this factor into consideration? Did the Department consider this factor in the sunset review of OCTG from Mexico?**

11. It is not "clear" to the United States that "the Department requires that import volume [sic]" be at pre-order levels, nor does Mexico provide support for this statement. Regardless, Commerce's analysis of the likelihood or continuation or recurrence of dumping in a sunset review does not require that import volumes be at any particular level. A significant and continued reduction in imports following the imposition of the duty, however, is considered highly probative evidence that the exporters cannot participate in the market at or near pre-order levels without dumping and, therefore, are likely to resume dumping. Nevertheless, any interested party, domestic or respondent, may submit any information it chooses in a sunset review, as provided by section 351.218(d)(3)(iv)(B) of Commerce's Sunset Regulations, to explain why a reduction in import volumes is not relevant to, or highly probative evidence for, the likelihood determination.

12. Commerce considered TAMSA's and Hylsa's explanations for their respective reductions in import volumes after imposition of the duty and addressed these explanations for the Final Results in the sunset review of OCTG from Mexico.<sup>2</sup>

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<sup>1</sup> See *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004 ("Japan Sunset AB"), paras. 205-207.

<sup>2</sup> See Commerce Sunset Final Decision Memorandum at 5-6 (Exhibit MEX-19).

**Q6. The Department determined that the margin "likely to prevail" would be 21.7 per cent. This is consistent with the US statute, the SAA, and SPB, which direct the Department to consider and assign a highly probative value to the original margin as the best indication of exporters' behavior. Does the United States agree that this margin was not calculated through the application of Article 2 of the Anti-Dumping Agreement, since the original investigation was initiated prior to entry into force of the Agreement? In reaching its determination that 21.7 per cent was the margin likely to prevail, did the Department take any steps to ensure that the margin was consistent with the WTO Anti-Dumping Agreement, including Articles 2 and 6?**

13. As the United States previously has explained, Commerce's determination of likelihood of continuation or recurrence of dumping is distinct from its reporting of a "margin likely to prevail" to the ITC. Furthermore, the SAA and Sunset Policy Bulletin do not and cannot "direct" Commerce to take any action because neither the SAA nor the Sunset Policy Bulletin have the force of law. Commerce did determine that the margin likely to prevail would be 21.7 per cent and did report that number to the ITC, which had the discretion to consider it or not in making the determination of the likelihood of continuation or recurrence of injury. Commerce did not base its affirmative likelihood determination in the sunset review on any particular magnitude of dumping, but instead based its affirmative likelihood determination solely on evidence concerning the significant reduction in import volumes since the imposition of the duty on OCTG from Mexico. There is no obligation in Article 11.3 or elsewhere in the AD Agreement to calculate a margin of dumping or to report a margin of dumping for use in making a determination of the likelihood of continuation or recurrence of injury determination in a sunset review.

#### **The Commission's Sunset Review of OCTG from Mexico**

**Q7. Assuming that the Panel finds that the Department's determination of likely dumping is inconsistent with Article 11.3, what effect would this have on the Commission's determination of likely injury? If there would be no effect, please explain why?**

14. Given the purely hypothetical nature of this question and the many variables that could underlie the finding alluded to by Mexico, the United States is unable to answer this question. The answer would depend on the basis for any such finding of inconsistency.

**Q8. Does the United States consider that it is possible to find injury in the absence of dumping? If the answer is yes, please explain how that would be compatible with the following provisions of the GATT and the Anti-Dumping Agreement:**

- (a) **GATT Article VI:6(a): No contracting party shall levy any anti-dumping  $\frac{1}{4}$  unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry."**
- (b) **Anti-Dumping Agreement, Article 3.5: It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement."**
- (c) **Anti-Dumping Agreement, Article 11.1: An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.**

- (d) **The Appellate Body's statement in Steel from Germany (para. 81): "It is unlikely that very low levels of subsidization could be demonstrated to cause 'material' injury."**

15. Under US law, the ITC will not assess injury in the absence of an affirmative dumping finding. Under the US statute, the ITC will not make an injury determination in an original investigation unless Commerce has made an affirmative dumping determination. Likewise, in a sunset review, the ITC will not make a likely injury determination unless Commerce has made an affirmative determination with respect to likely dumping.

**Q9. Does the United States consider that it is possible to find that injury would likely to continue or recur in the absence of a finding that dumping would be likely to continue or recur? If the answer is yes, please explain how that would be compatible with the above GATT and Anti-Dumping provisions? In particular how likely injury could be determined without any likely dumping.**

16. See the answer to question 8.

**Q10. Please indicate if in the OCTG sunset review of Mexico the ITC relied on: (a) the likely margin of dumping to prevail that was reported by the USDOC; (b) any other margin of dumping, or (c) no margin of dumping at all?**

17. The ITC did not rely on a margin of dumping.

**Q11. Section 752(a) (6) of the Tariff Act provides: "In making a determination under section 751 (b) or (c), the Commission may consider the magnitude of the margin of dumping or the magnitude of the net countervailable subsidy." (Emphasis added). Does it mean that the Commission may make determinations under those two sections without considering the magnitude of the margin of dumping? How does the Commission proceed in its injury analysis when it chooses not to consider the margin of dumping?**

18. Neither the AD Agreement nor the US statute require the ITC to consider the magnitude of the margin of dumping in a sunset review.<sup>3</sup> In its sunset reviews, the ITC conducts a thorough analysis of numerous statutory factors, as demonstrated by its determination in the OCTG review.

19. Although the Agreement does not require investigating authorities to consider any particular factors at all, the US statute imposes requirements beyond those of the Agreement by providing that the ITC must consider "the likely volume, price effect and impact of imports of the subject merchandise on the industry if the order is revoked," as well as other considerations such as prior injury determinations.<sup>4</sup> Further, for each of these considerations, the statute sets out specific criteria the ITC shall and does consider in its determination.

20. For example, in examining likely volume, the statute requires the ITC to consider any likely increase in production capacity or unused capacity in the exporting country; existing inventories of subject merchandise, or likely increases in the merchandise; the existence of barriers to the importation of such merchandise into countries other than the United States, and the potential for product shifting if the production

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<sup>3</sup> In *Japan Sunset*, the Appellate Body recognized that Article 11.3 does not even require investigating authorities to rely on dumping margins in making their determination of likelihood of continuation or recurrence of dumping. *Japan Sunset AB*, para. 127. Likewise, there is nothing in Article 11.3 that creates an obligation for investigating authorities to rely on dumping margins in making their determination of likelihood of continuation or recurrence of injury.

<sup>4</sup> 19 U.S.C. § 1675a(a)(1) (Exhibit MEX-24).

facilities in the exporting country that are currently used for production of other products can be used to produce the subject merchandise.<sup>5</sup>

21. In evaluating the likely price effects, the ITC considers whether there is likely to be significant price underselling by the subject merchandise or whether imports of the subject merchandise are likely to enter the United States as prices that otherwise would have price depressing or suppressing effects.<sup>6</sup>

22. Finally, in evaluating the likely impact, the statute requires the ITC to consider all relevant economic factors which are likely to bear on the state of the industry in the United States, including likely declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity; likely negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment; and likely negative effects on the existing development and production efforts of the industry.<sup>7</sup>

**Q.12 Section 752(a)(1) of the Tariff Act states: "That the Commission shall take into account ¼ . (D) in an anti-dumping proceeding under section 751(c), the findings of the administering authority regarding duty absorption under section 751(a)(4)." (Emphasis added). Why does the United States consider that the Department's duty absorption finding is relevant to the Commission's determination of the likelihood of injury? How can the mandatory statutory requirement to consider the duty absorption finding be reconciled with the discretionary statutory provision that gives the commission discretion to consider the magnitude of the margin of dumping in making the likelihood of injury determination?**

23. This question addresses matters that are outside the terms of reference of this dispute. There were no duty absorption findings made with respect to the review of OCTG from Mexico, and Mexico has not challenged the statutory provisions regarding consideration of duty absorption findings.

**Q13. Please compare paragraphs 315 and 316 of the US First submission. Paragraph 315 indicates that "the Commission considered each of the factors enumerated in article 3.4, and the chart included by the Commission specifically indicated that the Commission included the margin of dumping reported by the Department. In paragraph 316, however, the United States responds to Mexico's claim that the commission considered the wrong dumping margin by asserting that that "Mexico's assertion pertains to the commerce determination, not to the ITC's. Mexico's assertion is addressed at section B.3." Can the United States please reconcile these statements? Did the Commission consider the margin of dumping in its analysis?**

24. To the extent Mexico has challenged the propriety of the likely margin of dumping that Commerce reported to the ITC, this argument has been addressed in portions of the US submission concerning Commerce's review. To the extent Mexico claims that the alleged problems with the margin reported by Commerce tainted the ITC's determination, this cannot be so, because irrespective of the worthiness of the reported margin likely to prevail, the ITC did not rely on or otherwise factor the reported likely margin into its analysis.

**Q14. In the sunset review of OCTG from Mexico, did the Commission ever consider Mexican exports on an individual basis, that is, without cumulating the Mexican exports with those of other countries? If not, does the United States consider that Mexico has an independent right to termination under Article 11.3?**

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<sup>5</sup> 19 U.S.C. § 1675a(a)(2) (Exhibit MEX-24).

<sup>6</sup> 19 U.S.C. § 1675a(a)(3) (Exhibit MEX-24).

<sup>7</sup> 19 U.S.C. § 1675a(a)(4) (Exhibit MEX-24).

25. The ITC considered Mexican exports on an individual basis in connection with its analysis of whether it was appropriate to cumulate the volume and effect of imports from the five countries subject to the sunset reviews. First, the ITC examined subject imports from each of the individual countries (including Mexico) in addressing whether imports from any of the countries were likely to have no discernible adverse impact on the domestic industry.<sup>8</sup> The ITC did not find that subject imports of casing and tubing from any of the subject countries were "likely to have no discernible adverse impact on the domestic industry."

26. The ITC then found that there likely would be a reasonable overlap of competition between the subject imports (including imports from Mexico) and domestically produced casing and tubing, and among the subject imports themselves, sufficient to warrant cumulation.

27. The United States does not consider that Mexico has a right to termination under Article 11.3 premised on the examination only of whether the revocation of the anti-dumping duty order relating to subject imports from Mexico will lead to a continuation or recurrence of injury. Imports from a group of countries may cumulatively cause injury even if imports from individual countries in the group may not.<sup>9</sup> Accordingly, it would be illogical to require that the injury analysis in sunset reviews be conducted only on a country-specific basis. Such a requirement would require Members to allow anti-dumping duties to expire even though the expiry of the duty would be likely to lead to continuation or recurrence of injury.

**Q15. It is self-evident that injury cannot be both likely to continue and likely to recur at the same time. These two outcomes are mutually exclusive because for injury to recur, injury must not currently exist. At the same time, injury can only continue if injury currently exists. With this in mind, please clarify whether the Commission determined that injury was likely to continue or whether injury was likely to recur? If the Commission determined that injury was likely to continue, please explain how such a determination would be compatible with the Department's determination that dumping was likely to recur (not to continue).**

28. Contrary to the underlying premise of Mexico's questions, nothing in Article 11.3 requires Members to distinguish between the likely continuation of injury and the likely recurrence of injury. Nor does Article 11.3 require investigating authorities to make current dumping or injury determinations; rather it requires them to make determinations about whether injury and dumping are likely to continue or recur. Both Commerce and the ITC based their respective determinations on their findings that dumping and injury, respectively were likely to continue or recur. Commerce did not, as Mexico asserts, make a separate finding that dumping was likely to recur. (In fact, Hylsa was found to be dumping while the order was in place.)

29. Likewise, the ITC found that revocation of the anti-dumping duty orders from the five subject countries, and the countervailing duty order on imports of casing and tubing from Italy, would be likely to lead to continuation or recurrence of material injury to an industry in the United States.<sup>10</sup> Such a finding is consistent with Article 11.3.<sup>11</sup>

#### **The Department's Determination Not to Revoke the Order: The Article 11.2 Review**

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<sup>8</sup> The cumulation provision of the US sunset law provides that the ITC may not cumulatively assess the volume and effects 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. § 1675a(a)(7) (Exhibit MEX-24).

<sup>9</sup> See, *European Communities - Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, Report of the Appellate Body, adopted 18 August 2003 ("*EC Pipe Fittings*"), para. 116.

<sup>10</sup> ITC Report at 1.

<sup>11</sup> See, *United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon-Quality Line Pipe From Korea*, WT/DS202/AB/R, Report of the Appellate Body, adopted 8 March 2002, para. 167 (unnecessary to make a discrete finding of "serious injury" or "threat of serious injury" when making a determination whether to apply a safeguard measure).

**Q16. The United States takes the view that Article 11.2 does not create an obligation to terminate a measure on a "company-specific" basis.**

**(a) Would the United States explain its view as to "interested parties" and "any interested party" in Article 11.2?**

30. The reference to "any interested party" in Article 11.2 is to an interested party, domestic or respondent, who may request a review by submitting positive information to substantiate the need for the review. The term "interested parties" is plural, meaning many or multiple interested parties have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, or whether the injury would be likely to continue or recur if the duty were removed or varied, or both. Language concerning who can request that inquiry does not establish any obligations regarding how the inquiry is conducted.

**(b) Does the United States agree that Article 11.2 obligates Members to conduct a review under Article 11.2 when an interested party submits positive information warranting such a review?**

31. Article 11.2 of the AD Agreement requires the administering authority of the Member to review the need for the continued imposition of the duty, where warranted. Article 11.2 requires that, after a reasonable amount of time passed since the imposition of the anti-dumping duty, any interested party may request such a review by submitting positive information that substantiates the need for the review.

**(c) In the view of the United States what is the purpose of allowing individual exporters to request a review under Article 11.2 if it cannot lead to termination of the measure for that exporter?**

32. Article 11.2 of the AD Agreement allows individual exporters to request a review of the continuing need for "the duty," as a whole, i.e., the need for the anti-dumping duty order, before the obligations under Article 11.3 are triggered. In other words, Article 11.2 recognizes that revocation may be warranted at some time earlier than five years. Article 11.2 does not address, and does not explicitly require, termination on a company-specific basis. If the entire order is revoked, however, the duty will be revoked for the requesting respondent interested party, as well as all other exporters. Article 11.2 further states that the reviewing authorities have the discretion to determine whether review of the challenged duty is "warranted" and whether an interested party "submits positive information substantiating the need for a review." After determining the review is warranted, based on positive information substantiating the need for a review, authorities conducting an Article 11.2 review examine whether the continued imposition of the duty is necessary to offset dumping or whether the injury would be likely to continue or recur if the duty were removed. If the authorities determine that the anti-dumping duty is no longer warranted, they are obligated to terminate the duty immediately.

**Q17. Does the United States believe that TAMSA and Hylsa were the only known Mexican exporters of OCTG? If not, what information in the record provides a basis to believe that there were other Mexican exporters of OCTG?**

33. TAMSA and Hylsa are not the only Mexican exporters of OCTG known to Commerce. For example, in the original investigation, Mexican exporters Tubacero S.A. de C.V. and Villacero Tuberia Nacional, S.A. de C.V., as well as Hylsa, were sent anti-dumping surveys.<sup>12</sup> In the first administrative review, Commerce received requests for an administrative review for not only TAMSA and Hylsa, but also Tuberia Nacional S.A.

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<sup>12</sup> See 60 Fed. Reg. 6510 (2 February 1995) (MEX-3)

de C.V.<sup>13</sup> Lastly, during the sunset review of OCTG from Mexico, information on the record indicated that TAMSA and Hylsa represented only a portion of all Mexican exports of OCTG to the United States.<sup>14</sup> Because no order-wide request for revocation was made during the fourth administrative review, there was no reason for Commerce to determine the need for the continuation of the order for Mexican exporters other than TAMSA and Hylsa.

**Q18. Did the Department consider that the individual requests of TAMSA and Hylsa for revocation of the order were a sufficient basis to conduct a review and make a determination on an order-wide basis? If not, why?**

34. Both TAMSA and Hylsa requested revocation on a company-specific basis. Each of their letters requested that Commerce revoke the anti-dumping duty order with respect to each company, pursuant to section 351.222(b)(2) of Commerce's Regulations.<sup>15</sup> Pursuant to section 351.222(b)(2) of Commerce's Regulations, Commerce determined whether to revoke the anti-dumping duty order in part, as to the requesting producer or exporter. Therefore, Commerce considered each of their requests for a company-specific revocation review, not a request for an order-wide revocation review.

35. Section 351.222(b)(1) of Commerce's Regulations governs requests for revocation on an order-wide basis and would require Commerce to investigate the industry as a whole. Given the order-wide nature of the determination, such a review also would require information for all producers and exporters covered by the duty at the time of the revocation review. Commerce did not seek such information during the fourth administrative review because neither TAMSA nor Hylsa requested an order-wide revocation review pursuant to section 351.222(b)(1) of Commerce's Regulations.

**Q19. Under what US procedure can an individual company request revocation on an order-wide basis? Has this ever occurred? Can you provide examples since the entry into force of the WTO Anti-Dumping Agreement?**

36. An individual company may request revocation on an order-wide basis through a changed circumstances review under section 751(b) of the Act and section 351.222(g) of Commerce's regulations. Examples include Coumarin from the People's Republic of China, 69 Fed. Reg. 24122 (3 May 2004); Porcelain-on-Steel Cookware from Mexico, 67 Fed. Reg. 19553 (22 April 2002); Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled from Germany, 67 Fed. Reg. 19551 (22 April 2002); Certain Fresh Cut Flowers from Ecuador, 64 Fed. Reg. 56327 (19 October 1999). This list is not exhaustive. Section 351.222(b)(1) of Commerce's regulations provides a second option for an individual company to request revocation on an order-wide basis, so long as all exporters and producers covered at the time of the revocation have not dumped for at least three consecutive years.

**Q20. Mexico notes that TAMSA argued before the Department that the reasonableness of a particular sales-transaction of OCTG should not be measured on the basis of tonnage due to the influences that product characteristics have on weight. See MEX-54 at 15-16. Specifically, TAMSA explained that the 44.7 tons shipped during the fourth review amounted to more than four miles of tubes, which TAMSA considered to be in significant "commercial quantities." What weight did the Department give to this transaction?**

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<sup>13</sup> See Initiation of Anti-Dumping and Countervailing Duty Administrative Reviews and Requests for Revocation, 62 Fed. Reg. 50292 (25 September 1997)("Initiation of First Administrative Review") (Exhibit US-9).

<sup>14</sup> See Adequacy Memorandum (Exhibit US-31).

<sup>15</sup> TAMSA's request for review and revocation (Exhibit MEX-10); Hylsa's request for review and revocation (Exhibit MEX-11).



37. Commerce considered but rejected TAMSAs argument of using the length or number of pieces, as evidence for purposes of the commercial quantities threshold criteria for TAMSAs request for a revocation review. Commerce evaluates the commercial quantity standard on a case-by-case basis, with the goal of basing the revocation determination on a company's normal commercial practice. Sales of OCTG from Mexico by TAMSAs, in the original investigation and in the previous two reviews, as well as in this fourth administrative review, were consistently measured in terms of volume (metric tons) and value (US dollars). Accordingly, Commerce examined TAMSAs overall record of sales to the United States during these three years, in terms of comparable, common measurements of both volume and value, and concluded that TAMSAs did not sell OCTG in the United States in commercial quantities in each of the three years.<sup>16</sup>

**Q21. Does the United States agree that the 0.79 per cent dumping margin relied on by the Department was calculated as set forth in MEX-63?**

38. Commerce did not rely upon any margin for the purposes of its likelihood determination in the sunset review. The United States agrees that Attachments 1-12 of MEX-63, which are all record documents from the fourth administrative review, reflect the calculation methodology used by Commerce to calculate the 0.79 per cent dumping margin. The first 21 pages of Exhibit MEX-63 reflect Mexico's characterization of Commerce's methodology. The United States does not agree with this characterization and notes that it was not part of the record before Commerce in the fourth administrative review.

**Q22. Does the United States agree with Mexico's description of the calculation methodology in Exhibit MEX-63 and paragraphs 289-292 of Mexico's First Submission.**

39. No.

**Q23. Does the US agree that the extent to which the net price of sales to the United States exceeded the normal value is not reflected in the numerator of this calculation?**

40. The numerator used to calculate the overall margin of dumping aggregates all margins of dumping found as a result of comparisons between export price and normal value. When the export price is greater than the normal value, consistent with Article 2.1 of the AD Agreement, dumping has not occurred with respect to that comparison.

**Q24. Was the 0.79 per cent margin relied on by the Department for purposes of its likelihood determination in the sunset review established on the basis of a fair comparison in light of the Appellate Body's decisions in Bed – Linens (paras. 55, 61, 62) and Japan Sunset (paras. 126-132)?**

41. Commerce did not rely upon any margin for the purposes of its likelihood determination in the sunset review. Rather, Commerce relied upon the declining import volumes to establish its likelihood determination in the sunset review.

42. To the extent that Mexico's question relates to the calculation of the overall margin of dumping in the fourth administrative review, that margin was established on the basis of a fair comparison and Mexico has not established otherwise.

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<sup>16</sup> See *Fourth Review Issues and Decision Memorandum* at Comment 1 (Exhibit MEX-9).

## ANNEX E-4

### ANSWERS OF ARGENTINA TO QUESTIONS OF THE PANEL – THIRD PARTIES SESSION

(18 June 2004)

#### QUESTIONS TO THIRD PARTIES FOLLOWING THE FIRST MEETING

##### Questions to all third parties:

**Question 1.** Could the third parties explain their understanding of how a determination consistent with the requirements of Article 3 could be made in a sunset review, in a case in which there were, for example, no imports during the period of effectiveness of the anti-dumping measure from the sources originally found to be dumped. How in such a case could, for example, the requirement of Article 3.2 regarding consideration of the volume of dumped imports be satisfied?

##### Argentina's Response

1. Argentina considers that the requirements of Article 3 apply to an Article 11.3 injury determination. The fact that there may have been no imports following the imposition of the order does not affect the applicability of the requirements of Article 3 to Article 11.3 reviews. The key to the Article 11.3 determination is that the administering authority is investigating "injury," which is defined in footnote 9 of Article 3. Footnote 9 requires that "injury" "shall be interpreted in accordance with the provisions of [Article 3]."
2. In the Panel's hypothetical example – where there are no imports during the period following the imposition of the measure, Argentina does not see any problems in applying Article 3 to the injury determination required by Article 11.3. The absence of imports would require the administering authority to determine why the imports are absent. The administering authority cannot be passive and simply draw inferences based on historical data. Rather, the authority must determine, based on positive evidence, whether it is likely that they would return to the market and cause injury to the domestic industry. If so, then the authority can proceed with its analysis, applying Article 3 without major difficulties. In the end, if there is no positive evidence of likelihood, then the measure must be terminated.
3. The Appellate Body made clear that termination of the measure is the principal obligation of Article 11.3, and continuation based on a finding of likely dumping and likely injury is the exception. In the absence of imports, the requisite analysis under Article 11.3 would still require compliance with the requirements of Article 3. The Appellate Body confirmed that "a case-specific analysis of the factors behind a cessation of imports or a decline in import volumes (when dumping is eliminated) will be necessary to determine that dumping will recur if the duty is terminated."<sup>1</sup>
4. Argentina submits that the Commission's injury determination in this case violated Article 3, and that the Commission failed to determine "injury" in accordance with Article 3, as required by footnote 9. The

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<sup>1</sup> Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, para. 177 ("Japan Sunset").

Commission's determination is based on conjecture and a number of possibilities that arise from its analysis. The flaws with the Commission's analysis stem from the Commission's failure to apply a "likely" standard, and its failure to assess objectively information on the record. These are not problems arising from the terms of Article 3, or any particular difficulty in applying Article 3 to Article 11.3 reviews.

**Question 2. Do the third parties consider that the determination of "likelihood of continuation or recurrence of injury" under Article 11.3 is identical in nature and scope to the "determination of injury" under Article 3? Could the third parties please address, in this context, the views of the Appellate Body in *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("US – Carbon Steel"), WT/DS213/AB/R, at paragraph 87, that "original investigations and sunset reviews are distinct processes with different purposes" and that the "nature of the determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation"?**

Argentina's Response

5. Argentina believes that "injury" is the same in Article 3, Article 11.1, and Article 11.3. Argentina reads footnote 9 to mean that the scope of an injury determination is "injury" and that footnote 9 tells the Members that "injury" remains the same whether the need for an injury analysis arises under Article 5 investigation or under an Article 11.3 review.

6. As to the determination of the injury, it may be different in an Article 11.3 review than it is in another context, such as an Article 5 investigation. For example, if, in an Article 5 investigation an administering authority is considering whether current material injury exists, it will review information regarding the past and the present to determine whether the information supports the view that injury currently results from the dumped imports. In an Article 11.3 review, the authority will be investigating current and past information to determine whether injury currently exists (which is required in order to determine whether injury has "continued") , or if it does not exist currently whether it is likely to recur in the future. However, this difference in the nature of the injury inquiry arises from the prospective nature of the inquiry, and not from the source of the obligation to demonstrate injury, be it Article 5 or Article 11.3.

7. Argentina believes its position is consistent with the Appellate Body's statements in the above-referenced quotations. Argentina agrees that original investigations and sunset reviews are distinct processes and that they serve different purposes. Argentina also agrees that the nature of the analysis and the determination may differ in an Article 5 injury investigation and in an Article 11.3 injury investigation, such differences may not be significant. This predictive nature of the inquiry is always important to the nature of an Article 11.3 review, and sometimes relevant to an Article 5 investigation (for example, when "injury" is based on a "threat of injury").

**Question 3. Could the third parties explain why, in their view, it is relevant to the sunset determination that the original anti-dumping measure was imposed on the basis of a dumping calculation based in part on facts available? Are the third parties of the view that, in such a case, there is a requirement that the investigating authority undertake some particular action or analysis in determining whether there is a likelihood of continuation or recurrence of dumping in a sunset review, and if so, what do they consider is required?**

Argentina's Response

8. The determination under Article 11.3 must be prospective. Consequently, the circumstances that gave rise to the margin from the original investigation demonstrated that that margin should not have been relevant for the Department's likelihood determination.

9. In the absence of the peso devaluation, there would not have been a dumping margin in the original investigation. The preliminary determination in the original investigation was based on the company's sales and cost data alone and resulted in a zero dumping margin. Mexico's First Submission shows that the application of facts available for the final determination in the original investigation resulted from the 1994 Mexican peso devaluation coupled with the high US dollar indebtedness of the company. As Mexico's First Submission demonstrates, these circumstances were unique and would not be repeated in the event of termination. Hence, Argentina is of the view that the dumping margin that resulted from the use of facts available in the original investigation was not relevant to the prospective analysis required by Article 11.3.

10. Moreover, there was more probative positive evidence before the Department at the time of the sunset review. Since the original investigation, the Department conducted administrative reviews and calculated a zero margin in each review. These subsequently calculated zero dumping margins constituted positive evidence that was more recent than the margin from the original determination. Consequently, the subsequent zero margins should have been given more weight by the Department, as they were more probative for purposes of the Department's likelihood determination.

11. For Argentina, this case highlights that the Department does not engage in the analysis required by Article 11.3, but rather mechanically relies on historical margins and volume declines. In fact, the United States went as far as to say that findings from the original investigation were the "only evidence" of a company's behavior in the absence of an order:

As the starting point for making its likelihood determination in this sunset review, Commerce considered the findings concerning dumping made in the original investigation. The rationale for this approach is that the findings in the original investigation provide the only evidence of the behavior of the respondents without the discipline of an anti-dumping order in place.<sup>2</sup>

12. Argentina does not accept this assertion, as it is inconsistent with the requirements of Article 11.3 to conduct a review and make a determination, based on positive evidence, that termination of the order would be "likely" to lead to continuation or recurrence of dumping and injury.

**Question 4. Do the other third parties agree with the view of the EC that there must be an intervening calculation of dumping margins, consistent with Article 2, in order to make a proper determination of likelihood of continuation or recurrence of dumping?**

Argentina's Response

13. Argentina is of the view that there must be positive evidence of likelihood in order for the authority to make an affirmative determination under Article 11.3. So, while the calculation of Article 2 margins is not a prerequisite for an Article 11.3 determination (as the Appellate Body states in *Japan Sunset*<sup>3</sup>), such margins are the type of positive evidence that an authority would be expected to look to in rendering a determination under Article 11.3.

14. However, in Argentina's view, the Department's likely dumping determination in OCTG from Mexico was not supported by positive evidence. In that case, the original determination was shown to have almost no probative value because it was based on unique market circumstances that would not be repeated. (See discussion above in response to question 3.) In addition, the Department did conduct administrative reviews subsequent to the original investigation. The Department calculated separate zero dumping margins, which, in Argentina's view, was the most probative evidence on the question of likelihood.

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<sup>2</sup> US First Submission, para. 122.

<sup>3</sup> Appellate Body Report, *Japan Sunset*, para. 123.

**Question 5. Could the third parties indicate which provision(s) of the AD Agreement govern company-specific revocations of the type at issue in this dispute?**

Argentina's Response

15. Argentina is of the view that Article 11.2 creates obligations to terminate an anti-dumping measure on a company-specific basis. Argentina disagrees with the US position that Article 11.2 does not create company-specific obligations for several reasons.

16. First, the US position is inconsistent with the text of Article 11.2, which refers to "any interested party" and "interested parties." With these references, the text is explicit that the Article 11.2 obligations to conduct a review and/or to terminate an anti-dumping duty are company-specific.

17. Second, Argentina understands that the US revocation regulation, 19 C.F.R. 351.222(b), that implements the United States' obligations under Article 11.2 does not permit individual exporters to request "order-wide" revocations. By limiting the ability of the company to request revocation only as it pertains to itself, the regulations are consistent with Argentina's view that Article 11.2 contemplates company-specific revocations.

18. Third, *DRAMs from Korea* confirms that Article 11.2 relates to obligations that are company-specific. Both of the principal US measures challenged by Korea were company-specific. The anti-dumping measure at issue was entitled: "Notice of Final Results of Anti-dumping Duty Administrative Review and Determination Not to Revoke Order in Part: Dynamic Random Access Memory Semiconductors of One Megabyte or Above From the Republic of Korea" (Emphasis added.) Korea also challenged "as such" the US revocation regulation governing company-specific regulations, claiming specifically that it violated Article 11.2. Absent from the US position in that case was any argumentation that Article 11.2 does not create company-specific obligations.

19. Fourth, the manner in which the United States amended its revocation regulation suggests that the United States was of the view that its regulation with respect to company-specific regulations was subject to the disciplines of Article 11.2. For example, the Department explained in the Federal Register notice that the regulatory modifications were made to bring the United States into compliance with Article 11.2:

We have formulated the final rule in a way that clarifies that the Secretary must make an affirmative finding of necessity in order to retain an anti-dumping or countervailing duty order. While this reformulation does not affect the process by which the Department considers revocation, the reformulated regulation more closely tracks the wording of Article 11.2 of the Anti-dumping Agreement and Article 21.2 of the SCM Agreement.<sup>4</sup>

20. Fifth, the US position is inconsistent with the position recently taken by the United States in DS268. There, the United States asserted that sunset reviews are conducted on an "order-wide" basis. Based on this approach, the United States considered the relevance of the individual exporter participation to be limited.<sup>5</sup> The result of such an approach is that continuation of an anti-dumping order can be based on circumstances wholly unrelated to any one individual company. At the same time, the United States repeatedly emphasized throughout that proceeding that US procedures were consistent with the Anti-dumping Agreement because

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<sup>4</sup> 64 Federal Register at 51238.

<sup>5</sup> See, e.g., DS 268 US Answers to Argentina's First Set of Questions (8 Jan. 2004), para. 12; DS 268 US Answers to Panel's First Set of Questions (8 Jan. 2004), paras. 3 and 19; US Answers to Panel's Second Set of Questions (13 Feb. 2004), para. 3 (documents available on USTR's website).

they enabled a company to have an order revoked as it pertains to that company by obtaining zero margins in three consecutive administrative reviews.<sup>6</sup>

21. Finally, even assuming *arguendo* that Article 11.2 reviews impose "order-wide" obligations only, the evidence presented by both TAMSA and Hlysa – the only known Mexican producers of OCTG – provided the requisite degree of positive information sufficient not merely to warrant a "review" under Article 11.2, but also sufficient to demonstrate that the continued imposition of the duty was no longer "necessary to offset dumping."

### Question to Argentina

**1. The Panel notes that US law establishes a time-frame for the USITC's consideration of likelihood of continuation or recurrence of injury. Could Argentina clarify whether it considers that an investigating authority must specify when it considers that injury will continue or recur – that is, how far into the future it is looking in making its determination? If so, could Argentina indicate where in the text of the AD Agreement it finds support for this view?**

### Argentina's Response

22. Section 1675(a)(1) directs the Commission to determine whether injury would be likely to continue or recur "within a reasonably foreseeable time." The SAA explains that "'reasonably foreseeable time' . . . normally will exceed the 'imminent' timeframe applicable in a threat of injury analysis."<sup>7</sup> Section 1675(a)(5) further mandates that the Commission "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time."

23. Article 11.3, however, requires the authority to determine whether termination of an anti-dumping measure would be likely to lead to the continuation or recurrence of injury *upon termination of the measure*. Thus, the authority's likelihood of injury determination must not be based on speculation about possible market conditions several years into the future, but rather must be based upon the likelihood of injury upon "expiry" of the measure. By defining a "reasonably foreseeable time" as longer than an "imminent" time, the US statutory provisions are inconsistent with Article 11.3, which requires the determination to be based upon injury upon "expiry" of the duty.

24. The US position assumes that Article 11.3 is silent on the question of the relevant time frame in which injury would be likely to continue or recur. This position, however, ignores the immediate context of Article 11.3. WTO Members adopted Article 11.3 to enforce the underlying principle of Article 11.1: that anti-dumping measures "shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." Accordingly, when read together with its umbrella provision, Article 11.1, it is evident that the time frame in which injury would be likely to continue or recur under Article 11.3 must be as curtailed as possible to ensure that anti-dumping measures are maintained only as long as necessary to counteract injurious dumping. Equally important, from Argentina's perspective, the failure to define the relevant time frame is not consistent with the "likely" standard of Article 11.3, and even less so when considered in light of Article 11.1.

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<sup>6</sup> US Second Written Submission, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268 (8 Jan. 2004), paras. 13-15.

<sup>7</sup> SAA at 887.

## ANNEX E-5

### ANSWERS OF CHINA TO QUESTIONS OF THE PANEL – THIRD PARTIES SESSION

(18 June 2004)

#### QUESTIONS TO THIRD PARTIES FOLLOWING THE FIRST MEETING

##### Questions to all third parties:

**1. Could the third parties explain their understanding of how a determination consistent with the requirements of Article 3 could be made in a sunset review, in a case in which there were, for example, no imports during the period of effectiveness of the anti-dumping measure from the sources originally found to be dumped. How in such a case could, for example, the requirement of Article 3.2 regarding consideration of the volume of dumped imports be satisfied?**

##### Answer

1.1 First of all, provisions of Article 3 "Determination of Injury" of the Anti-Dumping Agreement apply to determination of continuation or recurrence of injury in sunset reviews under Article 11.3.

1.2 The phrase "[u]nder this Agreement" in Footnote 9 ensures that, whenever the Anti-Dumping Agreement uses the term "injury," the provisions of Article 3 define the term. To find "injury," therefore, when applicable, the provisions in Article 3 setting forth requirements for finding "injury" must be satisfied.

1.3 The texts of the individual provisions of Articles 3 further clarify that the requirements in these provisions apply to a determination of "injury." Article 3.1 sets forth general requirements for a determination of "injury." The phrase "a determination of injury for purposes of Article VI of GATT 1994" clarifies its cross-reference that the provisions of Article 3 apply to an "injury" determination throughout the Anti-Dumping Agreement to determine circumstances in which anti-dumping measure can be applied.<sup>1</sup>

1.4 The Panel in *US-Sunset Review of Steel from Japan* states that:

*Article 3 is entitled "Injury". This title is linked to footnote 9 of the Anti-Dumping Agreement... This seems to demonstrate that the term "injury" as it appears throughout the Anti-Dumping Agreement-including Article 11-is to be construed in accordance with this footnote, unless otherwise specified. This would seem to support the view that the provisions in Article 3 concerning injury may be generally applicable throughout the Anti-Dumping Agreement and are not limited to the application to investigations. Article 11 does not seem to explicitly specify otherwise in the case of sunset review.(emphasis added)*

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<sup>1</sup> See Article 1 of the AD Agreement, which defines that "[a]n anti-dumping measure shall be applied under the circumstances provided for in Article VI of GATT 1994."

1.5 The Article 3.2 of the Anti-Dumping Agreement requires the investigating authorities to consider the import volume and effect of the dumped imports on prices. It is notable that the last sentence of Article 3.2 states:

**No one or several of these factors can necessarily give decisive guidance**

Anyhow, the Article 3.1 illustrates the nature of injury decision shall be based on positive evidence and involve an object examination. Whether the imports volume increasing or not itself alone shall not constitute a decisive factor for injury decision.

1.6 However, China would emphasize that volume of dumped imports is critical in the initial investigations, i.e., the Article 3.2 requires that the investigating authorities shall consider whether there has been a significant increase in dumped imports. Normally, in order to make decision of injury, the investigating authorities shall have sufficient evidence to prove that the imports increased significantly in the initial anti-dumping investigations.

1.7 With regard to sunset review proceeding, the investigating authorities are required to make determination based on positive evidence and involve an object examination. How to involve an object examination of dumped import volume under Article 3.2 depends on different facts of the determination and situation during the past five years of the duty period. Again, since no one or several of these factors can necessarily give decisive guidance, the investigating authorities are required to go through overall examination of each related factors to reach the decision.

1.8 For example, if the domestic producers continuously suffer injury during the five years of duty application period, the investigating authority is justified to determine that the injury would likely to continue after fulfilling obligation under Article 11.3, without giving consideration to whether the dumped imports increased or decreased.

1.9 For example, if the domestic producers are recovered and perform well, and conditions of the domestic producers are sustainable at the time of sunset review and in a reasonable foreseeable time, even if the dumped imports increased during the past years, the investigating authorities may terminate the duty.

1.10 For example, if the domestic producers are recovered due to no imports for the past five years, the investigating authorities shall conduct the examination whether such recovering is sustainable or vulnerable and whether lifting anti-dumping duty would likely to recur the injury. If the evidence proves that the injury would likely to recur, even if there were no imports due to anti-dumping duty for the past five years, the investigating authorities are justified to make decision that the injury would likely to recur.

**2. Do the third parties consider that the determination of "likelihood of continuation or recurrence of injury" under Article 11.3 is identical in nature and scope to the "determination of injury" under Article 3? Could the third parties please address, in this context, the views of the Appellate Body in *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("US – Carbon Steel"), WT/DS213/AB/R, at paragraph 87, that "original investigations and sunset reviews are distinct processes with different purposes" and that the "nature of the determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation"?**

Answer

2.1 First of all, provisions of Article 3 of the Anti-Dumping Agreement apply to the sunset review with regard to the determination on the likelihood of continuation or recurrence of injury under Article 11.3. For example, the investigating authority shall follow Article 3.1, Article 3.4 and 3.5 to make determination based



on positive evidences, to evaluate all 15 relevant economic factors and indices and to demonstrate the causal link between dumped imports and injury.

2.2 The Appellate Body in *US-Carbon Steel* viewed that "the nature of determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation". The Appellate Body further illustrates this issue by giving an example:

*For example, in a sunset review, the authorities are called upon to focus their inquiry on what would happen if an existing countervailing duty were removed. In contrast, in an original investigation, the authorities must investigate the existence, degree and effect of any alleged subsidy in order to determine whether a subsidy exists and whether such subsidy is causing injury to the domestic industry as to warrant the imposition of a countervailing duty"*<sup>2</sup>

2.3 However, the Appellate Body immediately followed paragraph 87 and indicated in paragraph 88 that:

*The continuation of a countervailing duty is the rule and its continuation is the exception. The continuation of a countervailing duty must therefore be based on a properly conducted review and a positive determination that the revocation of the countervailing duty would "be likely to lead to continuation or recurrence of subsidization and injury".*<sup>3</sup>

2.4 Further, the Appellate Body stated that

*Mere reliance by the authorities on the injury determination made in the original investigation will not be sufficient. Rather, **a fresh determination, based on credible evidence, will be necessary** to establish that the continuation of the countervailing duty is warranted to remove the injury to the domestic industry.(emphasis added).*

2.5 It is clear that the Appellate Body requires "a fresh determination" regarding injury in the sunset review. When applicable, to make a "fresh" injury determination would request the investigating authorities to follow rules and provisions of Article 3 of the Anti-Dumping Agreement.

2.6 Therefore, we do not see the different between the nature and scope of injury determination under Article 3 and the "injury" under Article 11.3. However, the purpose may be different, as the Appellate Body stated in the first sentence of Paragraph 87 in the *US-Carbon Steel*, "we further observe that original investigations and sunset reviews are distinct processes with **different purposes**. \_ (emphasis added).

2.7 Since the purposes are different, for determination of injury, the investigating authorities may focus on different aspects. But the fundamental basis shall be the Article 3 of the Anti-Dumping Agreement, i.e., to determine injury would likely to continue, the investigating authority shall determine that the injury is existing at the time of determination, and to determine injury would likely to recur, the investigating authorities shall determine that the injury ceased at the time of determination.

**3. Could the third parties explain why, in their view, it is relevant to the sunset determination that the original anti-dumping measure was imposed on the basis of a dumping calculation based in part on facts available? Are the third parties of the view that, in such a case, there is a requirement that the investigating authority undertake some particular action or analysis in determining whether there is a likelihood of continuation or recurrence of dumping in a sunset review, and if so, what do they consider is required?**

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<sup>2</sup> Appellate Body Report, ("*US – Carbon Steel*"), WT/DS213/AB/R, at paragraph 87.

<sup>3</sup> Id, paragraph 88.

Answer

3.1 Article 11.3 of the Anti-Dumping Agreement requests the importing authority to **determine** whether expiry of the duty would be likely to lead to continuation or recurrence of dumping. Based on Article 2 of the Anti-Dumping Agreement, the authority would need to use evidences that can prove that dumping continued at the time of the sunset review or that dumping has ceased at the time of the sunset review but is "likely" to recur. (emphasis added)

3.2 Therefore, in any event, no matter the original anti-dumping measure was imposed on the basis of a dumping calculation based in part on facts available or on the basis of fully cooperating company data, the importing authorities are required to conduct **a rigorous examination** in a sunset review before the continuation of the duty can apply. (emphasis added).

3.3 The Appellate Body in *US-sunset review of steel from Japan* made the following statement,<sup>4</sup> which upheld the Panel Report.

*"In order to continue the imposition of the measure after the expiry of the five-year application period, it is clear that the investigating authority has to determine, on the basis of positive evidence, that termination of the duty is likely to lead to continuation or recurrence of dumping and injury. An investigation authority must have a sufficient factual basis to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence."<sup>5</sup>*

3.4 In sunset review, the investigating authorities are required to determine whether the termination of the duty is likely to lead to continuation or recurrence of dumping. This is normal obligation under article 11.3 of the Anti-Dumping Agreement, not particular action.

3.5 To determine whether dumping would continue or recur, the investigating authority must follow the rules defined by the Article 2 of the Anti-Dumping Agreement.

3.6 The first phrase "[f]or the purpose of this Agreement" of the Article 2.1 of the Anti-Dumping Agreement demonstrates drafter's clear intent to apply the obligation of Article 2 throughout the Anti-Dumping Agreement, wherever the word "dumping" appears. The basic concept of "dumping" under Article 2 thus applies to all "dumping" determinations throughout the Anti-Dumping Agreement, including sunset review under Article 11.3.

3.7 Therefore, the phrase "likely to lead to continuation or recurrence of dumping" in Article 11.3 does not change the core concept of "dumping," nor does it affect the applicability of Article 2 to Article 11.3. To find "continuation of dumping," the authorities must find the existence of dumping at the time of the sunset review. To find "recurrence of dumping," the authorities must first find that dumping has ceased by the time of sunset review.

**4. Do the other third parties agree with the view of the EC that there must be an intervening calculation of dumping margins, consistent with Article 2, in order to make a proper determination of likelihood of continuation or recurrence of dumping?**

Answer

4.1 First of all, pursuant to Article 11.3 of the Anti-Dumping Agreement, the investigating authorities are required to conduct an examination to determine whether the dumping would likely to continue or recur.

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<sup>4</sup> Appellate Body Report, *US-Sunset Review of Steel from Japan*, p. 41.

<sup>5</sup> Panel Report, *US-Sunset Review of Steel from Japan*, para. 7.271.

Therefore, the investigating authorities are required to conduct dumping examination being consistent with Article 2 the Anti-Dumping Agreement.

4.2 To determine the dumping would likely to continue, the investigating authorities must determine that the dumping is existing at the time of conducting sunset review proceedings. It is not proper to use the original anti-dumping duty calculation five years ago, therefore, the authorities are required to conduct dumping margin examination.

4.3 To determine the dumping would like to recur, the investigating authorities must determine that the dumping has ceased at the time of conducting sunset review proceedings. The dumping has ceased may have two scenarios, the first, there was no imports after the original final determination, and secondly, the company did not dump by the most recent result of administrative review.

4.4 However, to determine dumping would likely to recur requires "forward-looking analysis. "In *Sunset Review of Steel from Japan*, the Appellate Body illustrated 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."<sup>6</sup> (emphasis added) .

4.5 In conclusion, in order to make a proper determination of likelihood of continuation or recurrence of dumping, the investigating authorities are required to determine dumping which shall be consistent with Article 2 of the Anti-Dumping Agreement.

**5. Could the third parties indicate which provision(s) of the AD Agreement govern company-specific revocations of the type at issue in this dispute?**

Answer

5.1 China believes that the Anti-Dumping Agreement does not address the issue regarding company-specific revocations of duty.

5.2 However, the investigating authorities may base on Article 11.2 to conduct such revocations, especially for those investigating authorities, which adopts the retroactive duty collections regime such as the United States.

5.3 Article 11.2 of the Anti-Dumping Agreement states:

*The 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.*

5.4 Article 11.2 requires a review of continuing need for the duty. Such review may include changed circumstance review, administrative review/interim review. The purpose of such review is to constrain the duty remain in force only as long as and to the extent necessary to counteract dumping which is causing injury which requires by Article 11.1 of the Anti-Dumping Agreement.

5.5 China agrees with the United States that "the duty read in the context described above, refers to the anti-dumping duty order as a whole, not applied to individual companies."<sup>7</sup>

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<sup>6</sup> Appellate Body Report, *Sunset Review of Steel from Japan*, para.105.

<sup>7</sup> US First Submission, paragraph 147.

5.6 The United States adopts retroactive duty collection regime, which has the most significant characteristics of administrative review or annual review. The annual review system imposes tremendous workload to the foreign exporters even they receive consecutive zero dumping margin at the previous annual reviews, i.e., if the importing member domestic industry insists annual review during the duty period, the review proceeding is automatic, the foreign exporters have to respond the Department of Commerce questionnaire and may go through the on-the-spot verification every year. Therefore, to create a company-specific revocation system is to relieve the burdensome to those companies who has ceased dumping after the original final determination.

5.7 The requirement for revoking company-specific duty is not mandated under the Anti-Dumping Agreement. However, if the investigating authorities have such rules under its domestic laws and regulations, such rules shall be consistent with the Anti-Dumping Agreement, for example, as required by Article 11.2, if, as result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

## ANNEX E-6

### ANSWERS OF THE EUROPEAN COMMUNITIES TO QUESTIONS OF THE PANEL – THIRD PARTIES SESSION

(18 June 2004)

#### Questions to all third parties

**1. Could the third parties explain their understanding of how a determination consistent with the requirements of Article 3 could be made in a sunset review, in a case in which there were, for example, no imports during the period of effectiveness of the anti-dumping measure from the sources originally found to be dumped. How in such a case could, for example, the requirement of Article 3.2 regarding consideration of the volume of dumped imports be satisfied ?**

1. Article 11.3 *Anti-Dumping Agreement* requires a determination of likely continuance or recurrence of injury. If there would have been no imports from the original source, it would hardly be possible, in the opinion of the European Communities, to make a finding of likely continuance. That is because the approximately five years that would have elapsed between any such imports and the current state of the domestic industry would almost certainly indicate the absence of causation. That is, the five year old imports could not be considered to be responsible for causing the current state of the domestic industry. Thus, the determination that would have to be made in the example set out in the question would be a determination of likely *recurrence* of injury.

2. In such a case the investigating authority would have to take account of any intervening changes in the *Anti-Dumping Agreement*. For example, if price undercutting would have been a key factor in the original injury determination, and the new version of the *Agreement* established specific rules in that respect, then the investigating authority would have to take that into consideration. Similarly, if the new version of the *Agreement* would have introduced new factors to be considered when examining the state of the domestic industry, that would also have to be taken into account. The investigating authority could not content itself with determining that what happened before, that is, "injury" within the meaning of the old *Agreement*, would be likely to recur. The investigating authority would have to determine that injury within the meaning of the new *Agreement* would be likely to recur.

3. As regards the volume of imports, the investigating authority could consider, for example : the capacity situation in the original source countries (is there existing overcapacity, what is the position as regards stocks, what is the capacity utilisation rate); the pattern of exports from the original source countries to other countries (what are the volumes and the trends and could these be diverted to the importing Member); and the consumption and capacity situation in the importing Member (is it such as to draw in further imports).

4. As regards prices, the investigating authority could likewise consider current pricing levels in the original source countries (are they low or high in relation to the importing Member); the pattern of prices of exports from the original source countries to other countries (are they low or high in relation to the importing

Member and/or in relation to the exporting Member); and the current price situation in the importing Member (is it relatively depressed or relatively buoyant).

5. As regards the state of the domestic industry, the investigating authorities could consider whether it is robust or fragile, for example, by referring to the factors set out in Article 3.4 *Anti-Dumping Agreement*, including the kinds of financial ratios usually used by the markets for the purposes of investment decisions.

6. As regards causation, the investigating authorities could take into consideration known factors other than dumping. For example, if there had recently been an increase in imports of the product from third countries at prices lower than those of the domestic industry, that might be expected to contribute to any injury.

**2. Do the third parties consider that the determination of "likelihood of continuation or recurrence of injury" under Article 11.3 is identical in nature and scope to the "determination of injury" under Article 3? Could the third parties please address, in this context, the views of the Appellate Body in United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany ("US-Carbon Steel"), WT/DS213/AB/R, at paragraph 87, that "original investigations and sunset reviews are distinct processes with different purposes" and that the "nature of the determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation" ?**

7. The European Communities considers that the historical injury finding on which the investigating authority will necessarily have to rely for the purposes of Article 11.3 *Anti-Dumping Agreement* must be consistent with Article 3. It will have to be identical in nature and scope to a determination made pursuant to Article 3. If the *Agreement* has changed, the investigating authority must take that into account.

8. As regards the prospective part of the injury determination – the likely recurrence of injury - the European Communities agrees that it is different from the original determination, insofar as it is prospective, whereas the determination in the original investigation will, in most cases, be historical. The legal fact remains, however, that Article 3 defines injury, and, unless otherwise specified, that is the defined concept from which the investigating authority must start for the recurrence of injury analysis in a sunset review. The European Communities has indicated in its answer to the previous question some of the ways in which the investigating authority might go about that task.

9. The quotations from *US-Carbon Steel from Germany* are only part of the overall picture that emerges from that case. The Appellate Body made those statements in the context of reaching the conclusion that there are some differences between an original investigation and a sunset review investigation – specifically it found that the *de minimis* rule was by its own terms restricted to original investigations, that finding only being possible because of the words "unless otherwise specified" in the injury definition. However, at the same time, the Appellate Body also observed, and has since confirmed, that there are also important similarities between the two types of investigations – for example the fact that Article 3 defines injury and Article 2 dumping, for the purposes of the *Agreement*, and that a definition goes beyond a mere cross-reference.<sup>1</sup>

**3. Could the third parties explain why, in their view, it is relevant to the sunset determination that the original anti-dumping measure was imposed on the basis of a dumping calculation based on the facts available ? Are the third parties of the view that, in such a case, there is a requirement that the investigating authority undertake some particular action or analysis in determining whether there is a likelihood of continuance or recurrence of dumping in a sunset review, and if so, what do they consider is required ?**

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<sup>1</sup> Appellate Body Report, *US-Carbon Steel from Japan*, para. 126.

10. The European Communities respectfully refers to paras. 41 to 46 of its written submission.

11. The use of "facts available" is a legitimate approach, expressly provided for in the *Anti-Dumping Agreement*. The investigating authority does not need to reconsider the original determination. It does not need to reconsider whether or not the use of facts available was justified. However, if, as in this case, the investigating authority contents itself with (allegedly) finding that what happened in the original investigation is likely to happen again (that is, to recur), then the nature of the original events is relevant. If the original events were exceptional or linked to exceptional circumstances (a freak storm or earthquake or an exceptional financial crisis), then that is relevant to the determination of likelihood. An investigating authority cannot reasonably assert that an exceptional event is "likely" to recur, without offering some further detailed justification for such a finding.

**4. Do the other third parties agree with the view of the EC that there must be an intervening calculation of dumping margins, consistent with Article 2, in order to make a proper determination of likelihood or continuation or recurrence of dumping?**

12. The European Communities respectfully refers to paras. 22 to 30 of its written submission, with reference to a dumping determination, rather than calculation.

**5. Could the third parties indicate which provision(s) of the AD Agreement govern company-specific revocations of the type at issue in this dispute ?**

13. Other than in the context of a sunset review, the provision of the *Anti-Dumping Agreement* that deals with revocation, or rather "termination", is Article 11.2 *Anti-Dumping Agreement*. In this respect, the European Communities respectfully refers to para. 139 of its written submission. The European Communities considers that the *Anti-Dumping Agreement* does not provide for company specific revocations of an order, and that this view is supported by the Appellate Body Report in *US-Carbon Steel from Japan*, at paras. 149 to 158.

**Questions to the European Communities:**

**1. In paragraph 41 of its submission, the EC indicates that the reasoning for a determination in Article 11.3 reviews assumes particular importance. Assuming that Commerce in this case addressed all the evidence before it and the arguments of the parties, is it the EC's position that Commerce was obligated to seek out, on its own volition, additional information and arguments before making its determination? If so, could the EC explain where, in the text of the Agreement, it finds support for the existence of such an obligation ?**

14. The European Communities considers that, in the conduct of a sunset review, the investigating authority may publish a notice and solicit evidence or arguments from known interested parties, but that it is not generally obligated to seek out additional information proactively. It must, however, examine all the evidence and arguments placed before it. It must also conduct an investigation, based on objective evidence, in an even-handed and unbiased manner. It cannot ignore facts that are known to it. If issues are unclear, it should take steps to attempt to clarify them.

15. The European Communities considers that the evidence and argument to be considered by USDOC includes, by definition, the original dumping determination and any intervening reviews.

16. The European Communities does not comment on whether USDOC in this particular case in fact addressed all the evidence before it and the arguments of the parties – the question inviting this to be assumed.

17. However, the European Communities does not consider that it is enough for an investigating authority merely to *address* all the evidence and arguments placed before it. The investigating authorities must make a *determination* that dumping and injury are *likely* to recur if the duty is terminated. The "likely" standard is a higher standard than merely addressing the evidence and argument – it indicates something that is probable, rather than merely possible.

18. The Panel must therefore do more than merely verify whether or not the investigating authority addressed all the evidence and argument before it. The Panel must examine that evidence and argument. If the Panel finds that the evidence and argument does no more than support a finding that dumping and injury might *possibly* recur, then it must find inconsistency with Article 11.3 *Anti-Dumping Agreement*.

19. Thus, whilst the European Communities accepts that investigating authorities may proceed on the basis that interested parties may have some initial burden of presenting evidence and argument to support termination of the duty (as occurred in this case), once such evidence and argument has been presented, investigating authorities must then rebut such evidence and argument if the duty is not to be terminated. Because of the "likely" standard, this rebuttal is not a mere formality. It requires reference to persuasive evidence and reasoning. Reference only to the original dumping determination and its effects on imports is insufficient.

20. The European Communities' essential point is that, based on the USDOC approach, it will always be possible to extend the duty indefinitely. USDOC finds dumping in the original investigation and imposes an anti-dumping duty. It comes as no surprise that imports decrease or cease. When it comes to a sunset review, USDOC reasons that imports decreased or ceased because of the duty, so if the duty would be terminated, dumping and injury would be likely to recur. This is a *possibility* that is inherent in the USDOC approach right from the first day on which duties are imposed and imports decrease or cease, regardless of what happens over the next 5 years. That *possibility* then subsists and is maintained throughout the 5 year period, and forms the basis of USDOC's reasoning in the sunset review. Based on such reasoning, it is clear from the moment the original duty is imposed, that it could *possibly* be maintained in place indefinitely, and essentially only on the basis of the original dumping determination and its inevitable immediate effect. Thus, at the most, USDOC's method amounts to a finding that recurrence of dumping and injury are a *possibility* – but that cannot be sufficient to meet the likely standard of Article 11.3 *Anti-Dumping Agreement*. In the opinion of the European Communities, USDOC's approach deprives Article 11.3 *Anti-Dumping Agreement* of any effective meaning. The Appellate Body has stressed that an automatic time-bound termination is at the heart of this provision, and that extension is the *exception*. A decrease or ceasing of imports after the imposition of an anti-dumping duty is not exceptional – it is the norm, occurring in most, if not all, cases.

**2. Following from the statement in paragraph 48 of its submission, does the EC intend to suggest that in a dispute involving an Article 11.3 review, the original determinations of dumping and injury are always subject to scrutiny by the Panel ?**

21. The European Communities refers to paras. 47 and 48 of its written statement.

22. The consistency of the original dumping and injury determinations with the *Anti-Dumping Agreement* in force at the time of the original determination cannot be considered by the Panel. Nor can the Panel consider, as such, whether or not the original dumping and injury determinations are or are not consistent with the *Anti-Dumping Agreement* in force at the time of the sunset review.

23. However, the European Communities does consider that the "phenomena" that the investigating authority must determine are likely to continue or recur must be dumping and injury, as those terms are used in the *Anti-Dumping Agreement* in force at the time of the sunset review. The problem in the particular case before this Panel is that USDOC merely contented itself with finding that what happened in 1994 was likely to recur. But what happened in 1994 is not necessarily dumping and injury within the meaning of the *Anti-Dumping Agreement* currently in force. USDOC should have considered whether or not what happened in



1994 would, should it happen again, constitute dumping and injury within the meaning of the current *Anti-Dumping Agreement*. USDOC did not consider this matter at all, and the United States thus acted inconsistently with Article 11.3 *Anti-Dumping Agreement*. As indicated in the Appellate Body Report in *US-Carbon Steel from Japan*, at para. 130, this issue would only arise in circumstances where the likelihood determination is based on the original dumping determination; and where the complainant has invoked this point (as it has in the present case) – otherwise the point would not automatically be before the Panel.

24. Furthermore, the European Communities does consider that, in determining whether or not something is likely to recur, it is germane to consider whether the original event, when it first occurred, was a common occurrence, or an exceptional occurrence. An investigating authority must consider this point, because it goes to the question of likelihood. If the original event was an exceptional occurrence, it must be less likely to recur than if it was a common occurrence. In this particular case, there were exceptional circumstances surrounding the original determination – notably the Mexican financial crisis and the exporters' currency exposure. In the face of these facts, recorded in USDOC's record of the original investigation, the most that might be said is that recurrence is possible – but these facts cannot support the finding that recurrence is *likely*.

**3. Could the EC clarify, with reference to paragraph 73 of its submission, whether it considers the US Statement of Administrative Action accompanying the Uruguay Round Agreements Act a measure which is, itself; subject to challenge in this dispute ?**

25. Following the Appellate Body Report in *US-Carbon Steel from Japan*, the European Communities considers that a measure need not be "mandatory", in the sense that it has the binding force of law in the municipal jurisdiction, in order to be challenged before a Panel.

26. The European Communities considers that, if the SAA contains a measure that is "as such" inconsistent with an obligation contained in the *Anti-Dumping Agreement*, the Panel may make findings and recommendations in that respect.

27. The European Communities notes that the SAA has a particular status in United States law, that may make it relevant, together with other measures, when determining whether or not there may be an inconsistency with the *WTO Agreements*.

28. The European Communities further considers, also following the Appellate Body Report in *US-Carbon Steel from Japan*, that it is possible that the consistent practice of the United States on a specific point could, considered in the context of a specific provision of the SAA, give rise to an inconsistency with a specific provision of the *WTO Agreements*, which inconsistency only arises because of the consistent practice.

29. In this particular case, the European Communities has not commented further on whether or not any specific provision of the SAA is or is not inconsistent with the *Anti-Dumping Agreement*.

**4. Could the EC explain what it considers the appropriate benchmark in making the statement that "the total margin or amount of dumping calculated during the period of review is inflated" in paragraph 85 of its statement — that is, inflated by comparison to what benchmark ?**

30. The European Communities refers to table 2 to its written observations, which shows the calculation of 3 "dumping margins" in increasing order of ascendancy : without zeroing (the true dumping margin calculated in conformity with the *Anti-Dumping Agreement*); model zeroing; and simple zeroing. All other things being equal, this pattern will generally be repeated : the model zeroing margin will always be greater than the true margin calculated without zeroing; and the simple zeroing margin will always be greater than the model zeroing margin. The Appellate Body stated in *EC-Bed Linen* that model zeroing inflated the true

dumping margin. The European Communities observes that simple zeroing must also therefore necessarily inflate – or in fact super inflate - the true dumping margin, in the same way and for the same reasons.

31. The benchmark is that which results from the only true and permissible interpretation of the *Anti-Dumping Agreement*, notably Articles 2.4 and 2.4.2, as set out at length in the written submission of the European Communities.

32. The benchmark is also, at least in this particular case, the benchmark fixed by the investigating authority itself, when it established the parameters of its investigation. Particularly, the investigating authority will determine for which products and over which period it will investigate whether the imports from another country are dumped. As in the present case, USDOC will thus generally have decided to impose a dumping duty in relation to the whole period; to impose a dumping duty *at the same rate* throughout the relevant period; to impose a dumping duty on *all* export transactions during the relevant period (whether above or below normal value); to conduct the investigation in relation to the whole territory of the United States; and so on. In other words, the investigating authority itself set the benchmark, and thenceforth was bound by its own logic not to use simple zeroing in the way that it did, since this results in not duly taking into account export transactions that fall within the relevant category of transactions, even though the investigating authority had considered these transactions relevant to determine if there was dumping.

**5. Does the EC consider that the US periodic reviews of the amount of duty (annual administrative review) constitute reviews under Article 11.2 ? Article 11.3 ?**

33. The European Communities refers to paras. 86 to 90 of its written submission.

34. The European Communities considers that a United States periodic review of the amount of duty must comply with the obligations set out in Article 9.3.1 *Anti-Dumping Agreement*. The attached table details the relationship between United States periodic reviews of the amount of duty and Article 9.3.1 *Anti-Dumping Agreement*; and United States changed circumstances reviews and Article 11.2 *Anti-Dumping Agreement*.

35. Thus, the European Communities does not consider that, in the United States, a new cash deposit rate resulting from a periodic review of the amount of duty has any *autonomous* existence.

36. In any event, the European Communities has analysed both Article 9.3.1 and Article 11.2 in its written observations, and reached the same conclusions. It being temporal considerations that are at the heart of Article 11.2 *Anti-Dumping Agreement*, it does not provide investigating authorities with an excuse to ditch the basis principles on which the entire dumping calculation is based.

**6. Does the EC consider that the United States practice of comparing weighted average normal value to individual export prices in determining the amount of duty to be assessed for a previous period in a periodic review of the amount of duty (annual administrative review) violates the AD Agreement ?**

37. Absent the conditions and explanations set out in the second sentence of Article 2.4.2 *Anti-Dumping Agreement* – yes. We have requested a Panel in relation to this matter, and respectfully refer to the explanations set out at length in our written submission in the present case, particularly paras. 91 to 123.

**7. In paragraph 132 of its submission, the EC appears to argue that the use of the word "continued" in the text of Article 11.2 refers to the amount of the margin calculated. Could the EC please explain this view, in light of the textual reference to the "continued imposition of the duty" ?**

38. The European Communities does not argue that the use of the word "continued" in Article 11.2 *Anti-Dumping Agreement* supports the view that the *amount* of the dumping margin calculated in a review under

that provision must be the same as that calculated prior to such review. Rather, we argue that it indicates a degree of continuity in relation to something. To state the obvious, an investigating authority could not, for example, completely change the product scope of the original investigation in a review. We argue that the continuity that is referred to must have something to do with the "duty" – since that is what the phrase says. If it is not the *amount* of the duty that is referred to, it must be something else, the only other possibility being the *method* by which the duty is to be calculated. We therefore conclude that, it being temporal considerations that are at the heart of this provision, this provision does not afford investigating authorities an opportunity to abandon completely the basic methods used for calculating a dumping margin, in original investigations and otherwise, defined in Article 2 *Anti-Dumping Agreement*. At least any change in method would have to be clearly justified and explained, by reference to any changed circumstances. To conclude otherwise would be to render the choice of the word "continued" redundant, which would not be a permissible interpretation of Article 11.2 *Anti-Dumping Agreement*.

**8. The EC asserts that the establishment of the cash deposit rate for future shipments in the US periodic review of the amount of duty (annual administrative review) context is "an up-date of the temporal frame of reference for the investigation" (paragraph 131 of the EC submission), and that therefore it constitutes part of the "investigative phase" of the investigation. However, Article 5.10 specifies that investigations must be completed within, at most 18 months. Does the EC therefore suggest that the US system is, overall, inconsistent with that provision ?**

39. The European Communities does not consider that the establishment of the cash deposit rate is part of the original or initial or Article 5 investigation phase. We do not therefore consider that there is any inconsistency with Article 5.10 of the *Anti-Dumping Agreement*.

40. The European Communities only means to say that, while in a prospective system the rate calculated during the original investigation will serve as a basis for the calculation of the duty to be collected, subject to refund, in the United States retrospective system, this rate is subsequently "updated" following a method inconsistent with the *Anti-Dumping Agreement* (asymmetry and zeroing). In this way, the relationship between the two systems of collection, which should be just different means of arriving at the same result, is severely distorted.

41. The European Communities considers that a United States periodic review of the amount of duty involves, objectively, an assessment of duty and/or a type of investigation – not an original or initial or Article 5 investigation – but an investigation nonetheless. The *Anti-Dumping Agreement* contains no definition of the word "investigation" and in fact, under the *Anti-Dumping Agreement* that word is used in different senses, and there may thus be different types of investigation. We refer in this respect to paras 115 to 123 of our written submission.

**9. 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. Is this understanding correct? If so, could the EC clarify how it justifies this position in light of the fact that a retrospective system of assessment of the amount of anti-dumping duties is permitted under the AD Agreement and such a system would seem to entail some updating of the amounts deposited in advance of the ultimate assessment of duty amounts. Does the EC agree that without such updating, the result would be indistinguishable from the result under a prospective system of duty assessment?**

42. There is a threshold issue about which provisions of the *Anti-Dumping Agreement* govern a United States periodic review of the amount of duty : Article 9.3.1 or Article 11.2 *Anti-Dumping Agreement*, or both ? The European Communities is certain that most, and possibly all, of United States periodic reviews of the

amount of duty are governed by Article 9.3.1 *Anti-Dumping Agreement*. As indicated in paras. 86 to 90 of the European Communities written submission, the cash deposit rate may be governed, or also governed, by Article 11.2 *Anti-Dumping Agreement* (please see the response to question 5).

43. In any event, the European Communities considers that, because of the simple zeroing methodology, United States periodic reviews of the amount of duty are certainly inconsistent with Article 2 *Anti-Dumping Agreement*; certainly inconsistent with Article 9.3.1 *Anti-Dumping Agreement*; and certainly inconsistent with Article 11.2 *Anti-Dumping Agreement*. Thus, to be clear, the first sentence of the question does not reflect the position of the European Communities – we consider USDOC's final assessment of the amount of duty to be inconsistent with the above provisions of the *Anti-Dumping Agreement*.

44. The European Communities does not assert that a retrospective system of duty collection is, *per se*, inconsistent with any provision of the *Anti-Dumping Agreement*.

45. The European Communities does not necessarily agree that such a retrospective system "entails" an up-dating of the cash deposit rate with each assessment exercise. The European Communities finds no such obligation in Article 9.3.1 *Anti-Dumping Agreement*. However, this question is not before the Panel.

46. The European Communities does not agree that whether or not a prospective system and a retrospective system produce the same result hinges on whether or not the cash deposit rate is up-dated. The cash deposit rate is part of the measure that is, at least potentially, temporary or provisional – the final definitive measure is the final duty assessment. What determines the outcome in the final duty assessment are the rules that apply to the final assessment exercise – or in a prospective system, the rules that apply to the refund exercise.

47. It is not the up-dating of the cash deposit rate *per se* that the European Communities objects to. It is the fact that in the final assessment the rate of duty is super-inflated by the use of simple zeroing, and that unlawful distortion is also reflected in the up-dated cash deposit rate.

**10. Is the Panel correct in understanding, with reference to Table 1, the EC considers that the "Zeroing by transaction" column represents an unfair practice?**

48. The European Communities refers to paras. 92 to 102 of its written submission. That is correct as regards, first, the method of comparison used and, second, the use of simple zeroing, other than in the circumstances provided for in the second sentence of Article 2.4.2 *Anti-Dumping Agreement*.

**Is the Panel correct in understanding that this column sets out the amounts by which normal value exceeded export price on the respective shipments?**

49. This column reflects the amount by which a weighted average normal value (NV) as calculated by the United States exceeds the price of a specific export transaction (EP) as calculated by the United States. However, the European Communities considers that the methodology used by the United States to compare NV and EP is inconsistent with the *Anti-Dumping Agreement*, since it relies on an asymmetrical method of comparison with zeroing, without there being any basis for using such a method under the *Anti-Dumping Agreement*.

**Is the Panel correct in understanding that these figures represent amounts by which these sales were dumped?**

50. No - These figures do not represent the amounts by which these sales are "dumped" within the meaning of the *Anti-Dumping Agreement*. This is because the comparison of NV and the EP is not completed on a symmetrical basis (NV is established on a weighted average basis while export prices are established on a transaction by transaction basis) and the negative amounts of "dumping" are zeroed.

51. In other words, this question seems to imply that dumping can be established for each and every transaction. That assumption is in contradiction with the fact that a determination of dumping must fully reflect all export transactions falling within the scope of the investigation defined by the investigating authority, and not in respect of part of that universe (without prejudice to Article 2.4.2, second sentence, which permits, under very specific circumstances, the use of zeroing and hence that some transactions may not be fully reflected in the determination of dumping, see the reply to questions 14 and 15).

**Is it the EC's position that a Member is not entitled to collect duties in the amounts of actual dumping, i.e., the amounts by which export price is less than normal value on particular sales, but must offset actual dumping during the period of existence of an order by the amounts by which export price exceeds normal value on other sales?**

52. Essentially, this encapsulates the point. However, the European Communities would have the following observations.

53. **"Actual dumping"**: in the European Communities' view, "dumping" is a legal concept defined in the *Anti-Dumping Agreement*. Anything that does not conform to that definition is not "dumping" within the meaning of the *Anti-Dumping Agreement*. The fact that the price of a particular export is less than a weighted average normal value does not mean that it is "dumped" or that there is "dumping". The *Anti-Dumping Agreement* contains precise rules on when an individual export price can be compared to a weighted average normal value. If the required circumstances are not present, this type of comparison is simply utterly irrelevant for the purposes of determining whether or not there is dumping, as that legal concept is defined in the *Anti-Dumping Agreement*.

54. **"collect duties ... on particular sales"** : this does not properly describe the United States system of collection of duties. The United States does not collect duties on the basis of transaction-based margins. Rather, in a periodic review of the amount of duty, the United States establishes a new dumping margin for sales taking place during a certain period of time (following more or less the same discipline as in an original investigation, *except* for the asymmetrical method of comparison and the use of simple zeroing). On the basis of this super inflated margin, the United States calculates a similarly inflated assessment rate (see paras. 84 to 85 of the European Communities' written submission). This inflated rate is then applied to **all** transactions that are subject to the review **including** those for which no positive amount of "dumping" was established.

55. Once again this nicely illustrates the inherent unfairness of the United States approach, which consists in saying : this transaction is "dumped" so we assess a duty; this transaction is "not dumped" so we ... assess a duty anyway.

56. In conclusion, USDOC defines the universe of export transactions for which final liability and a new cash deposit rate will be determined. The European Communities considers that once this universe has been established (product, period of time, etc.) the investigating authority is bound to respect the parameters of such universe and to duly reflect the value of the export transactions that fall within this universe; otherwise, it would fail to make a fair comparison. This is consistent with the Appellate Body findings in *EC-Bed Linen* where it was held that the *Anti-Dumping Agreement* obliges an investigating authority to define one single margin of dumping for the whole of the subject product as defined by the investigating authority. Zeroing by transaction as performed by the United States in periodic reviews of the amount of duty results in calculating specific margins for each transaction (this is the most disaggregated level possible since it may result in several margins for the same exporter, importer, like product, sub-product types and period - in fact as many distinct margins as there are transactions...).

57. Once the margin of dumping has been established in conformity with the *Anti-Dumping Agreement*, in particular Article 2, duties must be collected on the basis of that margin pursuant to Article 9.3. The United States simple zeroing practice will inevitably lead to a collection of duties in excess of the margin of dumping

calculated under Article 2, as the example below clearly shows (this example is based on the same data as those used in the written submission).

Model	Customer	EP	NV	Amount of dumping	Amount of dumping based on simple zeroing
A	1	95	100	5	5
A	2	110	100	-10	0
A	2	95	100	5	5
A	3	110	100	-10	0
A	4	115	100	-15	0
B	1	95	110	15	15
B	2	90	110	20	20
B	3	100	110	10	10
B	4	125	110	-15	0
C	1	115	120	5	5
C	3	95	120	25	25
C	4	120	120	0	0
<b>TOTAL</b>		<b>1265</b>		<b>35</b>	<b>85</b>
<b>Margin</b>				<b>2.8%</b>	<b>6.7%</b>

58. In the example above, the margin of dumping for the whole set of transactions is 2.8 per cent (dumping amount: 35 - no zeroing). When applying the simple zeroing by transaction, the United States will calculate a total dumping amount of 85, on the basis of which the margin to be applied across the board to all transactions will be based on a rate of 6.7 per cent (instead of the 2.8 per cent). The European Communities considers that this constitutes a blatant violation of Article 9.3.

59. The EC recognises that a prospective collection of duty may also result in an initial duty collection in excess of the actual margin of dumping. That is why Article 9.3.2 *Anti-Dumping Agreement* provides for a prompt refund mechanism which will lead to the refund of the duty collected in excess of the actual margin of dumping.

**11. The Panel notes the view of the EC that while cumulation is permitted in sunset reviews, it may only be used if the conditions for cumulation set out in Article 3.3 of the AD Agreement are satisfied, either at the time of the sunset review, or within the reasonable foreseeable future. Does the EC include, in this context, the conditions regarding de minimis levels of dumping and negligible imports which are contained in Article 3.3? If so, could the EC please address the implications for this view of the Appellate Body's findings in United States — Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany ("US — Carbon Steel"), WT/DS213/AB/R regarding the inapplicability of de minimis in sunset reviews?**

60. The European Communities refers to para. 64 of its written observations.

61. There is a certain tension between two legal facts : on the one hand, Article 3 *Anti-Dumping Agreement* defines injury for the purposes of the *Agreement*, including sunset reviews (and the Appellate Body has said that a definition goes beyond a mere cross-reference); and, on the other hand, Article 3.3 refers to Article 5.8 *Anti-Dumping Agreement*, which relates only to original or initial or Article 5 investigations, and thus not to sunset review investigations under Article 11.3. The "safety-valve" that resolves this potential contradiction is the phrase "unless otherwise specified" in footnote 9 *Anti-Dumping Agreement*.

62. Thus, the issue of the *de minimis* rule is a special case, in respect of which it is "otherwise specified", because Article 3.3 refers expressly to Article 5.8, which in turn expressly applies to original or initial or Article 5 investigations.

63. The other conditions set out in Article 3.3 (the volume of imports and conditions of competition) are not so qualified.

64. Thus, the balanced approach, capable of reconciling these two propositions, is that cumulation is possible, at least subject to these other conditions.

**12. Could the EC explain where in the AD Agreement it finds support for the proposition that periodic reviews of the amount of the duty, which it considers the United States conducts under Article 9.3.1, must be consistent with the requirements of Article 2, including Article 2.4.2?**

65. Article 9.3 *Anti-Dumping Agreement* provides in relevant part:

The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

66. The European Communities considers that the words "Article 2" in this provision must be interpreted as referring to the whole of Article 2, including Article 2.4 and Article 2.4.2.

67. Further contextual support is provided for that proposition by the fact that Article 9.3.3 also refers to paragraph 3 of Article 2.

68. The European Communities would also point out that Article 2 *Anti-Dumping Agreement* defines dumping for the purposes of the *Agreement* (and the Appellate Body has confirmed that a definition goes beyond a mere cross-reference). Thus, when Article 9 refers to "dumping" it must be referring to dumping as defined by Article 2.

69. This is also common sense. There would be no point in having detailed and precise rules for the determination of the dumping margin, if, when it actually came to assessing duties, the investigating authority would be free to do as it wished. That would largely empty the *Anti-Dumping Agreement* of any effective meaning.

**13. The Panel notes the EC's view that the "disaggregated analysis" it discusses in the context of "simple zeroing" produces a super-inflated dumping margin. However, Article 2.4.2 allows for "disaggregated analysis" in original investigations, when it establishes that transaction-to-transaction comparisons are permitted. Assuming a Member undertakes transaction-by-transaction comparisons, is it the position of the EC that, when calculating the overall dumping margin in such a proceeding, zeroing is prohibited? If so, could the EC specify where, in the text of the Agreement, it finds support for this view? In this context, could the EC please address specifically the contention that the phrase "all comparable export transactions" is limited to the case of a weighted-average to weighted-average comparison.**

70. As a preliminary point, the European Communities notes that Article 2.4.2, first sentence, does not refer to "original" investigations. It refers to "investigations", which has a broader meaning. The Panel should not read into Article 2.4.2 *Anti-Dumping Agreement* words that are not there, and for which there is no supporting context or purpose. We refer, in this respect, to paras. 115 to 123 of our written submission.

71. As regards the substance of the question, the European Communities has the following observations.

72. First, the question of zeroing in transaction-to-transaction cases is not before this Panel, so the Panel need make no findings in this respect.

73. Second, the European Communities would observe that it considers that zeroing would be unfair in that context. We refer in this respect to Article 2.4 and to the findings of the Appellate Body and the *Lumber* Panel, as set out at para. 101 of our written submission. Because zeroing results in giving more weight to "dumped" transactions than to "non-dumped" transactions, it is intrinsically biased and unfair.

74. Third, even if the Panel would consider that zeroing in a transaction-to-transaction context might in certain circumstances be "fair" (a point that the European Communities does not concede, and a finding that it considers would constitute an error of law), then the European Communities would submit, in the alternative, that it could never be fair in circumstances such as the present case, where the investigating authority itself defined the parameters of its review investigation, in terms of : subject product; period of review; use of weighted average normal values; calculation of single dumping margin; application of a single rate of duty; investigation by reference to the whole territory; and so on. The investigating authority thereby became bound by its own logic, to which it should have adhered throughout its investigation and assessment.

75. Fourth, the phrase "all comparable export transactions" is indeed relevant for the prohibition of zeroing when applying the first method of comparison because zeroing *also* violates the mathematical rules provided by the first sentence of 2.4.2. However, this is not the only reason why zeroing is prohibited by the *Anti-Dumping Agreement*. Zeroing is also prohibited because it unduly adjusts the value of export transactions and thereby gives without justification more weight to "dumped" transactions than to "non-dumped" transactions in the calculation of the margin of dumping of the like product. As held by the Appellate Body, this is inherently unfair. The fact that the transaction-by-transaction method could be interpreted as meaning that the investigating authority may base its calculations on a representative sample of export transactions as opposed to all export transactions (a position that the European Communities does not necessarily share as such method would fail to reflect the actual amount of dumping practised during the period of reference – rather, the European Communities considers that the transaction-by-transaction method may lead to a selection of the domestic sales that are used for individual comparison with export transactions under investigation), does not mean that the investigating authority once it has selected the representative sample of export transactions would be entitled to disregard in one way or another the "non-dumped" transactions for the computation of the overall margin of dumping, as zeroing implies. Indeed, the use of the second method does not exempt the investigating authority from the obligation to calculate a margin of dumping in relation to the subject product in a manner consistent with Article 2 *Anti-Dumping Agreement*, or in a manner that is consistent with the parameters the investigating authority has itself established.

**14. The Panel notes that the EC argues that, if there is targeted dumping, Article 2.4.2 allows the use of the third method of comparison, weighted-average normal value to individual export transactions. Is it the EC's position that zeroing is prohibited when the third methodology is used?**

76. Zeroing is not prohibited when the third method is used in conformity with the provisions of 2.4.2 *Anti-Dumping Agreement*, second sentence. Indeed, as held by the Appellate Body in *EC-Bed Linen*, the *Anti-Dumping Agreement* explicitly recognises that certain types of targeting (regions, time periods and customers) may be addressed in the way the investigation is structured. The European Communities considers that zeroing is an appropriate tool against the types of targeting identified in Article 2.4.2. The Appellate Body also indicated that the *Anti-Dumping Agreement* does not authorise investigating authorities to address any other type of alleged targeting. This therefore excludes zeroing outside the circumstances provided for in Article 2.4.2 *Anti-Dumping Agreement*, second sentence. If zeroing is prohibited in such a calculation, then the resulting dumping margin is likely to be the same as the margin that would result from application of either of the other two methodologies (with no zeroing).

**How then does this third methodology allow a Member to effectively address the problem of targeted dumping? Would this result not render the third methodology meaningless?**



77. As indicated above, the European Communities agrees with the Panel that, all things being equal, the first and the third method would normally yield the same result absent "zeroing" (in the second method, normal value could be established on the basis of individual domestic prices). The fact that "zeroing" is the discriminating factor between the first and the third method, demonstrates, in the European Communities' view, that the *Anti-Dumping Agreement* restricts the use of "zeroing" to a well circumscribed set of circumstances, i.e. the types of targeting identified in the second sentence of Article 2.4.2, and to the conditions defined therein. Absent the conditions specified in 2.4.2, "zeroing" is prohibited by *Anti-Dumping Agreement*.

## ANNEX E-7

### ANSWERS OF JAPAN TO QUESTIONS OF THE PANEL – THIRD PARTIES SESSION

#### Questions to all third parties:

**1. Could the third parties explain their understanding of how a determination consistent with the requirements of Article 3 could be made in a sunset review, in a case in which there were, for example, no imports during the period of effectiveness of the anti-dumping measure from the sources originally found to be dumped. How in such a case could, for example, the requirement of Article 3.2 regarding consideration of the volume of dumped imports be satisfied?**

#### Answer

1. The analysis of the authorities under Article 11.3 of the AD Agreement involves both the current state of the domestic industry, and the future state of the industry.

2. Article 11.3 requires the authorities to determine likelihood of "continuation or recurrence" of injury. The words "continuation or recurrence" indicate that the analysis of injury under Article 11.3 must be in two folds, the current state of the domestic industry, and the future state of the domestic industry. In order for the injury to "continue," the authorities must first find that the domestic industry is currently injured, and then the injury will continue. In order for the injury to "recur", the authorities must find that the domestic industry is not injured at the time of the sunset review proceeding, but will be injured at a point in the future.

3. The analysis under Article 11.3 has no differences from the analysis required under Article 3.7. Article 3.7 requires the authorities to determine likelihood of injury based on analyses set forth in all provisions of Article 3. The panel in *US – Softwood Lumber ITC Investigation* agreed with our interpretation. It stated "there must, in every case in which threat of material injury is found, be an evaluation of the condition of the industry in light of the Article 3.4/15.4 factors to establish the background against which the impact of future dumped/subsidized imports must be assessed, in addition to an assessment of specific threat factors."<sup>1</sup> The panel also stated, "[a]s with the consideration of the Article 3.4/15.4 factors, the 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."<sup>2</sup>

4. In case of no imports at the time of a sunset review, the authorities would find that the domestic industry was not injured by imports. The authorities then must consider the volume of future dumped imports and its effects on the price of the domestic industry in accordance with Article 3.2 to find the impact of these imports on the state of the domestic industry and the causation under Articles 3.4 and 3.5.

**2. Do the third parties consider that the determination of "likelihood of continuation or recurrence of injury" under Article 11.3 is identical in nature and scope to the "determination of injury" under Article 3? Could the third parties please address, in this context, the views of the Appellate Body in *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat***

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<sup>1</sup> Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada* ("US – Softwood Lumber ITC Investigation") (WT/DS277/R), adopted 26 April 2004, para. 7.105.

<sup>2</sup> *Id.*, para. 7.111.

***Products from Germany ("US – Carbon Steel")*, WT/DS213/AB/R, at paragraph 87, that "original investigations and sunset reviews are distinct processes with different purposes" and that the "nature of the determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation"?**

Answer

5. As discussed in the answer to question 1 above, the determination of likelihood of continuation or recurrence of injury in a sunset review differs from the determination of the material injury in an original investigation with respect to the point of time at which the injury may be found. In this sense, the determination in the original investigation differs from the determination in the sunset review, as the Appellate Body has stated. Indeed, the Appellate Body in *US – Carbon Steel* has further explained at the same paragraph 87:

... For example, in a sunset review, the authorities are called upon to focus their inquiry on what would happen if an existing countervailing duty were to be removed. In contrast, in an original investigation, the authorities must investigate the existence, degree and effect of any alleged subsidy in order to determine whether a subsidy exists and whether such subsidy is causing injury to the domestic industry so as to warrant the imposition of a countervailing duty.

6. This qualitative difference, however, does not affect to the basic requirements under the AD Agreement for the determination of injury. The authorities must examine all factors as set forth in provisions of Article 3 to determine the likelihood of continuation or recurrence of injury in sunset reviews.

**3. Could the third parties explain why, in their view, it is relevant to the sunset determination that the original anti-dumping measure was imposed on the basis of a dumping calculation based in part on facts available? Are the third parties of the view that, in such a case, there is a requirement that the investigating authority undertake some particular action or analysis in determining whether there is a likelihood of continuation or recurrence of dumping in a sunset review, and if so, what do they consider is required?**

Answer

7. The fact that a determination in an original determination was based on the facts available does not necessarily diminish its evidentiary value for the subsequent sunset review. However, the authorities should not give too much weight on the determination in the original investigation because the determination was based on information which has been collected at least six years before at the time of the sunset review (one-year period for the proceeding of the original investigation plus five years of imposition of anti-dumping duties). As explained by the Appellate Body, "[m]ere reliance by the authorities on the injury determination made in the original investigation will not be sufficient. Rather, a fresh determination, based on credible evidence, will be necessary to establish that the continuation of the countervailing duty is warranted to remove the injury to the domestic industry."<sup>3</sup>

**4. Do the other third parties agree with the view of the EC that there must be an intervening calculation of dumping margins, consistent with Article 2, in order to make a proper determination of likelihood of continuation or recurrence of dumping?**

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<sup>3</sup> Appellate Body report, *US – Carbon Steel*, para. 88. (footnote omitted.)

Answer

8. The authorities must rely on margins of dumping to make a determination of dumping under Article 11 of the AD Agreement. Dumping occurs when the export price is lower than the normal value, as defined in GATT Article VI:1 and the Article 2.1 of the AD Agreement. This difference is the margin of dumping. The margin of dumping is, thus, always involved in the determination of dumping.

9. As discussed in the answer to question 1 above, the words "continuation or recurrence" indicate that the analysis of dumping under Article 11.3 must be in two folds. It is also clear that the provisions of Article 2.1 apply to a dumping determination under Article 11.3.<sup>4</sup> Because the margin of dumping is necessarily involved in a determination of dumping in accordance with Article 2.1, the authorities are required to examine the margin of dumping at the time of the sunset review and at a point in the future to make a dumping determination in a sunset review.

10. The provisions of Article 11.1 also require the analysis of the margin of dumping. Article 11.1 is a provision overarching other provisions of Article 11, providing that an anti-dumping duty "shall remain in force only as long as and to the extent necessary to counteract dumping." The Appellate Body explained "the general rule of Article 2.1 underlines the requirement for periodic review of countervailing duties and highlights the factors that must inform such reviews".<sup>5</sup> As such, Article 11.1 requires that a sunset review confirm the existence and the degree of dumping to counteract. The existence and the degree of dumping can be shown only through the margin of dumping. The authorities, therefore, are required to examine the margin of dumping in a sunset review in accordance with Article 11.1.

11. In sum, Article 11.1 and 11.3 require that the authorities assess the margin of dumping at the time of the sunset review and at a point in the future to make dumping determination in a sunset review.

**5. Could the third parties indicate which provision(s) of the AD Agreement govern company-specific revocations of the type at issue in this dispute?**

Answer

12. Articles 2.1, 6.10 and 9.2 of the AD Agreement provide the sufficient basis for the authorities to make company-specific revocation determination. Article 2.1 sets forth the general rule applicable to all provisions of the AD Agreement that dumping may be found where the export price is less than the normal value, *i.e.*, where the positive margin of dumping is found. Article 6.10 then sets forth the basic rule of the evidentiary basis that the margin of dumping must be established on a company-specific basis. Article 9.2 allows the authorities to collect anti-dumping duties by specifying "the supplier or suppliers of the product concerned."

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<sup>4</sup> See Appellate Body report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, (WT/DS244/AB/R), adopted 9 January 2004, para. 126 ("the word 'dumping' as used in Article 11.3 has the meaning described in Article 2.1.")

<sup>5</sup> See Appellate Body report, *US – Carbon Steel*, para 70.

## ANNEX E-8

### ANSWERS OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU TO QUESTIONS OF THE PANEL – THIRD PARTIES SESSION

(18 June 2004)

#### Question:

**1. Could the third parties explain their understanding of how a determination consistent with the requirements of Article 3 could be made in a sunset review, in a case in which there were, for example, no imports during the period of effectiveness of the anti-dumping measure from the sources originally found to be dumped. How in such a case could, for example, the requirement of Article 3.2 regarding consideration of the volume of dumped imports be satisfied?**

#### Reply

In our third party written submission, we argued that Article 3 of ADA should apply to sunset reviews, "because it represents the agreed disciplines for the determination of injury, and no other provisions of ADA exist upon which Members may make their determination of injury."<sup>1</sup> We concluded that, "even in the case of prospective injury analysis pursuant to Article 11.3, the authorities must necessarily apply, wherever appropriate, Article 3."<sup>2</sup>

While it may be possible that no imports exist during the period of effectiveness of the anti-dumping measure from the sources originally found to be dumped, investigating authorities should not automatically excuse themselves from the positive obligations of making injury determinations in accordance with Article 3, unless a reasonable decision in accordance with Article 3 is impossible. Even under this scenario, the fact that there is no import in itself needs to be examined, as required by the obligations under Article 11.3. A simple conclusion that dumping and injury would likely recur because there was no import cannot satisfy Article 11.3.

As Article 11.3 requires a prospective analysis of future injury, it would therefore be appropriate for investigating authorities to adopt the threat of injury analysis, which is also prospective in nature, as provided for in Article 3.7. Article 3.7 contains an indicative list of factors for consideration, e.g., freely disposable capacity, inventories, and has been designed in a flexible way to accommodate the need for a prospective injury analysis, as Article 3.7 does not restrict the authorities' ability to consider other factors for its determination of the likelihood of continuation or recurrence of injury, as long as they are reasoned and justified.

#### Question:

**2. Do the third parties consider that the determination of "likelihood of continuation or recurrence of injury" under Article 11.3 is identical in nature and scope to the "determination of**

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<sup>1</sup> Third Party Submission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, 28 April 2004, para. 24.

<sup>2</sup> *Id.*

**injury" under Article 3? Could the third parties please address, in this context, the views of the Appellate Body in *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("US – Carbon Steel"), WT/DS213/AB/R, at paragraph 87, that "original investigations and sunset reviews are distinct processes with different purposes" and that the "nature of the determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation"?**

Reply

In arguing that the disciplines in Article 3 injury determination apply to the determination of "likelihood of continuation or recurrence of injury" under Article 11.3, we are not asserting that the two are identical in nature and scope. The contexts under which the two determinations are conducted are different, as are their places in the overall anti-dumping process. Presumably, in an Article 11.3 investigation, the anti-dumping measure has been imposed, and the subject imports have very likely been affected, sometimes to a significant degree, by the duties imposed. The effect of the duties, and other intervening events, must be properly and carefully examined in the sunset review.

Even recognizing the differences in nature and scope of the two determinations, the Appellate Body nevertheless found that Article 11.3 requires the authorities to take an active role in conducting a sunset review, and that the determinations should be based on positive evidences.<sup>3</sup> The text of Article 11.3 places on the authorities an obligation to examine dumping and injury. As Article 3 is the only article providing a consistent discipline on injury, the investigating authorities should therefore follow, when appropriate, the relevant provisions of that article in order to meet the requirements set forth by the Appellate Body with regard to Article 11.3, and to reach a reasonable conclusion on injury analysis in sunset reviews.

**Question 3-5: [no comment].**

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<sup>3</sup> *US - Carbon Steel*, Appellate Body Report, WT/DS244/AB/R, para. 111.

## ANNEX E-9

### ANSWERS OF MEXICO TO QUESTIONS OF THE PANEL – SECOND MEETING

(13 September 2004)

#### Questions to Mexico:

**Question 1.** Could Mexico clarify its argument at paragraph 72 of its second oral statement that "there would be no way for the United States to correct retroactively a violation of the time-bound obligation of Article 11.3 to terminate after five years". In particular, could Mexico distinguish this case from a dispute involving an original investigation and the obligation under Article 5.10 of the AD Agreement to conclude an investigation within one year, or in special circumstances 18 months?

#### Answer to Question 1

1. Mexico's position is based on the unique nature of the obligation in Article 11.3. The text of Article 11.3 imposes a temporal limitation that requires termination at a specific point in time unless the investigating authorities make certain findings. Thus, if a Member wants to invoke the exception and maintain the measure beyond the specified time, it bears the burden of conducting a review and making the findings required by Article 11.3. If it fails to do so, or if it does so improperly, it has no right to maintain the measure.

2. The Appellate Body's interpretations of Article 11.3 support this view. The Appellate Body reaffirmed the time-bound nature of the obligation to terminate anti-dumping duties after five years, and the consequences for failing to comply with the stringent conditions for invoking the exception to maintain an anti-dumping measure:

Article 11.3 imposes a **temporal limitation** on the maintenance of anti-dumping duties. It lays down a mandatory rule with an exception. Specifically, Members are required **to terminate an anti-dumping duty within five years of its imposition "unless"** the following conditions are satisfied: first, that a review be initiated before the expiry of five years from the date of the imposition of the duty; second, that in the review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of *dumping*; and third, that in the review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of *injury*. **If any one of these conditions is not satisfied, the duty must be terminated**.<sup>1</sup>

3. The Appellate Body's statement reaffirms the plain meaning of Article 11.3. If the administering authority has failed to satisfy any of the conditions for continuing a measure, the "mandatory rule" of Article 11.3 applies, and "the duty must be terminated."

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<sup>1</sup> Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion Resistant Carbon Steel Flat Products From Japan*, DS 244, para. 104 ("*Japan Sunset*") (emphasis added).

4. Giving a Member a second opportunity to invoke the exception would not only undermine the five-year temporal limitation for which Members negotiated, it would also violate another temporal limitation specified in Article 11.3 for the time by which any Member must initiate and conclude the review. Article 11.3 provides that any review conducted in order to determine whether the measure should continue must be "initiated before that date," a reference to the date five years from the imposition of the measure. Article 11.3 also establishes as an additional exception to the general rule that "The duty may remain in force pending the outcome of such a review." In light of the temporal limitations in Article 11.3, after a sunset review determination has been found to be inconsistent with Article 11.3, there is simply nothing that the violating Member can do within the temporal limitations specified in Article 11.3 to bring that measure into conformity with the Anti-Dumping Agreement. The granting of a reasonable period of time to bring a measure into conformity may be used to cure non-time bound obligations only. Otherwise, it would create absurd results or render several provisions of the Agreement meaningless, which is not permitted by the *Vienna Convention on the Law of Treaties*.

5. The circumstances of this dispute highlight the unique nature of the Article 11.3 obligation and the significance of the Appellate Body's interpretations. The United States imposed the anti-dumping measure in this case in August 1995. Therefore, it had an Article 11.3 obligation to terminate the measure in August 2000 unless US authorities made certain findings in a manner consistent with the Article 11.3. A determination by the Panel that the United States did not meet the conditions to allow the continuation of the measure would mean that the United States improperly extended the measure beyond August 2000 and beyond the requisite temporal limitation for conducting a review. Viewed from a different perspective, Mexico had the right under Article 11.3 to have its exports of OCTG enter the United States without anti-dumping duties as of August 2000, unless the United States properly invoked the limited exception in Article 11.3. If the United States maintains the measure without properly invoking the exception, then Mexico's right to export without the application of anti-dumping duties must be restored immediately.

6. If the Panel finds that the United States acted inconsistently with Article 11.3 and nonetheless allows the United States to continue the measure, Mexico's rights under the Anti-Dumping Agreement will be diminished, rather than restored. Mexico's exports will continue to be subject to anti-dumping measure for a tenth years following imposition of the measure, without any proper invocation of the exception in Article 11.3. Mexican exports also will continue to be subject to the US administrative review process.<sup>2</sup> Soon, the United States will have to begin its second Article 11.3 review of this order, which would be absurd in light of a finding that the United States did not properly continue the measure in 2001.

7. With respect to the Panel's specific question relating to Article 5.10, there is a significant difference between the obligation in Article 11.3 and the obligation in Article 5.10. The obligations in Article 11 arise after anti-dumping duties have been imposed and have remained in effect for some time. The very title of Article 11 indicates that the disciplines imposed by Article 11 relate to the "duration" of an anti-dumping measure that is in effect. Article 11.1 and 11.2 impose obligations to terminate the measure immediately under certain circumstances, and Article 11.3 imposes an obligation to terminate the measure at a specific point in time unless certain specific findings are made. No other provision of the Anti-Dumping Agreement contains the affirmative obligation to terminate a measure at a specific point in time. The nature of this unique obligation is the basis for Mexico's view that the consequence of a violation of Article 11.3 must be termination of the measure.

8. Article 5.10 refers to the length of time to conduct an investigation that may lead to the imposition of anti-dumping measures in the first instance. Thus, the context is very different from that of Article 11. However, Article 5.10 has a similar structure to Article 11.3, in that it establishes a specific time frame in which the Member must act (12 or 18 months), subject to an exception (an explanation justifying more time).

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<sup>2</sup> Just two weeks ago, the US industry requested that the US Department of Commerce conduct another review of the 1994 anti-dumping duty order with respect to TAMSA. The mere filing of this request will imply administrative proceedings, questionnaires, and potentially verifications.



If a Member fails to comply with the temporal limitation in Article 5.10 and imposes duties after the 18-month period, Mexico considers that the Member would have violated its obligation under Article 5.10. Indeed, if a member breaches the time-bound obligation in Article 5.10 by imposing a duty after the maximum period of 18 months, it would be absurd to recommend that such Member brings its measure into conformity with the Agreement by granting that Member still more time (a "reasonable period of time") to do so.

9. Termination of the measure is even more compelling in the case of a violation of Article 11.3 because Article 11.3 contains the substantive disciplines relating to the duration of anti-dumping duties. Allowing a Member to extend the duration of the measure in order to cure a violation that already caused the measure to be in place longer than the time expressly permitted by the Anti-Dumping Agreement would serve only to further undermine Mexico's rights under Article 11.3.

10. As stated in its submissions to the Panel, Mexico's position on this point is an issue of law that affects Mexico's rights under the Anti-Dumping Agreement and is consistent with the several reports adopted by the DSB that recognized that the nature of the obligation, as well as the nature and extent of the violation, justified a specific suggestion or finding to restore the rights of the affected member.<sup>3</sup> In the absence of an immediate termination of the US measure as part of the Panel recommendation, Mexico's rights under the Agreement would be diminished in contravention of Article 3.2 and 21.2 of the Dispute Settlement Understanding.

**Question 2. Could Mexico clarify its argument at paragraph 32 of its second oral submission that "By failing to evaluate whether the Commission applied the right standard, and then making its own assessment of whether the facts would support a finding of "likely" injury, the Panel [in the *OCTG from Argentina* dispute] seriously undermined the substantive obligation in Article 11.3, which places the burden of establishing likely injury on the investigating authority". In this regard, the Panel notes the statement in the Panel's report in *OCTG from Argentina*, at paragraph 7.285, that "the standard set out in Article 11.3 of the Agreement for the investigating authorities' sunset determination is "likely". This standard applies to the likelihood of continuation or recurrence of dumping as well as injury determination in sunset reviews, and this is precisely the standard that the USITC applied". (emphasis added). In addition, Mexico's statement seems to assert that there is some burden of proof on the investigating authority – could Mexico clarify if this is its view, and if so, the basis for that view.**

11. The Panel in *OCTG from Argentina* stated several times that it did not consider Argentina to be challenging directly the standard that must be applied in Article 11.3 reviews. In paragraph 7.280, the Panel stated that it considered that the "crux of Argentina's claim is that the USITC either did not establish facts properly or did not evaluate them objectively or did not base them on a sufficient factual basis." In paragraph 7.285, the Panel stated that the "essence of Argentina's claim is not that the USITC applied the wrong standard, but that it erred in determining that the likely standard was met."

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<sup>3</sup> The Panel in *Argentina – Poultry from Brazil* reasoned that "in light of the nature and extent of the violations in this case" the Panel "could not perceive how Argentina could properly implement its recommendations without revoking the anti-dumping measure" (Panel Report, DS 241, para. 8.7); the Panel in *Guatemala – Cement II* found that "the violations to be of a "fundamental" and "pervasive nature" and "in light of the nature and extent of the violations in this case" that the measure should be revoked (Panel Report, para. 9.6); several Panels have said that under certain circumstances "compliance could best be achieved" and the "more appropriate and/or effective" way for a Member to comply with DSB recommendations would be through the repeal of the measure (See, e.g., Panel Report, *US – Byrd Amendment* 8.6; Panel Report, *US – Cotton Yarn* 8.5; *US – Underwear*, para. 8.3); the Panel in *Guatemala – Cement I* suggested the revocation of the existing anti-dumping measure based on the substantive violation of the standards for initiation in Article 5.3 of the Anti-Dumping Agreement (Panel Report, para. 8.6); the Panel in *US – Lead Bars* noted that the United States had continued to apply the violating measure in other cases during the course of the dispute, and therefore suggested that the United States take "all appropriate steps, including a revision of its administrative practices," to prevent the same violation in the future (Panel Report, para. 8.2).

12. Mexico has explained that it is challenging both the standard used by the Commission, and the Commission's establishment and evaluation of the facts to determine whether the standard was satisfied.<sup>4</sup> The requirement to use the correct standard is fundamental to a Member's ability to satisfy its WTO obligation, and it is related directly to the Panel's standard of review in this case. Using the wrong legal standard in an Article 11.3 review taints the process from the inception – it affects the investigating authority's ability to establish the requisite facts, its ability to objectively evaluate the facts, and its ability to determine whether the facts it has developed constitute positive evidence of what is likely to occur.

13. The Panel cannot restrict its analysis to the fact that the US statute used the same word – "likely" – as Article 11.3. The Panel must consider: 1) whether US law gives the statutory term "likely" a meaning that is consistent with the meaning of "likely" in Article 11.3, which is "probable;" and 2) whether the Commission in fact applies a standard that complies with the common meaning of "likely," which again is "probable."

14. Mexico submits that the statute must be interpreted in conjunction with the SAA. According to the Commission's own statements, the SAA precludes the Commission from applying the "likely" standard required by Article 11.3. In fact, the Commission explained this position to a NAFTA Panel examining the very same sunset determination, so there can be no doubt that the Commission's position is relevant to the claim presented by Mexico in this case.<sup>5</sup>

15. As for the Panel's question regarding the burden of proof, Mexico's view is based on the text of Article 11.3 and the statements of the Appellate Body.<sup>6</sup> As stated in response to question 1 above, Article 11.3 imposes a temporal limitation, which requires termination at a specific point in time unless the investigating authorities make certain findings. Thus, if a Member wants to invoke the exception and maintain the measure beyond the specified time, it bears the burden of proving that its authority conducted a proper review and made the determination required by Article 11.3. If it fails to do so, it has no right to maintain the measure.

16. The US is the party attempting to invoke an exception. Mexico understands that the party invoking the exception has the burden of proof. Therefore, the United States is the party that has to prove that it complied with the requirements of Article 11.3. In any event, in this case, the Panel's decision should not hinge on the question of which party has the burden of proof. Mexico only asks that the Panel, in analyzing Mexico's claims and arguments and the US responses, takes into consideration that Article 11.3 clearly establishes an obligation to terminate an anti-dumping measure, and an exception to continue the measure.

#### Questions to both:

**Question 7. Could the parties please address the import, in specific terms, of the decision of the Panel in the *Argentina – OCTG* dispute for the issues, and the decision, in this dispute?**

#### Answer to Question 7

17. As indicated in its Closing Statement in the Panel's Second Substantive Meeting with the Parties, Mexico reiterates that the appeal presented by the United States on 31 August 2004 should not affect Mexico's proceeding. Mexico did not present written arguments in that case. Nor was Mexico a complaining or disputing party. The Panel's ruling in that case cannot diminish Mexico's rights.

18. Mexico's statement quoted in the Panel's question 2 is a reflection of Mexico's concern with the possibility of unduly linking two different dispute settlement procedures that have not yet been completed. The use of reasoning from a Panel or Appellate Body Report that has been adopted by the DSB is one thing, but to link two pending disputes is another. Even when disputes may be similar, or may challenge the same

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<sup>4</sup> See Mexico's First Oral Statement.

<sup>5</sup> See Mexico's First Submission, para. 171 (citing MEX-47); Mexico's Second Submission, paras. 83 – 85.

<sup>6</sup> See Mexico's Second Oral Statement, paras. 2 – 3.

measure, Article 11 of the DSU makes clear that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case." Mexico has no doubt that the Panel will make an objective assessment of the matter before it, including an objective assessment of the facts. However, without having all the elements, evidence and arguments submitted by the parties in DS 268, Mexico does not know if that panel arrived to certain findings because of the evidence, the arguments of the parties, or any other factor that may be substantially different than those presented in this case.

19. For this reason and the reasons previously expressed, Mexico again respectfully asks that the Panel not delay its consideration of Mexico's claims.

20. With respect to the Panel's question, and based on Mexico's reading of the Panel's report in *OCTG from Argentina*, it is clear that many of the claims and arguments presented by Mexico to this Panel are different than the claims and arguments presented in that case. At the same time, it is important to analyze the issues that were appealed by the parties. In this respect, it is important to point out that the issues to be presented on appeal have not even been identified at this point as Argentina has until September 15 to present its cross appeal relating to the findings of the Panel. For this reason, in order to provide a complete response, Mexico respectfully asks that the Panel provide it an opportunity to elaborate on its response to this question in the comments to the responses provided by the United States, once all of the bases for appeal have been identified.

21. Mexico provides the following chart in order to facilitate the work of the Panel in identifying the differences between both cases:

<b>Claims and Arguments Presented by Mexico</b>	<b>Compared to DS 268</b>
As applied claims related to the Department's likely dumping determination in the Article 11.3 review	The United States did not appeal the findings related to the "as applied" claims in the Argentine case.  Also, Mexico's claims involve: exporters who participated in several administrative reviews; several findings in the reviews that the exporters were not dumping; a full sunset review; the Department's reliance on a decrease in volume to disregard positive evidence that dumping was not likely; the Department's reliance on the original dumping margin despite positive evidence that conditions had changed so dramatically that it would be nearly impossible to have dumping of this magnitude in the future.
Certain as applied claims related to the Department's likely dumping determination in the Article 11.3 review (reliance on a decrease in volume to disregard positive evidence)	Panel exercised judicial economy
As such and as applied claims related to the Commission's determination of likely injury in the Article 11.3 review	Different arguments
As such claims related to Article 11.2	No claim presented
As applied claims related to Article 11.2	No claim presented
Certain as applied claims related to Article 11.2 (specifically, zeroing of dumping margins)	Panel exercised judicial economy and did not address Argentina's claim that reliance on a zeroed margin for purposes of the likely dumping determination violates Articles 11.3 and 2.
Certain As such claims related to the Department's likely dumping determination in the Article 11.3	Panel exercised judicial economy

<b>Claims and Arguments Presented by Mexico</b>	<b>Compared to DS 268</b>
review (specifically, the Department's "consistent practice" violates Article 11.3, and the alternative argument that the Department's consistent practice violates Article X:3(a) of GATT1994	

## ANNEX E-10

### ANSWERS OF THE UNITED STATES TO QUESTIONS OF THE PANEL – SECOND MEETING

(13 September 2004)

#### Questions to United States:

**Q3. Could the United States clarify whether, in considering declines in imports in the context of a sunset review, there is any applicable benchmark, relative or absolute, for determining whether such declines are significant?**

1. There is no absolute benchmark for determining whether a decline in import volumes is significant. Commerce's assessment of whether a decline is "significant" is made on a case-by-case basis, and the question of whether the decline is "significant" has not been an issue. For example, in the vast majority of sunset reviews where Commerce has found that import volumes have declined "significantly," the declines in import volumes had been on the magnitude of 85 to 99 per cent and, in a number of cases, imports of the subject merchandise ceased entirely after imposition of the order. See Exhibit MEX-62. These declines are significant by any standard. Furthermore, in some cases, respondent interested parties have explained successfully that the "significant" decline in post-order import volumes was attributable to factors other than the imposition of the order. See, e.g., BS&S Netherlands. Companies have also been able to demonstrate that they were able to sell in significant volumes (at or near pre-order volumes) in sunset reviews notwithstanding the discipline of the order. See, e.g., Canada – Sugar.

**Q4. The anticipated result of imposition of an anti-dumping duty order would be a decline in the volume of imports, or an increase in import prices, or both. Thus, it would seem that consideration of declines in import volumes from pre-order levels in considering likelihood of continuation or recurrence of dumping is based on the view that a foreign producer or exporter subject to an anti-dumping order will, if the order is revoked, revert to making dumped sales at volumes similar to those prior to the order. Is this in fact the theory underlying the consideration of declines in import volumes from pre-order levels in US sunset reviews? Is there another basis underlying the consideration of declines in import volumes from pre-order levels in US sunset reviews?**

2. The comparison of pre-order to post-order import volumes gives an indication of the volume of subject merchandise foreign interested parties sold without the discipline of the order in place. The issue is not whether there has been any decline at all in the volume, but whether that decline is significant. If an importer's volume drops significantly, then – if no other explanation is offered – it is an indication that the product in question is only competitive if sold at dumped prices. Therefore, if the importer wishes to increase the volume of sales (and he will have more incentive to do so the more significantly the sales have dropped), then, in the absence of the order, he will likely resort to dumping to do so.

3. Parties are permitted to place any information they choose on the administrative record of the sunset review, including information to demonstrate that the existence of dumping and reduced or depressed import volumes does not indicate that dumping is likely to continue or recur in the particular case. Thus, notwithstanding a significant decline in post-order volumes, foreign interested parties may provide an explanation of the reduction of imports during the sunset review. Commerce considers "other factors," such

as price, cost, market, or other economic factors in determining the likelihood of continuation or recurrence of dumping and, in this regard, Commerce also would consider information or argument concerning reasons for declines in import volumes after imposition of the order. As explained above, respondent interested parties can explain and have explained that reduced post-order volumes are meaningful in the commercial sense and have not declined post-order simply in response to the discipline imposed by the order. See, e.g., BS&S Netherlands.

**Q5. Could the United States clarify whether, in considering the question of commercial quantities in the context of a company-specific revocation review, there is any applicable benchmark, relative or absolute, for determining whether volumes are in commercial quantities? It appears from the comments at the second meeting that the level of sales by the company prior to the imposition of the anti-dumping order is one, or even the major, relevant consideration. Could the United States in this context address the basis for linking the issue of "commercial quantities" to the prior level of sales of the particular company in question?**

4. It is important to consider the context in which the commercial quantities requirement is made. Companies subject to an order seek revocation of the order because in three consecutive administrative reviews, they have not engaged in dumping. Commerce is evaluating whether, if the order were revoked, dumping would be likely to continue or recur. Assume, for example, that those companies each had made one token sale at a high price to achieve a zero margin. The question is how probative those sales are of the companies' conduct if the order were revoked. Would those companies continue to sell at the high price, or were they able to do so only because of the token quantity sold? The principle behind the commercial quantities requirement is simply to assess whether the sales made were in sufficient quantities to be meaningful in terms of predicting the companies' behaviour if the order were revoked.

5. In this context, the volume of sales a company made during the period of investigation (*i.e.*, the examined period prior to the existence of the discipline of an antidumping duty order) serves as a benchmark for whether the volumes of the sales made during three "non-dumping" years in a revocation request were made in commercial quantities. This benchmark is further considered in the context of the market conditions (*e.g.*, supply and demand) for the specific industry and the subject merchandise, and is not used simply as a benchmark for analysis of volume of sales in isolation from the facts of case at hand.

6. This benchmark is relative, not absolute. The United States has previously demonstrated that companies which sold during the basis years at less than their pre-order volumes, and even at significantly less than their pre-order volumes, were found to have made sales in commercial quantities and revoked from the order.<sup>1</sup>

**Q6. It would seem that pre-order import volumes might be considered artificially high, in light of dumped prices. Why is a significant decline from such a level considered relevant in determining whether continuation or recurrence of dumping is likely?**

7. As noted above, the commercial quantities requirement should not be viewed as an assessment as to whether *any* drop in pre-order volumes occurred; rather, it is an assessment as to whether a small amount of sales has sufficient predictive value with respect to companies' conduct in the event of revocation. The mere fact that a company has made a few token non-dumped sales as part of a process of seeking revocation is not sufficient to provide evidence of how that company would likely react if the order were revoked.

8. More specifically, the "commercial quantities" standard is applied to determine whether a company is participating meaningfully in the market. Most companies will seek to place as much of their production as possible at the most profitable overall combination of sales volume and price because pricing decisions are

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<sup>1</sup> See US Second Written Submission, para. 61, and representative cases cited therein (Exhibits US 32, 34, 36, 37, 38).

governed by the market forces of supply and demand. Thus, a company, which has demonstrated its ability to produce and sell into a market (e.g., the US market) with given quantity of merchandise, may be expected to sell comparable quantities in the same market absent the constraints imposed by an order and absent an indication that the underlying dynamics of that relationship would vary significantly in a post-revocation period as compared to the pre-order period.

9. A significant decline from pre-order volumes is considered relevant because it may indicate the extent or degree to which an exporter may be able to participate in the US market where the order ensures a fair market price. In other words, there may be a financial incentive for a company to sell limited volumes at higher, non-dumped, prices while an order is in effect (so as to avoid paying dumping duties, yet continue to supply its regular customers, for example). Yet there is very little, if any, financial incentive once an order has been revoked for a company to forego "additional sales that can only be made by dumping." Thus it is important to determine the extent to which an exporter's ability to participate in the US market may be dependent upon such sales.

10. The volume of an exporter's pre-order sales in the US market is a relevant consideration because it provides baseline information on what volumes of merchandise that company is capable of producing and selling into the US market absent an order, and the extent to which those volumes are associated with dumped sales. Thus, it provides a rough estimate of what volumes the exporter could likely sell to the US market in the future, were the market conditions (including the presence or absence of a dumping order) favourable for making sales there. If an exporter can sell the subject merchandise in the US market at higher non-dumped prices and, thus, retain a significant portion of US sales without dumping, that exporter is less likely to dump in the US market were the order to be revoked. Conversely, a company whose US sales are so intrinsically linked to dumping that more than three years after the order it still cannot sell even 1 per cent of the volume it sold when it was dumping, such as TAMSAs and Hylsas in this case, is more likely to dump.

11. It is important to note that the party seeking revocation of an order under Article 11.2 bears the burden of establishing that review for this purpose is "necessary." An exporter must make a positive demonstration that its position in the US market (even if smaller than in pre-order periods) is sufficiently assured with non-dumped sales that it will not seek "additional sales that can only be made by dumping" in that market. TAMSAs and Hylsas have not met that burden. The mere fact that it is possible to make a few non-dumped sales under an antidumping order may be positive evidence that it would also be "possible" for a company to make the same few non-dumped sales in the same market after an order has been removed. It is not, however, positive evidence that it is "likely" to do so and that the companies requesting revocation would be content to leave their market penetration at the same minuscule level that was possible without dumping.

**Questions to both:**

**Q7. Could the parties please address the import, in specific terms, of the decision of the Panel in the Argentina-OCTG dispute for the issues, and the decision, in this dispute?**

12. As the United States noted in its closing statement at the second panel meeting, prior panel decisions are not binding with respect to subsequent panels. To the extent that the reasoning in a panel report is persuasive, then of course that reasoning may also be persuasive in a dispute involving an issue to which that reasoning would apply.

13. The panel in *Argentina – OCTG* made a number of findings that the United States believes are in error and are under appeal. For example, the panel's finding that the Appellate Body in *Japan Sunset* found that Commerce's *Sunset Policy Bulletin* is a "measure" and, thus, subject to dispute settlement is simply incorrect. In addition, the panel's finding that the *Sunset Policy Bulletin* mandates a breach of Article 11.3 was also error because it was based on an erroneous finding of fact with respect to US municipal law. As the United States has noted, the question of whether the *Sunset Policy Bulletin* requires Commerce to take action inconsistent with Article 11.3 can only be evaluated in the context of US municipal law. Under US law, the

*Sunset Policy Bulletin* is merely guidance and cannot require – or prohibit – Commerce from taking action. Therefore, as a matter of US law, the *Sunset Policy Bulletin* cannot mandate a breach, and the panel's finding is erroneous. Moreover, the Panel's reliance on the so-called "consistent application" of the *Sunset Policy Bulletin* as evidence that Commerce "perceived" it to be mandatory is equally flawed. Commerce did not apply the *Sunset Policy Bulletin*; Commerce cited to it. Either way, "consistent application" or repeated citation to a non-binding document cannot, under US law, render it binding. Therefore, the entire analytical framework underpinning the panel's analysis of the *Sunset Policy Bulletin* was egregiously erroneous.

14. The remaining findings made by the panel in *Argentina – OCTG* with respect to the determination of likelihood of recurrence or continuation of dumping are otherwise inapplicable to the present dispute because the issues regarding the US law and regulations (e.g. interested party waiver and expedited sunset reviews) are not present in this dispute.

15. The panel's conclusions with respect to issues relating to the determination of injury were correct, and because the panel's reasoning is persuasive the United States believes this Panel should take it into consideration.

16. First, the panel correctly concluded that sections 752(a)(1) and (5) of the Tariff Act are not inconsistent with Article 11.3 of the Antidumping Agreement. More specifically, the ITC's assessment as to whether injury is likely to continue or recur within a "reasonably foreseeable time" is not inconsistent with Article 11.3

17. The panel based its conclusion on the fact that Article 11.3 does not "mention the time-frame" on which the determination should be made, nor does it require the investigating authority to specify the time-frame on which a given determination was based.<sup>2</sup> As a result, the ITC's use of a "reasonably foreseeable time" is not inconsistent with Article 11.3.

18. Second, the panel also correctly reasoned that Article 3 does not *per se* apply to sunset reviews. First, the panel noted the absence of cross-references between Article 3 and Article 11.3.<sup>3</sup> The panel also recognized that the "nature of the inquiries in investigations and sunset reviews is significantly different," referencing the Appellate Body's views to the same effect in *Japan Sunset*.<sup>4</sup> In *Japan Sunset*, the Appellate Body concluded that an investigating authority is not required to make a dumping determination in a sunset review; the panel in the Argentina dispute applied the corollary and concluded that an investigating authority is therefore not required to make an injury determination in a sunset review.<sup>5</sup>

19. Third, the panel correctly concluded that cumulation is permitted in sunset reviews. The panel noted that Article 3.3 is the only provision that mentions cumulation and explored whether the reference to cumulation in that Article is meant to authorize cumulation or establish conditions for its use in investigations.<sup>6</sup> The panel, consistent with principles of treaty interpretation embodied in the Vienna Convention, found that the lack of a clear provision in the Agreement on this issue means that cumulation is permitted.<sup>7</sup> The panel further noted that Article 3 refers in various paragraphs to the phrase "dumped imports" without specifying that such imports come from a particular country;<sup>8</sup> the panel also rejected Argentina's argument that the use

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<sup>2</sup> *United States – Sunset Reviews of Anti-dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/R, Report of the Panel circulated 15 June 2004 ("Argentina Panel Report"), para. 7.184, 7.187.

<sup>3</sup> Argentina Panel Report, para. 7.270.

<sup>4</sup> Argentina Panel Report, para. 7.272, citing *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, paras. 106-107.

<sup>5</sup> Argentina Panel Report, para. 7.274.

<sup>6</sup> Argentina Panel Report, para. 7.331.

<sup>7</sup> Argentina Panel Report, para. 7.332.

<sup>8</sup> Argentina Panel Report, para. 7.333.



of the word "duty" in Article 11.3 was meant to indicate that the drafters intended cumulation to be prohibited in sunset reviews.<sup>9</sup>

20. Fourth, the panel correctly concluded that the ITC applied the "likely" standard in this determination. The panel noted that the US statute and the determination in question both use the term "likely."<sup>10</sup> The panel also evaluated the evidence upon which the ITC relied in the investigation and concluded that the ITC determination was based on an objective examination of the evidence in the record.

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<sup>9</sup> Argentina Panel Report, para. 7.334.

<sup>10</sup> Argentina Panel Report, para. 7.277.

## ANNEX E-11

### ANSWERS OF THE UNITED STATES TO QUESTIONS FROM MEXICO – SECOND MEETING

(13 September 2004)

**Q1. Suppose that an investigating authority completes an antidumping duty investigation at a time after 18 months of initiation of the investigation, the investigating authority offers no explanation for the delay, and an antidumping duty is imposed in month 19.**

- a. Would the United States consider there to be a violation of Article 5.10 of the Antidumping Agreement in these circumstances?**
- b. If so, how does the United States consider that a Member could bring its measure into conformity with its WTO obligations?**

1. Mexico's questions introduce a hypothetical situation involving neither legal issues nor facts present in this dispute. Also, Mexico has not made a claim based on Article 5 generally or Article 5.10 specifically in this dispute and therefore, any such claim at this time would not be within the Panel's terms of reference.

**Q2. In DRAMs from Korea (DS 99), Korea challenged, both as such and as applied, 19 CFR section 353.25(a)(2) of the Department's regulations as inconsistent with US obligations under Article 11.2 of the Antidumping Agreement**

- a. Does the United States dispute that that provision (section 353.25(a)(2)) is the predecessor provision of the revocation regulation, 19 CFR section 351.222(b)(2), under which both TAMSAs and Hylsa sought revocation in this case?**

2. No.

- b. Following the ruling of the Panel in DS 99, DRAMs from Korea, what actions did the United States take to bring the challenged measure into conformity with US WTO obligations?**

3. As the United States stated in its second written submission, the question of whether company-specific revocation reviews are required by Article 11.2 was not directly before the panel in *DRAMs from Korea*.<sup>1</sup> The United States further noted that the issue of whether company-specific reviews are subject to Article 11.2 is a question of treaty interpretation and not whether a member emphasized a particular argument in a previous dispute.<sup>2</sup>

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<sup>1</sup> US Second Written Submission, para. 52.

<sup>2</sup> US Second Written Submission, para. 53.

- c. **Did the United States submit to the WTO a written status report of US progress in the implementation of the recommendations or rulings of the DSB made in DS 99? If so, please identify any such report(s).**

4. It is not clear to the United States the relevance of this question, unless Mexico is attempting to have the United States include in the record a document Mexico sought to introduce, in contravention of paragraph 14 of the *Working Procedures for the Panel*, at the second substantive meeting of the Panel.

**Q3. Are there any cases in which the Department revoked an entire antidumping duty order on the basis of a request submitted under 19 CFR section 351.222(b)(2)? If so, does the Department always know that the exporter or exporters requesting revocation account for all of the exports from the country?**

5. There are no cases in which the Department revoked an entire order on the basis of a request submitted under 19 CFR section 351.222(b)(2).

**Q4. What happens if US importers or customers will not buy subject imports once an antidumping duty order is imposed? How does the Department take into account that exporters do not have complete control over whether post-order import volumes will be equal to those prior to the imposition of the order?**

6. Nothing in the Department's statute and regulations requires exporters to have "complete control" over the volumes in which they sell into a given market. Further, the question implies that the United States requires post-order import volumes to be equal to pre-order volumes, which is erroneous, as the United States has demonstrated.<sup>3</sup>

**Q5. Does the United States accept that "injury" in Article 11.3 means "material injury of a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry" as defined in footnote 9?**

- a. **If no, what does "injury" mean in Article 11.3?**
- b. **If yes, what is the basis for not giving meaning to the second clause of footnote 9 that "the term injury ... shall be interpreted in accordance with the provisions of" Article 3.**

7. The United States has provided its views on this issue in response to Questions 32 and 33 posed by the Panel after the first substantive meeting. The United States refers Mexico to the responses filed by the United States on 18 June 2004.

**Q6. During the sunset review, did the United States consider that TAMSA requested that there was "good cause" for the Department to consider information apart from the statutorily required factors of import volumes and historical dumping margins?**

8. Yes. TAMSA stated that the dumping rate calculated in the original investigation was inapplicable for a sunset review because it was based, in part, on a severe devaluation of the peso. See TAMSA Substantive Response at 5, 8 (Exhibit MEX-16); and Preliminary Issues and Decision Memorandum at 4 (Exhibit US-13). Commerce considered this argument. Further, Commerce found that dumping was eliminated during the two most recently completed administrative reviews. However, Commerce's likelihood determination was

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<sup>3</sup> See, e.g., US Second Written Submission, para. 59 and cases cited therein.

ultimately based on the significant decline in imports of OCTG from Mexico since the imposition of the order. See Preliminary Issues and Decision Memorandum at 6 (Exhibit US-13). (TAMSA argued that the reduction in import volumes was part of TAMSA's "necessary business strategy" in response to the deposit rate for OCTG from Mexico. Commerce addressed TAMSA's import volume arguments in the Issues and Decision Memorandum for the final sunset determination. See Issues & Decision Memorandum at 5, 8 (Exhibit MEX-19).)

- a. **As MEX-16 shows, TAMSA submitted evidence (in the form of its financial statements) to show that its exposure to currency devaluation has been significantly reduced, and that this information constituted positive evidence that dumping was not likely. Where in the Issues and Decision Memorandum did the Department consider this evidence?**

9. Commerce addressed this argument in the *Issues and Decision Memorandum*. See *Issues & Decision Memorandum* at 6 (Exhibit MEX-19).

**Q7. What was the positive evidence developed by the Commission for the sunset review (apart from information from the original investigation) that imports from other countries subject to the review were likely to be simultaneously present in the US market? When did the Commission believe that this was likely to recur?**

10. As an initial matter, the United States reiterates that there is nothing in the Agreement requiring investigating authorities to apply the criteria set out in Article 3.3 to an Article 11.3 review. Moreover, even the Article 3.3 "conditions of competition" requirement for cumulation in an original investigation does not require a finding of simultaneous presence.

11. As the United States has explained in its previous submissions, the US statute nonetheless allows the ITC to conduct a cumulative analysis in a sunset review only if, *inter alia*, the imports from each subject country would be likely to compete with one another and with the domestic like product in the United States market.<sup>4</sup> Among the various factors the Commission looked to in order to address this question was whether the imports are or are likely to be simultaneously present in the market.<sup>5</sup>

12. The evidence in this review demonstrated the past, present, and likely future simultaneous presence of imports of casing and tubing from each of the subject countries. As Mexico appears to acknowledge in its question, positive evidence in the record relied on by the ITC in this review showed that imports from each of the subject countries were simultaneously present in the market during the last period in which they were in the market without restraints (i.e., in each of the three years of the original investigation).<sup>6</sup> Moreover, imports of casing and tubing from each of the subject countries continued to be present in the US market after the orders were imposed and throughout the sunset period of review, albeit at lower levels than those prior to entry of the order.<sup>7</sup> Mexico's question as to when simultaneous presence was "likely to recur" seems to presume a different factual situation than the one at hand.

**Q8. Did the Commission make a determination that injury would likely continue, or did the Commission make a determination that injury would likely recur?**

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<sup>4</sup> Section 752(a)(7) of the Act; 19 U.S.C. § 1675a(a)(7) (Exhibit MEX-24). *See* United States Second Written Submission, para. 28.

<sup>5</sup> *See Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico*, USITC Pub. 3434, Inv. Nos. 701-TA-364, 731-TA-711, and 713-716 (June 2001) (Exhibit MEX-20) ("ITC Report"), pp. 7, n.33 and 13-14.

<sup>6</sup> ITC Report, p. 14 (Exhibit MEX-20).

<sup>7</sup> ITC Report, p. 14, n.82; PR at Table IV-1 (Exhibit MEX-20).

13. The United States has already answered the same question posed by Mexico in connection with the first substantive meeting. The United States refers Mexico to the response to Mexico question 15 in the *Answers of the United States of America to Questions from Mexico in Connection with the First Substantive Meeting* filed on 18 June 2004.

**Q9. In paragraph 3 of its closing statement, the US tells the Panel that "Without a commercial quantities requirement, companies could easily have antidumping orders eliminated and then simply resume dumping." Given that Mexico is only challenging the Article 11.2 decision "as applied" (as opposed to an "as such" claim), could the US explain the relevance of this general comment to its decision in this case? Specifically,**

- a. Was the rationale expressed in paragraph 3 applicable to the requests for revocation made in this case?
- b. If so, what is the factual basis for this concern with respect to the two Mexican exporters that requested revocation in this case?
- c. If so, could the US explain the procedures completed by the Department to arrive at its decisions in the second, third and fourth reviews of TAMSAs and Hylsa? Specifically, does the volume of US sales affect in any way the scope of the Department's review?

14. The comment was an effort to be responsive to the Panel's interest in the commercial quantities requirement. The Panel's line of questioning has not been limited to the application of that requirement in this determination.

**Q10. In accordance with the US legislation, the Commission "may" rely on the "margin of dumping to prevail" reported by the Department. On the other hand, in the ITC's Determination such margin is mentioned twice, one in footnote 51, the other in Part V ("Pricing and related information, Characteristics of likely dumping"). In Part V it is also indicated that "Commerce likely margins of dumping are the same as the original orders ..." In light of these elements,**

- a. Could the US indicate if there is any guideline, document or criteria that is or may be used to guide the Commission when deciding whether or not to rely on the "margin of dumping to prevail" reported by the Department. If yes, please explain and, if possible, attach a copy of it?

15. No, there is no guideline for this purpose.

- b. Is there any internal guideline within the Commission that is or may be used directly or indirectly by the Commission as a whole or by the Commissioners individually to decide when the Commission should rely on the "margin of dumping to prevail" reported by the Department and when not to rely on such margin? If yes, please explain and, if possible, attach a copy of it?

16. No, there is no guideline for this purpose.

- c. If the answer to a) and b) above is negative, could the US please explain how the Commission ensures on a case by case basis that its decisions concerning whether or not to rely on the "margin of dumping to prevail" reported by the Department is not, and cannot be perceived, as arbitrary and unreasonable?

17. This question has no bearing on this dispute. Mexico's claim in this regard was limited to the ITC's determination in this sunset review and was not an "as such" challenge. Therefore, this question pertains to matters beyond the terms of reference of this dispute. Further, the United States notes that the Antidumping Agreement does not provide for findings based on "perceptions."

- d. What has the Commission decided in the OCTG case under dispute? Has the Commission relied or not on the "margin of dumping to prevail" reported by the Department. Please, if possible, answer yes or no and then explain.**

18. The United States has already answered the same question posed by Mexico in connection with the first substantive meeting. The United States refers Mexico to the response to Mexico questions 10 and 11 in the *Answers of the United States of America to Questions from Mexico in Connection with the First Substantive Meeting* filed on 18 June 2004.

- e. If the Commission decided not to rely on the "margin of dumping to prevail" reported by the Department, please explain if the Commission relied on any other margin or not. If it relied on another margin, please indicate which one and on what basis and its relationship with the ITC statement in Part V that "Commerce likely margins of dumping are the same as the original orders ...".**

19. See above response.

- f. If the Commission decided not to rely on the "margin of dumping to prevail" reported by the Department, please explain if the Commission did not rely on such margin just for Mexico or with respect to all cumulated countries? If the answer is only Mexico, please explain why only Mexico and why not the others.**

20. The Commission did not rely on margins of dumping with respect to all cumulated countries.

- g. If the Commission did not rely on any margin of dumping, actual or potential, with respect to any cumulated country, please explain the compatibility of such procedure with the causation obligation contained in Article VI of GATT94 and the WTO Antidumping Agreement, excluding Article 3.5. Is the US position that sunset reviews are exempted from the causation? If yes, please explain why and what is the legal basis that supports it?**

21. The United States fails to see the connection that Mexico is making between reliance on the margin of dumping and causation requirements. Even Article 3 does not require *reliance* on a margin of dumping, and indeed, only requires an *evaluation* of the actual margin of dumping for the purposes of an original investigation (not a sunset review) under Article 3.4.

**Q11. In paragraph 15 of its 2nd Opening Statement, the United States asserted that "an agreement regarding reinstatement of the order" is "always" required, under section 351.222 of the Department's regulations, whenever an exporter requests revocation only with respect to itself. However, Section 351.222(b)(2)(B) of the Department's regulations explicitly provides that an agreement regarding reinstatement is only required from an exporter "that the Secretary previously has determined to have sold the subject merchandise at less than normal value. There is nothing in the Department's regulations that requires an exporter that has not previously been found to have "sold at less than normal value" to submit an agreement regarding reinstatement when it requests revocation with respect only to itself. (Thus, for example, Hylsa was not required to submit an**

**agreement regarding reinstatement of the order when it requested revocation with respect to itself in the fourth administrative review.). Could the US explain this mischaracterization of its laws?**

22. The United States has not made any "mischaracterizations" of US law in its submissions to the Panel in this dispute. Mexico has failed to support its overly limited reading of the regulation by providing any evidence that Commerce has ever denied a (b)(1) revocation because it was sought by one exporter rather than all. Nor can it provide such evidence, as this has never occurred. Moreover, this discussion is not relevant to the outcome of this dispute because a company can also seek order-wide revocation through a changed circumstances review.

## ANNEX E-12

### COMMENTS OF MEXICO ON THE UNITED STATES' ANSWERS TO THE PANEL'S AND MEXICO'S QUESTIONS – SECOND MEETING

(4 October 2004)

1. The Government of Mexico comments below on the answers provided by the United States to questions following the Second Meeting. Mexico limits its comments below to certain issues that it considers to be especially important at this stage of the proceeding. The fact that Mexico does not comment on a particular answer does not mean that Mexico agrees or is satisfied with the answer given by the United States.

#### **Comments Regarding US Response to Questions from Mexico Question 3:**

2. The United States indicates that "there are no cases in which the Department revoked an entire order on the basis of a request submitted under 19 CFR Section 351.222(b)(2)."<sup>1</sup>

3. Mexico believes that the answer is not correct, or at least not complete. In its review of the US practice, Mexico found that in the case of *Furfuryl Alcohol from South Africa*, the Department proceeded on the basis of a review under Section 351.222(b)(2), and then decided to revoke the order as a whole. For the Panel's convenience, Mexico includes in Annex MEX-69 to these comments relevant documents obtained from the public record in the case, as well as the preliminary and final revocation decisions as published in the *Federal Register*.

4. Based on these documents, Mexico concludes the following:

- The South African producer requested revocation "with respect to" the exporter, ISL, on the basis of three consecutive administrative reviews resulting in a finding that ISL was not dumping.<sup>2</sup>
- The Department of Commerce took the position that the "reinstatement" certification required by 351.222(b)(2)(iii) of the regulations was necessary.<sup>3</sup> The South African exporter requesting revocation took the position that such a certification should not have been required because it was the only known exporter. However, the Department pointed to import statistics and information indicating that there were other exporters, and on this basis, the Department requested the certification that the exporter requesting revocation would agree to be reinstated into the anti-dumping order if found to be dumping in the future. The South African exporter acceded to the Department's demands.<sup>4</sup>

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<sup>1</sup> US Answers to Questions from Mexico in Connection with the Second Substantive Meeting, para. 5.

<sup>2</sup> MEX-69, page 6 (column 3).

<sup>3</sup> While slightly different in form from the current regulations and those in effect when the Mexico exporters requested revocation, the 1999 regulation referenced in this case was identical in all relevant respects.

<sup>4</sup> See Preliminary Determination, page 7 of Annex 1 (column 3).



- In the preliminary determination, the Department determined that:

It is not likely in the future that ISL will sell the subject merchandise in the United States at less than normal value. Therefore, if these preliminary findings are affirmed in our final results, we intend to revoke the order with respect to merchandise produced and exported by ISL.<sup>5</sup>

- In the comments filed by the South African producer on the basis of the preliminary determination, the South African producer argued that the Department should revoke the order as a whole. The argument was based on: 1) the insignificant nature of the other exports; and 2) the South African producer's view of the requirements of Article 11.2 of the WTO Agreement.<sup>6</sup>
- In its final determination, the Department stated:

We have determined to revoke the order in full for the following reasons: (1) ISL has not sold the subject merchandise at less than normal value (NV) for three consecutive review periods, including this review; (2) there is no evidence to indicate that ISL or other persons are likely to sell the subject merchandise at less than NV in the future; and (3) the exports in question, which occurred over two years ago, represent isolated shipments of insignificant quantities of subject merchandise. We also note that there were no comments filed by any other party on this issue, with respect to either our preliminary results of ISL's case brief. Accordingly, we determined that a full revocation of the order is warranted under 19 C.F.R. § 351.222(b)(1) and Section 751(d)(1) of the Act.<sup>7</sup>

- In addition, the Department explained that the petitioner did not oppose revocation of the order. The public file includes a memorandum documenting the fact that the US industry "was aware of the preliminary decision to revoke this case in part" and that the Department also discussed with the US industry "the possibility that the case could be revoked in whole" in the final determination.<sup>8</sup>

5. To Mexico, the inaccuracy of the US response should be important to this Panel for the following reasons:

- a. First, it casts doubt on the US position before the Panel. The US has stated repeatedly that requests under Section 351.222(b)(2) are a WTO-plus mechanism under US law and that they do not lead to revocation of the order as a whole. The US also has blamed the Mexican exporter for their failure to request revocation under the correct provision. This case shows that those positions are not credible.
- b. Second, the Department's actions in that case undermined the credibility of the US position that the existence of other Mexican OCTG imports precluded revocation based on the requests filed by the only two exporters that DOC had ever reviewed (TAMSA and Hylsa).

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<sup>5</sup> MEX-69, page 7 (column 3).

<sup>6</sup> MEX-69, pages 12-17 Mexico is including only relevant excerpts of the exporter's brief.

<sup>7</sup> MEX-69, page 20 (columns 1, 2).

<sup>8</sup> See MEX-69, page 20 (footnote 1) and page 18.

In the *Furfuryl Alcohol* case, the existence of similar imports did not preclude revocation of the order as a whole. The Department investigated the nature of the imports and dismissed them as insignificant. In the OCTG case, the US explains to the Panel that the existence of other imports precluded revocation. The position is not credible.

- c. Third, by exposing the lack of credibility of the United States, the *Furfuryl Alcohol* case clarifies the issue for the Panel with respect to Mexico's Article 11.2 claims. The Department's decision not to revoke the order with respect to TAMSAs was based solely on declining import volumes, and the decision not to revoke the order with respect to Hylsa (or the order as a whole) was based solely on the positive margin calculated for Hylsa on the basis of zeroing.

### **Question 7**

6. Paragraphs 10 and 11 of the US answer are not responsive to Mexico's question. Mexico's question did not refer to Article 11.3 or Article 3.3 of the Agreement. Mexico's question requested the United States to identify the positive evidence that the Commission relied on to find that imports from the five countries subject to the cumulative injury analysis were likely to be simultaneously present in the US market. Mexico also asked the United States to identify the time period.

7. Paragraph 12 of the US is not consistent with the Commission's Sunset Determination. The Commission concluded in its sunset determination is that:

Nothing in the record of these reviews suggests that if the orders are revoked subject imports and the domestic like product **would not** be simultaneously present in the domestic market. (Emphasis added)<sup>9</sup>

8. This statement demonstrates that the Commission did not apply the correct legal standard in connection with its assessment of likelihood of simultaneity. By requiring a demonstration that the imports "would not" be simultaneously in the market, the Commission used a standard that a previous WTO Panel rejected as being inconsistent with the requirements of Article 11.<sup>10</sup> In addition, it is clear that the Commission's conclusion is not based on positive evidence. That there is "nothing in the record" to suggest that imports "would not be simultaneously present" is not positive evidence sufficient for purposes of Article 11.3.

9. The US answer states that "imports of casing and tubing from each of the subject countries continued to be present in the US market after the orders were imposed and throughout the sunset period of review." Even if this assertion were factually accurate, the statement cannot be equated with a prospective analysis, based on positive evidence, of whether imports from the five cumulated countries are likely to be simultaneously present in the market in the event of termination.

10. With respect to the second part of Mexico's question, the United States did not identify the time frame within which dumping or injury would likely occur.

11. Because the Commission's Determination does not contain any prospective analysis of the "likely future simultaneous presence of imports of casing and tubing from each of the subject countries," nor an analysis of the continued simultaneous presence of subject imports in the US market after the orders were imposed and throughout the sunset period of review, the sole basis for the Commission's conclusion on simultaneity is the original investigation. As the Appellate Body has clarified, determinations under Article 11.3

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<sup>9</sup> Commission's Sunset Determination at 14 (emphasis added) (MEX-20).

<sup>10</sup> See Panel Report, *DRAMS from Korea*, paras. 6.48, 6.52-6.58.

that rest solely on findings from the original investigation are an insufficient basis for a likelihood determination.<sup>11</sup>

12. A conclusion that is not supported by positive evidence, that is based on an incorrect legal standard ("not likely"), and which rests wholly on the results of the original investigation is inconsistent with Article 11.3, and cannot be in accord with Article 17.6(i) of the Anti-Dumping Agreement, which requires the Panel to ensure that the authority has established the facts properly and evaluated those facts in an unbiased and objective manner.

13. Finally, irrespective of the application of Article 3.3 to sunset reviews, the fact is that if imports are not simultaneously present in the market, an administering authority cannot assess their cumulative effects for purposes of an injury determination. Consequently, because the Commission's analysis was based on a cumulative assessment of the imports, the entire basis for Commission's likely injury determination is flawed.

### **Question 8**

14. The United States did not respond to Mexico's question. Rather, the United States referred Mexico to its response to a question asked by Mexico following the Panel's first substantive meeting with the Parties.<sup>12</sup> In so doing, the United States once again fails to respond to the question posed by Mexico. Following the First Panel Meeting, rather than answer Mexico's specific factual question of whether the Commission made a determination of that injury was likely to continue, or that injury was likely to recur, the United States stated that "nothing in Article 11.3 requires Members to distinguish between the likely continuation of injury and the likely recurrence of injury."<sup>13</sup>

15. Mexico's question, however, is not directed at the US interpretation of the obligations arising from Article 11.3. Rather, Mexico's question requested the United States to identify the factual basis for the Commission's likelihood determination. That is, whether the Commission determined, as a factual matter, that injury would likely continue or, that injury would likely recur. For Mexico, the facts of a case cannot support both a continuation of injury and a recurrence of injury under the same determination. For there to be continuation, there must have been injury during the sunset period. For there to be recurrence, injury must have ceased during the sunset period. Hence, apart from the nature of the obligations imposed by Article 11.3, unless the United States can demonstrate the factual basis for the Commission's determination – whether continuation or recurrence – the Panel can have no confidence that the Commission's determination is in accord with Article 17.6(i) of the Anti-Dumping Agreement. Indeed, how can an authority establish the facts properly and evaluate those facts in an unbiased and objective manner when it cannot even state definitively whether its analysis showed that injury would be likely to continue or that injury would be likely to recur?

16. Finally, in the answer referred to by the United States, United States stated that "Commerce did not, as Mexico asserts, make a separate finding that dumping was likely to recur. (In fact, Hylsa was found to be dumping while the order was in place.)"<sup>14</sup> The US answer is inconsistent with the *Issues and Decision Memorandum*, which provides without ambiguity:

Because we continue to find that Mexican export volumes in the post-order period were significantly lower than pre-order levels, we also continue to find that recurrence of dumping of OCTG from Mexico is likely if the order were to be revoked.<sup>15</sup>

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<sup>11</sup> See Appellate Body Report, *Steel from Germany*, para. 88.

<sup>12</sup> See US Answers to Mexico's Questions in Connection with the Second Substantive meeting, para. 13.

<sup>13</sup> US Answers to Mexico's Questions in Connection with the First Substantive Meeting, para. 28.

<sup>14</sup> US Answers to Mexico's Questions After the First Meeting, para. 28.

<sup>15</sup> Department's Issues and Decision Memorandum (MEX-19), page 4 (emphasis added).

17. It is clear that the Department's Issues and Decision Memorandum does not contain any reference to Hylsa having been found to be dumping. This is not surprising because, as explained in Mexico's submissions, Hylsa was wrongly found to be dumping in an Article 11.2 review that had been completed after the sunset review was concluded.

18. Notwithstanding the US refusal to indicate whether the Commission determined that injury was likely to continue or that injury was likely to recur, several facts show that the Commission determined that injury was likely to recur. First, since the Commission found that "The evidence on the most current condition of the domestic industry is positive" and that "we do not find the industry to be currently vulnerable", it is clear that the Commission's determination cannot be based on a "continuation" of injury, because injury did not exist during all or part of the sunset review period. Second, since the Department's *Issues and Decision Memorandum* determined that dumping was "likely to recur", it is also clear that any injury that might be caused by such dumping would also necessarily be "likely to recur". A determination that injury is likely to recur, rather than likely to continue, has important consequences on issues such as the lack of a time frame within which injury is "likely," as well as whether imports will be competing in the market simultaneously.

### **Question 10**

19. In paragraphs 15 and 16 of its answer, the United States confirms that the Commission enjoys discretion to either consider or disregard the "margin of dumping likely to prevail" that, pursuant to statutory mandate,<sup>16</sup> the Department is required to report to the Commission in connection with every sunset review.

20. In paragraph 17, the US answer provides no indication of the circumstances under which the Commission would rely on dumping margins. Hence, the US answer fails to demonstrate that the Commission's reliance on (or its failure to consider) a dumping margin is not arbitrary and unreasonable.

21. Also, while the United States asserts that Mexico's question "has no bearing in this dispute,"<sup>17</sup> the United States cannot credibly argue that the context within which the Commission decided whether or not to consider the "margin of dumping likely to prevail" was not highly relevant to the Commission's likelihood determination. As a result, the question is very much within the terms of reference of this dispute and very relevant to the consistency of the Commission's sunset determination with US obligations under the Agreement.

22. In its answer to a question posed by Mexico following the Panel's first meeting, the United States asserts categorically that "The ITC did not rely on a margin of dumping."<sup>18</sup> However, this statement cannot be reconciled with paragraph 315 of the US First Submission, in which the United States takes the position that: "In this review, the Commission's staff report clearly addresses each of the factors enumerated in Article 3.4" (emphasis added). Because the "magnitude of the margin of dumping" is one of the mandatory factors included in Article 3.4, one of the two US assertions cannot be true.

23. Irrespective of which position the Panel believes, the United States violated its obligations under Article 11.3.

24. If the Commission relied on the likely margin of dumping reported by the Department, then the Commission's likelihood determination would be flawed to the extent that the Department's determination was also flawed.<sup>19</sup> As explained in Mexico's submissions to the Panel, the DOC Determination is flawed because,

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<sup>16</sup> See 19 U.S.C. 1675a(c)(3).

<sup>17</sup> US Answers to Mexico's Questions In Connection With the Second Substantive Meeting, para. 17.

<sup>18</sup> US Answers to Mexico's Questions In Connection With the First Substantive Meeting, para. 17 (response to question 10).

<sup>19</sup> See Mexico's First Submission, paras. 150-155, 233-238; Mexico's Second Submission, paras. 48-59, 154-156.

among others, it merely incorporated the anti-dumping duty of the original investigation into the result of the sunset review after having disregarded all other evidence because of an inference drawn from the decline in import volumes.

25. On the other hand, if the Commission did not consider any likely margin of dumping to prevail, then its determination would be flawed to the extent that investigating authorities are required to evaluate all relevant economic factors and indices having a bearing on the state of the industry in Article 3.4 for purposes of all injury determinations, including those of a prospective nature.<sup>20</sup>

26. Alternatively, if the Commission did not rely on any likely margin of dumping to prevail "with respect to all cumulated countries" as the US affirms in paragraph 20, then the Commission's Determination is also flawed because under Article VI of GATT 1994 and the Anti-Dumping Agreement, "injury" (irrespective of being actual, potential or likely) could not have a meaning without dumping (actual, potential or likely).

27. Finally, paragraph 21 of the US answer suggests that the United States either misunderstood Mexico's question or declined to provide an answer. Although Mexico referred to "causation", the US answer referred to Article 3.4 only. The United States has not answered whether US authorities must satisfy the causation requirements of the GATT 1994 and the Anti-Dumping Agreement in the conduct of sunset reviews.

### **Questions from the Panel**

#### **Questions 4, 5, 6:**

28. The Panel asked several questions of the United States regarding the US reliance on lower import volumes in the Article 11.3 and Article 11.2 reviews. In its answers, the United States reinforces the inconsistency of its decisions with the WTO requirement, and exposes contradictions in its position.

29. In paragraph 2, the United States asserts:

If an importer's volume drops significantly, then – if no other explanation is offered – it is an indication that the product in question is only competitive if sold at dumped prices. Therefore, if the importer wishes to increase the volume of sales (and he will have more incentive to do so the more significantly the sales have dropped), then, in the absence of the order, he will likely resort to dumping to do so.<sup>21</sup>

30. This statement exposes the inconsistency of the US position with regard to Article 11.3. The US position is very clear: significant volume decreases mean that the product can only be competitive if sold at dumped prices, which means that revocation of the order will "likely" lead to a recurrence of dumping. This reasoning relies on speculation and is not based on positive evidence demonstrating "likelihood." It is not consistent with the commitment to "review" and "determine" whether dumping is "likely."

31. Also, the response mixes up the role of importer and exporter. The response is drafted in terms of the importer's decision to decrease volume, which is a new focus in the US responses. Certainly, the final determination in this case never even mentioned the actions of the importer. To Mexico, it is telling that the US is acknowledging, through its discussion of the importer, that there may be several reasons for the exporter to reduce its volume, and that relying on the exporter's decision to decrease volume may not support the inferences that the US drew in this case. The same is true of the importers: they may decide to decrease

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<sup>20</sup> See Panel Report, *HFCS From Mexico*, WT/DS132/R, paras. 7.127-7.128, 7.131-7.133; Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, para. 7.105.

<sup>21</sup> US Answers to Mexico's Questions in Connection with the Second Panel Meeting, para. 2.

their volumes because they do not want to accept the uncertainty of the open, contingent liability which exists in the US system of Article 9 reviews. The exporter and/or the importer may decide that the administrative burden and uncertainty of the US system simply are not worth the trouble, which says nothing about whether dumping is "likely" to continue or recur. Indeed, the Appellate Body warned against the investigating authority drawing any inference solely based on import volume declines in the conduct of an Article 11.3 review.<sup>22</sup> The switch in focus to the importer may be the result of Mexico's Question 4, which the United States did not answer satisfactorily.

32. Further, the United States mentions that it will infer that dumping is likely "if no other explanation is offered." As Mexico demonstrated in these proceedings, the Department used the volume decrease to disregard all other evidence and "explanation." The Department's action in this case belies the impression the United States creates of a decision maker that is open to consider objectively all information provided.

33. Mexico also would like to draw the Panel's attention to the differences in the US answers in paragraph 2 and paragraph 9. In paragraph 9, the US indicates that a volume decline "may" indicate that the exporter is not able to participate in the US market without dumping, and that there "may" be a financial incentive for a company to change its prices during the existence of the order. This more realistic approach is inconsistent with the strident position taken in paragraph 2, and it reveals the precise problem of the Department's reliance on volume declines: the fact that a volume decline "may" be explained by certain facts implies that it may have other explanations, and these explanations may not have any probative value whatsoever as to whether dumping is "likely" to continue or to recur. This is the basis for the Appellate Body's clarification that the investigating authority must in every case investigate the reasons for a volume decline, and that the investigating authority cannot simply rely on a volume decline as positive evidence of likely dumping.<sup>23</sup>

34. Paragraphs 9 and 10 are also interesting from the perspective of the type of analysis that the United States now tries to do, but which the Department did not do during the sunset review of OCTG from Mexico. In paragraph 9, the United States asserts that: "Yet there is very little, if any, financial incentive once an order has been revoked for a company to forego 'additional sales' that can only be made by dumping. Thus, it is important to determine the extent to which an exporter's ability to participate in the US market may be dependent upon such sales." The United States is correct that the additional investigation should be done, but the Department certainly engaged in no such investigation in this case, and an inference of what a company's financial incentives may be is not a sufficient basis for its "likely" dumping determination.

35. In paragraph 10, the United States says that "Conversely, a company whose US sales are so intrinsically linked to dumping that more than three years after the order, it still cannot sell even one percent of the volume it sold when it was dumping, such as TAMSA and Hylsa in this case, is more likely to dump." Again, the Department made no findings whatsoever that TAMSA's and Hylsa's US sales "are so intrinsically linked to dumping." In fact, the statement stands in stark contrast to the findings by the Department after full administrative reviews that the companies were not dumping. The final phrase of the statement – that a company is more likely to dump – again assumes the conclusion of the review. Assuming that sales are "so intrinsically linked to dumping" and that a company is "likely to dump" is inconsistent with Article 11.3.

36. Finally, the United States ends its response to Question 6 by noting that the "parties seeking revocation of an order under Article 11.2 bears the burden of establishing that review for this purpose 'is necessary.'" Three comments are in order.

37. First, in this paragraph, the US seems to concede a point that it has denied throughout the proceeding: this was, in fact, an Article 11.2 review.

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<sup>22</sup> Appellate Body Report, *Japan Sunset*, para. 177.

<sup>23</sup> Appellate Body Report, *Japan Sunset*, para. 177.

38. Secondly, it is not correct that an exporter requesting a review under Article 11.2 bears the burden of establishing that the review is "necessary." Article 11.2 gives exporters the "right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping . . . ." The authorities, in turn, "shall review the need for the continued imposition of the duty, where warranted . . . ." Article 11.2 says nothing about a burden of proof imposed on the exporter; rather, the investigating authority has the obligation to make the types of determinations required under Article 11.2, and it must do so on the basis of positive evidence.

39. Thirdly, the US response mixes the concepts of what is "likely" to happen after the expiry of the order, and the actual obligation under Article 11.2, which is to revoke the measure unless "it is necessary to offset dumping."

## ANNEX E-13

### COMMENTS OF THE UNITED STATES ON MEXICO'S RESPONSES TO QUESTIONS FROM THE PANEL – SECOND MEETING

(4 October 2004)

**Q1. Could Mexico clarify its argument at paragraph 72 of its second oral statement that "there would be no way for the United States to correct retroactively a violation of the time-bound obligation of Article 11.3 to terminate after five years." In particular, could Mexico distinguish this case from a dispute involving an original investigation and the obligation under Article 5.10 of the AD Agreement to conclude an investigation within one year, or in special circumstances 18 months?**

1. Mexico's reasoning in response to this question is not persuasive. Mexico states that giving a Member a "second opportunity to invoke the exception ... would ... violate another temporal limitation specified in Article 11.3 for the time by which any Member must initiate *and conclude* the review."<sup>1</sup> However, the obligation under Article 11.3 is not for a Member to *conclude* a review before the expiry of the five-year period, but to *initiate* a review before then. Mexico argues that "Article 11.3 also establishes an additional exception to the general rule that 'The duty may remain in force pending the outcome of such a review'"<sup>2</sup> yet does not state what the additional exception is. Therefore, even if the review in this dispute were found inconsistent with Article 11.3, it will remain true that the United States timely initiated the review. As a result, termination of the measure is not an appropriate recommendation.

2. Even were it incorrectly concluded that the United States breached Article 11.3, there is no reason why such a breach could not be corrected. To address the Panel's question, there is no difference between a Member's correcting a flawed investigation and a flawed review. Under the logic in Mexico's answer to this question, any measure that contains a WTO inconsistency must be terminated. For example, with regard to the Panel's reference to an original investigation, if a duty were imposed pursuant to a measure that was ultimately found not to comport with the Antidumping Agreement, then the "conditions precedent" to the imposition of that measure would likewise not have been met and the measure would, under the logic that Mexico presented in this answer, have to be terminated.<sup>3</sup> Mexico argues that it "had the right to have its exports of OCTG enter the United States without antidumping duties as of August 2000;"<sup>4</sup> yet the same argument could be made with respect to a flawed original investigation. Mexico states that the "obligations in Article 11 arise *after* antidumping duties have been imposed and have remained in effect for some time," as if this distinction supports the notion that sunset reviews cannot be remedied but original investigations can. Mexico does not explain how this difference is meaningful.

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<sup>1</sup> Mexico's Answers to the Panel's Questions Following the Second Meeting ("Mexico's Answers"), para. 4 (emphasis added).

<sup>2</sup> Mexico's Answers, para. 4.

<sup>3</sup> Needless to say, this is *not* the approach that Mexico took when the WTO found Mexico's own anti-dumping measure against US high fructose corn syrup to be in breach of the Anti-Dumping Agreement. *See Dispute Settlement Body: Minutes of Meeting Held on 20 March 2000*, WT/DSB/M/77, para. 30 (statement by Mexico: "In accordance with the DSU provisions, Mexico would require a reasonable period of time to be able to comply with the DSB's rulings and recommendations in this case.").

<sup>4</sup> Mexico's Answers, para. 5.



3. Mexico also asserts that "the granting of a reasonable period of time to bring a measure into conformity may be used to cure non-time bound obligations only."<sup>5</sup> Inasmuch as Mexico has failed to provide a citation for this proposition, the United States assumes that Mexico is referring to the reasonable period of time provided in Article 21.3 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). Yet the plain language of Article 21.3 provides as follows: "If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so." Article 21.3 makes no distinction between "time-bound" and "non-time bound" obligations. Indeed, the term "time-bound" does not appear in this provision, or in any other provision of the DSU, and is wholly of Mexico's invention.<sup>6</sup> Mexico's assertion, therefore, has no basis in the text of the DSU. Moreover, Article 21.3 inherently recognizes that Members may require time to implement recommendations – for example, in the case of a sunset review in which the Member might have to correct procedural or analytical flaws.

4. More importantly, Mexico's request is at odds with a Member's right to retain flexibility on how to implement DSB recommendations and rulings. In recognition of this right, prior panels – including the panels in *Argentina OCTG* and *German Sunset*<sup>7</sup> – have declined to make suggestions on implementation. There is no reason to deviate from that approach here. Whether Article 11.3 has a so-called "time-bound" obligation is immaterial; Mexico has offered no logical or legal justification as to why Members cannot correct breaches of so-called time-bound provisions as they do breaches of any other obligation.

5. Furthermore, Mexico makes the rather startling claim that: "If the Panel finds that the United States acted inconsistently with Article 11.3 and nonetheless allows the United States to continue the measure, Mexico's rights under the Antidumping Agreement will be diminished, rather than restored."<sup>8</sup> Mexico thus appears to claim that something in Article 11.3 of the Antidumping Agreement overrides the plain language of Article 19.1 of the DSU which specifies the only recommendation that a panel or the Appellate Body is permitted to make.<sup>9</sup> Again, however, Mexico offers no basis for this claim – nor could it. As noted above, Article 11.3 of the ADA is not listed as a "special or additional rule" for purposes of Appendix 2 of the DSU. Accordingly, there is no basis for Mexico's claim that it is entitled to more than what is provided under Article 19.1 of the DSU.

**Q2. Could Mexico clarify its argument at paragraph 32 of its second oral submission that "By failing to evaluate whether the Commission applied the right standard, and then making its own assessment of whether the facts would support a finding of "likely" injury, the Panel ... seriously undermined the substantive obligation in Article 11.3, which places the burden of establishing likely injury on the investigating authority." In this regard, the Panel notes the statement in the Panel's report in OCTG from Argentina, at paragraph 7.285, that "the standard set out in Article 11.3 of the Agreement for the investigating authorities' sunset determination is "likely". This standard applies to the likelihood of continuation or recurrence of dumping as well as injury determination in sunset review, and this is precisely**

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<sup>5</sup> Mexico's Answers, para. 4.

<sup>6</sup> In addition, Article 11.3 of the Antidumping Agreement is not listed in Appendix 2 of the DSU as a "special or additional rule or procedure" to which the provisions of the DSU are subject.

<sup>7</sup> See Report of the Panel, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/R ("*Argentina OCTG*"), circulated 15 June 2004, para. 7.283; see also Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, adopted 19 December 2002, ("*German Sunset*").

<sup>8</sup> Mexico's answers, para. 6.

<sup>9</sup> Mexico is clearly not arguing for a "suggestion" which is permitted by Article 19.1 of the DSU, since Mexico speaks about "allowing" the United States to maintain the measure. A "suggestion" under Article 19.1 is not mandatory and cannot compel a Member. Nonetheless, for the reasons explained above, such a suggestion would be inappropriate in this case as well.

**the standard that the USITC applied." (Emphasis added). In addition, Mexico's statement seems to assert that there is some burden of proof on the investigating authority – could Mexico clarify if this is its view, and if so, the basis for that view.**

6. Mexico's critique of the panel's reasoning in *Argentina OCTG* is unavailing. The panel in that dispute stated that the ITC used the phrase "likely" in making its overall determination.<sup>10</sup> Therefore, the panel (and Argentina) recognized that, on its face, the determination referenced the likely standard.<sup>11</sup> The panel then evaluated whether the evidence Argentina presented demonstrated that the ITC did not have sufficient evidence to reach that likelihood conclusion.<sup>12</sup> The panel correctly reasoned that, inasmuch as the ITC made a determination which it stated was based on the likely standard, then the standard for the panel's review of that conclusion had to be whether the ITC assessed the evidence objectively – otherwise, how could the ITC have concluded that recurrence or continuation of injury was likely? Therefore, the panel properly evaluated whether the ITC's findings were based on an objective examination of the record. Whether Mexico calls it "evaluating whether the ITC applied the wrong standard" or whether it is put in the terms used by the Argentina panel – "assessing the basis of the evidence" -- it amounts to the same thing, and the question is ultimately whether the ITC's establishment and assessment of the facts supported its finding that continuation or recurrence of injury was likely. The panel examined that issue and correctly concluded that the ITC's establishment and assessment of the facts *did* support its conclusion that injury was likely to continue or recur.

7. Mexico also states that it is challenging "both the standard used by the Commission, and the Commission's establishment and evaluation of the facts to determine whether the standard was satisfied."<sup>13</sup> Again, Mexico makes an assertion without explaining why that assertion is relevant. It is worth noting that Argentina challenged both the likely standard and the evidentiary standard as well. Therefore, if a distinction is implied between Mexico's and Argentina's claims, such distinction simply does not exist.

8. Mexico offers a further argument: that the ITC's use of the "wrong standard" "taints the process from its inception – it affects the investigating authority's ability to establish the requisite facts, its ability to objectively evaluate the facts, and its ability to determine whether the facts it has developed constitute positive evidence of what is likely to occur."<sup>14</sup> Mexico has provided no evidence to support this proposition. The statute establishes a likelihood standard, and the determination itself cites to a likelihood standard. Mexico has not clarified how the ITC could have failed to establish the facts properly. Moreover, with respect to Mexico's allegation that the ITC's use of the "wrong standard" affected the ITC's ability to evaluate the facts, it should be noted that this is precisely what the panel in *Argentina OCTG* examined and only confirms that evaluating whether the standard was properly applied and the evaluating whether the facts supported the conclusion reached are the same.

9. Finally, Mexico's discussion of the "burden of proof" is incorrect in a number of respects. Mexico says (without citation) that it "understands" that the party "invoking the exception has the burden of proof."<sup>15</sup> In fact, this statement reflects Mexico's misunderstanding of the relevant principles. In the first place, as the Appellate Body explained in its report in the *EC Hormones* dispute, simply describing a provision as an "exception" does not shift the burden of proof to the responding party;<sup>16</sup> a party to a dispute does not have the burden of proof unless it asserts the affirmative of a claim or defense.<sup>17</sup> Furthermore, the United States is not

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<sup>10</sup> *Argentina OCTG*, Panel Report, para. 7.283.

<sup>11</sup> *Argentina OCTG*, Panel Report, para. 7.283.

<sup>12</sup> *Argentina OCTG*, Panel Report, paras. 7.285 - 7.312.

<sup>13</sup> Mexico's Answers, para. 12.

<sup>14</sup> Mexico's Answers, para. 12.

<sup>15</sup> Mexico's Answers, para. 16.

<sup>16</sup> Appellate Body Report, *EC Measures Concerning Meat and Meat Products ("EC Hormones")*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 105.

<sup>17</sup> See Appellate Body Report, *United States - Measures Affecting Imports of Woven Shirts and Blouses from India ("US Wool Shirts")*, WT/DS33/AB/R, adopted 23 May 1997, p. 14.

invoking an "exception" (or an "affirmative defense") in this dispute. Article 11.3 is part of the overall balance of rights and obligations agreed to under the Antidumping Agreement. It provides a positive rule that authorizes Members to continue antidumping duties under certain circumstances. It is Mexico that is asserting that the United States violated Article 11.3 of the Antidumping Agreement by (allegedly) conducting a review improperly. Having made that assertion, Mexico has the burden of proving it – a burden that it has not met. In this dispute, Mexico has failed to make a *prima facie* case that the ITC failed to use the correct standard under Article 11.3. The statute and the determination use the word "likely" and the evidence, properly established, more than supports the conclusion that injury was likely to recur. Therefore, not only has Mexico failed to make its *prima facie* case, but Mexico will be unable to do so.

**Q7. Could the parties please address the import, in specific terms, of the decision of the Panel in the Argentina - OCTG dispute for the issues, and the decision, in this dispute?**

10. The United States is surprised that Mexico would express "concern with the possibility of unduly linking two different dispute settlement procedures that have not yet been completed."<sup>18</sup> Indeed, it is Mexico that "unduly" linked them by apparently providing Argentina with information from this dispute to use in the very dispute settlement proceeding Mexico now contends should not be "unduly" linked to this one. For example, the "Exhibit" Mexico sought to introduce at the second Panel meeting – an alleged summary of arguments and evidence already before this Panel – was submitted by Argentina in its appeal as an alleged critique of that panel's legal reasoning. Moreover, sections of Mexico's submissions seem, in many instances, to be copied straight out of Argentina's submissions. This is not surprising, as Mexico and Argentina share outside counsel. (This fact also calls into question Mexico's assertion in response to a question from the Panel that Mexico could not fully address the arguments advanced and conclusions reached by the *Argentina OCTG* panel.) In any event, Mexico is attempting to have it both ways: It is supplying Argentina with "evidence and argument" from this dispute and then arguing that it is the Panel that is "unduly linking" them.

11. Mexico further asserts that "many of the claims and arguments presented by Mexico to this Panel are different than the claims and arguments presented in that case."<sup>19</sup> This assertion is too general. While some of the claims are different – for example, Mexico here has made claims regarding administrative reviews, and Argentina made claims regarding expedited waivers – the Panel's question implicitly is concerned with the claims that overlap, not the claims that are unique to one of the disputes. In that sense, Mexico's answer seems to avoid the Panel's question.

12. Furthermore, Mexico has failed to identify even *one* relevant difference regarding these overlapping claims. Mexico provides a chart of facts and assertions, but no analysis. For example, Mexico states that its "claims" involve exporters who participated in several administrative reviews. This is simply a fact and is neither a claim nor an argument. Further, Mexico's statement that this review was full rather than expedited only confirms that this panel need not trouble itself with the Argentina panel's discussion of the waiver provisions of US law. Mexico then notes its arguments regarding Commerce's reliance on the decrease in volume and the original dumping margin – yet those arguments were also advanced in the Argentina dispute.<sup>20</sup>

13. Significantly, the one place where Mexico affirmatively asserts – without more – that its arguments were "different" is with respect to the likely injury claim. That claim is one where the panel found against Argentina – and involved the exact same ITC determination as the one here. One can only infer that Mexico is

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<sup>18</sup> Mexico's Answers, para. 17.

<sup>19</sup> Mexico's Answers, para. 20.

<sup>20</sup> See, e.g., *Argentina OCTG*, First Written Submission of Argentina, Annex A-1, para. 181.

hoping that this Panel will not evaluate the persuasive value of the Argentina panel's conclusions regarding this claim because of Mexico's unsupported allegation that it has made "different" arguments.

14. As the United States made clear in its own response to this question, the panel in *Argentina OCTG* made certain analytical errors regarding US law, as such and as applied, regarding the likelihood of dumping determination. It is for those reasons, and not because of vague and unsubstantiated allegations that "different arguments" were advanced in that dispute, that this Panel should not be persuaded by some of the conclusions the *Argentina* panel reached.

## ANNEX E-14

### COMMENTS OF MEXICO ON THE APPELLATE BODY'S REPORT IN UNITED STATES – SUNSET REVIEWS OF ANTI-DUMPING MEASURES ON OIL COUNTRY TUBULAR GOODS FROM ARGENTINA, DS268

(10 December 2004)

#### I. INTRODUCTION

1. The Panel requested the parties to comment<sup>1</sup> on the Appellate Body's Report in *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, circulated on November 29, 2004 ("*OCTG from Argentina*").<sup>2</sup> Mexico submits these comments pursuant to the Panel's request.

2. Mexico prefaces these comments with three preliminary observations. First, Mexico has maintained during the course of this proceeding that it did not believe that the *OCTG from Argentina* dispute should be "linked" with Mexico's case – other than in the same way in which WTO panels ordinarily view other panel or Appellate Body reports. As the Panel is well aware, recommendations of the DSB (based on the findings of a panel or the Appellate Body in a particular dispute) are binding only on the parties to the dispute and the doctrine of stare decisis does not apply. Consistent with the requirements of the DSU, the Panel must evaluate each of Mexico's claims independently and based on its merits. Second, although Mexico's comments follow the circulation of the Appellate Body's report in *OCTG from Argentina*,<sup>3</sup> the Panel will find that Mexico's comments are fully consistent with the manner in which Mexico has presented its claims and arguments during the course of this proceeding. Finally, Mexico's decision not to comment on certain aspects of the Appellate Body's report should not be interpreted by the Panel as meaning that Mexico endorses or otherwise takes a position regarding the Appellate Body's reasoning or findings related to any such aspects.

3. Section II of this submission explains that none of Mexico's claims related to the Department of Commerce's ("Department") fourth administrative review determination not to revoke the order have been affected by the Appellate Body's ruling in *OCTG from Argentina*.<sup>4</sup> Section III explains why Mexico's "as applied" claim regarding the Department's sunset review determination – that dumping would be likely to recur violates Article 11.3 – is, if anything, only bolstered by the Appellate Body's decision. Section IV explains why the Appellate Body's findings regarding the Sunset Policy Bulletin ("SPB")<sup>5</sup> do not diminish in any way Mexico's claim that the SPB violates Article 11.3. Section V reiterates that the Panel should reject the preliminary objection raised by the United States in this case. In *OCTG from Argentina*, the Panel rejected similar claims from the United States, and the Appellate Body affirmed all of the Panel's findings under Article

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<sup>1</sup> *United States – Anti-dumping Measures on Oil Country Tubular Goods from Mexico*, DS282, Request of the Panel for Comments on the Appellate Body's Report in *OCTG from Argentina*, DS268, Nov. 22, 2004.

<sup>2</sup> Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, circulated November 29, 2004 ("*OCTG from Argentina*").

<sup>3</sup> Mexico understands that the Panel Report and the Appellate Body Report in DS268 will be adopted by the Dispute Settlement Body at its next meeting, scheduled for December 17, 2004.

<sup>4</sup> See generally Mexico's First Submission, Section IX; Mexico's Second Submission, Section IV.

<sup>5</sup> *Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Anti-dumping and Countervailing Duty Orders*, 63 Fed. Reg. 18,871 (Dep't Commerce Apr. 16, 1998) ("*Sunset Policy Bulletin*") (MEX-32).

6.2 of the DSU. Section VI highlights that certain arguments advanced by Mexico, which were not addressed by the Panel in *OCTG from Argentina*, are central to Mexico's claims regarding the inconsistency of the International Trade Commission's ("Commission") likely injury determination with the Anti-Dumping Agreement. Section VII discusses Mexico's arguments regarding the exceptional nature of Article 11.3 and the failure of the United States to satisfy its burden of proof to show that that it complied with the strict requirements for invoking the limited exception to the time-bound obligation to terminate the measure under Article 11.3. This issue was raised by Mexico, but not addressed by the Appellate Body in *OCTG from Argentina*. Finally, Section VIII reiterates that Mexico has made a specific request that the Panel find that there is no legal basis for the United States to have continued the measure in the absence of strict compliance with the requirements of Article 11.3. Nothing in the Appellate Body's report in *OCTG from Argentina* eliminates the need for the Panel to rule on Mexico's request in this regard.

## II. MEXICO'S ARTICLE 11.2 CLAIMS ARE UNAFFECTED

4. None of Mexico's claims based on the Department's fourth administrative review determination not to revoke the order have been affected by the Appellate Body's ruling in *OCTG from Argentina*.

5. Mexico requested that the Panel find:

- The Department violated Article 11.2 of the Anti-Dumping Agreement because the Department did not terminate the anti-dumping duty on OCTG from Mexico immediately upon the demonstration by Mexican respondents that the continued imposition of the duty was not necessary to offset dumping;<sup>6</sup>
- The Department's determination not to revoke the anti-dumping duty on OCTG from Mexico was not based on positive evidence that the continued imposition of the duty was necessary to offset dumping;<sup>7</sup>
- With respect to TAMSAs, the Department's determination not to revoke violated Article 11.2 of the Anti-Dumping Agreement because the Department: (i) applied a standard which required a demonstration that dumping was "not likely" in the future; (ii) arbitrarily imposed a "commercial quantities" requirement test which is inconsistent with, and has no basis in, Article 11.2; and (iii) ignored positive evidence that demonstrated that the measure was no longer necessary to offset dumping;<sup>8</sup>
- The Department violated Article X:2 of the GATT 1994 because the Department imposed conditions on TAMSAs for the termination of the anti-dumping duty in advance of the official publication of such conditions;<sup>9</sup> and
- With respect to Hylsa, the Department's determination not to revoke the duty violated Articles 11.2, 2.4, and 2.4.2 of the Anti-Dumping Agreement because the Department failed to make a fair comparison between export price and normal value, by "zeroing" Hylsa's negative margins. By relying on the positive margin that resulted from this unlawful methodology as justification for not revoking the anti-dumping duty on OCTG from Mexico with respect to Hylsa, the Department did not determine whether the duty was necessary to offset dumping.<sup>10</sup>

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<sup>6</sup> See Mexico's First Submission, paras. 279-288; Mexico's Second Submission, paras. 225-236.

<sup>7</sup> Mexico's First Submission, paras. 312-319; Mexico's Second Submission, paras. 225-236.

<sup>8</sup> Mexico's First Submission, paras. 301-319; Mexico's Second Submission, paras. 237-265.

<sup>9</sup> Mexico's First Submission, paras. 320-349; Mexico's Second Submission, paras. 266-270.

<sup>10</sup> See Mexico's First Submission, paras. 289-300; Mexico's Second Submission, paras. 271-296.

6. Mexico submits that none of these claims has been affected by the Appellate Body's decision in *OCTG from Argentina*.

### III. MEXICO'S "AS APPLIED" CLAIM THAT THE DEPARTMENT'S SUNSET REVIEW DETERMINATION VIOLATES ARTICLE 11.3 WAS NOT AFFECTED AND IS, IF ANYTHING, BOLSTERED BY THE APPELLATE BODY'S DECISION

7. Mexico's "as applied" claim – that the Department's sunset determination that dumping would be likely to recur in this case is inconsistent with Article 11.3 of the Anti-Dumping Agreement – has not been affected by the Appellate Body's ruling in *OCTG from Argentina*.

8. In this case, Mexico has argued that the Department relied on the Mexican OCTG import volume decline and the existence of the dumping margin from the original investigation as the bases for its likely dumping determination. In particular, Mexico argued that the Department violated Article 11.3 of the Anti-Dumping Agreement because the Department: (i) focused exclusively on past import volumes to the exclusion of other relevant factors; (ii) failed to apply the "likely" standard required by Article 11.3; (iii) failed to conduct a prospective analysis; and (iv) failed to make a determination of likelihood of dumping on the basis of positive evidence.<sup>11</sup>

9. Mexico's submissions demonstrate that the Department ignored positive evidence on the record that demonstrated that dumping would not be likely, and rejected Mexican respondents' explanations regarding the volume decline and why the original dumping margin could not constitute positive evidence that dumping would be likely.<sup>12</sup> Mexico explained why this was contrary to the requirements of Article 11.3.<sup>13</sup> As the Appellate Body explained in *OCTG from Argentina*, "affirmative determinations [would be] flawed [where] the USDOC made its decisions relying solely on one or more of the scenarios of the SPB, even though the probative value of other factors outweighed it."<sup>14</sup>

10. This is precisely such a case. As Mexico detailed in this proceeding, the positive evidence before the Department during the sunset review demonstrated that the original anti-dumping duty order on Mexican OCTG resulted from the unique circumstances prevailing at the time of the 1994 investigation.<sup>15</sup> Mexican respondents also argued that the Department's "no dumping determinations" and calculation of zero margins for TAMSAs and Hylsas in the subsequent administrative reviews constituted positive evidence demonstrating that dumping would not be likely. Hence, in the absence of a recurrence of the unique circumstances in 1994, and in light of the zero margins and findings of no dumping, there was no factual basis for the Department to determine that dumping could "continue or recur" after revocation of the order.<sup>16</sup>

11. Mexico also requested the Panel to find that, separate and independent of other violations, the Department violated Article 11.3 by mechanically relying for purposes of its likelihood of dumping determination on a dumping margin that was determined in a pre-WTO original investigation.<sup>17</sup> Mexico claims that the Department also violated Article 2 of the Anti-Dumping Agreement by using as the "margin likely to prevail" a margin that was not the result of the application of the Anti-Dumping Agreement nor calculated in accordance with the requirements of the Agreement.<sup>18</sup> The Department also violated Article 6 of the

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<sup>11</sup> See Mexico's First Submission, Section VII.C; Mexico's Second Submission, Section II.B.

<sup>12</sup> See Mexico's First Submission, paras. 123-149; Mexico's Second Submission, paras. 67-78.

<sup>13</sup> See Mexico's First Submission, Section VII.C; Mexico's Second Submission, Section II.B.

<sup>14</sup> Appellate Body Report, *OCTG from Argentina*, para. 211.

<sup>15</sup> See Mexico's First Submission, paras. 123-149; Mexico's Second Submission, paras. 67-78.

<sup>16</sup> See Mexico's First Submission, paras. 123-149; Mexico's Second Submission, paras. 67-78.

<sup>17</sup> See Mexico's First Submission, paras. 150-155; Mexico's Second Submission, paras. 48-59.

<sup>18</sup> See Mexico's First Submission, paras. 150-155; Mexico's Second Submission, paras. 48-59.

Agreement by failing to provide the Mexican exporters with the opportunity to present evidence and defend their interests with respect to the "margin likely to prevail."<sup>19</sup>

12. In *OCTG from Argentina*, Argentina prevailed at the panel stage with its claim that the Department's determination of likely dumping was inconsistent with Article 11.3 of the Anti-Dumping Agreement. The Panel found the likelihood determination inconsistent with Article 11.3 for two reasons: 1) there was no factual basis for the Department's determination that dumping continued over the life of the order based solely on the existence of the dumping margin from the original investigation;<sup>20</sup> and 2) the Department's application of the waiver provisions invalidated the factual basis for the overall country-wide likelihood determination.<sup>21</sup> The United States did not appeal these findings.

13. For these reasons, the Appellate Body's decision in *OCTG from Argentina* has no direct impact on Mexico's "as applied" challenge to the Department's likely dumping determination. If anything, Mexico's "as applied" claim has been strengthened by the United States' failure to appeal the finding of the Department's likely dumping determination in *OCTG from Argentina*, and by the Appellate Body's reaffirmance of the fundamental requirement in Article 11.3 to examine the evidence provided by respondents.

#### **IV. THE APPELLATE BODY'S FINDINGS DO NOT DIMINISH MEXICO'S CLAIM THAT THE SUNSET POLICY BULLETIN IS INCONSISTENT "AS SUCH" WITH ARTICLE 11.3**

A. THE APPELLATE BODY CONFIRMED THAT THE SPB IS A MEASURE, AND THE DEPARTMENT'S APPLICATION OF THE TERMS OF THIS MEASURE "STRONGLY SUGGESTS" IT IS INCONSISTENT WITH ARTICLE 11.3

14. The Appellate Body's ruling in *OCTG from Argentina* confirms that the SPB is a measure that is subject to WTO challenge, and the Department's application of the terms of the SPB "strongly suggests" that the measure is inconsistent with Article 11.3 of the Anti-Dumping Agreement.<sup>22</sup>

15. First, all doubt has been eliminated that the SPB is a measure that is subject to WTO dispute settlement. The Appellate Body reaffirmed an earlier finding<sup>23</sup> that the SPB is a measure, thus leaving open only the question of the consistency of the SBP with US WTO obligations.<sup>24</sup>

16. Second, it is critical to emphasize that the Appellate Body reversed the Panel on very narrow grounds related to the Panel's error in evaluating Argentina's claim, based on the standard of Article 11 of the DSU. Although the Appellate Body found that the empirical evidence "strongly suggests that these scenarios are mechanistically applied[.]" it reasoned that it was not possible to definitively conclude that the Department treats the scenarios as determinative of likely dumping without a "qualitative assessment" of the likelihood determinations in individual cases.<sup>25</sup> Because, in the Appellate Body's view, the Panel had not conducted such a qualitative assessment of at least some of the individual cases, the Appellate Body reversed the Panel's conclusion that Section II.A.3 was inconsistent, as such, with Article 11.3. The Appellate Body explicitly

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<sup>19</sup> See Mexico's First Submission, paras. 150-155; Mexico's Second Submission, paras. 48-59.

<sup>20</sup> Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/R, circulated 16 July 2004, paras.7.219-7.221 ("*OCTG from Argentina*").

<sup>21</sup> Panel Report, *OCTG from Argentina*, para. 7.222. On grounds of judicial economy, the Panel declined to rule on Argentina's other claim that the Department's likelihood determination was inconsistent with Article 11.3 because it was based on the decline in import volume following the imposition of the order. *OCTG from Argentina*, para. 7.212.

<sup>22</sup> Appellate Body Report, *OCTG from Argentina*, para. 189.

<sup>23</sup> Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, paras. 99-100 ("*Japan Sunset*").

<sup>24</sup> Appellate Body Report, *OCTG from Argentina*, paras. 189, 190-215.

<sup>25</sup> Appellate Body Report, *OCTG from Argentina*, para. 212.



held, however, that it had "*not thereby concluded that Section II.A.3 of the SPB is consistent, as such, with Article 11.3*" (emphasis added):

We wish to emphasize that we have not thereby concluded that Section II.A.3 of the SPB is consistent, as such, with Article 11.3 of the Anti-Dumping Agreement. Rather, we have found that the Panel's conclusion to the contrary must be reversed due to its failure to comply with Article 11 of the DSU. Thus, our reasoning here does not exclude the possibility that, in another case, it could be properly concluded that the three scenarios in Section II.A.3 of the SPB are regarded as determinative/conclusive of the likelihood of continuation or recurrence of dumping. However, such a conclusion would need to be supported by a rigorous analysis of the evidence regarding the manner in which Section II.A.3 of the SPB is applied by the USDOC.<sup>26</sup>

17. Third, the Appellate Body's decision "strongly suggests" that, with appropriate analysis by the Panel in the next case, a Panel could well conclude that the Section II.A.3 criteria of the SPB are inconsistent as such with Article 11.3:

The Panel failed to undertake any such qualitative assessment and relied exclusively on the overall statistics or aggregated results of Exhibit ARG-63. The fact that affirmative determinations were made in reliance on one of the three scenarios in all the sunset reviews of anti-dumping duty orders where domestic interested parties took part strongly suggests that these scenarios are mechanistically applied. However, without a qualitative examination of the reasons leading to such determinations, it is not possible to conclude definitively that these determinations were based exclusively on these scenarios in disregard of other factors.<sup>27</sup>

B. THE PANEL MUST UNDERTAKE A "QUALITATIVE ASSESSMENT" OF MEX-62 AND MEX-65, AND THE ENTIRE RECORD IN THIS PROCEEDING

18. The Appellate Body's reversal of the Panel's finding related to the SPB was based on DSU Article 11: it was a Panel error, not a defect in Argentina's substantive claim, the evidence presented by Argentina, or an incorrect interpretation of a WTO decision, that caused the reversal. The main lesson from the case, then, is that this Panel should not commit the same error.

19. In Mexico's view, it is unlikely that this Panel would commit such an error due to the record developed during this proceeding. Mexico has provided to the Panel all the necessary evidence and argumentation for the Panel to undertake the qualitative assessment that the Panel in *OCTG from Argentina* failed to undertake (according to the Appellate Body). The Panel has asked specific questions about specific cases included in Exhibit MEX-62 and MEX-65, and both Mexico and the United States responded substantively to these questions. Thus, the information already developed by the Panel in this case provides it with a basis to determine both quantitatively and qualitatively that in every case in which one of the scenarios in the SPB is present, the Department mechanistically invokes the SPB and decisively relies on import volume declines and/or the existence of historical dumping margins.

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<sup>26</sup> Appellate Body Report, *OCTG from Argentina*, para. 215.

<sup>27</sup> Appellate Body Report, *OCTG from Argentina*, para. 212 (footnote omitted). Mexico notes that footnote 300 is completely consistent with Mexico's explanation of *Sugar and Syrups From Canada*: the Appellate Body recognized that this case falls outside of the cases relevant to prove the SPB "as such" claim because none of the three SPB scenarios was present.

20. Mexico reiterates that it has thoroughly analyzed every sunset review conducted by the Department through June 2004, and that in every case the Department treats the satisfaction of at least one of the Section II.A.3 scenarios as determinative of the likelihood of dumping. The Department gave the Section II.A.3 scenarios decisive weight regardless of the degree to which import volumes declined or dumping margins continued, regardless of trends in such data over time, and regardless of the presence of contrary evidence. Indeed, a qualitative review of the Department's sunset determinations evinces a purely mechanistic application of the Section II.A.3 scenarios, and not the reasoned and rigorous analysis of all relevant information required by Article 11.3.

21. Both Mexico and the United States have analyzed individual cases in numerous submissions in this proceeding and in response to questions from the Panel. These case examples demonstrate that the Department treats the Section II.A.3 scenarios as determinative/conclusive of a likelihood of dumping:

- Naturally, Mexico and the United States have each focused on the sunset review at issue in this dispute: *OCTG from Mexico*. The facts surrounding this sunset review are particularly egregious and show that the Department treats the Section II.A.3 scenarios as determinative of the likelihood of dumping. The Department based its likelihood determination solely on the margin calculated in the original investigation and a decline in volume, to the exclusion of positive evidence – including consecutive zero dumping margins and arguments that circumstances giving rise to the original margin would not be repeated – that demonstrated that dumping would not be likely. Both Mexico and the United States have discussed the facts of this case thoroughly.<sup>28</sup>
- Mexico discussed the sunset review of *Industrial Nitrocellulose from Yugoslavia* (MEX-62, Tab 145), in which the Department applied the Section II.A.3 scenarios and found that dumping would be likely despite the fact the sole Yugoslavian producer/exporter was no longer capable of exporting to the United States because the company's only factory was destroyed in war.<sup>29</sup> The United States took the position that the Department's determination in this case was reasonable.<sup>30</sup>
- Mexico pointed to the sunset review of *Stainless Steel Wire Rod from Spain* (MEX-62, Tab 295), in which the Department mechanistically found that dumping would be likely on the sole basis of a decline in imports during the year that the order was imposed, despite the evidence that dumping margin declined to 0.80 per cent and import volumes subsequently resumed to pre-order levels.<sup>31</sup>

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<sup>28</sup> For Mexico's analysis of the sunset review of *OCTG from Mexico*, please see: Mexico's First Submission, Section VII.C; Mexico's Opening Statement for the First Panel Meeting (25 May 2004), paras. 17-34; Mexico's Responses to the Panel's Questions Following the First Meeting (18 June 2004), paras. 1-8, 21, 83; Mexico's Second Submission, Section II.B; Mexico's Opening Statement for the Second Panel Meeting (17 August 2004), paras. 19-26. For the US analysis of the sunset review of *OCTG from Mexico*, please see: US First Submission, Section V.B; Executive Summary of the US First Submission (3 May 2004), para. 5; US Responses to the Panel's Questions Following the First Meeting (18 June 2004), para. 52; US Opening Statement at the Second Panel Meeting (17 August 2004), paras. 11-12; US Responses to Mexico's Questions Following the Second Meeting (13 September 2004), paras. 8-9.

<sup>29</sup> See Mexico's First Submission, paras. 115-116.

<sup>30</sup> See US Second Submission at n.12.

<sup>31</sup> See Mexico's Second Submission, para. 34 n.45; *Issues and Decision Memorandum for the Expedited Sunset Review of the Anti-dumping Order on Stainless Steel Wire Rod from Spain*, 68 Fed. Reg. 68,866 (Dep't Commerce Dec. 10, 2003)(MEX-62, Tab 295).

- The United States discussed the sunset review of *Porcelain-on-Steel Cooking Ware from Mexico* (MEX-62, Tab 194), in which the Department relied on the Section II.A.3 scenario of continued dumping in rendering an affirmative likelihood determination.<sup>32</sup>

22. Although the so-called "good cause" provisions purportedly allow for the consideration of factors other than historical dumping margins and import volumes, the provisions impermissibly place the burden on interested parties to provide information or evidence warranting the consideration of such other factors, which the Department may dismiss at its sole discretion.<sup>33</sup> The Department's regulations further limit the consideration of other factors to full sunset reviews only.<sup>34</sup> By restricting the Department's likelihood "analysis" to the Section II.A.3 scenarios, the "good cause" provisions effectively and, more importantly, in actual practice, block the ability of respondents to overcome the decisive weight given to volume reductions and the existence of dumping margins.

23. The Department has relied on "good cause" information as the basis for its final sunset determination in only four cases, and, in each of these cases, the Department did so because none of the Section II.A.3 scenarios was satisfied.<sup>35</sup> Thus, the Department has only relied on other factors in the handful of instances where the SPB required a negative likelihood determination in order to nevertheless justify an affirmative result. Conversely, the Department has never relied on other factors to conclude that dumping would *not* be likely to continue or recur in a final determination (nor has the Department ever, in fact, made a final determination that dumping would not be likely).

- Mexico analyzed the sunset review of *Sugar from Canada* (MEX-62, Tab 261), in which the Department relied on an abbreviated cost test based on limited data in rendering an affirmative likelihood, despite the fact that after imposition of the order there were significant volumes of non-dumped imports.<sup>36</sup> The United States also discussed this case.<sup>37</sup> The Appellate Body's observation in footnote 300 suggests that it concurs with Mexico's view that the case is not relevant to Argentina's and Mexico's claims because none of the three criteria in Section II.A.3 of the SPB was satisfied.<sup>38</sup>
- The other three cases in which the Department used good cause information involved reviews of agreements to suspend the anti-dumping investigations.<sup>39</sup> The SPB instructs that

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<sup>32</sup> See US Second Submission, para. 19.

<sup>33</sup> See Mexico's Second Submission, paras. 19-30; see also 19 U.S.C. § 1675a(c)(2) (MEX-24); 19 C.F.R. §§ 351.218(d)(3)(iv) & (e)(2) (MEX-25); *Sunset Policy Bulletin*, Section II.C (MEX-32).

<sup>34</sup> See Mexico's Second Submission, paras. 20; see also 19 C.F.R. § 351.218(e)(2)(iii)(MEX-25) ("The Secretary normally will consider such other factors only where it conducts a full sunset review . . .").

<sup>35</sup> See *Sugar from Canada*, 64 Fed. Reg. 48,362 (Dep't Commerce 3 September 1999)(final results of sunset review)(MEX-62, Tab 261); *Gray Portland Cement and Cement Clinker from Venezuela*, 65 Fed. Reg. 41,050 (Dep't Commerce 3 July 2000) (final results of sunset review) (MEX-62, Tab 125); *Uranium from Russia*, 65 Fed. Reg. 41,439 (Dep't Commerce 5 July 2000)(final results of sunset review)(MEX-62, Tab 282); *Uranium from Uzbekistan*, 65 Fed. Reg. 41,441 (Dep't Commerce 5 July 2000)(final results of sunset review) (MEX-62, Tab 284); see also Mexico's Closing Statement for the First Panel Meeting (26 May 2004) at 1; Mexico's Second Submission, paras. 25-26, 34 n.45.

<sup>36</sup> See Mexico's Closing Statement for the First Panel Meeting (26 May 2004) at 1; Mexico's Second Submission, paras. 25-26, 34 n.45.

<sup>37</sup> See US Responses to the Panel's Questions Following the First Meeting (18 June 2004), paras. 7, 17-19; US Second Submission (9 July 2004) at n.9; US Opening Statement for the Second Panel Meeting (17 August 2004), para. 10; US Responses to the Panel's Questions Following the Second Meeting (13 September 2004), para. 1.

<sup>38</sup> Appellate Body Report, *OCTG from Argentina*, n. 300. Mexico notes that footnote 300 is completely consistent with Mexico's explanation of *Sugar and Syrups From Canada*: the AB recognized that this case falls outside of the cases relevant to prove the SPB "as such" claim because none of the three SPB scenarios was present.

<sup>39</sup> See *Gray Portland Cement and Cement Clinker from Venezuela* (MEX-62, Tab 125); *Uranium from Russia* (MEX-62, Tab 282); *Uranium from Uzbekistan* (MEX-62, Tab 284).

the Department will be more likely to entertain good cause arguments in sunset reviews of suspended investigations.<sup>40</sup>

24. In cases where the Department has purportedly considered other factors raised by a respondent, the Department has routinely rejected such arguments and relied on the satisfaction of any of the Section II.A.3 scenarios to render an affirmative likelihood determination. For example:

- Mexico discussed the sunset review of *Brass Sheet and Strip from the Netherlands* (MEX-62, Tab 32), in which the Department concluded that dumping would be likely to recur solely on the basis of a decline in imports, despite the sole respondent's explanation that it limited its exports to the United States following imposition of the order because it had acquired a US facility from which to supply the US market.<sup>41</sup> The United States also discussed this case.<sup>42</sup>

25. Mexico submits that the above case analyses undertaken by Mexico and the United States provide the Panel with a basis upon which to perform the qualitative assessment of individual cases that the Panel failed to perform in *OCTG from Argentina* (according to the Appellate Body).

26. If the Panel finds that the referenced examinations of individual cases are, for whatever reason, not sufficient to enable it to properly determine whether the Section II.A.3 scenarios are regarded as determinative/conclusive, then the Panel must undertake a more thorough "qualitative analysis" in order to decide the issue. Indeed, as the Appellate Body made clear in *OCTG from Argentina*, the Panel's failure to do so would be inconsistent with the Panel's obligation to make an "objective assessment of the matter," as required by Article 11 of the DSU.<sup>43</sup>

27. In this regard, Mexico invites the Panel to examine the sunset reviews contained in MEX-62 and MEX-65. Mexico is confident that, upon doing so, the Panel will conclude – as did Mexico (and as the Appellate Body "strongly suggests") – that the Department indeed treats the satisfaction of any of the Section II.A.3 scenarios as conclusive of likely dumping. In particular, Mexico recommends that the Panel review the following cases – in addition to the cases cited above:

- *In Aspirin from Turkey*, (ARG-63, Tab 14), the Department explained its reasoning as follows:

As set forth in the *Sunset Policy Bulletin* (Section II.A.3), and consistent with the SAA at 889-90 and the House Report at 63, the Department normally will find that revocation of the anti-dumping duty order likely will lead to continuation or recurrence of dumping when dumping margins continued at any level after the issuance of the order or when dumping

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<sup>40</sup> Because suspension agreements are generally intended to eliminate dumping while allowing for continued imports, the Section II.A.3 scenarios are less likely to be met in sunset reviews of suspended investigations. Recognizing this, Section II.A.3 states:

[I]n the context of a sunset review of a suspended investigation, the data relevant to the criteria under paragraphs (a) through (c) [(i.e., the three scenarios)] may not be conclusive with respect to likelihood. Therefore, the Department may be more likely to entertain good cause arguments . . . in a sunset review of a suspended investigation.

*Sunset Policy Bulletin*, Section II.A.3 (MEX-32).

<sup>41</sup> See Mexico's Second Submission (9 July 2004), paras. 27-30.

<sup>42</sup> See US Responses to the Panel's Questions Following the First Meeting (June 18, 2004), para. 8; US Opening Statement for the Second Panel Meeting (17 August 2004), para. 10; US Responses to the Panel's Questions Following the Second Meeting (13 September 13, 2004), paras. 1, 3.

<sup>43</sup> Appellate Body Report, *OCTG from Argentina*, para. 212 (footnote omitted).

was eliminated after the issuance of the order and import volumes of the subject merchandise declined significantly or ceased. With respect to Atabay, although dumping was eliminated in 1997, shipments of the subject merchandise have declined dramatically. Further, with respect to all other Turkish producers/exporters, anti-dumping duty deposit rates remain in effect and we have no reason to believe that dumping has been eliminated. On the basis of this analysis, in conjunction with the fact that respondent interested parties have waived their right to participate in this review before the Department, and, absent argument and evidence to the contrary, the Department determines that dumping is likely to continue if the order were revoked.<sup>44</sup>

The Department thus based its analysis on the volume reduction and continued dumping, based solely on the existence of deposit rates. As *OCTG from Argentina* confirms, however, the mere existence of an anti-dumping duty deposit rate cannot serve as the factual basis for a determination that dumping has continued.<sup>45</sup>

- In the preliminary phase of *Pure Magnesium from Canada* (MEX-62, Tab 201), the respondent, which had received zero margins in the past four administrative reviews, argued that "good cause" existed for the Department to consider exchange rates in making the likelihood of dumping determination.<sup>46</sup> The Department declined to consider this other factor because it found that the decline in import volume conclusively demonstrated a likelihood of dumping: "Given that the Department has conducted numerous administrative reviews and is satisfied that observed patterns regarding import volumes are indicative of the likelihood of continuation or recurrence of dumping, we will not consider good cause arguments in this case."<sup>47</sup>

28. Mexico has provided to the Panel all the necessary evidence, and argumentation for the Panel to undertake the qualitative assessment that the Panel in *OCTG from Argentina* failed to undertake. The evidence presented by Mexico demonstrates that in its sunset reviews the Department: explicitly cited the authority of the SPB to justify its determination that dumping was likely to continue or recur; relied on volume decreases or the existence of dumping margins as the basis for its likelihood determinations; and disregarded all other evidence and explanations.

29. In its analysis of the evidence and the decisions in individual cases, it is important that the Panel keep in mind that the United States has a burden to rebut the evidence provided by Mexico. The Appellate Body noted the United States had argued to the Panel in DS268 that the information provided by Argentina "had no probative value with respect to the question whether the three scenarios in Section II.A.3. of the SPB are determinative/conclusive for purposes of sunset determinations," and that "Exhibits ARG-63 and ARG-64 ignore the factual circumstances of the listed sunset reviews ..." The Appellate Body added:

It is regrettable that the United States did not substantiate these assertions with reference to cases where other factors constituted the basis of the USDOC's determination; it is also unfortunate that the United States did not identify cases where the circumstances were such that the probative value of the identified scenario outweighed that of other factors introduced by

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<sup>44</sup> *Aspirin from Turkey*, 64 Fed. Reg. 36,328, 36,329-330 (Dep't Commerce 6 July 1999)(final results of sunset review)(ARG-63, Tab 14).

<sup>45</sup> Panel Report, *OCTG from Argentina*, paras. 7.219-7.221.

<sup>46</sup> *Issues and Decision Memo for the Sunset Review of Pure Magnesium from Canada (Preliminary Results)*(18 February 2000) at 4.

<sup>47</sup> *Issues and Decision Memo for the Sunset Review of Pure Magnesium from Canada (Preliminary Results)*(18 February 2000) at 7.

interested parties, so as to counter the proposition that the USDOC applies the SPB scenarios in a mechanistic fashion. Had the United States furnished such information, the Panel's task would have been facilitated. Nevertheless, the lack of assistance from the United States cannot excuse the Panel from conducting an "objective assessment of the matter" as required by Article 11 of the DSU.<sup>48</sup>

30. This Panel must hold the United States to the same standard in this case. The United States, in fact, has not and cannot identify cases in which at least one of the SPB scenarios was satisfied, but other factors constituted the basis of its likelihood decision. Nor can the United States identify cases in which the Department provided in its decisions any substantive discussion as to why historic dumping margins and volume declines are more probative of likely, future behaviour than any other evidence. This is not surprising because the United States relies on another presumption, namely that the actions of the exporter prior to the discipline of the order are always more probative than the exporter's actions after the imposition of the order.<sup>49</sup>

31. The most that the United States can do is point to the portions of its decisions in which it repeated the parties' arguments. But repeating arguments does not substitute for the substantive, prospective analysis that Article 11.3 requires. Nor should the Panel accept empty statements that the Department "considers" all the information, even though its written decisions do not reflect that consideration. The extent to which the US mechanistically applies the SPB in these cases must be judged by the manner in which the Department has written its decision, not by what it claims the decision-makers were thinking at the time.

32. Finally, the detailed substantive submissions of Mexico in this case also satisfy the Appellate Body's requirement for evaluation of Mexico's alternative claims regarding the Department's "consistent practice" in the conduct of sunset reviews. Mexico claims that the Department's "consistent practice" is inconsistent "as such" with Article 11.3 of the Agreement. As a second alternative claim, Mexico argues that even if the Department's practice is not inconsistent as such, then the US administration of its anti-dumping laws and regulations regarding the Department's likely dumping determination violates Article X:3(a) of the GATT 1994.

## **V. THE APPELLATE BODY REJECTED THE US PRELIMINARY OBJECTIONS BASED ON DSU ARTICLE 6.2**

33. The Appellate Body rejected all of the preliminary objections raised by the United States based on DSU Article 6.2.<sup>50</sup> The United States made a similar – but untimely – claim in this case. The Panel should similarly reject the US preliminary objection here. Also, there are several additional reasons for the Panel to reject the US preliminary objection, as Mexico has explained.<sup>51</sup>

## **VI. MEXICO HAS MADE DIFFERENT ARGUMENTS REGARDING THE COMMISSION'S LIKELIHOOD DETERMINATION**

### **A. THIS PANEL MUST REACH ITS OWN CONCLUSION ON THE LIKELY STANDARD**

34. This Panel must reach its own conclusions regarding the relevance and weight of the Commission's statements that it did not consider "likely" to mean "probable." The Panel in *OCTG from Argentina* considered these statements to be "irrelevant." The Appellate Body declined to reverse this finding because it considered that it could not reweigh this piece of evidence. This does not mean that the Panel in *OCTG from Argentina*

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<sup>48</sup> Appellate Body Report, *OCTG from Argentina*, para. 214.

<sup>49</sup> See SAA 889-890, SPB Sections II.A.3 and II.B.1; see also Mexico's Second Submission, paras. 52-53.

<sup>50</sup> See Appellate Body Report, *OCTG from Argentina*, paras. 155-176.

<sup>51</sup> See Comments of Mexico on the Draft Descriptive Part of the Panel Report (1 November 2004), paras. 19-

was correct in considering the statements to be irrelevant. Mexico has argued forcefully that they are relevant – if not dispositive – and the Panel must make its own determination.

35. Mexico has argued that: a) the Commission did not use the legal standard required by Article 11.3; and b) the Commission did not properly establish and objectively evaluate the facts necessary to meet the correct standard.<sup>52</sup> Notwithstanding *OCTG from Argentina*, as a first step in this case, the Panel must determine whether the Commission applied the right standard in connection with Mexico's claim with respect to the likely standard.

36. The Appellate Body has clarified that "likely" means "probable.". Mexico demonstrated that the Commission argued vigorously in the NAFTA dispute involving this same sunset review that the SAA precludes the Commission from applying a "probable" standard.<sup>53</sup> The Commission's admission that it did not apply a probable standard is conclusive of the issue, and cannot be deemed irrelevant. Mexico specifically asks that the Panel rule on the issue of whether the Commission applied the proper Article 11.3 standard. The fact that the Appellate Body decided not to reweigh the evidence regarding the Panel's decision in *OCTG from Argentina* to deem the statements irrelevant does not relieve the Panel in this case from making its own assessment of the weight of the Commission's admission in this case that it did not apply "likely" to mean "probable."

B. THERE IS NO LEGAL BASIS FOR THE ITC TO HAVE ASSESSED "DUMPED IMPORTS" BECAUSE THERE IS NO WTO-CONSISTENT DETERMINATION OF "LIKELY" DUMPING

37. In light of the Panel and Appellate Body decisions in *OCTG from Argentina*, the Department's "likely dumping" determinations for all of the countries involved in the Commission's cumulative analysis have been effectively voided. The Panel in *OCTG from Argentina* considered that there was no WTO-consistent basis to consider that imports from Argentina were likely to be dumped.<sup>54</sup> This finding was not appealed by the United States. The strength of Mexico's case in this respect, and the further statements by the Appellate Body, should lead this Panel to a similar conclusion with respect to Mexico. The likely dumping determination with respect to all other cumulated countries (i.e., Italy, Japan, and Korea) was based on the "waiver" provisions,<sup>55</sup> which the Appellate Body confirmed are inconsistent with Article 11.3.<sup>56</sup> Therefore, as a result of the Panel and Appellate Body reports in *OCTG from Argentina*, and this Panel's consideration of the finding with respect to Mexico, there is no WTO-consistent basis for a finding that dumping was likely to continue or recur in this case – not for any cumulated country. This Panel must assess the Commission's determination of the likely volume, price effects, and impact of "dumped imports" in light of the fact that there is no WTO-consistent determination of likely "dumped imports" from any of the cumulated countries.

38. This is particularly true in this case because, as Mexico has argued, Article 11.3 and Article 11.1 of the Anti-Dumping Agreement, and Article VI of the GATT, each independently establish a causation requirement between the likely dumping and the likely injury. This requirement exists irrespective of the applicability of the requirements of Article 3 (including Article 3.5) to Article 11.3 reviews.<sup>57</sup> The Appellate Body did not address this issue in *OCTG from Argentina*.

39. The invalidation of the Department's likely dumping findings that results from *OCTG from Argentina* also is relevant to this Panel's assessment of Mexico's claim related to the Commission's reliance on the "margin likely to prevail" reported by Department. If the Commission did not rely on any dumping margins, then it cannot have satisfied the causation requirement in Articles 11.1 and 11.3 of the Anti-Dumping

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<sup>52</sup> See Mexico's First Submission, Sections VIII.A & B.; Mexico's Second Submission, Sections III.A & C.

<sup>53</sup> See Mexico's First Submission, paras. 159-175; Mexico's Second Submission, paras. 83-89.

<sup>54</sup> Panel Report, *OCTG from Argentina*, paras. 7.219-7.222.

<sup>55</sup> See *OCTG from Argentina, Italy, Japan, and Korea*, 65 Fed. Reg. 66,701 (Dep't Commerce 7 November 2000)(MEX-62, Tab 174).

<sup>56</sup> Appellate Body Report, *OCTG from Argentina*, paras. 234-235.

<sup>57</sup> See Mexico's Second Submission, para. 161.

Agreement, and Article VI of GATT 1994. If, on the other hand, the Commission relied on margins reported by Department, its analysis is defective because the basis for the Department's likely dumping determination with respect to Mexico and all of the cumulated cases has been vitiated. As the Appellate Body has found, "if a likelihood determination is based on a dumping margin calculated using a methodology inconsistent with Article 2.4, then this defect taints the likelihood determination too."<sup>58</sup>

### C. VOLUME, PRICE EFFECTS, AND IMPACT ANALYSIS

40. The Appellate Body conclusions regarding the Commission's findings on volume, price, and impact are limited to discrete areas:

- the Appellate Body's decision not to reweigh the evidence (e.g., "[W]e see no reason to disturb the Panel's assessment;" "we see no reason to interfere in the Panel's conclusion");<sup>59</sup>
- the Appellate Body's interpretation of the specific arguments made by Argentina (e.g., "Argentina seems to assume that positive evidence requires absolute certainty ...";<sup>60</sup> "Argentina does not explain, on appeal, why the Panel could not properly find a relationship of cause and effect ...");<sup>61</sup>
- Argentina's failure to persuade the Panel and the Appellate Body regarding specific arguments relating to the Commission's volume, price, and impact conclusions.<sup>62</sup> The Appellate Body findings on these points are necessarily limited to the manner in which Argentina presented its arguments, as perceived and considered by that Panel.

41. The Appellate Body's discussion of the likely volume, price, and impact issues shows that Mexico has made different arguments on several issues that the Appellate Body considered to be important in evaluating Argentina's claims.

#### 1. Product Shifting

42. Mexico does contest that it was reasonable for the Commission to base its determination on an analysis of the incentive for subject producers to shift production.<sup>63</sup> Also, Mexico does dispute that shifting production was "technically possible."<sup>64</sup>

#### 2. Mexico Challenged All Five of the Factual Bases Purporting to Support the Commission's Volume Analysis

43. The Appellate Body suggests that Argentina only challenged the factual basis of two of the five factors on which the Commission based its finding that the subject producers had an incentive to shift production to OCTG, which production-shifting was the basis for the Commission's conclusion that the likely volume of OCTG would be significant in the absence of an order.<sup>65</sup> Mexico has developed detailed arguments that demonstrate why the Commission's conclusions regarding each of the so-called five incentives can

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<sup>58</sup> Appellate Body Report, *Japan Sunset*, para. 130.

<sup>59</sup> Appellate Body Report, *OCTG from Argentina*, paras. 334, 346.

<sup>60</sup> Appellate Body Report, *OCTG from Argentina*, para. 340.

<sup>61</sup> Appellate Body Report, *OCTG from Argentina*, para. 351; *see also* Appellate Body Report, *OCTG from Argentina*, paras. 342, 348, 352 (addressing volume, price, and impact, respectively).

<sup>62</sup> Appellate Body Report, *OCTG from Argentina*, paras. 334, 346, 352.

<sup>63</sup> Appellate Body Report, *OCTG from Argentina*, para. 335; *see also* Mexico's First Submission, paras. 202-210; Mexico's Second Submission, paras. 122-127.

<sup>64</sup> Appellate Body Report, *OCTG from Argentina*, para. 337; *see also* Mexico's First Submission, paras. 202-210; Mexico's Second Submission, paras. 122-127.

<sup>65</sup> Appellate Body Report, *OCTG from Argentina*, paras. 335-336.



neither be considered to be an "objective examination" of the record, nor constitute "positive evidence" of a likely volume increase in the event of termination. The Appellate Body report addressed only two of the factors (trade barriers and price differences between the US and world market).<sup>66</sup> Mexico challenged the factual and legal basis for the Commission's reliance on all five of these factors.<sup>67</sup> Mexico has also asserted that these factors taken either in isolation or considered together may, at best, imply mere possibilities, but not likelihood.

### 3. Positive Evidence of "Likely " Recurrence of Injury

44. The Appellate Body evidently interpreted Argentina's arguments as "Argentina seems to assume that positive evidence requires absolute certainty on what is likely to occur in the future."<sup>68</sup> Mexico does not advance such arguments. Rather, Mexico argues that the Commission's Article 11.3 determination must be supported by "positive evidence" not simply that injury would be possible, but that injury is "likely" in the event of termination. As the Appellate Body stated, "an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be probable if the duty were terminated—and not simply if the evidence suggests that such a result might be possible or plausible."<sup>69</sup>

45. As Mexico summarized in its Second Submission:

The Commission's conclusions regarding the likely volume of imports, the likely price effects, and the likely impact of imports on the domestic industry:

- cannot be considered objective and impartial when viewed in light of the information on the record;
- are not based on positive evidence of likely injury as required by Article 3.1 and by Article 11.3 of the Anti-Dumping Agreement; and
- could not lead an objective and unbiased decision maker to the conclusion that termination of the duty would be likely to lead to continuation or recurrence of injury.<sup>70</sup>

46. The Appellate Body upheld the Panel's finding that "Argentina has failed to prove" that the Commission's determinations concerning the likely volume, price effect and impact of dumped imports were WTO-inconsistent.<sup>71</sup> Mexico has put forward different arguments, and this Panel has developed different information through its questions and the substantive meetings. Mexico has further emphasized that it is the United States, as the party invoking the limited exception in Article 11.3 to maintain the anti-dumping measure, which has the burden of proof. Therefore, the Panel must make its own determination of Mexico's arguments regarding the Commission's determination of "likely" volume, price effects, and impact.

#### D. CUMULATION

47. In its Report the Appellate Body "disagree[s] with Argentina that the USITC's references to information gleaned in the original investigation rendered WTO-inconsistent its decision to cumulate the

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<sup>66</sup> See Appellate Body Report, *OCTG from Argentina*, paras. 335-342.

<sup>67</sup> See Mexico's First Submission, paras. 202-210; Mexico's Opening Statement for the First Panel Meeting, para. 42; Mexico's Second Submission, paras. 120-127; Mexico's Opening Statement for the Second Panel Meeting, paras. 33-35; and Exhibit MEX-68.

<sup>68</sup> Appellate Body Report, *OCTG from Argentina*, para. 340.

<sup>69</sup> Appellate Body Report, *Japan Sunset*, para. 111.

<sup>70</sup> Mexico's Second Submission, para. 198.

<sup>71</sup> Appellate Body Report, *OCTG from Argentina*, paras. 342, 348, 352.

effects of dumped imports."<sup>72</sup> Because Mexico's arguments are qualitatively different than Argentina's, Mexico's claim should not be affected by this finding.

48. Mexico has requested the Panel to find that irrespective of the applicability of Article 3.3 to Article 11.3, the Commission failed to satisfy the requirements inherent in the conduct of any cumulative injury assessment; specifically, the Commission failed to ensure that cumulation was appropriate in light of the conditions of competition between imported OCTG, and between imported OCTG and the domestic like product, which findings required a threshold finding that the injurious effects of the subject imports would be simultaneously present in the US market.<sup>73</sup>

49. As Mexico has emphasized, an authority can conduct a cumulative injury analysis only when, and only if, it demonstrates that the basic conditions justifying the practice of cumulation exist. The Commission's decision to conduct a cumulative injury assessment: (i) lacks a sufficient factual basis; (ii) cannot be considered an objective examination of whether the injurious effects of the subject imports would be simultaneously present in the domestic market; (iii) employed a WTO-inconsistent "not likely" standard in the analysis; and (iv) fails to identify a time frame within which injury would be likely.<sup>74</sup>

50. As the Panel in *OCTG from Argentina* found, based on the reasoning of the Appellate Body in the *Japan Sunset* case, "even though in the course of a sunset review an authority may not be obliged to comply with provisions of Article 3 of the Agreement, if the authority decides to conduct an 'injury determination' in a sunset review, or if it uses a 'past' injury determination as part of its sunset determination, that authority is then obligated to make sure that its injury determination, or the past injury determination upon which it relies, is consistent with the relevant requirements of Article 3."<sup>75</sup> Consequently, even assuming *arguendo* that the Commission was neither prohibited from, nor required to, conduct a cumulative injury assessment, because it decided to undertake cumulative analysis, then the Commission was obliged to make sure that the inherent conditions necessary to cumulate were satisfied.

51. In any event, the express language of the Commission's likelihood determination demonstrates that the Commission not only failed to comply with these conditions but also that the Commission relied on a WTO-inconsistent "not likely" standard to conclude that there likely would be a reasonable overlap of competition:

Nothing in the record of these reviews suggests that if the orders are revoked subject imports and the domestic like product would not be simultaneously present in the domestic market.

Therefore, we conclude that there likely would be a reasonable overlap of competition between the subject imports and the domestic like product, and among the subject imports themselves if the orders are revoked.<sup>76</sup>

#### E. TIME FRAME FOR DETERMINING LIKELIHOOD OF INJURY

52. The Appellate Body confirmed that the time frame within which injury is likely to recur under Article 11.3 is not completely open-ended (i.e., "an assessment regarding whether injury is likely to recur that focuses

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<sup>72</sup> Appellate Body Report, *OCTG from Argentina*, para. 328.

<sup>73</sup> See Mexico's Second Submission, paras. 192-197; Mexico's Oral Statement at Second Panel Meeting, paras. 49-51.

<sup>74</sup> See Mexico's Second Submission, paras. 192-197; Mexico's Oral Statement at Second Panel Meeting, paras. 49-51.

<sup>75</sup> Panel Report, *OCTG from Argentina*, paras 7.273 and 7.274.

<sup>76</sup> See Mexico's Second Submission, para. 193 (quoting *Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico*, USITC Pub. 3434, Inv. Nos. 701-TA-364, 731-TA-711, and 713-716 at 14 (June 2001) (emphasis added) (MEX-20)).

'too far in the future would be highly speculative").<sup>77</sup> Hence, even assuming *arguendo* that the standard set forth in the Tariff Act is WTO-consistent, the only way to assess whether the law has been applied in a WTO-consistent way (i.e., whether the injury assessment has not focused too far in the future) is by knowing the time frame used by the Commission in its assessment regarding likelihood of injury. Throughout the course of this proceeding, the United States failed to identify any time frame considered by the Commission with respect to when injury would be likely to continue or recur.

53. Independent from whether or not Article 11.3 imposes a time frame for purposes of likelihood of injury in all sunset reviews, the fact that the United States was not able to indicate the time frame used by the Commission in determining whether injury would be likely to continue or recur in this case, further demonstrates that the Commission failed to satisfy the basic conditions to conduct a cumulative injury assessment. In particular, how was the Commission able to conclude that the injurious effects of the subject imports would be simultaneously present in the US market, if the Commission did not know the time frame within which injury was likely to continue or recur?

## VII. BURDEN OF PROOF

54. Irrespective of which party holds the burden of proof in connection with a challenged Article 11.3 determination, Mexico asserts that it has established a prima facie case that the United States' decision to invoke the limited exception in Article 11.3 (to maintain the anti-dumping duties on OCTG from Mexico) was inconsistent with the strict requirements of Article 11.3 and was not supported by sufficient positive evidence.

55. In *OCTG from Argentina*, the Appellate Body reiterated that the continuation of an anti-dumping duty is an "exception" to the requirement that an anti-dumping measure be terminated after five years.<sup>78</sup> Previously, in *Japan Sunset*, the Appellate Body held that "Article 11.3 imposes a temporal limitation on the maintenance of anti-dumping duties. It lays down a mandatory rule with an exception."<sup>79</sup> As noted above, the Appellate Body in *OCTG from Argentina* declined to reverse the Panel's finding that "Argentina has failed to prove" that the Commission's determinations concerning the likely volume, price effects and impact of dumped imports were WTO-inconsistent. In *OCTG from Argentina* the allocation of the burden of proof did not appear to be central to the reasoning of either the Panel or the Appellate Body. In contrast, in Mexico's case the Panel has asked specific questions regarding which party has the burden of proof.

56. In its answer to the Panel's question Mexico asserted "if a Member wants to invoke the exception and maintain the measure beyond the specified time, it bears the burden of proving that its authority conducted a proper review and made the determination required by Article 11.3. If it fails to do so, it has no right to maintain the measure."<sup>80</sup> Mexico also stated "The US is the party attempting to invoke an exception. Mexico understands that the party invoking the exception has the burden of proof. Therefore, the United States is the party that has to prove that it complied with the requirements of Article 11.3"<sup>81</sup>

57. In light of the US comments on Mexico's answer,<sup>82</sup> the Panel should decide whether (i) the United States has the burden of proving that its authorities complied with the strict conditions required by Article 11.3 so as to maintain the measure beyond the otherwise-mandated expiry of the duty after five years, or (ii) Mexico has the burden of proving that the United States failed to satisfy the requirements of Article 11.3 and hence has no right to maintain the measure beyond the temporal limitation contained therein.

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<sup>77</sup> Appellate Body Report, *OCTG from Argentina*, para. 360.

<sup>78</sup> See Appellate Body Report, *OCTG from Argentina*, para. 178.

<sup>79</sup> Appellate Body Report, *Japan – Sunset*, para. 104.

<sup>80</sup> Mexico's Responses to the Panel's Questions Following the Second Meeting (13 September 2004), para. 15.

<sup>81</sup> Mexico's Responses to the Panel's Questions Following the Second Meeting (13 September 2004), para. 16.

<sup>82</sup> Comments of the United States on Mexico's Responses to the Questions from the Panel in Connection with the Second Substantive Meeting of the Panel, para. 9.

58. According to the United States, "the United States is not invoking an "exception" (or an "affirmative defense") in this dispute. Article 11.3 is part of the overall balance of rights and obligations agreed to under the Anti-Dumping Agreement. It provides a positive rule that authorizes Members to continue anti-dumping duties under certain circumstances."<sup>83</sup>

59. Mexico reiterates that: "Termination of a countervailing [or anti-dumping] duty is the rule and its continuation is the exception;"<sup>84</sup> "the continuation of an anti-dumping duty is an "exception" to the otherwise-mandated expiry of the duty after five years;"<sup>85</sup> Article 11.3 'lays down a mandatory rule with an exception'<sup>86</sup>, the "authorities must conduct a rigorous examination in a sunset review before the exception (namely, the continuation of the duty) can apply;"<sup>87</sup> and Article 11.4 "create[s] an additional exception to the requirement that anti-dumping duties will be terminated after five years."<sup>88</sup>

60. As the Appellate Body stated in *European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries*:

In cases where one provision permits, in certain circumstances, behaviour that would otherwise be inconsistent with an obligation in another provision, and one of the two provisions refers to the other provision, the Appellate Body has found that the complaining party bears the burden of establishing that a challenged measure is inconsistent with the provision permitting particular behaviour *only* where one of the provisions suggests that the obligation is not applicable to the said measure. Otherwise, the permissive provision has been characterized as an exception, or defence, and the onus of invoking it and proving the consistency of the measure with its requirements has been placed on the responding party.<sup>89</sup> (citations omitted).

61. Mexico also argues that the provision in Article 11.3 that permits Members to continue anti-dumping duties beyond the five years temporal limitation is not and cannot be considered a "positive rule" – as argued by the United States. The obligation in Article 11.3 is to terminate the measure after five years. This obligation applies to all members. Article 11.3 does not obligate Members to continue anti-dumping duties beyond the explicit five-year temporal limitation. The obligation in Article 11.3 is to terminate the anti-dumping duties, not to continue them. If anti-dumping duties are continued based on the limited exception in Article 11.3, a Member must first satisfy all of the strict requirements of Article 11.3.

62. Mexico has argued that the US determinations under Article 11.3 in this case are based on presumptions, inferences, speculation and conjecture and not on positive evidence.<sup>90</sup> For this reason, the

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<sup>83</sup> Comments of the United States on Mexico's Responses to the Questions from the Panel in Connection with the Second Substantive Meeting of the Panel, para. 9.

<sup>84</sup> Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, adopted December 19, 2002, para. 88.

<sup>85</sup> Appellate Body Report, *OCTG from Argentina*, para. 178.

<sup>86</sup> Appellate Body Report, *Japan Sunset*, para. 104.

<sup>87</sup> Appellate Body Report, *Japan Sunset*, para. 113.

<sup>88</sup> Appellate Body Report, *Japan Sunset*, para. 113.

<sup>89</sup> Appellate Body Report, *European Communities- Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted April 20, 2004, para. 88.

<sup>90</sup> See Mexico's First Submission, paras. 121-144, 184-220; Mexico's Opening Statement for the First Panel Meeting, paras. 21-34, 41-45; Mexico's Closing Statement for the First Panel Meeting at 1-3; Mexico's Responses to the Panel's Questions Following the First Meeting, paras. 7, 21, 80-83; Mexico's Second Submission, Section II and III.C.1; Mexico's Opening Statement for the Second Panel Meeting, Sections II and III.B; Mexico's Closing Statement for the Second Panel Meeting, para. 6; Mexico's Comments on US Answers Following the Second Meeting, paras. 6-13, 28-33.

decisions of the Department and the Commission are insufficient to invoke the limited exception to the obligation to terminate the measure, and continue the anti-dumping duty beyond five years under Article 11.3.

#### **VIII. LACK OF LEGAL BASIS FOR THE UNITED STATES TO MAINTAIN THE ORDER**

63. Strict compliance with Article 11.3 is required in order for a Member to extend the anti-dumping duties beyond five years. A finding that the United States did not comply with Article 11.3 would require a finding that the United States impermissibly extended the anti-dumping measure in this case beyond five years without a legal basis for doing so. Mexico has specifically requested such a finding in this case.<sup>91</sup> The fact that neither the Panel nor the Appellate Body addressed Argentina's similar request does not relieve this Panel from addressing this issue substantively – separate and apart from Mexico's request under DSU Article 19.1. In this regard, Mexico also specifically invoked its rights as a developing country under Article 21.2 of the DSU, and requested that the Panel consider and make a finding on this issue.<sup>92</sup>

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<sup>91</sup> See Mexico's First Submission, paras 376-381; Mexico's Second Submission, paras. 297-310.

<sup>92</sup> See Mexico's Second Submission, para. 310.

**IX. CONCLUSION**

64. In light of the comments above, Mexico respectfully requests that the Panel, consistent with the requirements of Article 11 of the DSU, make all necessary findings and reach its own conclusions with respect to all of Mexico's claims.

65. Mexico thanks the Panel for its consideration of these comments and for its work during the course of this proceeding.

## ANNEX E-15

### COMMENTS OF THE UNITED STATES ON THE RELEVANCE OF THE APPELLATE BODY REPORT IN UNITED STATES – SUNSET REVIEWS OF ANTI-DUMPING MEASURES ON OIL COUNTRY TUBULAR GOODS FROM ARGENTINA ("ARGENTINA OCTG")

1. Adopted panel and Appellate Body reports, while not binding on other panels, nevertheless can provide persuasive reasoning and guidance. This is particularly true when the specific claims and arguments in a dispute have been addressed by a previous panel and the Appellate Body, as is the case with this dispute.<sup>1</sup> Indeed, the Appellate Body in *Argentina OCTG* drew three conclusions with respect to issues that are identical to those in this dispute: (1) statistical evidence does not suffice to prove that the Sunset Policy Bulletin is inconsistent with US WTO obligations; (2) certain statutory provisions related to the determination of likelihood of continuation or recurrence of injury are not inconsistent with US WTO obligations; and (3) the likelihood-of-injury determination examined in *Argentina OCTG* – which is the same as the determination at issue in this dispute – is not inconsistent with US WTO obligations. In addition, the Appellate Body's reasoning that individual company determinations in sunset reviews are not subject to Article 11.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement"), although order-wide determinations are, is equally applicable in this dispute with respect to Article 11.2.

#### **Relevance of the Report on Issues Relating to Likelihood of Dumping**

##### Sunset Policy Bulletin

2. The United States has argued, in *Argentina OCTG* as well as this dispute, that statistical evidence of the type offered both by Mexico and Argentina is not probative on the question of whether the Sunset Policy Bulletin is inconsistent with Article 11.3.<sup>2</sup> The panel in *Argentina OCTG* concluded, based on the same statistical evidence presented here by Mexico, that the Sunset Policy Bulletin is inconsistent with Article 11.3.<sup>3</sup> The Appellate Body reversed the panel and concluded that the panel's reliance on this statistical evidence was a failure to make an objective assessment of the matter, as required by Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*.<sup>4</sup>

3. The evidence and arguments Mexico has presented in this dispute are the same as those presented by Argentina. For example, in its first written submission, Mexico states that it "is prepared to demonstrate the existence of a WTO-inconsistent presumption" by presenting the "results of its analysis of all the Department's sunset reviews."<sup>5</sup> The evidence in support of this statement was "Mexico's Exhibit MEX-62"<sup>6</sup> – the equivalent

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<sup>1</sup> The panel and Appellate Body reports in *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (WT/DS268) ("*Argentina OCTG*") will be considered by the Dispute Settlement Body on December 17, 2004.

<sup>2</sup> Appellate Body Report, *Argentina OCTG*, circulated November 29, 2004, paras. 204, 214; see, e.g., US First Written Submission, paras. 105-109, US Second Written Submission, paras. 11-21.

<sup>3</sup> Appellate Body Report, para.

<sup>4</sup> Appellate Body Report, para. 215.

<sup>5</sup> First Submission of Mexico, para. 99.

<sup>6</sup> First Submission of Mexico, para. 113. Mexico updated its exhibit to include subsequent reviews, Exhibit MEX-65.

to the exhibit Argentina presented in its dispute, and which the Appellate Body rejected as insufficient. Likewise, Mexico offers the same analysis of the text of the Sunset Policy Bulletin as that offered by Argentina. The Argentina OCTG panel concluded that the text of the Sunset Policy Bulletin did not establish that the three scenarios set out in the SPB are regarded as determinative for purposes of Commerce's likelihood determination.<sup>7</sup>

4. Mexico has presented the same factual record to this Panel as Argentina offered to the *Argentina OCTG* panel, which the Appellate Body rejected as insufficient to establish that the Sunset Policy Bulletin is inconsistent with Article 11.3. The Panel should reach the same conclusion.

5. The Appellate Body not only rejected Argentina's Article 11.3 claim because of the lack of evidence but also Argentina's GATT Article X:3(a) claim, for the same reason. The Appellate Body stated that "allegations that the conduct of a WTO Member is biased or unreasonable are serious under any circumstances. Such allegations should not be brought lightly, or in a subsidiary fashion. A claim under Article X:3(a) . . . must be supported by solid evidence; the nature and scope of the claim, and the evidence adduced by the complainant in support of it, should reflect the gravity of the accusations inherent in [such] claims."<sup>8</sup> The Appellate Body noted that Argentina relied on the same statistical evidence for its Article X:3(a) claim as for its claim that the Sunset Policy Bulletin was inconsistent with Article 11.3, and the Appellate Body rejected Argentina's Article X:3(a) claim for the same reason it rejected Argentina's Article 11.3 claim.<sup>9</sup> Mexico has also relied solely on the same statistical evidence in support of its Article X:3(a) claim.<sup>10</sup> Therefore, Mexico has failed to prove its claim, and that claim must be rejected.

6. With respect to whether Commerce's "consistent practice" is inconsistent with Article 11.3, the United States reiterates that this claim is not within the terms of reference of this dispute. Nevertheless, the United States offers the following observations regarding the substance of Mexico's argument. Mexico stated that it was "undisputed" that the Appellate Body had already concluded that "practice" is a measure subject to dispute settlement.<sup>11</sup> Yet the Appellate Body makes it clear in *Argentina OCTG* that it has drawn no such conclusion, stating that it expresses no view as to whether a "practice" may be challenged as a measure.<sup>12</sup> The Appellate Body also rejected statistical evidence as sufficient to support a claim that this "practice" was inconsistent with US obligations, even assuming *arguendo* that it were a measure.<sup>13</sup>

### **Relevance of Report on Issues Relating to Administrative Reviews**

7. The Appellate Body in *Argentina OCTG* analyzed whether company-specific determinations are subject to Article 11.3 when a Member conducts its reviews on an order-wide basis. The Appellate Body concluded that the correct analysis under Article 11.3 is whether the order-wide determination is consistent with that article.<sup>14</sup> Company-specific determinations are not subject to Article 11.3, except to the extent that they affect the order-wide determination.

8. As the United States noted in this dispute, Article 11.2 reviews may be conducted on an order-wide basis. The Appellate Body stated with respect to Article 11.3, "Members are not required by Article 11.3 to make their likelihood-of-dumping determinations on a company-specific basis ...."<sup>15</sup> The Appellate Body's reasoning with respect to Article 11.3 reviews is equally applicable to Article 11.2 reviews. The United States is not required to conduct Article 11.2 reviews on a company-specific basis, and company-specific

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<sup>7</sup> Panel Report, WT/DS268/R, circulated 16 July 2004, paras. 7.152-7.157.

<sup>8</sup> Appellate Body Report, para. 217.

<sup>9</sup> Appellate Body Report, paras. 218-219.

<sup>10</sup> *See, e.g.*, First Submission of Mexico, paras. 359-366.

<sup>11</sup> *See, e.g.*, First Submission of Mexico, para. 118.

<sup>12</sup> Appellate Body Report, para. 220.

<sup>13</sup> Appellate Body Report, para. 220.

<sup>14</sup> Appellate Body Report, paras. 231-232.

<sup>15</sup> Appellate Body Report, para. 231.



administrative revocation reviews are the only ones requested by Tamsa and Hylsa. These company-specific reviews are not required by Article 11.2. The Panel should reject Mexico's argument that they are.

### **Relevance of Report on Issues Relating to Likelihood of Injury**

9. With respect to the injury-related claims, the panel and Appellate Body in *Argentina OCTG* addressed legal and factual issues that are the same in all material respects to those raised by Mexico in this dispute. Indeed, the likelihood of injury determination is the same in both disputes. The Appellate Body's analysis of the injury issues is persuasive. The United States believes that this Panel should, like the *Argentina OCTG* panel and Appellate Body, conclude that neither the statute nor the determination is inconsistent with US WTO obligations.

10. At the outset, we note that the Appellate Body upheld all of the *Argentina OCTG* panel's findings on injury, all of which were resolved in favour of the United States. We addressed the relevance of the panel's findings in response to a question from this Panel.<sup>16</sup>

### Claims Under Article 3 of the Anti-Dumping Agreement

11. First, the Appellate Body upheld the panel's finding that the obligations set forth in Article 3 of the Anti-Dumping Agreement do not apply to likelihood-of-injury determinations in sunset reviews.<sup>17</sup> In that dispute, Argentina argued, just as Mexico has argued in this dispute, that by virtue of the reference to the definition of "injury" in footnote 9 of the Anti-Dumping Agreement, all references in the Agreement to "injury" require a determination made in conformity with the provisions of Article 3.<sup>18</sup> The Appellate Body disagreed.

12. As the Appellate Body found, it does not follow from the single definition of "injury" in footnote 9 that the provisions of Article 3 are applicable to sunset determinations under Article 11.3.<sup>19</sup> The Appellate Body explained that Argentina was confusing the *definition* of injury, which was contained in footnote 9, with the *determination* of injury, which is addressed by the provisions of Article 3 that lay down steps involved and evidence to be examined for the purposes of making a *determination* of injury.

13. Also persuasive is the Appellate Body's finding that the Anti-Dumping Agreement distinguishes between "determinations of injury" addressed in Article 3 and determinations of likelihood of "continuation or recurrence ... of injury," addressed in Article 11.3.<sup>20</sup> As the Appellate Body explained, Article 11.3 contains no cross-references to Article 3 that would make Article 3 provisions applicable to sunset reviews. Nor does Article 3 indicate that whenever the term "injury" appears in the Anti-Dumping Agreement, a determination of injury must be made following the provisions Article 3.

14. With respect to the threshold issue of why the provisions of Article 3 do not apply to Article 11.3 sunset reviews, the Appellate Body concluded that:

Given the absence of textual cross-references, and given the different nature and purpose of these two determinations, we are of the view that, for the "review" of a determination of injury that has already been established in accordance with Article 3, Article 11.3 does not require that injury again be determined in accordance with Article 3. We therefore

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<sup>16</sup> US Answers to Second Set of Panel Questions, paras. 15-20.

<sup>17</sup> Appellate Body Report, para. 285.

<sup>18</sup> See Appellate Body Report, para. 275.

<sup>19</sup> Appellate Body Report, para. 277.

<sup>20</sup> Appellate Body Report, para. 278.

conclude that investigating authorities are not *mandated* to follow the provisions of Article 3 when making a likelihood-of-injury determination.<sup>21</sup>

15. This analysis applies equally to the Article 3 claims raised by Mexico in the instant dispute. To the extent Mexico argues that the United States has failed to comply with Articles 3.2., 3.3, 3.4, 3.5, 3.7, and 3.8 of the Anti-Dumping Agreement, the United States submits that the well-reasoned analysis of the Appellate Body leads to the conclusion that the United States has not acted inconsistently with those provisions, as there is no requirement that a Member apply those provisions in a sunset review.

16. As the United States has previously noted before this Panel,<sup>22</sup> Article 17.6(i) provides that an authority's establishment of the facts in a sunset review must be "proper," and that the evaluation of those facts must be "unbiased and objective."<sup>23</sup>

### Cumulation

17. In the Argentina dispute, the Appellate Body addressed and rejected a similar claim to that raised by Mexico concerning the permissibility of cumulation in sunset reviews. The Appellate Body recalled that Article 11.3 makes no reference to cumulation or to Article 3.3.<sup>24</sup> Rejecting an argument that is advanced by Mexico in the instant proceedings, the Appellate Body found that the mere use of the word "duty" in the singular in Article 11.3 does not necessarily suggest that likelihood-of-injury determinations must be made on a Member-by-Member basis.<sup>25</sup> In this regard, the Appellate Body observed, as the United States has pointed out to this Panel, that even where a Member issues an anti-dumping order applicable to products from one country, the order assigns separate duties to individual exporters from that country, and that duties may vary from country to country. Notwithstanding these variations in duties, Article 9.2 of the Anti-Dumping Agreement literally provides for the collection of a "duty," although there actually may be variations in the margins and countries to which such "duty" applies. As the Appellate Body found, the reference to a "duty" in the singular in Article 11.3 may likewise refer to duties imposed with respect to multiple sources of the imported product.

18. Having found that nothing in Article 11.3 itself prohibited cumulation, the Appellate Body examined Article 3.3 – the only provision in the Anti-Dumping Agreement that specifically addresses the practice of cumulation.<sup>26</sup> Consistent with the arguments the United States presented to this Panel, the Appellate Body observed that Article 3.3 mentions only the injury analyses undertaken in an original investigation, and that there are no cross-references between Articles 3.3 and 11.3.

19. Citing to the underlying purposes of cumulation discussed in *EC – Tube or Pipe Fittings*,<sup>27</sup> the Appellate Body found that the rationale for cumulation applies both to original determinations as well as to sunset reviews.<sup>28</sup> As the Appellate Body noted, "injury to the domestic industry – whether *existing* injury or *likely future* injury – might come from several sources simultaneously."<sup>29</sup> The Appellate Body found that cumulation remains a "useful tool" in both inquiries to ensure that all sources of injury and their cumulative

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<sup>21</sup> Appellate Body Report, para. 280 (emphasis in original).

<sup>22</sup> US First Submission (21 April 2004) at para. 234 footnote 247 and at para. 263 footnote 272.

<sup>23</sup> Anti-Dumping Agreement, Article 17.6(i).

<sup>24</sup> Appellate Body Report, para. 292.

<sup>25</sup> Appellate Body Report, para. 293.

<sup>26</sup> Appellate Body Report, para. 294.

<sup>27</sup> Appellate Body Report, *European Communities - Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted August 18, 2003, para. 116.

<sup>28</sup> Appellate Body Report, paras. 296-297.

<sup>29</sup> Appellate Body Report, para. 296.

impact are taken into account in the investigating authority's original injury and sunset likelihood determinations.<sup>30</sup>

20. The United States believes the textual and contextual analysis of the Appellate Body is correct, and urges this Panel to be guided by that analysis and to reject Mexico's contention that the Agreement prohibits cumulation in sunset reviews. Likewise, this Panel should reject Mexico's argument that the ITC was required to satisfy the prerequisites for cumulation as set forth in Article 3.3. Addressing an identical claim made by Argentina, the Appellate Body noted that there is no textual support for that contention, and that the text of Article 3.3 in fact plainly limits its applicability to original investigations.<sup>31</sup>

#### The Interpretation of Likely

21. Mexico has argued to this Panel that the Argentina panel did not address the WTO consistency of the "likely" standard applied by the ITC in the OCTG sunset review.<sup>32</sup> The United States previously responded to this assertion by noting that the Argentina panel addressed this issue, first by recognizing that the determination on its face was consistent with the "likely" requirements in Article 11.3 given that the ITC used the phrase "likely" in making its overall determination.<sup>33</sup> The panel reasoned that, inasmuch as the ITC made a determination which it stated was based on the likely standard, then the standard for the Panel's review of that conclusion had to be whether the ITC assessed the evidence objectively. The Appellate Body stated that "[w]e agree with the United States that because the USITC had explicitly stated in its final determination that it applied the 'likely' standard, 'the only way for the Panel to assess whether that standard was in fact applied was to evaluate whether the facts supported that finding.'"<sup>34</sup>

22. In light of the Appellate Body's findings, there is no basis for Mexico to continue to assert that the Argentina report does not address both the WTO-consistency of the ITC's "likely" standard and the application of that standard to the facts of the OCTG sunset review.

23. The Appellate Body also upheld the panel's decision not to resort to statements of the ITC before domestic courts or a NAFTA panel.<sup>35</sup> As the Argentina panel reasonably found, such statements were "not relevant" to the WTO dispute, because the panel's role was to assess the meaning of "likely" within the WTO legal system.<sup>36</sup> Applying the same reasoning, this Panel should likewise decline to rely on statements the ITC made in domestic cases concerning compliance with the US statute. Rather, this Panel, like the Argentina panel and the Appellate Body must focus on the consistency of the standard applied by the ITC with the Anti-Dumping Agreement.

#### Consistency of ITC's Determination with Article 11.3 "Likelihood" Standard

24. With respect to the ITC's application of the "likely" standard in the OCTG sunset review, the Appellate Body upheld the Argentina panel's review of the ITC determination in all respects.<sup>37</sup> The United States has previously explained to this Panel the merits of the Argentina panel's findings on these factual

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<sup>30</sup> Appellate Body Report, para. 297.

<sup>31</sup> Appellate Body Report, para. 301.

<sup>32</sup> See Mexico's Closing Statement in the Panel's Second Substantive Meeting With the Parties, para. 2; Mexico's Response to Questions to the Parties Following the Second Meeting, paras. 11-14.

<sup>33</sup> See United States Comments on Mexico's Responses to Questions from the Panel in Connection with the Second Substantive Meeting of the Panel, paras. 4-6, *citing* Argentina Panel Report at paras. 7.283 - 7.284.

<sup>34</sup> Appellate Body Report, paras. 311.

<sup>35</sup> Appellate Body Report, para. 312.

<sup>36</sup> Appellate Body Report, para. 312, *citing* Argentina Panel Report, para. 7.285.

<sup>37</sup> Appellate Body Report, paras. 315-352.

questions.<sup>38</sup> The Appellate Body's discussion confirms that the ITC's OCTG sunset determination was consistent with the objectivity and evidentiary requirements of the Anti-Dumping Agreement.

25. The United States reiterates that the ITC determination at issue in the Argentina case is exactly the same determination that Mexico challenges in this dispute. Further, Mexico's challenges to the ITC's determination echo those arguments that were made by Argentina and rejected by the panel and the Appellate Body in the Argentina dispute. The United States believes the analysis and findings in the Argentina dispute are well-founded and based upon the proper standard of review, and urges this Panel to take a consistent approach in its review of the same ITC determination.

26. At the outset, the Appellate Body explained that the Article 11.3 "likely" standard applies to the overall determinations regarding dumping and injury, and that the standard "need not necessarily apply to each factor considered in rendering the overall determinations of dumping and injury."<sup>39</sup> The Appellate Body upheld the panel's review of the ITC's factual conclusions on all aspects of the ITC's likely injury determination, *viz.*, cumulation, likely volume of cumulated dumped imports, likely price effects of the dumped imports, and likely impact of dumped imports on the domestic industry if the order were revoked.<sup>40</sup>

27. In addressing these findings, the Appellate Body disagreed with Argentina's contention (and a contention that is also raised by Mexico in this dispute) that the ITC's references to information gleaned in the original investigation rendered the sunset determination WTO-inconsistent for failure to make a "fresh determination" on the likelihood of future injury.<sup>41</sup> The Appellate Body explained that its earlier finding in *US–Carbon Steel*<sup>42</sup> does not prohibit investigating authorities from referring in a sunset review to information related to the original investigation.<sup>43</sup> As the Appellate Body found, and as the United States has pointed out to this Panel, the information from the original investigation to which the ITC cited was relevant in particular to the cumulation question and in general to the task of assessing whether expiry of the orders would be likely to lead to continuation or recurrence of injury.

28. The Appellate Body upheld the panel's finding that it was reasonable for the ITC to base its determination on an analysis of the incentives for subject producers to devote more of their productive capacity to producing and shipping casing and tubing to the United States market.<sup>44</sup> In the Argentina dispute, as in the instant dispute, the complaining party focused on two of the five factors cited by the ITC as supporting its conclusion of likely product shifting. In particular, Argentina, like Mexico, challenged the ITC findings that subject country producers also face import barriers in other countries on the same or related products, and that prices for casing and tubing sold in the US market are higher than the prices for such products in other world markets. The Argentina panel found that there was a sufficient factual basis for the ITC's findings;<sup>45</sup> this Panel should find so as well. The Appellate Body saw no need to modify the Argentina panel's conclusions.<sup>46</sup>

29. This Panel should also find, as did the Argentina panel, that the ITC's determination regarding the likely price effects of cumulated dumped imports was based on an objective examination of the evidence in

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<sup>38</sup> See, e.g., Opening Statement of the United States at the Second Meeting of the Panel with the Parties para. 49; Answers of the United States of America to Questions from the Panel to the Parties in Connection with the Second Substantive Meeting (13 September 2004), para. 20; United States Comments on Mexico's Responses to Questions from the Panel (4 October 2004), paras. 6-17.

<sup>39</sup> Appellate Body Report, para. 323.

<sup>40</sup> See Appellate Body Report, paras. 323, 342, 348, 352.

<sup>41</sup> Appellate Body Report, para. 328.

<sup>42</sup> Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products From Germany*, WT/DS213/AB/R, adopted 19 December 2002, para. 87.

<sup>43</sup> *Argentina OCTG* Appellate Body Report, para. 328.

<sup>44</sup> Appellate Body Report, paras. 334-335.

<sup>45</sup> *Argentina Panel Report*, paras. 7.290-7.297.

<sup>46</sup> Appellate Body Report, paras. 334-335.

the record.<sup>47</sup> In upholding the panel's findings on this issue, the Appellate Body agreed that the price comparisons made by the ITC were adequate and supported the ITC's price-underselling analysis.<sup>48</sup> This Panel should reject Mexico's contentions regarding the limited number of price comparisons that the ITC made; as the Appellate Body found, "the small volume of export sales following the imposition of the anti-dumping orders limited the number or comparisons the ITC could make."<sup>49</sup>

30. The Appellate Body's affirmance of the Argentina panel's likely impact analysis is also instructive for this Panel. Notwithstanding the positive state of the domestic industry with the order in place, the panel properly upheld the ITC's findings that in the circumstances of this case the likely increased volume and negative price effects of dumped imports would also have a negative impact on the domestic industry.<sup>50</sup>

#### The Time Frame in a Likelihood-of-Injury Determination

31. The Appellate Body upheld the Argentina panel's findings that sections 752(a)(1) and (5) of the Tariff Act are not inconsistent with Article 11.3 of the Anti-Dumping Agreement.<sup>51</sup> More specifically, both the panel and the Appellate Body found that the statutory standard of whether injury is likely to continue or recur within a "reasonably foreseeable time" is not inconsistent with Article 11.3.<sup>52</sup>

32. The United States has previously submitted to this Panel that the analysis applied by the Argentina panel on this issue is correct. The Appellate Body likewise found that the Argentina panel properly analyzed this issue.<sup>53</sup>

33. Argentina, like Mexico in the instant dispute, claimed that the US standard creates an "impermissible gap" during which an anti-dumping duty would remain in effect without the existence of present or threatened material injury.<sup>54</sup> Following the reasoning of the Argentina panel and the Appellate Body, this Panel should reject that argument as "nothing more than a theoretical possibility" which unjustifiably attempts to import the Article 3.7 "imminent" standard for original threat of injury determinations into Article 11.3, notwithstanding the distinct nature and purpose of sunset reviews.<sup>55</sup>

34. The Appellate Body further upheld the Argentina panel's finding that the ITC's application of the "reasonably foreseeable time" standard in the OCTG was consistent with the Agreement.<sup>56</sup> The panel and the Appellate Body rejected Argentina's argument (which is echoed by Mexico) that the ITC did not apply the proper "likely" standard because it failed to explicitly mention the parameters of the likely injury time frame.<sup>57</sup> The panel concluded that the ITC's determination of likelihood of continuation or recurrence of injury rested on a sufficient factual basis, and the Appellate Body agreed.<sup>58</sup> This Panel's review of the same facts under the proper standard should likewise lead to the same conclusion as that reached in the Argentina case.

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<sup>47</sup> Argentina Panel Report, para. 7.306.

<sup>48</sup> Appellate Body Report, para. 346.

<sup>49</sup> Appellate Body Report, para. 346.

<sup>50</sup> Appellate Body Report, paras. 349-352.

<sup>51</sup> Appellate Body Report, paras. 354-361.

<sup>52</sup> Appellate Body Report, para. 36; Argentina Panel Report, paras. 7.193 and 8.1(c).

<sup>53</sup> Appellate Body Report, para. 360.

<sup>54</sup> See, e.g., Second Written Submission of Mexico, paras. 166-167.

<sup>55</sup> Appellate Body Report, para. 359.

<sup>56</sup> Appellate Body Report, paras. 362-364.

<sup>57</sup> Appellate Body Report, para. 364.

<sup>58</sup> Appellate Body Report, para. 364.