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

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

September 13, 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 percent 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 a 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' behavior 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.[1]

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 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 U.S. 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 participate in the U.S. 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 U.S. market may be dependent upon such sales.

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[1] See U.S. Second Written Submission, para. 61, and representative cases cited therein (Exhibits U.S. 32, 34, 36, 37, 38).

10. The volume of an exporter's pre-order sales in the U.S. 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 U.S. 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 U.S. market in the future, were the market conditions (including the presence or absence of a dumping order) favorable for making sales there. If an exporter can sell the subject merchandise in the U.S. market at higher non-dumped prices and, thus, retain a significant portion of U.S. sales without dumping, that exporter is less likely to dump in the U.S. market were the order to be revoked. Conversely, a company whose U.S. sales are so intrinsically linked to dumping that more than three years after the order it still cannot sell even 1 percent of the volume it sold when it was dumping, such as TAMSA and Hylsa 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 U.S. 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. TAMSA and Hylsa 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 U.S. 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 U.S. municipal law. Under U.S. law, the *Sunset Policy Bulletin* is merely guidance and cannot require – or prohibit – Commerce from taking action. Therefore, as a matter of U.S. 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 U.S. 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 U.S. 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.[2] 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.[3] 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*.[4] 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

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[2] *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.

[3] Argentina Panel Report, para. 7.270.

[4] 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 January 9, 2004, paras. 106-107.

dispute applied the corollary and concluded that an investigating authority is therefore not required to make an injury determination in a sunset review.[5]

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.[6] 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.[7] 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;[8] the panel also rejected Argentina's argument that the use of the word "duty" in Article 11.3 was meant to indicate that the drafters intended cumulation to be prohibited in sunset reviews.[9]

20. Fourth, the panel correctly concluded that the ITC applied the "likely" standard in this determination. The panel noted that the U.S. statute and the determination in question both use the term "likely."[10] 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.

[5] Argentina Panel Report, para. 7.274.
[6] Argentina Panel Report, para. 7.331.
[7] Argentina Panel Report, para. 7.332.
[8] Argentina Panel Report, para. 7.333.
[9] Argentina Panel Report, para. 7.334.
[10] Argentina Panel Report, para. 7.277.