WORLD TRADE ORGANIZATION

WT/DS282/R
20 June 2005

(05-2464)

Original: English

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

Report of the Panel

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India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
Mexico – Corn Syrup	Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R and Corr.1, adopted 24 February 2000, DSR 2000:III, 1345
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
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US – Export Restraints	Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001, DSR 2001:XI, 5767
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US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004
US – Oil Country Tubular Goods Sunset Reviews	Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/R and Corr.1, adopted 17 December 2004, as modified by the Appellate Body Report, W/DS/268/AB/R
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

I. INTRODUCTION

1.1 On 18 February 2003, the Government of Mexico requested consultations[1] with the Government of the United States of America (United States) pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the AD Agreement) regarding the final determinations of the United States Department of Commerce (USDOC) and the United States International Trade Commission (USITC) in the sunset and fourth administrative reviews of oil country tubular goods (OCTG) from Mexico, as well as certain United States laws, regulations, procedures, administrative provisions and practice. Mexico and the United States held consultations on 4 April 2003, but they failed to settle the dispute.

1.2 On 29 July 2003, Mexico requested the Dispute Settlement Body (DSB) to establish a panel pursuant to Article XXIII of the GATT 1994, Article 6 of the DSU and Article 17 of the AD Agreement.[2]

1.3 At its meeting on 29 August 2003, the DSB established a Panel pursuant to the request by Mexico in document WT/DS282/2, in accordance with Article 6 of the DSU. At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by Mexico in document WT/DS282/2, the matter referred to the DSB by Mexico in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

1.4 On 11 February 2004, the parties agreed to the following composition of the Panel:

Chairman: Mr. Christer Manhusen

Members: Mr. Alistair James Stewart
Ms. Stephanie Sin Far Man

1.5 Argentina, Canada, China, the European Communities, Japan, Chinese Taipei and Venezuela reserved their third-party rights.

1.6 The Panel met with the parties on 25-26 May 2004 and on 17-18 August 2004. It met with the third parties on 26 May 2004. The Panel provided its interim report to the parties on 24 March 2005

II. FACTUAL ASPECTS

2.1 At issue in this dispute are a number of determinations by the USDOC and the USITC in connection with reviews of anti-dumping duties on imports of OCTG from Mexico, as well as certain laws, regulations, procedures, administrative provisions and practice governing those reviews. Specifically, Mexico challenges the determinations of both the USDOC and USITC in the sunset review of the anti-dumping duty order, and the determination of USDOC in the fourth administrative review. In the sunset review, USDOC determined that the expiry of the anti-dumping duty would be

[1] WT/DS282/1-G/L/605-G/ADP/D47/1.
[2] WT/DS268/2 (Annex F).

likely to lead to continuation or recurrence of dumping,[3] and USITC determined that the expiry of the anti-dumping duty would be likely to lead to continuation or recurrence of injury.[4] As a consequence, the anti-dumping duty order on imports of OCTG from Mexico was continued. In the fourth administrative review, USDOC determined that neither of the two exporters of OCTG from Mexico requesting the review qualified for revocation of the anti-dumping duty, and therefore declined to terminate the measure.[5]

2.2 The anti-dumping investigation on OCTG from Mexico was initiated in 1994, and thus, in accordance with Article 18.3 of the AD Agreement was not subject to the obligations set out in that Agreement. Therefore, the original investigation was carried out under pre-WTO US laws and regulations.

2.3 In the original investigation, USDOC calculated a dumping margin for the largest of the Mexican OCTG producers, TAMSA, which accounted for about 60 per cent of the exports to the United States during the period of investigation, 1 January 1994 through 30 June 1994. Three other potential respondent companies were not individually investigated. Following investigation, USDOC calculated a margin for TAMSA, based in part on facts available, of 23.79 per cent,[6] which was also applied to exports from "all other" Mexican producers, including Hylsa. The margin calculation for TAMSA was based, *inter alia*, on a constructed normal value. In constructing the normal value, USDOC chose not to rely on 1993 financial data provided by TAMSA, and instead used as facts available 1994 financial data TAMSA had filed with the Mexican Securities and Exchange Commission, concluding that it was more appropriate in light of the period of investigation. The USITC carried out an investigation of injury, and concluded that OCTG from Mexico, and four other countries (Argentina, Italy, Japan, and Korea), was causing material injury to the US domestic industry. Subsequently, on 11 August 1995, USDOC issued the anti-dumping duty order on OCTG from Mexico.

2.4 USDOC initiated administrative reviews in each year following imposition of the original anti-dumping duty order. During the period relevant to the first review, 11 August 1995 to 31 July 1996, there were no exports by the companies reviewed, including TAMSA and Hylsa, and USDOC terminated the review. For the second period, 1 August 1996 to 31 July 1997, USDOC calculated zero margins for both TAMSA and Hylsa, which became the effective deposit rate in March 1999. For the third period, 1 August 1997 to 31 July 1998, both TAMSA and Hylsa again requested review, and USDOC calculated a zero margin for TAMSA. However, Hylsa withdrew its request and USDOC terminated the review with respect to Hylsa, resulting in the collection of duties in the amount of the original deposit rate. Both companies again requested review for the fourth period, 1 August 1998 to 31 July 1999. For that review, USDOC again calculated a zero margin for TAMSA, and calculated a margin of 0.79 per cent for Hylsa.

2.5 Concurrent with the fourth administrative review both TAMSA and Hylsa requested revocation of the anti-dumping duty under relevant US legislation and regulations which provide that USDOC may revoke an anti-dumping duty if it finds, *inter alia*, that there was no dumping for three years, and that continued application of the anti-dumping duty order is not otherwise necessary to offset dumping. In response to the requests by TAMSA and Hylsa, USDOC determined that TAMSA

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[3] *Oil Country Tubular Goods from Mexico; Final Results of Sunset Review of Antidumping Duty Order*, 66 Fed. Reg. 14,131 (9 March 2001) (Exhibit MEX-19) (hereinafter "USDOC Sunset Determination").

[4] *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) (hereinafter "USITC Sunset Determination").

[5] *Oil Country Tubular Goods from Mexico: Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part*, 66 Fed. Reg. 15,832 (21 March 2001) (Exhibit MEX-9) (hereinafter "USDOC Fourth Administrative Review Determination").

[6] This margin was later amended to 21.70 per cent.

did not sell the subject OCTG in commercial quantities during the preceding three years, and there was a dumping margin of 0.79 per cent calculated for Hylsa. Therefore, USDOC concluded that neither company qualified for revocation, and denied the requests on 21 March 2001.[7]

2.6 On 3 July 2000, while the fourth administrative review was underway, USDOC initiated a sunset review of the anti-dumping duty order on OCTG from Mexico. On 9 March 2001, USDOC made a final determination, following a "full" sunset review[8], that there was a likelihood of continuation or recurrence of dumping. USDOC reported to the USITC that the magnitude of the dumping margin likely to prevail was 21.70 per cent, the rate calculated in the original investigation as amended, for all Mexican producers.

2.7 The USITC meanwhile had undertaken the investigation of the injury side of the sunset review. In its original determination, the USITC had found that there were two US industries producing two separate products "like" the imports, and had made separate affirmative determinations. On 10 July 2001, the USITC made a final determination that the revocation of the anti-dumping duty orders on one of the relevant products, casing and tubing, from Mexico, and the four other countries subject to the original order (Argentina, Italy, Japan, and Korea) was likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. With respect to the other product, the ITC determined that revocation of the orders on drill pipe from Mexico and Argentina was not likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. Consequently, the anti-dumping duty orders with respect to drill pipe from Mexico and Argentina were revoked. This aspect of the USITC's determination is not at issue in this dispute.

2.8 As a result of the determinations by USDOC and USITC, the anti-dumping duty order on OCTG from Mexico was continued effective 25 July 2001.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. MEXICO

3.1 Mexico requests the Panel to find that:

- the statute (19 U.S.C. § 1675a(c)(1)), the Statement of Administrative Action (SAA) (pages 889-890) and the Sunset Policy Bulletin (SPB) (section II.A.3) as such violate Article 11.3 of the AD Agreement because they establish a presumption that termination of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping, which presumption is based on a reduction in import volumes or the mere existence of dumping margins being given decisive weight, while the burden is placed on respondents even to have USDOC consider any other factors;

- the statute (19 U.S.C. § 1675a(c)(1)), the SAA (pages 889-890) and the SPB (section II.A.3) as such violate Article 11.3 of the AD Agreement because by requiring the USDOC to attach decisive weight to the mere existence of dumping margins and/or a decline in import volume, these instruments establish a standard that is less than the "likely" or "probable" required by Article 11.3;

[7] USDOC Fourth Administrative Review Determination, *supra* note 5.

[8] US law provides that "full" sunset reviews are conducted where the response to the notice of initiation is adequate. USDOC normally will consider the response to the notice of initiation to be adequate if it receives complete responses from a domestic interested party and respondent interested parties accounting on average for more than 50 per cent of the total exports of subject merchandise.

- USDOC's consistent sunset review practice in applying the statute (19 U.S.C. § 1675a(c)(1)), the SAA (pages 889-890) and the SPB (section II.A.3) not only further demonstrates the WTO-inconsistent presumption that these instruments embody, but also itself violates as such Article 11.3 of the AD Agreement; and

- USDOC violated Article 11.3 of the AD Agreement because USDOC: (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;

- USITC's standard for determining whether termination of the anti-dumping duty would be likely to lead to continuation or recurrence of injury as such violates Article 11.3 of the AD Agreement because the standard is something less than "likely" or "probable" as required by Article 11.3;

- USITC violated Article 11.3 of the AD Agreement because USITC applied a standard that was less than the "likely" or "probable" standard required by Article 11.3;

- USITC violated Article 11.3 of the AD Agreement because USITC failed to base its likelihood of injury determination on positive evidence;

- USITC violated Articles 3.1, 3.2, 3.4, and 3.5 of the AD Agreement, and violated 11.3 of the Antidumping Agreement (independently of the application of Article 3) by failing to conduct an objective examination of the record and failing to base its likelihood of injury determination on positive evidence. The USITC'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 when viewed in light of an impartial examination 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 AD 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;

- USITC violated Article 3.4 of the AD Agreement because USITC failed to evaluate all the relevant economic factors and indices having a bearing on the state of the industry, including those enumerated in Article 3.4 of AD Agreement;

- USITC violated Article 3.4 and Article 11.3 (independently of the application of Article 3) by: (i) relying on the margin likely to prevail reported by USDOC to USITC for purposes of the USITC's likelihood determination; or (ii) alternatively, failing to consider the magnitude of the margin of dumping in determining that injury would be likely to continue or recur;

- USITC violated Article 3.5 of the AD Agreement because USITC failed to: (i) demonstrate a causal relationship between the dumped imports and likely injury to the domestic industry; (ii) separate and distinguish the effects of other factors causing the likely injury from the effects of the dumping; and (iii) base its determination on the effects of the dumping on the domestic industry;

- independent of the applicability of Article 3.5, USITC violated the causation requirements inherent in Article VI of the GATT and Article 11.1 of the AD Agreement and thereby also

applicable to Article 11.3 injury determinations, when it determined that termination of the duty would be likely to lead to continuation or recurrence of injury;

- USITC violated Articles 3.7 and 3.8 of the AD Agreement because USITC based its likelihood of injury determination on conjecture and remote possibility and failed to satisfy the special requirements of Articles 3.7 and 3.8 for making prospective injury determinations;

- USITC violated Articles 11.3 and 3.3 because these provisions preclude cumulation in Article 11.3 reviews, and USITC cumulatively assessed the effects of OCTG imports from Argentina, Italy, Japan, Korea, and Mexico to determine whether termination of the anti-dumping duty on Mexican OCTG imports would be likely to lead to continuation or recurrence of injury; and

- in the alternative, *assuming arguendo*, that a cumulative injury analysis is permitted in sunset reviews, USITC violated Articles 11.3 and 3.3 because USITC failed to apply the requirements of Article 3.3 in this case;

- irrespective of the applicability of Article 3.3 to Article 11.3, the USITC failed to satisfy the requirements inherent in the conduct of any cumulative injury assessment; specifically, the USITC 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 imports would be simultaneously present in the US market;

- 19 U.S.C. §§ 1675a(a)(1) and (5) as such violate Articles 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 11.1, and 11.3 of the AD Agreement because they require that USITC determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" and that USITC "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time"; and

- USITC violated Articles 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 11.1, and 11.3 of the AD Agreement by applying 19 U.S.C. §§ 1675a(a)(1) and (5) in the sunset review of OCTG from Mexico;

- USDOC violated Article 11.2 of the AD Agreement because USDOC did not terminate the anti-dumping duty immediately upon a showing that the continued application of the duty was not "necessary to offset dumping";

- USDOC violated Articles 11.2, 2.4, and 2.4.2 of the AD Agreement because USDOC "zeroed" Hylsa's negative margins and relied 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;

- USDOC violated Article 11.2 of the AD Agreement because USDOC: (i) applied a standard which required a demonstration that dumping was "not likely" in the future; (ii) arbitrarily imposed a "commercial quantities" threshold test which has no basis in Article 11.2; and (iii) it ignored positive evidence that demonstrated that the measure was no longer necessary to offset dumping;

- USDOC violated Article X:2 of the GATT 1994 because USDOC imposed conditions on TAMSA for the termination of the anti-dumping duty in advance of the official publication of such conditions; and

- assuming *arguendo* that the Panel finds that the statute, the SAA and the Sunset Policy Bulletin do not establish a WTO-inconsistent presumption that violates Article 11.3 of the AD Agreement, then USDOC violated Article X:3(a) of the GATT 1994 by failing to administer in an impartial and reasonable manner US anti-dumping laws, regulations, decisions and rulings with respect to USDOC's conduct of sunset reviews of anti-dumping duty orders;

- the United States violated the provisions of Article VI of the GATT 1994, Articles 1 and 18 of the AD Agreement, and Article XVI:4 of the WTO Agreement because the United States violated its obligations under the AD Agreement;

- the United States violated Article 18.4 of the AD Agreement by failing to ensure the conformity with the above noted laws, regulations and administrative procedures with its WTO obligations; and

- the United States violated Article XVI:4 of the WTO Agreement by failing to ensure the conformity with the above noted laws, regulations and administrative procedures with its WTO obligations.

3.2 Mexico also requests the Panel to:

- recommend the United States to bring its measures into conformity with the covered agreements (AD Agreement, GATT 1994, WTO);

- suggest that the United States implement its recommendation by immediately revoking the anti-dumping duty on OCTG imports from Mexico.

B. THE UNITED STATES

3.3 The United States requests the Panel to reject Mexico's claims in their entirety. The United States requests the Panel to find that the claim set forth in paragraph 3.1 regarding USDOC's consistent sunset review practice violation as such of Article 11.3 of the AD Agreement is not within the Panel's terms of reference. The United States also requests the Panel to rule that exhibit MEX-68 presented by Mexico in the context of the second substantive meeting is inadmissible on the grounds that it is contrary to paragraph 14 of the Working Procedures for the Panel.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their written submissions and oral statements to the Panel and their answers to questions. The executive summaries provided by the parties of their submissions and oral statements, and their answers to questions, are attached to this Report as Annexes (see List of Annexes, pages iii and iv).[9]

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties, Argentina, Canada, China, the European Communities, Japan, Chinese Taipei and Venezuela are set out in their written submissions and oral statements to the Panel and their answers to questions. The third parties' submissions and oral statements, or

[9] The English and Spanish versions of Mexico's executive summaries are reproduced as submitted by Mexico in their original language.

executive summaries thereof, and their answers to questions, are attached to this Report as Annexes (see List of Annexes, pages iii and iv).[10] [11]

VI. INTERIM REVIEW

6.1 In accordance with the timetable for these proceedings, both parties submitted comments on the interim report, requesting review of precise aspects of the interim report on 4 April 2005. Neither party requested a further meeting with the Panel. The United States submitted an unsolicited letter on 11 April 2005, bringing to the Panel's attention certain aspects of an Appellate Body report issued after the 4 April deadline for requests for review of the interim report. On 18 April 2005, the parties submitted comments on each others' comments of 4 April. On 14 April 2005, Mexico submitted a letter objecting to the US letter of 11 April. We address below the various comments of the parties.

6.2 Turning first to Mexico's request for review, we note that the first two aspects of Mexico's request relate to the descriptive part of the Panel's report. First, Mexico requests that we include, as annexes to the report, comments filed by the parties in response to a request from the Panel for their views on the decision of the Appellate Body in *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*,[12] and the parties' comments on the draft descriptive part of the report. The United States did not comment on this aspect of Mexico's request.

6.3 With respect to the parties' comments on the Appellate Body decision in *US – Oil Country Tubular Goods Sunset Reviews*, as these were submitted in response to a specific request of the Panel, and set forth substantive arguments regarding the claims at issue in this case, we have included them as annexes to our final Report.

6.4 However, we decline the second part of Mexico's request, regarding the parties' comments on the draft descriptive part of the report. While it is well established that a panel's report in dispute settlement proceedings will include a descriptive part, nothing in the DSU requires that such a descriptive part exhaustively set forth all aspects of the parties' and third parties' arguments and positions in the proceedings. In this case, the annexes to the report contain executive summaries of the parties' and third parties' written and oral submissions, their answers to questions during the proceedings, and the comments of the parties on the Appellate Body decision in *US – Oil Country Tubular Goods Sunset Review*. We see no reason to also include the parties' comments on the draft descriptive part. Of course, those comments are part of the record of this proceeding, and thus available to the Appellate Body in the event of an appeal.

6.5 Mexico next requests 1) that the Panel amend paragraph 3.1 of the report to include requested findings Mexico had previously asked to be included in the descriptive part, in its comments on the draft descriptive part of the report, and 2) that the Panel make the requested findings. The United States objects to this request, asserting that the Panel has examined these arguments, and made the necessary findings, simply not in Mexico's favour. We did not include the requested findings in the descriptive part in response to Mexico's original comments, and decline to do so now. We note in this regard that it is common for the requests for findings in the descriptive part of panel reports to be drawn verbatim from parties' first submissions, which is what we originally did in this case.

[10] At the third party session Chinese Taipei made a brief statement referring the Panel to the arguments in its written submission, but did not submit a written or electronic version of its statement.

[11] The English and Spanish versions of Argentina's executive summaries are reproduced as submitted by Argentina in their original language.

[12] Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina ("US – Oil Country Tubular Goods Sunset Reviews*"), WT/DS268/AB/R, adopted 17 December 2004.

However, in response to the comments of the parties, we also included specific requests for findings that had been made in the parties' second written submissions. We did not include a number of Mexico's purported "requests for findings" which we considered to be summaries or restatements of arguments, and which we considered had not been clearly presented as requests for findings in the first or second written submissions. This category includes the elements which Mexico now seeks to have incorporated in the report. As a consequence of our decision, we make no additional findings.

6.6 Mexico notes that the interim report does not include findings with respect to Mexico's claim that the statute, the SAA, and the SPB establish a standard that is less than "likely" in violation of Article 11.3. Although it is not specified, Mexico apparently wishes the Panel to make the requested finding. The United States comments that, in concluding that the statute and SAA do not attach decisive weight to dumping margins and import volumes, but that USDOC perceived the SPB to do so, the Panel has already addressed Mexico's argument regarding Article 11.3 and made findings accordingly. We decline to make any changes in response to this comment of Mexico. As the United States notes, we have resolved the issue in dispute, Mexico's claim that the US statute, SAA, and SPB are, *per se*, in violation of Article 11.3 of the AD Agreement. We do not consider that we are obliged to make findings in this context with respect to each aspect of Mexico's arguments in support of its claim.

6.7 The United States has requested that we amend the first sentence of paragraph 3.1 of the report to reflect the fact that the requested findings listed therein were not all set out in Mexico's first written submission. We have made the necessary change.

6.8 Mexico next asserts that paragraph 7.8 of the interim report does not accurately reflect the parties' position with respect to the burden of proof. Mexico asks that the paragraph be redrafted to "reflect accurately" the differing position of the parties on this issue, and that the Panel should subsequently make a finding on it, explaining how it resolved the differences between the parties. The United States has not responded specifically to this comment. We decline to make any changes in response to this request. Paragraph 7.8 is accurate as drafted. The fact that the Panel asked questions concerning the burden of proof during the proceedings, to which the parties responded, does not change the fact that burden of proof was not raised by the parties as an issue, and no findings are necessary. We do not consider it necessary that, in our findings, we reflect all aspects of the parties' arguments, and developments in those arguments, over the course of the proceedings, particularly where, as here they concern questions as to which no findings are necessary to resolve the claims in dispute.

6.9 We have corrected the error in paragraph 7.51 of the report identified by Mexico.

6.10 Mexico refers to paragraphs 7.69 and 7.81 of the interim report, which refer to the fact that USDOC's final sunset determination was based solely on import volumes, and requests amendment of the report to "reflect the fact that Mexico repeatedly explained in its Written Submissions and in response to specific questions from the Panel the role that historic dumping margins played in the USDOC's final sunset determination". The United States objects to this request. We decline to make any changes in this regard. We have considered the references to submissions cited by Mexico, and in our view, these show at most that Mexico asserted that USDOC relied on historic dumping margins in its sunset determination, but do not "explain" their role in the determination. In any event, we have found that, in fact, historic dumping margins did not play a role in the determination, which was, as also asserted by Mexico, based solely on the decline in import volumes following imposition of the anti-dumping duty.

6.11 Mexico requests that we change paragraph 7.83 to delete the statement that Mexico cited no provision of the AD Agreement that requires "reporting" of a margin likely to prevail. The United States objects to this request. We decline to make the requested change. We have considered the references to submissions cited by Mexico, and while they do set forth argument concerning alleged

errors in the margin reported by USDOC to the USITC, we can find no reference therein to any provision of the AD Agreement which requires such reporting.

6.12 Mexico requests that the Panel make findings "with respect to the requirement that there be a causal link between the likely dumping and likely injury" and "address the specific comments made be Mexico during the course of the proceedings." The United States objects to this request. We decline to make changes to the report in this regard. As noted in the report, Mexico's arguments regarding the USITC determination revolved principally around Article 3 of the AD Agreement. While Mexico did make arguments concerning alleged failure to establish a causal link between likely dumping and likely injury, these were, in our view, based on Article 3.5, which we found did not apply in sunset reviews. Mexico did not explain or elaborate on its bare assertion that Article 11.1 of the AD Agreement and Article VI of GATT 1994 establish "inherent" causation requirements, parallel to but independent of those in Article 3.5. In the absence of any basis for such findings, we did not consider it necessary to address this aspect of Mexico's argument.

6.13 The United States requests that we delete, from paragraph 3.1 of the report, the bullet point describing this request for a finding, asserting that it was not made in any of Mexico's submissions to the Panel. The requested finding at issue, the 12th bullet point of paragraph 3.1, appears in paragraph 198 of Mexico's second written submission. As noted above, unusually in this case, we included findings requested in the parties' second submissions in the descriptive part of the report. We therefore decline to make the requested change.

6.14 Mexico requests that we include findings on the USITC's "use of the margin likely to prevail in its assessment of likely injury" and "address the specific comments made by Mexico during the course of the proceedings." The United States objects to any further findings in this regard, asserting that Mexico did not set forth claims in its Panel request that the USITC's alleged reliance on the margin likely to prevail was inconsistent with either Article 3.4 or Article 11.3, that the panel found that Article 3.4 was not applicable in sunset reviews, and that the Panel found the USITC's determination consistent with Article 11.3, making any further findings unnecessary. We decline to make any changes to the report in this regard. We have concluded that Article 3.4 of the AD Agreement does not apply in sunset reviews. That is the only provision of the AD Agreement which refers to consideration of dumping margins in the analysis of injury. Moreover, we note that we found that the AD Agreement does not obligate USDOC to report such a margin to the USITC, and we can find no indication in the USITC's report that it in fact "used" the margin likely to prevail reported to it by USDOC in its analysis of likelihood of continuation or recurrence of injury in this case. We have found that the USITC's determination of the likelihood of injury issue was not inconsistent with Article 11.3 of the AD Agreement. In the absence of any applicable requirement to consider the margin likely to prevail, and the absence of any evidence that such a margin was in fact considered, we can see no basis for any findings in this regard.

6.15 Mexico requests changes to the Panel's findings in paragraphs 7.93-7.98 with respect to the Mexico's "as such" challenge to the standard employed by the USITC. Specifically, Mexico requests that we elaborate on and address further the arguments presented by Mexico in this regard. The United States objects to this request. We decline to make any changes in this regard. As previously noted, we do not consider it necessary that, in our findings, we reflect all aspects of the parties' arguments, and developments in those arguments, over the course of the proceedings. Moreover, with respect to statements made in litigation in other fora, as discussed at paragraph 7.97, we do not consider such statements relevant to the assessment whether the "likely" standard applied by the USITC is *per se* inconsistent with Article 11.3 of the AD Agreement. Therefore, we see no reason to elaborate on Mexico's arguments in this regard.

6.16 Mexico requests that we change paragraph 7.111 of the report, arguing that the statement that Mexico never argued that the time-frame was too far in the future is inaccurate. The United States considers that the Panel's statement is correct. We decline to make the requested change. We have

considered the references to submissions cited by Mexico, and in our view they express Mexico's argument that the USITC failed to specify the time-frame it considered in making its determination of likelihood of continuation or recurrence of injury, a position not consistent with the suggestion that Mexico argued that the time-frame was too far in the future.

6.17 Mexico requests that we change paragraph 7.122 of the interim report, asserting that the statement concerning the crux of Mexico's claim is not "an accurate description of Mexico's position, which included several levels of argumentation, all of which involved the substantive obligations of Article 11.3". The United States objects to this request. As we have previously noted, we do not consider it necessary that, in our findings, we reflect all aspects of the parties' arguments, including various "levels" of argumentation. We consider our statement to be an accurate reflection of the essence of Mexico's arguments – it does not purport to, nor need it, reflect all the nuances thereof, in order to introduce our resolution of the claims at issue.

6.18 Mexico requests that we change paragraph 7.149 of the report, asserting that Mexico did not misquote Article 11.3. The United States objects to this request. We decline to make the requested change. Our understanding of Mexico's argument is based on paragraph 254 of Mexico's First Written Submission, which in both the original Spanish text, and the English translation provided by Mexico, asserts that "the specific reference in the text of Article 11.3 to "an anti-dumping duty" is singular and not plural...".[13] Paragraph 176 of Mexico's Second Written Submission, which addresses an argument of the United States, does not alter our view that Mexico's argument rests on a misquotation of Article 11.3 of the AD Agreement.

6.19 Mexico requests that we make unspecified changes to the report, asserting that the Panel "failed to address Mexico's third cumulation argument". In this context, Mexico maintains that the Panel failed to make legal or factual findings regarding "inherent obligations" governing cumulation. The United States objects to this request. We decline to make any changes in this regard. While it is true that Mexico requested a finding in this regard, we found that Article 3.3 did not apply in sunset reviews, and that the requirements regarding cumulation in that provision therefore did not apply. Mexico did not explain or elaborate on its bare assertion that Article 11.3 somehow establishes "inherent" obligations for cumulation independent of those in Article 3.3. In the absence of any basis for such findings, we did not consider it necessary to address this aspect of Mexico's argument.

6.20 Mexico requests that we modify two allegedly inaccurate characterizations of Mexico's position with respect to Article 11.2, in paragraphs 7.157 and 7.173 of the report. The United States objects to this request. We decline to make the requested modifications. We note first that paragraph 7.157 contains a statement of the Panel's understanding of Article 11.2, and is not attributed to Mexico. With respect to paragraph 7.173, this paragraph reflects our understanding of Mexico's argument, which repeatedly stressed the alleged lack of dumping for three consecutive years in arguing that USDOC was required to revoke the anti-dumping duty order.

6.21 The United States notes that Mexico states in its comments on interim review that it did not challenge US law as such with respect to Article 11.2. The United States recalls that Mexico had listed, in a chart summarizing its claims and arguments submitted in response to a question by the Panel, "as such claims related to Article 11.2"[14], and requests that, in view of Mexico's statement that it makes no such claim, the Panel find that Mexico abandoned this claim. We decline to make the requested finding. We did not rely on the chart in question for our understanding of Mexico's claims, and indeed, never understood Mexico to have made "as such" claims in connection with Article 11.2. Consequently, there is no basis for a finding that Mexico "abandoned" a claim it never made.

[13] In Spanish, "la referencia en el texto del artículo 11.3 a “un derecho antidumping” esta hecha en singular y no en plural…".

[14] Mexico's answers to the Panel's questions following the second meeting, para. 21.

6.22 Mexico comments that it is "troubled by the lack of response to its arguments regarding the appropriate recommendation, suggestions, and findings in the Interim Report." Mexico refers specifically to its invocation of its rights as a developing country under Article 21.2 of the DSU, and its requests that "the Panel consider and make a finding on this issue." The United States objects to this request. We note that it is entirely unclear to us what "precise aspects" of the report Mexico wishes to have reviewed in light of these remarks. To the extent Mexico is referring to its request for a suggestion or recommendation concerning implementation, we denied that request at paragraph 8.18 of the report. With respect to Article 21.2 of the DSU, while it is true Mexico made reference to that provision in support of its request that the Panel suggest that the United States immediately terminate the anti-dumping duty, we fail to find any elaboration of legal argument or request for findings under that provision in Mexico's submissions. Our decision not to make any suggestion regarding implementation, and specifically not to suggest immediate termination of the measure, fully disposed of Mexico's request, and no further findings are necessary.

6.23 Finally, Mexico has pointed out an inconsistency between the English and Spanish texts of the report in paragraph 8.5. We have made the necessary correction.

6.24 The United States requests that we review paragraphs 7.52 to 7.64 of the report, arguing that while paragraph 7.8 of the report correctly sets forth the burden of proof in this dispute, the Panel's analysis of whether USDOC's Sunset Policy Bulletin is consistent with Article 11.3 of the AD Agreement is based on an incorrect allocation of that burden. The United States considers that Mexico failed to make a *prima facie* case for its claim regarding the SPB, and that the Panel, by undertaking a qualitative assessment of the evidence submitted by Mexico improperly made Mexico's *prima facie* case for it. In connection with its request, the United States asserts that the Panel's analysis of the evidence contains several errors, which the United States considers result from the lack of opportunity for rebuttal of the Panel's analysis. In further support of its position, the United States submitted a letter drawing the Panel's attention to the report of the Appellate Body in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (*US – Gambling*), WTO/DS285/AB/R, circulated 7 April 2005, which it argues has a direct bearing on the question of whether a panel may conduct its own review of the evidence, allegedly relieving a complaining part of the burden of making a *prima facie* case, and finds that a panel may not do so. Mexico objects to the United States' request, and to the submission of the letter concerning the *US - Gambling* report.

6.25 We have carefully considered the US request, and have decided to make no substantive changes to the report. We note that while the submission of the US letter addressing the Appellate Body's report in the *US - Gambling* dispute came very late in the proceedings, it was made at the first opportunity, very shortly after that report issued. Moreover, Mexico had an opportunity to respond to the US letter, of which it availed itself. In any event, we were not unaware of the report, and can see no reason not to consider its import, if any, and the parties' views in that connection, during interim review. In these circumstances, we see no harm in accepting the US letter.

6.26 We do not agree with the basis of the US request, that in undertaking a qualitative analysis of the evidence presented by Mexico in connection with its claim that the SPB is inconsistent with Article 11.3 of the AD Agreement, we have improperly allocated the burden of proof in this proceeding, and undertaken improperly to establish a *prima facie* case which Mexico failed to do on its own. The claims and evidence with respect to the SPB in this dispute and in the *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* dispute were substantially identical. We therefore delayed issuance of our own report until after the Appellate Body had finished its consideration of the appeal in that dispute, and specifically requested the parties to comment on the import of the Appellate Body's decision. We carefully considered the Appellate Body's report, and concluded that it was necessary and appropriate for us to take guidance from it in conducting our own analysis in this case. In that context, we note the statement of the Appellate Body, in that very report, that:

> following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same.[15]

6.27 In that report, the Appellate Body found error in the Panel's analysis of the evidence presented by Argentina in support of its claim that the SPB was inconsistent with Article 11.3 of the AD Agreement. Unlike the situation in *US – Gambling*, the Appellate Body did not find that Argentina had failed to make a *prima facie* case of violation, which the Panel had then erroneously made for it. Indeed, while the Appellate Body did not decide the consistency of the SPB with Article 11.3, it found that the evidence of the overall statistics, on which the Panel had relied, strongly suggested inconsistency, but that a definitive conclusion was not possible without a "qualitative examination" of the determinations represented in those statistics.[16] In the *US - Gambling* dispute, by contrast, the Appellate Body faulted the Panel not for its evaluation of the evidence presented by the parties in assessing the claims, but for its review of the evidence presented in order to identify the challenged measures. Thus, the Appellate Body concluded that the Panel had improperly made Antigua's *prima facie* case with respect to inconsistency of certain measures with Article XVI of the GATS. The Appellate Body observed that the:

> evidence and arguments underlying a *prima facie* case, therefore, must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision.[17]

6.28 In this dispute, we are satisfied that Mexico made out a *prima facie* case with respect to the SPB. Mexico clearly identified the measure, the SPB, and its import, that is, how it operated, identified the relevant WTO provision, Article 11.3, and the obligation therein, to make a reasoned determination based on facts, and explained the basis for the claimed inconsistency, that the SPB gave determinative or conclusive effect to the factors of historical dumping margins and import volumes in sunset reviews. The fact that our analysis of the evidence presented by Mexico in support of its claim was not structured along the lines of Mexico's argument, but rather follows the guidance of the Appellate Body in *United States- Oil Country Tubular Goods Sunset Reviews* does not establish any impropriety or need for changes in our report.

6.29 Finally, with respect to the asserted factual errors in our analysis of the evidence presented by Mexico, we note first that the parties had ample opportunity, both originally, and in their comments following the issuance of the Appellate Body report in *United States- Oil Country Tubular Goods Sunset Reviews*, to address that evidence. While it is true they had no opportunity to respond to the Panel's evaluation of the evidence until interim review, that is not an unusual circumstance – parties generally do not have an opportunity to respond to a panel's evaluation of their cases until interim review. Mexico has responded to the US assertions of factual error, arguing that the assertions do not survive scrutiny, and do not warrant any changes in the report. We address the allegations of factual error in our discussion of the USDOC sunset determinations in evidence below.

6.30 The US asserts that the Panel's statement in paragraph 7.53 that "206 of those determinations were in cases where the foreign respondent interested parties did not fully participate in the proceedings, referred to by Mexico as expedited reviews" is misleading, as it implies that there was some level of participation by foreign respondents. We consider the statement to be factually accurate. However, in order to make the situation clear, we have modified the paragraph to indicate

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[15] Appellate Body Report, *United States- Oil Country Tubular Goods Sunset Reviews*, para. 188.
[16] *Ibid*., at para. 212.
[17] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (*US – Gambling*), WTO/DS285/AB/R, circulated 7 April 2005, para. 141.

that in these 206 cases, foreign respondent interested parties either did not fully participate, or did not participate at all, in the proceedings. We note that, even if our original statement were considered misleading in the manner suggested by the United States, this is irrelevant, as our conclusion concerning the inconsistency of the SPB is not based on our review of these determinations. We commented that a review of a sample of these determinations revealed that they were based on the SPB scenarios, but this was not determinative of our analysis.

6.31 The United States also asserts that, in paragraph 7.57, the Panel was incorrect, with respect to one of seven cases referred to, in stating that "there appears to have been no arguments or information put before the USDOC concerning other factors which might be relevant." In that one case[18], the United States asserts that a domestic interested party offered argument and data regarding "other factors" that was considered but not relied upon by USDOC. It appears the United States is referring to the fact that a domestic interested party in that case argued that USDOC should report a more recent margin as the margin likely to prevail, based on other factors including changes in exchange rates. While the decision memorandum does use the phrase "other factors", it is not in the context with which we were concerned in our analysis of these determinations. In any event, this does not change the conclusion drawn on the basis of our review of the seven cases referred to in this paragraph, that in each case, the final affirmative determination was based on one of the three affirmative SPB scenarios. Nonetheless, we have modified the paragraph to clarify that no arguments or information concerning other factors was put before USDOC by respondent interested parties.

6.32 The United States also asserts that the Panel was incorrect, with respect to two of five cases referred to in paragraph 7.58 in stating that respondent interested parties "appear to have made good cause arguments concerning the relevance of the scenarios and other evidence". We note that the United States has misquoted paragraph 7.58, by including a reference to "good cause" before the word "arguments" in the first sentence. In fact, paragraph 7.58 discusses five cases in which "respondent foreign parties appear to have made arguments concerning the relevance of the scenarios and other evidence, **although they do not appear to have specifically asserted that good cause existed to consider other factors**." (emphasis added) That is, these cases involved some argumentation by the respondent foreign parties, but did not involve arguments that good cause existed to consider other factors. Thus, the United States' comments on this paragraph do not warrant any change, and we have made none.

6.33 The United States asserts that the Panel's statement in paragraph 7.59, that in three cases, respondent interested parties asserted "good cause" to consider other factors and that USDOC ultimately "rejected the assertion of good cause", is misleading with respect to two of the cases. The United States appears to be relying on the assertion that USDOC explained why it rejected the good cause arguments. Even assuming USDOC did explain the rejection of good cause arguments, this does not change our view of these cases, and their import. Our view of these cases was not determined by the explanation given for the rejection, but rather the fact that USDOC concluded that it had not been demonstrated that good cause existed to consider other factors, and made an affirmative final determination based on facts fitting one of the SPB scenarios. As we stated, the consistent results in USDOC sunset reviews, including in these cases, demonstrated the "the unwillingness of USDOC to actually undertake an analysis of evidence other than evidence of import volumes and dumping margins submitted in sunset reviews".

6.34 The United States asserts that the statement in the last sentence of paragraph 7.60, indicating that additional evidence was submitted in one case[19] is incorrect, and requests that we delete that statement. That statement is based on our understanding of the USDOC Decision Memorandum underlying the final determination, which states that USODC was "not convinced based on the

[18] Exhibit MEX-62, Tab 13.
[19] Exhibit MEX-62, Tab 165.

evidence on the record that respondents' market share was maintained". As it was on this point, relative market share, that USDOC had, in its preliminary determination, indicated that it would provide parties an opportunity to submit additional evidence, we understood the statement in the final Decision Memorandum to be referring to such additional evidence supplied in the final proceedings. As the United States presumably has a better knowledge of the facts than we can derive from the published notice and unpublished decision memorandum, we have made the requested change. We note that this does not affect our conclusions in any way.

6.35 The United States asserts that, in paragraph 7.62, the Panel erred in omitting alleged additional bases for USDOC's affirmative likelihood determination in one case.[20] We have reviewed the published decision and cannot agree with the US characterization of the basis of the USDOC decision. While it is true that the decision discusses several arguments made by the parties, in our view, these are subsidiary to the conclusion reached, which was that dumping continued after the imposition of the anti-dumping order, and therefore, as suggested by SPB scenario (a), dumping would continue or recur in the event the order were revoked. We therefore decline to make any changes in this regard.

6.36 Finally, the United States has noted an extraneous word in paragraph 7.154. We have made the necessary correction. We have also corrected a misstatement in paragraphs 7.96 and 7.97, in light of comments by the United States.

VII. FINDINGS

A. RELEVANT PRINCIPLES REGARDING STANDARD OF REVIEW, BURDEN OF PROOF, AND TREATY INTERPRETATION

1. Standard of review

7.1 Article 11 of the Dispute Settlement Understanding ("DSU") provides the standard of review for WTO panels in general. Article 11 requires panels to make an objective assessment of both the factual and the legal aspects of the case.

7.2 Article 17.6 of the AD Agreement sets forth a special standard of review that applies specifically to panel proceedings dealing with the application of that Agreement. Article 17.6 provides:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

[20] Exhibit MEX-62, Tab 261.

Taken together, Article 11 of the DSU and Article 17.6 of the AD Agreement establish the standard of review this Panel must apply with respect to both the factual and the legal aspects of the present dispute.

7.3 Pursuant to that standard of review, in conducting our examination of the US measures at issue, we will find them to be consistent with the WTO Agreements if we find that the US investigating authorities established the facts properly and evaluated them in an unbiased and objective manner, and that the determinations are based on a permissible interpretation of the relevant treaty provisions. In our assessment of the matter, we will limit our review to the "facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member", in accordance with Article 17.5(ii) of the AD Agreement, and will not undertake a *de novo* review of the evidence in the record of the sunset review or the fourth administrative review, and will not substitute our judgement for that of the US investigating authorities even if we might have made a different determination were we examining the evidence in the record ourselves.

2. Relevant principles of treaty interpretation

7.4 With respect to the question of legal interpretation, Article 3.2 of the DSU provides that Members recognise that the dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law." Article 31.1 of the Vienna Convention on the Law of Treaties ("Vienna Convention")[21], which is generally accepted as a such a customary rule, provides:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

7.5 There is a considerable body of WTO case law dealing with the application of these provisions on treaty interpretation in dispute settlement in the WTO. It is clear that interpretation must be based above all on the text of the treaty[22], but that the context of the treaty also plays a role in certain circumstances. It is also well-established that these principles of interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[23] Furthermore, panels "must be guided by the rules of treaty interpretation set out in the *Vienna Convention*, and must not add to or diminish rights and obligations provided in the *WTO Agreement*."[24]

7.6 In the context of WTO disputes under the AD Agreement, the Appellate Body has stated that:

> The *first* sentence of Article 17.6(ii), echoing closely Article 3.2 of the DSU, states that *panels* 'shall' interpret the provisions of the *Anti-Dumping Agreement* 'in accordance with customary rules of interpretation of public international law.' Such customary rules are embodied in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ('*Vienna Convention*'). Clearly, this aspect of Article 17.6(ii) involves no "conflict" with the DSU but, rather, confirms that the usual rules of treaty interpretation under the DSU also apply to the *Anti-Dumping Agreement*. …

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[21] (1969) 8 *International Legal Materials* 679.

[22] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages II*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, p. 11.

[23] Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India – Patents (US)*"), WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, para. 45.

[24] *Ibid*., para. 46.

> The *second* sentence of Article 17.6(ii) … *presupposes* that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give rise to, at least, two interpretations of some provisions of the *Anti-Dumping Agreement*, which, under that Convention, would both be '*permissible* interpretations.' In that event, a measure is deemed to be in conformity with the *Anti-Dumping Agreement* 'if it rests upon one of those permissible interpretations.'[25]

7.7 Thus, it is clear that under the AD Agreement, we are to follow the same rules of treaty interpretation as in any other dispute. The difference is that if we find more than one permissible interpretation of a provision of the AD Agreement, we may uphold a measure that rests on one of those interpretations.

3. Burden of proof

7.8 While the parties have not raised burden of proof as an issue, we have kept in mind the general principles applicable to burden of proof in WTO dispute settlement, which require that a party claiming a violation of a provision of a WTO Agreement by another Member must assert and prove its claim.[26] In this dispute, Mexico, which has challenged the consistency of the United States' measures, thus bears the burden of demonstrating that the measures are not consistent with the relevant provisions of the relevant Agreements. It is generally for each party asserting a fact to provide proof thereof.[27] Therefore, it is also for the United States to provide evidence for the facts which it asserts. We also note our understanding that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case.

B. ALLEGED INCONSISTENCIES IN THE USDOC SUNSET DETERMINATION

1. Alleged inconsistency of US statute, Statement of Administrative Action, and Sunset Policy Bulletin as such

(a) Arguments of Mexico

7.9 Mexico challenges the US statute, the Statement of Administrative Action ("the SAA"), and USDOC's Sunset Policy Bulletin ("the SPB") as such. Mexico considers that US law is inconsistent with Article 11.3 of the AD Agreement because, taken together, the US statute, 19 U.S.C. §1675a(c)(1), relevant passages of the SAA, and relevant passages of the SPB establish a presumption that dumping is likely to continue or recur in certain factual situations. Mexico notes that the statute requires USDOC to consider the weighted average dumping margins in the original investigation and subsequent reviews, and the volume of imports before and after the issuance of the anti-dumping duty. Mexico acknowledges that the statute does not instruct USDOC as to how to interpret these elements in a particular case. However, Mexico maintains that the SAA and SPB provide further instruction on this question in a manner which requires that these two factors, previously calculated dumping margins and import volumes, are to be given decisive weight in all cases, and places a burden on exporters to have USDOC even consider other factors. Mexico then argues that "consistent US practice" demonstrates the existence and application of the inconsistent presumption, and constitutes a violation of Article 11.3 itself.

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[25] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*US – Hot-Rolled Steel*"), WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697, para. 57.

[26] Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("*US – Wool Shirts and Blouses"),* WT/DS33/AB/R and Corr. 1, adopted 23 May 1997, DSR 1997:I, 323, p. 337.

[27] *Ibid*.

7.10 Mexico claims that USDOC's practice in sunset reviews itself constitutes a violation of Article 11.3 of the AD Agreement "as such". In this regard, Mexico points to the statistics on the outcomes of sunset reviews, and asserts that in no case has a respondent ever been able to overcome the presumption.

(b) Arguments of the United States

7.11 The United States argues that that, as a matter of fact and law, the asserted "presumption" in sunset reviews does not exist. The United States notes first that Article 11.3 contains only limited guidance on the conduct of sunset reviews, and does not establish any particular methodology in making the likelihood determination. The United States argues that Mexico cannot point to any provisions of US statute that establish the asserted presumption. Nor, in the US view, does either the SAA or the SPB establish the asserted presumption. Rather, the United States argues that these latter two simply give indications of probable outcomes in certain factual circumstances, describing what result will "normally" obtain in those circumstances. However, the actual outcome depends on the facts of each case. In this regard, the United States disputes Mexico's reliance on the outcomes of US sunset reviews to support its argument that there is a presumption.

7.12 The United States maintains that neither the SPB nor USDOC practice constitute "measures" which can be found to be inconsistent with Article 11.3 "as such". The US asserts that neither of these authorizes USDOC to do anything, nor do they establish rules that bind USDOC's actions. The United States considers the SPB to have essentially the same status as USDOC practice – that is, both describe the outcomes in previous cases, but in any case, USDOC may depart from the SPB, or its practice, provided it explains its reasons.

7.13 Finally, the United States argues that even if the SPB and USDOC practice were regarded as "measures", they cannot be considered inconsistent "as such" because neither is mandatory – that is, neither the SPB nor USDOC practice requires action inconsistent with the US' WTO obligations, and neither precludes WTO-consistent action.

(c) Findings

(i) Is US practice a measure before the Panel in this dispute?

7.14 We note first that, although not addressed by either party at the outset, we had concerns with Mexico's challenge to the USDOC practice as such, as it did not appear to us to be within the Panel's terms of reference. We questioned Mexico concerning where, in the request for establishment in this dispute, such a claim was set out.[28] Mexico responded that

> 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 USITC, are inconsistent,

[28] Panel's question 12 to Mexico following the first meeting.

> 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.[29]

7.15 Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter "DSU") provides that the request for the establishment of a panel shall "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly …"

7.16 In this case, Mexico contends that USDOC practice in sunset reviews is a measure in dispute, and is inconsistent with Article 11.3. However, we cannot find any mention of USDOC practice in this regard in the request for establishment. In our view, the cited passage from the request for establishment does not, in fact, set out a claim with respect to USDOC practice in sunset reviews as such. Indeed, even Mexico indicates that the claim is set out "explicitly" in its first submission[30], suggesting that the claim is not made explicitly in the request for establishment, as is required in WTO dispute settlement.

7.17 Mexico elaborated arguments on its purported claim regarding allegedly inconsistent US practice in its first submission, and continued to do so throughout the proceedings. However, in our view, a failure to state a claim in even the most minimal sense, by identifying the specific measure at issue in the request for establishment, cannot be cured by presenting arguments in subsequent submissions. In this regard, we note the statement of the Appellate Body in *EC – Bananas*:

> Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint. If a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently 'cured' by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding.[31]

Thus, the fact that Mexico may have fully elucidated its position avails it nothing as a legal matter. Failure to even mention in the request for establishment the measure it alleges is in violation of the AD Agreement constitutes failure to state a claim regarding such measure at all.

7.18 Mexico implies that we should not dismiss the claim regarding USDOC practice, as the United States responded to Mexico's "as such" claims regarding USDOC's "consistent practice", and did not argue that Mexico's claim is not properly before the Panel on DSU Article 6.2 grounds.[32]

7.19 In this regard, we note that the Appellate Body has stated:

> panels have to address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues. In this regard, we have previously observed that '[t]he vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings.[34] For this reason, panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues – if

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[29] Mexico's answers to the Panel's question 12 following the first meeting, Annex E-1 (emphasis in original).

[30] *Ibid*.

[31] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 143.

[32] Mexico's opening statement at the second meeting of the Panel, para. 16.

necessary, on their own motion – in order to satisfy themselves that they have authority to proceed.

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[34]Appellate Body Report, *United States – 1916 Act, supra*, footnote 32, para. 54.[33]

7.20 Unlike the lack of prior consultations that was at issue before the Panel in the *Mexico – Corn Syrup (Article 21.5 – US)* dispute, we consider this issue to be "a defect that, by its very nature, deprives a panel of its authority to deal with and dispose of a matter, and that, accordingly, ... [it is] one which a panel must examine even if both parties to the dispute remain silent thereon."[34] Therefore, while it is true that the United States did not make a preliminary objection on this matter, we considered it appropriate, and indeed, necessary, to raise this issue on our own motion and resolve it.

7.21 We conclude that Mexico failed to set forth a claim regarding USDOC practice in sunset reviews in its request for establishment of a panel in this dispute. Therefore, that purported claim is beyond the scope of our terms of reference, and we will make no findings on it.[35] However, this does not, of course preclude Mexico from presenting arguments referring to USDOC practice in support of its other claims.

(ii) Issues relating to the status of the Sunset Policy Bulletin in this dispute

7.22 We turn next to the question whether the SPB is properly before us as a measure in this dispute. The United States submits that the SPB does not constitute a measure that can be challenged in WTO dispute settlement proceedings because it is not a measure that has a functional life of its own under US law – it does not "do something concrete, independently of any other instruments."[36]. The United States further argues that even if the Panel considers the SPB as a measure, it does not mandate WTO-inconsistent action, and therefore cannot be found inconsistent as such.

7.23 This question has been addressed by other Panels, and by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*. The Appellate Body has made it clear that the concept of a "measure" that can be subject to a WTO challenge is very broad: "any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings"[37] (footnote omitted). The Appellate Body further stated that any legal instrument under a WTO Member's law could also be challenged as a measure before a WTO panel irrespective of the way in which it operates in individual cases.[38] Given that the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* was addressing precisely the issue of the SPB, it seemed clear that the Appellate Body considers the SPB to be a measure that can be subject to WTO dispute settlement. Indeed, the Appellate Body has recently made this explicit in its decision affirming the conclusion of the Panel to

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[33] Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, Recourse to Article 21.5 of the DSU by the United States* ("*Mexico – Corn Syrup (Article 21.5 – US)*"), WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675, para. 36.

[34] *Ibid.*, para. 64.

[35] In view of our finding, we do not consider it necessary to address the question whether practice, as such, constitutes a "measure" which can be challenged as such in WTO dispute settlement.

[36] US first submission at para. 111, citing Panel Report, *United States – Measures Treating Exports Restraints as Subsidies* ("*US – Export Restraints*"), WT/DS194/R and Corr.2, adopted 23 August 2001, DSR 2001:XI, 5767, para. 8.85

[37] Appellate Body Report, *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, adopted 9 January 2004, para. 81.

[38] *Ibid.*, para. 82.

that effect in *US – Oil Country Tubular Goods Sunset Reviews.*[39] The Appellate Body stated in this regard:

> In our view, the SPB has normative value, as it provides administrative guidance and creates expectations among the public and among private actors. It is intended to have general application, as it is to apply to all the sunset reviews conducted in the United States. It is also intended to have prospective application, as it is intended to apply to sunset reviews taking place after its issuance. Thus, we confirm – once again – that the SPB, as such, is subject to WTO dispute settlement.[40]

7.24 In light of the foregoing, we consider that the SPB is a measure subject to WTO dispute settlement. We further conclude that we cannot rule, in the abstract, on the mandatory/discretionary distinction, but must consider the nature and meaning of the relevant sections of the SPB on the basis of the evidence submitted by Mexico in this case.

(iii) Alleged inconsistency of US statute, SAA, and SPB with Article 11.3

7.25 Before turning to our analysis of the alleged inconsistency of US law, as set forth in statute, the SAA, and the SPB, with Article 11.3, we consider it important to establish what requirement of Article 11.3 is allegedly violated by those provisions. The Appellate Body has made it clear that Article 11.3 requires that a likelihood determination in a sunset review be made on a sufficient factual basis, taking into consideration the circumstances of the case at issue. It cannot be based on presumptions that establish outcomes if certain facts exist, to the exclusion of a full examination of the factual circumstances. In other words, a scheme that attributes a determinative/conclusive value to certain factors in sunset determinations is likely to violate Article 11.3.

7.26 The Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* pointed out that:

> [A] firm evidentiary foundation is required in each case for a proper determination under Article 11.3 of the likelihood of continuation or recurrence of dumping. Such a determination cannot be based solely on the mechanistic application of presumptions. We therefore consider that the consistency of Sections II.A.3 and 4 of the Sunset Policy Bulletin with Article 11.3 of the *Anti-Dumping Agreement* hinges upon whether those provisions instruct USDOC to treat dumping margins and/or import volumes as **determinative or conclusive**, on the one hand, or **merely indicative or probative**, on the other hand, of the likelihood of future dumping.
>
> ...
>
> As we have found in other situations, the use of presumptions may be inconsistent with an obligation to make a particular determination in each case using positive evidence. Provisions that create 'irrebuttable' presumptions, or 'predetermine' a

[39] Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina ("US – Oil Country Tubular Goods Sunset Reviews*"), WT/DS268/AB/R, para. 189, adopted 17 December 2004, affirming finding of the Panel that the SPB is a "measure" subject to WTO dispute settlement, Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina ("US – Oil Country Tubular Goods Sunset Reviews*"), WT/DS268/R, at para. 7.136, adopted 17 December 2004 as modified by the Appellate Body Report, WT/DS268/AB/R.

[40] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39, para. 187.

> particular result, run the risk of being found inconsistent with this type of obligation.[41] (footnote omitted, emphasis added)

7.27 Thus, the Appellate Body has made it clear that Article 11.3 requires that a likelihood determination in a sunset review be based on a sufficient factual basis, taking into consideration the circumstances of the case at issue, and cannot be based on presumptions that establish a priori conclusions in certain factual situation without the possibility of consideration of all the facts and circumstances. The Appellate Body distinguished provisions which create such irrebuttable presumptions from those which establish that certain facts are "merely indicative or probative."[42] Clearly, if certain evidentiary factors are treated as determinative or conclusive, we would conclude that they create an irrebuttable presumption, and thus that the relevant provisions are inconsistent with Article 11.3 of the AD Agreement. On the other hand, if we conclude that the factors required for consideration under US law are probative and indicative, but not determinative, in the assessment of likelihood of dumping, we may find no inconsistency with Article 11.3.

7.28 In this regard, we understand that Mexico, in arguing that the two factors of import volumes and historical dumping margins are to be "given decisive weight"[43] is arguing that the challenged provisions of the statute, SAA, and SPB do treat those factors as determinative or conclusive, and thus that they establish the existence of an irrebuttable presumption of likelihood of continuation or recurrence of dumping in US law. This is the relevant question we must address in this dispute.

7.29 We are in much the same position as the Panel was in the *US – Oil Country Tubular Goods Sunset Reviews* when it addressed this same question. That Panel concluded that the statute, interpreted in light of the SAA, did not establish an irrebuttable presumption of likelihood of continuation or recurrence of dumping based on the factors of import volumes and historical dumping margins.[44] The Panel further concluded that it was unclear from the text of the SPB itself whether it established such a presumption.[45] The Panel therefore, in order to resolve the issue of the consistency of the SPB with Article 11.3 of the AD Agreement, turned to evidence presented by Argentina of USDOC's application of the SPB in its determinations in sunset reviews. The Panel found that in each of the sunset reviews in evidence, USDOC applied the contested provisions of the SPB, and found likelihood of continuation or recurrence of dumping based on one of the three scenarios. The Panel concluded that the evidence demonstrated that USDOC perceived the provisions of the SPB as conclusive regarding the issue of likelihood of continuation or recurrence of dumping. The Panel considered this result contrary to the requirement of Article 11.3 to make determinations on a sufficient factual basis, and therefore found the provisions of the SPB inconsistent with Article 11.3.

7.30 On review of the Panel's decision, the Appellate Body concluded that the Panel had correctly stated the standard for determining whether section II.A.3 of the SPB is consistent with Article 11.3 of the AD Agreement, approving the Panel's view that "the issue here is whether the SPB directs the USDOC to treat the mentioned two factors, as presented in these three factual scenarios, as determinative/conclusive or simply indicative. If we find that the SPB requires the USDOC to treat

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[41] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra* note 37, paras. 178, 191.

[42] "We therefore consider that the consistency of Sections II.A.3 and 4 of the Sunset Policy Bulletin with Article 11.3 of the *Anti-Dumping Agreement* hinges upon whether those provisions instruct USDOC to treat dumping margins and/or import volumes as determinative or conclusive, on the one hand, or merely indicative or probative, on the other hand, of the likelihood of future dumping."

Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra* note 37, para. 178.

[43] Mexico's first submission, para. 375.

[44] Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39, para. 7.151. The Panel used the term "irrefutable", which we understand to mean the same as "irrebuttable" in this context.

[45] Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39, at para. 7.157.

them as conclusive it will follow that Section II.A.3 of the SPB is inconsistent with Article 11.3 of the Agreement. Alternatively, if these factors are not conclusive but simply indicative we will find Section II.A.3 to be consistent with Article 11.3."[46] Thus, we will apply that same standard in our analysis in this case.

7.31 Following the pattern of the Panel in *US – Oil Country Tubular Goods Sunset Reviews*, and as prescribed by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, we will begin with an analysis of the text of the provisions. If that analysis does not enable us to reach a conclusion, we will go on to evaluate the evidence submitted by Mexico concerning the application by the USDOC of these provisions. We note that we have reviewed the arguments made to the *US – Oil Country Tubular Goods Sunset Reviews* Panel, and the evidence presented, and consider that they are very much the same as the arguments and evidence in this dispute. Consequently, we consider the views of the Panel, and particularly of the Appellate Body, in its review of the Panel's decision, in *US – Oil Country Tubular Goods Sunset Reviews* to be highly relevant with respect to the issues before us. As is required under Article 11 of the DSU, we have carefully considered the arguments made by the parties before us, and made an objective assessment of the facts of this case before reaching our conclusions.

7.32 Mexico asserts that the alleged presumption of likelihood of continuation or recurrence of dumping is established by the text of the statute, Section 752(c)(1) of the Tariff Act of 1930, as amended (19 U.S.C. 1675a(c)(1)), and relevant provisions of the SAA and the SPB, in particular Section II.A.3. In light of the arguments made, we understand Mexico's claim to be that the statute, read in conjunction with the relevant provisions of the SAA and SPB, establishes an irrebuttable presumption of likelihood of continuation or recurrence of dumping in certain factual situations.

7.33 The relevant provisions of the US statute, 19 U.S.C. 1675a(c)(1), provide, in pertinent part, that in determining whether revocation of an anti-dumping duty would be likely to lead to continuation or recurrence of dumping, USDOC

> shall consider—
>
> > (A) the weighted average dumping margins determined in the investigation and subsequent reviews, and
> >
> > (B) the volume of imports of the subject merchandise for the period before and the period after the issuance of the anti-dumping duty order or acceptance of the suspension agreement.
>
> (2) Consideration of other factors
>
> If good cause is shown, the administering authority shall also consider such other price, cost, market, or economic factors as it deems relevant.[47]

7.34 The statute clearly establishes that USDOC must, in each sunset review, consider two factors – historical dumping margins and import volumes – in determining whether dumping is likely to continue or recur in the case of revocation of the order. The statute also provides that, if good cause is shown, USDOC **shall** consider other factors. It is true the text does impose a threshold on the consideration of other factors, requiring good cause before such other factors are considered. However, we do not consider this to demonstrate, as Mexico argues, that historical dumping margins

[46] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39, para. 197, approving Panel Report, *supra* note 39, at para. 7.155.

[47] 19 U.S.C. § 1675a(c) (Exhibit MEX-24).

and import volumes have determinative or conclusive weight, since if that threshold is passed, other factors **must** be considered.[48]

7.35 Mexico argues that the statute cannot be read in isolation, but must be understood in conjunction with the SAA and SPB, which give instruction on the meaning of the statute. In this regard, we note that, under US law, the SAA provides an authoritative interpretation of the statute.[49] Thus, it serves as an important tool in our understanding of the statute. The relevant portion of the SAA provides:

> Under section 752(c)(1), Commerce will examine the relationship between dumping margins, or the absence of margins, and the volume of imports of the subject merchandise, comparing the periods before and after the issuance of an order or the acceptance of a suspension agreement. For example, declining import volumes accompanied by the continued existence of dumping margins after the issuance of an order may provide a strong indication that, absent the order, dumping would be likely to continue, because the evidence would indicate that the exporter needs to dump to sell at pre-order volumes. In contrast, declining (or no) dumping margins accompanied by steady or increasing imports may indicate that foreign companies do not have to dump to maintain market share in the United States and that dumping is less likely to continue or recur if the order were revoked.
>
> The Administration believes that the existence of dumping margins after the order, or the cessation of imports after the order, is highly probative of the likelihood of continuation or recurrence of dumping. If companies continue to dump with the discipline of the order in place, it is reasonable to assume that dumping would continue if the discipline were removed. If imports cease after the order is issued, it is reasonable to assume that the exporters could not sell in the United States without dumping and that, to re-enter the US market, they would have to resume dumping.
>
> New section 752(c)(2) provides that, for good cause shown, Commerce also will consider other information regarding, price, cost, market or economic factors it deems relevant. Such factors might include the market share of foreign producers subject to the antidumping proceeding; changes in exchange rates, inventory levels, production capacity, and capacity utilisation; any history of sales below cost of production; changes in manufacturing technology of the industry; and prevailing prices in relevant markets. In practice, this will permit interested parties to provide information indicating that observed patterns regarding dumping margins and import volumes are not necessarily indicative of the likelihood of dumping. The list of factors is illustrative, and the Administration intends that Commerce will analyze such information on a case-by-case basis.[50] (emphasis added)

7.36 Consideration of the text of the SAA as an aid to understanding the statute does not change our view that the statute does not assign conclusive or determinative weight to the two factors of dumping margins and import volumes. The SAA states that certain fact patterns regarding dumping margins and import volumes following the imposition of an anti-dumping order are "highly probative"

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[48] We note that Mexico does not challenge the "good cause" aspects of US law, unlike the complainant in *US – Corrosion-Resistant Steel Sunset Review*.

[49] SAA (Exhibit MEX-26) at 4040. Mexico's request for establishment appears to identify the SAA as a measure in dispute. However, Mexico has made no independent claims concerning the SAA, and has not presented arguments regarding violation of any provision of the AD Agreement by the SAA, separate from the arguments regarding the overall alleged inconsistency of US law. We therefore do not address the question whether the SAA is, standing alone, a measure in violation of any provision of the AD Agreement.

[50] SAA (Exhibit MEX-26) at 4213-4214.

or may provide a "strong indication" of the likelihood of continuation or recurrence of dumping in the event of revocation of the order. To us, this language clearly indicates that these factors are to be treated as important indicators of the likelihood of continuation or recurrence of dumping, but not as determinative or conclusive on that issue. Further, the SAA supports our view, based on the text of the statute, that the requirement to consider other factors if good cause is shown undermines the argument that these two factors are determinative or conclusive. Thus, in our view, the SAA does not support the view that the statute creates an irrebuttable presumption of continuation or recurrence of dumping based on these two factors.

7.37 The SAA itself sets out an illustrative list of such other factors, and the text points out that this will permit interested parties to provide information which would support a conclusion that the evidence regarding dumping margins and import volumes "are not necessarily indicative" of likelihood of continuation or recurrence of dumping. Again, this possibility supports the view that the two factors are not determinative or conclusive. Moreover, the SAA makes clear that USDOC is to "analyze such information on a case-by-case basis." We recall that the SAA constitutes authoritative interpretation of US law. In our view, there would be no reason to establish a list of other factors, and emphasize that they are to be analysed on a case-by-case basis, if information regarding such other factors could in no case affect the outcome of a sunset review.

7.38 Thus, not only does the SAA contain nothing that would cause us to change our view of the statute based on its text, but to the contrary, it confirms our view that the statute does not establish that the factors of historical dumping margins and import volumes have conclusive or determinative weight in USDOC determinations of likelihood of continuation or recurrence of dumping.

7.39 Turning next to the SPB, we observe that the SPB treats the two factors of historical dumping margins and import volumes in a different manner from the statute itself. Unlike the statute, which we have concluded does not establish any presumption based on these two factors, the SPB places these factors in the context of factual scenarios, three of which will "normally" result in USDOC making an affirmative finding of likelihood of continuation or recurrence of dumping.

7.40 We note at the outset that there are two aspects to our consideration of the SPB. The first is in the context of our understanding of the US statute – that is, as an interpretive tool. In this regard, we note that, unlike the SAA, the SPB is not identified as an authoritative interpretation of the statute. Indeed, by its own terms the SPB is subordinate to the statute. The SPB states, in relevant part:

> The proposed policies are intended to complement the applicable statutory and regulatory provisions by providing guidance on methodological or analytical issues not explicitly addressed by the statute and regulations.[51]

Thus, even assuming USDOC "complemented" the provisions of the statute in the SPB in a manner inconsistent with Article 11.3, this could not, in our view, fundamentally change the meaning of the statute, and thus does not change our understanding of the statute as discussed above.

7.41 The second aspect of our consideration is in the context of our review of the SPB as a measure. In undertaking this analysis, we turn first to the text of the SPB. The SPB provides in pertinent part at section II.A.3:

> [T]he Department normally will determine that revocation of an antidumping order or termination of a suspended dumping investigation is likely to lead to continuation or recurrence of dumping where—

[51] SPB (Exhibit MEX-32) at 18871.

(a) dumping continued at any level above *de minimis* after the issuance of the order or the suspension agreement, as applicable;

(b) imports of the subject merchandise ceased after issuance of the order or the suspension agreement, as applicable; or

(c) dumping was eliminated after the issuance of the order or the suspension agreement, as applicable, and import volumes for the subject merchandise declined significantly.

The Department recognizes that, in the context of a sunset review of a suspended investigation, the data relevant to the criteria under paragraphs (a) through (c), above, may not be conclusive with respect to likelihood. Therefore, the Department may be more likely to entertain good cause arguments under paragraph II.C in a sunset review of a suspended investigation.…

[T]he Department normally will determine that revocation of an antidumping order or termination of a suspended dumping investigation is not likely to lead to continuation or recurrence of dumping where dumping was eliminated after issuance of the order or the suspension agreement, as applicable, and import volumes remained steady or increased. Declining margins alone normally would not qualify because the legislative history makes clear that continued margins at any level would lead to a finding of likelihood. See section II.A.3, above. In analyzing whether import volumes remained steady or increased, the Department normally will consider companies' relative market share. Such information should be provided to the Department by the parties.

The Department recognizes that, in the context of a sunset review of a suspended investigation, the elimination of dumping coupled with steady or increasing import volumes may not be conclusive with respect to no likelihood. Therefore, the Department may be more likely to entertain good cause arguments under paragraph II.C in a sunset review of a suspended investigation. ...

Section 752(c)(2) of the Act provides that, if the Department determines that good cause is shown, the Department also will consider other price, cost, market or economic factors in determining the likelihood of continuation or recurrence of dumping. The SAA at 890, states that such other factors might include,

the market share of foreign producers subject to the antidumping proceeding; changes in exchange rates, inventory levels, production capacity, and capacity utilization; any history of sales below cost of production; changes in manufacturing technology in the industry; and prevailing prices in relevant markets.

The SAA at 890, also notes that the list of factors is illustrative, and that the Department should analyze such information on a case-by-case basis.

Therefore, the Department will consider other factors in AD sunset reviews if the Department determines that good cause to consider such other factors exists. The burden is on an interested party to provide information or evidence that would warrant consideration of the other factors in question. With respect to a sunset review of a suspended investigation, where the Department determines that good cause

> exists, the Department normally will conduct the sunset review consistent with its practice of examining likelihood under section 751(a) of the Act.[52]

7.42 Thus, the SPB provides that the USDOC will "normally" make an affirmative likelihood determination if it finds one of three factual scenarios to exist. These factual scenarios are based on the two factors that USDOC is required, by the statute, to consider in each sunset review – that is, historical dumping margins and import volumes. However, while the statute does not limit in any way the possible outcomes that might result from that consideration, the SPB does appear to do so. The SPB identifies patterns with respect to these two factors – the factual scenarios – and states that in certain of these scenarios, USDOC will "normally" find a likelihood of continuation or recurrence of dumping.

7.43 The use of the word "normally" in the SPB could be understood to indicate that the SPB envisages the possibility that likelihood of continuation or recurrence of dumping may not be found even if the facts fit one of the three scenarios based on the pattern of import volumes and dumping margins, thus suggesting these two factors are indicative, rather than determinative or conclusive – if they were to be treated as determinative or conclusive, one would not expect to see the word normally. However, nothing in the SPB itself clarifies whether normally should be understood in this way.

7.44 In addition, the SPB states that, in the case of a sunset review of a suspended investigation, the existence of facts fitting one of scenarios may not be conclusive.

> The Department recognizes that, in the context of a sunset review of a suspended investigator, the data relevant to the criteria under paragraphs (a) through (c), above, may not be conclusive with respect to likelihood.[53]

That USDOC considered it necessary to include this additional statement in the SPB could be understood to imply, *a contrario*, that the existence of facts fitting one of the factual scenarios will be conclusive in USDOC's determination except in the case of a suspended investigation. If the three scenarios may **not** be conclusive in sunset reviews of suspended investigations, this suggests that "normally", they may well be so.

7.45 However, in our view, it is not sufficiently clear from the text of the SPB whether determinative or conclusive weight is attributed to the two factors of import volumes and historical dumping margins. Therefore, we need to extend our analysis to consider what the evidence of USDOC's application of the SPB reveals about USDOC's view of what the SPB envisions in sunset reviews, as an aid to our understanding the SPB, in order to determine whether it attributes determinative or conclusive weight to the two factors, historical dumping margins and import volumes, or whether these two factors are merely indicative.

7.46 Mexico has proffered evidence concerning USDOC determinations in sunset reviews as an aid to understanding how USDOC itself understands and applies the SPB, arguing that those determinations demonstrate the determinative weight given to the two factors of historical dumping margins and import volumes by USDOC. We note that this is fundamentally the same argument, and largely the same evidence, as proffered by Argentina in the *US – Oil Country Tubular Goods Sunset Reviews*.

7.47 The Panel in that case had concluded, based on its review of the evidence concerning 291 sunset review determinations presented by Argentina, that "USDOC does in fact perceive the

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[52] SPB (Exhibit MEX-32) at 18872-18874.
[53] *Ibid.*, at 18872-18874.

provisions of Section II.A.3 of the SPB as conclusive."[54] The Panel stated that its analysis of the evidence "demonstrate[d] that the USDOC applied the contested provisions of the SPB in each sunset review and found likelihood of continuation or recurrence in each one of these sunset reviews on the basis of one of the three scenarios contained in Section II.A.3 of the SPB."[55] The Panel found the SPB inconsistent with Article 11.3 of the AD Agreement.[56]

7.48 The Appellate Body reversed the Panel's decision.[57] The Appellate Body faulted the Panel for having reached its conclusion on USDOC's consistent application of the SPB relying "solely on the overall statistics, or aggregate results", noting that the Panel "did not undertake a qualitative analysis of at least some of the individual cases [presented in evidence] in order to see whether the USDOC's determinations in those cases were objective and rested on a sufficient factual basis."[58] The Appellate Body observed that:

> 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.[59]

While the Appellate Body recognized the importance of the two factors, historical dumping margins and import volumes, it stated: "our concern here is with the possible mechanistic application of the three scenarios based on these factors, such that other factors that may be of equal importance are disregarded."[60] Finally, the Appellate Body emphasized that it had not concluded that Section II.A.3 of the SPB **is** consistent with Article 11.3 of the AD Agreement. Thus, the Appellate Body stated that its reasoning "does not exclude the possibility that 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."[61]

7.49 Based on our understanding of the Appellate Body's decision in *US – Oil Country Tubular Goods Sunset Reviews* it seems clear that we must undertake a qualitative assessment of the evidence concerning USDOC's sunset review determinations. The Appellate Body has given us guidance on the nature of such an assessment, observing that the Panel in that case appeared:

> not to have examined in how many cases the foreign respondent parties participated in the proceedings, in how many they introduced other 'good cause' factors, and how the USDOC dealt with those factors when they were introduced. Such an inquiry would have enabled the Panel to identify and undertake a qualitative analysis of at least some of those cases to see whether the affirmative determinations were made solely on the basis of one of the scenarios to the exclusion of other factors.[62]

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[54] Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39, para. 7.165.
[55] *Ibid*
[56] *Ibid.*, para. 7.166.
[57] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39, at para. 215.
[58] *Ibid.*, para. 210.
[59] *Ibid.*, para. 212 (footnote omitted).
[60] *Ibid.*, para. 208.
[61] *Ibid.*, para. 215.
[62] *Ibid.*, para. para. 212.

The Appellate Body went on to explain that;

> in order to objectively assess, as required by Article 11 of the DSU, whether the three factual scenarios of Section II.A.3 of the SPB are regarded as determinative/conclusive, it is essential to examine concrete examples of cases where the likelihood determination of continuation or recurrence of dumping was based solely on one of the scenarios of Section II.A.3 of the SPB, even though the probative value of other factors might have outweighed that of the identified scenario. Such an examination requires a qualitative assessment of the likelihood determinations in individual cases.[63]

7.50 We cannot just look at the statistics to determine if, as a matter of fact, the scenarios in the SPB are consistently treated by USDOC as determinative or conclusive, in order to assist us in determining whether the SPB is, as such, consistent with Article 11.3 of the AD Agreement. In this regard, we note the finding of the Appellate Body in *US-Carbon Steel*:

> a responding Member's law will be treated as WTO-*consistent* until proven otherwise. The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case.[64] (footnote omitted, emphasis added)

7.51 Therefore, it is not consistency in the outcomes of US sunset reviews, but rather consistency in the process of decision-making, and the bases on which the decisions were reached, that are relevant to our assessment. The fact that in each of 232 of the sunset review determinations put before us in evidence, USDOC made an affirmative determination of likelihood of continuation or recurrence of dumping is not sufficient in itself to demonstrate that the scenarios set out in the SPB are determinative or conclusive.[65] While this fact may raise concerns as to whether USDOC has, as required by Article 11.3, based its determination on a sufficient factual basis, taking into consideration the circumstances of each case, it does not resolve the issue.

7.52 Turning then to the evidence, Mexico has put before us, in exhibits MEX-62 and 65, evidence in the form of preliminary and final USDOC determinations in 306 sunset reviews, including decision memoranda setting out the analysis and recommendation underlying the determinations. Of those 306 determinations, 74 cases terminated in revocation of the anti-dumping duty, based on no participation by the domestic industry.[66] Obviously, these have no relevance to the question before us.

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[63] *Ibid.*, para. 209 (footnote omitted).

[64] Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*US – Carbon Steel*"), WT/DS213/AB/R and Corr.1, adopted 19 December 2002, para. 157. This finding was relied upon by the Appellate Body in its Report in *US – Corrosion-Resistant Steel Sunset Review*, *supra* note 37, para. 168

[65] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39, para. 212.

[66] We note that our grouping of these cases is that set out in the table provided by Mexico, Exhibit MEX-62-Chart and MEX-65-Chart. As Mexico bears the burden of demonstrating the consistent application of the SPB by USDOC, we considered it appropriate to use Mexico's own characterization of the evidence it presented in support of its argument.

7.53 206 of those determinations were in cases where the foreign respondent parties either did not participate at all, or did not fully participate in the proceedings, referred to by Mexico as "expedited" reviews.[67] In these cases, there may well have been other facts that might be relevant or probative, but they were not before USDOC, and thus were not addressed. We have reviewed a sampling of these decisions, and note that in each of those we considered, USDOC's final affirmative determination of likelihood of continuation or recurrence of dumping was based on one of the three affirmative scenarios.

7.54 We thus come to the remaining 26 determinations. These were made by USDOC in "full" sunset reviews, in which foreign respondent parties participated, at least in the preliminary determination phase. Of these, we consider that the five determinations made in suspended investigations do not shed light on the issue before us. While these investigations do involve the participation of respondent foreign parties, the relevance and application of the scenarios in the SPB in the case of suspended investigations is materially different, by the terms of the SPB itself, than in sunset reviews of anti-dumping duties in force. Indeed, it is in part because the SPB itself suggests that the scenarios do not have conclusive or determinative weight in suspended investigations that we are addressing the question whether they do have such weight in other cases. Our task here is to examine the evidence in order to assess whether there is consistent USDOC practice which can aid us in understanding the situation with respect to reviews in cases other than suspended investigations.

7.55 Finally, we are left with 21 cases involving sunset reviews of anti-dumping duties in which both domestic and foreign interested parties participated. We have carefully read the published USDOC determinations in these cases, and where they exist and were submitted in evidence, the underlying decision memoranda, to assist us in determining, as a matter of fact, whether there is a pattern of consistent application of the SPB which can aid us in deciding whether the factual scenarios set out in the SPB are regarded as determinative or conclusive, or merely indicative. We emphasize that these decisions are not before us for review on their own merits – that is, we are not reaching any conclusions as to whether these decisions themselves were made consistently with the requirements of the AD Agreement. Rather, we are looking to this evidence to assist us in interpreting the SPB in light of its application by USDOC.

7.56 Looking at these 21 full reviews, we find that in 15 of these cases,[68] USDOC appears to have considered that scenario (a) of the SPB applied – that is, dumping continued after the imposition of the order at a level above *de minimis*.

7.57 In seven of these 15 cases, there appears to have been no arguments or information put before USDOC by respondent interested parties concerning other factors which might be relevant – there is, in any event, no discussion of whether or not good cause exists to consider other factors.[69] In each of these cases, the final affirmative determination of likelihood of continuation or recurrence of dumping was based on one of the three affirmative SPB scenarios.

7.58 In five of these 15 cases, respondent foreign parties appear to have made arguments concerning the relevance of the scenarios and other evidence, although they do not appear to have specifically asserted that good cause existed to consider other factors.[70] These cases suggest that USDOC may have considered the existence of facts fitting scenario (a) as determinative. In at least

[67] We note that the treatment of some cases as "expedited" by USDOC is not at issue in this dispute, as it was before the Panel in *US – Oil Country Tubular Goods Sunset Reviews*. Our understanding is that reviews may be treated as "expedited" in several circumstances, including cases where inadequate responses are received from foreign respondent parties as well as cases in which such parties elect not to participate.

[68] Exhibit MEX-62 Tabs 13, 19, 25, 35, 62, 75, 78, 84, 89, 124, 146, 159, 163, 194, and 272.

[69] Exhibit MEX-62 Tabs 13, 19, 146, 159, 163, 194, and 272.

[70] Exhibit MEX-62 Tabs 25, 35, 62, 75, and 89.

one case,[71] USDOC, stated, in its preliminary determination, "[b]ecause we have based these preliminary results on the continuation of dumping, we have not considered the interested parties' arguments related to other factors."[72] Such statements are troubling, as they certainly do not indicate an open-minded willingness to consider potentially relevant information and make an objective evaluation based on the circumstances of each case.[73]

7.59 In three of these 15 cases,[74] respondent foreign parties did assert that there was good cause to consider other factors, and submitted arguments concerning such other factors. In each of these cases, USDOC rejected the assertion of good cause. In one of these cases,[75] the respondent foreign party did not submit evidence of good cause in a timely fashion under USDOC regulations, but USDOC indicated that even if it had considered the other factors, the determination would still have been based on the import volumes and dumping margins on the record. In both of the other two cases, USDOC concluded that it had not been demonstrated that good cause existed to consider other factors, and made an affirmative final determination based on facts fitting one of the SPB scenarios. Again, the consistent results of these decisions are troubling, as is the unwillingness of USDOC to actually undertake an analysis of evidence other than evidence of import volumes and dumping margins submitted in sunset reviews.

7.60 In four of the 21 cases put before us,[76] USDOC appears to have considered that scenario (c) of the SPB applied – that is, dumping was eliminated after the imposition of the duty, and import volumes declined significantly. In two of these cases,[77] respondent foreign parties specifically argued that good cause existed to consider other factors, while in the other two cases, respondent foreign parties presented arguments on the interpretation of the facts in light of the SPB. These arguments were rejected by USDOC in each case. Again, the stated rationale for certain of the rejections is circular and troubling: "Since we are basing our likelihood determination on the elimination of dumping at the expense of exports, it is not necessary to consider other factors ..."[78] In another case,[79] despite an asserted willingness in the preliminary phase to consider additional evidence and arguments,[80] USDOC made a final affirmative determination of likelihood, relying on a decline in import volumes, as set out in one of the SPB scenarios.

7.61 Overall, the consistency of the outcomes is troubling, and raises serious doubts about USDOC's decision-making process. While we recognize that the USDOC itself has stated that the SPB scenarios are not determinative in its decision-making, we consider it telling that even in those cases, cases where facts are presented that might warrant a different outcome, the decisions conform to "normal" results predicted by the SPB scenarios.

7.62 Finally, in two of the 21 full sunset reviews,[81] USDOC reached a preliminary determination of no likelihood of continuation or recurrence of dumping. In one of these cases,[82] scenario (c)

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[71] Exhibit MEX-62 Tab 89.

[72] Exhibit MEX-62 Tab 89, Issues and Decision Memorandum, Preliminary Results at p. 5. We note that no briefs were submitted in the final phase of this case, and the final determination in this case was a finding of likelihood of continuation or recurrence of dumping.

[73] We note that the respondent foreign parties did not submit any further arguments in response to the preliminary determination.

[74] Exhibit MEX-62 Tabs 78, 84 and 124.

[75] Exhibit MEX-62 Tab 78.

[76] Exhibit MEX-62 Tabs 42, 165, 179 and 201.

[77] Exhibit MEX-62 Tabs 165 and 201.

[78] Exhibit MEX-62 Tab 201 Issues and Decision Memorandum, Preliminary Results at pp. 6-7.

[79] Exhibit MEX-62 Tab 165.

[80] Exhibit MEX-62 Tab 165 – Preliminary Results of Full Sunset Review, 65 Fed. Reg. 753, 754 (6 January 2000).

[81] Exhibit MEX-62 Tabs 32 and 261.

appeared to be relevant – that is, dumping was eliminated and imports declined – and USDOC preliminarily concluded that other relevant information and argument indicated that it was unlikely that the respondent foreign company would resume dumping. In the end, however, USDOC made an affirmative final determination, relying on evidence fitting one of the SPB scenarios. In the second case[83], USDOC in the preliminary phase of the review found no likelihood of continuation or recurrence of dumping in light of facts that did not fit any of the three affirmative SPB scenarios. USDOC then took the unusual step of conducting a cost-of-production analysis, and calculated a dumping margin, and made an affirmative determination of likelihood, based on the conclusion that dumping continued after the imposition of the order, as suggested by SPB scenario (a).

7.63 In summary, our qualitative analysis of USDOC decisions reveals a clear picture. In almost all cases, USDOC begins with a recitation of the SPB scenarios. In the simplest cases, the determinations then recite facts fitting one of the scenarios, and USDOC concludes that there is a likelihood of continuation or recurrence of dumping. In other cases, USDOC seems clearly to have made its decision based exclusively on the SPB, without giving consideration to other potentially probative factors in evidence. We consider it telling that some of the determinations appear to indicate that the USDOC perceives the SPB scenarios as conclusive or determinative to the extent of obviating any necessity even to admit, let alone weigh, evidence as to other factors.[84] In a few cases, USDOC appears at the outset willing to consider whether other factors may be relevant or probative, but does not ultimately rely on such factors, dismissing them summarily or not discussing them at all, and basing its final determination on evidence fitting the SPB scenarios. We emphasize that we are not focussing solely on the outcomes in these sunset reviews, but rather on our qualitative analysis of the determinations, and what we can discern about USDOC's decision-making process underlying those determinations. We therefore conclude that, despite the apparent recognition that it may do otherwise, USDOC has consistently based its determinations in sunset reviews exclusively on the scenarios, to the disregard of other factors.[85] In our view, the actual determinations made, which in all cases ultimately conform to the results predicted by the SPB scenarios, belie the conclusion that USDOC does not consider them as conclusive or determinative in sunset reviews.

7.64 As discussed above, we have found that the US statute, read in light of the SAA and the SPB, is not as such inconsistent with Article 11.3 of the AD Agreement. With regard to the SPB itself, we were unable to determine, based on its text, whether it gave determinative or conclusive weight to the scenarios regarding historical dumping margins and import volumes. We thus looked to USDOC decisions to see if consistent practice by USDOC under the SPB could shed light on the import of the SPB in this regard. We recall that we undertook this analysis of the evidence put before us by Mexico in order to aid us in understanding the SPB and assessing whether it is, as such, inconsistent with Article 11.3 of the AD Agreement because it establishes an irrebuttable presumption of likelihood of continuation or recurrence of dumping. Based on our analysis, we consider that the SPB scenarios are treated as conclusive or determinative in sunset reviews.[86] Thus, we conclude that the SPB

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[82] Exhibit MEX-62 Tab 32.

[83] Exhibit MEX-62 Tab 261.

[84] In this regard, we note that a mere recitation of evidence or arguments made by respondent foreign parties cannot, in our view, support the conclusion that such evidence or arguments have been actually weighed, in the absence of some analysis.

[85] We emphasize that our analysis of the USDOC determinations is **not** to be understood as suggesting that any particular decision was made consistently with US obligations under the AD Agreement. Indeed, we have serious doubts about the consistency of some of the decisions reviewed, but as they are not themselves before us in this dispute, we wish to be clear that we are not passing judgement on their consistency *per se*.

[86] We do not dispute that USDOC might have reached the same conclusions in some cases even had it not mechanistically applied the SPB scenarios, but rather carried out an objective analysis of the relevant facts. However, the existence of some correct results does not undermine our conclusion that USDOC made its determinations by applying the SPB scenarios, to the disregard of other potentially relevant and probative information.

establishes an irrebuttable presumption in this regard, and consequently that Mexico has demonstrated that the SPB is, as such, inconsistent with Article 11.3 of the AD Agreement.

7.65 As noted above, we have concluded that Mexico's claim regarding USDOC practice, as such, is not within our terms of reference, and we therefore make no findings on that claim.

7.66 Finally, we note that our conclusion regarding the inconsistency of the SPB has no effect on our view of the consistency of the US statute. The SPB states, in relevant part:

> The proposed policies are intended to complement the applicable statutory and regulatory provisions by providing guidance on methodological or analytical issues not explicitly addressed by the statute and regulations.[87]

The fact that USDOC has "complemented" the provisions of the statute in the SPB in a way which is inconsistent with Article 11.3 does not, in our view, change the meaning of the statute, which we have found to be not inconsistent with Article 11.3 in this regard.

7.67 Having found the SPB to be inconsistent with Article 11.3, we do not address Mexico's alternative claim under Article X:3(a) of the GATT 1994.

2. Alleged inconsistency of USDOC determination of likelihood of continuation or recurrence of dumping

(a) Arguments of Mexico

7.68 Mexico argues that the determination in this case is inconsistent with Articles 11.3 and 2 of the AD Agreement. Mexico argues that USDOC's determination in the OCTG sunset review is inconsistent with Article 11.3 of the AD Agreement because USDOC focused solely on a decline in import volume, ignored relevant evidence, did not make its determination consistently with the obligations of Article 2 of the AD Agreement, failed to conduct a prospective analysis, failed to make a determination of "likely" continuation or recurrence of dumping, and failed to base its determination on positive evidence.

7.69 Mexico asserts that USDOC's determination was based solely on the fact that the volume of imports of OCTG from Mexico declined following the imposition of the anti-dumping duty order in 1995, and remained well below the pre-order levels during the period the order was in place. Mexico asserts that USDOC ignored the evidence provided by the Mexican exporters concerning why import volumes declined, and evidence concerning why the historical margins of dumping were not relevant to the issue of likely dumping, and simply relied on historical information and the dumping margin calculated in the original investigation. Moreover, Mexico asserts that the dumping margin calculated for TAMSA in the original investigation was based on a unique set of circumstances arising from the Mexican peso crisis in 1994, and thus was even less reliable as a consideration in the sunset review. Mexico argues that USDOC ignored that zero dumping margins had been calculated for TAMSA in successive administrative reviews. With respect to Hylsa, Mexico argues that as it was not investigated in the original investigation, and the only dumping margin calculated for it was below 2 per cent, Hylsa had never been determined to be dumping within the meaning of Article 2 of the AD Agreement. Mexico also argues that by relying on the dumping margin calculated in the original investigation, USDOC violated Article 11.3 by not making a prospective determination, and by denying Mexico the opportunity to present evidence and defend its interests, USDOC acted in violation of Article 6 of the AD Agreement.

[87] SPB (Exhibit MEX-32) at 18871.

7.70 Finally, Mexico also claims that the margin of dumping reported by USDOC to the USITC as the "margin likely to prevail", which was the dumping margin calculated in the original investigation, 21.70 per cent, is inconsistent with Articles 2 and 6 of the AD Agreement.

(b) Arguments of the United States

7.71 With respect to the "as applied" aspect of Mexico's claim, the United States argues that Mexico's claim amounts to disagreement with USDOC's weighing of the evidence. The United States asserts that USDOC did not "rely" on the margin calculated in the original investigation in making its determination of likelihood of continuation or recurrence of dumping, and that therefore there can be no violation of Article 2. The United States asserts that USDOC fully considered all the record evidence, including that of the completed second and third administrative reviews, but concluded that in light of the low level of exports from TAMSA at the zero levels of dumping calculated, there was a likelihood that dumping would continue or resume. The US notes that USDOC's determination is not, and is not required to be, on the basis of evaluation of individual companies/exporters, but is with respect to the anti-dumping duty order as a whole.

7.72 The United States notes that there is no obligation in the AD Agreement to "report" a margin to the USITC, and maintains that therefore there can be no violation in reporting the margin as USDOC did in this case. Moreover, the United States asserts that there is no obligation under the AD Agreement for the USITC to consider the margin of dumping in making its determination of likelihood of continuation or recurrence of injury. Therefore, the US considers that the Panel need not consider the manner in which USDOC identified the margin it reported to the USITC.

(c) Findings

7.73 Before turning to our assessment of the USDOC determination in dispute, we outline below our understanding of the obligations established by Article 11.3 with respect to determinations of likelihood of continuation or recurrence of dumping. Article 11.3 of the AD Agreement provides:

> Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.[22] The duty may remain in force pending the outcome of such a review.

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[22] When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

7.74 The ordinary meaning of "determine" is, *inter alia*, "settle or decide (a dispute, controversy, etc., or a sentence, conclusion, issue, etc.) as a judge or arbiter."[88] In our view, Article 11.3 requires the investigating authority to make a reasoned finding on the basis of positive evidence that dumping is likely to continue or recur should the measure be revoked. The obligation to make such a determination precludes an investigating authority from simply assuming that likelihood exists. The

[88] The New Shorter Oxford English Dictionary, Oxford University Press, p. 651.

authority must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination.[89] Moreover, an investigating authority's determination that dumping is likely to continue or recur must be supported by reasoned and adequate conclusions based on the facts before it.

7.75 In the case at hand, two Mexican exporters, TAMSA and Hylsa, participated fully in the sunset review, and submitted arguments and information in support of their position that there was no likelihood of continuation or recurrence of dumping. Mexico argues that USDOC ignored relevant evidence submitted by the two companies and instead, relied solely on the decline in import volumes in making its determination. Specifically, Mexico asserts that USDOC ignored evidence presented by TAMSA that the reason for the decline in import volumes was that it was not reasonable for it to export significant amounts in light of the high dumping margin and consequent deposit rate on sales to the United States market. Mexico also asserts that USDOC ignored evidence that the reason for the original dumping finding was the Mexican currency crisis of 1994, and the application of facts available. The Mexican exporters argued that the combination of circumstances in the original investigation had changed, and was not likely to recur, and thus there was no likelihood of continuation or recurrence of dumping. In this regard, Mexico also argues that USDOC ignored the fact that zero dumping margins had been calculated for TAMSA in the second and third administrative reviews, indicating that continuation or recurrence of dumping was not likely. Mexico also asserts that USDOC ignored evidence submitted by Hylsa allegedly demonstrating that it was not dumping and was not likely to dump in the future.

7.76 We have reviewed the USDOC decision memorandum to establish whether, in fact, USDOC ignored the evidence referred to by Mexico, or whether, as the United States contends, USDOC considered all the evidence, but simply reached different conclusions than those sought by Mexican exporters. While USDOC's decision memorandum is not a model of thoroughness in its discussion of the evidence presented, it seems clear to us that USDOC did address some evidence presented to it. Thus, for instance, USDOC specifically addressed TAMSA's explanation for the decline in import volumes:

> The premise that the decline in TAMSA's export levels after the issuance of the order was the result of a prudent and necessary business strategy, and the fact that TAMSA was able to sell small amounts of OCTG without dumping in no way conflict with the Department's inference. If it became 'prudent and necessary' to make fewer sales at a more fairly traded priced while the discipline of the order was in place, it is reasonable to infer that dumping would be likely to resume if such disciplines ceased to exist and it was no longer 'necessary' for TAMSA and other Mexican exporter to maintain the same business strategy.[90]

Similarly, USDOC addressed arguments by Hylsa that a separate finding should be made for it, and that the consideration of declining import volumes should have referred to volumes prior to initiation and after imposition of the order, rather than volumes before and after imposition of the order.[91]

7.77 However, information was presented to USDOC by TAMSA concerning its financial situation and the stability of the Mexican peso which would appear relevant to the question of likelihood of continuation or recurrence of dumping. In the original investigation, USDOC had relied on a constructed normal value in calculating a dumping margin for TAMSA, relying in part on facts available. TAMSA asserted that its large dollar-denominated debt, together with the significant peso

[89] Our view in this regard is supported by the findings of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, *supra* note 37, paras. 111-115.

[90] USDOC Decision Memorandum (Exhibit MEX-19) page 4.

[91] USDOC Decision Memorandum (Exhibit MEX-19) p. 4.

devaluation during the Mexican currency crisis, combined to dramatically increase the cost of production component of the constructed normal value, resulting in sales not being used for comparison purposes as being at less than the cost of production, and a consequently high dumping margin. TAMSA argued in its response to the initiation of the sunset review, however, that the facts demonstrated that TAMSA had much less debt, and therefore could not experience the type of foreign exchange losses that had affected the original calculations, and the Mexican peso had stabilized, such that large devaluations such as happened at the time of the original investigation were unlikely. TAMSA argued that these facts, combined with the fact that it had been found not to be dumping in (at the time the sunset review was initiated) two successive administrative reviews, demonstrated that dumping was not likely to occur if the order were revoked as to it. [92]

7.78 It is clear that USDOC made its determination of likelihood of continuation or recurrence of dumping exclusively on the basis of a decline in import volumes, and did not rely on information concerning historical dumping margins, including the information on dumping margins calculated in administrative reviews during the period the measure was in place. Nor did USDOC otherwise consider any evidence relating to the amount of dumping originally found, the basis of that calculation, or whether changes in the underlying financial situation might affect the question of likelihood of continuation or recurrence of dumping. Indeed, the United States has stated as much in its submission in this dispute: "Commerce based its affirmative likelihood determination solely on the depressed state of import volumes for OCTG from Mexico."[93] There is no indication on the face of the decision memorandum that USDOC considered any of the information or arguments presented concerning changes in TAMSA's financial situation and overall economic conditions in Mexico. We stress that we express no opinion as to the outcome of such consideration. Our decision is based on the failure to consider potentially relevant evidence, which is not consistent with the obligation to make a reasoned analysis on the basis of relevant facts, and not on any views as to the result in this case.

7.79 The United States argues that the inference that dumping would continue or recur based on declines in import volumes following the imposition of the anti-dumping order is "an exercise in logic."[94] We do not dispute that an investigating authority may draw inferences in support of its conclusions, through the exercise of logic, based on the evidence presented. However, where information is presented that suggests that the inference is not appropriate in a particular case, then the investigating authority is obligated, under Article 11.3, to at least consider that information and take it into account before making its determination. In our view, information regarding changes in the financial circumstances of a company previously found to have been dumping, and changes in the overall economic situation of the exporting country, would appear to be relevant to whether the inference relied upon by USDOC is reasonable. This is particularly true where, as here, intervening reviews had resulted in findings of zero dumping margins. Thus, in our view, consideration of such evidence is necessary in order to satisfy the requirements of Article 11.3. USDOC did not do so in this case.

7.80 We therefore conclude that the sunset determination at issue is not consistent with Article 11.3 of the AD Agreement because USDOC's determination that dumping is likely to continue or recur is not supported by reasoned and adequate conclusions based on the facts before it.

7.81 Given our determination, we do not consider it either necessary or appropriate to address Mexico's claims regarding Article 2. We would note that, in any event, as it is clear that USDOC did not rely on historical dumping margins in this case, but solely on import volumes, we would not have

[92] Exhibit MEX-16, at 5.
[93] US first submission, para. 132.
[94] *Ibid*., para. 123.

made any findings concerning Article 2 even if we had reached a different conclusion on the adequacy of USDOC's consideration of the evidence.

7.82 The Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* stated that the investigating authorities did not have to "calculate or rely on dumping margins in determining the likelihood of continuation or recurrence of dumping. However, should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4"[95] In a case such as this one, where the United States acknowledges that USDOC explicitly relied solely on import volumes in making its determination, we consider that there can be no basis for a finding of violation of Article 2 of the AD Agreement.

7.83 Finally, with respect to Mexico's claims concerning the margin of dumping reported to the USITC as the margin likely to prevail, we recall that, as discussed above, USDOC did not rely on this margin in making its determination of likelihood of continuation or recurrence of dumping. We can find no provision of the AD Agreement, and Mexico has cited none, that requires such "reporting" of a margin likely to prevail – this appears to be an element of US law that is not derived from any element of the AD Agreement. Therefore, we do not consider it either necessary or appropriate to address Mexico's claims under Articles 2 and 6 of the AD Agreement regarding the margin of dumping reported to the USITC.

C. ALLEGED INCONSISTENCY OF US LAW REGARDING THE DETERMINATION OF LIKELIHOOD OF CONTINUATION OR RECURRENCE OF INJURY, AS SUCH AND AS APPLIED

1. Arguments of Mexico

7.84 Mexico asserts that the standard applied by the USITC, set forth in 19 U.S.C. § 1675a(a)(1), for determining whether termination of the anti-dumping duty order is "likely" to lead to continuation or recurrence of injury is inconsistent, as such, with Articles 11.1 and 11.3 of the AD Agreement.

7.85 Mexico further argues that, in the sunset review at issue, the USITC applied this inconsistent standard, instead of the proper "likely" standard set out in Article 11.3. Mexico considers that since the USITC did not apply the proper "likely" standard in this sunset review, it also failed to carry out an objective examination, thereby acting inconsistently with Articles 11.3, 3.1 and 3.2 of the AD Agreement. In addition, Mexico argues that the USITC failed to base its determination of likelihood of continuation or recurrence of injury on positive evidence, inconsistently with Articles 11.3, 3.1 and 3.2 of the AD Agreement. Mexico asserts, in general, that the provisions of Article 3 apply in sunset reviews. Mexico submits that the USITC violated Article 3.4 of the AD Agreement by failing to address some of the fifteen injury factors listed therein. Finally, Mexico asserts that the USITC failed to analyse the causal link between likely dumped imports and likely injury, as Mexico contends is required by Article 3.5 of the AD Agreement, by failing to inquire whether there would be other factors that would also affect the domestic industry in the event of revocation of the anti-dumping duty.

7.86 Mexico also claims, in conjunction with its other claims, that the USITC's determination is inconsistent with Article 3.3 of the AD Agreement. Mexico submits that by undertaking a cumulative assessment, the USITC acted inconsistently with Articles 11.3 and 3.3 of the AD Agreement. Assuming that Articles 11.3 and 3.3 do not preclude cumulative assessment in sunset reviews, Mexico submits that Article 3.3 establishes the conditions in which a cumulative assessment is permitted, and that those conditions were not satisfied in this case, resulting in a violation of Article 3.3.

[95] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra* note 37, para. 127.

7.87 Finally, Mexico asserts that 19 U.S.C. §§ 1675a(a)(1) and (5), which establish a time-frame for the USITC's consideration of whether injury is likely to continue or recur, are inconsistent with Articles 11.1, 11.3, and 3 of the AD Agreement, both as such, and as applied in this case.

2. Arguments of the United States

7.88 The United States argues that US law governing the standard for USITC determinations of likelihood of continuation or recurrence of injury in sunset reviews is consistent with Article 11.3 of the AD Agreement. The United States submits that in the instant sunset review the USITC applied the standard provided for under Article 11.3, i.e., the "likely" standard.

7.89 Generally, the United States asserts that the USITC's establishment of the facts was proper, and its evaluation of those facts was unbiased and objective. The United States maintains that Article 3 does not apply to sunset reviews, although some of the provisions of Article 3 may provide guidance as to the type of information that may be relevant to the consideration of whether injury is likely to continue or recur.

7.90 With regard to the claim concerning cumulative assessment, the United States maintains that the AD Agreement does not prohibit cumulative assessment in sunset reviews. The United States notes that Article 11.3 of the AD Agreement does not mention cumulation, and that cumulation was a widespread practice before the AD Agreement was adopted, suggesting that unless it is specifically prohibited by the AD Agreement, it is permitted. Moreover, the United States contends that Article 3.3 does not apply in sunset reviews generally, as it is limited, by its terms, to investigations.

7.91 Finally, the United States asserts that Article 11.3 does not specify a time-frame for the determination of whether injury is likely to continue or recur, and that therefore the US statutory provisions in this respect are not inconsistent with any obligations in the AD Agreement. In particular, the United States considers that Articles 3.7 and 3.8, which Mexico relies on in this regard, only apply to original determinations of threat of material injury, and not to determinations in sunset reviews.

3. Findings

(a) Introduction

7.92 The USITC's determination in the OCTG sunset review concerned five countries, i.e., Argentina, Italy, Japan, Korea and Mexico. The USITC carried out a cumulative analysis with respect to these five countries.[96] The USITC determined that material injury would be likely to continue or recur if the order on OCTG from Argentina, Italy, Japan, Korea and Mexico were to be revoked.[97] This same determination was challenged by Argentina in the *US – Oil Country Tubular Goods Sunset Reviews* dispute. While the claims and arguments of Mexico in this dispute are not identical to those of Argentina in the earlier dispute, there are strong similarities. We have therefore carefully considered the reports of the Panel and of the Appellate Body in the *US – Oil Country Tubular Goods Sunset Reviews* dispute, but have, of course, made our own determinations in resolving Mexico's claims.

(b) Challenges to US law "as such"

7.93 Mexico raises two "as such" claims with respect to US law governing the USITC determination of likelihood of continuation or recurrence of injury. The first asserts that the standard

[96] USITC Sunset Determination, supra note 4, (Exhibit MEX-20) p. 14.
[97] *Ibid.*, pp. 16-17.

of "likelihood" in US law, as interpreted by the USITC, is inconsistent with Article 11.3. The second asserts that the provisions of US law establishing a time-frame for the determination in a sunset review are inconsistent with Articles 11.1, 11.3, and 3 of the AD Agreement.

7.94 Turning to the first of these, we note that 19 U.S.C. § 1675a(a)(1) reads, in relevant part:

> In general
>
> ...The Commission shall determine whether revocation of an order, or termination of a suspended investigation, would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time ...[98]

In the instant case, the USITC final determination states, in pertinent part:

> Based on the record in these five-year reviews, we determine under section 751(c) of the Tariff Act of 1930, as amended ('the Act'), that revocation of the anti-dumping duty orders on Oil Country Tubular Goods ('OCTG') other than drill pipe ('casing an tubing') from Argentina, Italy, Japan, Korea, and Mexico and of the countervailing duty order on casing and tubing from Italy would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[99]

7.95 Thus, as Mexico acknowledges,[100] on its face, both the statute, and the USITC's determination, refer to the proper standard as set out in Article 11.3.

7.96 However, Mexico argues that despite this, the USITC in fact interpreted the likely standard inconsistently with the AD Agreement, and relied on that inconsistent interpretation in this case. Mexico notes that the Appellate Body ruled, in *US – Corrosion-Resistant Steel Sunset Review*, that the ordinary meaning of "likely" as used in Article 11.3 is "probable",[101] and asserts that the USITC wrongly interpreted "likely" to mean "possible", thus necessarily applying an inconsistent standard in making its determination. In support of its view, Mexico points to statements made on behalf of the USITC in other fora, and in NAFTA litigation involving the determination at issue in this dispute, which Mexico asserts demonstrate the inconsistent interpretation of "likely" relied on by the USITC. The United States maintains that since these statements were made, the US courts resolved the interpretative question, concluding that "likely" was synonymous with "probable". Therefore, the United States argues, the determination in dispute is consistent with the "likely" standard in Article 11.3.

7.97 We do not consider statements made on behalf of the USITC in other fora or in litigation to be relevant to our assessment whether the standard of likelihood applied by the USITC was consistent, as such, with Article 11.3.[102] On its face, the USITC determination refers to the proper standard. While there may have been some questions as to the interpretation of the standard by the USITC, it seems clear that this question has been resolved in the US courts. The United States has represented that it

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[98] Exhibit MEX-24.
[99] USITC Sunset Determination, supra note 4, (Exhibit MEX-20 at 1).
[100] Mexico's second submission, para. 88.
[101] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra* note 37, para. 111
[102] We note that the Appellate Body has stated that it was "not unreasonable" for the Panel in *US – Oil Country Tubular Goods Sunset Reviews*, to reach the same conclusion. Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39, para.312.

> agrees that the term 'likely' as used in Article 11.3 can be equated with 'probable' in the manner that the US courts understand the meaning of 'probable' and as 'probable' has been explained by the Appellate Body.[103]

7.98 In this circumstance, even assuming Mexico were correct that there was some difference in views as to the meaning of "likely", we cannot look behind the standard which the USITC clearly stated that it was applying in its determination and assess in the abstract whether it applied the correct legal standard of likelihood. In our view, the only way for a reviewing panel to assess whether, in fact, the proper standard was applied is to evaluate the determination actually made in light of that standard.[104] If, following that evaluation, we conclude that the USITC determination is consistent with Article 11.3 and the "likely" standard, then, in our view, whatever statements may have been made are irrelevant. If on the other hand, we conclude following our evaluation that the USITC determination is inconsistent with Article 11.3 and the "likely" standard, it will not be because of the perceptions or understanding of the USITC or individual Commissioners in the abstract, but rather because the determination actually made could not have been made if the proper standard had been applied. We address that question further below.

7.99 We next address Mexico's claim concerning the time-frame for USITC determinations in US law. 19 U.S.C. § 1675a(a)(5) provides, in relevant part:

> (5) Basis for determination
>
> The presence or absence of any factor which the Commission is required to consider under this subsection shall not necessarily give decisive guidance with respect to the Commission's determination of whether material injury is likely to continue or recur **within a reasonably foreseeable time** if the order is revoked or the suspended investigation is terminated. In making that determination, 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**.[105] (emphasis added)

With reference to this provision the SAA provides:

> A 'reasonably foreseeable time' will **vary from case-to-case**, but normally will **exceed the 'imminent' timeframe** applicable in a threat of injury analysis. New Section 752(a)(5) expressly states that the effects of revocation or termination may manifest themselves only over a longer period of time. The Commission will consider in this regard such factors as the fungibility or differentiation within the product in question, the level of substitutability between the imported and domestic products, the channels of distribution used, the methods of contracting (such as spot sales or long-term contracts), and lead times for delivery of goods, as well as other factors that **may only manifest themselves in the longer term**, such as planned investment and the shifting of production facilities.[106] (emphasis added)

7.100 Thus, US law establishes a time-frame for the USITC's determination of whether revocation of the duty would be likely to lead to the continuation or recurrence of injury within a reasonably

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[103] US first submission at para. 225, citing Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, *supra* note 37, para. 111.

[104] We note that the Appellate Body has agreed with the very similar statement that "the only way for the Panel to assess whether [the "likely"] standard was in fact applied was to evaluate whether the facts supported that finding". Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39, para. 311.

[105] Exhibit MEX-24.

[106] SAA (Exhibit MEX-26) 4211.

foreseeable time. Read together, the statute and the SAA establish that this time frame will vary from case-to-case, but may clearly be longer than "imminent".

7.101 Mexico argues that, under Article 11.3, the time-frame within which revocation of the order would lead to continuation or recurrence of injury must be "as curtailed as possible", and indeed, the determination should be based upon a finding of likely injury upon expiry of the order.[107] Thus, Mexico maintains that US law is inconsistent by allowing a longer time-frame for the determination than is consistent with Article 11.3. In addition, Mexico points to the provisions of Articles 3.7 and 3.8, which relate to determinations of threat of material injury, and argues that these provisions apply to "prospective injury determinations"[108], and that by allowing for a longer period of time than those provisions, US law is inconsistent with Articles 3.7 and 3.8. Finally, Mexico argues that this allegedly inconsistent time-frame is inconsistent with the "likely" standard of Article 11.3, and allows for determinations of likelihood of continuation or recurrence of injury not based on an objective evaluation of positive evidence, inconsistently with Articles 3.1, 3.2, and 3.4 of the AD Agreement.

7.102 The United States argues that Article 11.3 does not specify a time-frame for sunset inquiries. Moreover, the United States asserts that Article 11.3, by referring to a determination whether revocation "would be likely **to lead to** continuation or recurrence of injury" contemplates some period of time between the revocation and continuation or recurrence of injury. The United States maintains that in the absence of any specification in the AD Agreement, Members remain free to establish a relevant time frame in domestic law, and the time-frame in the US law is inherently reasonable. Finally, the United States argues that Article 3 does not apply to sunset reviews, and in particular, Articles 3.7 and 3.8 pertain to threat of injury determinations in original investigations, but not to sunset reviews.

7.103 It is clear to us that Article 11.3 does not establish any rules regarding the time-frame for a determination concerning likelihood of continuation or recurrence of injury. In particular, the text does not set out a requirement that the investigating authorities specify when injury is likely to continue or recur. Article 11.3 simply requires that the investigating authorities make a determination whether injury is likely to continue or recur should the duty be revoked. Of course, as the Appellate Body has stated, that determination must have a sufficient factual basis and be supported by reasoning.[109] However, we disagree with Mexico that the time-frame for that determination established by US law is, as such, inconsistent with Article 11.3. A determination based on that time-frame might be found to be inconsistent, if it is found to be based on inadequate evidentiary grounds or unreasonable, a question we address below. However, merely that US law establishes a standard of "a reasonably foreseeable time" for such determinations does not demonstrate inconsistency with Article 11.3 of the AD Agreement.[110]

7.104 Moreover, we agree with the view of the United States that Article 11.3 does not require a finding that injury is likely upon expiry of an anti-dumping order. Such an interpretation would run counter to the notion of likelihood that injury will recur, which implies that there is no injury at the time the order is terminated, but will recur. It seems to us unreasonable to conclude that such recurrence must be immediate – rather, it is in our view more appropriate to understand that there may be some time between expiry of an order and likely recurrence of injury. Certainly, upon revocation of any anti-dumping order, some time might be expected to pass before exporters or importers could

[107] Mexico's second submission, para.163, Mexico's first submission, para. 266.

[108] Mexico's first submission, para. 270

[109] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra* note 37, paras. 114-115.

[110] We note that the Appellate Body reached the same conclusion in *US – Oil Country Tubular Goods Sunset Reviews*. Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39, para. 359.

book orders and ship product into the importing market, and some additional time might be expected to pass before the effects of such imports might be felt by the domestic industry. Thus, we conclude that 19 U.S.C. 1675a(a)(1) and (5), governing the time-frame in which the USITC must consider whether injury is likely to continue or recur, are not inconsistent Article 11.3.

7.105 Mexico also contends that 19 U.S.C. 1675a(a)(1) and (5) are inconsistent with Articles 3.7 and 3.8 of the Agreement. As discussed below, the nature of the determinations at issue under Articles 3.7 and 3.8 on the one hand, and Article 11.3 on the other, are different, and are properly understood to entail different substantive elements.

7.106 Article 3 of the AD Agreement is entitled "Determination of Injury". Footnote 9 to Article 3 defines three types of injury – material injury to a domestic industry, threat of material injury to a domestic industry, and material retardation of the establishment of a domestic industry. Articles 3.7 and 3.8 of the AD Agreement specifically relate to determinations of threat of material injury.[111] Article 11 is entitled "Duration and Review of Anti-Dumping Duties and Price Undertakings". Article 11.3 specifically relates to, *inter alia*, the determination of likelihood of continuation or recurrence of injury. As we discuss in more detail below, at paragraphs 7.115 - 7.118, the determinations under Article 3, and under Article 11.3 are substantively different from one another. As the Appellate Body observed in *US – Corrosion-Resistant Steel Sunset Review*, investigations and reviews are two distinct processes with different purposes. [112] It is therefore, in our view, entirely reasonable that these two distinct processes with different purposes are subject to different rules in certain respects. Nothing in Mexico's arguments persuades us that Articles 3.7 and 3.8 are exceptional in this regard, such that they should be found to be directly applicable in sunset reviews. There is certainly nothing in the text of those provisions, or in Article 11.3, that would establish any such requirement – and indeed, Mexico has not asserted otherwise.

7.107 While it might be argued that the **analysis** of threat of injury in an original anti-dumping investigation and the **analysis** of likelihood of continuation or recurrence of injury determination in a sunset review are similar, in that they both require prospective analysis, this is not sufficient to persuade us of the conclusion sought by Mexico, that the specific requirements of Articles 3.7 and 3.8 apply to sunset reviews. Indeed, in our view, there are important differences in fact between a determination of threat of material injury and a determination that injury is likely to continue or recur. The former determination presumes a conclusion that there is not material injury at the time of the finding of threat of material injury. It seems logical to us that, in order to justify imposition of an anti-dumping measure in such circumstances, Members would have agreed that the change in circumstances to a situation of material injury must be imminent, and therefore specified a time-frame in the AD Agreement. The same considerations do not necessarily apply in the context of a determination of likelihood of continuation or recurrence of dumping, where the observed facts are affected by the existence of the anti-dumping measure, and it is not necessarily the case that there is no injury at the time of the determination. Therefore, in our view, it is clear that the temporal elements of Articles 3.7 and 3.8 are not directly applicable in sunset reviews. [113]

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[111] Other provisions of Article 3 are also relevant to determinations of threat of material injury, see Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* ("*Mexico – Corn Syrup*"), WT/DS132/R and Corr.1, adopted 24 February 2000, DSR 2000:III, 1345, but they are not at issue here.

[112] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra* note 37, paras. 106-107.

[113] We note that the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*, reached substantially the same conclusion. Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39, para. 358.

7.108 On the basis of the above considerations, we find that 19 U.S.C. §§ 1675a(a)(1) and (5) are not inconsistent with Articles 3.1, 3.2, 3.4, 3.7, 3.8, 11.1, and 11.3 of the AD Agreement.[114][115]

(c) Challenges to US law "as applied"

(i) Time-frame

7.109 Mexico submits that the application of 19 U.S.C. §§ 1675a(a)(1) and (5) in the instant sunset review was inconsistent with Articles 11.3 and 3 of the Agreement. According to Mexico, the USITC's determination does not indicate what time period it considered to be a "reasonably foreseeable time" in making its determination in the instant sunset review. The United States argues that because Article 11.3 is silent as to the time-frame relevant to sunset reviews and thus imposes no obligations in this regard, the USITC's determination cannot be inconsistent with Articles 3 and 11.3 of the AD Agreement merely because it does not specify the time-frame on which it was based.

7.110 We recall our finding that the US statutory provisions relating to the time-frame on the basis of which the USITC makes its likelihood determinations in sunset reviews are not inconsistent with Articles 11.1, 11.3, and 3 of the AD Agreement. Therefore, it follows that their application in the sunset review at issue is not **necessarily** inconsistent with Articles 11.3 and 3 of the AD Agreement.

7.111 Mexico argues that even assuming the US statutory provisions were consistent with the AD Agreement, the USITC failed to apply these provisions to the evidence before it in the instant sunset review and failed to analyze any of the factors relevant to defining the time it considered reasonably foreseeable. At most, Mexico's argument might imply that the USITC failed to comply with US law in this regard. In light of our conclusion that Article 11.3 does not require investigating authorities to specify the time-frame on which the determination of likelihood of continuation or recurrence of injury is based, we see no inconsistency with the AD Agreement in the fact that the USITC did not specifically identify the time-frame it considered in making its determination in this case. In comments received after the issuance of the Appellate Body Report in *US – Oil Country Tubular Goods Sunset Reviews*, Mexico notes that the Appellate Body agreed with the Panel in that case, that "an assessment regarding whether injury is likely to recur that focuses 'too far in the future would be highly speculative.'"[116] Mexico goes on to argue that "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". We have already found that there is no obligation on the USITC to identify the time-frame it considered in making its determination. Now, to the extent that Mexico seems to imply that this time-frame was "too far in the future", we note that Mexico never made this argument in its submissions and therefore it is not necessary for us to make a finding on this question.

7.112 In light of the above considerations, we conclude that 19 U.S.C. §§ 1675a(a)(1) and (5) were not applied inconsistently with Articles 11.3 and 3 of the AD Agreement in the OCTG sunset review.[117]

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[114] We note that, while Mexico claimed that 19 U.S.C. §§ 1675a(a)(1) and (5) violated Articles 11.1, 3.1, 3.2, and 3.4 of the AD Agreement, it did not elaborate on these claims or make specific arguments regarding them. Therefore, we have not discussed these provisions in our analysis.

[115] We note that this is the conclusion reached on this same question by the Panel in *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39.

[116] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39, para. 360.

[117] We note that this is the conclusion reached on this same question by the Panel in *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39.

(ii) Alleged violations of Articles 3.1, 3.2 and 11.3 of the AD Agreement in the determination of likelihood of continuation or recurrence of injury

7.113 Mexico submits that the USITC failed to apply the "likely" standard of Article 11.3 in the sunset review at issue. Mexico argues that in this sunset review, the USITC applied a "possibility" standard instead of the proper likely standard of Article 11.3, thus determining that injury would be likely to continue or recur on the basis of facts that demonstrated that a certain outcome was possible, rather than probable. Mexico also argues that the USITC failed to carry out an objective examination on the basis of positive evidence with respect to the volume, price effects, and impact of imports, as required by Articles 3.1 and 3.2 of the AD Agreement, failed to address all the injury factors set out in Article 3.4, failed to comply with the requirements of Article 3.5 regarding causal link and non-attribution of injury caused by other factors, and acted inconsistently with Articles 3.7 and 3.8. The United States submits that in the instant sunset review the USITC applied the "likely" standard provided for under Article 11.3. The United States generally argues that the specific provisions of Article 3 – including Article 3.1 – do not apply to sunset reviews. The United States nevertheless submits that the USITC's determination was based on an objective evaluation of positive evidence, and was not otherwise inconsistent with the requirements of the AD Agreement.

7.114 Mexico's claims with regard to the USITC's determination in dispute are almost entirely premised on the provisions of Article 3 of the AD Agreement, either independently, or in conjunction with Article 11.3. In this regard, Mexico relies mainly on the provisions of footnote 9 to Article 3, which defines "injury". The United States, on the other hand, maintains that the provisions of Article 3 are not directly applicable in sunset reviews, because the nature of the inquiry is different in original anti-dumping investigations under Article 3, and sunset reviews under Article 11.3. In the US view, Article 3 applies to the determination of "injury" in an original anti-dumping investigation, but does not apply to the determination of the "likelihood of continuation or recurrence of injury" in a sunset review. We begin our evaluation by addressing this central question of the relation between Articles 3 and 11 of the AD Agreement.

7.115 Neither Article 11.3, nor any other paragraph of Article 11, specifically addresses whether the provisions of Article 3 in general, or specific paragraphs thereof, apply to sunset reviews. Nor does any provision of Article 3 contain any references to sunset reviews or Article 11 in general. Some elements of the text of Article 3 do suggest that it has broad application in anti-dumping cases. Thus, the reference in Article 3.1 to "A determination of injury for purposes of Article VI of GATT 1994" and footnote 9, which introduces the meaning of the term "injury" with the phrase "[u]nder this Agreement" both suggest that the concept of injury should be understood in the manner set out in Article 3 throughout the Agreement. However, in our view, this is not sufficient to lead to the conclusion that the specific requirements of Article 3 apply directly to the determination of likelihood of continuation or recurrence of injury under Article 11.3.

7.116 In this regard, we note in particular that the nature of the inquiries in investigations and sunset reviews is significantly different. Regarding the differences between original investigations and sunset reviews, Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* observed:

> In considering the nature of a likelihood determination in a sunset review under Article 11.3, we recall our statement in *US – Carbon Steel*, in the context of the *SCM Agreement*, that:
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> > … original investigations and sunset reviews are distinct processes with different purposes. 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.[116]

> This observation applies also to original investigations and sunset reviews under the Anti-Dumping Agreement. In an original anti-dumping investigation, investigating authorities must determine whether *dumping exists* during the period of investigation. In contrast, in a sunset review of an anti-dumping duty, investigating authorities must determine whether the expiry of the duty that was imposed at the conclusion of an original investigation would be *likely to lead to continuation or recurrence of dumping.*
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> ———————
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> [116]Appellate Body Report, *US – Carbon Steel*, para. 106.[118]

7.117 Although the Appellate Body was discussing the differences between original investigations and sunset reviews with respect to the question of dumping, we consider that its reasoning applies with equal force to the question of injury. A determination of injury in an original investigation is a conclusion regarding the situation of the industry during the period investigated, based on historical facts. A determination of likelihood of continuation or recurrence of injury in a sunset review, however, is a conclusion regarding the likely situation of the industry in the future, following revocation of an anti-dumping measure that has been in place for five years. While such a determination must, as the Appellate Body has stated, rest upon an adequate factual basis and be supported by reasoning, there is, in our view, no doubt that the determinations are different in kind, and that consequently, requirements relevant to a determination of injury are not necessarily relevant to a determination of continuation or recurrence of injury. We note that the Appellate Body has stated that an investigating authority is not required to make a dumping determination in a sunset review.[119] Similarly, we consider that an investigating authority is not required to make an injury determination in a sunset review.[120] It follows, then, that the obligations set out in Article 3 are not directly applicable in sunset reviews.[121]

7.118 Our conclusion on this issue is the same as that reached by the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*. In that report the Appellate Body noted that:

> [T]he *Anti-Dumping Agreement* distinguishes between 'determination[s] of injury', addressed in Article 3, and determinations of likelihood of 'continuation or recurrence ... of injury', addressed in Article 11.3. In addition, Article 11.3 does not contain any cross-reference to Article 3 to the effect that, in making the likelihood-of-injury determination, all the provisions of Article 3—or any particular provisions of Article 3—*must* be followed by investigating authorities. Nor does any provision of Article 3 indicate that, wherever the term 'injury' appears in the *Anti-Dumping Agreement*, a determination of injury must be made following the provisions of Article 3.[122] (emphasis in the original)

Subsequently the Appellate Body went on to find, as we have done in this case, that:

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[118] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra* note 37, paras. 106-107.

[119] *Ibid*., para. 123.

[120] We note that this is the conclusion reached on this same question by the Panel in *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39.

[121] If, however, an investigating authority **were** to make an injury determination in a sunset review, such a determination would be subject to the requirements of Article 3. See Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra* note 37, paras. 126-130.

[122] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39, para. 278.

> 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 conclude that investigating authorities are not *mandated* to follow the provisions of Article 3 when making a likelihood-of-injury determination.[123] (emphasis in the original)

7.119 However, our finding regarding applicability of the obligations in Article 3 to sunset reviews, does not mean that Article 3 is irrelevant to our evaluation of the USITC's determinations in this dispute. While Article 3 is entitled "Determination of Injury", and sets out various elements to be considered in the analysis of evidence underlying such a determination, footnote 9 to Article 3 does establish the meaning of the term injury for the entire AD Agreement. Thus, in our view, throughout the Agreement – including sunset reviews – the term injury should be understood and interpreted as set out in footnote 9.[124] The provisions of Article 3 governing the determination of injury thus may provide useful guidance in the context of the analysis in sunset reviews, and we will be mindful of this in our evaluation.[125]

7.120 Turning then to Mexico's specific claims regarding the USITC determination at issue here, we note first that, as discussed above, Mexico contends that the USITC did not apply the "likely" standard set out in Article 11.3 in making its determination. Mexico points to the USITC's analysis of the volume, price effects, and impact on the domestic industry in support of its position, asserting its findings rested on possible outcomes, rather than likely, or probable, outcomes. Mexico also argues that the USITC did not base its determination on sufficient positive evidence because it considered evidence from the original investigation, and that the USITC did not undertake an objective examination of the evidence it did consider.

7.121 Mexico's claims are made under Articles 3.1 and 3.2 of the AD Agreement, and Article 11.3. To the extent that Mexico is asserting claims directly under Articles 3.1 and 3.2, these claims would be cognizable only if the USITC had made a determination of injury in this case. However, it is clear from the face of the USITC's determination that it made a determination regarding the likelihood of continuation or recurrence of injury, rather than a determination of injury.[126] Indeed, Mexico does not argue otherwise. Thus, we make no findings regarding Mexico's claims under Articles 3.1 and 3.2.

7.122 However, the crux of Mexico's arguments 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. The USITC's conclusion that there was a likelihood of continuation or recurrence of injury was based on its consideration of the likely volume, price effects, and impact of imports We must therefore consider these aspects of the USITC determination under the standard of review applicable in this dispute. If we find that the USITC's establishment of facts was proper and its evaluation of those facts was unbiased and objective, we will find no violation of Article 11.3, even if we might have reached a different conclusion on the basis of the same facts.

Likely volume of imports

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[123] *Ibid*., para. 280.

[124] We note the similar conclusion of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* regarding the definition of dumping set out in Article 2.1 of the Agreement. Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra* note 37, para. 126.

[125] We note that this is the conclusion reached on this same question by the Panel in *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39.

[126] See, for instance, pages 1, 16 and 33 of the USITC Sunset Determination (Exhibit MEX-20), *supra* note 4.

7.123 The USITC's determination sets out a detailed discussion regarding the likely volume of imports, starting with a description of the relevant findings in the original investigation, and then addressing the evidence relevant to the period of application of the measure. The USITC acknowledged that the foreign producers' capacity utilization rates were high, but concluded that these producers had incentives to devote more of their productive capacity from other types of tubular products to casing and tubing[127], and could do so because these two groups of products are produced on the same production lines with the same machinery. The USITC set out five reasons for this conclusion, and determined that the likely volume of dumped imports would be significant, both in absolute terms and relative to the US market, in the absence of the anti-dumping duty. Mexico take issue with the USITC's conclusion, challenging each of the reasons cited in support of that conclusion. Mexico argues that the USITC based its findings on speculation, rather than positive evidence, and disregarded positive evidence supporting the opposite conclusion. Therefore, the issue we must address is whether the USITC's determination that foreign producers could shift productive capacity from other pipe and tube products to casing and tubing, and had incentives to do so in order to ship to the US market, which would lead to likely increases in import volumes had a sufficient basis of positive evidence.

7.124 The USITC determination reads, in pertinent part:

> The recent *** capacity utilization rates represent a potentially important constraint on the ability of these subject producers to increase shipments of casing and tubing to the United States. Nevertheless, the record indicates that these producers have incentives to devote more of their productive capacity to producing and shipping more casing and tubing to the US market.
>
> First, Tenaris is the dominant supplier of OCTG products and related services to all of the world's major oil and gas drilling regions except the Untied States. Tenaris states that it is the only entity that can serve oil and gas companies on a global basis, and that it seeks worldwide contracts with such companies. Many of Tenaris existing customers are global oil and gas companies with operations in the United States. While the Tenaris companies seek to downplay the importance of the US market relative to the rest of the world, they acknowledge that it is the largest market for seamless casing and tubing in the world. Given Tenaris' global focus, it likely would have a strong incentive to have a significant presence in the US market, including the supply of its global customers' OCTG requirements in the US market.
>
> Second, casing and tubing are among the highest valued pipe and tube products, generating among the highest profit margins. Thus, producers generally have an incentive, where possible, to shift production in favor of these products from other pipe and tube products that are manufactured on the same production lines.
>
> Third, the record in these reviews indicates that prices for casing and tubing on the world market are significantly lower than prices in the United States. Virtually all purchasers report that, notwithstanding the discipline imposed by the orders, subject imports are nevermore expensive than the domestic like product and often less expensive. One purchaser reported that if the orders are revoked, ***. We have considered respondents' arguments that the domestic industry's claims of price differences are exaggerated, but nevertheless conclude that there is on average a

[127] OCTG includes two different product sub-groups: "Casing and tubing" and "drill pipe". The like product in the OCTG sunset review at issue included "casing and tubing", but not "drill pipe". See, USITC Sunset Determination, supra note 4, (Exhibit MEX-20) pp. 1-4.

> difference sufficient to create an incentive for subject producers to seek to increase their sales of casing and tubing to the United States.
>
> Fourth, subject country producers also face import barriers in other countries, or on related products. Argentine, Japanese, and Mexican producers are subject to antidumping duty orders in the United States on seamless standard, line, and pressure pipe, which are produced in the same production facilities as OCTG. Korean producers are subject to import quotas on welded line pipe shipped to the United States and US antidumping duty orders on circular, welded, non-alloy steel pipe. Canada currently imposes 67 per cent antidumping duty margins on casing from Korea.
>
> Finally, we find that industries in *** of the subject countries are dependent on exports for the majority of their sales. Japan and Korea in particular have very small home markets and depend nearly exclusively on exports. The export orientation of the industries in the subject countries indicates that they would seek to re-enter the US market in significant quantities, as they did during the original investigations, if the orders were revoked.
>
> We therefore find that, in the absence of the orders, the likely volume of cumulated subject imports, both in absolute terms and as a share of the US market, would be significant.[128] (footnotes omitted)

7.125 Regarding the first point, Mexico argues that some of the companies in the Tenaris group were not covered by the anti-dumping duty, and thus there was no incentive for companies subject to the duty to export to the United States. Mexico notes the existence of long-term contractual commitments, and argues that there was no evidence that producers would break these contracts. However, evidence before the USITC indicated that long-term contracts accounted for only about 55 per cent of Tenaris sales.[129] Moreover, evidence indicated that the Tenaris companies had contracts with oil and gas companies covering their operations outside the United States, and wanted to extend arrangements to include the United States, the world's largest market for OCTG. Moreover, the mere fact that one of the Tenaris companies was not covered by the anti-dumping duty does not undermine the incentives for other companies in the group to ship to the United States, particularly in light of evidence that this one company had no intention of increasing its exports to the United States.[130] We cannot conclude that the USITC's analysis in this regard was not based on positive evidence.

7.126 With respect to the USITC's second reason, Mexico argues that the conclusion that "producers generally have an incentive, where possible, to shift production in favour of" casing and tubing, which are "among the highest valued pipe and tube products, generating among the highest profit margins" is a "general assumption" and does not take account of the fact that Tenaris did not rely on the US market and was therefore not motivated by such general incentives. However, Mexico does not dispute the fact that the subject products are of relatively high value, and that shifting product to the relatively higher value products was possible.[131] Thus, we cannot conclude that the USITC's analysis in this regard was not based on positive evidence.

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[128] USITC Sunset Determination, supra note 4, (Exhibit MEX-20 at 19-20). The asterisks in the text indicate confidential information deleted from the public version of the report.

[129] USITC hearing transcript, paras. 200 and 205 (Exhibit US-24).

[130] Post-Hearing Brief of TAMSA at 8 (Exhibit US-25).

[131] In comments received after the issuance of the Appellate Body Report in *US – Oil Country Tubular Goods Sunset Reviews*, Mexico asserts that unlike Argentina it does dispute that "shifting production was

7.127 Next, Mexico argues that the USITC's analysis concerning the price differences between the US and the world markets was based on anecdotal and contested evidence, and did not relate to the question whether producers had incentives despite the existence of long-term contracts and sales primarily to end-users. The USITC cited the testimony of three individuals in this sector in support of the price differential, and Mexico has not referred to any contrary evidence.[132] The fact that there may have been differing evidence as to the magnitude of the price difference does not affect the fact that a price difference existed, and the USITC concluded that "on average" the difference was sufficient to create the incentive to sell in the US market, indicating that it took the conflicting evidence into account. Moreover, the mere fact that the evidence was "anecdotal" in Mexico's terminology does not remove its probative value. The AD Agreement does not establish any limits on the type of evidence that may be relied upon by investigating authorities. Thus, we cannot conclude that the USITC's analysis in this regard was not based on positive evidence.

7.128 Fourth, Mexico argues that, with respect to the existence of trade barriers, only one of the trade barriers was on the subject OCTG product, while others concerned related products that could be produced on the same production lines as casing and tubing. Mexico argues that there was no evidence that product shifting would occur, and therefore these trade barriers do not support the USITC's conclusion. Given that it is undisputed that such shifting **could** occur, we see no reason to conclude that it was unreasonable of the USITC to consider that the existence of barriers to trade in related products provided an incentive to shift production to a higher value product for which the revocation of the anti-dumping order would open a large market. Thus, we cannot conclude that the USITC's analysis in this regard was not based on positive evidence.

7.129 Finally, Mexico disputes the USITC's finding that, because the industries in the countries subject to the sunset review were "dependent on exports for the majority of their sales", they would seek to re-enter the US market in significant quantities. Mexico argues that this "observation" of export dependence served as the basis for the conclusion that these producers were export oriented, and this indicated that they would seek to re-enter the US market in significant quantities. It is noteworthy that Mexico does not dispute the fact that these companies were dependent on exports, or that they had had a significant presence in the US market prior to the imposition of the anti-dumping duty. Rather, Mexico seems to suggest a mere "observation that certain companies had been successful in exporting", is insufficient to support the conclusion that these companies had an incentive to re-enter the market. In our view, this "observation" is an undisputed finding of fact, and we see no reason to conclude that it was unreasonable of the USITC to draw the inferences it did.

7.130 While Mexico has attacked each of the elements underlying the USITC's conclusion regarding the likely volume of imports, it is important, in our view, to keep in mind that it is the USITC's determination of likelihood of continuation or recurrence of injury which must be based on sufficient positive evidence and supported by reasoning. As one element of that determination, the USITC determined that certain producers had incentives to increase their exports to the United States on the basis of its analysis of a variety of factors. While we might differ with the USITC's views as to the relative importance of these factors on an individual basis, overall, we find no support for a conclusion that the USITC's conclusion regarding the likely volume of imports was not based on a proper establishment of facts and an unbiased and objective evaluation of those facts.

'technically possible'". In support of this assertion Mexico points to paras. 202-210 of its first submission and paras. 122-127 of its second submission. We have carefully reviewed the cited paragraphs, which we understand to assert that product shifting would be an unlikely business decision, but not that it was technically impossible. Thus, as Mexico did not argue that product shifting was not technically possible prior to the decision of the Appellate Body, we decline to consider that assertion at this stage of the dispute.

[132] USITC Sunset Determination, supra note 4, (Exhibit MEX-20) p. 21, footnote 128, Mexico's first submission, para. 207.

Likely price effects of dumped imports

7.131 The USITC's determination also contains a detailed discussion regarding the likely price effects of imports, again starting with a description of the relevant findings in the original investigation, and then addressing the evidence relevant to the period of application of the measure. The USITC concluded:

> Given the likely significant volume of subject imports, the high level of substitutability between the subject imports and domestic like product, the importance of price in domestic purchasing decision, the volatile nature of US demand, and the underselling by the subject imports in the original investigation and during the current review period, we find that in the absence of the orders, casing and tubing from Argentina, Italy, Japan, Korea and Mexico likely would compete on the basis of price in order to gain additional market share. We find that such price-based competition by subject imports likely would have significant depressing or suppressing effects on the prices of the domestic like product.[133] (footnote omitted)

7.132 Mexico argues that the USITC's findings are unsupported by evidence on the record, and that its key finding on underselling is based largely on evidence from the original investigation. Mexico maintains that there was little evidence of underselling by likely imports, and thus the USITC gave greater weight to the evidence of underselling in the original investigation. Mexico also asserts that the USITC's ancillary findings concerning the volatile nature of demand and the importance of price in purchasing decisions are not based on positive evidence.

7.133 With respect to the analysis of price underselling, we note that the USITC did undertake a comparison for the period in which the anti-dumping duty was in effect:

> While direct selling comparisons are limited because the subject producers had a limited presence in the US market during the period of review, the few direct comparisons that can be made indicate that subject casing and tubing generally undersold the domestic like product especially in 1999 and 2000.[134] (footnote omitted)

7.134 The mere fact that there was only a limited number of comparisons does not, in our view, demonstrate inconsistency with Article 11.3 of the AD Agreement.[135] There is no minimum number of price comparisons that must be made, or instances of underselling that must be found, in order for the evidence on price underselling to be taken into account by an investigating authority in a sunset review. Indeed, it may often be the case that imports decline during the period an anti-dumping duty is in effect, thus limiting or even eliminating possible price comparisons. This would not preclude an investigating authority from drawing conclusions regarding price based on whatever evidence was available to it. In this case, the USITC was able to make price comparisons, and explained the reason for the limited number of those comparisons – the low volume of imports following the imposition of the anti-dumping duty. Mexico makes no argument or allegations concerning the probative value of the price comparisons actually undertaken.

7.135 Mexico does suggest that, in the absence of more price comparisons, the USITC "gave greater weight" to information from the original investigation, and that this "reliance on outdated

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[133] USITC Sunset Determination, supra note 4, (Exhibit MEX-20, at 21).

[134] *Ibid*., p. 21.

[135] We note that the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*, endorsed a similar finding by the Panel in that case. Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39, para. 346.

information" demonstrates that the USITC did not rely on positive evidence.[136] We do not agree with Mexico's characterization of the USITC determination. While it is true that the USITC's conclusion refers to "underselling by the subject imports in the original investigations", that reference is immediately followed by the phrase "and during the current review period".[137] This does not suggest any "greater weight" accorded the information regarding the original investigation. In the absence of any arguments regarding the price comparisons developed in the original investigation or the findings of underselling, and given that the USITC did develop and refer to price comparison information in the sunset review, we see no basis to find that the mere reference to evidence from the original investigation demonstrates a lack of positive evidence or an unobjective or biased evaluation.

7.136 Mexico also argues that the USITC's "ancillary findings" are unsupported by positive evidence, referring specifically to the volatile nature of US demand and the importance of price in purchasing decisions. With respect to the question of "volatile US demand", Mexico appears to argue that the USITC failed to explain why this was important, but does not dispute as a factual matter that demand in the US market was volatile.[138] As this factual statement is merely one element of the USITC's conclusion, we do not consider that it was necessary to demonstrate its importance *per se*.

7.137 Mexico also argues that the USITC's determination that price was an important factor in the purchasing decisions in the US market was flawed because the evidence shows that purchasers attached a similar importance to factors other than price. Purchasers were asked, during the sunset review, to indicate the importance of various factors in their purchasing decisions, with 2 indicating "very important", 1 indicating "important", and 0 indicating "not important". The staff report accompanying the USITC's determination in this case shows that purchasers gave the factor of "lowest price" an average rating of 1.8.[139] While it is true that other factors were also rated important, we cannot see that this in any way diminishes the importance of price in purchasing decisions. The USITC did not find that price was the **only** important factor, or even the **most** important factor; it found that it was **an** important factor. Mexico also asserts that purchasers cited quality and product availability just as frequently as price as their "primary purchasing criterion". However, the staff report indicates that no purchaser ranked product availability as the most important factor, while nine purchasers ranked price as the most important factor.[140] Thus, Mexico's argument does not undermine the evidence supporting the USITC's conclusion.

7.138 We therefore conclude that the USITC's determination regarding the likely price effect of dumped imports was based on an objective examination of positive evidence in the record.

Likely impact of dumped imports on the US industry

7.139 The USITC once again began by referring to the findings in the original investigation and went on to consider the evidence relating to the period of application of the anti-dumping duty. The USITC clearly stated that the evidence of the then-current condition of the domestic industry was positive. However, on the basis of its earlier findings regarding the likely volume of dumped imports and their likely price effects, it nevertheless concluded that these imports are likely to have an adverse impact on the US industry. The determination reads, in relevant parts:

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[136] Mexico's first submission, para. 213.

[137] USITC Sunset Determination, supra note 4, (Exhibit MEX-20) p. 21.

[138] Mexico asserts that there was "no evidence for the proposition that demand for OCTG was unusually volatile during the period examined." Mexico's first submission, para. 214. However, the USITC did not find that demand was **unusually** volatile. Thus, we fail to see any relevance in Mexico's assertion.

[139] Staff Report to USITC Sunset Determination, supra note 4, (Exhibit MEX-20 at II-19).

[140] *Ibid*., p. II-17.

> On balance, we find that the domestic industry's condition has improved since the orders went into effect as reflected in most indicators over the period reviewed, and we do not find the industry to be currently vulnerable.
>
> We find, however, as discussed above, that revocation of the orders likely would lead to a significant increase in the volume of subject imports which likely would undersell the domestic like product and significantly depress or suppress the domestic industry's prices. Moreover, in the original investigations, subject imports captured market share and caused price effects despite a significant increase in apparent consumption in 1993 and 1994 as compared to 1992. In these reviews, we find that a significant increase in subject imports is likely to have negative effects on both the price and volume of the domestic producers' shipments despite strong demand conditions in the near term. We find that these developments likely would have a significant adverse impact on the production, shipments, sales, market share, and revenues of the domestic industry. This reduction in the domestic industry's production, shipments, sales, market share, and revenues would result in erosion of the domestic industry's profitability as well as its ability to raise capital and make and maintain necessary capital investments.[141]

7.140 Mexico argues that the USITC's conclusions regarding the likely impact of future imports on the US industry were not based on an objective examination of the evidence in the record. According to Mexico, the USITC "based its conclusion of what would be likely to happen" if the order were revoked on what had occurred during the original period of investigation.[142] Moreover, Mexico contends that the USITC's conclusion was "particularly egregious" given that the evidence showed the domestic industry was "quite healthy".[143] Mexico argues that the evidence of good operating results demonstrated that injury would not be likely, and that the USITC's conclusion regarding the likely volume and price effects of dumped imports fatally affected its examination of the adverse impact of such imports on the US industry.

7.141 While it is true that the USITC's determination references the findings in the original investigation, it also clearly addresses the evidence of the condition of the industry during the period the anti-dumping duty was in effect, and concludes that despite the positive nature of the evidence on the current condition of the industry, the likely volume and price effects of imports would have a significant adverse impact on various aspects of the state of the US industry in the future. It is thus clear to us that the determination is not, in fact, based on the findings in the original investigation.

7.142 Therefore, in our view, the issue is whether, given its findings regarding the likely volume of dumped imports and their likely price effect, the USITC could conclude that there would be an adverse impact on the US industry.

7.143 In our view, the USITC did not act inconsistently with Article 11.3 of the Agreement in its determination regarding the likely impact of future dumped imports on the US industry. There is nothing in Article 11.3 that requires an investigating authority to follow a particular method in considering the likelihood of continuation or recurrence of injury. As long as the investigating authority's determination rests on a sufficient basis of positive evidence and reflects an objective examination of these facts, it will meet the requirements of Article 11.3. In this case, the USITC found that imports were likely to increase and to have a negative effect on the prices of the US industry in the event of revocation of the measure at issue. As discussed above, we have found no inconsistency with Article 11.3 in those conclusions. Then, the USITC found that this likely increase

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[141] USITC Sunset Determination, supra note 4, (Exhibit MEX-20, at 22-23).
[142] Mexico's first submission, para. 218.
[143] *Ibid*., para. 219.

in imports and their likely price effect would have a negative impact on the US industry. We do not consider that an objective and unbiased investigating authority could not reach this conclusion in light of the evidence cited. The mere fact that the evidence of the domestic industry's condition was positive does not preclude a finding that increased import volumes which would likely have negative effects on prices would likely have an adverse impact on the domestic industry.[144] Indeed, a desired effect of an anti-dumping duty is improvement in the condition of the domestic industry. Moreover, if a finding that imports would likely have an adverse impact an industry whose condition is generally good were precluded, there would be no basis for continuation of an anti-dumping measure based on likely "recurrence" of injury, which is specifically provided for in Article 11.3. We therefore conclude that the USITC's determination regarding the likely impact of the likely dumped imports on the US industry was not inconsistent with Article 11.3 of the AD Agreement. As discussed above, we make no findings regarding Mexico's claims under Articles 3.1 and 3.2

(iii) Alleged violations of Articles 3.4, 3.5, 3.7, and 3.8 of the AD Agreement in the determination of likelihood of continuation or recurrence of injury

7.144 As discussed above, we have concluded that Article 3 does not apply directly in sunset reviews. Thus, Mexico's claims under Articles 3.4, 3.5, 3.7, and 3.8 of the AD Agreement would be cognizable only if the USITC had made a determination of injury in this case. However, it is clear from the face of the USITC's determination that it made a determination regarding the likelihood of continuation or recurrence of injury, rather than a determination of injury. Indeed, Mexico does not argue otherwise. Thus, we make no findings regarding Mexico's claims under Articles 3.4, 3.5, 3.7, and 3.8 of the AD Agreement.

(iv) Cumulation

7.145 Mexico argues that the USITC's use of the cumulation methodology in the sunset review in dispute was inconsistent with Articles 11.3 and 3.3 of the Agreement. According to Mexico, Article 11.3 requires a finding of the likelihood of continuation or recurrence of injury if the anti-dumping duty on imports **from Mexico** were revoked, and in the absence of any specific provision permitting cumulation in a sunset review, that methodology is inconsistent with Article 11.3. In addition, Mexico argues that Article 3.3 limits the use of cumulation to investigations only. In the alternative, Mexico argues that if cumulation is not prohibited in sunset reviews, then the conditions set forth in Article 3.3 regarding the use of cumulation must be fulfilled. In this case, Mexico maintains that the *de minimis* dumping and negligible import elements of Article 3.3 would have precluded cumulation. The United States asserts that the AD Agreement does not prohibit cumulation in sunset reviews. Therefore, WTO Members are generally free to use this methodology in such reviews. According to the United States, the text of Articles 3.3 and 5.8 of the Agreement confirms that the numerical criteria set out in Article 3.3 of the Agreement regarding the use of cumulation are limited to investigations and do not extend to sunset reviews. Thus, the United States argues that the USITC did not act inconsistently with the Agreement by using cumulation in the instant sunset review without taking into consideration the requirements of Article 3.3.

7.146 We begin our analysis with the text of the Agreement. Article 11.3 provides:

> Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or

[144] We find support for our view in the Appellate Body Report in *US – Oil Country Tubular Goods Sunset Reviews*. In examining the same issue, the Appellate Body observed that "[t]he positive state of the domestic industry as of the date of the sunset review need not necessarily be dispositive of the future when other adverse factors are present." Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews, supra* note 39, para. 351.

> from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.[22] The duty may remain in force pending the outcome of such a review.
>
> _____
>
> [22] When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

Article 3.3 of the AD Agreement provides:

> Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

7.147 It is clear that the text of Article 11.3 does not mention cumulation at all. Thus, it does not resolve the issue of whether the methodology may be used in sunset reviews. Nor is there any direct guidance on this matter in other provisions of the Agreement – there are no cross-references between Article 11 and Article 3.3, or any other provision of Article 3. Mexico acknowledges these facts, but argues that they demonstrate that cumulation is not permitted in sunset reviews. In Mexico's view, to allow cumulation in sunset reviews would be to condition Mexico's right to termination of the anti-dumping duty on the actions of exporters from other WTO Members, which would be inconsistent with the plain meaning and object and purpose of Article 11.3.

7.148 We do not agree. In our view, the silence of the AD Agreement on the question of cumulation in sunset reviews is properly understood to mean that cumulation is permitted in sunset reviews. We note in this context the recent finding of the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* that Articles 3.3 and 11.3, on their own, are "not to be instructive on the question of the permissibility of cumulation in sunset reviews."[145] The Appellate Body went on to note that "[t]he silence of the text on this issue, however, cannot be understood to imply that cumulation is prohibited in sunset reviews."[146]

7.149 We note that Article 11.3 contains almost no guidance on questions of methodology for determinations of likelihood of continuation or recurrence of injury, unlike Article 3, which does establish certain required elements of analysis for determinations of injury. Thus, we consider it unsurprising that Article 11.3 does not specifically provide for cumulative analysis. Mexico argues that Article 11.3 refers to "an anti-dumping duty" in the singular, allegedly demonstrating that it refers to the measure with respect to one country. However, we note that Mexico has misquoted

[145] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39, para. 294.
[146] *Ibid*., para. 294.

Article 11.3, which refers to "**any** anti-dumping duty", not "**an** anti-dumping duty". "Any" has both singular and plural meanings[147] and thus the text of Article 11.3 fails to support Mexico's position. Moreover, we note that even with respect to one country, it might be argued that there is more than one duty, as different exporters are subject to anti-dumping duties at differing rates, depending on the calculation of the margin of dumping. We find no support for Mexico's assertion that the object and purpose of the sunset provisions, or the AD Agreement as a whole, suggests that cumulation is prohibited. Even assuming Mexico were correct in asserting that the object and purpose of Article 11.3 is to "ensure that anti-dumping measures would not continue in perpetuity", a cumulative analysis does not vitiate that object and purpose.

7.150 Turning to Mexico's alternative argument, we note first that, as we have already discussed, the provisions of Article 3 do not apply directly to sunset reviews. With respect to Article 3.3 in particular, we note that it is unique among the paragraphs of Article 3 in that it is the only paragraph that contains the word "investigation":

> Where imports of a product from more than one country are **simultaneously subject to anti-dumping investigations**, ...

Thus, in our view, Article 3.3 of the Agreement on its face establishes conditions for the use of cumulative analysis which apply **only** in original anti-dumping investigations.[148] Therefore, the USITC's use of cumulation in the instant sunset review cannot be found to be inconsistent with Article 3.3 of the AD Agreement.

7.151 On the basis of the fore-going, we conclude that the USITC's determination in the sunset review of OCTG is not inconsistent with Articles 3.3 and 11.3 of the Agreement because it involved a cumulative analysis.

D. ALLEGED INCONSISTENCY OF USDOC'S FOURTH ADMINISTRATIVE REVIEW DETERMINATION

1. Claims under Articles 11.2, 2.4 and 2.4.2 of the AD Agreement

(a) Arguments of Mexico

7.152 Mexico claims that the USDOC's Fourth Administrative Review Determination is inconsistent with Article 11.2 of the Antidumping Agreement because USDOC did not terminate the anti-dumping duty immediately upon a showing, by both Mexican producers participating in the review, that the continued application of the duty was not "necessary to offset dumping". In addition, and in support of its principal claim, Mexico also claims that USDOC'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. This claim is based on the arguments with respect to the individual companies requesting reviews.

7.153 With respect to Hylsa, Mexico argues the USDOC's determination not to revoke the duty violated Articles 11.2, 2.4, and 2.4.2 of the AD Agreement because, in calculating a margin of dumping for Hylsa, the USDOC failed to make a fair comparison between export price and normal value, by "zeroing" Hylsa's negative margins. With respect to TAMSA, Mexico argues that USDOC's determination not to revoke violated Article 11.2 of the AD Agreement because the Department:

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[147] New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993 ("any – *adj*. 1 gen. As ***sing***., a -- , some -- , no matter which, or what. As ***pl***., some – no matter which, or what kind, or how many") (emphasis added).

[148] We note that this was also the conclusion reached by the Panel in *US – Corrosion-Resistant Steel Sunset Review*, *supra* note 75, para. 7.102, and by the Panel and Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39, paras. 7.336 and 302, respectively.

(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.

(b) Arguments of the United States

7.154 The United States notes that Mexico's claim rests on asserted obligations under Article 11.2 of the AD Agreement. The United States argues, however, that Article 11.2 of the AD Agreement does not oblige a Member to terminate a measure with respect to individual companies. In the United States' view, Article 11.2 requires a review of the continuing need for the anti-dumping "duty" as a whole, not as applied to individual companies. The United States asserts that TAMSA and Hylsa, the two Mexican companies which participated in the fourth administrative review, did not seek revocation of the duty as a whole, which they could have done, either individually or collectively, under governing US regulations. Rather, as provided for under governing US regulations, each company individually requested revocation of the order, as to itself, on the basis that each company had not dumped for three consecutive years. The United States argues that the possibility to seek revocation, in the context of administrative reviews, on a company-specific basis, is a provision of governing US law which goes beyond the WTO obligations of the United States under Article 11 of the AD Agreement in a manner that favours the exporter. Thus, the United States argues, the provisions of Article 11.2 do not govern the conduct of and determinations made in such cases, and therefore the Panel need not reach the issues of whether the individual determinations with respect to TAMSA and Hylsa violated Articles 11.2, 2.4 and 2.4.2 of the AD Agreement respectively.

7.155 The United States further argues that even assuming *arguendo* that the Panel were to find that Article 11.2 requires the United States to carry out revocation reviews on a company specific basis, the terms of Article 11.2 would not compel the revocations TAMSA and Hylsa sought in the fourth administrative review.

(c) Findings

7.156 Mexico's claim rests on Article 11.2 of the AD Agreement, which provides:

> 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.[21] Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

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[21] A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not itself constitute a review within the meaning of this Article.

7.157 Article 11.2 thus establishes an obligation on a WTO Member's part to review the need for continued imposition of an anti-dumping duty "where warranted", and establishes that such a review must be undertaken at the request of any interested party which presents positive information substantiating the need for such a review, provided a reasonable time has passed since the duty in question was imposed. If the result of such review is a determination that the anti-dumping duty is "no longer warranted", it shall be terminated immediately. Article 11.2 does not, however, require the

immediate termination of an anti-dumping duty merely because there is no dumping found at the time of such a review.[149]

7.158 The United States argues that company-specific revocation reviews, such as those requested by TAMSA and Hylsa in this case, are not required by Article 11.2 and therefore do not give rise to any obligations under the AD Agreement with respect to the conduct of and determinations resulting from these proceedings. The United States argues that the words "the duty" when read in the context of Article 11.3 of the AD Agreement refer to the anti-dumping duty as a whole and not as applied to individual companies. In support, the United States refers to the report of the Appellate Body *US – Corrosion-Resistant Steel Sunset Review*, which found that the word "duty" in Article 11.3, when read in the light of Article 9.2, did not require authorities to make their likelihood determination on a company-specific basis.[150] Mexico, in response, argues that references to "interested parties" and "any interested party" in Article 11.2 must be interpreted to include individual exporters, and the absence of these terms in Article 11.3 distinguishes it from Article 11.2.

7.159 We need not, however, determine in this case whether or not Article 11.2 requires investigating authorities to provide for company specific reviews. As discussed further below, our understanding is that the United States system does, in fact, provide for such reviews, both under the changed circumstances provision, and in the more limited circumstances of no dumping for three years and sales in commercial quantities.

7.160 Before undertaking our analysis, we consider it important to have a clear understanding of the US system of reviews. US law provides for a number of different types of reviews. 19 U.S.C. § 1675(a) provides for "periodic review of amount of duty" – commonly referred to as administrative reviews. This is a form of duty assessment procedure, as required by Articles 9.2 and 9.3, to ensure that the US authorities do not collect duty in excess of the amount of dumping.[151] 19 U.S.C. § 1675(b) provides for reviews based on changed circumstances. 19 U.S.C. § 1675(c) provides for sunset reviews. 19 U.S.C. § 1675(d)(1) provides for the revocation, **in whole or in part**, of an anti-dumping duty. Such revocation may come after the completion of an administrative review in which certain findings were made, or completion of a changed circumstances review.[152]

7.161 The USDOC regulations implementing these provisions include 19 C.F.R. 351.222(b)(1), which authorizes revocation of an anti-dumping order following an administrative review when **all** exporters and producers covered by the order at the time of revocation have sold the subject merchandise at non-dumped prices for at least three consecutive years. 19 C.F.R. 351.222(b)(2) authorizes revocation of an anti-dumping duty order, **in whole or in part**, following an administrative review if one or more exporters or producers has sold the subject merchandise at non-dumped prices for at least three consecutive years. A request for revocation under this provision must be accompanied by, *inter alia*, a certification that there were sales in commercial quantities during the three year period.[153] 19 C.F.R. 351.222(g) authorizes revocation of an anti-dumping duty order, **in whole or in part**, if, *inter alia*, USDOC determines there are changed circumstances sufficient to

[149] Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea ("US – DRAMS")*, WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521, para. 6.34.

[150] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra* note 37, para.150.

[151] The United States operates a duty assessment system on a retrospective basis, as provided for in Article 9.3.1, of which the administrative reviews are an integral part. Other Members have other mechanisms, for instance refund mechanisms under Article 9.3.2. Mexico has made no claims in connection with the US duty assessment system in general, or specifically under Article 9.

[152] 19 U.S.C. § 1675(d)(2) provides for the revocation of an anti-dumping duty after a sunset review. (Exhibit MEX-24).

[153] 19 C.F.R. § 351.222(e)(1).

warrant revocation. A review may be requested by any interested party, including individual companies, under each of these provisions.[154]

7.162 Thus, our understanding of the US system is that an individual company may, in the context of an administrative review begun after the order has been in place at least three years, request revocation of an anti-dumping order as applied to itself if it has not dumped for three years and made sales in commercial quantities during that period.[155] It may also request revocation of an anti-dumping order in whole, or as applied to itself, based on any relevant changed circumstances. Essentially, the former possibility establishes an automatic right to revocation if the necessary factual and procedural requirements are met, while the latter establishes a right to request revocation on the basis of any relevant evidence and arguments presented to the administering authority.

7.163 The reviews at issue in this dispute were requested by two Mexican exporters, TAMSA and Hylsa, under section 351.222(b)(2) of the USDOC regulations.[156] Under that provision, USDOC may revoke an anti-dumping duty with respect to the individual company making the request if, as a threshold matter, it finds that the company has not made dumped sales for three years, and made sales in commercial quantities during that period. USDOC in this case found that these threshold requirements were not met – with respect to TAMSA, USDOC determined that it had not made sales in commercial quantities, while with respect to Hylsa, USDOC determined that it had made sales at dumped prices during the relevant period.[157] The question before us, thus, is whether by deciding not to revoke the anti-dumping order with respect to these two companies individually, because the threshold requirements for revocation under the governing regulation had not been met, USDOC acted inconsistently with Article 11.2 of the AD Agreement.

7.164 We have reviewed the relevant provisions of US law and USDOC regulations, and it is clear to us that individual companies are entitled in the US system to request revocation of an anti-dumping order either as a whole, or as applied to the particular company. Such requests can be based on the general "changed circumstances" review provisions, or on the basis of no dumping for three years. In the latter case, however, USDOC regulations impose additional requirements on the company seeking revocation, including the requirement that a company seeking revocation on the basis of no dumping for three years have made sales in the US market in commercial quantities during that period.

7.165 As we understand the US system, a company which does not satisfy the additional requirements for revocation on the basis of no dumping in section 351.222(b)(2) is nonetheless entitled to seek revocation of the anti-dumping duty order as applied to it under the general changed circumstances provision, providing it can provide information substantiating the need for review, as provided for in Article 11.2. In our view, what the United States law and regulations do is establish that certain information is in all cases sufficient to warrant a review and possible revocation – information demonstrating no dumping for three years and sales in commercial quantities during that time. A company which submits such information is automatically entitled to a review to determine whether continued application of the anti-dumping duty order with respect to that company is warranted. However, a company which cannot submit such information is nonetheless entitled to seek a review to determine whether continued application of the anti-dumping duty order with respect

[154] Exhibit US-28

[155] 19 C.F.R. § 351.222(f)(1) provides that a request for revocation under section 351.222(1), will be considered as including a request for administrative review, and such a review will be conducted under the applicable regulation, section 351.213.

[156] Letter from White & Case LLP to USDOC requesting revocation with respect to TAMSA (Exhibit MEX-10), Letter from Shearman & Sterling to USDOC requesting revocation with respect to Hylsa (Exhibit MEX-11).

[157] USDOC Fourth Administrative Review Determination, *supra* note 5, Decision Memorandum, pp. 9 and 21.

to that company is warranted, on the basis of any other information which it considers sufficient to substantiate the need for review.

7.166 There does not appear to be any limitation on the evidence or arguments that might be presented in support of a request under the general changed circumstances provision. Thus, an exporter or foreign producer who is unable to satisfy the requirements under section 351.222(b)(2) is not precluded from arguing, based on facts that might be insufficient to satisfy the requirements of that section, that revocation is nonetheless warranted. Essentially, the company-specific revocation provision establishes a presumption that, if the requisite factual situation exists, application of the anti-dumping duty as to that company is no longer warranted. Given that this operates in favour of foreign producers and exporters, and that a more general opportunity to request review exists, we see no basis to conclude that USDOC acted inconsistently with Article 11.2 in the fourth administrative review when it concluded that the Mexican exporters were not entitled to revocation as their situation did not fit the required factual prerequisites.

7.167 The two Mexican exporters involved in the fourth administrative review, TAMSA and Hylsa, both requested revocation under the provisions entitling a company to a review and possible revocation if it demonstrates no dumping for three years and sales in commercial quantities during that time. However, USDOC determined that these factual prerequisites were not satisfied, and that therefore neither company was entitled to the requested review and revocation. Neither company sought review under the general changed circumstances provisions, or provided any other information which might have substantiated the need for review, either with respect to themselves, or with respect to the order as a whole.

7.168 If a request based on three years of no dumping and sales in commercial quantities during that time were the only avenue available to an interested party in the US system to obtain a review and possible revocation of a duty, we might well conclude that application of those requirements, and a refusal to consider other evidence, leads to a different conclusion regarding the consistency of USDOC's determination with Article 11.2. However, it is clear to us that this is not the case. The decision not to consider revocation under the specific provision does not preclude a party from seeking revocation under the more general changed circumstances provision. In this case, the Mexican exporters did not avail themselves of this possibility.

7.169 Thus, even assuming Mexico is correct in arguing that Article 11.2 requires company-specific revocation reviews, such reviews are provided for under US law. Merely that USDOC has enacted a regulation establishing an automatic revocation review if certain factual prerequisites are demonstrated does not detract from this right, and a decision under that regulation that the factual prerequisites have not been demonstrated does not establish a violation of Article 11.2.

7.170 In this context, we note the views of the Panel in *US – DRAMS*. In that dispute, the Panel was considering, *inter alia*, whether a requirement that exporters certify their agreement to their immediate reinstatement in an anti-dumping order if they dump subsequent to revocation was inconsistent with Article 11.2. The Panel concluded that "because of the existence of legislative avenues for Article 11.2-type reviews that do not impose a certification requirement, and which have not been found inconsistent with the WTO Agreement, we are precluded from finding that the section 353.25(a)(2)(iii) certification requirement in and of itself amounts to a mandatory requirement inconsistent with Article 11.2 of the AD Agreement." Mexico has not challenged the consistency with Article 11.2, as such, of the regulatory provisions at issue here, but we consider that the principle applies with equal force to the situation at hand.

7.171 Mexico contends that section 351.222(g), which provides for revocation of an anti-dumping duty order in whole or in part on the basis of a general changed circumstances review, is chiefly a mechanism for revocation where the US industry is no longer interested in the continuation of the anti-dumping order, not a means through which the USDOC examines whether continued imposition

of the duty is necessary to offset dumping with respect to one company. In support of its argument Mexico submits Exhibit MEX-66 which contains a list of all changed circumstances reviews (conducted from January 1995 to June 2004) and the stated basis for the decision on whether or not to revoke the duty. Mexico draws two conclusions from this exhibit: first, the USDOC has never revoked an anti-dumping duty on an order-wide basis where the domestic industry favours continuation of the order, and second, the USDOC has never made a determination in any of these cases as to whether the continued imposition of the duty was necessary to offset dumping. Mexico also asserts that a determination that an exporter has not made dumped sales in the US market in the three consecutive years prior to requesting revocation demonstrates that the duty is not warranted and that therefore revocation is required under Article 11.2.

7.172 We are of the view that the conclusions drawn by Mexico on the basis of Exhibit MEX-66 are not relevant to the question of whether, in denying TAMSA's and Hylsa's request for reviews to determine whether continued application of the duty was warranted with respect to those companies individually the United States has violated its obligations under Article 11.2. Merely that revocation has not been granted in the cases cited in the exhibit does not in itself demonstrate that an individual company may not seek and obtain revocation of the duty as to itself under that provision. Indeed, whether individual companies have availed themselves of the opportunity to seek revocation of an anti-dumping duty order, either in whole or in part, under the general changed circumstances provision, simply has no bearing on our views concerning the consistency with Article 11.2 of the USDOC determinations at issue here. In any event, Mexico has not challenged the general changed circumstances regulation, either as such, or as applied – as of course, it could not, as no review was requested by the Mexican exporters under that provision in this case.

7.173 Regarding Mexico's argument that three consecutive years without dumping should be sufficient, in all cases, to demonstrate that an anti-dumping duty is not warranted, we find no basis for such a conclusion in Article 11.2 While three years with no dumping might be sufficient to demonstrate that continued imposition of an anti-dumping duty is not warranted in some cases, we cannot accept that it is necessarily sufficient in all cases. For instance, take an extreme example of an anti-dumping order on sales of transistor radios. A sale of one radio per year at a non-dumped price for three consecutive years might well be considered a mere token sale and not sufficient to demonstrate that continued imposition of the anti-dumping order is no longer warranted. Moreover, we note that, under the US system as we understand it, three years of no dumping **could**, in principle, serve as the basis for a request for review under the general changed circumstances provision, an option that was available in this case, but not taken by either Mexican exporter. In this case, the Mexican exporters chose to seek review and revocation under the more limited option provided for in US law, which requires a demonstration of three years of no dumping and sales in commercial quantities during that period in order to qualify for review and revocation. Given the availability of an alternative, we are not prepared to conclude that the USDOC determination at issue here is inconsistent with Article 11.2.

7.174 In this regard, we note the findings of the Panel in *US – DRAMS*, where the Panel concluded that Article 11.2 of the AD Agreement does not require revocation of an anti-dumping duty order as soon as an exporter is found to have ceased dumping, and that the continuation of an anti-dumping duty is not precluded *a priori* in any circumstances other than where there is present dumping.[158] We also note footnote 22 of the AD Agreement, which provides "[w]hen the amount of the anti-dumping duty is assessed on a retrospective basis [as is the case in the US system], a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty." No duty is levied in a retrospective system if no dumping is found. Merely because no dumping is found for three consecutive years does not, in our view, necessarily require the conclusion that the anti-dumping duty is no longer warranted.

[158] *US – DRAMS*, *supra* note 149, para. 6.34.

Such a conclusion might depend on additional facts, which could be presented in a changed circumstances review. By providing that, in certain circumstances, USDOC may revoke an anti-dumping duty order based in part on three years of no dumping, we consider the United States has gone beyond what is required by Article 11.2.

7.175 Mexico also argued that since TAMSA and Hylsa were the only Mexican exporters, and each individually requested review as to itself, these requests constituted a request for revocation under Article 11.2 and should have been treated as such by USDOC. We do not agree. USDOC was entitled to treat these parties' requests on the basis on which they were actually made. Each company requested review and revocation of the anti-dumping order with respect to itself on the basis of a provision in US regulation which requires a demonstration that the requesting company had not dumped for three years and made sales in the US market in commercial quantities during that period. USDOC determined that they had failed to make the necessary factual demonstration. We can see no provision in the AD Agreement that would require USDOC to disregard the actual basis of the requests made and treat them under a different provision, and Mexico has cited none.

7.176 Mexico also refers to the report of the Panel in *US-DRAMS*, in which the Panel found the US regulations governing reviews inconsistent with Article 11.2 because they set out a standard for determination inconsistent with the "likely" standard. Mexico argues that in that case, which involved a request for review and revocation of the order as applied to one company, the United States did not argue that the review at issue was not subject to the requirements of Article 11.2. Moreover, Mexico asserts that in implementing the recommendation of the DSB to bring its measure into conformity with its obligations under Article 11.2, the United States made changes to its provisions on company specific revocation which demonstrated that the United States considered this provision to implement its obligations under Article 11.2.[159] We do not find Mexico's argument persuasive. The question whether the type of review involved in the *US-DRAMS* dispute was subject to the requirements of Article 11.2 was simply not at issue before the Panel in that case. The issue in that case was the standard of determination applied by USDOC. Thus, when the Panel concluded that the standard applied was inconsistent with US obligations under Article 11.2, it also concluded that there was no WTO-consistent avenue for seeking revocation as required by Article 11.2.[160] While the United States might have argued that the review at issue in *US-DRAMS* was not subject to Article 11.2, as it did here, we do not consider that Members are limited in presenting their arguments in a particular dispute by the arguments made, or not made, in previous disputes, even if those previous disputes involved a similar or related topic

7.177 In light of our finding that the reviews undertaken by USDOC at the request of TAMSA and Hylsa are not subject to the requirements of Article 11.2, we consider that it is not necessary for us to make findings on Mexico's claims under Articles 11.2, 2.4 and 2.4.2 regarding the specific basis of the USDOC determinations with respect to TAMSA and Hylsa.

[159] In support of this argument, Mexico submitted, as exhibit MEX-68, a copy of an official WTO document setting forth a status report by the United States on its implementation of the Panel's report in *US – DRAMS*. The United States objected to the submission of this exhibit. As the document in question is a public document relating to WTO dispute settlement, we see no basis for refusing to accept its submission. Of course, merely that we do not reject the submission does not mean we found it to be pertinent or persuasive.

[160] We note that we are reaching the opposite result in this dispute – that is, we have found that because there is an alternative available, the consistency of which with US obligations under Article 11.2 is not at issue in this dispute and must therefore be assumed, the United States is not precluded from providing for a more limited option for review and possible revocation of an anti-dumping order.

2. Claim under Article X:2 of GATT 1994

(a) Arguments of Mexico

7.178 Mexico claims that USDOC violated Article X:2 of GATT 1994 because it imposed conditions on TAMSA for the termination of the anti-dumping duty in advance of the official publication of such conditions. Mexico argues that the use of the commercial quantities threshold requirement constituted a change in the USDOC's practice and administration of the law that was not notified to WTO Members in advance of its application, in violation of Article X:2 of GATT 1994.

(b) Arguments of the United States

7.179 The United States argues that the commercial quantities requirement was set forth in regulations published in 1997, prior to the date of the requests for the second, third, and fourth administrative reviews with respect to OCTG imports from Mexico. The United States asserts that Mexico's claim is not based on a change in the regulation itself, but on an asserted change in US practice under the regulation. The United States argues that Mexico is incorrect in asserting that there was a change in US practice under the regulation. In any event, the United States argues that "practice" is not a measure for purposes of WTO dispute settlement.

(c) Findings

7.180 Article X:2 of GATT 1994 provides:

> No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefore, shall be enforced before such measure has been officially published.

7.181 Obviously, since Article X:2 precludes **retroactive** application of a measure, compliance with this obligation, and thus questions of alleged violation, will depend on the timing of the publication of a measure, and its enforcement in particular circumstances affecting the rights of WTO Members.

7.182 Mexico argues in this case that changes in USDOC practice regarding two elements of USDOC's regulations were not published prior to being applied in the instant sunset review. The regulations in question, sections 351.222(d)(1) and (e)(1)(ii) provide, respectively, that in order for USDOC to grant revocation of a measure after three consecutive years of no dumping, sales during that period must be made in commercial quantities, and that an exporter must certify that during the three consecutive years of no dumping necessary for revocation, sales have been made at commercial quantities. We will refer to these regulations as the "commercial quantities" requirement.

7.183 The United States submits that the commercial quantities requirement was introduced in USDOC's 1997 amendments to its governing regulations, and that the regulations in question were published on 19 May 1997 in the Federal Register. The United States also submits that in that same publication it was specified that the amendments to the regulation would only become effective for administrative reviews initiated on the basis of requests made on or after 1 July 1997.

7.184 The 19 May 1997 Federal register does, in fact, set forth these regulations, and does specify that the amendments in question would only become effective for administrative reviews initiated on the basis of requests made on or after 1 July 1997.[161] We note that it is undisputed that the initiation

[161] 62 Fed. Reg. 27296, 27416-27417, 19 May 1997, (Exhibit US-1).

of each of the administrative reviews which served as the basis of Mexican exporters' claims of three consecutive years of no dumping was based on requests made **after** 1 July 1997, the effective date for the amendments to the regulation.[162] Therefore, it is clear that these regulations were, in fact, published prior to being enforced in the administrative reviews in question.

7.185 Mexico acknowledges these facts, but argues that the commercial quantities requirement was not in practice applied by the USDOC until the fourth administrative review on Mexican OCTG. Mexico asserts that this was an "abrupt change in practice" of which the United States failed to give notice to Mexican exporters. Putting aside the issue of whether "practice" is a measure of general application which is covered by the Article X:2 obligations, we find this argument to be without merit. As stated above, the legal instrument that introduced the commercial quantities requirement was duly published, and came into effect with respect to administrative reviews initiated on the basis of requests made more than one month subsequent to that publication. As of the date of publication, notice had clearly been given of the substance of the regulation, and of which cases would be affected by the regulation. Thus, exporters, including the Mexican exporters involved in the administrative reviews of OCTG, had notice as to the requirements imposed by USDOC for requests for revocation based on three years of no dumping, including the commercial quantities requirement. In support of its argument, Mexico refers to a case in which the requirement was not applied, without noting that the administrative review in question was initiated based on a request made **prior to** the effective date of the regulation.[163]

7.186 On the above basis, we reject Mexico's claim that the application of the commercial quantities requirement in the USDOC determination not to revoke the measure was in violation of Article X:2 of GATT 1994.

E. ALLEGED INCONSISTENCY WITH ARTICLE VI OF GATT 1994, ARTICLES 1, 18.1 AND 18.4 OF THE AD AGREEMENT, AND ARTICLE XVI OF THE WTO AGREEMENT

7.187 Mexico argues that any finding by the Panel that the United States acted inconsistently with any of its obligations under the AD Agreement necessitates a consequential finding that it also acted inconsistently with Articles 1, 18.1 and 18.4 of the AD Agreement, Article XVI:4 of the WTO Agreement, and Article VI of the GATT 1994.

7.188 The United States argues that since the measures identified by Mexico with regard to its substantive claims are not WTO-inconsistent, there can be no consequential violations of the kind alleged by Mexico.

7.189 Mexico's claims under Articles 1, 18.1 and 18.4 of the AD Agreement, Article XVI:4 of the WTO Agreement, and Article VI of the GATT 1994 are, as Mexico acknowledges, consequential claims. That is, any finding of violation under these claims would rest entirely on the basis of a finding of violation of one or another of the asserted specific provisions of the AD Agreement. There are no independent bases for these claims. Thus, addressing these consequential claims would provide neither the parties nor other Members with additional guidance in terms of understanding the obligations established by the AD Agreement. Nor would it aid in implementation of any DSB recommendation where a violation of one of those obligations has been found to exist. We therefore do not consider it either necessary or appropriate to address these claims, and in the exercise of judicial economy make no findings with respect to them.

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[162] The second administrative review was initiated on 25 September 1997 based on a request filed in August 1997 (Exhibit MEX-4), the third administrative review was initiated on 23 September 1998 based on a request filed in August 1998 (Exhibit MEX-6), and the fourth administrative review was initiated on 24 September 1999 based on a request filed on 31 August 1999 (Exhibit US-11).

[163] Exhibit US-19.

VIII. CONCLUSIONS AND RECOMMENDATIONS

A. CONCLUSIONS

(a) Claims regarding USDOC's sunset review

8.1 With regard to claims regarding the alleged inconsistency of the US statute, 19 U.S.C. § 1675a(c)(1)), the Statement of Administrative Action (SAA) (pages 889-890) and the Sunset Policy Bulletin (SPB) (section II.A.3), with Article 11.3 of the AD Agreement, we conclude the SPB, in section II.A.3, establishes an irrebuttable presumption that termination of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping, and therefore is, in this respect, inconsistent, as such, with the obligation set forth in Article 11.3 of the AD Agreement to determine likelihood of continuation or recurrence of dumping.

8.2 With regard to the determination of USDOC in the sunset review at issue in this dispute, we conclude that USDOC acted inconsistently with Article 11.3 of the AD Agreement in that its determination that dumping is likely to continue or recur is not supported by reasoned and adequate conclusions based on the facts before it.

8.3 We make no findings concerning Mexico's claims under Articles 2 and 6 of the AD Agreement in the context of the USDOC sunset review at issue in this dispute.

8.4 We conclude that claims regarding alleged inconsistency of USDOC "practice" in sunset reviews are not within the Panel's terms of reference.

(b) Claims regarding USITC's sunset review

8.5 We conclude that the standard applied by USITC in determining whether termination of the anti-dumping duty would be likely to lead to continuation or recurrence of injury, is not inconsistent with Article 11.3 of the AD Agreement as such, or as applied in the sunset review at issue in this dispute.

8.6 We conclude that the relevant provisions of US law, 19 U.S.C. §§ 1675a(a)(1) and (5) regarding the temporal aspect of USITC determinations of likelihood of continuation or recurrence of injury are not, as such, or as applied in the sunset review before us in this dispute, inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 11.1, and 11.3 of the AD Agreement.

8.7 We conclude that the USITC did not act inconsistently with Article 11.3 of the AD Agreement in making its determination of likelihood of continuation or recurrence of injury in the sunset review at issue in this dispute.

8.8 We conclude that the USITC's determination in the sunset review at issue in this dispute is not inconsistent with Articles 3.3 and 11.3 of the Agreement because it involved a cumulative analysis.

8.9 We make no findings regarding the remaining aspects of Mexico's claims under Articles 3.1, 3.2, 3.3, 3.4, 3.5, 3.7 and 3.8 of the AD Agreement.

(c) Claims regarding USDOC's fourth administrative review

8.10 We conclude that USDOC did not act inconsistently with Article 11.2 of the AD Agreement in determining not to revoke the anti-dumping duty in the fourth administrative review.

8.11 We further conclude that it is not necessary for us to address claims under Articles 11.2, 2.4, and 2.4.2 of the AD Agreement with respect to the calculation of dumping margins in the fourth administrative review.

8.12 We further conclude that USDOC did not act inconsistently with Article X:2 of the GATT 1994 in the conduct of the fourth administrative review in dispute before us.

(d) Other claims

8.13 We make no findings concerning alleged inconsistency with of Article X:3(a) of the GATT 1994 in the administration of US anti-dumping laws, regulations, decisions and rulings with respect to USDOC's conduct of sunset reviews of anti-dumping duty orders;

8.14 We make no findings concerning asserted subsidiary violations of the provisions of Article VI of the GATT 1994, Articles 1 and 18 of the AD Agreement, and Article XVI:4 of the WTO Agreement.

B. RECOMMENDATION AND REQUEST FOR SUGGESTION

8.15 Under Article 3.8 of the *DSU*, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that, to the extent the United States has acted inconsistently with the provisions of the AD Agreement, it has nullified or impaired benefits accruing to Mexico under that agreement. We therefore recommend that the Dispute Settlement Body request the United States to bring its measure into conformity with its obligations under the WTO Agreement.

8.16 Mexico requests that the Panel suggest that the United States implement its recommendation by immediately revoking the anti-dumping duty on OCTG imports from Mexico. The United States objects to this request.

8.17 We note that Article 19.1 of the *DSU* states that WTO panels may suggest ways the Member concerned could implement their recommendations:

> Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body **may** suggest ways in which the Member concerned could implement the recommendations. (footnotes omitted, emphasis added).

8.18 In the circumstances of the present proceedings, we see no particular reason to make such a suggestion and therefore decline Mexico's request.

ANNEX A

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES

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ANNEX A-1

FIRST WRITTEN SUBMISSION OF MEXICO

I. EXECUTIVE SUMMARY OF MEXICO' CLAIMS

1. Mexico's claims are summarized as follows:

A. THE DEPARTMENT'S SUNSET REVIEW WAS INCONSISTENT WITH WTO OBLIGATIONS

- The statute (19 U.S.C. § 1675a(c)(1)), the SAA (pages 889-890), and the SPB (Section II.A.3) as such violate Article 11.3. The text of the statute, the SAA, and the SPB are sufficiently clear to demonstrate a violation of Article 11.3 for two reasons:

  - First, the statute, the SAA, and the SPB establish a presumption that termination of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping in violation of Article 11.3. The presumption created by the statute, the SAA, and the SPB violates Article 11.3 as such because declines in import volume and/or the existence of historic dumping margins are given decisive weight, while the burden is placed on exporters to convince the Department even to consider any other factors (see section VII.A.).

  - Second by permitting the use of presumptions, the statute, SAA, and SPB adopt a meaning of "likely" that is inconsistent with the use of that term in Article 11.3. Because the statute, SAA, and Section II.A.3 of the SPB require the Department to attach decisive weight to declines in import volume and/or the existence of historic dumping margins, the US legal standard is less than the "likely" or "probable" standard required by Article 11.3 and therefore inconsistent as such with Article 11.3 (see section VII.A.).

- The Department's consistent practice in sunset review cases demonstrates the WTO-inconsistent presumption and itself constitutes a violation of Article 11.3 as such. To date there have been 227 sunset reviews conducted by the Department where the domestic industry has participated. In 100 per cent of these proceedings, the Department determined that dumping would be likely to continue or recur.[1] In these cases no respondent has been able to overcome the criteria prescribed by the SAA and the SPB as conclusive of likely dumping[2] (see section VII.B.);

- The Department's Sunset Determination was inconsistent with Article 11.3 of the Anti-Dumping Agreement because the Department focused solely on a decline in import volume, failed to apply the disciplines of Article 2, failed to conduct a prospective analysis, failed to make a determination of "likely" (or "probable") dumping, and failed to base its determination on positive evidence. The Department's reliance on the import volume decline in the wake of the anti-dumping measure as the sole basis for its likelihood determination was inconsistent

[1] US Department of Commerce Sunset Reviews (MEX-62).
[2] *Id.*

with Article 11.3. In addition, the Department's reporting of the original margin of dumping of 21.70 per cent to the Commission for purposes of its likelihood decision was inconsistent with Article 11.3 and Article 2 of the Anti-Dumping Agreement (see section VII.C.);

B. THE COMMISSION'S SUNSET REVIEW WAS INCONSISTENT WITH US WTO OBLIGATIONS

- The Commission's standard for determining whether termination of the duty would be likely to lead to continuation or recurrence of injury is inconsistent as such with Article 11.3 of the Anti-Dumping Agreement because the Commission applies a lower standard than that required by Article 11.3 (see section VIII.A.);

- The Commission's Sunset Determination that termination of the duty would be likely to lead to continuation or recurrence of injury was inconsistent with Article 11.3 of the Anti-Dumping Agreement because the Commission applied a lower standard for determining the likelihood of injury than that which is required by Article 11.3. The Appellate Body has confirmed that "likely" means "probable" and not something less than probable (see section VIII.B.);

- The Commission's Sunset Determination violated Article 11.3 because it was not based on "positive evidence" that termination of the duty would be likely to lead to continuation or recurrence of injury (see section VIII.C.);

- The Commission's Sunset Determination violated Articles 3.1, 3.2, 3.4, 3.5, and 11.3 of the Anti-Dumping Agreement because the Commission did not conduct an objective examination of the record or base its determination on positive evidence. The Commission's conclusions regarding the likely volume of imports, the likely price effects, and the likely impact of imports on the domestic industry can in no way be considered to be objective when those conclusions are viewed in light of a neutral examination of the information on the record. Moreover, the purported bases relied on by the Commission in support of its likely injury finding simply do not constitute positive evidence as required by Article 3.1 of the Anti-Dumping Agreement (see sections VIII.D.1-3);

- The Commission's Sunset Determination violated Article 3.4 because in assessing the likelihood of continuation or recurrence of injury to the domestic industry, the Commission either failed to evaluate or improperly evaluated the relevant economic factors and indices having a bearing on the state of the industry, including the mandatory factors enumerated in Article 3.4 of Anti-Dumping Agreement (see section VIII.D.4);

- The Commission' Sunset Determination violated Article 3.5 because the Commission failed to: (1) demonstrate a causal relationship between the dumped imports and likely injury to the domestic industry; (2) separate and distinguish the effects of other factors from those of the effects of the dumping; and (3) base its determination on the effects of the dumping on the domestic industry (see sections VIII.D.5);

- The Commission's Sunset Determination violated Articles 3.7 and 3.8 because the Commission based its likelihood of injury determination on conjecture and remote possibility and failed to satisfy the special requirements of Articles 3.7 and 3.8 for making prospective injury determinations (see sections VIII.D.6);

- The Commission's application of a cumulative injury analysis of OCTG imports from Korea, Italy, Japan, Mexico, and Argentina to determine whether termination of the anti-dumping duty on Mexican OCTG imports would be likely to lead to continuation or recurrence of

injury was inconsistent with Articles 11.3 and 3.3 of the Anti-Dumping Agreement, which preclude the use of a cumulative injury analysis in sunset reviews. Alternatively, assuming *arguendo* that cumulation is permitted in sunset reviews, the Commission violated Articles 11.3 and 3.3 by failing to comply with the explicit restrictions on cumulation set forth in Article 3.3. (see sections VIII.E and F);

- The US statutory requirements that the Commission determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" (19 U.S.C. § 1675a(a)(1)) and 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" (19 U.S.C. § 1675a(a)(5)) are inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 11.1 and 11.3 of the Anti-Dumping Agreement. By adding the phrase "within a reasonably foreseeable time" and including a time frame that is not "imminent" but rather relates to "a longer period of time," US law requires ("shall consider") speculation and an open ended analysis for possible future injury. The Commission's market forecasting and sheer speculation is inconsistent with WTO requirements to assess whether termination of an anti-dumping duty order would be likely to lead to recurrence of injury at the time of termination – not at some distant, undefined point in the future. The Commission's application of these statutory provisions in the sunset review of OCTG from Mexico also violated US WTO obligations as noted above (see sections VIII.G.1 and 2).

C. THE DEPARTMENT'S FOURTH ADMINISTRATIVE REVIEW DETERMINATION NOT TO REVOKE THE ORDER WAS INCONSISTENT WITH US WTO OBLIGATIONS

- The Department's Fourth Administrative Review Determination Not to Revoke violated Article 11.2 of the Anti-Dumping Agreement because the Department did not terminate the anti-dumping duty immediately upon a showing that the continued application of the duty was not "necessary to offset dumping" (see section IX.A.);

- The Department violated Articles 11.2, 2.4, and 2.4.2 of the Anti-Dumping Agreement because the Department "zeroed" Hylsa's negative margins and relied 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 (see section IX.B.);

- The Department's Fourth Administrative Review 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" threshold test which has no basis in Article 11.2; and (iii) it ignored positive evidence that demonstrated that the measure was no longer necessary to offset dumping (see section IX.C); and

- The Department violated Article X:2 of the GATT 1994 because the Department imposed conditions on TAMSA for the termination of the anti-dumping duty in advance of the official publication of such conditions (see section IX.D.).

D. VIOLATIONS OF GATT ARTICLE X:3(A)

- Separate and apart from whether US anti-dumping laws and regulations regarding sunset reviews are found to be consistent *per se* with US WTO obligations, the data drawn from the Department's sunset review determinations demonstrate that the Department failed to administer in an impartial and reasonable manner US anti-dumping laws, regulations,

decisions and rulings with respect to the Department's conduct of sunset reviews of anti-dumping duty orders, in violation of Article X:3(a) of the GATT 1994 (see section X).

E. CONSEQUENTIAL VIOLATIONS OF THE ANTI-DUMPING AGREEMENT, THE GATT 1994, AND THE WTO AGREEMENT.

Because the United States violated its obligations under the Anti-Dumping Agreement, it also violated the provisions of Article VI of the GATT 1994, Articles 1 and 18 of the Anti-Dumping Agreement, and Article XVI:4 of the WTO Agreement (see section X.I).

ANNEX A-2

FIRST WRITTEN SUBMISSION OF THE UNITED STATES

(3 May 2004)

I. INTRODUCTION

1. This proceeding involves Mexico's challenge to the findings of the US Department of Commerce ("Commerce") and the US International Trade Commission ("ITC") in the sunset review determinations and Commerce's fourth administrative review of the anti-dumping duty order on oil country tubular goods ("OCTG") from Mexico.

2. Mexico disagrees with the conclusions drawn by Commerce and the ITC in the sunset and fourth review determinations. However, the fact that Mexico disagrees with those conclusions does not render them inconsistent with US obligations under the AD Agreement. Mexico asserts obligations that in many cases do not exist, and its claims to have identified breaches by the United States are meritless.

II. THE PANEL SHOULD REJECT MEXICO'S CLAIMS CONCERNING AN ALLEGED "PRESUMPTION" AND ITS ALLEGED INCONSISTENCY WITH ARTICLE 11.3

3. Article 11.3 establishes the requirement that an investigating authority either terminate the duty after five years or conduct a review to determine whether termination of that order "would be likely to lead to continuation or recurrence of dumping and injury."

4. Mexico's entire claim under Article 11.3 hinges upon the existence of an alleged Commerce "presumption" in sunset reviews that the continuation or recurrence of dumping is likely. Mexico's claim fails because: (1) the alleged "WTO-inconsistent presumption" does not exist; (2) the instruments that allegedly give rise to this presumption do not constitute challengeable measures for purposes of the DSU; and (3) even if the instruments and practices were subject to challenge, two of them – the *Sunset Policy Sunset Policy Bulletin* and Commerce practice – are not "mandatory" within the meaning of the mandatory/discretionary distinction, i.e., they do not mandate a breach of a WTO obligation.

III. COMMERCE FULLY CONSIDERED ALL RECORD INFORMATION IN MAKING THE FINAL SUNSET DETERMINATION

5. Mexico claims that Commerce failed to address all the record information in the sunset review of OCTG from Mexico and, thereby, failed to determine, in accordance with Article 11.3, that dumping was likely to continue or recur if the anti-dumping duty were removed. Specifically, Mexico asserts that Commerce failed to address TAMSA's explanations for the depressed state of OCTG imports from Mexico for the period following imposition of the order. In addition, Mexico alleges that Commerce failed to consider, in making the likelihood determination, information regarding the dumping margin calculated for TAMSA in the original investigation. Mexico is wrong

because Commerce addressed TAMSA's import volume explanation and Commerce did not rely upon the dumping margin from the original investigation (or any dumping margin) in making the affirmative likelihood determination in the sunset review.

IV. MEXICO'S CLAIMS REGARDING COMMERCE'S IDENTIFICATION OF THE MARGINS LIKELY TO PREVAIL IN THE EVENT OF REVOCATION ARE EQUALLY ERRONEOUS

6. Mexico maintains that, pursuant to Article 2 and Article 11.3 the margins reported to the ITC as the rates of dumping likely to prevail in the event of revocation were improperly identified by Commerce. Mexico is wrong, because there simply is no obligation under the AD Agreement to consider the magnitude of the margin likely to prevail in determining likelihood of continuation or recurrence of injury in a sunset review under Article 11.3. In addition, as a factual matter, Commerce did not "rely" on the margins from the original investigation in making the likelihood determination in OCTG from Mexico as asserted by Mexico. Rather, Commerce relied solely on the depressed state of OCTG imports from Mexico to make its affirmative determination that dumping was likely to continue or recur and simply reported the "margins likely to prevail" to the ITC. For these reasons, the Panel should not and need not consider Mexico's arguments concerning the manner in which Commerce identified the margins that it reported to the ITC.

V. THE PANEL SHOULD REJECT MEXICO'S CLAIM THAT COMMERCE'S DETERMINATION NOT TO REVOKE TAMSA AND HYLSA FROM THE ANTI-DUMPING DUTY ORDER WAS INCONSISTENT WITH ARTICLES 11.1 AND 11.2 OF THE AD AGREEMENT

7. Article 11.2 requires a review of the continuing need for "the anti-dumping duty." The "anti-dumping duty" refers to the anti-dumping duty order as a whole, not as applied to individual companies. As the Appellate Body stated in *Japan Sunset*, "the duty" referenced in Article 11.3 is imposed on a product-specific (i.e., order-wide) basis, not a company-specific basis.

8. Mexico's second principal claim is that, in not revoking the order on OCTG from Mexico based on the results of the fourth administrative review, the United States breached its obligations under the AD Agreement and GATT 1994. The heart of Mexico's claim rests on the obligations in Article 11.2 of the AD Agreement. An examination of the text of that Article, in context and in light of its object and purpose, demonstrates that Mexico's claims are unfounded.

9. Article 11.2 contains no obligation for Members to provide company-specific revocations. For this reason, and because neither TAMSA nor Hylsa sought to present information substantiating the need for the overall revocation of "the duty" during the fourth administrative review, Mexico's revocation claims based on the fourth administrative review must fail.

10. Even assuming *arguendo* that this Panel were to find that Article 11.2 applies to company-specific opportunities for revocation, the terms of Article 11.2 would not compel the revocations TAMSA and Hylsa sought in the fourth administrative review, as Mexico argues.

11. Article 11.2 of the AD Agreement provides that a reviewing authority must conduct a revocation review "where warranted" and where an interested party requests a review in order to determine whether continued imposition of an anti-dumping duty is necessary. However, Article 11.2 expressly limits this right to instances in which the interested party is able to ". . . submit positive information substantiating the need for a review." In the Fourth Administrative Review, however, TAMSA failed to substantiate the need for such a review.

12. Under US law and consistent with Article 11.2, Commerce will examine the need for revocation at the request of an interested party only if the interested party provides positive information substantiating the need for a review. This positive information includes, *inter alia*, that (1) the requesting party has meaningfully participated in the US market for at least three years and (2) the requesting party has not dumped subject merchandise during that three year period.

13. Meaningful participation in the market is necessary because without it there is no evidentiary basis for determining whether continued imposition of the duty is necessary. Commerce examines the sales volumes during the periods in which the exporter did not dump both in absolute terms and in comparison with the period of investigation and/or other review periods. If the sales volumes during the non-dumped periods represent an extremely small portion of the sales during the period of investigation and/or other review periods, Commerce infers that these sales are an insufficient evidentiary basis for the need to examine whether the order continues to be necessary. If an interested party were able to provide evidence that the severely reduced sales volume was due to some unusual occurrence, independent of the discipline of the order, Commerce could find that the extremely small sales constitute information sufficient to substantiate the need to review the duty.

14. During the fourth administrative review, TAMSA argued that it had sold OCTG in commercial quantities during the second, third and fourth reviews. Commerce analyzed TAMSA's request and determined that these sales were made at volumes that constituted an extremely small portion of the sales TAMSA made during the POI.. Commerce allowed TAMSA an opportunity to refute the inference that its extremely small sales failed to substantiate the need for an examination of whether the order remained necessary. In response, TAMSA argued that its extremely small sales were probative because the small sales were caused by both the dumping order on OCTG from Mexico as well as a cyclical downturn in the oil industry. After considering these arguments, Commerce rejected them, fully explaining why in the final results of the fourth review. Thus, Commerce found that TAMSA failed to meaningfully participate in the market because it had not sold OCTG in commercial quantities. Consistent with Article 11.2, TAMSA had failed to provide positive information substantiating the need for a review and Commerce properly rejected its revocation request.

15. Mexico also argues that, in reviewing the necessity of the OCTG order in the *Final Results of Fourth Review*, Commerce improperly applied a "not likely" standard with respect to the question of whether the order remained necessary as to TAMSA. In the *Final Results of Fourth Review*, Commerce analyzed whether TAMSA's revocation request provided a sufficient evidentiary basis for consideration for revocation. Commerce found that, as an evidentiary matter, the request was insufficient. Because Commerce thus did not reach the question of whether the continued imposition of the duty remained necessary to offset dumping, Mexico's arguments that Commerce improperly applied a "not likely" standard in resolving that question should be rejected by this Panel.

VI. COMMERCE'S "IMPOSITION OF CONDITIONS" FOR REVOCATION WAS NOT INCONSISTENT WITH ARTICLE X:2 OF THE GATT 1994

16. Through a misleading characterization of the facts, Mexico has attempted to argue that the commercial quantities requirement Commerce applied in the *Final Results of Fourth Review* was imposed without official publication "in advance of its application," in breach of Article X:2 of the GATT. Although Mexico implies that the commercial quantities requirement was imposed through a change in practice in 1999, that requirement was set forth in the regulations published in 1997, in section 351.222(e)(1) of Commerce's regulations, a section of the regulations Mexico studiously deemphasizes. This regulation was effective for all administrative reviews initiated on the basis of requests for reviews made on or after 1 July 1997. Thus, the effective date of the regulations preceded the date of request for the second, third, and fourth OCTG administrative reviews. Commerce properly applied the regulation to TAMSA's request for revocation. Second, to the extent

that Mexico is challenging an alleged change in Commerce "practice," TAMSA's claim under Article X:2 must fail because, Article X:2(a) is limited in scope to measures of general application, not to changes in how Commerce exercises its discretion on a case-by-case basis – its so-called practice.

VII. THE MARGIN CALCULATION METHODOLOGY IN THE FOURTH REVIEW WAS CONSISTENT WITH THE AD AGREEMENT BOTH AS SUCH AND AS APPLIED TO HYLSA

17. Mexico claims that the United States calculated dumping margins for OCTG with respect to Hylsa in a manner inconsistent with Articles 11.2 and 2 of the AD Agreement, relying primarily on the Appellate Body reports in *EC – Bed Linen* and *Japan Sunset*.

18. In the fourth review, one of the three consecutive years Hylsa needed to qualify for revocation, Commerce calculated a weighted-average margin of 0.79 for Hylsa. Because the revocation inquiry conducted in accordance with Article 11.2 failed to demonstrate that the anti-dumping duty was no longer necessary to offset injurious dumping, no obligation arose under Article 11.1 for Commerce to revoke the order as to Hylsa. Mexico argues that, had the margin been calculated in the manner it suggests, Hylsa would not have been considered to have dumped in that review and argues that the order should therefore have been revoked as to Hylsa. However, quite apart from the question of which methodology Commerce used to calculate Hylsa's overall margin, the United States was not required to revoke the order as to Hylsa.

19. First, even if Hylsa had been assigned a weighted-average margin of zero per cent for the fourth review, this alone would not have been sufficient for the order to have been revoked with respect to Hylsa. Commerce would have permissibly analyzed whether Hylsa made sales to the United States in commercial quantities during the three years upon which the revocation claim was based. Thus, the United States was not required to revoke the order with respect to Hylsa even if it had received a margin of zero per cent in the fourth review.

20. Second, because Article 11.2 of the AD Agreement does not require company-specific revocation, the Panel should reach this calculation methodology issue only if it finds that the United States was required to conduct a company-specific revocation analysis. Moreover, the Panel should find that Mexico has failed to establish a *prima facie* violation of Article 2.4 with respect to the challenged calculation methodology.

21. Commerce's calculation is not inconsistent with the AD Agreement. Article 2.4 does not establish obligations as to the calculation of the overall dumping margin. Mexico merely justifies its position with respect to "zeroing" largely by relying on the reasoning in the Appellate Body Reports in *EC – Bed Linen* and *Japan Sunset*.[1] That reliance, however, is misplaced. *EC – Bed Linen* is not relevant to this dispute because the finding in that case was based on a provision that is explicitly limited to the investigation phase and because it examined a calculation methodology distinct from that which is before this Panel. Mexico's reliance on the Appellate Body report in *Japan Sunset* is equally inapposite.[2] In *Japan Sunset*, the Appellate Body found that it was unable to make findings on whether the United States acted inconsistently with Article 2.4 or Article 11.3 of the ADA by relying on dumping margins from administrative reviews in making its likelihood determination in a sunset review.[3] Consequently, there were no findings in that report relevant to this dispute.

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[1] *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India ("EC – Bed Linen"*), WT/DS141/AB/R, Report of the Appellate Body, adopted 12 March 2001.

[2] Mexico First Written Submission, paras. 293-294.

[3] *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. 138.

VII. THE UNITED STATES APPLIED ITS ANTI-DUMPING LAWS, REGULATIONS, DECISIONS AND RULINGS WITH RESPECT TO COMMERCE'S SUNSET REVIEWS IN A UNIFORM AND IMPARTIAL MANNER, IN ACCORDANCE WITH ARTICLE X:3(A) OF THE GATT 1994

22. Mexico attempts to revisit its claims by turning to Article X:3(a) of the GATT 1994 in the alternative. Taken together the terms of Article X:3(a) require that, in administering US sunset review laws and regulations, Commerce must act in a manner that is consistent, unbiased and not irrational or absurd. Mexico does not appear to be arguing that US administration of its laws is not consistent, focusing instead on an alleged lack of impartiality and reasonableness.

23. However, Mexico has provided no evidence of bias or that Commerce has administered US laws and regulations in an irrational or absurd manner, instead merely asserting the conclusion that the record in sunset reviews demonstrates bias. As demonstrated above, Mexico's "clear systematic bias" does not exist, and a deconstruction of Mexico's "analysis" of 301 Commerce sunset reviews shows that in 88 per cent of the cases, the issue of likelihood of dumping simply was not contested. With respect to the 12 per cent of the cases where likelihood was contested, Mexico provides no evidence – let alone proves – that those cases were not decided in an impartial and unreasonable manner.

VIII. THE ITC APPLIED THE CORRECT STANDARD FOR DETERMINING WHETHER TERMINATION OF THE ANTI-DUMPING DUTY ORDERS WOULD BE LIKELY TO LEAD TO CONTINUATION OR RECURRENCE OF INJURY, AND THE ITC'S DETERMINATION OF LIKELIHOOD IN THE SUNSET REVIEW OF OCTG FROM MEXICO WAS CONSISTENT WITH ARTICLE 11. 3 AND ARTICLE 3.1 OF THE AD AGREEMENT

24. Much of Mexico's first submission is based on the incorrect and unproven premise that the Commission's application of the "likely" standard was inconsistent with Article 11.3 of the Agreement. The Commission does not, as Mexico states, take the position in this dispute that "likely" means "possible." Rather, the United States agrees that the term "likely" as used in Article 11.3 can be equated with "probable" in the manner that the US courts understand the meaning of "probable" and as "probable" has been explained by the Appellate Body. The views of the participating Commissioners in the OCTG sunset review remain consistent with the "likely" standard as that term has been defined by the US courts and the WTO Appellate Body.

25. The US courts charged with reviewing the interpretation of the statute have interpreted the meaning of "likely" as used in the US statute, giving due regard to the SAA, in a manner completely consistent with the meaning ascribed to "likely" in Article 11.3. Accordingly, there is no basis for Mexico to assert that the US statute is inconsistent as such with Article 11.3. Mexico plainly has failed to meet its burden on this claim.

IX. THE ITC'S DETERMINATION WAS CONSISTENT WITH ARTICLE 11.3 BECAUSE THE ESTABLISHMENT OF THE FACTS WAS PROPER AND THE EVALUATION OF THE FACTS WAS UNBIASED AND OBJECTIVE

26. Mexico argues that the ITC failed to conduct an "objective examination" based on "positive evidence" in accordance with Article 3.1. Article 3.1 does not apply to sunset reviews. Nonetheless, the ITC's sunset determination was based on a proper establishment of the relevant facts and an unbiased and objective evaluation of those facts and, accordingly, would satisfy the requirements of Article 3.1, were that provision applicable.

X. ARTICLE 3 DOES NOT APPLY TO SUNSET REVIEWS

27. Nothing in Article 3 indicates that its requirements are intended to extend to sunset reviews, nor does Article 11.3 indicate that sunset reviews are governed by the requirements of Article 3. The inapplicability of Article 3 to sunset reviews under Article 11.3 is clear based on an analysis of the text of these treaty provisions.

XI. THE ITC'S SUNSET DETERMINATION WAS CONSISTENT WITH ARTICLE 11.3

28. Mexico's claims concerning Article 3.1 are premised on the notion that Article 3.1 applies to sunset reviews. As explained above, the provisions of Article 3 are not applicable to sunset reviews. There are further textual indications in Article 3.1 as to why it specifically is not applicable to sunset reviews. For example, in a sunset review, authorities are required to evaluate the likelihood in the future of a continuation or recurrence of injury if the dumping order is lifted. Imports may not even be present in the market at the time of the sunset review, and they may not be sold at dumped prices. Even if they are sold at dumped prices, the effects of the dumping are offset, at least in part, by the anti-dumping duty. As a result, an examination of "the volume of dumped imports and the effect of dumped imports on prices" is not meaningful in the context of an Article 11.3 review.

29. The ITC's sunset determination was based on a proper establishment of the relevant facts and an unbiased and objective evaluation of those facts, was based on evidence gathered during the review, and, accordingly, would satisfy the requirements of Article 3.1, were that provision applicable. Mexico has failed to show that the ITC's determination was biased in favour of any interested party or that the quality of the evidence considered was compromised in any way. That the ITC may have given a different weight or meaning to record evidence than the Mexican respondent would have preferred, does not go to whether the ITC conducted an "objective" examination based on "positive" evidence. To the contrary, if the ITC's establishment of the facts was proper and its evaluation was unbiased and objective, then its evaluation shall not be overturned "even though the panel might have reached a different conclusion."

30. Mexico's arguments concerning the likely volume of imports do not stand up to scrutiny. The ITC's findings on the likely volume of imports are based on an objective evaluation of the relevant facts and are supported by positive evidence. Mexico's criticisms of the ITC's findings with respect to likely price effects likewise are without merit. The claim regarding the likely adverse impact should be rejected because it is based on Mexico's meritless arguments concerning volume and price effects.

XII. THE ITC SUNSET DETERMINATION WAS NOT INCONSISTENT WITH ARTICLE 3.4 OF THE AD AGREEMENT

31. In addition to the general inapplicability of the provisions of Article 3 to sunset reviews, there are also textual indications in Article 3.4 as to why it specifically is not applicable to sunset reviews. There may be no "dumped imports" at the time of a sunset review, and consequently there may be no "impact" for the investigating authority to examine. There also may not be any "actual and potential" declines evident or reflected in the information before the investigating authority at the time of the sunset review, by virtue of the absence of imports. In short, the obligations described in Article 3.4 cannot practicably be applied to all sunset reviews, and certainly could not be applied to sunset reviews in the same systematic and comprehensive manner that has been required in original dumping investigations.

32. Moreover, even if Article 3.4 did apply, while all enumerated factors must be evaluated, not all are necessarily material in any particular case. If, upon evaluation, the authority determines that a particular factor is not material to the investigation, the authority is not required to discuss that factor

in its notice or report. In this review, the Commission's staff report clearly addresses each of the factors enumerated in Article 3.4.

33. The ITC considered, cited extensively to, and appended to its published determination the report of the ITC staff in the OCTG sunset review, which presents detailed information concerning each of the Article 3.4 factors.

XIII. THE ITC SUNSET DETERMINATION WAS NOT INCONSISTENT WITH ARTICLE 3.5 OF THE AD AGREEMENT

34. In addition to the general inapplicability of Article 3 to sunset reviews, there are further textual indications in Article 3.5 that it specifically is not applicable to sunset reviews. For example, Article 3.5 refers to the "dumped imports and speaks of such imports in the present tense as "causing injury." However, in a sunset review there may be no dumped imports. As a result of the order, such imports may have decreased or exited the market altogether, or if they have maintained their presence in the market, they may be priced higher than they were during the original investigation, when they were entering the market unencumbered by any additional duties.

35. Second, Article 3.5 refers to existing "injury" and describes an existing causal link between dumped imports and that injury. However, in a sunset review, with an anti-dumping order in place, there may be no current injury or causal link; indeed, it would be surprising if there were given the remedial effect of an anti-dumping duty order. This is implicit in the reference in Article 11.3 to the "continuation or recurrence of injury."

36. Third, under Article 3.5, investigating authorities are obliged only to "examine any known factors other than the dumped imports which are at the same time injuring the domestic industry" and ensure that the injurious effects caused by those factors are not attributed to the dumped imports (emphasis added). If a particular factor is not known to the investigating authorities, or if that factor is not "at the same time injuring the domestic industry," then the investigating authorities are under no obligation to examine that factor in the course of their causality analysis.

37. In focusing on the positive performance of the domestic industry during the review period, Mexico ignores that Article 11.3 expressly contemplates an examination of the likelihood of a "recurrence" of injury. Such an examination plainly recognizes that an industry that was injured prior to the entry of the orders may not experience injury during the pendency of the orders, yet injury may be likely to recur if the orders are revoked. Indeed, the imposition of the orders in the first instance may be responsible for the industry's improved performance.

38. Even if Article 3.5 were applicable, Mexico has not identified any "other causal factors" the ITC failed to consider.

XIV. THE US STATUTORY PROVISIONS AS TO THE TIME FRAME IN WHICH INJURY WOULD BE LIKELY TO CONTINUE OR RECUR ARE NOT INCONSISTENT WITH ARTICLES 11.3 AND 3 OF THE AD AGREEMENT

39. Article 11.3 does not specify the time frame relevant to a sunset inquiry. Article 11.3 only requires a determination of whether revocation "would be likely to lead to continuation or recurrence of injury." The words "to lead to" affirmatively indicate that the Agreement contemplates the passage of some period of time between the revocation of the order and the continuation or recurrence of injury. In the absence of any specific provision in Article 11.3, Members remain free to determine under their own laws and procedures the time frame relevant in sunset inquiries.

40. Mexico attempts to inject the "imminent" and "special care" terms from Articles 3.7 and 3.8 into an Article 11.3 sunset review. As previously explained, Article 3 does not apply to Article 11.3 sunset reviews.

41. Because the statutory requirements contained in Sections 752(a)(1) and 752(a)(5) are not inconsistent with AD Agreement Articles 11.3 and 3, the ITC's application of those requirements is likewise not inconsistent with those articles.

XV. THE ITC DID NOT ACT INCONSISTENTLY WITH ANY PROVISION OF THE AD AGREEMENT BY CONDUCTING A CUMULATIVE ANALYSIS IN THE OCTG SUNSET REVIEW

42. Mexico argues that because cumulation is not expressly permitted in Article 11.3, the ITC is prohibited from engaging in a cumulative analysis in a sunset review. However, the genesis of any obligation or right arising under the WTO Agreement is the text of the relevant provision. Absent a textual basis, the rights of Members cannot be circumscribed.

43. The relevant principle of treaty interpretation goes to the object and purpose of the treaty, and not particular treaty provisions. To the extent that the purpose of Article 11.3 is relevant, Mexico simply misconstrues it. If that purpose were simply a ministerial rescission of anti-dumping duties, there would be no need to inquire as to whether expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.

44. Mexico seeks to bolster its argument that cumulation is not permitted in sunset reviews by noting that there is no explicit cross-reference to cumulation or to Article 3.3 in the context of Article 11. This argument has no merit. A cross-reference to an obligation is necessary where the drafters seek to assert a broader obligation. However, there is no need to cross-reference to a permissive authority where a right exists absent its limitation in the Agreement.

45. In addition to the inapplicability of the provisions of Article 3 to sunset reviews, Mexico's position is directly at odds with recent panel and Appellate Body reports construing the meaning of Article 3.3.

XVI. THE DECISIONS OF COMMERCE AND THE COMMISSION COMPLIED WITH ARTICLE VI OF THE GATT 1994, ARTICLES 1, 18.1, AND 18.4 OF THE AD AGREEMENT AND ARTICLE XVI:4 OF THE WTO AGREEMENT

46. These claims are consequential claims in that they depend upon a finding that some other provisions of the AD Agreement or GATT 1994 have been breached. None of the "measures" identified by Mexico, however, is inconsistent any other provision of the WTO Agreement. They are therefore not inconsistent with Article VI of the GATT 1994, Articles 1 and 18 of the AD Agreement, and Article XVI:4 of the WTO Agreement.

XVII. THE SPECIFIC REMEDY SOUGHT BY MEXICO IS INCONSISTENT WITH ESTABLISHED PANEL PRACTICE AND THE DSU

47. Finally, Mexico has requested this Panel to recommend that the DSB request the United States to immediately revoke the anti-dumping duty on OCTG imports from Mexico. In so doing, Mexico has requested a specific remedy that is inconsistent with established GATT/WTO practice and the DSU. Therefore, should the Panel agree with Mexico on the merits, the Panel nonetheless should reject the requested remedy, and instead should make a recommendation, consistent with the DSU and established GATT/WTO practice, that the United States bring its anti-dumping measure into conformity with its obligations under the AD Agreement.

XVIII. CONCLUSION

48. Based on the foregoing, the United States respectfully requests that the Panel reject Mexico's claims in their entirety.

ANNEX B

THIRD PARTIES' SUBMISSIONS OR EXECUTIVE SUMMARIES THEREOF

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ANNEX B-1

THIRD PARTY SUBMISSION OF ARGENTINA

(28 April 2004)

TABLE OF CASES REFERRED TO IN THIS SUBMISSION

Short Title	**Full Title**
US - DRAMS	United States – Anti-dumping duty on dynamic random access memory semiconductors (DRAMS) of one megabyte or above originating from Korea, Report of the Panel, WT/DS 99/R
US – Hot Rolled Steel	United States – Anti-dumping measures on certain hot-rolled steel products from Japan. Report of the Panel, WT/DS 184/R
US – Hot Rolled Steel	United States – Anti-dumping measures on certain hot-rolled steel products from Japan. Report of the Appellate Body, WT/184/AB/R
US – Carbon Steel	United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, Report of the Panel, WT/DS213/R
US – Carbon Steel	United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, Report of the Appellate Body, WT/DS213/AB/R
Japan – Sunset	United States – Sunset review of anti-dumping duties on corrosion-resistant carbon steel flat products from Japan. Report of the Panel, WT/DS 244/R
Japan – Sunset	United States – Sunset review of anti-dumping duties on corrosion-resistant carbon steel flat products from Japan. Report of the Appellate Body, WT/DS 244/AB/R

I. INTRODUCTION

Argentina welcomes this opportunity to present its views to the panel in *United States – Anti-Dumping Measures on OCTG from Mexico* (DS 282). Mexico's case brings into question once again the United States' implementation of the obligations established by Article 11 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement").

Article 11.1 directs that "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." The significant limitations established by Article 11.1 – on the duration of an anti-dumping measure, the permissible magnitude of the duty, and the purpose for which an anti-dumping measure can be imposed – are implemented in Articles 11.2 and 11.3 of the Anti-Dumping Agreement. Article 11.2 requires the termination of anti-dumping duties where it is shown that the imposition of anti-dumping duties is no longer necessary to offset dumping. Article 11.3 requires that anti-dumping duties be terminated within five years of their imposition in the absence of strict compliance with the conditions for maintaining the duties.

Mexico has demonstrated that the United States has failed to (1) properly implement its Article 11 obligations, and (2) satisfy the requisite conditions for maintaining anti-dumping duties on OCTG from Mexico. In the end, as Mexico's First Submission shows and as Argentina can attest based on its own experience (particularly in reviews conducted by the US Department of Commerce ("Department")), there is effectively no possibility of a negative likely dumping determination when shipment volumes have declined following the imposition of the measure.

Section II of this submission sets forth the relevant WTO jurisprudence regarding Members' obligations in reviews conducted under Article 11. Section III describes US violations of Article 11.3, both "as such" and "as applied" in this case. Section IV compares the experience of Argentina and Mexico with respect to Article 11 reviews conducted by the United States. Finally, in section V, Argentina endorses the specific request by Mexico for suggestions by the Panel on the manner in which the United States should implement the Panel's recommendations.

II. ARTICLE 11 OF THE ANTI-DUMPING AGREEMENT PLACES SIGNIFICANT LIMITATIONS ON THE USE OF ANTI-DUMPING DUTIES

A. ARTICLE 11.2 REQUIRES THAT ANTI-DUMPING DUTIES BE TERMINATED IF THEY ARE NO LONGER NECESSARY TO OFFSET DUMPING

Article 11.2 implements the general rule provided in Article 11.1. Specifically, Article 11.2 requires the administering authority to "review the need for the continued imposition" of an anti-dumping duty, and to terminate the duty if it is "no longer warranted." The authority must conduct this revocation review on its own initiative "where warranted," or upon the request of an interested party that has submitted "positive information" supporting the need for a review.

Where an interested party requests an Article 11.2 review, the authority must – at the interested party's request – examine "whether the continued imposition of the duty is necessary to offset dumping." The panel in *DRAMS from Korea* explained that the "need for the continued imposition of the duty must be demonstrable on the basis of [positive] evidence." [1] Thus, in order to justify the maintenance of a duty, the authority must demonstrate through positive evidence that the continued imposition of the duty is necessary to offset dumping.

[1] Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999, para. 6.42 ("*DRAMS from Korea*").

B. ARTICLE 11.3 REQUIRES TERMINATION OF ANTI-DUMPING DUTIES AFTER FIVE YEARS ABSENT STRICT COMPLIANCE WITH THE LIMITED EXCEPTION

The Appellate Body in *Japan Sunset* confirmed that the obligation of Article 11.3 is termination of anti-dumping duties after five years. The Appellate Body thus reaffirmed the principle it first articulated in *Steel from Germany*.[2] Continuation of the measure is the exception, and is only permissible if the authorities conduct a "review," undertake a "rigorous examination" of the facts, and "determine" that termination of the anti-dumping measure would be likely to lead to continuation or recurrence of injury and dumping.[3] The Appellate Body reaffirmed forcefully that, "[i]f any one of these conditions is not satisfied, the duty must be terminated."[4]

Under Article 11.3, the authority cannot passively assume that dumping and injury would likely continue or recur,[5] but rather must take action and ground its determination on a "sufficient factual basis" to allow it to "draw reasoned and adequate conclusions concerning the likelihood" of continuation or recurrence.[6] In this regard, the authority's determination cannot be based solely on outdated information, but rather "should rest on the evaluation of the evidence that it has gathered during the original investigation, the intervening reviews and finally the sunset review."[7] The authority must make a "fresh determination" that is forward-looking and "based on credible evidence."[8]

In interpreting the meaning of the words "review" and "determine" in Article 11.3, the Appellate Body highlighted the "investigatory and adjudicatory aspects" of Article 11.3 reviews:

> This language in Article 11.3 makes clear that it envisages a process combining *both* investigatory and adjudicatory aspects. In other words, Article 11.3 assigns an active rather than a passive decision-making role to the authorities. The words "review" and "determine" in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination.[9]

The Appellate Body in *Japan Sunset* made clear that the conduct of a review and the determination of the likelihood of dumping and injury in order to invoke the exception require a "rigorous examination" that comports with the "exacting nature" of obligations imposed by Article 11.3.[10]

Moreover, the authority must satisfy itself that dumping and injury would be "probable" in the event of termination. The ordinary meaning of the term "likely" as used in Article 11.3 is "probable"

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[2] *See* 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. 63 ("*Steel from Germany*") (interpreting Article 21.3 of the Agreement on Subsidies and Countervailing Measures, which parallels Article 11.3 of the Anti-Dumping Agreement).

[3] *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, paras. 104, 113 ("*Japan Sunset*").

[4] Appellate Body Report, *Japan Sunset*, para. 104.

[5] *See* Panel Report, *Japan Sunset*, para. 7.177.

[6] *See* Panel Report, *Japan Sunset*, para. 7.177.

[7] Panel Report, *Steel from Germany*, para. 8.95.

[8] Appellate Body Report, *Steel from Germany*, para. 88.

[9] Appellate Body Report, *Japan Sunset*, para. 111.

[10] Appellate Body Report, *Japan Sunset*, para. 113 (emphasis added).

and not "possible" or any other standard less than likely (or "probable"). The Appellate Body ended any possible dispute as to the meaning of the term "likely" in Article 11.3, stating authoritatively that "likely" means "probable."

Article 2 of the Anti-Dumping Agreement defines "dumping" "for the purposes of the Anti-Dumping Agreement," including reviews under Article 11. Article 2 sets forth the rules for determining whether a company is or is not dumping. The Appellate Body ruled that when a Member relies on a dumping margin in making a likely dumping finding in an Article 11.3 review, that margin must be WTO-consistent.[11] The Appellate Body confirmed that relying on a WTO-inconsistent margin in an Article 11.3 review would "taint the likelihood determination."[12] Therefore, in determining whether dumping would be likely to continue or recur under Article 11.3, the authority cannot ignore the disciplines prescribed by Article 2.

Article 3 of the Anti-Dumping Agreement defines "injury" for purposes of the Anti-Dumping Agreement. Thus, an authority's determination of whether "injury" would likely continue or recur under Article 11.3 must meet the requirements of that provision. Article 3.1 mandates that the authority's "determination of injury" be based on "positive evidence" and "an objective examination" of "(a) the volume of dumped imports and the effect of dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products."[13] Articles 3.4, 3.5, 3.7, and 3.8 impose further obligations related to consideration of specific economic factors and indices having a bearing on the state of the domestic industry, causation, and rules related to all future injury determinations.

III. US SUNSET REVIEWS UNDER ARTICLE 11.3 OF THE ANTI-DUMPING AGREEMENT

Mexico's First Submission presents a compelling case. As explained by Mexico, certain provisions of US law, and US practice, violate the Article 11.3 obligations of the United States, and the US application of its law and regulations to Mexico in these specific "sunset" and "revocation" reviews reveals several violations of Articles 11.2 and 11.3.

A. BY ESTABLISHING A WTO-INCONSISTENT PRESUMPTION OF LIKELY DUMPING, CERTAIN US SUNSET REVIEW LAWS, REGULATIONS, AND ADMINISTRATIVE PROCEDURES ARE INCONSISTENT WITH US WTO OBLIGATIONS

19 U.S.C. § 1675a(c)(1), the Statement of Administrative Action (SAA),[14] and the Sunset Policy Bulletin ("SPB"),[15] as such, as well as the Department's consistent practice in sunset review cases (as set forth in MEX-62), establish a WTO-inconsistent presumption that termination of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping.[16]

Under US law, declines in import volume and/or the existence of historic dumping margins are given decisive weight. The burden is placed on exporters to convince the Department even to consider any other factors. With respect to the likelihood of dumping determination, the Department always treats dumping margins and/or declining import volumes as highly probative of the likelihood

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[11] *See* Appellate Body Report, *Japan Sunset*, paras. 126-132.

[12] Appellate Body Report, *Japan Sunset*, para. 130.

[13] Emphasis added. *See also* Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, paras. 192-93 (footnotes omitted).

[14] SAA at 889-890.

[15] SPB, Section II.A.3.

[16] Mexico's First Submission, sec. VII.A.

of continuation or recurrence of dumping. Either or both of these factors are considered by the Department as constituting sufficient evidence to determine that termination would be "likely" to lead to continuation or recurrence of dumping.[17] The mechanistic application of these criteria precludes the Department from conducting the requisite "review" and making a "determination" based on fresh evidence, contrary to the requirement of Article 11.3, and it establishes a presumption that dumping will likely continue or recur. Under the system implemented by the United States, satisfaction of at least one of the three basic criteria is nearly certain in every case.[18]

In addition, the United States employs a standard that is less than the "likely" or "probable" standard required by Article 11.3. This is because the SAA directs the Department to interpret the phrase "likely to lead to continuation or recurrence of dumping" to mean that *any* determination – negative or affirmative – is permissible as long as either outcome is "possible."[19]

The empirical evidence put forward by Mexico demonstrates that every time the Department finds that at least one of the three criteria contained in section II.A.3 of the SPB is satisfied (continuation of dumping, cessation of imports, and no dumping with a significant decline of imports), the Department makes an affirmative finding of likely dumping, without considering additional factors. The Department's determinations themselves demonstrate that they are based solely on the mechanistic application of presumptions.

In connection with the likelihood of dumping determination, the Department will not even consider factors other than dumping margins and import volumes (such as price, cost, market or economic factors), unless an interested party convinces it that "good cause" exists. The SPB places the burden on an interested party to provide information or evidence that would warrant consideration of the other factors in question.

In the *Japan Sunset* case, the Appellate Body emphasized that the likelihood determination under Article 11.3 could not be based "solely on the mechanistic application of presumptions" but instead must be grounded on a "firm evidentiary foundation."[20] Contrary to the Appellate Body's unambiguous statement, the Department's likelihood determinations operate exclusively on the "mechanistic application of presumption." In all (227 out of 227) of the full and expedited sunset reviews, the Department determined that dumping was likely to continue or recur. In all of the sunset reviews for which the Department determined that dumping was likely to continue or recur, the Department failed to conduct a prospective analysis, as required by Article 11.3 of the Anti-Dumping Agreement.

In its First Submission, the United States attempts to discredit the clear import of Mexico's empirical analysis by noting that there were only 35 cases in which respondent interested parties contested the existence of likelihood of dumping.[21] The United States attempted to the same in the Argentina OCTG case. However, the US position is not persuasive. First, the US focus on only "contested" cases is dubious, because even where respondent interested parties do not participate in a sunset review, the United States still has "a duty to seek out relevant information"[22] and to ensure that its likelihood of dumping determination is supported by a "sufficient factual basis."[23] The

[17] Appellate Body Report, *Japan Sunset*, para. 171.

[18] Out of the 227 full and expedited sunset reviews conducted by the Department, no respondent was able to overcome the three criteria prescribed by the SAA and Sunset Policy Bulletin, such that the Department determined that dumping would not be likely. *See* MEX-62.

[19] SAA at 883.

[20] Appellate Body Report, *Japan Sunset*, para. 178.

[21] See US First Submission, DS 282, para. 107.

[22] Appellate Body Report, *Japan Sunset*, para. 199.

[23] Panel Report, *Japan Sunset*, paras. 7.177, 7.279.

United States cannot passively assume in such cases that the continuation of recurrence of dumping would be likely. Second, even assuming that only the "contested" cases are relevant, 35 out of 35 still proves Mexico's prima facie case. The United States simply cannot dispute that, in 100% of these cases, the Department gave declines in import volume and/or the existence of historic dumping margins decisive weight, and thus employed a WTO-inconsistent presumption. Indeed, as the United States itself explains, "In each of those 35 cases, the evidence presented a scenario that satisfied one or more of the criteria that the *Sunset Policy Bulletin* identifies as indicia of likelihood."

In any event, even if using the US benchmark of so-called "contested cases," Argentina would note that there were actually 43 cases in which respondents contested the likelihood determination. MEX-62 shows that the Department conducted 26 full reviews in which respondents participated. In addition, respondent interested parties participated in 17 expedited reviews.[24] Thus, respondent interested parties "contested" the likelihood determination in 43 (26 plus 17) sunset reviews.

Finally, Argentina notes that irrespective of whether the Panel is satisfied that Mexico has sustained its burden to demonstrate that the US law, SAA, and Sunset Policy Bulletin establish a WTO-inconsistent presumption that dumping would be likely, Mexico has demonstrated a US violation of Article X:3(a) of the GATT 1994. Article X:3(a) directs that the authority "shall administer in a[n] ... impartial and reasonable manner all its laws, regulations, decisions and rulings" covered by Article X:1. The results of the Department's sunset reviews demonstrate that the Department failed to administer in an impartial and reasonable manner US anti-dumping laws, regulations, decisions and rulings with respect to its conduct of sunset reviews, in violation of Article X:3(a).[25] It is simply 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. A record of 227 wins and 0 losses for the US industry suggests a lack of impartiality, and the unreasonable administration of national laws.

B. THE DEPARTMENT'S LIKELIHOOD OF DUMPING DETERMINATION IN THE SUNSET REVIEW OF OCTG FROM MEXICO WAS INCONSISTENT WITH ARTICLE 11.3 OF THE ANTI-DUMPING AGREEMENT

As Mexico's First Submission demonstrates, the Department relied completely on declining import volumes of Mexican OCTG for its conclusion that dumping was likely to recur.[26] The Department justified its reliance on volume based on the authority of the US statute, the SAA, and the SPB. The Department disregarded the evidence and explanations offered by the Mexican exporters to explain the reason for the lower export volumes after the imposition of the order in 1995, and why the dumping margin from the original investigation was not relevant to the issue of whether dumping would be likely to continue or recur.

The Appellate Body stated that it was inconsistent with Article 11.3 for an authority to draw conclusive inferences in Article 11.3 reviews based solely on declines in import volumes without conducting a fact-specific analysis on a case-by-case basis to determine the cause for the decline.[27]

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[24] Similar to Mexico, Argentina conducted an exhaustive study of the Department's sunset reviews in DS 268, *United States – Sunset Reviews of Anti-Dumping Measures on OCTG from Argentina*. Unlike Mexico, however, Argentina recorded the extent of foreign interested party participation in each sunset review (conducted through December 2003). Argentina found that, in addition to the 26 full reviews in which respondents participated, respondents participated in 17 expedited reviews. See Argentina's Second Submission, *United States – Sunset Reviews of Anti-Dumping Measures on OCTG from Argentina*, DS 268, 8 January 2004, n. 119 (citing Argentina's Exhibit ARG-63).

[25] *See* Mexico's First Submission, Secs. VII.A and B, and MEX-62.

[26] Mexico's First Submission, sec. VII.C.

[27] Appellate Body Report, Japan Sunset, para.177.

Yet, this is precisely what the Department did in the sunset review of OCTG from Mexico. The Department relied solely on post-order import volume figures to the exclusion of a prospective analysis and thus violated Article 11.3. A substantive analysis is necessary in every case.

Moreover, the flaws with the Department's analysis were compounded in the sunset review of OCTG from Mexico. The evidence on the record demonstrated that the market and economic circumstances prevailing at the time of the original investigation no longer existed and were not likely to exist in the future.[28]

After a dumping determination in the original 1994 investigation based on "best information available," TAMSA obtained three consecutive no dumping determinations in the administrative reviews immediately preceding the sunset review. Hylsa had never been shown to be "dumping" within the meaning of Article 2 of the Anti-Dumping Agreement.

In this case, the two Mexican exporters participated fully in the sunset review, and provided factual information to explain why export levels had declined after the imposition of the order in 1995 and why the dumping margin from the original investigation was not relevant to the issue of likely dumping.[29] The Department ignored the relevant evidence, and, with respect to the export volumes, considered that TAMSA's stated reasons for the decline were irrelevant.[30]

Had the Department conducted the forward-looking review required by Article 11.3, it would have been clear that the severe peso devaluation of 1994 was an isolated event that was not likely to recur, and that it was inappropriate to mechanistically assume that the historic rate of 21.70 per cent margin from years earlier was in anyway valid for purposes of the sunset analysis.

In sum, in rendering its likelihood of dumping determination in the sunset review of Mexican OCTG, the Department ignored current and relevant information and failed to conduct a prospective analysis. Thus, the Department's sunset determination was inconsistent with Article 11.3.

C. A CUMULATIVE INJURY ANALYSIS IS INCONSISTENT WITH ARTICLE 11.3

Consistent with Argentina's argumentation of this issue in DS 268, Mexico rightly asserts that the application of a cumulative injury analysis is not consistent with the rights granted to individual WTO Members by Article 11.3.[31] The purpose of Article 11.3 is to provide each WTO Member with the right to have an anti-dumping measure affecting its exports terminated after five years, unless its exports are likely to be dumped within the meaning of Article 2 and are likely to cause injury within the meaning of Article 3. A cumulative injury analysis violates the object and purpose of Article 11.3, because it conditions each Member's right to termination of an anti-dumping measure covering its imports on the commercial practices of exporters from other countries.

In addition, fundamental to the rationale for cumulation is the concept of simultaneity. That is, the subject merchandise must be imported simultaneously and there must be demonstrated competition in the market. Otherwise, the cumulative effect of imports on the importing market could not properly be assessed. Consequently, if as Mexico's First Submission demonstrates, the Commission did not define the time frame within which injury would be likely to recur, how then could the Commission be certain that imports would enter the US market simultaneously? While the Commission discussed the likelihood of a reasonable overlap of competition of the subject imports,

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[28] See Mexico's First Submission, paras. 129-144.

[29] Case Brief of TAMSA, *Sunset Review of Oil Country Tubular Goods ("OCTG") from Mexico,* A-201-817, (11 Dec. 2000) at 3-8 (MEX-39).

[30] *Sunset Review Issues and Decision Memorandum* at 4 (MEX-19)

[31] See Mexico's First Submission, sec. VIII.E.

the Commission failed to link its analysis in this regard to the time frame within which injury would be likely to continue or recur under Article 11.3. As a result, the basis for the Commission's determination that imports would be simultaneously present in the US market and cause likely injury is flawed. Therefore, irrespective of the time frame within which injury most recur, for purposes of the obligation under Article 11.3, and even assuming *arguendo* that Articles 3.3 and 11.3 do not preclude cumulation in Article 11.3 reviews, is its clear from the record that the way the Commission cumulated in this case is inconsistent with Article 11.3.

Argentina also understands that Mexico has also rightly asserted that the express terms of the Anti-Dumping Agreement preclude cumulation in Article 11.3 reviews.[32] As Argentina argued in its submission in DS 268, article 11.3 refers to an anti-dumping duty in the singular, not plural. Thus, on its face, Article 11.3 requires the authority to determine whether the revocation of a *single* anti-dumping measure – rather than the revocation of multiple anti-dumping measures – would be likely to lead to the continuation or recurrence of injury. Article 11.3 thus does not permit cumulation. A reading of Article 11.3 within the context of the Anti-Dumping Agreement as a whole lends further support to this conclusion.

Through Article 3.3, the Anti-Dumping Agreement limits the use of a cumulative injury analysis to "investigations," and even then only where certain conditions are met. The fact that Article 3.3 provides for the conditioned use of cumulation in "investigations" but not in "reviews" indicates that a cumulative injury analysis is not permitted in the likelihood of injury determination made in an Article 11.3 review. The failure of Article 3.3 and Article 11.3 to cross-reference each other corroborates this reading. Article 11.3 contains explicit cross-references to other articles of the Anti-Dumping Agreement (such as Articles 6 and 8), and other articles in the agreement explicitly cross-reference Article 11 (such as the cross reference in Article 12.3). Thus, it is evident that, "when the negotiators . . . intended that the disciplines set forth in one provision be applied in another context, they did so expressly."[33] Accordingly, the lack of cross-references between Articles 11.3 and 3.3 indicates that the drafters of the Anti-Dumping Agreement did not intend for the *limited use* of a cumulative injury analysis permitted in an *investigation* to be extended to the likelihood of injury determination in a *review* under Article 11.3. Moreover, there are no general references to cumulation in the Anti-Dumping Agreement, nor is cumulation generally defined for purposes of the Anti-Dumping Agreement, as are the terms "dumping" and "injury."[34]

D. AN INJURY DETERMINATION UNDER ARTICLE 11.3 MUST SATISFY THE "LIKELY" STANDARD AS WELL AS THE EVIDENTIARY REQUIREMENTS OF ARTICLE 3.1

The evidence required by Article 11.3 must be sufficient to establish that injury would be "likely." The Appellate Body reaffirmed that "likely" in Article 11.3 means "probable."[35] Therefore, the authority must determine that injury would be *probable* upon termination of the anti-dumping measure in order to justify continuation of anti-dumping duties under Article 11.3. If the evidence is inconclusive, or is insufficient for a reasonable, objective person to say that injury is "likely," the measure must be terminated. The United States, however, has interpreted "likely" in the context of Article 11.3 to mean "possible," or "a concept that falls in between 'probable' and 'possible' on a

[32] See Mexico's First Submission, para. 254.

[33] Appellate Body Report, *Steel from Germany*, para. 69.

[34] Similar to Argentina's reasoning in Ds 268, Mexico convincingly argues in the alternative argument that: "Assuming *arguendo* that Articles 3.3 and 11.3 do not preclude cumulation in Article 11.3 reviews, then the terms of Article 3.3 must be applied to a cumulative analysis in a sunset review. Indeed, the application of either the *de minimis* or negligibility requirements would have prevented cumulation in this case. The Commission's cumulative injury analysis in its Sunset Determination thus failed to satisfy the Article 3.3 requirements." Mexico's First Submission, para. 261.

[35] *See* Appellate Body Report, *Japan Sunset*, paras. 110-111.

continuum of relative certainty."[36] US courts have held that the Commission has not implemented the "likely" injury standard in sunset reviews.[37]

It is clear that the United States did not apply a "probable" standard in this case. Indeed, in a NAFTA challenge to the sunset determination in this case, the Commission stated that the SAA precludes the Commission from applying a "probable" standard.[38]

The same type of evidence necessary for an injury determination under Article 3 is required for a determination of "likely injury" under Article 11.3; that is, positive evidence sufficient to meet the substantive injury standards of Article 3. Moreover, that evidence must also satisfy the "likely" standard of Article 11.3. Article 3 applies to reviews under Article 11.3 by virtue of footnote 9 to the Anti-Dumping Agreement, which states, "*Under this Agreement the term 'injury'* shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of injury to a domestic industry or material retardation to the establishment of such an industry and *shall be interpreted in accordance with the provisions of this Article*." (Emphasis added.) Article 11 does not specify an alternative definition of "injury" for the purposes of that article; therefore, the authority's likelihood of "injury" determination under Article 11.3 must comply with Article 3.[39] Article 3.1 mandates that the authority's determination of "injury" be based on "positive evidence" and "an objective examination" of "(a) the volume of dumped imports and the effect of dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products."

Accordingly, the authority's determination of likely injury under Article 11.3 must also be based on positive evidence and an objective examination of the likely volume, price effects, and impact of the imports subject to the measure under review. The likelihood of injury analysis is further subject to the requirements imposed by Articles 3.4, 3.5, 3.7, and 3.8 of the Anti-Dumping Agreement related to consideration of specific economic factors and indices having a bearing on the state of the domestic industry, causation, as well as the special rules related to all future injury determinations.

Argentina notes that the injury portion of the Article 11.3 review of Mexican OCTG imports is identical to the injury portion of the Article 11.3 review of Argentine OCTG at issue in DS 268. Argentina endorses all of Mexico's "as applied" arguments related to the injury portion of the review. The Commission's decision is based on speculation, and, at best, "possible" events based on the evidence developed during the review. The Commission's determination does not demonstrate, on the basis of positive evidence, that injury is "likely" to continue or recur.

E. 19 U.S.C. §§ 1675A(A)(1) AND (5) ARE INCONSISTENT AS SUCH WITH ARTICLES 11.3 AND 3 OF THE ANTI-DUMPING AGREEMENT

Consistent with Argentina's analysis in DS 268, Mexico convincingly demonstrates that 19 U.S.C. §§ 1675a(a)(1) and (5) are inconsistent as such with Articles 11.3 and 3 of the Anti-Dumping Agreement.[40] Article 11.3 requires the authority to determine whether termination of an

[36] *See* Mexico's First Submission, sec. VIII.A; *see also* SAA at 883 ("There may be more than one likely outcome following revocation or termination. The possibility of other likely outcomes does not mean that a determination that revocation or termination is likely to lead to continuation or recurrence or countervailable subsidies, or injury is erroneous . . . .")(MEX-26); Int'l Trade Comm'n Remand Determ. Pursuant to *Usinor Industeel S.A., et. al v.United States*, No. 01-00006 (July 2002) at 6 (MEX- 45).

[37] *See* Mexico's First Submission, para. 171.

[38] *See* Mexico's First Submission, para. 171 and (MEX-47).

[39] *See* Panel Report, *Japan Sunset*, paras. 7.99 – 7.101; Panel Report, *DRAMs from Korea*, para. 6.59 n.501 ("We note that, by virtue of note 9 of the AD Agreement, the term 'injury' in Article 11.2 'shall be interpreted in accordance with the provisions of Article 3.'").

[40] *See* First Submission of Mexico, Sec. VIII.G.

anti-dumping measure would be likely to lead to the continuation or recurrence of injury. 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.

Section 1675(a)(1) requires 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' time frame applicable in a threat of injury analysis."[41] Moreover, section 1675(a)(5) 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." Accordingly, by defining a "reasonably foreseeable time" as longer than an "imminent" time, the US statutory provisions are inconsistent with the Anti-Dumping Agreement, which requires the determination to be based upon injury upon "expiry" of the duty.

Sections 1675(a)(1) and (5) are also inconsistent with Articles 3.7 of the Anti-Dumping Agreement. Article 3.7 requires injury determinations to be "based on facts and not merely on allegation, conjecture or remote possibility," and that the circumstances under which injury would occur be "imminent." The US provisions provide that the likelihood of injury determination need not be based on "imminent" injury, thereby fostering speculation.

IV. THE UNITED STATES VIOLATED ARTICLES 11.2 AND 11.3 IN THIS CASE BY ASSIGNING DECISIVE WEIGHT TO DECLINING IMPORT VOLUMES.

Argentina is not surprised by the nature of the claims advanced by Mexico in this case. Indeed, as previously noted, Argentina is currently in the midst of a separate WTO dispute settlement proceeding with the United States involving many of these same issues, *United States – Sunset Reviews of Anti-Dumping Measures on OCTG from Argentina*, DS 268. Furthermore, as part of its case, Argentina also undertook a comprehensive analysis of the all of the Department's sunset reviews, including the sunset review of OCTG from Mexico.

Mexico's case offers compelling evidence that the United States has not faithfully implemented its obligations under Article 11. With respect to the sunset obligations established by Article 11.3, the United States uses presumptions and incorrect legal standards that enable the administering authorities to continue anti-dumping measures beyond the five-year term established by Article 11.3. For the Department's sunset review, the mere existence of historic dumping margins or a decline in volume after the imposition of anti-dumping duties is sufficient to keep an anti-dumping measure in place. For its part, the Commission concedes that it does not apply a "probable" standard in making the likely injury determination. The Commission also routinely conditions individual Members' rights of termination on the import practice of importers from other countries through its practice of cumulatively assessing the effects of imports in the likely injury analysis.

To compound these problems, the United States takes the position that because its Article 11.3 review determinations reflects an order wide (country-wide) decision, the fact that a particular exporter may not be dumping or causing injury is not determinative. The United States maintains that there are other US procedures in place that enable a company to have an order revoked as it pertains to that company and that these procedures implement US obligations under Article 11.2, such as where an exporter obtains consecutive no dumping determinations in three consecutive administrative reviews of the anti-dumping duty order.

Mexico's experience stands in stark contrast to the US characterizations of its procedures and practices for implementing the requirements of Article 11 as explained in DS 268 – the US-Argentina

[41] SAA at 887 (MEX-26).

case. In DS 268, the United States argued that if only the Argentine producer, Siderca, had continued to ship to the United States after the imposition of the measure, or if only the company had participated in the annual review process, the results might have been different. In this case, however, neither the Mexican companies' complete participation in full sunset reviews in which the evidence showed that dumping was not likely to continue or recur (in accordance with the requirements of Article 11.3), nor one company's participation in the annual review process and its ability to obtain three consecutive no dumping findings (zero margins) to demonstrate that the order was no longer necessary to offset dumping (in accordance with the requirements of Article 11.2) resulted in termination of the anti-dumping duties.

As noted above, consistent with other WTO sunset cases, in DS 268, 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.[42] 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 enabled a company to have an order revoked as it pertains to that company by obtaining zero margins in three consecutive administrative reviews.[43]

For example, the US Second Submission stated:

> Specifically, revocation for a particular company from an antidumping duty order is possible by two methods under US law (revocations of antidumping duty orders, in part, are generally termed "company-specific" revocations in US parlance). The first and most common method is for a producer or exporter to seek revocation pursuant to section 351.222(b)(2) of *Commerce's Regulations*, *i.e.*, after three annual administrative reviews wherein Commerce has calculated, in each review, a dumping margin of zero or de minimis for the producer or exporter seeking revocation.
>
> The second method for a producer or exporter seeking revocation is the "changed circumstances" review. Under this method, a producer or exporter may request a review at any time after providing information that changed circumstances warrant a review for the purposes of revocation of an antidumping duty order.
>
> Thus, a producer or exporter may seek revocation for itself from an antidumping duty order prior to the initiation of a sunset review.[44]

Thus, the United States stressed that, although the Department issues its determinations in sunset reviews on an order-wide basis, US law permits a particular foreign producer/exporter to seek a company-specific revocation prior to the initiation of a sunset review. Contrary to the US assertion in its First Submission in this case (DS 282),[45] Argentina is of the view that satisfaction of the obligations in Article 11.2 could well require the termination of an anti-dumping duty on a company-specific basis. In DS 268, the United States referred to sections 351.222(b)(2) and 351.216 of the

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[42] *See, e.g.*, US Answers to Argentina's First Set of Questions, DS 268 (8 Jan. 2004), para. 12; US Answers to Panel's First Set of Questions, DS 268 (8 Jan. 2004), paras. 3 and 19; US Answers to Panel's Second Set of Questions, DS 268 (Feb. 13, 2004), para. 3.

[43] US Oral Response to Panel Question During First Substantive Meeting of the Panel with the Parties; *see also* 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 ("US DS268 Second Submission").

[44] US DS268 Second Submission, para. 13 (footnotes omitted).

[45] US First Submission, DS 282, para. 147.

Department's regulations as providing company-specific revocation procedures. Under section 351.222(b)(2), a foreign producer/exporter may seek a company-specific revocation if the Department has calculated zero or de minimis dumping margins for that company in three administrative reviews. Under section 351.216, a foreign producer/exporter may argue that "changed circumstances" warrant the revocation of an order with respect to that company. According to the United States, "[t]he Appellate Body in *Japan Sunset* recognized the importance of the availability of these procedures in ensuring that an anti-dumping duty remain in force only as long as and to the extent necessary to counteract dumping which is causing injury."[46]

The facts of Mexico's case belie the US statements in DS 268. TAMSA continued to export to the United States throughout the life of the order and participated in three administrative reviews. In each review the Department determined that the company was not dumping. The company thus obtained three consecutive zero margins and thereby demonstrated that the order was no longer necessary to offset dumping, in accordance with the requirements of Article 11.2. The Department did not revoke the order, and ignored the results of the three, complete annual reviews that it conducted, based on the following rationale:

> Because TAMSA did not meaningfully participate in the market, its sales during these periods do not provide a reasonable basis for determining that it is unlikely that TAMSA will dump in the future. Therefore, we find that 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).[47]

As Mexico argues, there are several flaws with the Department's Determination in the Fourth Review Not to Revoke the Order as Applied to TAMSA. As Mexico's First Submission demonstrates, the United States violated Article 11.2 because: (1) the Department applied a standard which required a demonstration that dumping was "not likely" in the future; (2) the Department arbitrarily imposed a "commercial quantities" threshold requirement that has no basis in Article 11.2; and (3) the Department ignored positive evidence that demonstrated that the measure was not necessary to offset dumping.[48]

Argentina endorses all three elements of the argument put forward by Mexico. However, Argentina would like to draw the Panel's attention specifically to the role that import volumes play in the Department's Article 11.2 determination described by Mexico. As Mexico's submission makes clear, the Department's determinations not to revoke the measure as to TAMSA – under both the Article 11.2 and 11.3 mechanisms provided for in US law – were based solely on a comparison between import volume to the United States during the original investigation period and the OCTG volume shipped during each of the three relevant administrative review periods. The Department stated in the Article 11.3 review that:

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[46] US DS268 Second Submission, para. 15. The United States cited paragraph 199 of the Appellate Body's report in *Japan Sunset* as support for this assertion. This paragraph, however, does not refer to the company-specific revocation provisions at sections 351.222(b)(2) and 351.216. Based on an earlier citation in the US second submission, it appears that the United States had intended to cite to paragraph 158 of the Appellate Body's report. Contrary to the US characterization, however, the Appellate Body did not endorse these provisions as consistent with Article 11.1 (i.e., "only as long as and to the extent necessary") in this paragraph (or in any other section of the report). Rather, the Appellate Body merely cited the US provisions in explaining that Article 11.3 does not preclude authorities from making separate likelihood determinations for individual producers and exporters. (Appellate Body Report, *Japan Sunset*, para. 158)

[47] See Mexico's First Submission, para. 301 (citing *Fourth Review Issues and Decision Memorandum* at 9 (MEX-9)).

[48] See Mexico's First Submission, sec. IX.C.

> We disagree with TAMSA's claim that the Department cannot base its decision with regard to whether dumping is likely to resume if the order were revoked on the fact that the post-order export volumes were well below pre-order volumes. As discussed in section II.A.3 of the Sunset Policy Bulletin, the SAA at 889, and the House Report at 63-64, if the volume of imports declined 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. The premise that the decline in TAMSA's export levels after the issuance of the order was the result of a prudent and necessary business strategy, and the fact that TAMSA was able to sell small amounts of OCTG without dumping in no way conflict with the Department's inference. If it became "prudent and 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 disciplines ceased to exist and it was no longer "necessary" for TAMSA and other Mexican exporters to maintain the same business strategy.[49]

Likewise, in the Article 11.2 review, the Department specifically defended the "inference" it had drawn from the lower import volumes and justified the use of a so-called "commercial quantities" threshold test:

> As explained in the SAA at 889-90, and the House Report at 63-64, if the volume of imports declined 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. The 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 OCTG and a high deposit rate, and the fact that TAMSA was able to sell small amounts of OCTG without dumping in no way conflict 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 disciplines ceased to exist, especially if TAMSA were again to encounter a "depressed market" in this very cyclical industry.[50]

These statements leave no doubt that the United States did not fulfil its obligations under either Article 11.2 or 11.3 in this case. As in the treatment of Argentine exports examined in DS 268, the Department decisions relating to Mexican exports demonstrate clearly that the Department gave decisive weight to a single factor – declining export volumes. Reliance on this factor precluded the Department from making a determination consistent with the requirements of Articles 11.2 and 11.3. The Appellate Body has ruled that an administering authority cannot draw a conclusive inference from a decline in volume alone for purposes of an Article 11.3 determination,[51] and the same rationale applies with equal force for purpose of the Article 11.2 determination.

While the common denominator in this case and DS 268 is the Department's reliance on declining import volumes, the two cases demonstrate the bias with which the Department applies its laws. In the Argentine case examined in DS 268, very small volumes from an unknown source were

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[49] Mexico's First Submission, para. 123, citing *Oil Country Tubular Goods from Mexico*, 66 Fed. Reg. 14,131 (Dep't Commerce Mar. 9, 2001)(final results of sunset review); *Issues and Decision Memorandum for the Full Sunset Review of the Anti-Dumping Duty Order on Oil Country Tubular Goods from Mexico* (9 Mar. 2001)(final results)("*Sunset Review Issues and Decision Memorandum*") at 4 (MEX-19).

[50] Mexico's First Submission, para. 316, citing *Fourth Review Issues and Decision Memorandum* at 8 (MEX-9).

[51] See Appellate Body Report, *Japan Sunset*, para. 177.

considered to be relevant enough to trigger the "waiver" provisions of US law, and to justify the application of "facts available," both of which were used by the Department to justify continuation of the measure against Argentine exports.[52] In the review of Mexican exports, comparable import volumes are considered to be completely irrelevant. It simply does not matter that the imports in comparable volume are demonstrated to be traded fairly; now the volume is too small to be relevant. Not only is the demonstrated reliance on import volumes itself a violation of Articles 11.2 and 11.3, the inconsistency in treatment of the volume factor highlights concerns about the objectivity with which the United States implements its Article 11 obligations.

V. REQUEST FOR SUGGESTIONS FROM THE PANEL ON THE MANNER IN WHICH THE UNITED STATES SHOULD IMPLEMENT THE PANEL'S RECOMMENDATIONS

Mexico has alleged that the United States has committed multiple violations of its WTO obligations. Argentina believes that Mexico has presented a compelling case of violations. If the panel agrees and recommends that the United States bring itself into compliance with its obligations, Argentina agrees that termination of the anti-dumping measure on OCTG from Mexico would be the appropriate suggestion from the panel.

In light of the obligations in Article 11.3, the chance to renew the duties in the sunset review determination arise only at the time of the expiry of the five year period of the duty. Such a review can be conducted only once. Additionally, as stated in Article 11.1, which provides context for the obligation in Article 11.3, the duty "shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." If in this context, an authority failed to conduct the review according to the Anti-Dumping Agreement, then there is no chance for that Member to cure in a subsequent proceeding. Otherwise, the obligation of Article 11 (i.e., termination of the anti-dumping measure) will be thwarted because Members could always continue the imposition of anti-dumping duties, knowing that that they could again revisit that decision after WTO dispute settlement proceedings. As in the case of Argentina in DS 268, the only remedy that will restore the benefits obtained by Mexico through the negotiation of the Anti-Dumping Agreement is termination of the measure that has applied to its exports for the last decade.

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[52] The key facts at issue in DS 268 relevant to the Department's sunset review of OCTG from Argentina are recounted briefly as follows. The Argentine producer, Siderca, had not exported any OCTG to the United States for consumption during the relevant period for purposes of the sunset review. Siderca provided this information to the Department and made similar "no-shipment" representations during each of the relevant administrative review periods. The Department conducted "no-shipment" reviews and in each instance verified Siderca's claims that the company had not exported OCTG to the United States. The Department's import data, however, showed the existence of very small quantities of Argentine OCTG imports to the United States. Because Siderca's total exports of OCTG to the United States (zero exports) were less than 50 per cent of total OCTG exports from Argentina to the United States, however, the Department determined Siderca's response to be "inadequate." *See* First Submission of Argentina, DS 268, paras. 97-99. The Department then determined that because Siderca's response was deemed to be "inadequate," the company was similarly deemed to have "waived" its right to participate in the sunset review. *See* First Submission of Argentina, DS 268, para. 98, citing the Department's *Issues and Decision Memorandum* at 4-5 ("In the instant reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation."). The Department deemed Argentina to have waived its right to participate because of the "inadequate" response to the initiation notice. The company's response was inadequate simply because of its low export volume. Ironically, it is interesting to note the Department's reliance in DS 268 on very small Argentine OCTG import quantities to deem Siderca to have waived its participation in the sunset review, with devastating consequences. In the end, it is clear that import volume is used by the Department in a very outcome determinative manner.

VI. CONCLUSION

Argentina thanks the Panel for providing the opportunity to comment on the important issues presented in this dispute.

ANNEX B-2

THIRD PARTY SUBMISSION OF CHINA

(28 April 2004)

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I. INTRODUCTION

1. China welcomes this opportunity to present its view in the dispute brought by Mexico over the consistency with Article VI of the General Agreement on Tariffs and Trade 1994 ("GATT") and the Agreement on Implementation of Article VI of the GATT ("Anti-Dumping Agreement") of the decision made by the United States not to terminate the imposition of the anti-dumping duty on oil country tubular goods ("OCTG") from Mexico, to impose a positive dumping margin in the forth administrative review and US statutory, regulatory, and administrative measures with regard to sunset review.

2. China has systemic interests in the interpretation and application of the Anti-dumping Agreement with regard to sunset review and dumping margin calculation. As a third party, China would like to address the following issues raised by Mexico:

– Inconsistency of the determination by the US Department of Commerce ("Department") of likelihood of continuation or recurrence of dumping with Article 2 and Article 11.3;

– Inconsistency of the determination by the US International Trade Commission ("Commission") of likelihood of continuation or recurrence of injury with Articles 3.1, 3.4, 3.5 and 11.3;

– Inconsistency of margin of dumping determined by the Department based on the zeroing methodology for determining "dumping" with Articles 2.1 and 2.4.

II. ARGUMENTS

A. THE DEPARTMENT'S SUNSET REVIEW DETERMINATION IS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

3. Article 11.3 of the Anti-Dumping Agreement requests that an existing anti-dumping measure shall be terminated unless "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury." The term "likely" in Article 11.3 requires that the authorities make an affirmative determination on a prospective basis[1] that there is a probability, not a mere possibility, that the dumping will continue or recur in the future.[2] In *US – Sunset Review of Steel from Japan*, the panel also expressed that the term "likely" in Article 11.3 means "probable." [3] The continuation or recurrence of dumping and injury shall, therefore, be based on evidences that show "probability" rather than simple "possibility."

4. As Mexico pointed out in its first submission regarding this case, the United States itself acknowledged such interpretation of the term "likely" into "probable" in *US – Steel from Germany*,[4] and it demonstrates the understanding of the United States regarding this issue.

5. In *The Sunset Review of Steel from Japan*, the Appellate Body reaffirmed that continuation of anti-dumping duty in a sunset review is exceptional and thus requires that "authorities must conduct **a rigorous examination** in a sunset review before the exception (namely, the continuation of the

[1] *See* Panel Report, *US – Carbon Steel*, para. 8.96.
[2] *See* Panel Report, *US – DRAMs*, para. 6.45.
[3] Appellate Body Report, *US – Sunset Review of Steel from Japan*, paras. 110-111.
[4] See the First Submission of Mexico before the World Trade Organization regarding the current dispute, para 163.

duty) can apply. (emphasis added) The Appellate Body also agreed with the Panel's reasoning below[5]:

> "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."[6]

6. Thus, in order to make a determination that is consistent with Article 11.3, the US authorities would need to find that it is "likely" and thus far more than "possible" (i.e., more probable than not) that termination of the anti-dumping measure will lead to the continuance or recurrence of injury and dumping, respectively.

1. Provisions Of Article 2 Apply To The Determination Of Likelihood Of Continuation Or Recurrence Of "Dumping" Under Article 11.3

7. The title of Article 2 states "Determination of Dumping." Article 2.1 then states that:

> **For the purpose of this Agreement**, a product is to be considered as being dumped, i.e., introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. (emphasis added)

8. The first phrase "[f]or the purpose of this 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.

9. 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.

10. The Appellate Body in *US – Sunset Review of Steel From Japan* has confirmed such cross-reference that general provision and definition of dumping applies to the sunset review provisions:

> "[a]rticle 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 suggest that the question for investigation authorities, in making a likelihood determination in a sunset review pursuant to article 11.3, is whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping of the product subject to the duty (that is, to the introduction of that product into the commerce of the importing country at less than its normal value)."[7]

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[5] Appellate Body Report, *US – Sunset Review of Steel from Japan*, p. 41
[6] Panel Report, *US – Sunset Review of Steel from Japan*, para. 7.271.
[7] Appellate Body Report, *US – Sunset Review of Steel from Japan*, p. 39.

11. Therefore, a determination of whether future dumping is likely to continue or recur under Article 11.3 must reflect the definition and obligations enumerated in Articles 2.1, 2.4 and other provisions in Article 2.

12. However, in the Department's sunset review practice, continued dumping margins, the cessation of imports, and/or declining import volumes accompanied by the elimination of dumping margins become the three criteria. Such criteria do not adhere to the "dumping" definition in Article 2 of the Anti-Dumping Agreement.

13. The United States admitted that "[a]s the starting point for making its likelihood determination is this sunset review, Commerce considered the findings concerning dumping made in the original investigation.[8] The fact that the 21.70 per cent dumping margin for all other Mexican companies was provided to the Commission by the Department testifies the Department determination.

14. However, article 11.3 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.

15. The Appellate Body confirms the Panel's description of "determine" in the *US – Sunset Review of Steel from Japan:*[9]

> The text of Article 11.3 contains an obligation "to determine" likelihood of continuation or recurrence of dumping and injury. The text of Article 11.3 does not, however, provide explicit guidance regarding the meaning of the term "determine." The ordinary meaning of the word "determine" is to "find out or establish precisely" or to "decide or settle". The requirement to make a "determination" concerning likelihood therefore precludes an investigating authority from simply assuming that likelihood exists. 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 continuation or recurrence of dumping and injury. The investigating authority must have a sufficient factual basis to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence. (emphasis added)

2. The Department's Sunset Review Determination Is Not Consistent With The Anti-Dumping Agreement Article 2 And Article 11.3

16. The Department acted inconsistently with Article 11.3 of the Anti-Dumping Agreement by not basing its determination on overall evaluation but rather ignoring the current information and focusing only on the import volume factor.

17. The United States made the following statement in its First Submission:[10]

> "Commerce normally will find that dumping would be likely to continue or recur based on evidence of significantly depressed import volumes after imposition of the duty even where there is also evidence that dumping has been eliminated during the

[8] US First Submission, para. 122
[9] Panel Report, *US – Sunset Review of Steel from Japan, para. 7.271.*
[10] US First Submission, para. 123.

> five-year period preceding the sunset review. If there is evidence that no dumping has existed since the order was imposed but import volumes have been adversely affected to a significant degree, Commerce may make an affirmative sunset determination because, if these conditions are found, Commerce may reasonably conclude that dumping would continue were the discipline of the duty removed."

18. According to the First Submission of Mexico, "the record demonstrates vividly that the conclusion was based entirely on an approach which: 1) was based solely on Mexican OCTG import volumes; 2) ignored current and relevant evidence; and 3) was not prospective."[11]

19. China agrees with Mexico that a determination solely based on the decrease of import volumes, bearing no consideration on the current information and prospective evidence, is not consistent with Article 11.3 of the WTO Anti-Dumping Agreement, as the latter clearly requests that no anti-dumping duty should be continued unless the authority determines that the expiration of such duty would be likely (probably) to lead to continuation or recurrence of dumping and injury.

20. As Mexico points out in its First Submission, in the "Sunset Review Issues and Decision Memorandum," the Department clearly states that it perceives that "if the volume of imports declined 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."[12] According to the Department, the decline of import volume is directly attributed to the effect of the anti-dumping duty, and ceasing such duty would cause resumption of dumping. The Department also explained in the "Sunset Review Issues and Decision Memorandum" that "[b]ecause 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."[13]

21. It is clearly demonstrated that the Department relied solely on the export volumes for its conclusion that dumping was likely to recur, is inconsistent with Article 11.3.

22. The Appellate Body in *US – Sunset Review of Steel from Japan* reasoned that "the cessation of imports in the second scenario and the decline in import volumes in the third scenario could well have been caused or reinforced by changes in the competitive conditions of the market-place or strategies of exporters, rather than by the imposition of the duty alone. Therefore, 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.[14]

23. Despite the fact that Article 11.3 requires a case-specific and proactive analysis rather than a passive assumption and simple comparison[15], in the OCTG Sunset Review, the Department based its determination that termination of the anti-dumping measure would be likely to lead to recurrence of dumping solely on a comparison of the total quantities shipped to the United States during the original

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[11] See the First Submission of Mexico before the World Trade Organization regarding the current dispute, para 122.

[12] See the First Submission of Mexico before the World Trade Organization regarding the current dispute, para 123.

[13] *Oil Country Tubular Goods from Mexico*, 66 Fed. Reg. 14,131 (Dep't Commerce 9 Mar. 2001)(final results of sunset review); *Issues and Decision Memorandum for the Full Sunset Review of the Anti-dumping Duty Order on Oil Country Tubular Goods from Mexico* (9 Mar. 2001)(final results)("*Sunset Review Issues and Decision Memorandum*") at 4; see also the First Submission of Mexico before the World Trade Organization regarding the current dispute, para 123.

[14] Appellate Body Report, *US – Sunset Review of Steel from Japan*, para. 177.

[15] Appellate Body Report, *US – Sunset Review of Steel from Japan*, p.39.

investigation period with the total quantities shipped during review periods, which is a clear violation of the afore-mentioned Article.

24. The Department did not act consistently with its obligation under Article 11.3 to consider all positive evidence by ignoring the most recent administrative reviews where the Mexican companies obtained zero dumping margins. Although the Department conducted all these reviews and was well aware of the company's financial and export data, it gave preference to the "decisive factor" of the decrease in export volume and even rejected the company's justification of the decrease from the commercial aspect. Rather, the Department planted its position in the sole factor of export volume decrease and made the determination that dumping would continue or recur without a comprehensive and rigorous evaluation of all aspects.

25. In *US – 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."[16](emphasis added) By using the 21.70 per cent dumping margin calculated in the original investigation years ago when there might be other factors (significant currency devaluation) involved and neglecting or ignoring the most recent dumping margins calculated by the Department itself in the administrative reviews, the Department failed its obligation to do a "forward-looking analysis".

26. In summary, that the Department relied solely on the depressed state of OCTG imports from Mexico to make its affirmative determination that dumping was likely to continue or recur is inconsistent with Article 11.3 and Article 2 of the Anti-Dumping Agreement.

B. THE COMMISSION'S SUNSET REVIEW DETERMINATION IS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

27. Mexico challenged the Commission's standard for "likely" and concluded that the Commission's "likely" standard is compromised. China supports Mexico in this argument.

28. Article 11.3 of the Anti-Dumping Agreement states:

> "Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review."

29. The Appellate Body has also reaffirmed the same principle repeatedly that continuation of an anti-dumping after its 5-year application period is an exception, which can only exist when the authority determines in the sunset review that the expiration of such duty would be "likely" to lead to continuation or recurrence of injury.[17]

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[16] Appellate Body Report, *US – Sunset Review of Steel from Japan*, para.105.

[17] *See* Appellate Body Report, *US – Sunset Review of Steel from Japan*, para. 104; Appellate Body Report, *Steel from Germany*, para. 88.

30. In *US – Sunset Review of Steel from Japan*, the Appellate Body ruled that the ordinary meaning of "likely" as used in Article 11.3 is "probable," rather than simply possible or plausible.[18] The *DRAMs from Korea* panel interpreted the word "likely' in accordance with "its normal meaning of 'probable.'"[19]

1. Provisions of Article 3 Apply to Article 11.3

31. Mexico correctly interprets that Article 3 applies to Article 11.3. The title of Article 3 states "Determination of Injury." Footnote 9 then defines the term "injury" that:

> **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.(emphasis added)

32. 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, the provisions in Article 3 setting forth requirements for finding "injury" must be satisfied.

33. The Appellate Body in *US – Sunset Review of Steel from Japan* found that similar language in Article 2 ("For the purpose of this Agreement") made clear that the disciplines of Article 2 apply to sunset review under Article 11.3. The Appellate Body's reasoning thus requires the parallel finding that Article 3 applies to Article 11.3. Just as Article 2 contains the disciplines for making dumping determinations for the purpose of Anti-Dumping Agreement, Article 3 contains the disciplines for determining injury under the Anti-Dumping Agreement.

34. 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.[20]

35. 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.

36. Article 3.1 requires the authorities to base their injury determination on "positive evidence" and "objective examination" of "the volume of the dumped imports" and "the effect of the dumped imports on prices."

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[18] *See* Appellate Body Report, *US – Sunset Review of Steel from Japan*, para. 111; *see also* Panel Report, *US – DRAMs from Korea*, para. 6.48 n.494.

[19] Panel Report, *DRAMS from Korea*, para. 6.46.

[20] *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."

37. Article 3.1 also provides that the authorities must base their injury determinations on positive evidence and objective examination of "the consequent impact of these imports on domestic producers of such products." Article 3.4 then sets forth how "the impact of dumped imports on the domestic industry" must be examined. Article 3.4 thus provides the detailed requirements for the examination of the impact of dumped imports under Article 3.1, and therefore, for a determination of injury. As such, the authorities must satisfy the requirements in Article 3.4 to determine "injury" in any proceedings under the Anti-Dumping Agreement.

38. Article 3.5 provides that injury "within the meaning of this Agreement" must be caused by dumped imports through the effects of dumping as set forth in paragraphs 2 and 4. The phrase "injury within the meaning of this Agreement" ensures that the provisions of Article 3.5 further define the term "injury" whenever the term "injury" appears in this Agreement. The causation and non-attribution requirements under Article 3.5, therefore, must be satisfied to make a determination of "injury."

39. The phrase "likely to lead to continuation or recurrence" in Article 11.3 does not change the core concept of "injury," as is the case of "dumping" discussed above. The terms "continuation or recurrence" demonstrate that the authorities must first find the current state of injury to the domestic industry, and then how the current state is likely to change. The modifying phrase therefore does not affect the applicability of Article 3 to Article 11.3.

40. The provisions of Article 3, therefore, apply to "injury" determinations in sunset reviews under Article 11.3.

2. The Commission's Injury Determination Is Inconsistent With Article 3.1, 3.4, 3.5, And 11.3

41. China supports Mexico's claims that Commission's injury determination was inconsistent with Article 3.1, 3.4 and 3.5 of the Anti-Dumping Agreement.

42. As mentioned before, Article 3.1 provides that the authority must base their injury determination on positive evidence and objective examination of the consequent impact of these imports on domestic producers. Article 3.4 thus provides detailed requirements for the examination of the impact of dumped imports under Article 3.1. Article 3.5 then provides that the authorities must examine any known factors other than the dumped imports to prove the causal link between the dumped imports and injury.

43. Mexico submitted convincing evidence[21] that the Commission did not evaluate certain factors mandated by Article 3.4 for determining injury. As Mexico pointed out, Article 3.4 requires that the authorities evaluate all relevant economic factors indices as set forth in the Article. The Appellate Body in Thailand – H-Beams confirmed the obligation of the authorities, stating, "Article 3.4 requires a mandatory evaluation of all of the factors listed in that provision."[22]

44. By using outdated and fragmented information and failing to evaluate "all of the factors," the Commission acted inconsistently with Article 3.4 and accordingly with Article 11.3.

45. Mexico further indicated in its First Submission that the Commission failed to demonstrate a causal relationship of the dumped imports and likely injury to the domestic industry. The

[21] See First Submission of Mexico, para. 229 and related exhibits.
[22] Appellate Body Report, *Thailand – H-Beams*, para. 128.

Appellate Body in *Hot-Rolled Steel from Japan* laid out a framework for the Commission to conduct such causation analysis.

46. China respectfully requests that the Panel review whether the Commission did causal link analysis. If the Panel finds that the Commission failed to do so, the Commission has acted inconsistently with Article 3.5 and 11.3.

47. Furthermore, by failing to satisfy the requirements under Article 3.4 and 3.5, the Commission consequently failed to act consistently with Article 3.1, which requires an "objective examination" of "positive evidences".

3. 19 U.S.C. § 1675a(A)(1) And 19 U.S.C. § 1675a(A)(5), Are Inconsistent, As Such And As Applied, With Articles 11.1, 11.3 And 3 Of The Anti-Dumping Agreement

48. China upholds Mexico's position in that 19 U.S.C. § 1675a(a)(1) and 19 U.S.C. § 1675a(a)(5) are inconsistent with Articles 11.1, 11.3 and Article 3 of the Anti-Dumping Agreement.

49. The US legislation requires that in a sunset review the Commission must determine whether injury would be likely to continue or recur "within a reasonably foreseeable time,"[23] and 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."[24] The SAA further elaborates that the "'reasonably foreseeable time' ... normally will exceed the 'imminent' time frame applicable in a threat of injury analysis."[25] The SAA also provides that the Commission shall consider "factors that may only manifest themselves in the longer term."[26]

50. Article 11.1 clearly states that an "anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." A literal interpretation of the article would tell that, if at the time of the review there is no injury then the anti-dumping duty should be terminated. The US statute, however, allows the authorities to probe into the long-term future possibilities which, even according to common sense, is unpredictable and is almost impossible to prove with sound facts.

51. As discussed above, the phrase "likely to lead to continuation or recurrence of injury" in Article 11.3 does not change the core concept of "injury". The footnote 9 of the Anti-dumping Agreement defines the term "injury" means material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry … Therefore, to determine whether the injury is likely to continue or recur under Article 11.3 of sunset review also requests the investigating authority to identify the injury.

52. Article 3.1 of the Anti-Dumping Agreement requests the investigating authority to determine injury on the basis of positive evidence and involve an objective examination. There is no room that the investigating authority "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time."

53. Furthermore, regarding threat to material injury, Article 3.7 of the Anti-Dumping Agreement makes it compulsory that the authority cannot base its threat of material injury determination on sheer "allegation, conjecture or remote possibility," and "the change in circumstances which would create a

[23] 19 U.S.C. § 1675a(a)(1).
[24] 19 U.S.C. § 1675a(a)(5).
[25] SAA at 887.
[26] *Id.*

situation in which the dumping would cause **injury must be clearly foreseen and imminent**." (emphasis added).

54. The SAA's elaboration that the "'reasonably foreseeable time' ... normally will exceed the 'imminent' time frame applicable in a threat of injury analysis" is inconsistent with the Article 3 and Article 11.3 of the Anti-Dumping Agreement.

55. Further, the "reasonably foreseeable time," defined by the US statute, which the SAA interprets as an ambiguous and undefined term "in the longer term," is inconsistent with the Anti-Dumping Agreement that requires the determination to be based on injury upon "expiry" of the order.

C. THE DEPARTMENT ACTED INCONSISTENTLY WITH ARTICLE 2.1 AND 2.4 OF THE ANTI-DUMPING AGREEMENT BY APPLYING "ZEROING" IN ITS DETERMINATION OF DUMPING MARGIN

56. China agrees with Mexico that the margin of dumping calculated using the "zeroing" methodology in the Department forth administrative review is inconsistent with the Article 2.1 and 2.4 of the Anti-Dumping Agreement.

57. The practice of "zeroing" selectively calculates margins only for those sales of a product with positive margins, setting negative margins produced from sales of the product to zero. This methodology thus creates an artificially inflated dumping margin. As discussed below, a "dumping" determination based on margins with the "zeroing" practice is inconsistent with Articles 2.1 and 2.4.

58. Article 2.1 of the Anti-Dumping Agreement states that:

> For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.[27]

59. The term "a product" under Article 2.1 clarifies that the margin of dumping, i.e., the basis of the determination of "dumping," must incorporate all types of the product that are subject to a particular anti-dumping proceeding.

60. The Appellate Body in *EC - Bed Linen* has stated, "from the wording of this provision, it is clear to us that the Anti-Dumping Agreement concerns the dumping of a product."[28] The Appellate Body in *EC-Bed Linen* further clarified this point:

> "[a]ll references to the establishment of "the existence of margins of dumping" are references to the *product* that is subject of the investigation. … Whatever the method used to calculate the margins of dumping, in our view, these margins must be, and can only be, established for the *product* under investigation as a whole.[29]"

61. The Appellate Body in *EC – Bed Linen* also confirmed, "dumping is a determination made with reference to a product from a particular producer [or] exporter, and not with reference to

[27] Article 2.1 of the AD Agreement.
[28] Appellate Body Report, *EC -- Bed Linen*, para. 51.
[29] Appellate Body Report, *EC – Bed Linen*, para. 53.

individual transactions."[30] Article 2.1 thus provides that dumping must be determined on the basis of all types of a product under consideration as a whole, not some types of the product.

62. Article 2.4 requires the authorities to make "a fair comparison" between the export price and the normal value. The Appellate Body in *EC - Bed Linen* clarified that the "fair comparison" required in Article 2.4 and the "price comparability" defined in Article 2.1 mean that the establishment of dumping margins must be made by evaluating the product under consideration as a whole, not just a portion of the product. The Appellate Body stated "[a]ll types or models falling within the scope of a 'like' product must necessarily be 'comparable.'"[31] It then further stated that:

> "[T]he European Communities argues on the basis of the "due allowance" required by Article 2.4 for "differences in physical characteristics" that distinctions can be made among different types or models of cotton-type bed linen when determining "comparability". But here again we fail to see how the European Communities can be permitted to see the physical characteristics of cotton-type bed linen in one way for one purpose and in another way for another.[32]"

63. The Appellate Body in *US – Sunset Review of Steel from Japan* confirms that "zeroing" methodology will tend to inflate the margins calculated either in an original investigation or otherwise. The report states:

> When investigating authorities use a zeroing methodology such as that examined in EU-Bed Linen to calculate a dumping margin, **whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated**. Apart from inflating margins, such a methodology could, in some instances, turn a negative dumping margin of dumping into a positive dumping margin of dumping. As the Panel itself recognized in the present dispute, "zeroing … may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing". Thus, the inherent bias in zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also finding of the very existence of dumping. (emphasis added)

64 The United States makes the following statement in its First Submission:[33]

> "[I]n Japan Sunset, the Appellate Body found that it was unable to make findings on whether the United States acted inconsistently with Article 2.4 or Article 11.3 of the ADA by relying on dumping margins from administrative reviews in making its likelihood determination in a sunset review. Consequently, there were no findings in that report relevant to this dispute."

65. However, the Appellate Body in *US – Sunset Review of Steel from Japan* made the following findings and conclusions:

> "[R]everses the Panel's findings, in paragraphs 7.170, 7.184, and 8.1(d) (iii) of the Panel Report, that the United States did not act inconsistently with Article 2.4 or Article 11.3 of the Anti-Dumping Agreement by relying, in the CRS sunset review,

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[30] *Appellate Body Report, European Communities -- Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 of the DSU India* (*"EC – Bed Linen (Article 21.5 – India)"*), WT/DS141/AB/RW (8 April 2003), para. 143.

[31] Appellate Body Report, *EC – Bed Linen*, para. 58.

[32] *Ibid*. para. 60.

[33] US First Submission, para. 213.

> on dumping margins calculated in previous administrative reviews allegedly using a "zeroing" methodology; but finding that **there is not a sufficient factual basis** to complete the analysis of Japan's claims on this issue. (emphasis added).

66. The Appellate Body in *US – Sunset Review of Steel from Japan* confirms that "zeroing" methodology will tend to inflate the margins calculated either in an original investigation or otherwise. However, just due to there is no sufficient factual basis, the Appellate Body did not make any finding.

67. Mexico in its First Submission presented a table to prove that the Department adopted "zeroing" methodology in its fourth administrative review in calculating dumping margin for Hylsa.[34]

68. China therefore respectfully requests that the Panel carefully review the evidence to confirm if the Department adopted zeroing methodology to find that 0.79 per cent dumping margin to Hylsa. If the Panel finds that the Department applied the zeroing methodology to find the positive dumping margin, the Department's determination in the fourth administrative review was inconsistent with Article 2.1 and 2.4 of the Anti-Dumping Agreement.

III. CONCLUSION

69 China hereby wishes to thank the Panel for providing it with an opportunity to comment on the issues involved in this proceeding, and hopes that these comments will prove to be useful.

[34] Mexico First Submission, para. 23-24.

ANNEX B-3

THIRD PARTY SUBMISSION OF THE EUROPEAN COMMUNITIES

I. SUNSET REVIEW "AS APPLIED"

A. LIKELY RECURRENCE OF DUMPING

1. A sunset review necessarily involves an historical analysis, including a dumping determination, which must be consistent with Article 2 *ADA*. USDOC made a determination of likely *recurrence* of dumping. The historical basis for the recurrence determination was the dumping margin calculated in the original period of investigation (1 January to 30 June 1994). The events USDOC found likely to recur are thus those that occurred during that period.

2. With the US method, a dumping measure could be perpetuated indefinitely, on the basis of the calculation made in relation to the original investigation period, together with the prospective part of the likely recurrence determination. That is inconsistent with Article 11.1 and 11.3 *ADA*. Article 11.1 *ADA* states a general and overarching principle in the light of which Article 11.3 must be interpreted. *Only as long a*s there is dumping can there be an anti-dumping duty. A dumping determination in relation to the original investigation period has a limited "shelf-life". There must be a sufficiently recent determination of *dumping*, not just a determination concerning *imports*. ***The minimum meaning of Article 11.3 ADA is that, to continue the measure beyond 5 years, a dumping determination more recent than that made in the original investigation is necessary.***

3. If the historical dumping determination relates only to the original investigation period, some new facts must be added for the prospective determination. The additional fact relied on by USDOC was that post-order export volumes were well below pre-order export volumes. This was insufficient. There are many reasons why imports from one Member to another might have been at a particular level prior to the order, and not increased after the order, other than the existence of the order itself. A sufficient and fair consideration of those reasons cannot be made if the factual basis for the determination is as narrow as that used by USDOC.

4. Identifying facts relevant to a prospective determination is problematic. Reasons assume a particular importance. A sufficiently detailed and persuasive set of reasons is necessary. USDOC failed to *review* the (highly unusual) reasons that gave rise to the original dumping determination, imposing a duty of 21.7 per cent (instead of 0 per cent) on all firms some *12 years, 2 months and 9 days* later. That determination neither meets the "likely" standard nor corresponds to a determination made by an objective and even-handed authority. The most that could be said is that USDOC established likely recurrence of dumping within the meaning of the Tokyo Round *AD Code*. That is not enough. USDOC must establish likely recurrence of dumping within the meaning of Article 2 of the *ADA*.

B. LIKELY RECURRENCE OF INJURY

5. The provisions of Article 3 *ADA* apply *mutatis mutandis* in the context of a sunset review investigation. The likely injury for the purposes of Article 11.3 *ADA* need not be imminent. A determination of likely injury within a reasonably foreseeable time would be based on a permissible

interpretation of the *ADA*. A cumulative analysis of injury is permissible in a sunset review, provided that the conditions set out in Article 3.3 *ADA* are fulfilled. The conditions should be fulfilled, if not at the time of the sunset review, at least within the reasonably foreseeable future.

II. SPB AND CONSISTENT PRACTICE "AS SUCH"

6. The SPB is "as such" reviewable by this Panel for consistency with the *ADA*.

7. The SPB is a useful tool for authorities and participants in anti-dumping proceedings. However, provisions that create "irrebuttable" presumptions, or "predetermine" a particular result, are inconsistent with the *ADA*. The US anti-dumping system is skewed towards findings of likelihood in sunset reviews. This case is just one more particularly egregious example. The suggestive language of the SPB makes an important contribution towards that state of affairs.

8. The drafters of the *ADA* contemplated the possibility of a recidivist dumper, and inserted provisions in the *ADA* to address that scenario. These provisions would have no purpose if, once a measure was in place, it was never terminated. It makes a difference in the US system if a measure is in place with a zero cash deposit rate. There is, in the US system, a chilling effect. If, in the long run, USDOC *always* found likelihood and *never* terminated, it would be possible to conclude in general terms that the US was not complying with its obligations under Article 11.3 *ADA*. The Panel should thus consider the history of past sunset cases and draw the appropriate conclusions.

III. FOURTH PERIODIC REVIEW OF AMOUNT OF DUTY

A. ZEROING

1. Article 2.4 ADA

(a) Overarching and independent obligation

9. The first sentence of Article 2.4 *ADA* establishes a general principle - an overarching obligation to make a fair comparison between export price and normal value. That is an independent and separate obligation on Members. It is more than a mere introduction to the following sentences of Article 2.4.

10. This is confirmed by the fact that the text of the Uruguay Round *ADA* contains an important and significant innovation by comparison with the text of the Tokyo Round *AD Code*. The words "fair comparison … between the export price and the normal value" were lifted up and placed on their own in a new first sentence of Article 2.4.

(b) US zeroing unfair

11. Given the common and ordinary meaning of the word "fair", the obligation to make a fair or equivalent comparison must necessarily normally involve a fairly balanced comparison, being one based on equivalent methodologies – that is, a symmetrical comparison. A symmetrical comparison for the purposes of calculating a dumping margin and eventually imposing a duty, in relation to a given product or time, is necessarily one that precludes zeroing.

12. The inherent unfairness of the zeroing method used by the US, and the dramatic effect it can have on the outcome of the calculation is illustrated in table 1. Table 1 shows a hypothetical dumping calculation for three models (A, B, C) and four customers (1 to 4). Without zeroing the dumping margin is 2.8 per cent. With model zeroing the dumping margin is 4.7 per cent. With simple zeroing the dumping margin is 6.7 per cent. Thus, the effect of the zeroing method used by the US in periodic

reviews of the amount of duty is that, even if an exporter's selling prices and quantities are identical to those examined in the original investigation, USDOC will find a higher dumping margin, simply because it has switched from model zeroing to simple zeroing. If model zeroing in an original investigation does not involve a "fair comparison" as required by Article 2.4 *ADA*, it cannot be that simple zeroing, which leads to an even higher margin of dumping, constitutes a fair comparison.

13. These conclusions are confirmed if one considers the situation from the exporter's point of view. Having been made subject to a duty following the original investigation, an exporter will wish to raise its prices to eliminate dumping. However, the removal of the original margin of dumping will not prevent the exporter from being subject to the further imposition of a duty following a US periodic review of the amount of duty, unless the exporter actually increases its prices by *more than* the margin of dumping. In the example in table 2, even if the exporter raises its prices so as to eliminate the margin of dumping found by USDOC in the original investigation, USDOC will still calculate a margin of dumping of 3.6 per cent. This cannot be consistent with the general overarching principle that comparisons between normal value and export price be fair.

14. Another aspect of the inherent unfairness of the zeroing methodology used by the US in periodic reviews of the amount of duty is illustrated in table 3. In the logic of the US, an exporter's liability for anti-dumping duties may depend entirely on the frequency and size of its sales in the US. Two exporters, A and B, both sell 1.000 units of an identical product to the same customer in the US at an average price of $100 per unit, normal value also being $100. Exporter A chooses to sell at the same time in one large transaction, whilst exporter B chooses to sell at five different times in five separate transactions. USDOC will calculate a dumping margin of zero for exporter A, and a dumping margin of 4 per cent for exporter B, despite the fact that the pricing policy of both is the same to the same customer, and the return on their export sales is identical. This is an absurd result. In effect, the US appears to be making its assessment on the basis that exporter B is engaged in some kind of targeted dumping simply because its shipments are carried out as five transactions instead of one. There is nothing in Articles 2.4 or 2.4.2 *ADA* that would permit this, as there is nothing in those provisions that would permit a targeted analysis on the basis of the model zeroing condemned in the *EC – Bed Linen* case. In truth, the proposition that exporter B is engaged in "dumping" in such circumstances is an illusion – nothing more than that.

(c) Existing case law confirms US zeroing unfair

15. These conclusions are confirmed by the findings of the Appellate Body in *EC – Bed Linen* and *US – Carbon Steel from Japan* and by the panel Report in *US – Softwood Lumber from Canada*.

16. In the present case, the zeroing methodology used by the US involved an inherent bias that had the effect of inflating the margin of dumping, and even of turning a negative margin into a positive one.

2. Article 2.4.2 ADA

(a) Method for comparing normal value and export price

17. The main purpose of Article 2.4.2 *ADA* is to provide for an exception (asymmetrical comparison in the case of targeted dumping) to the normal methods of comparison (symmetrical comparison) in order to ensure a fair comparison within the meaning of Article 2.4 *ADA*. The US acted inconsistently with the *ADA* for three reasons : use of the asymmetrical method when neither the first nor second conditions were fulfilled; and failure to use a symmetrical method when that was the only lawful option.

(b) Simple zeroing

18. Just as an anti-dumping proceeding concerns "a product" (the subject product), so it also concerns a margin of dumping based on a comparison of sales made at as nearly as possible "the same time" (the investigation or review period). Just as the *ADA* contains no express rule governing the definition of the "subject product", so it contains no express rule governing the definition of the period of investigation or the period of review. The "same time" might be a shorter period or a longer period (such as a year). Just like product characteristics, time (along with geography) is typically a parameter by reference to which markets – that is, categories of goods or services with a certain competitive relationship or degree of comparability - are defined. Just as the US defined the "subject product", so the US defined the period of review, and decided to calculate a single dumping margin for that period of review. Just as in the case of "model zeroing", having defined the period of review, and having decided to calculate a single overall dumping margin for that period of review, the US was obliged to ensure that the dumping margin for that period of review was calculated in conformity with Articles 2.4 and 2.4.2 of the *ADA*. The US had become bound by its own logic.

19. The reasoning of the Appellate Body in the *EC – Bed Linen* case in relation to model zeroing also applies whenever an investigating authority decides to fix the parameters of its investigation, whether in relation to subject product, time, level of trade, region, or any other parameter. USDOC thereby became bound by its own logic, and should have completed its analysis on the basis of the same logic.

20. The US decision to calculate a single dumping margin and impose a single rate of duty in relation to "the same time" (the period of review), means that whichever of the two methods would have been chosen, simple zeroing would not have arisen or would have been impermissible. Thus, since the US used simple zeroing, it must necessarily have acted inconsistently with Articles 2.4 and 2.4.2 *ADA*.

(c) During the investigation phase

21. The words "during the investigation phase" in Article 2.4.2 *ADA* do not mean that the methodologies set out in that provision are irrelevant to the present case.

22. First, the "periodic review of amount of duty" carried out in the US must be consistent with the provisions of Article 9 *ADA*, which expressly provide that the amount of duty shall not exceed the margin of dumping calculated under Article 2.

23. Second, the term "investigation" and "review" are not mutually exclusive. There is no definition of the terms "investigation" or "review" in the *ADA*. Those words are used in many different senses. including initial or original investigation within the meaning of Article 5 of the *Agreement*; and in the more general sense of Article 6 of the *Agreement*, which must apply to the exercise under scrutiny in this case because of the express cross-reference from Article 11.4 to Article 6, and absent the words *mutatis mutandis*, which are used in Article 11.5 of the *Agreement*. It is not possible to apply the provisions of Article 6 of the *Agreement* in a US periodic review of the amount of duty and assert that there is no investigation, when that word is used repeatedly – there must at least be a review investigation, conducted by investigating authorities. The word "investigation" in Article 2 of the *Agreement* has the same general and unqualified meaning as in Article 6. If the drafters had intended otherwise, they would have inserted words to that effect, which they chose not to do. There is no reason based on context or purpose to conclude otherwise. The Panel should not read into that provision words such as "original" or "initial" or "Article 5" that are not there.

24. Third, the exercise conducted by the US in a periodic review of the amount of duty corresponds, objectively, to an investigation or assessment by an investigating authority.

25. Fourth, Article 2 of the *ADA* contains a definition, which goes beyond a cross-reference, and is not qualified by the words "unless otherwise specified".

26. Fifth, even if the US would be correct, that would not mean that simple zeroing would be permitted in periodic reviews – it would still be prohibited by Article 2.4 *ADA*, as analysed above.

27. Sixth, if the US would be correct on its interpretation of the phrase "during the investigation phase", that could effectively only mean that the negotiators, when agreeing to transform a commonly used method of comparison into an exception subject to certain conditions, decided to limit the scope of application of such method to original investigations only. Otherwise, the implication would be that that Members could use the exception outside original investigations without being subject to any conditions at all. That would be a very strange conclusion that would be at odds with the overall obligation to make a fair comparison in all circumstances. The United States has offered no context or reason to explain why the exception could become the norm outside original investigations. The European Communities considers that such proposition, if accepted, would severely undermine the overall obligation to make a fair comparison in all margin of dumping determinations.

28. Seventh, if the US would be correct in respect of both Articles 2.4.2 and Article 2.4 *ADA*, that would open up in the *ADA* a vast loophole on the fundamental issue of how to calculate a dumping margin.

29. Eighth, the view expressed by the US would appear to be an attempt to create a gross distortion between systems of retrospective collection and those of prospective collection, for which there is no basis in the *ADA*.

3. Articles 11.1 and 11.2 ADA

30. If an investigating authority makes or relies on a dumping determination for the purposes of Article 11.2 *ADA*, it is bound to establish any such dumping margin in conformity with the provisions of Article 2.4, including Article 2.4.2 *ADA*.

31. It being *temporal* considerations that are at the heart of this provision, recourse to Article 11.2 *ADA* does not provide an opportunity for a Member to switch to making a comparison between normal value and export price that is "unfair" within the meaning of Articles 2.4 and 2.4.2 *ADA*, insofar as it involves unlawful zeroing. To accept that would be to accept a fundamental rupture in continuity that would set at naught the word "continued" in the text of Article 11.2. This is all the more so when the first review period stretches back to the date on which provisional measures were first imposed, thus eclipsing entirely the results of the original investigation.

Table 1

Model	Customer	EP	NV	Amount of dumping	No zeroing	Zeroing per model	Zeroing by transaction
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
	AVERAGE	**105**	**100**	**-5**		**0.0**	
B	1	95	110	15			15
B	2	90	110	20			20
B	3	100	110	10			10
B	4	125	110	-15			0
	AVERAGE	**102.5**	**110**	**7.5**		**7.5**	
C	1	115	120	5			5
C	3	95	120	25			25
C	4	120	120	0			0
	AVERAGE	**110**	**120**	**10**		**10**	
		1265		**MARGIN**	**2.8%**	**4.7%**	**6.7%**

Table 2

Initial investigation							Review	
Model	**Customer**	**EP**	**NV**	**Amount of dumping**	**No zeroing**	**Zeroing Per model**	**EP Increased by original dumping amount**	**Zeroing By trans-action**
A	1	95	100	5			95	5
A	2	110	100	-10			110	0
A	2	95	100	5			95	5
A	3	110	100	-10			110	0
A	4	115	100	-15			115	0
	AVERAGE	**105**	**100**	**-5**		**0.0**	**105**	
B	1	95	110	15			102.5	7.5
B	2	90	110	20			97.5	12.5
B	3	100	110	10			107.5	2.5
B	4	125	110	-15			132.5	0
	AVERAGE	**102.5**	**110**	**7.5**		**7.5**	**110**	
C	1	115	120	5			125	0
C	3	95	120	25			105	15
C	4	120	120	0			130	0
	AVERAGE	**110**	**120**	**10**		**10**	**120**	
		1265		**MARGIN**	**2.8%**	**4.7%**	1325	**3.6%**

Table 3

Exporter	Transaction	Quantity	Export Price	Dumping
A	**1**	**1000**	**100**	**0**
B	**1**	**200**	**90**	**2000**
	2	**200**	**90**	**2000**
	3	**200**	**100**	**0**
	4	**200**	**110**	**0**
	5	**200**	**110**	**0**
Total/Average				
A		**1000**	**100**	**0**
B		**1000**	**100**	**4000**

ANNEX B-4

THIRD PARTY SUBMISSION OF JAPAN

(7 May 2004)

1. Japan joined this proceeding as a third party because it has systemic concerns with respect to the interpretation and the application of the AD Agreement, the GATT 1994 and the WTO Agreement with regard to sunset reviews and administrative reviews. Japan would like to address the legal issues as follows.

A. THE THREE SCENARIOS IN THE *SUNSET POLICY BULLETIN* ARE INCONSISTENT WITH ARTICLE 11.3 OF THE AD AGREEMENT AS SUCH

2. Japan agrees with Mexico that the three scenarios, which the DOC sets forth in Section II.A.3 of the *Sunset Policy Bulletin* to instruct individual sunset review determinations, are inconsistent with Article 11.3.

3. The Appellate Body in *US – CRS Sunset Review*, as a preliminary jurisdictional matter, clarified that the *Sunset Policy Bulletin* is a measure that is challengeable, *as such*, under the WTO Agreement.[1]

4. In this dispute, Mexico claims the inconsistency of the *Sunset Policy Bulletin* with AD Agreement as such. The Panel, therefore, must review whether the *Sunset Policy Bulletin* satisfies the substantive requirements of Article 11.3 of the AD Agreement.

5. As also clarified by the Appellate Body in *US – CRS Sunset Review*, if the three scenarios in the Section II.A.3 of the *Sunset Policy Bulletin* are found to be determinative or conclusive of the likelihood of future dumping, they are, as such, inconsistent with Article 11.3. [2]

6. In this dispute, Mexico has established that the DOC consistently applied, and never deviated from, the three scenarios in all past sunset reviews, and every time it found that at least one of the three scenarios was satisfied, the DOC made these affirmative findings of likely dumping without considering additional factors.

7. The repeated and consistent application of the three scenarios to all sunset reviews could not be a coincidence. Nor were similar facts presented to the DOC in all previous cases. It demonstrates the DOC's mechanical application to all cases of the presumption in the three scenarios in the *Sunset Policy Bulletin* that respondents, who were found to have dumped in the original investigations and did not sell more volume than the pre-order level at non-dumped price, are likely to continue or recur dumping. It also demonstrates that the DOC's sunset reviews in accordance with the *Sunset Policy Bulletin* lack any rigorous or diligent examination of facts underlying individual sunset reviews.

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[1] *See* WT/DS244/AB/R, paras. 87-88.
[2] *See* WT/DS244/AB/R, para. 178.

8. As such, the DOC's mechanical and consistent applications without rigorous and diligent examination of facts on a case-specific basis well prove that the three scenarios in the Section II.A.3 of the *Sunset Policy Bulletin* are determinative and conclusive and are inconsistent with the requirements of Article 11.3.

B. THE ITC'S DETERMINATION OF LIKELIHOOD OF CONTINUATION OR RECURRENCE OF INJURY WOULD BE INCONSISTENT WITH ARTICLES 3.1, 3.4, 3.5 AND 11.3 OF THE AD AGREEMENT

1. Provisions of Article 3 Apply to Article 11.3

9. Mexico correctly stated that provisions of Article 3 apply to Article 11.3.

10. The phrase "[u]nder this Agreement" in Footnote 9 of Article 3 ensures that, whenever the AD Agreement uses the term "injury," the provisions of Article 3 define the term.

11. 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 AD Agreement to determine circumstances in which an anti-dumping measure can be applied. The Appellate Body in *Thailand – H-Beams* has confirmed that "Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation in this respect. Article 3.1 informs the more detailed obligations in succeeding paragraphs."[3]

12. Article 3.1 requires the authorities to base their injury determination on positive evidence and objective examination of "the volume of the dumped imports" and "the effect of the dumped imports on prices." Article 3.2 then sets forth further rules on how the authorities shall consider these two elements. In this way, Article 3.2 informs Article 3.1 and all other provisions of the AD Agreement of the analytical methods that the authorities must follow for making an injury determination.

13. Article 3.1 also provides that the authorities must base their injury determinations on positive evidence and objective examination of "the consequent impact of these imports on domestic producers of such products." Article 3.4 then sets forth how "the impact of dumped imports on the domestic industry" must be examined. Article 3.4 thus provides the detailed requirements for the examination of the impact of dumped imports under Article 3.1, and therefore, for a determination of injury. The authorities must satisfy the requirements in Article 3.4 to determine "injury" in any proceedings under the AD Agreement.

14. Article 3.5 provides that injury "within the meaning of this Agreement" must be caused by dumped imports through the effects of dumping as set forth in paragraphs 2 and 4. The phrase "injury within the meaning of this Agreement" ensures that the provisions of Article 3.5 further define the term "injury" whenever the term "injury" appears in this Agreement. The causation and non-attribution requirements under Article 3.5, therefore, must be satisfied to make a determination of "injury."

15. The phrase "likely to lead to continuation or recurrence" in Article 11.3 does not change the core concept of "injury," as is the case of "dumping" as the Appellate Body in *US – CRS Sunset Review*.[4] The terms "continuation or recurrence" demonstrate the drafters' intent that the authorities must first find the current state of injury to the domestic industry, and then how the current state is likely to change. The modifying phrase therefore does not affect the applicability of Article 3 to

[3] *See*, WT/DS122/AB/R, para.106.
[4] *See* WT/DS244/AB/R, para.109.

Article 11.3. The provisions of Article 3, therefore, apply to "injury" determinations in sunset reviews under Article 11.3.

2. The ITC Would Have Acted Inconsistently with Articles 3.4 and 11.3

16. Japan agrees with Mexico that the authorities must evaluate all relevant economic factors and indices as set forth in the Article 3.4 in sunset reviews.

17. It seems to us that Mexico submitted convincing evidence that the ITC did not evaluate certain factors mandated by Article 3.4 for determining injury.

18. We note that the ITC's evaluation of the magnitude of the margin of dumping, even if the ITC were to evaluate it, would be inconsistent with Article 3.4. The magnitude of the margin of dumping is a factor that the ITC must evaluate in accordance with Article 3.4. If the ITC did not evaluate this factor, the ITC's injury determination is inconsistent with Article 3.4. As Mexico has established, the DOC had no positive evidence which would show that the OCTG market would be under the conditions similar to those at the time of the pre-AD order. The ITC's evaluation of the magnitude of the margin of dumping was, thus, not supported by positive evidence required by Article 3.1, and, therefore, is inconsistent with Articles 3.1 and 3.4.

3. The ITC Would Have Acted Inconsistently with Articles 3.5 and 11.3

19. The first sentence of Article 3.5 expressly states that the authorities must demonstrate that the effects of "dumping" actually caused the injury.

20. Further, the "non-attribution" requirement in the second and third sentences of Article 3.5 requires that the authorities explicitly separate and distinguish the injurious effects of other injury factors from the injurious effects of the dumping.[5]

21. Japan, therefore, respectfully requests that the Panel carefully review whether the ITC demonstrated that the likely injury to the domestic industry was caused by the effects of dumping and whether the ITC separated and distinguished effects of all known factors to the likely injury to the domestic industry from the effects of dumping.

C. THE DOC'S DETERMINATION IN THE FOURTH REVIEW NOT TO REVOKE THE ANTI-DUMPING MEASURES BASED ON THE DUMPING MARGINS CALCULATED WITH ZEROING METHODOLOGY IS INCONSISTENT WITH ARTICLES 11.2 AND 2.4 OF THE AD AGREEMENT

1. Article 11.2 Reviews are Subject to Disciplines in Article 2

22. The Appellate Body clarified that the disciplines in Article 2 of the AD Agreement are applicable to any determination of "dumping," and dumping margins, in any kind of AD proceedings, unless otherwise indicated in the provisions which set forth such proceedings. A determination of dumping, including likelihood of dumping under Article 11.3, therefore, would be inconsistent with Article 2.4 (and Article 11.3), if it relies on the dumping margins calculated in a manner inconsistent with Article 2.4.[6]

23. The DOC's revocation review in question was conducted under Article 11.2 of the AD Agreement. As is the case of Article 11.3, Article 11.2 does not contain any language, which indicates that "dumping" has a different meaning in the context of such proceedings from that in the

[5] *See* WT/DS184/AB/R, paras. 222-223.
[6] *See*, WT/DS244/AB/R, paras. 109 and 127.

rest of the AD Agreement. Therefore, the disciplines of Article 2 apply with equal force to the determination of "dumping" and calculation of the dumping margins, including those for the reviews under Article 11.2.

2. The Zeroing Methodology for Calculating Dumping Margins Is Inconsistent With Article 2.4

24. The "zeroing" occurs when the authorities calculate the dumping margins in two steps. At the first step, the authorities calculate dumping margins of various sub-groups of all export transactions separately. At the second step, the authorities add up these individual margins to obtain the overall margin of dumping, but setting negative individual margins to zero.

25. The Appellate Body in *EC – Bed Linen* clarified that such zeroing methodology is inconsistent with Articles 2.4 and 2.4.2. It found that the EC's methodology "inflated the result from the calculation of the margin of dumping" and was inconsistent with "fair comparison" because it "did *not* take fully into account the entirety of the prices of *some* export transactions, namely, those export transactions involving models of cotton-type bed linen where 'negative dumping margins' were found."[7]

26. The Appellate Body in *US – CRS Sunset Review* also confirmed the above-stated rationales for prohibiting the zeroing methodology, and further stated that the zeroing not only distorts the magnitude of the dumping margin, but may distort a finding of the very existence of dumping.[8]

27. Thus, the zeroing methodology to calculate dumping margins, whether in an original investigation or otherwise, is inconsistent with Article 2.4.

3. The DOC Uses Zeroing Methodology to Calculate Dumping Margins in Its Administrative Reviews, and Thus the Calculation Is Inherently Inconsistent with Article 2.4

28. The above rationale squarely applies to the DOC's dumping margin calculation methodology in administrative reviews. In administrative reviews, the DOC calculates the dumping margins using a weighted average-to-transaction method. Under this method, at the first step, the DOC calculates the dumping margin of each individual export transaction. If there are 100 export transactions, for example, the DOC calculates 100 different dumping margins. The DOC then calculates the total dumping margin of all export transactions. The DOC, however, does not simply add all 100 dumping margins. In adding these margins, the DOC turns negative dumping margins to zero. In effect, the DOC adds only positive dumping margins of individual transactions to reach the total dumping margin.

29. Thus, there is no methodological difference between the EC's method challenged in *EC – Bed Linen* and the DOC's method in administrative reviews in applying the zeroing methodology to the individual negative margins at the second calculation step. The DOC's method of zeroing in administrative reviews is, therefore, equivalent to, if not worse, the zeroing methodology which was disputed and found to be inconsistent in *EC – Bed Linen*.

[7] *See*, WT/DS141/AB/R, para. 55.
[8] *See*, WT/DS244/AB/R, para. 135.

30. As demonstrated by Mexico, the DOC's determination not to revoke the AD order against OCTG from Mexico relied on dumping margins which were calculated on the basis of the zeroing methodology. Therefore, the DOC's determination is inconsistent with Articles 2.4 and 11.2.

ANNEX B-5

THIRD PARTY SUBMISSION OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

(28 April 2004)

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I. INTRODUCTION

1. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu presents this third party submission because of its systemic interest in the interpretation of Article VI of the General Agreement on Tariffs and Trade of 1994 (GATT) and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (ADA) with respect to sunset reviews. In particular, this third party submission will address the following issues:

- the ability of the Statement of Administrative Action (SAA) and the Sunset Policy Bulletin (SPB) to be challenged as such;

- the inconsistency of the SAA and the SPB with the ADA Article 11.3 obligation to terminate the duty no later than five years from the date of the imposition, unless the conditions set forth in the Article are met; and

- the applicability of Article 3 of the ADA in sunset reviews.

2. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu considers that the limited scope of this submission does not prejudice its position on the other claims raised by Mexico in this dispute. Accordingly, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu reserves its right to raise the issues not contained in this written submission in the oral statement.

II. LEGAL ARGUMENTS

A. THE STATEMENT OF ADMINISTRATIVE ACTION (SAA) AND THE SUNSET POLICY BULLETIN (SPB) CAN BE CHALLENGED AS SUCH

2. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu agrees with Mexico that the SAA and SPB are "measures" that can be challenged as such.[1] In *US – Sunset Review of Steel from Japan*, the Appellate Body reversed "the Panel finding…that the Sunset Policy Bulletin is not a mandatory legal instrument and thus is not a measure that is 'challengeable', as such, under the *Anti-Dumping Agreement* or the *WTO Agreement*."[2] Though the Appellate Body stopped short of stating that the SPB *in itself* is an "administrative procedure" within the meaning of ADA Article 18.4 and therefore a measure, the Appellate Body, in examining specific as such claims by Japan on Sections II.A.2, 3, and 4 of the SPB, did consider those provisions as measures, and entertained Japan's as such challenges.[3] Similarly, in this case, these same provisions, and others, of the SPB can certainly be considered measures capable of being challenged as such.

3. Neither the Panel nor the Appellate Body addressed the nature of the SAA to be challenged as such in *US – Sunset Review of Steel from Japan* because the claim was not raised by Japan.[4] However, in its examination of the SPB, the Appellate Body cited its own report in *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico* in observing the broad scope of

[1] First Submission of Mexico, 24 March 2004, paras. 42-46.

[2] *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* (US – Sunset Review of Steel from Japan), Appellate Body Report, WT/DS244/AB/R, paras. 100, 212.

[3] *Id.*, paras. 156 and 169.

[4] The United States does not seem to be refuting Mexico's claim that the SAA can be challenged as such. Nevertheless, this submission presents the arguments with regard to the SAA for consideration by the Panel in case the United States raises the issue in future submissions.

"measures" that could be subject to WTO dispute settlement, including "non-binding administrative guidance".[5] The Appellate Body further stated that,

> instruments of a Member containing *rules or norms* could constitute a "measure", irrespective of how or whether those rules or norms are applied in a particular instance. This is so because the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade. This objective would be frustrated if *instruments setting out rules or norms* inconsistent with a member's obligations could not be brought before a panel … It would also lead to a multiplicity of litigation if instruments embodying rules or norms could not be challenged as such, but only in the instances of their application.[6] [emphasis added]

4. In reversing the Panel's conclusions that the SPB is not a mandatory legal instrument and therefore cannot be challenged as such under the WTO, the Appellate Body also faulted the Panel for concentrating too much on the mandatory/discretionary distinction[7], and failing to recognize the undue limitations the SPB has on the US Department of Commerce's determinations[8] and thus the "normative nature" of the provisions[9].

5. According to the Appellate Body, therefore, a "non-binding administrative guidance" containing "rules or norms" can constitute a "measure". Furthermore, even if the measure is non-mandatory, it can be challenged as such if it improperly limits the factors to be taken into account by the investigating authorities in making determination in a sunset review as to become normative in nature.

6. The SAA, following the Appellate Body reasoning outlined above, is a measure capable of being challenged as such. As Mexico has pointed out, the SAA contains three criteria or rules that the United States believes to be "highly probative" of likely dumping.[10] The introduction of the SAA also confirms that,

> this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements … Furthermore, the Administration understands that *it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement.* Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretations of those agreements included in this Statement carry particular authority.[11] [emphasis added]

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[5] *Id.*, para. 85.
[6] *Id.*, para. 82.
[7] *Id.*, para. 93.
[8] *Id.*, para. 97.
[9] *Id.*, para. 98.
[10] First Submission of Mexico, para. 91.
[11] Statement of Administrative Action, H.R. 5110, H.R. Doc. 316, Volume 1, 103d Congress, 2nd Session, 656 (1994), page 656.

7. The SAA has been approved by Congress.[12] The investigating authority, as part of the Administration of the United States, is expected by Congress to "observe and apply" the SAA. This is language which indicates that the SAA is intended to be normative; the Administrative does not have the discretion to deviate from the SAA in its implementation of the Uruguay Round agreements. And in practice, as Mexico has demonstrated in Exhibit MEX-62, the US Department of Commerce follows the interpretation of the SAA, which is further elaborated by the SPB, in every sunset review case. Based on these facts, the SAA is certainly a measure that can be challenged as such.

B. THE SAA AND THE SPB VIOLATE THE EXPLICIT OBLIGATION IN ADA ARTICLE 11.3 TO TERMINATE THE DUTY NO LATER THAN FIVE YEARS FROM THE DATE OF THE IMPOSITION, UNLESS THE CONDITIONS SET FORTH IN THE PROVISION ARE MET

8. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu agrees with Mexico that the SAA and SPB are inconsistent with ADA Article 11.3 as such.[13] Leaving aside the question of whether a WTO-inconsistent presumption of the continuation or recurrence of dumping has been created by the SAA and the SPB, as Mexico alleges,[14] the SAA and the SPB are nevertheless inconsistent with the explicit obligation in Article 11.3 of termination of the anti-dumping duty within five years unless the specific conditions are met. In particular, this submission will discuss the incorrect "likely" standard called for by the SAA and the SPB, and the improper assignment of burden on the exporters to provide information and to demonstrate good cause to consider other factors.

1. The explicit obligation contained in Article 11.3 of the ADA is the termination of the anti-dumping duty within five years, unless the conditions set forth in the provision are met

9. Article 11.3 of the ADA requires at the outset that "any definitive anti-dumping duty shall be terminated on a date no later than five years from its imposition."[15] The conditions for the continuation of the duty beyond five years are stated in the subsequent dependent clause following the word "unless". The use of such a grammatical construction suggests that the main sentence, which calls for termination no later than five years, should be considered the norm and thus constitutes the obligation on Members under Article 11.3, while continuation of the duty is the exception, and only if the conditions are met.

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[12] 19 USC § 3511

> (a) Approval of agreements and statement of administrative action
> … the Congress approves –
> (1) …
> (2) the statement of administrative action proposed to implement the agreements that was submitted to the Congress on September 27, 1994.

[13] First Submission of Mexico, para. 88.

[14] *Id.*, paras. 88-109.

[15] The full text of Article 11.3 provides that,

> 11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury .[22] The duty may remain in force pending the outcome of such review.
> [22] When the amount of the anti-dumping duty is assessed on a retroactive basis, a finding in the most recent assessment proceeding under subparagraph 3.1of Article 9 that no duty is to be levied shall not be itself require the authorities to terminate the definitive duty.

10. The Appellate Body in *US – Sunset Review of Steel from Japan* agrees with this interpretation:

> 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…If any one of these conditions is not satisfied, the duty must be terminated.[16] [emphasis original][footnote omitted]

The Appellate Body further noted the parallel language between Article 11.3 of the ADA and Article 21.3 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), and affirmed that its similar prior interpretation in *US – Carbon Steel* with regard to Article 21.3 of the SCM Agreement can be applied *mutatis mutandis* to Article 11.3 of the ADA.[17]

11. Article 11.1 of the ADA re-enforces the obligation of termination in Article 11.3. It states that, "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." The Panel in *EC – Pipe Fittings from Brazil* explained that Article 11.1 contains "a general, unambiguous and mandatory requirement … It furnishes the basis for the review procedures contained in Article 11.2 (and 11.3) by stating a general and overarching principle, the modalities of which are set forth in paragraph 2 (and 3) of that Article."[18] Article 11.1 thus informs Members of the obligation to terminate a anti-dumping measure should the dumping and injury, and in the case of Article 11.3, the likelihood of continuation or recurrence of dumping and injury, no longer exist.

12. A Member may extend an anti-dumping measure only if the conditions for the exception, as set forth in Article 11.3 are met. The text of Article 11.3 is clear that the authorities, in asserting that exception, must actively "determine … that the expiry of the duty would be likely lead to continuation or recurrence of dumping and injury." This active role of the authorities is affirmed by the Appellate Body in *US – Sunset Review of Steel from Japan*, that:

> Article 11.3 assigns an active rather than a passive decision-making role to the authorities. The words "review" and "determine" in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination.[19]

Any other interpretation or the reversal of the burden of demonstrating information or evidence in order to assert the exception would be inconsistent with Article 11.3.

2. The SAA and the SPB are inconsistent with the "likely" standard in Article 11.3 of the ADA

13. One of the conditions for the continuation of the anti-dumping order under Article 11.3 of ADA is a determination by the authorities that the end of the duty would "likely lead to continuation or recurrence of dumping and injury." The Separate Customs Territory of Taiwan, Penghu, Kinmen

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[16] *US – Sunset Review of Steel from Japan*, Appellate Body Report, para. 104.

[17] *Id.*, Fn. 114. See also *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products From Germany* (US – Carbon Steel), Appellate Body Report, WT/DS213/AB/R, paras. 63, 88.

[18] European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube and Pipe Fittings from Brazil (EC Pipe Fittings from Brazil), Panel Report, WT/DS219/R, para. 7.113.

[19] *US – Sunset Review of Steel from Japan*, para. 111.

and Matsu agrees with Mexico that the SAA and the SPB, in interpreting the statue of the United States[20] on the revocation of the anti-dumping order, establish a standard that is inconsistent with the "likely" standard in Article 11.3.[21]

14. The Appellate Body in *US – Sunset Review of Steel from Japan*, citing the Shorter Oxford English Dictionary, defined the term "likely" as "[h]aving an appearance of truth or fact; that looks as if it would happen, be realized, or prove to be what is alleged or suggested; probable; to be reasonably expected."[22] In the next paragraph, the Appellate Body stated that, "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*."[23] [emphasis added] The "likely" standard in Article 11.3, therefore, is one of probable occurrence.

15. Instead, the SAA and the SPB establish a much looser standard. The "likely" language in Article 11.3 is transformed in the SAA to the much more uncertain languages of "highly probative of the likelihood", "it is reasonable to assume", "may provide a strong indication," and "highly probative of the likelihood."[24] Because of these uncertain indications and assumptions, the SPB directs the US Department of Commerce (Department) to determine that dumping is likely to continue or recur, if,

(a) dumping continued at any level above *de minimis* after the issuance of the order or the suspension agreement, as applicable;

(b) imports of the subject merchandise ceased after issuance of the order or the suspension agreement, as applicable; or

(c) dumping was eliminated after the issuance of the order or the suspension agreement, as applicable, and import volumes for the subject merchandise declined significantly.[25]

16. Without going into too much detailed analysis, these criteria bear minimal relationship with the probable occurrence of dumping in the future. Import volumes may fluctuate for any number of reasons, with or without the anti-dumping duty. In addition, the imposition of the duty and the manner in which the duty is collected[26] may further affect the business decisions of the importers and exporters. The resulting decline or cessation of imports therefore is not surprising, nor should it be an indication of the likelihood of future dumping, especially when no other factors are considered.

17. These criteria are based on uncertain indications and assumptions and simply do not meet the higher and more certain "likely" standard. Therefore, they are inconsistent with Article 11.3. Furthermore, the SAA and the SPB, by establishing a lower standard, violates the presumptive action in Article 11.3 to be taken by the authorities that the duty is to be terminated no later than five years from its imposition unless the conditions for the assertion of the exception are met.

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[20] 19 USC § 1675a(c)(1).
[21] First Submission of Mexico, paras. 105-109, 166-175.
[22] *US – Sunset Review of Steel from Japan*, para. 110.
[23] *Id.*, para. 111.
[24] SAA at 889-890.
[25] Sunset Policy Bulletin, Section II.A.3, at 18872.
[26] The US assesses anti-dumping duties on a retrospective basis, by which the final duty is not certain until the Department conducts the annual review. With this system, the importers face more uncertainty with respect to the maximum amount of final anti-dumping duties that will eventually be levied, and thus may affect their purchase decision.

3. The burden is erroneously assigned to exporters instead of remaining with the investigative authority

18. The SPB recognizes that the above criteria are not only indicators of likelihood of dumping to continue or recur: "[t]he Department recognizes that, in the context of a sunset review of a suspended investigation, the data relevant to the criteria under paragraphs (a) through (c), above, may not be conclusive with respect to likelihood."[27] Instead of directing the Department to consider other criteria or factors on its own, the statute, the SAA, and the SPB shifts the burden onto the exporters to show that other factors warrant consideration. The SPB states,

> the Department will consider other factors in AD sunset reviews if the Department determines that good cause to consider such other factors exists. The burden is on an interested party to provide information or evidence that would warrant consideration of the other factors in question[28].

19. By shifting the burden onto the exporters to provide information or evidence, the SPB is essentially reaffirming the supremacy and the decisive nature of the historical dumping margin and import volumes as factors in the Department's determination of likelihood. The implication here is that if exporters do not demonstrate good cause (and there is no explanation of what constitutes good cause) to consider other factors, the Department would automatically take the existence of any one of the three above criteria as a demonstration of the likelihood of the continuation or recurrence of dumping, without examining other economic and market factors.

20. Article 11.3 simply does not allow such a shift of burden. As already discussed above, the obligation in Article 11.3 is the termination of the duty "no later than five years from its imposition." The exception, namely, the continuation of the duty, is allowed only if investigating authorities have properly determined, on the basis of sufficient evidence, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping[29].

21. By requiring the exporters to provide information that would warrant the consideration of other factors by the Department, the SPB, and by extension SAA and the statute, grants the authorities the discretion of examining only the historic dumping margin and import volumes, and re-assigns the burden on the exporters to produce information and to demonstrate good cause to examine other factors. The Department, as a result, can mechanically apply the three criteria, assuming a passive role and relinquishing the requirement of active information gathering by investigating authorities in Article 11.3. The conditions for the assertion of the exception under Article 11.3 cannot be met if the Department follows the SPB, and in the process, the United States ignores the obligation of termination pursuant to Article 11.3. Therefore, the United States violates Article 113 as such.

C. ARTICLE 3 OF THE ADA APPLIES TO ARTICLE 11.3 SUNSET INVESTIGATIONS

22. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu disagrees with the assertion of the United States that Article 3 does not apply to sunset reviews.[30] The text of Article 11.3 places on the authorities an obligation to examine dumping and injury. Recalling the statement of the Appellate Body in *US – Sunset Review of Steel from Japan* cited above, the words "review" and "determine" assigns an active role to the authorities, should the authorities wish to assert the exception in Article 11.3. While the nature of sunset reviews differs from an original investigation in that

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[27] *Id.*
[28] *Id.*, at Section II.C, at 18874.
[29] *US – Sunset Review of Steel from Japan*, para. 158.
[30] First Written Submission of the United States of America, 21 April 2004, paras. 238-258.

Article 11.3 requires a prospective analysis, the underlying determination to be made by the authorities still relates to dumping and injury.

23. In addition to the arguments Mexico has already presented in its first written submission[31], the Appellate Body ruled in *US – Sunset Review of Steel from Japan* that Article 2 applies to the calculation of dumping margins in Article 11.3 likelihood determination:

> Article 2 sets out the agreed disciplines in the *Anti-Dumping Agreement* for calculating dumping margins … should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4. We see no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins.[32]

24. Similarly, Article 3 of ADA must also apply to the likelihood determination for the likelihood of injury, 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. Therefore, even in the case of prospective injury analysis pursuant to Article 11.3, the authorities must necessarily apply, wherever appropriate, Article 3.

III. CONCLUSION

25. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu takes the position that the SAA and SPB are measures capable of being challenged as such. The SAA and SPB, as such, violate the explicit obligation under ADA Article 11.3 to terminate the duty no later than five years after the imposition. Finally, ADA Article 3 applies to the prospective injury analysis in Article 11.3, wherever appropriate.

26. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu respectfully requests that the Panel consider the views presented above and make its findings accordingly.

[31] First Submission of Mexico, paras. 191-195.
[32] *US – Sunset Review of Steel from Japan*, para. 127.

ANNEX C

EXECUTIVE SUMMARIES OF THE SECOND SUBMISSIONS OF THE PARTIES

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ANNEX C-1

SECOND WRITTEN SUBMISSION OF MEXICO

(19 July 2004)

I. INTRODUCTION

1. The US view that Article 11 contains few (if any) substantive obligations[1] is untenable. With Articles 11.1, 11.2, and 11.3, WTO Members placed strict disciplines on the imposition of anti-dumping duties, including definitive temporal limitations. At the heart of these provisions, and central to this dispute, is the obligation to terminate anti-dumping duties: under Article 11.2, when they are no longer necessary to offset dumping; and, under Article 11.3, after five years.

2. The US determinations in this case to maintain duties under Articles 11.2 and 11.3 are based on presumptions, inferences, speculation and conjecture and not on positive evidence. For this reason, they are insufficient to invoke the limited exception to continue an anti-dumping duty beyond five years under Article 11.3, and they cannot be used to evade the obligation in Article 11.2 to immediately terminate the duty when it is no longer necessary.

II. THE DEPARTMENT'S SUNSET DETERMINATION

A. THE UNITED STATES HAS FAILED TO REBUT MEXICO'S *PRIMA FACIE* CASE THAT DEMONSTRATES THAT US LAW ESTABLISHES A WTO-INCONSISTENT PRESUMPTION THAT DUMPING IS LIKELY TO CONTINUE OR RECUR

3. The statute (19 U.S.C. § 1675a(c)(1)), the US Statement of Administrative Action ("SAA") (pages 889-890), and the Sunset Policy Bulletin ("SPB") (Section II.A.3), operating independently and together, establish a presumption that dumping would be likely to continue or recur.[2] This presumption is inconsistent with Article 11.3 of the Anti-Dumping Agreement and the United States has failed to rebut Mexico's *prima facie* case demonstrating this inconsistency.

4. The United States asserts that Mexico's argument relies on the assumption that the three scenarios outlined in the SPB "are the only possible ones and that as a result Commerce will always make an affirmative finding."[3] Mexico does not argue that the three scenarios in Section II.A.3 of the SPB are the only possible outcomes. Mexico argues that, under US law, the Department treats the fulfilment of any one of the three scenarios as conclusive of likely dumping – to the exclusion of other relevant evidence. MEX-62 and MEX-65 demonstrate that the Department follows Section II.A.3 in every sunset review, and every time it finds that at least one of the three criteria of the SPB is satisfied, it makes an affirmative finding of likely dumping without considering additional factors. It follows, then, that Section II.A.3 instructs the Department to attach decisive weight to historical dumping margins and declining import volumes (or cessation of imports) in every case.

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[1] *See, e.g.*, US First Submission, paras. 2, 90-91.
[2] Mexico's First Submission, paras. 87-109.
[3] US First Submission, para. 97.

5. Contrary to US assertions that the US system provides the Department with the ability to consider information apart from dumping margins and import volumes through the "good cause" provisions,[4] the actual application of this provision shows that the "good cause" route has led only to affirmative likelihood determinations. This is not surprising because, as MEX-62 and MEX-65 demonstrate, the Department has never rendered a not likely determination in any full or expedited sunset review.

6. The US arguments that the SPB and the Department's practice cannot be challenged must be rejected. This issue has been settled. The Appellate Body overruled the Panel's finding that the SPB is not a measure that is challengeable, as such, in WTO dispute settlement.[5] The Appellate Body held that "measure" for purposes of WTO challenge is cast broadly, and includes administrative instruments such as the SPB.[6] The Appellate Body's reasoning in *Sunset Review of Steel from Japan* similarly compels the conclusion that the Department's consistent practice may be challenged as such.[7]

7. In sum, the statute, the SAA, and the SPB are measures that direct the Department to give decisive guidance to historical dumping margins and import volume declines. Mexico's Exhibits MEX-62 and MEX-65 (which set forth the Department's consistent practice) demonstrate 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.

B. THE DEPARTMENT'S LIKELIHOOD DETERMINATION IN THE SUNSET REVIEW OF OCTG FROM MEXICO VIOLATED ARTICLES 11.3 AND 2 OF THE ANTI-DUMPING AGREEMENT

1. The Department Impermissibly Relied on the Margin from the Original Investigation

8. The positive evidence submitted by the Mexican respondents demonstrated that dumping would not be likely.[8] The evidence before the Department included information as to why the margin of dumping from the original investigation was not relevant to the question of likelihood of dumping, as well as the results of the recently conducted administrative reviews of the anti-dumping order, which resulted in consecutive zero margin (no dumping) determinations.

9. The Department relied on the lower Mexican OCTG import volume as the sole basis for disregarding this the positive evidence submitted by the Mexican respondents. After doing so, the only remaining information before the Department was the margin of dumping margin from the original investigation and the decline in volume. The Department then mechanically relied on this information despite the Appellate Body's admonition 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."[9]

10. That the Department relied on the margin from the original investigation in this case necessarily follows from the design of the US system. The statute requires that the Department "shall consider" (1) "the dumping margins determined in the investigation and subsequent reviews" and (2)

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[4] *See* 19 U.S.C. § 1675a(c)(2) (MEX-24); 19 C.F.R. §§ 351.218(d)(3)(iv) and (e)(2)(iii) (MEX-25); Section II.C of the SPB.

[5] Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 94-100.

[6] *Id.* at paras. 82-88.

[7] *Id.* at para. 78, 88.

[8] *See, e.g.*, MEX-64 (Evidence Chart from Mexico's First Oral Statement).

[9] Appellate Body Report, *Sunset Review of Steel from Japan*, para. 177.

the volume of imports.[10] 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."[11] 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. . . ."[12] The SPB confirms "that continued margins at any level would lead to a finding of likelihood."[13] In fact, the Department's *Issues and Decision Memorandum* in this case, the margin from the original investigation was the only finding of dumping made by the Department.[14] Mexico can find no other information on the record before the Department in the sunset review showing dumping by a Mexican exporter. As a result, it seems clear to Mexico that the Department necessarily relied on this margin.

2. The Department Impermissibly Presumed that Declining Import Volumes Demonstrated That Dumping Would Be likely to Recur

11. In relying solely on the decline in import volume as a basis to ignore the positive evidence submitted by the respondents, the Department made two assumptions, neither one of which was supported by positive evidence, and then linked these two assumptions to make the likely dumping determination. First, the Department inferred that the decline in import volume alone was sufficient to show that the Mexican exporters could not compete in the United States without dumping. Second, further compounding the error of the first assumption, the Department reasoned that simply because it had inferred that the exporters could not compete in the United States without dumping, they would likely dump in the United States upon revocation.

3. The Department Dismissed Relevant Evidence Demonstrating That Dumping Would Not Be Likely

12. The Department failed to consider TAMSA's arguments and the positive evidence on the record that, but for the severe Mexican peso devaluation of 1994, an anti-dumping duty order on Mexican OCTG would not have been imposed in the first place. The Department calculated zero margins for TAMSA and Hylsa in the administrative reviews; therefore, if there had been no dumping in the original investigation, but for the unique circumstances in 1994, then dumping cannot "continue or recur" after revocation of the order. The Department also ignored that zero margins had been calculated for TAMSA and Hylsa in the most recent administrative reviews. This evidence is clearly relevant to the Department's likelihood determination.

13. The Department did not consider TAMSA's evidence, but rather dismissed it perfunctorily. The Department inferred from the lower import volumes that TAMSA could not export to the US market without dumping[15] Inferences are not "positive evidence" of what is "likely."

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[10] 19 U.S.C. 1675a(c)(1) (MEX-24).

[11] *US Statement of Administrative Action*, accompanying the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) at 890, *reprinted in* 1994 U.S.C.C.A.N. 4040 ("SAA").

[12] 19 C.F.R. § 351.218(e)(2)(i) (emphasis added) (MEX-25).

[13] Section II.A.4 (emphasis added).

[14] *Issues and Decision Memorandum for the Full Sunset Review of the Anti-dumping Duty Order on Oil Country Tubular Goods from Mexico* (9 Mar. 2001) (final results) at 5-6 (MEX-19) ("[t]he Department continues to find that the margin rates from the original investigation are the appropriate rates to report to the Commission. (emphasis added). . .").

[15] *Sunset Review Issues and Decision Memorandum* at 4 (MEX-19).

III. THE COMMISSION'S SUNSET DETERMINATION

A. THE COMMISSION'S "LIKELY" STANDARD IS INCONSISTENT AS SUCH AND AS APPLIED WITH ARTICLE 11.3

14. The authority must find that expiry of the duty is "likely" to lead to a continuation or recurrence of injury. It is beyond doubt 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. The Commission argued: "The SAA explains, unambiguously, that after the revocation '[t]here may be *more than one* likely outcome.' SAA at 883. The possibility of 'more than one likely outcome' shows that Congress did not intend 'likely' to mean 'probable' or 'more probable than not.'"[16]

15. The United States cannot undo the Commission's statements. At the time that it made the Article 11.3 injury determination in this case, the Commission admitted that it did not need to establish that injury was the probable result of revocation.

16. Mexico is challenging the standard used by the Commission both as such and as applied. If the Panel finds that the Commission used the wrong standard, the Panel cannot now reassess the evidence on its own to make a determination as to whether the evidence would have supported a finding of "likely" injury. This would be tantamount to a prohibited *de novo* review.[17] The Panel's job is not to perform the analysis the Commission was obligated to perform (but which it affirmatively disavowed) in the first instance.

B. ARTICLE 3 APPLIES TO THE LIKELIHOOD OF INJURY DETERMINATION UNDER ARTICLE 11.3

17. The United States argues that footnote 9 "is simply a drafting device that avoids unnecessary repetitions . . . ." [18] The United States also confuses the issue, and makes the text much more complicated than it is. The issue is not whether the inquiry in an original investigation is identical to the likelihood inquiry in a sunset review. The issue is whether "injury" in Articles 11.1 and 11.3 is different than "injury" defined by footnote 9, and whether "injury" in Articles 11.1 and 11.3 is to be interpreted in accordance with the provisions of Article 3. That analysis must begin with the text, and for Mexico and all of the Third Parties, footnote 9 settles the issue.

18. The Appellate Body found in *Sunset Review of Steel from Japan* that the term "dumping" used in Article 2 "for the purpose of the Agreement" is the same "dumping" used in Article 11.3.[19] For the same reason, the term "injury" used in Article 3 "under this Agreement" is the same "injury" used in Article 11.3. The Appellate Body did not find that the phrase "continuation or recurrence of" changes the meaning of "dumping." The Panel cannot find that this same phrase changes the meaning of "injury."

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[16] ITC Brief, *Oil Country Tubular Goods from Mexico: Results of Five-Year Review*, USA-MEX-201-1904-06 (8 Feb. 2002) (non-proprietary version) at 43 (MEX-47).

[17] *See* Panel Report *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, adopted 26 April 2004, paras. 7.15, 7.16 ("*Softwood Lumber from Canada*").

[18] *Id.* at para. 245.

[19] Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 108-109 (emphasis removed).

C. THE COMMISSION'S SUNSET DETERMINATION WAS INCONSISTENT WITH ARTICLE 11.3, 3.1, AND 3.2 BECAUSE IT WAS NOT BASED ON POSITIVE EVIDENCE AND AN OBJECTIVE ASSESSMENT OF VOLUME, PRICE AND IMPACT; THE COMMISSION'S SUNSET DETERMINATION ALSO VIOLATED ARTICLES 3.4 AND 3.5

19. The positive evidence and objective examination requirements of Article 3.1 are fundamental to an Article 11.3 injury finding. The positive evidence and objective assessment requirement is also inherent in Article 11.3 injury determinations, apart from the applicability of Article 3.

20. In evaluating "injury" in this case, the Commission did not develop "positive evidence" necessary to determine that injury would likely follow from expiry. The information gathered regarding volume, price, and impact did not rise to the level of positive evidence, and an objective decision maker could not have concluded that injury was "likely" based on this information. In numerous instances, the Commission relied on assumptions and unsupported inferences. In other relevant parts of the determination, the Commission based its conclusions on findings made during the original investigation.

21. The United States argues based on the text of Article 3.4 that that provision "cannot practicably be applied to all sunset reviews, and certainly could not be applied to sunset reviews in the same systematic and comprehensive manner that has been required in original dumping investigations."[20] However, that dumped imports may not be present at the time of the sunset review does not mean that Article 3.4 does not apply to Article 11.3 reviews. In the context of a sunset review, the authority must examine the "likely" impact of dumped imports on the domestic industry. Without a thorough understanding of the state of the domestic industry, the authority cannot determine whether injury would be likely to continue or recur in a manner consistent with Article 11.3.

22. The fundamental requirement of Article 3.5 is that the authority must establish a causal link between dumped imports and injury to the domestic industry. This causation requirement reflects the requirement in Article VI of GATT 1994. The United States fails to explain how this concept cannot apply in a sunset review.

D. THE US STATUTORY REQUIREMENTS GOVERNING THE TIME FRAME WITHIN WHICH INJURY WOULD BE LIKELY TO CONTINUE OR RECUR ARE INCONSISTENT, BOTH AS SUCH AND AS APPLIED, WITH ARTICLES 11 AND 3 OF THE ANTI-DUMPING AGREEMENT

23. The United States argues that Article 11.3 does not specify the time frame relevant to a sunset inquiry, and thus, the relevant time period is within each Member's discretion.[21] In this regard, the United States notes that "[t]he words 'to lead to' affirmatively indicate that the Agreement contemplates the passage of some period of time between the revocation of the order and the continuation or recurrence of injury."[22]

24. The United States ignores the immediate context of Article 11.3. Article 11.1 requires 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, 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. The phrase "to lead to" does not change this principle. The phrase merely links the expiry or termination with the likely dumping and the likely injury.

[20] US First Submission, para. 312.
[21] US First Submission, paras. 330-331.
[22] *Id.* at para. 330.

25. An undefined 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. US law does not define, nor has the Commission articulated, what constitutes "a reasonably foreseeable time." Furthermore, US law creates an impermissible "gap" which is inconsistent with Article VI of the GATT and Article 11.1 of the Anti-Dumping Agreement. Finally, the violation arising from the application of the law in this case is clear. The Commission never even disclosed when the injury was likely to continue or recur.

E. THE COMMISSION'S DETERMINATION TO CONDITION MEXICO'S RIGHT TO REVOCATION OF THE ANTI-DUMPING DUTY ORDER AGAINST MEXICAN OCTG ON THE BEHAVIOUR OF EXPORTERS FROM OTHER COUNTRIES VIOLATED ARTICLES 11.3 AND 3 OF THE ANTI-DUMPING AGREEMENT

26. The United States misconstrues Mexico's primary cumulation argument. Mexico does not argue that Article 11.3 is silent with respect to cumulation. Mexico asserts that Article 11.3 – both pursuant to its terms ("duty" in the singular) and as interpreted in its context – expressly prohibits cumulation.

27. The United States contends that "the reference in Article 11.3 to 'the duty' is merely descriptive and is not evidence that the drafters intended to prohibit cumulation."[23] The US argument is inconsistent with the position it took in *Sunset Review of Steel from Japan*, in which it argued that "the meaning of the word 'duty' in Article 11.3 is explained in Article 9.2 of the *Anti-Dumping Agreement*, which 'makes clear that the definitive duty is imposed on a product-specific (*i.e.*, order-wide) basis, not a company-specific basis."[24] The Appellate Body agreed that Article 9.2 informs the interpretation of "duty" in Article 11.3.[25] Thus, the Appellate Body confirmed that the use of "duty" in the singular means that the authority must determine whether the termination of a single anti-dumping order – and not multiple orders – would be likely to lead to injury.

28. Assuming *arguendo* that Articles 11.3 and 3.3 do not preclude cumulation in Article 11.3 reviews, then the terms of Article 3.3 would have precluded cumulation in this case. In the event that the Panel finds that cumulation is not prohibited by Articles 11.3 and 3.3, then the authorities must respect the substantive standards for cumulation in Article 3.3.

29. Finally, in arguing that Article 3.3 cannot apply to Article 11.3 injury reviews, the United States never mentions clause (b) of Article 3.3. More than an additional requirement under Article 3.3, this clause re-states a basic justification for cumulation in any injury determination under the Agreement. If the imports are not in the market together and competing against each other, what possible justification could exist to evaluate the effects of the imports in a cumulative manner?

[23] US First Submission, para. 339.
[24] Appellate Body Report, *Sunset Review of Steel from Japan*, para. 150.
[25] *Id.*

IV. THE DEPARTMENT'S FOURTH ADMINISTRATIVE REVIEW AND DETERMINATION NOT TO REVOKE THE ANTI-DUMPING DUTY

A. ARTICLE 11.2 IS NOT LIMITED TO ORDER-WIDE OBLIGATIONS TO TERMINATE ANTI-DUMPING MEASURE

30. According to the United States, "Article 11.2 does not address, and does not require, termination on a company-specific basis."[26] The US arguments should be rejected as they are inconsistent with: (1) the text of Article 11.2; (2) the United States' implementation of its Article 11.2 obligations; and (3) the Panel Report in *DRAMS from Korea*.

31. First, the US position is inconsistent with the text of Article 11.2, which refers to "any interested party" and "interested parties." These references to "interested parties" and "any interested party" in the context of the anti-dumping review must be interpreted to include individual exporters, who are arguably the most interested parties in an anti-dumping review. It is difficult to imagine why Members would have granted such rights to individual exporters to request a review, and would have imposed an obligation on Members to perform such a review, if the obligation to terminate was limited to an "order-wide" basis. Equally important, the explicit reference to "interested parties" in Article 11.2 distinguishes that provision from Article 11.3, which does not refer to interested parties. In *Sunset Review of Steel from Japan*, the Appellate Body noted this distinction as a basis for finding that Article 11.3 does not require company-specific sunset reviews.[27]

32. Second, the US regulations that implement the US Article 11.2 obligation undermine the US Position. The United States indicates that section 351.222(g), "The changed circumstance review most directly implements US obligations under Article 11.2 and can be conducted on an order-wide or a company-specific basis."[28] However, the United States has never revoked an anti-dumping duty under Section 351.222(g) based on a substantive analysis of whether the continued imposition of the duty was necessary to offset dumping. Section 351.222(g) is chiefly a mechanism for revocation where the US industry is no longer interested in the continuation of the anti-dumping order, not a means through which the Department examines the substantive standard of Article 11.2 – whether continued imposition of the duty is necessary to offset dumping.

33. The United States indicates that "Section 351.222(b)(1) 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."[29] However, Section 351.222(e)(1) unambiguously limits the ability of an individual company to request revocation only as it pertains to itself: "an exporter or producer may request in writing that the Secretary revoke an order or terminate a suspended investigation under paragraph (b) of this section with regard to that person if the person submits with the request" the requisite certifications pertaining to its export behaviour.[30]

34. Finally, the Panel Report in *DRAMS from Korea* makes the US position untenable. The Panel Report in *DRAMs from Korea*, and the US implementation of the DSB's rulings and recommendations in the wake of that report, leave no doubt that Article 11.2 creates obligations to terminate anti-dumping orders on a company-specific basis. Following the adverse ruling of the Panel, the United States clarified to its trading partners the nature of the changes it was making to the US regulation

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[26] US First Submission, para. 148.
[27] Appellate Body Report, *Sunset Review of Steel from Japan*, para. 149.
[28] Opening Statement of the United States at the First Meeting of the Panel With the Parties, May 25, 2004, para. 3.
[29] US Answers to Questions from Mexico, para. 36 (emphasis added).
[30] 19 C.F.R. § 351.222(e)(1) (emphasis added) (MEX-12).

implementing its Article 11.2 obligations. The United States provided notice that the company-specific revocation procedure outlined in 19 C.F.R. § 351.222(b) was the way in which the United States implements its obligations under Article 11.2 to determine whether the continued imposition of the duty is necessary to offset dumping. 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.

B. THE DEPARTMENT'S DETERMINATION NOT TO REVOKE THE ANTI-DUMPING DUTY ORDER ON OCTG FROM MEXICO VIOLATED ARTICLE 11.2

35. 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 that the continued imposition of the duty was not necessary to offset dumping.

36. 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. 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.

37. With respect to TAMSA, 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.

38. The Department violated Article X:2 of the GATT 1994 because the Department imposed conditions on TAMSA for the termination of the anti-dumping duty in advance of the official publication of such conditions.

V. MEXICO'S REQUEST UNDER DSU ARTICLE 19.1

39. Even assuming that the United States could even cure many of the violations of the Anti-Dumping Agreement through another sunset review, there would be no way for the United States to comply with the fundamental time-bound obligations of Article 11.2 to terminate immediately upon a showing that the duty is no longer necessary to offset dumping, or of Article 11.3 to terminate after five years in the absence of the requisite likelihood findings. The violations of Article 11.2 and 11.3 in this case cannot be cured retroactively. Therefore, the only way to bring the United States measures into conformity with the Anti-Dumping Agreement would be through the immediate termination of the order.

VI. CONCLUSION

40. Mexico refers the Panel to specific requests it made of the Panel in paragraphs 375 through 381 of Mexico's First Submission.

ANNEX C-2

SECOND WRITTEN SUBMISSION OF THE UNITED STATES

(19 July 2004)

I. INTRODUCTION

1. Mexico has proffered, but not substantiated, a variety of claims regarding the sunset review of OCTG, as well as the fourth administrative review of TAMSA and Hylsa. The United States more fully rebutted these claims in its first written submission, the first meeting, and answers to questions. In this submission, the United States will limit its remarks to exposing further several basic flaws in Mexico's arguments.

II. ISSUES RELATING TO MEXICO'S SUNSET REVIEW CLAIMS

2. Mexico has advanced various claims regarding the US conduct of sunset reviews. Having already addressed Mexico's claims in detail in its first submission, the United States will limit its discussion in this submission to the most basic flaws in those claims, first with respect to Commerce's determination, and then with respect to the ITC's determination.

A. COMMERCE'S CONDUCT OF SUNSET REVIEWS

3. Mexico has essentially argued that the *Sunset Policy Bulletin* is a measure that mandates that Commerce accord decisive weight to dumping margins and lower import volumes. A proper legal analysis of Mexico's claims, as well as a review of the evidentiary support for them, reveals that Mexico has not met its burden of proving those claims.

1. Legal Framework for Assessing whether the Sunset Policy Bulletin is a Measure that Mandates a Breach

4. Mexico seeks to establish that the *Sunset Policy Bulletin* is a measure and mandates a breach by citing the results of full and expedited sunset reviews. As the United States stated at the first meeting of the parties, this approach is not legally correct. Proper legal analysis of the question of whether the *Sunset Policy Bulletin* is a measure that mandates a breach requires a two-step approach. First, the Panel should examine whether the *Sunset Policy Bulletin* is a measure. Second, if the *Sunset Policy Bulletin* were a measure, the Panel would then examine whether it mandates a breach.

5. As the United States described in its first written submission and its responses to Panel Questions 29 and 41, the *Sunset Policy Bulletin* does not "do" anything. Regardless of the terms of the *Sunset Policy Bulletin*, or the number of times it is cited in reviews, the *Sunset Policy Bulletin* has no legal effect. It is not a measure. In addition, the *Sunset Policy Bulletin* does not mandate a breach of any WTO provisions. As noted above, as a matter of US law the *Sunset Policy Bulletin* cannot "mandate" that Commerce do anything. It certainly cannot mandate a breach.

2. Mexico Fails to Substantiate its Claim that the *Sunset Policy Bulletin* Mandates that Commerce Give "Decisive Weight" to Dumping Margins and Import Volumes When Making the Likelihood of Dumping Determination in a Sunset Review

6. Mexico offers its Exhibit MEX-62 as "evidence" that the *Sunset Policy Bulletin* mandates an affirmative likelihood determination whenever there is evidence of dumping margins and depressed import volumes, to the exclusion of any other evidence, in a sunset review. As a matter of US municipal law – that is, as a matter of fact – this is simply incorrect. A document like the *Sunset Policy Bulletin* which does nothing more than explain to the public Commerce's thinking with regard to a variety of issues does not become binding simply because Mexico submits a misleading statistical analysis of past results in sunset reviews. The meaning of the Sunset Policy Bulletin can only be determined by examining US law, and Mexico has failed to explain how its statistical analysis is part of, or changes, US municipal law.

7. Exhibit MEX-62 demonstrates that Commerce made reasoned and reasonable likelihood determinations in each of the sunset reviews in the exhibit and has provided an explanation on each affirmative determination. To set the record straight, there was not an affirmative finding in "all sunset reviews." Mexico would have the Panel come away with the impression that Commerce made an affirmative finding in every sunset review; but that is not the case.

8. Therefore, Mexico's claim concerns a subset of sunset reviews. Mexico's assertion in this dispute is that the 227 cases in Exhibit MEX-62 are evidence that Commerce makes an affirmative likelihood determination in every review simply because dumping margins or depressed import volumes are present and the *Sunset Policy Bulletin* "mandates" that Commerce so find without reviewing other evidence. Exhibit MEX-62 does nothing of the sort.

9. The question is whether the results in the 227 reviews in question are "mandated" by the *Sunset Policy Bulletin.* Mexico appears to assert that the fact that no respondent has been able to overcome the so-called "decisive weight" of dumping margins and depressed import volumes, as described in the *Sunset Policy Bulletin*, proves that the *Sunset Policy Bulletin* mandates an affirmative likelihood finding in every case. This is nothing more than circular reasoning.

10. Even assuming *arguendo* that the *Sunset Policy Bulletin* could mandate results, Exhibit MEX-62 does not prove that the *Sunset Policy Bulletin* is what generated the results in question. The *Sunset Policy Bulletin* merely reflects logical principles. For example, if dumping continued over the life of the order, there is reason to be concerned that dumping will continue once the discipline of the order is removed. The Appellate Body agrees.[1] Therefore, if dumping continues over the life of the order, and Commerce concludes that continuation or recurrence of dumping is likely, then Commerce has so concluded because of logic – not the *Sunset Policy Bulletin*.[2]

11. A closer examination of the reviews in Exhibit MEX-62 reveals that Mexico's characterization of the 227 reviews is erroneous. In sum, a review of Exhibit MEX-62 reveals the following:

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[1] *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. 177.

[2] We also note that, with regard to Mexico's claim that Exhibit MEX-62 proves that Commerce has never made an affirmative sunset determination without referring to the guidance provided in the *Sunset Policy Bulletin*, this assertion is incorrect as a factual matter. As we discussed in our answer to question 26 from the Panel in this case, Commerce did not rely on historical data when making the final affirmative sunset determination in the full sunset review of *Canada-Sugar*, but rather calculated a predicted future dumping margin based on information submitted by both the domestic and respondent interested parties. Exhibit MEX-62, Tab 261.

- in almost a quarter of the reviews found in Exhibit MEX-62, the order was revoked;

- in over 80 per cent of the remaining reviews , domestic interested parties placed evidence on the record indicating that dumping was likely to continue or recur, but respondents placed no evidence on the record at all;

- in all of these reviews, and the remaining ones, Commerce evaluated all the evidence on the record and presented a reasoned conclusion that dumping was likely to continue or recur.

12. This is hardly evidence that, in any of those reviews, Commerce attached "decisive" weight to dumping margins and import volumes without considering more.

3. Mexico's Claim Regarding an Alleged "Consistent Practice" is Beyond the Terms of Reference of This Panel

13. In Question 12, the Panel specifically asked Mexico to identify "where, in the request for establishment," Mexico set forth its claim regarding Commerce's alleged "consistent practice." Mexico responded by citing a section that fails to reference this allegedly consistent "practice." By contrast, Mexico did expressly refer to "practice" in Section D of its panel request (a claim concerning GATT Article X:3(a), not Article 11.3). Thus, when Mexico wished to include a claim concerning practice in its panel request, it knew how to do so. With respect to a claim in connection with Article 11.3, it did not do so. The Panel should therefore reject Mexico's claim as not being within the terms of reference of this dispute.

14. In any event, Mexico's claim – though beyond the terms of reference – is also without merit. Commerce "practice" is not a measure; it is no more than short-hand to refer to recent Commerce precedent. As the panel in *India Steel Plate* concluded, Commerce "practice" is not within the scope of measures that may be challenged under Article 18.4 of the AD Agreement, and mere repetition cannot turn such a "practice" into a procedure and thus a measure.[3] In particular, repetition does not mean that Commerce's past applications of a law are binding as something called "practice."

B. ISSUES RELATING TO THE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF INJURY IN A SUNSET REVIEW

1. Cumulation of imports from more than one subject country is permitted under Article 11.3

15. Mexico contends that cumulation is prohibited in sunset reviews, notwithstanding the silence of the Agreement on this issue. The Appellate Body has recognized that silence in an Agreement must have some meaning.[4] Members are free to do that which is not prohibited. In this situation,

[3] *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R, Panel Report adopted 29 July 2002, para. 7.22 (citation omitted). For a more detailed discussion, *see* US First Written Submission, para. 113. That Mexico devoted eight paragraphs in its answers to Pane l questions (paras. 46-53) without even referring to *India Steel Plate* is indicative of the feeble nature of this claim. Mexico instead elected to rely on question posed by the Appellate Body in *Japan Sunset* – "does the type of instrument itself – be it a law, regulation, procedure, practice, or something else – govern whether it may be subject to WTO dispute settlement?" Nowhere did the Appellate Body conclude that Commerce's "practice" may be challenged.

[4] *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products From Germany*, WT/DS213/AB/R, Appellate Body Report adopted 19 Dec. 2002 ("*German Sunset*"), paras. 64-65.

where nothing in the text of the AD Agreement prohibits cumulation and Article 11.3 is silent on the subject, the only logical conclusion is that cumulation is permitted.

16. Mexico attempts to pin its argument on the use of the word duty rather than duties in Article 11.3, as well as in Articles 11.1 and 11.2. Reliance on the reference to the singular word "duty" ignores that Article VI:6 of GATT 1994, in requiring an injury evaluation for purposes of an original investigation, likewise refers to the levying of an anti-dumping (or countervailing) duty. Cumulation in anti-dumping investigations was widespread among GATT contracting parties under Article VI, even prior to the adoption of Articles 3.3 and 11.3 of the AD Agreement in the Uruguay Round.[5] Mexico has not disputed this point.

2. Nothing in the Agreement makes the provisions of Article 3 applicable to Article 11.3 sunset reviews

17. As the United States has noted, there are many examples of how Article 3 cannot be applied in a sunset review.[6] This is a strong textual indication that Article 3 was not intended to apply to sunset reviews. Mexico has sought to counter that argument by devising scenarios in which it might be possible to apply the provisions of Article 3 to a sunset review. This argument is not persuasive. Article 11.3 must be interpreted in a way that allows it be applied to all sunset reviews in order to give it meaning and effect. "An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[7]

18. Mexico has not explained how the specific provisions of Articles 3.2, 3.4 and 3.5 of the AD Agreement could be applied to all sunset reviews. One reasonably expected reaction to the imposition of an anti-dumping order would be the exit of the subject imports from the domestic market. Yet Mexico has not demonstrated how the investigating authority could, for example, apply the requirements of Article 3.5 in such a situation.

19. Mexico's response to this obvious incongruity is to state that "WTO Members intended the sunset analysis to be difficult and rigorous" (emphasis in original). This answer is non-responsive. The fact is that the provisions simply cannot be applied – no matter how rigorous the efforts of the investigating authority.

20. Mexico may be concerned that Article 11 reviews do not contain specific disciplines such as those contained in Articles 2 and 3; but as the Appellate Body has found, Article 2 does not *per se* apply in Article 11.3 reviews, and by analogy nor does Article 3. To the extent Mexico has concerns about the absence of specific criteria in Article 11.3, those concerns are not properly raised in the context of this dispute. As the DSU makes clear, "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."[8]

21. Article 5, unlike Article 11, cross-references Article 3 in several respects. In particular, Article 5.2 requires that the application filed by the domestic industry shall include evidence of, *inter alia*, "injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement." This language echos that of Article 3.1 which refers to "a determination of injury for purposes of

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[5] *See* The GATT Uruguay Round, A Negotiating History (1986-1992), (T. Stewart, Ed.) at 1475-1478, 1594, and 1598 (Exhibit US-27).

[6] *See, e.g.,* US First Written Submission, paras. 312-313, and 319-322.

[7] *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, Report of the Appellate Body, adopted 1 February 2002, para. 338; *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Report of the Appellate Body, adopted 20 May 1996, at 21.

[8] Article 3.2. *See also* Article 19.2 ("in their findings and recommendations, the panel and the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.")

Article VI of GATT 1994," and footnote 9 of Article 3, which instructs that the term "injury," unless otherwise specified "shall be interpreted in accordance with the terms of this Agreement." Whereas it is clear from the language of the Agreement that injury for purposes of Article 5 shall be interpreted in accordance with footnote 9, the Agreement provides no similar connection between the likely "continuation or recurrence of injury" for purposes of Article 11.3 and the injury determination contemplated by Article 3.

22. In addition, the cumulation provision contained in Article 3 cross-references Article 5 in two ways. This cross-reference in an integral provision of Article 3 indicates that Article 3 and Article 5 are linked. Article 5 sets out the procedural aspects for the original determinations of both dumping and injury.[9] Article 3 provides the substantive requirements for original injury determinations. There simply is no similar linkage between Article 11.3 and Article 3.

23. Mexico suggests that there are two types of injury "investigations" – a so-called "Article 5 injury investigation" and a so-called "Article 11.3 injury investigation." This argument conflicts with the Appellate Body's report in *German Sunset*, notwithstanding Mexico's assertion that its views are "completely consistent" with the Appellate Body's statements.

24. The Appellate Body's observation that "original investigations and sunset reviews are distinct processes with different purposes,"[10] is not, as Mexico suggests, less applicable to injury determinations than to dumping determinations. Article 11.3 of the AD Agreement (and Article 21.3 of the SCM Agreement) make no mention or reference to an investigation of either dumping or injury. With respect to both the dumping and injury determinations, the Agreement distinguishes between original investigations and reviews that may follow imposition of an anti-dumping duty order.

25. That Article 11.3 contemplates basic evaluation and objectivity standards – the "investigatory" aspect – does not translate into a wholesale incorporation of the step-by-step Article 3 analysis required for purposes of an original investigation. Just as the Appellate Body declined to equate obligations of an investigatory nature with a wholesale incorporation of Article 2, there is likewise no incorporation of Article 3.

III. ISSUES RELATING TO THE FOURTH ADMINISTRATIVE REVIEW

26. Mexico believes that TAMSA's and Hylsa's requests for reviews trigger obligations under Article 11.2. Mexico has also advanced various arguments regarding the application of the commercial quantities requirement in this particular review. These arguments fail.

A. OVERVIEW OF REVOCATION OPTIONS

27. US law provides for three separate revocation procedures. A company seeking revocation for itself ("revocation in part") during an annual assessment review will make a revocation request pursuant to section 351.222(b)(2) of the regulations. TAMSA and Hylsa requested revocation reviews under this procedure. If the company in question seeks revocation of the entire order during its annual assessment review, then the company needs to request a review under section 351.222(b)(1). TAMSA and Hylsa did not request revocation reviews under this procedure. The United States also provides respondents the opportunity to seek revocation, either in whole or in part, through a "changed circumstances" review. Commerce may revoke the order in whole (*i.e.*, order-wide) or in part (company-specific). Neither TAMSA nor Hylsa requested a "changed circumstances" review.

[9] *See German Sunset*, para. 67.
[10] *German Sunset*, para. 87.

28. In practice, a foreign producer or exporter in a country with multiple exporters normally does not request revocation of the order as a whole. A company requesting revocation has a business incentive to request revocation with respect only to itself, rather than the entire order, because revocation in part would put that company at a competitive advantage vis-à-vis other producers and exporters that remain subject to the order.[11]

29. In this light, Mexico's argument that TAMSA and Hylsa were the only known Mexican producers when Commerce conducted the fourth review, and that the company-specific revocation review in this proceeding was really the same as an order-wide review under Article 11.2, rings hollow. First, there were several indications throughout the duration of this proceeding indicating that TAMSA and Hylsa were not the only known producers of OCTG in Mexico.[12] Second, each company had reason to seek revocation for itself alone and not for its competitor or competitors.

30. In any event, the company-specific revocation procedure is of benefit to foreign exporters and producers. If this revocation procedure were not available to respondents, the United States would still meet its Article 11.2 obligations through order-wide review procedures. The fact that the United States provides additional procedures, which benefit foreign producers, does not mean those procedures are subject to Article 11.2. To conclude as much would create a disincentive for Members to provide procedures beyond those required to fulfil specific obligations.

B. ARTICLE 11.2 REQUIRES ONLY ORDER-WIDE REVOCATION REVIEWS

31. Mexico has argued that Article 11.2 requires company-specific revocation procedures. The text of Article 11.2 does not support Mexico's view. First, the text of Article 11.2 requires a review of the continuing need for "the duty." As the Appellate Body found in connection with a similar phrase in Article 11.3, "the duty" refers to the anti-dumping duty order as a whole, not as applied to individual companies.[13] Second, the text of Article 11.2 states that "any interested party," domestic or respondent, may request a review by submitting positive information to substantiate the need for the review. This simply means that the request of one interested party is sufficient to trigger the review; interested parties need not collectively request the review.

32. Mexico has argued that the fact that the United States amended its company-specific revocation regulations after *DRAMs from Korea* demonstrates that company-specific revocation reviews are subject to Article 11.2.[14] However, the question of whether company-specific revocation reviews are required by Article 11.2 was not directly before the panel in *DRAMs from Korea*. More importantly, whether company-specific reviews are subject to Article 11.2 is a question of treaty interpretation, not whether a Member emphasized a particular argument in previous proceedings or how that Member later amended its regulations.

C. MEXICO'S CHARACTERIZATION OF THE COMMERCIAL QUANTITIES ELEMENT OF THE "THREE YEARS WITHOUT DUMPING" REQUIREMENT IS ERRONEOUS

33. Mexico has argued that Commerce's application in OCTG from Mexico of the requirement that sales have been made in commercial quantities during the three sequential years of no dumping is inconsistent with Article 11.2. As discussed above, Article 11.2 does not apply to company-specific

[11] US Answers to Panel Questions, para. 2.
[12] US Answers to Mexico's Questions, para. 33.
[13] *Japan Sunset AB*, para. 150.
[14] 19 C.F.R. § 351.222(b) (Exhibit US-4). This regulation was amended to include the phrase "otherwise necessary to offset dumping" pursuant to implementation of the recommendations and rulings adopted by the DSB in *DRAMs from Korea*.

revocation procedures; nevertheless, Commerce's application of the commercial quantities requirement was not inconsistent with Article 11.2.

34. Article 11.2 states that a Member is obligated to review the continuing need for an anti-dumping duty upon request by an interested party "which submits positive information substantiating the need for a review." It also states that a Member shall terminate the duty if, as a result of the review, the authorities determine that the duty is "no longer warranted."

35. Under section 351.222(b), in determining whether the duty is "warranted," the United States evaluates whether the exporter or producer in question has been able to maintain a meaningful presence in the US market after imposition of the order. Failure to do so is evidence that the exporter or producer needs to dump in order to meaningfully participate in the US market and that, absent the order, dumping will continue or recur. Requiring the exporter or producer under section 351.222(e) to provide evidence that it has met the commercial quantities requirement is thus in harmony with the provision of Article 11.2 requiring a Member to conduct a review thereunder only if the exporter or producer provides "positive information" sufficient to warrant the review.

36. The commercial quantities element of Commerce's requirements for revocation review does not mandate that an importer maintain the same pre- and post-order import volumes. Both Mexico and the Panel have noted that it is natural that, following the imposition of an anti-dumping measure, the volumes sold by the affected exporters would decline. The United States agrees that this is often the case, although some exporters have been able to raise their prices to avoid dumping and sell at well above pre-order volumes.

37. More importantly, Mexico's claim that the commercial quantities requirement "arises from a presumption that volume declines means [*sic*] that the order is necessary" is simply wrong. A drop in volumes does not necessarily result in a finding that the commercial quantities threshold has not been met. Indeed, Commerce has considered sales of 32 per cent of annualized POI sales to have been made in commercial quantities and revoked on that basis.

D. COMMERCE'S APPLICATION OF THE COMMERCIAL QUANTITIES REQUIREMENT IN OCTG FROM MEXICO WAS UNBIASED, OBJECTIVE, AND BASED ON THE RECORD EVIDENCE

38. As discussed above, Commerce's commercial quantities determinations are based on the facts of each case. The information presented by TAMSA in support of its commercial quantities claim, however, was not persuasive. First, TAMSA sold OCTG to the United States, when it sold at all, in only token volumes after the order was issued. Specifically, TAMSA's year-long volumes for the three basis years were only 0.5 per cent, 0.6 per cent, and 0.2 per cent of the annualized sales volumes present in the period of investigation.[15]

39. TAMSA made two arguments, each of which Commerce considered and addressed in the final determination, finding them insufficient to provide a basis for finding that TAMSA's extremely small sales were probative of its ability to maintain normal market participation without dumping.[16]

40. Mexico bears the burden of proving that, in fulfilling its obligations under Article 11.2, Commerce did not properly establish the facts or did not evaluate those facts in an unbiased and objective manner. Mexico has simply demonstrated that TAMSA and Hylsa presented facts and

[15] *See Fourth Review Issues and Decision Memorandum*, at Comment 1 (Exhibit MEX-9).
[16] *See Fourth Review Issues and Decision Memorandum*, at Comment 1 (Exhibit MEX-9).

arguments; there is no evidence that Commerce did not evaluate those facts in an unbiased and objective manner. Mexico's claim fails.[17]

E. THE MARGIN CALCULATION METHODOLOGY FOR HYLSA IN THE FOURTH REVIEW WAS CONSISTENT WITH THE AD AGREEMENT

41. Mexico's allegations that the United States calculated the dumping margin for respondent Hylsa in a manner inconsistent with Article 11.2 and 2 of the AD Agreement are without foundation and should be rejected by this Panel.

42. First, Mexico has failed to advance any claim that the United States acted in a manner inconsistent with Article 11.2 in its establishment of the margins of dumping in the fourth administrative review. The calculation of margins of dumping in an administrative review under the United States' system is performed pursuant to Article 9.3.1 of the AD Agreement. Mexico did not reference Article 9.3.1 in its request for panel establishment.

43. Second, with respect to Mexico's Article 2 claims, the analysis of each export transaction in the fourth administrative review was based on a comparison with a normal value for identical or similar home market transactions. In each case, due allowance was made for any differences affecting price comparability, consistent with Article 2.4. Mexico has offered no textual support for a finding that, once an anti-dumping measure is in place, Members may not impose anti-dumping duties based on the amount by which sales have been dumped. Similarly, Mexico has offered no textual basis for finding that Members must offset or reduce that amount of dumping based on the extent to which distinct comparisons have involved export prices which were greater than normal value.

44. In addition, Mexico has failed to establish that the AD Agreement contains any obligations as to how an administering authority is to determine an overall rate of dumping, or even *whether* an administering authority must determine an overall rate of dumping in a review.

45. Third, to the extent that Mexico seeks to rely on Article 2.4.2 for its offset claim, Mexico is pursuing contradictory legal arguments. Mexico suggests that the term "investigation phase" in

[17] Mexico has also tried to argue that the United States conducted a full revocation review for TAMSA and Hylsa, rather than an evaluation of the revocation requests. This argument is unavailing. US regulations make clear that the commercial quantities requirement is a prerequisite for a request to conduct a revocation review. Section 351.222(e)(i) of the regulations provides that a company may only request revocation if it certifies, *inter alia*, that it has sold the subject merchandise in commercial quantities for three consecutive years. In verifying that certification, Commerce concluded that TAMSA had not sold the subject merchandise in commercial quantities and therefore did not qualify for a revocation review. With respect to Hylsa, Commerce noted that Hylsa had failed to obtain a *de minimis* margin in the fourth review. It stands to reason that if a company does not meet the threshold requirement for seeking revocation, then revocation will not occur. Mexico's reference to the title of the notice as providing evidence that a full revocation review in fact occurred is sophistic. (*See*, e.g., Mexico's Written Answers to Panel Questions, para. 11.)

Moreover, Mexico's quotation of the *Issues and Decision Memorandum* is misleading. (Mexico's Written Answers to Panel Questions, paras. 12-13.) In arguing that it met the commercial quantities requirement, TAMSA tried to justify the significant drop in sales. The passage quoted from the *Issues and Decision Memorandum* simply represents Commerce's response to TAMSA's argument that it met the commercial quantities requirement. This is confirmed by the paragraph following that which Mexico has quoted, in which Commerce stated that the "commercial quantities standard is evaluated on a case-by-case basis." (Issues and Decision Memorandum at 8 (Exhibit MEX-9)).

Finally, the United States notes that Mexico includes a quotation from the Issues and Decision Memorandum as "evidence" that the United States conducted a substantive review: "'[W]e find that TAMSA does not qualify for revocation of the order on OCTG under 351.222(e)(1)(ii) . . . ." Section 351.222(e) of the regulations is the commercial quantities certification requirement and thus expressly refers to a procedural, rather than a substantive decision.

Article 2.4.2 means any time an administering authority undertakes a process that is *investigative* in nature. Mexico also interprets the term "investigations" in Article 3.3 as limited to only original investigations. Not only does Mexico fail to offer any textual support for its disparate use of these terms, Mexico also fails to recognize that its interpretation of the phrase "investigation phase" in Article 2.4.2 would deprive that term of any meaning.

ANNEX D

ORAL STATEMENTS, FIRST AND SECOND MEETINGS OR EXECUTIVE SUMMARIES THEREOF

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ANNEX D-1

ORAL STATEMENT OF MEXICO – FIRST MEETING

(25 May 2004)

I. INTRODUCTION

1. Mexico respectfully ask that the members of the Panel keep the following key elements in mind throughout this meeting:

- First, the Appellate Body has made clear that the principal obligation of Article 11.3 is termination of the measure; continuation of the measure beyond 5 years is the exception. The United States must prove that it has satisfied the requirements of Article 11.3 to justify the continuation of the anti-dumping duty beyond the five year period.

- Second, underlying the US position is the view that Articles 11.2 and 11.3 contain no substantive obligations, and that the standards relating to "dumping" and "injury" in Articles 2 and 3 simply do not apply.

- Third, the U.S review decisions at issue in this case are based on presumptions, or inferences, drawn from one observation: that Mexican import volumes are lower than the volume reached before the imposition of the anti-dumping measure in 1995.

II. US VIOLATIONS OF ARTICLE 11.2 AND 11.3

A. THE ANTI-DUMPING STATUTE, THE SAA, AND THE SPB ARE INCONSISTENT AS SUCH WITH ARTICLE 11.3 OF THE ANTI-DUMPING AGREEMENT BECAUSE THEY ESTABLISH A WTO-INCONSISTENT PRESUMPTION

2. Paragraph 123 of the US First Submission reveals the presumptions that underpin US law and direct the Department's practice. The obligations in Article 11.3 cannot be satisfied by presumptions or "simply an exercise in logic." Determinations under Article 11.3 must always rest on "positive evidence" of likelihood.

3. The empirical evidence provided in MEX-62 demonstrates the operation of a WTO-inconsistent presumption.

B. US VIOLATIONS ARISING FROM THE DEPARTMENT'S ARTICLE 11.3 REVIEW

1. Import Volumes as the Only Basis for the Decision

4. The US position could not be clearer: the "depressed state of import volumes" was the only basis for Commerce's determination that dumping was likely to recur, and the US firmly believes that there is nothing wrong with this approach. There is no reason to require a Member to maintain its

export volumes to one market as a pre-condition to benefit from its rights under Article 11.3, and Article 11.3 contains no such pre-condition.

2. Lack of Positive Evidence

5. It is important for the Panel to focus on the following questions when examining the specific facts of this case:

1. does Article 11.3 allow an authority to rely, in the circumstance of this case, solely on an inference arising from lower than pre-order import volumes, and to ignore evidence provided by the parties?; and

2. is there positive evidence that dumping is "likely" on the facts of this case?

Mexico submits that the answer to both questions is "no".

6. With respect to the first question, an authority must base its likelihood decision **on positive evidence**. In this case, the Department passively relied on the presumption that lower volumes mean likely dumping (following the direction of the statute, SAA, and SPB).

7. With respect to the second question, the only positive evidence developed in the case demonstrated that dumping would not occur, and that it was certainly not "likely." Mexico demonstrates in the chart appearing as MEX-64 that the Department ignored evidence of past, present, and future behaviour by the Mexican exporters.

8. In addition, the United States argues in its First Submission that the likely margin to prevail was irrelevant to its substantive decision that dumping was likely to recur in this case. The United States attempts to avoid the consequences the *Japan Steel* appeal decision, by arguing that the dumping "margin likely to prevail," while reported, was not relied upon in determining *whether* dumping was likely to continue or recur. This ex-post rationalization by the United States is not credible. The statute, regulations, and SPB direct the Department to consider the dumping margin in rendering its "likelihood" determination, and the evidence shows that the Department unjustifiably – but clearly – relied on the historic dumping margin in this case.

C. US VIOLATIONS ARISING FROM THE COMMISSION'S ARTICLE 11.3 REVIEW

1. The "likely" standard used by the Commission violates Articles 11.3 "as such" and "as applied" in this case

9. The Commission has admitted that its interpretation of "likely" is something less than "probable," while the Appellate Body has confirmed that "likely" means "probable," and not something less.[1]

10. The United States explains in rebuttal that the only reason the Commission argued before the CIT and the NAFTA Panel examining this very same case that "likely" did not mean "probable" was because the Commission did not understand what "probable" meant and that its previous understanding was that a probable standard required "a high level of certainty" or "near certainty." Again, the argument lacks credibility given the Commission's sophisticated, technical arguments in the litigation.

[1] *See* Appellate Body Report, *Japan Sunset*, paras. 110-111.

2. The Commission's Likelihood of Injury Determination Violated US Obligations Under Article 11.3 Because it was not based on an Objective Examination of the Record, Was Not Based on Positive Evidence, and Was Tainted by the Flawed "Margin of Dumping to Prevail" Reported by the Department

11. The Commission's decision was based on mere speculation: events pulled from the past, or potential outcomes best described as "possibilities," were cobbled together by the Commission to form the basis for its inference that injury would be likely. With respect to the price, volume, and impact of the "likely" imports, the Commission combined reliance on anecdotal evidence of what possibly could occur, with findings from the original investigation several years earlier. Mexico submits that the investigating authority cannot rely to this extent on evidence from the original investigation as the basis for its Article 11.3 determination.

3. Article 3 Applies To Reviews Conducted Under Article 11.3

12. Mexico and all of the Third Parties participating in this case, are firm in their belief that the text of the Anti-dumping Agreement necessarily implies that the Article 11.3 injury determination must satisfy the substantive requirements of Article 3. This view is based on the text of the Agreement, particularly footnote 9.

13. The only way to sustain that Article 11.3 injury determinations are somehow different is to demonstrate that some other provision of the Agreement "specifies" that "injury" as used in Article 11.3 need not be interpreted in accordance with Article 3. No such provision exists.

4. The Commission's decision to conduct a cumulative injury analysis violates Article 11.3 because cumulation is not permitted by Article 11.3

14. Article 11.3 affords every WTO Member the right to termination of anti-dumping duties after five years. Cumulation nullifies that right because termination depends on the export practices of private companies of other WTO Members.

15. The United States offers no textual arguments to support its repudiation of the right created by Article 11.3. Mexico asserts that Article 11.3 – both pursuant to its terms and as interpreted in its context – expressly prohibits cumulation. Alternatively, if cumulation is permitted, it simply cannot remain unregulated. In this case, the Commission conducted a cumulative analysis even though it never defined a time frame for its likelihood determination. If an investigating authority has not even decided when the "likely" imports will be in the market and when the injury is "likely" to recur, it cannot justify a decision to cumulate the "likely" imports

D. US VIOLATIONS ARISING FROM THE DEPARTMENT'S ARTICLE 11.2 REVIEW

16. According to the United States, Article 11.2 does not create an obligation on WTO Members to allow termination of the measure with respect to individual companies, but rather obligates the Members to implement a system for "order-wide" termination. The argument is not credible for several reasons: (1) it ignores the two references in the text to Article 11.2 to "interested parties," which demonstrate an intent to require termination when individual exporters demonstrate that the measure is no longer necessary; (2) in developing this argument, the United States never once mentions the *DRAMs from Korea* case, which demonstrates that the Department's company-specific revocation proceedings are governed by Article 11.2; and (3) in this case, the only two known exporters requested termination because the measure was no longer necessary, which is expressly the circumstance covered by Article 11.2.

17. Treatment of Hylsa's request, and the specific issue of zeroing. The question for this Panel is whether the Department's practice of zeroing complies with the obligations and Articles 11.2 and 2. In

this case, zeroing creates a dumping margin, where no dumping margin exists. Consequently, the zeroing in this case violates the United States' obligation under Articles 11.2 and 2.4 to base its calculation on a "fair comparison."

18. The use of zeroing in this case also violates Article 2.4.2. As the Appellate Body explained in *Steel from Japan*, reviews under Article 11 contain both an adjudicatory and *investigatory* element. That is, "investigation phase" is properly understood in the context of Article 2.4.2 to mean the portion of the proceeding (original investigation or review) in which the authority "investigates" whether dumping has occurred.

19. Department's determination not to revoke the measure as to TAMSA. It is clear that the decision was based solely on the basis of the volume factor. For the same reasons explained above in the context of the Article 11.3 review, the excessive reliance on the volume factor violates the obligations of Article 11.2.

III. BASED ON THE PERVASIVE AND FUNDAMENTAL US VIOLATIONS, THE PANEL SHOULD SUGGEST THAT THE MEASURE BE TERMINATED

20. Mexico refers the Panel to the specific requests it made of the Panel in paragraphs 375 to 381 of Mexico's First Submission.

ANNEX D-2

ORAL STATEMENT OF THE UNITED STATES – FIRST MEETING

(7 June 2004)

Mr. Chairman, members of the Panel:

1. At the outset, we thought it would be helpful to outline the US review system. US law provides that an anti-dumping duty order may be revoked by Commerce after a completion of any of three types of reviews - sunset, changed circumstances, and administrative. The sunset review implements the US obligations of Article 11.3 of the AD Agreement and is conducted on an order-wide basis. The changed circumstance review most directly implements US obligations under Article 11.2 and can be conducted on an order-wide or a company-specific basis. The administrative review primarily provides the mechanism for the calculation of duties owed, as required by Article 9 of the AD Agreement. However, it can also provide a mechanism for an order-wide or company-specific termination; here, TAMSA and Hylsa sought company-specific terminations of the order in this dispute.

ISSUES CONCERNING THE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING

2. With regard to Commerce's sunset determination, Mexico claims that the United States breached its obligations under Article 11.3 of the AD Agreement because US law and practice require that a "presumption of likely dumping" be applied in favour of maintaining the anti-dumping duty order. Article 11.3 does not prescribe how to determine likelihood in a sunset review, or what particular methodology a Member should use to determine likelihood. In a situation where, as is the case here, an administering authority employs a methodology that is consistent with its WTO obligations, properly establishes the facts, and evaluates those facts in an unbiased and objective manner, the authority's decision may not be overturned.

3. Mexico's entire sunset review claim is premised on the existence of an alleged "irrefutable presumption" that Commerce makes an affirmative likelihood determination in every sunset review in which a domestic interested party participates. Mexico claims that the Statement of Administrative Action, the *Sunset Policy Bulletin*, and an alleged "consistent practice" all give rise to the alleged presumption. Mexico fails to show the existence of the allegedly "WTO-inconsistent presumption" in US law because no such presumption exists.

4. With respect to the SAA, Mexico quotes a passage to demonstrate the alleged "presumption." However, the quoted passage does not demonstrate any such presumption. Likewise, Mexico cites certain passages from the *Sunset Policy Bulletin* as a potential source for the alleged "WTO-inconsistent presumption." Here we recall that the *Sunset Policy Bulletin* has no status under US law. Therefore, it is, as a factual matter, impossible to conclude that the *Sunset Policy Bulletin* creates any kind of presumption.

5. Because Mexico cannot establish that US law creates a "presumption," Mexico instead asserts that a "presumption" exists simply because Commerce has found likelihood in a particular number of sunset determinations. Previous panels have found that the mere frequency of a particular outcome does not transform that outcome into a "measure" that may be challenged independently for its alleged WTO inconsistency. Second, the statistic does not reveal the particular factual circumstances in each case or the analysis resulting from the evaluation of those factual circumstances.

6. We also wish to note that the Appellate Body in *Japan Sunset* did not affirmatively find that the *Sunset Policy Bulletin* is a measure.

7. Turning to Mexico's "as applied" sunset review claims, Mexico has based these claims either on an inaccurate understanding of the facts on the record or Mexico's disagreement with Commerce's weighing of the evidence in the sunset review of OCTG from Mexico.

ISSUES CONCERNING THE FOURTH ADMINISTRATIVE REVIEW

8. Mexico's second principal claim is that Commerce's determinations in the fourth review were inconsistent with Article 11.2 and Article 2 of the AD Agreement and GATT 1994. Mexico is attempting to read obligations into Article 11.2 that do not exist.

Company-specific terminations under US Law

9. Although a company-specific examination of the necessity for the continuation of a duty is not required by Article 11.2 or any other provision of the AD Agreement, the United States, nevertheless, provides such a procedure under its domestic law in a manner that is entirely WTO consistent. The United States points out that it has procedures, separate and apart from those challenged here, that provide for the possibility of termination of the order on a company-specific basis.

10. Mexico has argued that the commercial quantities requirement is inconsistent with Article 11.2. Nothing in Article 11.2, however, prohibits a commercial quantities requirement.

Commerce did not conduct a termination analysis

11. Mexico claims that Commerce applied a standard that was inconsistent with Article 11.2 of the AD Agreement in determining whether the continued imposition of the anti-dumping duty order on OCTG from Mexico was necessary to offset dumping in the fourth review. In fact, Commerce did not undertake a substantive analysis of whether the OCTG order was necessary in the fourth review, because Commerce determined that a termination review was not necessary.

The margin calculation methodology in the fourth review

12. Mexico also claimed that the United States calculated Hylsa's overall dumping margin in violation of Article 2.4 of the AD Agreement. Mexico concludes that this violation also led to a violation of Article 11.2 because, if the overall dumping margin had been calculated as Mexico suggests is required, the order would have been revoked as to Hylsa. This claim fails because Mexico adopts an interpretation that would expand the obligations in Article 2.4.2 and Article 11.2 beyond their express terms.

ISSUES CONCERNING THE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF INJURY

13. Mexico has raised a number of issues regarding the ITC's determination of likelihood of continuation or recurrence of injury in the OCTG sunset review. We will focus on three of those issues.

The Likely Standard

14. Mexico argues that the ITC misinterpreted the term "likely" in Article 11.3. Essentially, Mexico maintains that "likely" can only mean "probable," and that the ITC disregarded this meaning and interpreted "likely" to mean "possible." The ITC did not interpret "likely" to mean "possible," as demonstrated by the determination itself.

Article 3

15. Mexico claims that Article 3 of the AD Agreement applies in its entirety to sunset reviews. But there are numerous textual indications that this is not the case. For example, there are no cross-references in Article 3 to Article 11, or in Article 11 to Article 3.

16. Moreover, a determination of injury, or threat of injury, under Article 3 and a determination of likely continuation or recurrence of injury under Article 11.3 are entirely different concepts.

The Time Frame

17. Mexico claims that the provisions of US law regarding the time frame within which injury would be likely to continue or recur are inconsistent with Articles 3 and 11.3 of the AD Agreement. Mexico misconstrues Article 11.3, which does not specify the time frame relevant to a sunset inquiry.

CONCLUSION

18. Mr. Chairman, that concludes the opening statement of the United States. We would be pleased to answer any questions the Panel may have.

ANNEX D-3

THIRD PARTY ORAL STATEMENT OF ARGENTINA

(26 May 2004)

I. INTRODUCTION

1. Argentina welcomes this opportunity to present its views to the panel in *United States – Anti-Dumping Measures on OCTG from Mexico* (DS 282). Argentina's comments today will focus on the US violations of Article 11.3 arising from US law and practice, the Department's determination of likely dumping, and the Commission's determination of likely injury. Argentina will also offer its views as why Article 11.2 contains company-specific obligations, and why the United States violated Article 11.2.

II. US ARTICLE 11.3 REVIEWS

A. THE UNITED STATES EMPLOYS A WTO-INCONSISTENT PRESUMPTION THAT DUMPING IS LIKELY

2. The US statute, the Statement of Administrative Action, and the Sunset Policy Bulletin, as such, as well as the Department's consistent practice in sunset review cases, establish a WTO-inconsistent presumption that termination of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping. Under US law, declines in import volume and/or the existence of historic dumping margins are given decisive weight. The empirical evidence developed by Mexico in Exhibit MEX-62 in this case demonstrates that every time the Department finds that at least one of the three criteria contained in section II.A.3 of the SPB is satisfied (continuation of dumping, cessation of imports, and no-dumping with a significant decline of imports), the Department makes an affirmative finding of likely dumping, without considering additional factors. There are no exceptions.

3. The Appellate Body emphasized in *Japan Sunset* that the likelihood determination under Article 11.3 could not be based "solely on the mechanistic application of presumptions" but instead must be grounded on a "firm evidentiary foundation."[1] The Department's likelihood determinations operate exclusively on the "mechanistic application of presumption." In <u>all</u> (227 out of 227) of the full and expedited sunset reviews, the Department determined that dumping was likely to continue or recur.

B. THE DEPARTMENT'S DETERMINATION OF LIKELIHOOD OF DUMPING WAS FLAWED

4. The Department's likelihood of dumping determination in the sunset review of OCTG from Mexico was inconsistent with Article 11.3. The Department rejected positive evidence that demonstrated that dumping would not be likely and instead it relied on post-order import volume in

[1] Appellate Body Report, *Japan Sunset*, para. 178.

determining that dumping was likely to recur. The prospective analysis required by Article 11.3, as confirmed by the Appellate Body, was completely absent.

5. The evidence in this case demonstrated that the market and economic circumstances prevailing at the time of the original investigation (Mexican peso devaluation and high dollar indebtedness of Mexican exporters) no longer existed and were not likely to exist in the future.[2] In addition, neither of the Mexican exporters had ever been found to be dumping based on a review of their own data. The Mexican exporters provided evidence of these facts, and the Department ignored the evidence. The Department's actions are completely unjustified in this case, and violate Article 11.3. As the European Communities has highlighted, the Mexican case is a particularly glaring and egregious example indicative that the United States anti-dumping system is skewed toward findings of likelihood in sunset review investigations.[3]

C. THE DETERMINATION OF LIKELIHOOD OF INJURY WAS FLAWED

1. Determining Likely Injury Under Article 11.3

6. In order to impose anti-dumping measures, a domestic industry must be injured, and the cause of that injury must be dumping. This bedrock principle has applied to the international regulation of dumping and dumping measures since its inclusion in Article VI of GATT 47. The requirements of dumping, and injury caused by dumping, continue through the life of the measure; without these elements, the measure must be terminated. This is made clear by Article 11.1 of the Anti-Dumping Agreement, which states that: "An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury."

7. "Dumping," "Injury," and "Causation." What do all these terms mean? There is no mystery here because the WTO Members defined the terms. Article 2 defines dumping "for the purposes of this Agreement." Article 3, footnote 9 defines injury "under this agreement," and requires that the term "injury" "shall be interpreted in accordance with the provisions of this Article." Article 3.5 explains that there must be a causal link between the dumping and the injury, and describes the nature and type of evidence necessary to establish the necessary causal link. There is no ambiguity in these terms.

8. But the United States' First Submission claims that the requirements are not clear, and that Article 3 does not apply to the injury determination required by Article 11.3. Argentina respectfully asks that the Panel to focus on this issue. For Argentina, and for the other Third Parties, the US argument conflicts directly with the text of the Agreement, and therefore changes the balance of rights and obligations agreed by the WTO Members.

9. While confident that the Panel will agree with Mexico and all the Third Parties in this dispute regarding the application of Article 3 to Article 11.3 determinations, Argentina notes that Mexico's claims are not dependent upon the application of Article 3. Mexico claims that the United States violated Article 11.3 because: (1) the Commission did not apply a "likely" standard in this case (as it admitted to a NAFTA Panel reviewing the very same injury determination)[4]; (2) the Commission did not properly establish and objectively evaluate evidence that could support a finding that injury was likely to continue or recur; and (3) the improper finding of likely dumping necessarily taints the Commission's analysis of likely injury, and necessarily negates the possibility of proving a causal link between the dumping and injury. Each of these claims relate to the substance of the Article 11.3 obligation.

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[2] See Mexico's First Submission, paras. 129-144.
[3] See European Communities, Third Party Submission, page 16 para. 68.
[4] *See* Mexico's First Submission, para. 171 and (MEX-47).

10. Argentina notes that the injury portion of the Article 11.3 review of Mexican OCTG imports is identical to the injury portion of the Article 11.3 review of Argentine OCTG, which is the subject of a separate WTO dispute settlement proceeding (DS 268). Argentina endorses all of Mexico's "as applied" arguments related to the injury portion of the review. The Commission's decision is based on speculation, and, at best, events that can be considered to be "possible."

2. Cumulative Injury Analysis Prohibited in Article 11.3 Reviews

11. Argentina considers that the application of a cumulative injury analysis is not consistent with the rights granted to individual WTO Members by Article 11.3.[5] The purpose of Article 11.3 is to provide each WTO Member with the right to have an anti-dumping measure affecting its exports terminated after five years, unless its exports are likely to be dumped within the meaning of Article 2 and the dumping is likely to cause injury within the meaning of Article 3. A cumulative injury analysis violates the object and purpose of Article 11.3, because it conditions each Member's right to termination of an anti-dumping measure covering its imports on the commercial practices of exporters from other countries.

12. Argentina shares Mexico's view that the text of the Anti-Dumping Agreement is not silent on the issue of cumulation.[6] Article 11.3 refers to anti-dumping "duty" in the singular, not plural. Thus, on its face, Article 11.3 requires the authority to determine whether the revocation of a *single* anti-dumping measure – rather than the revocation of multiple anti-dumping measures – would be likely to lead to the continuation or recurrence of injury. Article 11.3 thus does not permit cumulation.

13. Argentina notes that WTO Members in the Uruguay Round achieved, for the first time, disciplines on the practice of cumulation. The use of a cumulative analysis was authorized for "investigations," and even then only where certain conditions are met. The fact that Article 3.3 provides for the conditioned use of cumulation in "investigations" but not in "reviews" indicates that a cumulative injury analysis is not permitted in the likelihood of injury determination made in an Article 11.3 review. The failure of Article 3.3 and Article 11.3 to cross-reference each other corroborates this reading. Article 11.3 contains explicit cross-references to other articles of the Anti-Dumping Agreement (such as Articles 6 and 8), and other articles in the agreement explicitly cross-reference Article 11 (such as the cross reference in Article 12.3). Thus, it is evident that "when the negotiators . . . intended that the disciplines set forth in one provision be applied in another context, they did so expressly."[7] Accordingly, the lack of cross-references between Articles 11.3 and 3.3 indicates that the drafters of the Anti-Dumping Agreement did not intend for the *limited use* of a cumulative injury analysis permitted in an *investigation* to be extended to the likelihood of injury determination in a *review* under Article 11.3.

3. Defining the Timeframe for the Likelihood of Injury Determination

14. A fundamental flaw with the Commission's injury analysis in this case was its failure to specify any timeframe for the likelihood of injury. As Argentina has argued in DS 268, the statutory provisions (19 U.S.C. §§ 1675a(a)(1) and (5)), are inconsistent as such with Articles 11.3 and 3.[8] Article 11.3 requires the authority to determine whether termination of an anti-dumping measure would be likely to lead to the continuation or recurrence of injury. 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.

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[5] See Mexico's First Submission, sec. VIII.E.
[6] See Mexico's First Submission, para. 254.
[7] Appellate Body Report, *Steel from Germany*, para. 69.
[8] *See* First Submission of Argentina in DS 268, Sec. VIII.C.1.

15. Argentina does not see how the obligations of Article 11.3 can be implemented without defining the period in which injury is likely to continue or recur. Simply put, to determine whether something would be likely or probable, the administering authority must have some timeframe in mind because time affects the probability of occurrence. US law violates Article 11.3 because it strongly suggests that injury need not be imminent upon the expiry of the measure. Also, the Commission's decision in this case violates Article 11.3 because the Commission did not even bother to define a time period when injury was likely to recur. It simply cannot be – as in this case – that a Member can conduct the Article 11.3 injury analysis without any parameters at all for the timeframe within which injury would be likely to continue or recur.

III. US ARTICLE 11.2 REVIEWS

16. Argentina is puzzled by US arguments regarding the nature of the Article 11.2 obligation. For Argentina, it is clear that Article 11.2 creates an obligation to terminate the measure upon the presentation of positive evidence by individual exporters that the measure is no longer necessary to offset dumping.

17. 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. The Appellate Body confirmed this reading in the context of its analysis of whether Article 11.3 creates company-specific obligations.[9]

18. Further, 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.[10] 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 they enabled a company to have an order revoked as it pertains to that company by obtaining zero margins in three consecutive administrative reviews.[11]

19. Once the Panel arrives to the substance of the 11.2 claims, it is clear to Argentina that the United States did not have a proper basis to deny the requests for termination and to continue the measure to TAMSA, Hylsa, and "all others." With respect to TAMSA, the Department once again placed decisive weight on the volume factor, even to the extent of explicitly calling it a "threshold" factor that was imposed after TAMSA had begun the process of reviews required by US law. With respect to Hylsa, the evidence provided by Mexico is crystal clear: the so-called evidence of dumping was a margin calculated on the basis of zeroing, which violates the "fair comparison" requirement of Article 2.4. The US decision to ignore the evidence that the measure was no longer necessary to offset dumping violates the requirements of Article 11.2.

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[9] Appellate Body Report, Japan Sunset, para. 149.

[10] *See, e.g.*, US Answers to Argentina's First Set of Questions (8 Jan. 2004), para. 12; 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.

[11] US Oral Response to Panel Question During First Substantive Meeting of the Panel with the Parties; *see also* 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.

IV. CONCLUSION

20. Argentina believes that Mexico has presented a compelling case of violations. If the panel agrees and recommends that the United States bring itself into compliance with its obligations, Argentina agrees that termination of the anti-dumping measure on OCTG from Mexico would be the appropriate suggestion from the panel. Argentina and Mexico are both of the view that a suggestion is appropriate in the case of violations of Articles 11.2 and 11.3, both of which create affirmative obligations to terminate an anti-dumping measure, unless certain findings are made by the Member seeking to continue the measure. If the findings are improper, the Panel should suggest termination in order to restore the rights of the exporting Member.

21. Argentina thanks the Panel for providing the opportunity to comment on the important issues presented in this dispute.

ANNEX D-4

THIRD PARTY ORAL STATEMENT OF CHINA

(26 May 2004)

1. Thank you, Mr. Chairman, and members of the Panel. China appreciates this opportunity to present its views on the issues raised in this Panel proceeding. In this statement, I will summarize China's major view of points in our written submission.

2. The first issue is whether the US Department of Commerce ("DOC") acted inconsistently with Article 2 and Article 11.3 of the Anti-Dumping Agreement regarding DOC's likelihood of continuation or recurrence of dumping decision.

3. China agrees with Mexico that a determination solely based on the decrease of import volume to decide that the expiry of the duty would be likely to lead to continuation or recurrence of dumping is not consistent with Article 11.3 of the Anti-Dumping Agreement.

4. The three criteria DOC adopted to determine dumping continuation or recurrence, i.e., continued dumping margins, the cessation of imports and/or declining import volumes accompanied by the elimination of dumping margin do not adhere to the "dumping" definition in Article 2 of the Anti-Dumping Agreement.

5. Article 11.3 of the Anti-Dumping Agreement requires the investigation authorities to determine that the expiry of the duty would be likely, i.e., probable to lead to continuation or recurrence of dumping before they decide not to terminate the anti-dumping measure. "To determine" means the investigation authorities to conduct a rigorous examination in a sunset review to continue the anti-dumping measures based on evidences that show "probability" rather than simple "possibility".

6. The second issue is whether the US International Trade Commission ("ITC") acted inconsistently with Article 3 and Article 11.3 of the Anti-Dumping Agreement regarding ITC's likelihood of continuation or recurrence of injury decision.

7. As we mentioned above, same as dumping decision, the investigation authorities are required to determine that the expiry of the duty would be likely, i.e., probable, to lead to continuation or recurrence of injury before they decide not to terminate the anti-dumping measure.

8. China agrees with Mexico that provisions of Article 3 of the Anti-Dumping Agreement apply to Article 11.3.

9. Article 3.1 of the Anti-Dumping Agreement provides that the investigation authorities must base their injury determination on positive evidence and objective examination of the consequent impact of these imports on domestic producers of such products.

Article 3.4 of the Anti-Dumping Agreement requires the investigation authorities to evaluate all 15 economic factors and indices. China agrees with Mexico that in sunset review, the authorities must follow Article 3.4 as well.

10. Article 3.5 provides that injury within the meaning of this Agreement must be caused by dumped imports through effect of dumping set forth in paragraphs 2 and 4. This means the investigation authority must prove causal link between dumping and injury. If the Panel finds that the ITC failed to make causation analysis, the ITC acted inconsistently with Article 3.5 and 11.3 of the Anti-Dumping Agreement.

11. China shares the view of Mexico that 19 U.S.C. § 1675a(a)(1) and 19 U.S.C. § 1675a(a)(5) are inconsistent with Article 11.3 and Article 3 of the Anti-Dumping Agreement. The US legislation empowers the ITC to determine whether injury would be likely to continue or recur "within a reasonable foreseeable time" and to consider the effects of revocation or termination over a longer period of time". It thus gives the ITC discretion to investigate into the long indefinite future, which is inconsistent with the Article 11.3 of the Anti-Dumping Agreement that requires the determination to be based on injury upon expiry of the order.

12. The last issue China would like to address is "zeroing" methodology.

13. China agrees with Mexico that the dumping margin calculated using the "zeroing" methodology in the DOC 4th administrative review is inconsistent with Article 2.1 and 2.4 of the Anti-Dumping Agreement.

14. The practice of "zeroing" selectively calculates margins only for those sales of a product with positive margins, setting negative margins produced from sales of product to zero. This methodology creates an artificially inflated dumping margin.

15. If the Panel, based on the evidence submitted by Mexico, finds that DOC applied zeroing methodology to find positive dumping margin for Hylsa in the 4th administrative review, the DOC determination was inconsistent with Article 2.1 and Article 2.4 of the Anti-Dumping Agreement.

16. We thank you again for this opportunity to express our views.

ANNEX D-5

THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

(26 May 2004)

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Chairman, Members of the Panel.

I. INTRODUCTION

1. The European Communities makes this third party oral statement because of its systemic interest in the correct interpretation of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*").

2. In this oral statement, in addition to the observations set out in its written observations, and reacting to certain statements made by the other parties, the European Communities will comment on the following points :

- the precise nature of the findings made by USDOC in the sunset review;
- the categorisation of United States periodic reviews of the amount of duty under the *Anti-Dumping Agreement*; and
- the inherent unfairness of the simple zeroing methodology used by the United States in periodic reviews of the amount of duty.

II. SUNSET REVIEW "AS APPLIED"

3. The European Communities would draw the Panel's attention to the fact that all of the third parties - Argentina, China, the European Communities, Japan and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu – agree that the conduct of sunset reviews in the United States, generally, or in this specific case, is not consistent with the provisions of the *Anti-Dumping Agreement.*

A. LIKELY RECURRENCE OF DUMPING

4. The European Communities interest in this case is systemic. However, the distinction between the general and the specific is not always an easy one. In order to understand what is wrong with the United States system of sunset reviews in general terms it is helpful, even necessary, to understand what is wrong with this, and other, specific determinations. That requires clarity on the facts of the specific case. The European Communities would therefore like to draw the Panel's attention to certain facts which are not entirely consistent with the United States presentation of the facts in its first written submission.

5. The United States asserts that it found likely *continuation* or recurrence[1], referring in general terms to all of the Issues and Decisions Memorandum relating to the preliminary sunset determination.[2] In fact, the specific determination was likely *recurrence.*[3] Even if, in other parts of the Issues and Decisions Memorandum, reference is made in general terms to "continuation or recurrence", these are just general references to the relevant legal test. The Panel must look to the specific determination made by USDOC, that being recurrence.

6. It is important to be precise about what USDOC actually determined on this point. Being precise, by using the word "recurrence" rather than "continuation", makes it clear that USDOC made a determination in relation to a phenomenon that had ceased, that phenomenon being the dumping

[1] United States first written submission, para 46.
[2] United States first written submission, footnote 73 (referring to Exhibit US-14).
[3] Issues and Decisions Memorandum relating to the preliminary sunset determination, Exhibit US-14, page 9, para 2.

determination made in respect of the original period of investigation. Using the word "continuation" is factually inaccurate and would serve only to obfuscate the analysis – that is, to cover-up serious weakness in the position of the United States in this case on this point.

7. The United States cannot, before this Panel, retroactively add to the measure determinations that the measure does not contain. Nor can the United States retroactively change the determination in the measure.

8. The United States further suggests or asserts that it relied for its determination on *dumping throughout the history of the order*[4], referring to pages 5 to 8 of the Issues and Decisions Memorandum relating to the preliminary sunset determination.[5] In fact, the United States relied on the *original dumping margin and imports*[6] to find that "recurrence of dumping of OCTG from Mexico is likely if the order were to be revoked". The preliminary results of the fourth periodic review (1.47 per cent for Hylsa) are described in the factual section of the Issues and Decisions Memorandum, entitled "History of the Order". They are not, however, relied on by USDOC for the purposes of its preliminary sunset determination.

9. These facts are confirmed by the Issues and Decisions Memorandum relating to the *final* sunset determination, which is drafted in the same terms.[7]

10. It is equally important to be precise about what USDOC actually relied on to make its recurrence determination, for the same reasons. Also in relation to this matter, the United States cannot retroactively seek to re-write history, by denying what is written in the measure before this Panel. Its attempts to do so nicely flag the weakness of its case on this point.

11. The European Communities refers to its written submission, in which it has explained why it considers USDOC's determination in this case to be inconsistent with various provisions of the *Anti-Dumping Agreement*.

III. FOURTH PERIODIC REVIEW OF AMOUNT OF DUTY

A. CATEGORISATION OF UNITED STATES PERIODIC REVIEWS OF THE AMOUNT OF DUTY UNDER THE ANTI-DUMPING AGREEMENT

12. In its written observations the European Communities drew the Panel's attention to the fact that United States periodic reviews of the amount of duty correspond very closely, entirely or almost entirely, to the provisions of Article 9.3.1 of the *Anti-Dumping Agreement*, rather than Article 11.2 of the *Anti-Dumping Agreement*. The European Communities explained, in this respect, that the United States changed circumstances review corresponded more closely to the provisions of Article 11.2 of the *Anti-Dumping Agreement*. The consequence of this is that the investigation or assessment made during a United States periodic review must be conducted in a manner that is consistent with Articles 9 and 2 of the *Anti-Dumping Agreement*.

13. This is a point that the European Communities would like to re-iterate and emphasize. If a systematic comparison is made between the texts of the various provisions, paying close attention to the purpose, temporal character, outcome, time limits, evidentiary and other procedural rules, it is an observation of fact that is incontrovertible.

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[4] United States first written submission, para 46.
[5] United States first written submission, footnote 74 (referring to Exhibit US-14).
[6] Issues and Decisions Memorandum relating to the preliminary sunset determination, Exhibit US-14, page 9, para 2.
[7] Exhibit Mex-19, page 4, para 4.

14. The European Communities finds further confirmation of this analysis in the fact that, during the relevant period, the United States also conducted a changed circumstances review.[8] This confirms the fact that periodic reviews of the amount of duty and changed circumstances reviews are quite different, one relating essentially to Article 9.3.1 of the *Anti-Dumping Agreement*, and the other to Article 11.2.

B. ZEROING

15. The European Communities would like to emphasise that what it presents in its written observations is an interpretation of the relevant provisions of the *Anti-Dumping Agreement* that reflects the general principle and overarching obligation to make a fair comparison between export price and normal value. The relevant provisions of Article 2 of the *Agreement*, which define dumping, must be interpreted in a systematic and logical manner, in order to give the *Agreement* its true meaning.

16. In particular, the European Communities would like to emphasise that the United States practice of simple zeroing in periodic reviews of the amount of duty is inconsistent with the basic rule in Article 2.4 that a fair comparison must be made, notably insofar as it cuts across the logic established by USDOC itself when USDOC itself fixes the parameters of its investigation or assessment. A dumping determination that is internally logically self-contradictory cannot be based on a permissible interpretation of the *Anti-Dumping Agreement*. It cannot reflect an objective assessment based on positive evidence. Just as the Appellate Body has ruled that this is so in respect of the definition of the subject product and model zeroing, so it is equally true for any other parameter that is used by the investigating authority more than once in its determination. That parameter must be consistently established and used throughout the assessment. It cannot be arbitrarily changed, according to the outcome sought by the investigating authority.

17. In the context of zeroing, these observations have particular force with regard to the parameters mentioned in the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*, namely: purchasers; regions and time. Absent targeted dumping by reference to one of these parameters, an investigating authority must use a symmetrical method of comparing normal value and export price without zeroing. The investigating authority is bound by its own definition of the scope of its analysis and must therefore duly reflect all the export transactions falling within that scope. The simple zeroing method used by the United States is, at least potentially, offensive to any one of these parameters, because it is performed at the most disaggregated level, that is, at the level of individual transactions. In other words, instead of treating all the relevant export transactions as a whole, the United States methodology results in treating each export transaction individually in the same manner as model zeroing results in treating each model separately.

18. The recent dissenting opinion in the *US-Softwood Lumber* case is just that – a dissenting and minority opinion. It is wrong. And that may be demonstrated with ease. It fails to mention at any point, let alone grasp, the kernel of the reasoning of the Appellate Body in the *EC-Bed Linen* case : the requirement that determinations be objective and based on positive evidence means that they must be internally logically consistent. Once an investigating authority has adopted a certain logic, of its own choice, it is bound to apply the same logic in a consistent manner throughout its determination. That is particularly true when it comes to identifying the category of transactions, in terms of subject product, geography and time, that will be the subject of an anti-dumping proceeding. Whether or not there is such a thing as a perfect market definition, once the parameters for the analysis have been fixed, they must be applied consistently by the investigating authority in order to ensure that a fair comparison is made. Thus, the essential point is not whether or not the choice between the two "schools of thought" to which the dissenter refers can be made on the basis of the text, context and

[8] Exhibit US-12.

purpose of the *Anti-Dumping Agreement*. The point is rather that once the investigating authority has itself made that choice, it is bound by its own logic.

19. In the face of the text and the overwhelming logic of the meaning of the provisions in Article 2 of the *Anti-Dumping Agreement* which define dumping, the United States advances essentially one brief and purely textual argument – the phrase "during the investigation phase". The United States entire defence on this point is therefore premised on the assertion that this means "not during the review phase"; that the *Anti-Dumping Agreement* defines the terms investigation and review; and that these terms are mutually exclusive. Even if, for the sake of argument, the United States were correct, that would not render "zeroing" permissible in reviews - quite the contrary, it would in fact mean that the asymmetrical method of comparison that Article 2.4.2 introduces as an exception to the norm is not available in reviews. In any event, these textual assertions made by the United States are simply wrong. In textual terms, the European Communities has explained in its written observations that the matter before this Panel is essentially an investigation or assessment within the meaning of Article 9.3.1 of the *Anti-Dumping Agreement* (whatever term is used by the United States). The European Communities has also explained that the *Agreement* contains no definition of the terms "review" and "investigation"; and that in fact these terms are used in different senses in the *Agreement* – the meaning or meanings in any case being derived from the context and purpose of the provisions in question. In particular, the European Communities has explained that the text "investigation" in Article 2.4.2 of the *Agreement* must have the same general and unqualified meaning as the word "investigation" in Article 6 of the *Agreement*. The European Communities has thus demonstrated, in equally textual terms, the basic fallacy in the United States textual argument. The United States is actually asking the Panel to read into Article 2.4.2 words such as "initial" or "original" or "Article 5" – words that are simply not there in the text. Add to this the overwhelming arguments of context and purpose put forward by the European Communities – arguments that the United States has neither responded to nor matched with any context or purpose based arguments *of any kind*, and the only permissible and true interpretation of the *Agreement* becomes clear.

20. The European Communities holds the firm conviction that the reason why the United States has offered no contextual or purpose based argument in support of its (erroneous) textual assertion is that there are no such arguments to be made. Why should the overarching principle of "fair comparison" for which Article 2.4 stands actually count for nothing when it comes to finally assessing and paying anti-dumping duty? Why should a method of comparison that gives more weight to dumped transactions than to non-dumped transactions be considered "fair"? Why should the methodology for calculating dumping margins change from one moment to another? Why should the results of an original investigation be totally eclipsed and set at naught by the results of a first assessment exercise? Why should two exporters, exporting the identical product from the same country during the same period, in an identical series of transactions (in terms of amount, price and timing) be subjected to two completely different methodologies and anti-dumping duties? If model zeroing is unfair, how can simple zeroing, which produces an even worse result, be fair? Why should exporters who eliminate the margin by which they have been found to be dumping, nevertheless be subject to a dumping duty? Why should dumping be found to exist or not, and its magnitude determined, according to the arbitrary distribution of transactions over time? Why should Members using a prospective collection system be penalised compared to Members using a retrospective system? The United States offers no answers to these questions because it has none. The silence is deafening.

Thank you for your attention.

ANNEX D-6

THIRD PARTY ORAL STATEMENT OF JAPAN

(26 May 2004)

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I. INTRODUCTION

1. Mr. Chairman and distinguished Members of the panel, on behalf of the Government of Japan, I thank you for your attention to this important matter. This morning, we will not repeat our arguments in our written submission. Rather, we would like to focus on certain arguments presented by parties that we did not address in detail in our written submission.

II. ARGUMENTS

A. THE THREE SCENARIOS IN THE *SUNSET POLICY BULLETIN* ARE INCONSISTENT WITH ARTICLE 11.3 OF THE AD AGREEMENT AS SUCH

2. The United States insists that the Appellate Body in *US – Corrosion-Resistant-Carbon Steel Frat Products from Japan Sunset Review* case[1] found in favour of the DOC's affirmative likelihood finding, which was based solely on dumping margins and depressed import volumes.[2] We disagree.

3. The United States appears to have misunderstood the Appellate Body's statements. As the United States should be fully aware, Japan narrowed its as-applied claims regarding the DOC's likelihood determination in the CRS sunset review case, focusing on other issues, such as the zeroing and the as-such claim of *Sunset Policy Bulletin*, in its appeal. With respect to the as-applied claims, Japan asked the Appellate Body to review whether DOC's reliance on the automatic review mechanism provided for in *Sunset Policy Bulletin* was justified. Japan also asked the Appellate Body to review whether DOC's reliance on the dumping margins, which DOC calculated in previous administrative reviews using the zeroing method, was justified. The Appellate Body, however, was unable to rule on either of these issues because "the Panel did not examine the nature and meaning of Section II.A.3 of the *Sunset Policy Bulletin*,"[3] and because of "the lack of factual finding by the Panel regarding the methodology used by USDOC in the administrative reviews."[4] Japan did not ask the Appellate Body to review the DOC's reliance on the import volume[5], nor did Japan ask the Appellate Body to review whether DOC's reliance on dumping margins and import volumes alone would constitute sufficient evidence in the *CRS sunset review* case.[6] Absent of these factual findings by the panel, the Appellate Body had no choice to disturb the DOC's conclusion that dumping margins and import volume "pointed in the same direction, that is, toward likely future dumping."[7] Therefore, the Appellate Body has never stated that dumping margins and import volumes alone constitute a sufficient basis to determine the likelihood of dumping in sunset review.

4. The United States also argues that the *Sunset Policy Bulletin* is not a "measure," which is actionable under the WTO dispute settlement proceedings, because it is not "an instrument with a functional life of its own" and not "mandatory."[8] This argument has been rejected by the Appellate Body in *US – CRS Sunset Review* case.

5. The Appellate Body in *US – CRS Sunset Review* case expressly stated, "allowing measures to be the subject of dispute settlement proceedings, whether or not they are of a mandatory character, is

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

[2] First Submission of the United States, para. 104.

[3] *See* Appellate Body Report, *US – CRS Sunset Review*, para. 184.

[4] *See id*., para 138. *See also id*., paras. 203, and 253.

[5] *See id*., para. 203.

[6] See *id*., paras. 192-198.

[7] *Id*., para. 205.

[8] First Submission of the United States, paras. 110-114.

consistent with the comprehensive nature of the right of Members to resort to dispute settlement."[9] In fact, the Appellate Body in *US – CRS Sunset Review* case and other cases has not required a measure to be "an instrument with a functional life of its own." The issue of mandatory "is relevant, if at all, only as part of the panel's assessment of whether the measure is, as such, inconsistent with particular obligations."[10]

6. The only question that this Panel has to consider, therefore, is whether the *Sunset Policy Bulletin* is inconsistent with Article 11.3 of the AD Agreement as such. The Appellate Body in *US – CRS Sunset Review* case pointed out that the following factors would be relevant in examining whether the *Sunset Policy Bulletin* is inconsistent with Article 11.3 as such: the nature and meaning and consistent application of Section II.A.3 of the *Sunset Policy Bulletin* and the nature and meaning of the "good cause" standard in Section II.C.[11] Japan believes that Mexico has established that the *Sunset Policy Bulletin* is inconsistent with Article 11.3.

7. In sum, the Panel should reject the argument made by the United States.

B. THE ITC'S DETERMINATION OF LIKELIHOOD OF CONTINUATION OR RECURRENCE OF INJURY WOULD BE INCONSISTENT WITH ARTICLES 3.1, 3.4, 3.5 AND 11.3 OF THE AD AGREEMENT

8. The US arguments on the applicability of Article 3 of the AD Agreement to sunset reviews are not based on the interpretation of the ordinary meaning of footnote 9 of the AD Agreement, and thus must be rejected. As discussed in our submission, the first phrase of footnote 9 "[u]nder this Agreement" clarifies that the term "injury" throughout the whole AD Agreement, including the term in Article 11.3 shall be understood in accordance with footnote 9.

9. The phrase in the footnote – "shall be interpreted in accordance with the provisions of this Article"[12] – further clarifies the application of the substantive rules of Article 3 to Article 11.3. The phrase "likely to lead to continuation or recurrence" in Article 11.3 does not change the core concept of "injury." To find a "recurrence" of injury, for example, the authorities must find that injury, which does not exist through the effects of dumping at the time of the review, will recur at a point in the future. These analyses do not affect the substantive requirement that the authorities must find injury based on positive evidence and on objective examination of the effect of dumped imports on prices and of the volume of dumped imports. In the same vein, the requirement for evaluating economic factors listed in Article 3.4 as well as the causation and non-attribution requirements under Article 3.5 must be satisfied under the sunset review proceedings.

10. The United States argues that likelihood of injury as defined in Article 11.3 requires "decidedly different analysis"[13] from that for the injury analysis in the original investigation. Contrary to the US argument, Article 3 contemplates prospective analysis even in original investigations. Footnote 9 and the provisions of Article 3 clarify that all the provisions of Article 3 apply to the determination of the threat of material injury. Article 3.7 then requires that the authorities examine a situation at a point in the future, at which the effects of dumping will cause material injury to the domestic industry. In a threat case, therefore, the examination of economic factors and causations under Articles 3.4 and 3.5 also must be made at the point in the future. The analysis of "injury" in sunset reviews is analogous to the analysis required in Article 3 for the threat of material injury. As such, Article 3 contemplates the prospective injury analysis, as Article 11.3 requires. The US argument thus has no merits.

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[9] Appellate Body Report, *US – CRS Sunset Review*, para. 89.
[10] *Id*.
[11] *Id*., paras. 169, 184 and 189.
[12] Footnote 9 of the AD Agreement. (emphasis added).
[13] The US First Submission, para. 301.

11. In this case, the ITC appears to have failed to evaluate individual factors as listed in Article 3.4. The ITC also appears to have failed to separate and distinguish the effects of factors other than the dumped imports, which the ITC knew at the time of the sunset review, from effects of dumping. The ITC's injury determination in the sunset review, therefore, appears to be inconsistent with Articles 3.4 and 3.5.

C. THE DOC'S DETERMINATION BASED ON THE DUMPING MARGINS CALCULATED WITH ZEROING METHODOLOGY

12. The United States argues that the Appellate Body reports in *EC-Bed Linen*[14] and in *US – CRS Sunset Review* case are not relevant to this case. The United States alleges that the finding in *EC – Bed Linen* case was limited to the investigation phase and that it examined a calculation methodology distinct from that in this case.[15] The United States also asserts that the Appellate Body found that it was unable to confirm the inconsistency of the zeroing method with the AD Agreement.[16] We disagree.

13. The Appellate Body in *Japan-Taxes on Alcoholic Beverages*[17] stated that panel reports constitute legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.[18]

14. As discussed in our submission, the Appellate Body in *EC-Bed Linen* case clarified that zeroing is inconsistent with Article 2.4 and 2.4.2 because "the *Anti-Dumping Agreement* concerns the dumping of a *product*,"[19] and because "[w]hatever the method used to calculate the margins of dumping, in our view, these margins must be, and can only be, established for the *product* under investigation as a whole".[20] It further clarified "[t]he comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions – such as the practice of 'zeroing' at issue in this dispute – is *not* a 'fair comparison' between export price and normal value, as required by Article 2.4 and by Article 2.4.2".[21] In these aspects, there is no difference between the calculation methods used in *EC-Bed Linen* and the calculation methods in this case as discussed in our submission.

15. The Appellate Body in *US – CRS Sunset Review* case has clarified that the differences of the types of AD proceedings are irrelevant to the zeroing issue. In particular, the Appellate Body has explicitly stated with respect to the sunset review, "should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4"[22], and "[i]f these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the *Anti-Dumping Agreement*."[23] The Appellate Body has further stated, "the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping."[24]

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[14] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* ("*EC – Bed Linen*"), WT/DS141/AB/R (adopted 12 March 2001).

[15] First Submission of the United States, para. 212.

[16] *Id.*, para. 213.

[17] Appellate Body Report, *Japan-Taxes on Alcoholic Beverages*, WT/DS8, 10, 11/AB/R (adopted 1 November 1996) .

[18] *Id*., page 14.

[19] Appellate Body Report, *EC – Bed Linen*, para. 51.

[20] *Id*., para. 53.

[21] *Id*.

[22] Appellate Body Report, *US – CRS Sunset Review*, para. 127.

[23] *Id*.

[24] *Id*., para. 135.

16. Therefore, contrary to the argument by the United States, the rulings and findings in both *EC-Bed Linen* case and *US – CRS Sunset Review* case are fully relevant to this case. Thus, they constitute "legitimate expectation" among WTO Members. This Panel, therefore, should follow the findings in *EC-Bed Linen* case and *US – CRS Sunset Review* case.

17. The United States also argues that the Appellate Body in *US – CRS Sunset Review* case made no finding and undertook no serious legal analysis on the issue of zeroing.[25] This is incorrect. The Appellate Body in *US – CRS Sunset Review* case could not conclude that the calculation method adopted by the United States is inconsistent with Article 2.4 only because of the lack of factual finding by the Panel.[26] As discussed, the Appellate Body clearly found that the determination in sunset reviews based upon dumping margins calculated with zeroing methodology is inconsistent with Article 2.4.[27]

III. CONCLUSION

18. For the foregoing reasons, Japan respectfully requests the Panel to find that the United States acted inconsistently with Articles 2.4, 3.1, 3.4, 3.5, 11.2 and 11.3 of the AD Agreement.

[25] First Submission of the United States, para. 212.
[26] *See* Appellate Body Report, *US – CRS Sunset Review*, para. 138.
[27] *See id*., para. 127.

ANNEX D-7

OPENING ORAL STATEMENT OF MEXICO – SECOND MEETING

(17 August 2004)

I. INTRODUCTION

1. Article 11 contains specific obligations related to the termination of anti-dumping duties. If a Member wants to continue a measure beyond the five-year period prescribed in Article 11.3, or to continue a measure after a review requested by an interested party pursuant to Article 11.2, the Member must satisfy the obligations of Article 11.[1] The determinations of the Department of Commerce ("the Department") and the International Trade Commission ("Commission") in this case fail to satisfy these obligations, as the decisions were based on presumptions and the use of legal standards that violate Article 11. Because the US authorities did not satisfy the requirements for continuing the measure, the measure must be immediately terminated.

2. Mexico notes its disagreement with the US statements regarding the burden of proof. Mexico has presented a *prima facie* case and the United States has invoked what the Appellate Body has reaffirmed to be the limited exception of Article 11.3 to extend the measure beyond the temporal limitation contained therein.

II. THE DEPARTMENT'S SUNSET DETERMINATION

A. WTO-INCONSISTENT PRESUMPTION OF LIKELY DUMPING

3. The US statute (19 U.S.C. § 1675a(c)(1)), the US Statement of Administrative Action ("SAA") (pages 889-890), and the Sunset Policy Bulletin ("SPB") (Section II.A.3), operating independently and together, establish a presumption that dumping would be likely to continue or recur.[2] This presumption is inconsistent with Article 11.3.

4. The US has failed to rebut the following facts: First, the Department has never issued a determination in any full or expedited sunset review that dumping would not be likely; out of 232 full and expedited sunset reviews, the DOC rendered 232 likely dumping determinations. Second, MEX-62 and MEX-65 confirm that the Statute, the SAA, and the SPB establish a WTO-Inconsistent presumption of likely dumping in every case by requiring the Department to give decisive weight to historical dumping margins or declines in import volume. Third, the "good cause" provision impermissibly reverses the burden and has never resulted in a not likely determination.

5. Mexico has highlighted and documented the Department's consistent practice for three different reasons. First, the Department's consistent practice provides evidence of the meaning of the statute, the SAA, and the SPB. Second, the Department's consistent practice itself is a measure that violates Article 11.3. And third, the Department's consistent practice demonstrates that the

[1] *See* Appellate Body Report, Sunset Review of Steel from Japan, para. 113.
[2] See Mexico's First Submission, paras. 87-109; Mexico's Second Submission, paras. 8-47.

United States has not administered its law in a reasonable and impartial manner, as required by GATT Article X:3(a).

B. THE DEPARTMENT'S LIKELIHOOD DETERMINATION

6. In its Second Submission, the US did not even attempt to rebut Mexico's "as applied" claims regarding the Department's determination of likely dumping in this case. The positive evidence submitted by the Mexican respondents showed that the margin of dumping from the original investigation was not in any way indicative of the likelihood of dumping. Also before the Department were the no dumping determinations (zero margins) of the recently conducted administrative review – probative that dumping would not be likely. [3]

7. The Department cited reduced import volume, ignored the positive evidence submitted by the Mexican respondents, and then relied on the only remaining information before the Department (the original dumping margin and the decline in volume) as the basis for the likely dumping determination. The Department did not conduct a case-specific analysis to determine the basis for the decline, as the Appellate Body indicated was necessary. The Department then exaggerated its error by inferring that the volume decrease must mean that the Mexican exporters could not compete in the US market without dumping, and then extending the inference further to mean that the Mexican exporters would be likely to dump upon revocation. The Department also violated Article 11.3 by relying on the original margin in determining whether revocation of the duty would be likely to lead to continuation or recurrence of dumping.

III. THE COMMISSION'S SUNSET DETERMINATION

A. FAILURE TO APPLY A "LIKELY" STANDARD AND MISINTERPRETATION OF "INJURY"

8. The US arguments regarding the injury determination are firmly anchored to the flawed misinterpretations of "likely" and "injury" in Article 11.3. The failure to apply a "likely" standard and to interpret "injury" correctly affected everything that the Commission did in its review. Having misinterpreted what it needed to find, it failed to properly establish and objectively evaluate facts that constituted positive evidence of likely injury.

9. It is beyond doubt that "likely" means "probable;" the Appellate Body has said so. 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. The Commission's admission that it did not apply a probable standard is conclusive of the issue. If the authority is applying the wrong standard, then, by definition, it cannot properly establish the facts necessary to support the correct standard, and it cannot objectively examine the facts to reach the correct standard. Exhibit MEX-68 provides examples of the Commission failures to comply with the standards for Article 11.3 reviews. In numerous instances, the Commission relied on assumptions and unsupported inferences. In other relevant parts of the determination, the Commission based its conclusions on findings made during the original investigation as decisive, or even the "tie-breaker." Findings from pre-WTO investigations are not consistent with any post-WTO Anti-Dumping Agreement provision because by definition they cannot be the result of the Anti-Dumping Agreement, as required by Article 18.3.

10. The United States contends that "injury" in Article 11.3 is "conceptually different" than "injury" in Article 3.[4] The argument is remarkable from a textual point of view, and is inconsistent with the approach taken by the Appellate Body.[5] The Appellate Body did not find that the phrase

[3] *See, e.g.*, MEX-64 (Evidence Chart from Mexico's First Oral Statement).
[4] US Answers to Questions from the Panel, para. 26; US First Submission, paras. 259-263.
[5] Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 108-109 (emphasis removed).

"continuation or recurrence of" changes the meaning of "dumping." This Panel cannot find that this same phrase changes the meaning of "injury." "Injury" in Article 11.3 is "injury" that is defined in, and subject to, footnote 9 of the Anti-Dumping Agreement.

B. US STATUTORY REQUIREMENTS GOVERNING THE TIME FRAME FOR LIKELY INJURY

11. The United States argues that Article 11.3 does not specify the time frame relevant to a sunset inquiry, and thus, the relevant time period is within each Member's discretion.[6] An undefined time frame is not consistent with the "likely" standard of Article 11.3. Without a time frame, how can one determine if the time frame used in a review was "reasonable"? Without a time frame, how can one know when the injury will be likely to occur? Without a time frame how can one know if cumulated imports are likely to be simultaneously present in the market?

C. THE COMMISSION'S CUMULATIVE INJURY ANALYSIS

12. The United States misconstrues Mexico's primary cumulation argument. Mexico does not argue that Article 11.3 is silent with respect to cumulation. Mexico asserts that Article 11.3 – both pursuant to its terms ("duty" in the singular) and as interpreted in its context – expressly prohibits cumulation. Article 3.3 also demonstrates that cumulation is limited to investigations.

13. Assuming *arguendo* that Articles 11.3 and 3.3 do not preclude cumulation in Article 11.3 reviews, then following the Appellate Body's logic, the Panel should find that the United States failed to respect the substantive standards for cumulation in this case. When an authority decides to rely on findings related to cumulation from the original investigation, the authority must ensure that the findings are consistent with Article 3.[7] Irrespective of whether or not Article 3 directly or indirectly applies to sunset reviews, a basic condition to cumulate imports in assessing injury is that the imports from the cumulated countries must be simultaneously present in the US market. The Commission's determination shows that the Commission analysis failed in this respect.

IV. THE DEPARTMENT'S DETERMINATION NOT TO REVOKE

A. THE ARTICLE 11.2 OBLIGATION IS NOT LIMITED TO TERMINATION OF AN ANTI-DUMPING DUTY ON AN ORDER-WIDE BASIS

14. MEX-66 demonstrates that the United States has never revoked an anti-dumping duty under Section 351.222(g) based on a substantive analysis of whether the continued imposition of the duty was necessary to offset dumping. Section 351.222(g) is chiefly a mechanism for revocation where the US industry is no longer interested in the continuation of the anti-dumping order.

15. The United States' implementation of the adverse ruling of the Panel in *DRAMS from Korea* should eliminate any lingering doubt as to whether Article 11.2 creates company-specific obligations. The United States explained to its trading partners that the United States had "implemented the recommendations and rulings of the DSB" to bring its measures into conformity with its Article 11.2 obligations.

[6] US First Submission, paras. 330-331.
[7] Cf. Appellate Body Report, *Sunset Review of Steel from Japan*, para. 127.

B. THE DEPARTMENT'S DETERMINATION NOT TO REVOKE IN THIS CASE

16. The Department violated Article 11.2 because the Department did not terminate the anti-dumping duty on OCTG from Mexico immediately upon the demonstration that the continued imposition of the duty was not necessary to offset dumping. In the case of Hylsa, the Department claimed that revocation was not appropriate because Hylsa was found to have a dumping margin of 0.79 per cent in the fourth review. But that margin was calculated using the practice of "zeroing." The decisions by the Appellate Body in *EC Bed Linen*, *Japan Sunset* and, most recently, *Softwood Lumber* establish beyond dispute that the practice of zeroing is not consistent with the requirement of Article 2.4 or with the requirement of Article 2.4.2. With respect to TAMSA, the Department's determination not to revoke violated Article 11.2 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; and (iii) ignored positive evidence that demonstrated that the volume was reasonable in the context of the historically-low market conditions for oil and OCTG, and the positive evidence that the measure was no longer necessary to offset dumping. The Department also violated GATTT Article X:2.

V. CONCLUSION

17. Because strict compliance with the requirements of 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 these rules requires a finding that the US impermissibly extended the anti-dumping measure in this case beyond 5 years, and therefore must immediately terminate the measure.

ANNEX D - 8

CLOSING ORAL STATEMENT OF MEXICO – SECOND MEETING

(18 August 2004)

1. Mexico would like to begin by addressing the issue discussed at the end of yesterday's session. Mexico believes that a possible appeal of *OCTG from Argentina* (DS 268) should not affect this proceeding. Mexico did not present written arguments in that case, was not a complaining or disputing party, and the Panel's ruling in that case cannot diminish Mexico's rights. Mexico has presented a prima facie case on all its claims, and the United States has responded to those claims. The Panel should make findings on all of the claims presented.

2. Also, while there is some overlap of issues and measures, there are also important differences. For example, *OCTG from Argentina* did not involve any claims related to the obligations of Article 11.2. With respect to the injury determination, the Panel in *OCTG from Argentina* interpreted Argentina not to be challenging the likely standard, whereas Mexico has made specific arguments related to the application of the likely standard, and how this standard affected the Commission's determination. Also, the Panel in *OCTG from Argentina* used "judicial economy" to avoid addressing many of the claims made by Argentina, whereas Mexico has specifically asked this Panel to make findings on all claims presented. For these reasons, Mexico respectfully requests that in case of a possible appeal in OCTG from Argentina, this case should not be delayed, and that Mexico's case be analyzed on its own merits and in accordance with the procedures contained in the DSU.

3. Turning now to the substance of the issues, the United States returned to a familiar theme yesterday. According to the US, Mexico is "grafting onto" Article 11.3 detailed substantive requirements that are not there, and in the process is creating obligation for the United States that do no exist. (paragraphs 15, 30, 31, 34, 41, 44). But, Mexico is doing no such thing. Instead, Mexico's claims are based firmly on the words that the WTO Members incorporated into the text of Article 11.3 and in the Anti-Dumping Agreement. The difference in our positions is that Mexico believes that the words are meaningful and create substantive obligations, while the US looks at these words and sees no substantive obligations.

4. That US position makes sense only if you accept that the United States never meant to be bound by the text of Articles 11.1, 11.2 and 11.3. The United States wants the Panel to rule that it is permissible to keep anti-dumping duties in place forever, as the US did before the WTO Anti-Dumping Agreement, as long as the US goes through the motions of reviewing the measures every five years, and revoking orders whenever the US industry supports their removal. That notion cannot be reconciled with the affirmative obligations in Articles 11.1, 11.2 and 11.3 to terminate anti-dumping duties immediately once they are no longer warranted.

5. The words in Article 11 do impose substantive obligations. Let me briefly mention these in light of some of the statements made by the United States yesterday:

6. "Likely": The word "likely" is central to Mexico's claims arising from the sunset reviews by both the Department and Commission. On the Department side, the US showed in paragraph 11 of its comments yesterday that it is very comfortable telling the Panel that it relied only on an inference that

lower volumes meant that dumping was "likely." To the US, that is enough, and the word "likely" requires nothing more. Mexico is confident that this is not consistent with the substantive obligation to terminate the measure unless the authority develops and objectively examines positive evidence that dumping is "likely." Likely means probable, and relying solely on presumptions and an inference drawn from lower volumes does not establish what is probable. This is especially true in a case such as this where the exporters have provided positive evidence demonstrating that dumping is not probable. The Mexican exporters provided positive evidence that the only dumping margin calculated in the case – 21.7 per cent - could not be repeated short of some miracle, yet the Department considered that dumping would be "likely" to recur, and that 21.7 per cent would be the "likely" margin to prevail.

7. On the Commission side, the US tries to downplay the importance of the Commission's admission that it did not apply a "probable" standard in this same sunset determination, and that the SAA precluded it from applying such a standard. We heard yesterday that this admission is not relevant because it occurred at the "beginning of the dialogue" with the US courts related to the Commission's likely standard. It is important for the Panel to recognize that the entire "dialogue" alluded to by the United States related to a single question: did the Commission correctly interpret the word "likely." In the rest of the "dialogue," the court told the Commission that "likely" does, in fact, mean "probable," and it required the Commission to re-do its decisions in the cases under review. The US cannot refute this. At the WTO, the only question for the Panel is whether the Commission applied a likely standard, and the Commission's admission answers the question. If the Panel concludes that the Commission did not give "likely" its ordinary meaning of "probable," then the United States violated its Article 11.3 obligations because it improperly continued the measure beyond 5 years.

8. "Injury": First, Mexico would like to emphasize that it has presented claims related exclusively to Article 11.3 that are not dependent upon the application of other articles of the Anti-Dumping Agreement. In addition, the US did not mention yesterday its earlier position that "continuation or recurrence of injury" is different than "injury" defined in footnote 9, or that Article 11.3 is a specific exception to the definition of injury in footnote 9. In paragraph 42, the US takes the position that the "case does not turn on whether the term 'injury' referred to in Article 11 has the same meaning as the term referenced in footnote 9." For Mexico, if "injury" in Article 11.3 is "injury" in footnote 9, then it "shall be interpreted in accordance with" Article 3. So, the proper interpretation of the word "injury" in Article 11.3 is important to this case precisely because the WTO Members agreed that "injury" had to be interpreted in a very specific manner; that is, "in accordance with" Article 3. While Mexico has given several examples of how the Commission's decision is not made in accordance with Article 3, perhaps the most striking example is the US assertion in paragraph 36 of its oral statement that there is no requirement of a causal link between the likely dumping and likely injury. This is unprecedented in the history of anti-dumping regulation, and is contrary to the basic requirements of Article VI of GATT1994 and the WTO Anti-Dumping Agreement. Also, the US has never rebutted Mexico's arguments with simultaneity, which is essential to any decision to cumulate imports.

9. Mexico has explained in its various submissions that the proper interpretation of the words "likely" and "injury" necessarily affect the Commission's determination. Without a proper interpretation of these words, the Commission does not know what it is looking for, and it can hardly be expected to establish the facts properly, evaluate the facts objectively, and base the determination on positive evidence of "likely" "injury." Mexico summarized some of this evidence in MEX-68, which accompanied yesterday's oral statement.

10. Mexico is surprised by the US objection to Exhibit MEX-68. As Mexico has explained, there is no new evidence in MEX-68. Rather the exhibit is simply a compilation of evidence and arguments already before the Panel. MEX-68 is comprised of three columns. The first quotes findings in the Commission's Sunset Determination (MEX-20) that are already in the record, the second column

summarizes the flaws with the Commission's analysis as have already been argued by Mexico, and the third column identifies where in its first and second written submissions Mexico made these arguments. No element of the Exhibit is new, and it is hard to understand how the US could seriously take the position that the Exhibit as a whole cannot be offered by Mexico to complement its oral statement.

11. "Dumping": The United States offers two arguments in paragraph 31 regarding its notion of dumping: (1) that the Anti-Dumping Agreement does not contain any obligations as to how to determine an overall rate of dumping, and (2) that there is no requirement to calculate an overall rate of dumping in a review. Whatever the broader implications of these questions, there can be no doubt that the Department calculated a margin in its fourth review of Hylsa, the dumping finding was based on prohibited "zeroing," and the resulting dumping finding was used by the Department as the justification to continue the anti-dumping measure despite its Article 11.2 obligations. On the issue of "zeroing" — which the United States now refers to as "Offset" —the Appellate Body's recent decision in *Softwood Lumber* is dispositive. The Anti-Dumping Agreement requires the calculation of a single overall dumping margin for the product under investigation, even if the dumping comparisons are made at the level of sub-categories. In *Japanese Steel Sunset*, the Appellate Body held that authorities are not required to calculate dumping margins in Article 11.3 reviews, but if they choose to do so, their calculations must comply with the requirements of Article 2. The logic of these decisions is compelling, and applies with equal force to the Article 11.2 review under consideration in this case. The failure of the United States even to acknowledge these decisions is disappointing, to say the least.

12. "Necessary": The panel in *DRAMS from Korea* held that the "need for the continued imposition of the duty must be demonstrable on the basis of [positive] evidence ... " (para. 6.42). In its oral statement yesterday, the US continued its strategy of avoiding references to the case, which says a lot about the US position. As we have explained previously, the United States admitted at that time that it was modifying its regulations for company-specific revocation in order to bring its procedures into compliance with the obligations of Article 11.2. The United States has not attempted to square its statements in *Korean DRAMs* with its current position for the obvious reason that they are not reconcilable.

13. The statements that the US did make yesterday about its Article 11.2 obligation are not credible in light of the Department's practice. Despite its explanation that it primarily implements its Article 11.2 obligation through the "changed circumstances" provision of its regulations (Section 351.222(g)), the simple fact is that the United States has never used the 351.222(g) procedure in that manner. The provision does not even mention the substantive standard. Yesterday, the US told the Panel that it should not be concerned with whether phrase containing the substantive standard of Article 11.2 "was explicity invoked." (paragraph 18). Mexico disagrees. The absence of the substantive standard casts substantial doubt on the US explanation that this provision is the implementation of the Article 11.2 obligation. Combined with the US statements to the WTO in *Korean DRAMs*, and the practice highlighted in MEX-66, the US position is untenable.

14. In summary, Mexico asks that the Panel consider the arguments made by the parties, without losing sight of the systemic implications of the case.. TAMSA and Hylsa, the exporters, provided positive evidence demonstrating that the anti-dumping order should have been terminated after the fourth administrative review and again after the sunset review. For the last three and a half years, they have been subjected to anti-dumping duties that are not permitted by the Anti-Dumping Agreement.

16. Mexico has requested that this proceeding result in the immediate termination of the anti-dumping measure applicable to OCTG. This request is based on the impossibility of retroactively complying with the prescribed time limit in Article 11.3. As the Appellate Body has established, Article 11.3 imposes temporal limitations which, if not met, require the removal of the anti-dumping measure. Mexico has made this request based on the time-bound nature of the obligation since its

first submission, and the United States has not offered any rebuttal yet. Mexico asks, as a matter of law, that the Panel affirm that the only manner in which the US can bring its measure into conformity with the Agreement is through the immediate termination of the anti-dumping order. Mexico looks forward to the opportunity to respond to any questions that the Panel may have regarding this request.

ANNEX D-9

OPENING ORAL STATEMENT OF THE UNITED STATES – SECOND MEETING

(27 August 2004)

Mr. Chairman, members of the Panel:

1. I would like to thank you for this opportunity to further clarify certain issues raised by Mexico's second submission. We will focus on issues raised by Mexico's second submission.

ISSUES REGARDING SUNSET REVIEW

2. Mexico's claims focus on the obligations in Article 11.3 of the AD Agreement. Mexico's second submission presents nothing new, and Mexico fails to establish a *prima facie* case.

3. Citing the Appellate Body report in *Japan Sunset,* Mexico argues that the *Sunset Policy Bulletin* is a "measure." The Appellate Body in *Japan Sunset* did not find that the *Sunset Policy Bulletin* is a "measure." Instead, the Appellate Body simply reversed the panel's finding that the *Sunset Policy Bulletin* was not a measure because the panel's analysis was flawed.

4. Mexico incorrectly claims that the Appellate Body "evaluated" whether "'the type of instrument itself, be it a law, regulation, *procedure, practice,* or something else'" could be subject to dispute settlement. Mexico misquotes the Appellate Body, which made no such statement but instead asked whether the type of instrument should determine whether it is subject to dispute settlement. Moreover, Mexico claims that the United States has failed to address Mexico's comments in this regard. However, the United States has addressed Mexico's claim in both our first written submission at paragraph 114 and in our second submission in footnote 21. Mexico has provided neither evidence nor argument to establish its claim regarding the legal significance of the *Sunset Policy Bulletin* in the context of the US legal regime.

5. While the Appellate Body did state that "legal instruments" could be challenged as measures, Mexico has not demonstrated that the *Sunset Policy Bulletin* is a "legal instrument." The *Sunset Policy Bulletin* is not a law or a regulation, and it does not have the status of a law or regulation under the US legal regime. Mexico's response has been to state that the Panel is not required to take as "'fact' any Member's explanation" regarding the meaning of its own law. However, Mexico has not established that the US explanation of the meaning of the *Sunset Policy Bulletin* in the context of its municipal law is incorrect.

6. Mexico also claims that, notwithstanding the failure of respondent interested parties to respond to the notice of initiation in 173 sunset reviews, Commerce has failed in its "duty to seek out information." In failing to respond, respondents also fail to rebut the positive evidence placed on the record by the domestic interested parties.

7. Mexico argues that the "good cause" provision in US law restricts the evidence Commerce may consider in a sunset review. The "good cause" provision, however, is nothing more than a

requirement for the submitting party to provide a legally sufficient reason for the information to be considered in the sunset review. In practice, very few interested parties have submitted or attempted to submit "other factors" information in sunset reviews.

8. In support of this claim, Mexico has mischaracterized both *Canada-Sugar* and *Brass Sheet & Strip-Netherlands*. Mexico's grievance is not with the application of the "good cause" and "other factors" provisions in those reviews, but with Commerce's analysis of the information in those reviews.

9. With regard to the sunset review of OCTG from Mexico, Mexico claims both that Commerce impermissibly relied upon the margin of dumping calculated in the original investigation in making the affirmative dumping determination, and that Commerce impermissibly relied on depressed import volumes because import volume data alone cannot support an affirmative dumping determination.

10. In addition, Mexico alleges that Commerce referred to Hylsa's 0.79 per cent margin of dumping in the fourth administrative review to support the affirmative likelihood determination in the sunset review. This is incorrect.

ISSUES CONCERNING THE FOURTH ADMINISTRATIVE REVIEW

Article 11.2 Does Not Impose Company-Specific Termination Obligations

11. The text of Article 11.2 does not impose company-specific termination obligations, but refers to the termination of "the duty" as a whole.

12. Mexico argues that because Article 11.2 permits "any interested party" to request termination of "the duty," it also compels investigating authorities to conduct termination reviews at the company-specific level. This goes beyond the obligations agreed to in the text of the Agreement. Mexico also relies upon section 351.222(e) for its assertion that an individual company can only request revocation for itself. However, section 351.222(e) simply means that when an individual exporter requests revocation for itself (either as part of a request for revocation as a whole or in part), that exporter must submit the information in that section.

13. Mexico further claims that, because Article 11.2 permits a request by any interested party and Article 11.3 provides for a request only by a domestic industry, this means that the scope of the termination review must be different under Article 11.2. There is, however, no need for a provision in Article 11.3 for an individual respondent to request a termination review because that Article provides that, absent such a review, the duty shall be terminated.

14. Second, Article 11.2 refers not just to respondents, but to "any interested party." The United States wishes to make clear, however, that respondent interested parties, as well as domestic interested parties, have requested and received order-wide revocation reviews.

15. Mexico claims that section 351.222(g) reviews do not fulfil Article 11.2 obligations because that provision does not contain the language "determine whether the continued imposition of the duty is necessary to offset dumping." The issue, however, is not whether that phrase was explicitly invoked, but whether the relevant obligation has been met. Based on section 351.222(g) reviews, Commerce has terminated numerous measures which no longer remained necessary to offset dumping.

16. Mexico asserts that section 351.222(g) is not a vehicle for assessing whether the continued imposition of the duty is necessary to offset dumping because it is chiefly a mechanism for revocation where the US industry is no longer interested in the continuing the order is incorrect. This is a false dichotomy. So-called "no interest" revocations are an important means of revocation when the duty is

no longer necessary; most foreign exporters and producers prefer to seek company-specific revocation to maintain an advantage over home-country competitors.

17. The number of cases relevant to the issue before this Panel is, moreover, much smaller than that suggested by Mexico's new exhibit. Section 351.222(g) deals with various types of "changed circumstances," including requests for narrowing the scope of the products covered by the order. Termination of "the duty" when it was no longer necessary accounted for 18 of the cases, and led to revocation of the order in all but one of those cases.

Neither TAMSA nor Hylsa presented Positive Information Sufficient to Warrant an 11.2 Review

18. Mexico has not demonstrated why TAMSA's ability to make a single token sale to or through its US affiliate in each of the three review periods without dumping constitutes evidence sufficient to substantiate the need for a review of the necessity of the order. The same is true of Hylsa's token sales, which Commerce did not further evaluate because Hylsa was found to have dumped in the fourth review period.

19. The United States has previously shown why the commercial quantities requirement accords with the requirement in Article 11.2 for the interested party to substantiate that such a review is needed. Mexico has seized upon the theory that Commerce did not apply a threshold requirement at all, asserting, instead, that Commerce conducted a substantive review of the merits of the future necessity of the order. However, these claims are baseless.

Mexico's Remaining Commercial Quantities Complaints Lack Merit

20. Mexico continues to repeat unavailing arguments regarding commercial quantities – without explaining how they constitute breaches of US obligations. Mexico has also argued that if there were sufficient quantities to conduct an administrative review for purposes of calculating the final margin, then there were sufficient quantities to conduct a revocation review. However, the purpose of the administrative review under US law is to calculate the final margin for imports, regardless of the quantity involved. On the other hand, a revocation review requires an evaluation as to whether dumping is likely to continue or recur. Unless zero margins are based on sales in commercial quantities, those margins cannot "warrant" an Article 11.2 review.

21. Mexico also argues that footnote 22 of the AD Agreement implies that any zero margin is sufficient "positive evidence" to trigger obligations under Article 11.2. However, if the drafters intended an Article 11.2 review to be compelled by the existence of a zero margin, they would have so stated. Such decisions are thus at the discretion of each Member.

Mexico Has Not Met its Burden of Proof with Respect to the Revocation Issue

22. The review obligation contained in Article 11.2 is only triggered when there is a request for a review of the duty by an interested party which submits positive information substantiating the need for the review. Neither TAMSA nor Hylsa ever requested a review of "the duty" and neither submitted information sufficient to "substantiate" the need for such a review. Mexico's claim that Commerce has not demonstrated that the order did remain necessary is irrelevant and seeks to turn the burden of proof in this proceeding on its head. Mexico's claims regarding the US commercial quantities requirement also rely upon unsupportable claims of inflexible "presumptions" regarding declines in import volumes after the imposition of an order.

Mexico's Arguments Regarding "*Offset*" Are Also Inapposite

23. Mexico alleges that Hylsa's margin calculation is WTO-inconsistent based on Articles 2 and 11.2 of the AD Agreement. However, the calculation of dumping margins in an administrative review under the United States' system is performed pursuant to Article 9.3.1 of the AD Agreement and Mexico has failed to raise any claims pursuant to this provision.

24. Regarding its Article 2 claims, Mexico argues that a "fair analysis" of Hylsa's sales would have found "negative dumping margins." The analysis of each export transaction in the fourth administrative review was based on a comparison with a normal value for identical or similar home market transactions, with due allowance made for any differences affecting price comparability. Thus, a fair comparison was made. Second, Mexico has failed to establish that the AD Agreement contains any obligations as to how to determine an overall rate of dumping or even whether such an overall rate of dumping must be determined in a review.

25. Finally, Mexico not only pursues contradictory legal arguments of the interpretation of the term "investigation," but now asserts that the United States' non-application of an offset is inconsistent with two separate Article 2 provisions of the AD Agreement. Mexico's claims for an offset for non-dumped transactions should be rejected by the Panel.

ISSUES CONCERNING THE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF INJURY

Standard of Review

26. The United States agrees that the Panel should review the ITC's determination to ascertain whether that determination was based on a proper establishment of the facts based on Article 17.6(i) of the Agreement, rather than Article 3.

Inapplicability of Article 3 Requirements to an Article 11.3 Sunset Review

27. Mexico has not shown that the Commission's evaluation was anything other than objective and unbiased and based on a proper establishment of the facts.

28. While Mexico and the third parties may believe that Article 11 should specify particular criteria that must be addressed in making an Article 11.3 evaluation, it remains that the Agreement as written does not so specify.

29. Mexico's discussion of the requirements of Article 3.5 provides a good example of how Mexico is attempting to expand improperly the obligations of Members in sunset reviews. According to Mexico, Article 3.5 requires authorities to demonstrate that expiry of the duty would lead to dumped imports, and that the dumped imports are likely to cause injury. Nothing in Article 3.5 imposes these requirements, which instead are captured in Article 11.3.

30. Mexico has failed to explain how the volume and price effects analyses mandated by Articles 3.1 and 3.2 would be applied in a sunset review. Instead, Mexico states that the absence of imports would require the investigating authorities to determine why the imports are absent and whether they are likely to return to the market. These are relevant inquiries in a sunset review, but they are not required by Article 3.2.

31. Mexico's own arguments concerning the application of Articles 3.4 and 3.7 further illustrate why those Articles are not applicable to sunset reviews. As the panel in *ITC Lumber* explained, even in the context of an original threat determination, Article 3.4 serves to establish the background

against which the impact of future dumped imports must be assessed. It does not require an evaluation of what the industry would look like based on future dumped imports.

32. Mexico's emphasis on the Article 3.4 mention of the magnitude of the margin of dumping serves to illustrate that the Article does not apply to sunset reviews. Article 3.4 does not mention the magnitude of the dumping margin that is likely to prevail if an order is revoked.

33. Mexico points to the US statute as proof that it is practical to apply those requirements to sunset reviews. Just because the US statute requires consideration of some of the same elements in both original investigations and sunset reviews does not indicate that the analytical framework for the two types of determinations is the same.

34. Moreover, this case does not turn on whether the term "injury" referred to in Article 11 has the same meaning as the term referenced in footnote 9. The determination required under an Article 11.3 review differs from the determination required under an Article 3 investigation.

The "Reasonably Foreseeable Future"

35. Mexico incorrectly insists that the US statute allows an "undefined time frame" within which injury may continue or recur after expiry of the duty. The US statute restricts the period for the injury review to what is likely to occur within "the reasonably foreseeable future."

36. Nothing in the Agreement spells out any set period of time that should be examined. Mexico's reliance on Article 11.1 and on the last sentence of Article 11.3 to show otherwise is misplaced. Neither refers to the length of the future period that should be examined to ascertain whether revocation of the order is likely to lead to continuation or recurrence of injury.

The *Likely* Standard

37. Mexico raises two questions raised concerning the *likely* injury standard. First, is the standard set out in the US statute consistent with Article 11.3? Second, in the OCTG review, did the Commission apply the *likely* standard in a manner consistent with Article 11.3?

38. The answer to both of these questions is an emphatic *yes*. With respect to the first issue, the statute on its face plainly uses the exact same term – *likely* – as the term used in the Agreement. Thus, Mexico's as such claim fails. Regarding the ITC's application of the *likely* standard in the OCTG review, we have rebutted in our written submissions Mexico's claim that the ITC did not apply the standard in a WTO-consistent manner.

39. Mexico's arguments regarding the *likely* standard and the ITC's interpretation of it are semantic. It is more useful to examine the details of the ITC's analysis. Notably, the ITC, using the *likely* standard, has made negative determinations as to the likelihood of continuation or recurrence of injury, leading to the revocation of anti-dumping measures, in over one-third of the transition sunset reviews it conducted.

40. Turning to Mexico's challenges to the factual aspects of the ITC's determination, Mexico consistently fails to address the collective weight of the evidence relied on by the ITC, instead arguing that a particular fact is not itself sufficient to support a finding. The application of the standard of review to the facts in this case should lead this Panel to the same conclusion that the Argentina *OCTG* panel reached in finding that the *identical* ITC determination was based on a proper establishment of the facts.

41. For example, Mexico argues as though the ITC identified only one fact that supported its finding that foreign producers would have the incentive to increase their exports of casing and tubing

to the United States if the orders were revoked. Mexico simply fails to acknowledge the other findings showing the incentive to increase imports of casing and tubing.

42. Mexico has not demonstrated any flaw in the ITC's likely price effects or likely impact findings. With respect to likely impact, Mexico in its second submission merely repeats arguments that we have already rebutted. As to likely price effects, Mexico takes a new approach to its repetitious argument that underselling was the key to the ITC's price effects findings, arguing now that US law requires the ITC to consider likely underselling. US law requires the ITC to consider likely underselling, but not to rely on it.

ANNEX D-10

CLOSING ORAL STATEMENT OF THE UNITED STATES – SECOND MEETING

(27 August 2004)

Mr. Chairman, members of the Panel:

1. We will confine ourselves now to commenting on the few issues that remain outstanding, including new issues raised by Mexico in its second opening statement yesterday.

Volume Requirements

2. We want to address the issue of whether the commercial quantities threshold for revocation reviews should be defined. It is important to recall the context in which the commercial quantities requirement is applicable: Companies have established zero dumping margins and thus request a review seeking revocation of the order. Absent a commercial quantities requirement, companies could simply obtain review by making one token sale to the United States each year in order to establish zero margins, after which they could then resume dumping. The requirement is thus necessary in order to establish whether the zero margins that were achieved can provide a realistic picture of the likely future behavior of the exporters.

3. No number is set up to be a bright-line threshold for determining whether companies meet the requirement, nor does Article 11.2 require the United States to establish this threshold in its order-wide reviews. Furthermore, such a threshold would not benefit respondents. Respondents are currently able to argue that they have satisfied the requirement even when they have shipped a low percentage of pre-order exports. A fixed threshold would deprive respondents of that opportunity. Moreover, Mexico has not demonstrated that the United States uses the requirement to deny revocation reviews where warranted. Instead, the United States has demonstrated that relatively low post-order import volumes can satisfy the requirement.

4. Creating a bright-line threshold for commercial quantities would have no basis in the text of Article 11.2. Moreover, in the present dispute, TAMSA's volumes dropped to 0.2 per cent of pre-order levels. Assuming *arguendo* that Article 11.2 applies to the review in question, this is not a close call.

5. The same logic applies to the sunset review analysis, which requires a Member to draw informed conclusions about what might happen in the future. If import volumes have dropped significantly, then it is reasonable to question whether it is the existence of the order – and not reformed behavior of the respondents – that led to the decrease in imports. The Anti-Dumping Agreement affords Members great discretion with respect to the details of conducting Article 11.2 and Article 11.3 reviews, both of which require counterfactual determinations about which petitioners and respondents will always be able to disagree.

The Statistics in Argentina OCTG and this Dispute

6. Mexico proffers a new and erroneous argument regarding the statistics it submitted in support of its claim that the *Sunset Policy Bulletin* is a measure. Mexico states that the United States has departed from its position in the Argentina OCTG dispute and that the United States did not challenge the statistics in that dispute but does so now by providing "alternative statistics." Mexico is wrong on all counts. First, the United States challenged the relevance of the statistics in Argentina OCTG, as it has here. Second, the United States has not offered "alternative statistics" but has analyzed Mexico's statistics and revealed their lack of probative value. The United States has not "departed" from its position in Argentina OCTG.

The Argentina OCTG Panel's Evaluation of the Likely Standard

7. Mexico incorrectly states that the Argentina OCTG panel failed to evaluate whether the Commission applied the right standard. The Argentina panel in fact did evaluate whether the ITC met the likelihood standard of Article 11.3 and concluded that it did.

Other Issues Relating to Injury

8. Mexico states that a likely injury determination without a dumping margin is inconsistent with Article 11.3. Yet the Appellate Body has already concluded that Article 11.3 does not require a Member to calculate a margin. Mexico quotes from *German Steel* to imply that in a countervailing duty case, the level of subsidization is determinative for purposes of determining injury. Mexico ignores the Appellate Body's primary conclusion: Injury is not defined in the SCM Agreement in relation to any specific level of subsidization. Likewise, injury in the Anti-Dumping Agreement is not defined in relation to any specific magnitude of dumping.

9. Mexico's arguments relating to the cumulation analysis are not persuasive. Mexico implies that the ITC did not properly evaluate whether subject imports are likely to compete with each other and with the domestic like product. However, Mexico fails to note that the US statute at issue provides for such an evaluation in sunset reviews and that, in this review, the ITC did thoroughly evaluate the competition issue. Mexico also argues that if imports are not in the market together, there is no justification for cumulation, ignoring the fact that there were imports in the market together, albeit at lower levels than those prior to the entry of the order.

10. In addition, in paragraph 34 of its opening statement yesterday, Mexico attempts to discredit the ITC's likely injury determination, which took into consideration findings in the original investigation, by arguing that Article 18.3 provides that pre-WTO findings are not consistent with the Anti-Dumping Agreement. However, Article 18.3 simply says that the Anti-Dumping Agreement applies to investigations and review of existing measures initiated after the entry into force of the Agreement.

Procedural Concerns

Mexico's Claim Regarding Consistent Practice is Beyond the Panel's Terms of Reference

11. Mexico continues to argue that its claim regarding the US "consistent practice" in sunset reviews is within the Panel's terms of reference. It is not. Mexico relies on the fact that the United States addressed Mexico's arguments regarding the consistent practice. Yet it is not whether arguments were made and rebutted that establishes whether a claim is properly within a panel's terms of reference. Rather, it is the panel request that establishes the terms of reference. Mexico's panel request does not include a claim regarding "consistent practice" and a violation of Article 11.3.

Remedy

12. Mexico's request that the Panel make suggestions regarding the appropriate remedy, should the Panel find in Mexico's favour, is also troubling. Members retain flexibility on how to implement DSB recommendations and rulings.

13. Second, the United States strongly objects to Mexico's statements that imply that the United States will somehow act in bad faith should the Panel find the existence of WTO inconsistencies. There is no basis for such an allegation, as the United States hopes that there was no basis for such an allegation in, for example, the *Mexico HFCS* dispute where the DSB found that Mexico had failed to comply with the DSB recommendations and rulings.

14. It follows then that it is inappropriate for Mexico to request that the Panel dictate precisely how the United States should implement any recommendation or ruling, in anticipation of such bad faith.

15. Also troubling is Mexico's argument in paragraph 72 of its oral statement that the Panel should suggest termination because to do otherwise will permit the United States to correct "retroactively" a violation of Article 11.3. Article 19.1 is clear as to the recommendation required of panels and the Appellate Body.

16. Mexico's request asks the Panel to prejudge the question of continuation or recurrence of dumping and injury. That is not something that panels are authorized to do under the DSU.

Consideration of a Possible Appeal in Argentina OCTG

17. Finally, with regard to the relevance of an Appellate Body report in *Argentina OCTG* to this dispute, should the former dispute be appealed, the United States has noted that prior panel and Appellate Body reports are not binding on future WTO disputes. That said, the United States would not object to delaying the current proceedings to take into account any such Appellate Body report. However, the United States would respectfully request that the Panel provide each party with the opportunity to comment on any such Appellate Body report as it may pertain to this dispute, and then to comment on the comments of the other party, prior to the Panel issuing its interim report in this dispute.

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 form 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."[1] The Department

[1] Issues and Decision Memorandum, page 8.

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 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)."[2]

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.

[2] Issues and Decision Memorandum, page 8.

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

> 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.[3]
>
> . . .
>
> 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.[4]
>
> . . .
>
> 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.[5]

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

[3] 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).

[4] 64 Federal Register at 51238.

[5] 64 Federal Register at 51238.

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 statements by TAMSA and Hylsa that the companies would not dump in the event the order was termination. The positive evidence submitted included detailed explanations by TAMSA 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 TAMSA 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 TAMSA 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 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 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 TAMSA; 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 TAMSA 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 TAMSA 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 TAMSA "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 TAMSA 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 TAMSA. (First Submission, paras. 334-343). Fourth, the "commercial quantities" requirement as applied as a "prerequisite for revocation" was introduced after TAMSA 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;

Measure	Alleged Violations
	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.[6] 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 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 <u>each</u> 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."[7] 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.[8]

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[.]"[9] 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*."[10] The Appellate Body's reasoning thus requires the conclusion that agency practice may be challenged as such.

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

<u>Mexico's Response</u>

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

[6] *See* US Department of Commerce Sunset Reviews (MEX-62).

[7] *See* US First Submission, paras. 110-116.

[8] *See* US First Submission, paras. 110-116.

[9] 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).

[10] Appellate Body Report, *Japan Sunset*, para. 88.

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 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."[11] 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 is 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.

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.[12] 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

[11] US Opening Statement, para. 7.
[12] *Sunset Policy Bulletin*, Section II.C, at 18,874 (MEX-32).

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.[13]

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

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.

[13] *See* Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 178, 191.

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"[14]) 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.[15]

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[14] 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.

[15] *See* Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 127-132.

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. 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."[16] 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"?

[16] 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.[17] 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.[18] 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

[17] 19 C.F.R. 351.218(d)(3)(iii).
[18] 19 U.S.C. 1675a(c)(2); 19 C.F.R. 351.218(d)(3)(iv); Sunset Policy Bulletin, Section II.

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 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 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."[19]

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

> "1. To depend. 2. To trust confidently."[20]

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."[21] 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.

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

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[19] Webster's II New College Dictionary 241.

[20] Webster's II New College Dictionary 937.

[21] 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.

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.[1] This choice on the part of the requesting companies ensured that, if TAMSA and/or Hylsa were to achieve revocation from the anti-dumping order, the benefit

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

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 <u>prospective</u> determination. In other words, the authorities must undertake a <u>forward-looking</u> 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."[2] The United States agrees, believing that past behavior is indicative of future behavior. In predicting whether dumping is likely to continue or recur, Commerce begins with an assessment of whether companies subject to the order have been able to participate meaningfully in the market without dumping. If they have been unable to do so – either they have continued to have margins during the life of the order or their exports have dropped significantly – then this actual behavior is evidence of what future behavior may be if the order is terminated.

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

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

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

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

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

6. Paragraph 135 of the 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.[5]

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

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

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

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

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[6] *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).

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

16. Attached as Exhibit US-28.

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

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

18. Interested parties, both domestic and respondent, have submitted additional factual information in only a handful of sunset reviews, even though Commerce's *Sunset Regulations* provide for the submission of argument and factual information concerning the likely effects of revocation and for the submission of any other information an interested party may choose to submit.[8] Notwithstanding the handful of other sunset reviews in which additional information was submitted, the *Canada-Sugar* sunset review is unique with respect to the volume and complexity of the additional information, analysis, and argument supplied by the interested parties in that sunset review.

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

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

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

Could the United States clarify whether, in its view, continuation or recurrence of injury is, in effect, another kind or category of injury? Further, could the Unites States explain whether, in its view, "injury" as used in Article 11.3, is conceptually the same as "injury" as defined in footnote 9

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

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

of the AD Agreement, and it is the concept of "continuation or recurrence" that distinguishes the Article 11.3 determination from a determination under Article 3?

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

21. Footnote 9 derives from the Article 3 heading "Determination of Injury." Consistent with the heading of Article 3, Article 3.1 begins by referring to "[a] determination of injury for purposes of Article VI of GATT 1994." In turn, Article VI of GATT 1994 contemplated only original determinations of dumping and injury. The requirement for investigating authorities to conduct sunset reviews was first imposed in the WTO Agreement, specifically by Article 11.3 of the AD Agreement. The "definition" of injury set out in footnote 9 lists the three types of injury that were recognized under GATT 1994: Present material injury, threat of material injury, and material retardation to the establishment of a domestic industry. *See* Article VI.1, GATT 1994 ("dumping . . . is to be condemned if it causes or threatens material injury to an established industry in the territory of a contacting party or materially retards the establishment of an industry").

22. While present injury, threat of injury, and material retardation are each a possible basis for establishing injury, for purposes of Article 3, each of those findings is different and involves, at least in part, some distinct considerations. For example, the requirements of Article 3.7 apply only to threat of injury determinations. The various categories of injury/injury determinations cannot be considered identical, with the one exception that any of the three findings can provide the basis, when combined with a finding of dumping, for the issuance of an 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.[9] The panel noted that, for the purposes of an investigation, consideration of ADA Article 3.4 factors was necessary in order to establish a background against which the authorities could evaluate whether imminent further dumped imports would affect the industry's condition in such a manner as to threaten it with material injury as defined by the Agreement in Article 3.7.[10] As the panel found, there is nothing in the text of the

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

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

Agreement "setting out an obligation to conduct a second analysis of the injury factors in cases involving threat of material injury."[11]

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

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

43. In addition to the textual demonstration of why application of an Article 3.4 examination is not required in future-looking assessments, the *ITC Lumber* report further explains that the information necessary to conduct an Article 3.4 analysis would not be available in many instances. The *ITC Lumber* reports cites, as examples, the likely absence of necessary information concerning projected productivity, return on investment, and projected cash flow.[13] The reasoning of the *ITC Lumber* panel in this respect is even more on point in the context of a sunset review, given the counterfactual nature of a review. In a review, not only is much of the data concerning Article 3.4 factors unavailable in any meaningful fashion; even the projected 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."[14] As the panel explained, Article 3.2 refers to consideration of whether there "has been" a significant increase in imports, whether there "has been" significant price undercutting, or whether the effect of imports is otherwise to depress prices or prevent price increases that otherwise "would have occurred." These considerations allow the authorities to examine the effects of the dumped imports during the period where they were unchecked by the 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

[11] *ITC Lumber*, Panel Report, para. 7.105.
[12] *ITC Lumber*, Panel Report, para. 7.105.
[13] *ITC Lumber*, Panel Report, para. 7.105.
[14] *ITC Lumber*, panel report, para. 7.111.

evaluate the effects of future dumped and/or subsidized imports."[15] In the view of the United States, consideration of Article 3.2 factors is not necessarily required even as background for the purposes of a sunset review. Nonetheless, the 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.

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 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.

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

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

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

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

49. The Panel cannot properly evaluate Mexico's argument, however, without examining the status of the *Sunset Policy Bulletin* under 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.[17] Mexico has not, and cannot, demonstrate that the *Sunset Policy Bulletin* itself has legal force. As such, Mexico has not sustained its burden of proving that the *Sunset Policy Bulletin* is a measure.

50. In addition, under 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

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

[17] Thus, the panel in *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.

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 dumping determined in the original investigation. Could the parties explain what, in their view, is the distinction between the concepts of "consider" and "rely" in this context?

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

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

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.[1]

(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.[2]

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[1] *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.

[2] *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 … 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 <u>may</u> 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.[3] 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.[4] 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 facilities in the exporting country that are currently used for production of other products can be used to produce the subject merchandise.[5]

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[3] 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 <u>dumping</u>. *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 <u>injury</u>.

[4] 19 U.S.C. § 1675a(a)(1) (Exhibit MEX-24).

[5] 19 U.S.C. § 1675a(a)(2) (Exhibit MEX-24).

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.[6]

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.[7]

Q.12 Section 752(a)(1) of the Tariff Act states: "That the Commission shall take into account …. (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?

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

[6] 19 U.S.C. § 1675a(a)(3) (Exhibit MEX-24).
[7] 19 U.S.C. § 1675a(a)(4) (Exhibit MEX-24).

discernible adverse impact on the domestic industry.[8] 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.[9] 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.[10] Such a finding is consistent with Article 11.3.[11]

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

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.

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[8] 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 discernable adverse impact on the domestic industry." 19 U.S.C. § 1675a(a)(7) (Exhibit MEX-24).

[9] 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.

[10] ITC Report at 1.

[11] *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).

(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.[12] In the first administrative review, Commerce received requests for an administrative review for not only TAMSA and Hylsa, but also Tuberia Nacional S.A. de C.V.[13] 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

[12] See 60 Fed. Reg. 6510 (2 February 1995) (MEX-3)

[13] *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).

exports of OCTG to the United States.[14] 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.[15] 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?

37. Commerce considered but rejected TAMSA's argument of using the length or number of pieces, as evidence for purposes of the commercial quantities threshold criteria for TAMSA's 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

[14] See Adequacy Memorandum (Exhibit US-31).

[15] TAMSA's request for review and revocation (Exhibit MEX-10); Hylsa's request for review and revocation (Exhibit MEX-11).

OCTG from Mexico by TAMSA, 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 TAMSA's 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 TAMSA did not sell OCTG in the United States in commercial quantities in each of the three years.[16]

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.

[16] 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."[1]

[1] 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*").

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 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 mechanistically 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.[2]

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*[3]), 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.

[2] US First Submission, para. 122.
[3] Appellate Body Report, *Japan Sunset*, para. 123.

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.

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.[4]

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

[4] 64 Federal Register at 51238.

to be limited.[5] 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 they enabled a company to have an order revoked as it pertains to that company by obtaining zero margins in three consecutive administrative reviews.[6]

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."[7] 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:

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[5] *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).

[6] 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.

[7] SAA at 887.

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.

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.[1]

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)*

[1] *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 emphasis 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"*[2]

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".*[3]

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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[2] Appellate Body Report, ("*US – Carbon Steel* "), WT/DS213/AB/R, at paragraph 87.
[3] 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, [4] 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."*[5]

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] Appellate Body Report, *US-Sunset Review of Steel from Japan*, p. 41.
[5] Panel Report, *US-Sunset Review of Steel from Japan*, para. 7.271.

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. 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."[6] (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.

[6] Appellate Body Report, Sunset Review of Steel from Japan, para.105.

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.[7]

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.

[7] US First Submission, paragraph 147.

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.[1]

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 ?

[1] 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 that 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
TOTAL		**1265**		**35**	**85**
Margin				**2.8%**	**6.7%**

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/DS2I3/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."[1] 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."[2]

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.

[1] 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.

[2] *Id*., para. 7.111.

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

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."[3]

[3] Appellate Body report, *US – Carbon Steel*, para. 88. (footnote omitted.)

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

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.[4] 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 21.1 underlines the requirement for periodic review of countervailing duties and highlights the factors that must inform such reviews".[5] 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."

[4] *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.")

[5] *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."[1] 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."[2]

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

[1] Third Party Submission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, 28 April 2004, para. 24.

[2] *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 am 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.[3] 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 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].

[3] *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**.[1]

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."

[1] 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.[2] 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

[2] 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.

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). 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.[3] 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

[3] 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).

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."

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.[4] 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.[5]

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.[6] 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

[4] *See* Mexico's First Oral Statement.
[5] *See* Mexico's First Submission, para. 171 (citing MEX-47); Mexico's Second Submission, paras. 83 – 85.
[6] *See* Mexico's Second Oral Statement, paras. 2 – 3.

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 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:

Claims and Arguments Presented by Mexico	**Compared to DS 268**
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	Different arguments

Claims and Arguments Presented by Mexico	**Compared to DS 268**
the Article 11.3 review	
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 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	Panel exercised judicial economy

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 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' 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.[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

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

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 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 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 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 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. 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

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.[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 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

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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 9 January 2004, paras. 106-107.

[5] Argentina Panel Report, para. 7.274.

[6] Argentina Panel Report, para. 7.331.

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 US 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.

[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.

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 TAMSA 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 takes 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*.[1] 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.[2]

[1] US Second Written Submission, para. 52.
[2] 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 quesion 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.[3]

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 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

[3] *See*, e.g., US Second Written Submission, para. 59 and cases cited therein.

(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 believed 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.[4] 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.[5]

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).[6] 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.[7] 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?

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.

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[4] 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.

[5] *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.

[6] ITC Report, p. 14 (Exhibit MEX-20).

[7] ITC Report, p. 14, n.82; PR at Table IV-1 (Exhibit MEX-20).

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 TAMSA 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 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)."[1]

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.[2]

- The Department of Commerce took the position that the "reinstatement" certification required by 351.222(b)(2)(iii) of the regulations was necessary.[3] 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.[4]

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[1] US Answers to Questions from Mexico in Connection with the Second Substantive Meeting, para. 5.

[2] MEX-69, page 6 (column 3).

[3] 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.

[4] *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.[5]

- 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.[6]

- 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.[7]

- 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.[8]

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

[5] MEX-69, page 7 (column 3).
[6] MEX-69, pages 12-17 Mexico is including only relevant excerpts of the exporter's brief.
[7] MEX-69, page 20 (columns 1, 2).
[8] *See* MEX-69, page 20 (footnote 1) and page 18.

on the requests filed by the only two exporters that DOC had ever reviewed (TAMSA and Hylsa). 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 TAMSA 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)[9]

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.[10] 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

[9] Commission's Sunset Determination at 14 (emphasis added) (MEX-20).
[10] *See* Panel Report, *DRAMS from Korea*, paras. 6.48, 6.52-6.58.

simultaneity is the original investigation. As the Appellate Body has clarified, determinations under Article 11.3 that rest solely on findings from the original investigation are an insufficient basis for a likelihood determination.[11]

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.[12] 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."[13]

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.)"[14] 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

[11] *See* Appellate Body Report, *Steel from Germany*, para. 88.
[12] *See* US Answers to Mexico's Questions in Connection with the Second Substantive meeting, para. 13.
[13] US Answers to Mexico's Questions in Connection with the First Substantive Meeting, para. 28.
[14] US Answers to Mexico's Questions After the First Meeting, para. 28.

> continue to find that recurrence of dumping of OCTG from Mexico is likely if the order were to be revoked.[15]

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,[16] 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,"[17] 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."[18] 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.

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[15] Department's Issues and Decision Memorandum (MEX-19), page 4 (emphasis added).

[16] *See* 19 U.S.C. 1675a(c)(3).

[17] US Answers to Mexico's Questions In Connection With the Second Substantive Meeting, para. 17.

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

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.[19] As explained in Mexico's submissions to the Panel, the DOC Determination is flawed because, 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.[20]

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.[21]

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."

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[19] *See* Mexico's First Submission, paras. 150-155, 233-238; Mexico's Second Submission, paras. 48-59, 154-156.

[20] *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.

[21] US Answers to Mexico's Questions in Connection with the Second Panel Meeting, para. 2.

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 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.[22] 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.[23]

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.

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[22] Appellate Body Report, *Japan Sunset*, para. 177.
[23] Appellate Body Report, *Japan Sunset*, para. 177.

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.

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."[1] 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'"[2] 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.[3] Mexico argues that it "had the right to have its exports of OCTG enter the United States without antidumping duties as of August 2000;"[4] 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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[1] Mexico's Answers to the Panel's Questions Following the Second Meeting ("Mexico's Answers"), para. 4 (emphasis added).

[2] Mexico's Answers, para. 4.

[3] 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.").

[4] 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."[5] 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.[6] 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*[7] – 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."[8] 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.[9] 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 the standard that the USITC applied." (Emphasis added). In addition, Mexico's statement

[5] Mexico's Answers, para. 4.

[6] 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.

[7] *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*").

[8] Mexico's answers, para. 6.

[9] 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.

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.[10] Therefore, the panel (and Argentina) recognized that, on its face, the determination referenced the likely standard.[11] The panel then evaluated whether the evidence Argentina presented demonstrated that the ITC did not have sufficient evidence to reach that likelihood conclusion.[12] 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."[13] 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 its has developed constitute positive evidence of what is likely to occur."[14] 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."[15] 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;[16] a party to a dispute does not have the burden of proof unless it asserts the affirmative of a claim or defense.[17]

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[10] *Argentina OCTG*, Panel Report, para. 7.283.
[11] *Argentina OCTG*, Panel Report, para. 7.283.
[12] *Argentina OCTG*, Panel Report, paras. 7.285 - 7.312.
[13] Mexico's Answers, para. 12.
[14] Mexico's Answers, para. 12.
[15] Mexico's Answers, para. 16.
[16] 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.
[17] *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.

Furthermore, 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 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."[18] 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."[19] 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.[20]

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 hoping that this Panel will not evaluate the persuasive value of the Argentina panel's

[18] Mexico's Answers, para. 17.
[19] Mexico's Answers, para. 20.
[20] *See, e.g.*, *Argentina OCTG*, First Written Submission of Argentina, Annex A-1, para. 181.

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[1] 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*").[2] 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*,[3] 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*.[4] 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")[5] 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

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[1] *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.

[2] 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*").

[3] 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.

[4] See generally Mexico's First Submission, Section IX; Mexico's Second Submission, Section IV.

[5] *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).

Panel rejected similar claims from the United States, and the Appellate Body affirmed all of the Panel's findings under Article 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;[6]

- 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;[7]

- With respect to TAMSA, 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;[8]

- The Department violated Article X:2 of the GATT 1994 because the Department imposed conditions on TAMSA for the termination of the anti-dumping duty in advance of the official publication of such conditions;[9] 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

[6] *See* Mexico's First Submission, paras. 279-288; Mexico's Second Submission, paras. 225-236.
[7] Mexico's First Submission, paras. 312-319; Mexico's Second Submission, paras. 225-236.
[8] Mexico's First Submission, paras. 301-319; Mexico's Second Submission, paras. 237-265.
[9] Mexico's First Submission, paras. 320-349; Mexico's Second Submission, paras. 266-270.

from Mexico with respect to Hylsa, the Department did not determine whether the duty was necessary to offset dumping.[10]

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.[11]

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.[12] Mexico explained why this was contrary to the requirements of Article 11.3.[13] 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."[14]

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.[15] Mexican respondents also argued that the Department's "no dumping determinations" and calculation of zero margins for TAMSA and Hylsa 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.[16]

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.[17] 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

[10] *See* Mexico's First Submission, paras. 289-300; Mexico's Second Submission, paras. 271-296.
[11] *See* Mexico's First Submission, Section VII.C; Mexico's Second Submission, Section II.B.
[12] *See* Mexico's First Submission, paras. 123-149; Mexico's Second Submission, paras. 67-78.
[13] *See* Mexico's First Submission, Section VII.C; Mexico's Second Submission, Section II.B.
[14] Appellate Body Report, *OCTG from Argentina*, para. 211.
[15] *See* Mexico's First Submission, paras. 123-149; Mexico's Second Submission, paras. 67-78.
[16] *See* Mexico's First Submission, paras. 123-149; Mexico's Second Submission, paras. 67-78.
[17] *See* Mexico's First Submission, paras. 150-155; Mexico's Second Submission, paras. 48-59.

Agreement nor calculated in accordance with the requirements of the Agreement.[18] The Department also violated Article 6 of the 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."[19]

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;[20] and 2) the Department's application of the waiver provisions invalidated the factual basis for the overall country-wide likelihood determination.[21] 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.[22]

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[23] that the SPB is a measure, thus leaving open only the question of the consistency of the SBP with US WTO obligations.[24]

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.[25] Because, in the Appellate Body's view, the Panel

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[18] *See* Mexico's First Submission, paras. 150-155; Mexico's Second Submission, paras. 48-59.

[19] *See* Mexico's First Submission, paras. 150-155; Mexico's Second Submission, paras. 48-59.

[20] 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*").

[21] 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.

[22] Appellate Body Report, *OCTG from Argentina*, para. 189.

[23] 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*").

[24] Appellate Body Report, *OCTG from Argentina*, paras. 189, 190-215.

[25] Appellate Body Report, *OCTG from Argentina*, para. 212.

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 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.[26]

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.[27]

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

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[26] Appellate Body Report, *OCTG from Argentina*, para. 215.

[27] 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.

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.

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.[28]

- 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.[29] The United States took the position that the Department's determination in this case was reasonable.[30]

- 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.[31]

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[28] 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.

[29] *See* Mexico's First Submission, paras. 115-116.

[30] *See* US Second Submission at n.12.

[31] *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.[32]

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.[33] The Department's regulations further limit the consideration of other factors to full sunset reviews only.[34] 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.[35] 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.[36] The United States also discussed this case.[37] 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.[38]

- The other three cases in which the Department used good cause information involved reviews of agreements to suspend the anti-dumping investigations.[39] The SPB instructs

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[32] *See* US Second Submission, para. 19.

[33] *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).

[34] *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 . . . .").

[35] *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.

[36] *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.

[37] *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.

[38] 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.

[39] *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).

> that the Department will be more likely to entertain good cause arguments in sunset reviews of suspended investigations.[40]

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.[41] The United States also discussed this case.[42]

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.[43]

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 was eliminated after the issuance of the order and import

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[40] 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.
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> *Sunset Policy Bulletin*, Section II.A.3 (MEX-32).

[41] *See* Mexico's Second Submission (9 July 2004), paras. 27-30.

[42] *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.

[43] Appellate Body Report, *OCTG from Argentina*, para. 212 (footnote omitted).

> 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.[44]
>
> 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.[45]

- 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.[46] 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."[47]

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 whether 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

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[44] *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).

[45] Panel Report, *OCTG from Argentina*, paras. 7.219-7.221.

[46] *Issues and Decision Memo for the Sunset Review of Pure Magnesium from Canada (Preliminary Results*)(18 February 2000) at 4.

[47] *Issues and Decision Memo for the Sunset Review of Pure Magnesium from Canada (Preliminary Results*)(18 February 2000) at 7.

> that the probative value of the identified scenario outweighed that of other factors introduced by 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.[48]

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.[49]

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.[50] 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.[51]

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[48] Appellate Body Report, *OCTG from Argentina*, para. 214.

[49] *See* SAA 889-890, SPB Sections II.A.3 and II.B.1; *see also* Mexico's Second Submission, paras. 52-53.

[50] *See* Appellate Body Report, *OCTG from Argentina*, paras. 155-176.

[51] *See* Comments of Mexico on the Draft Descriptive Part of the Panel Report (1 November 2004), paras. 19-28.

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* 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.[52] 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.[53] 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.[54] 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,[55] which the Appellate Body confirmed are inconsistent with Article 11.3.[56] 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.

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[52] *See* Mexico's First Submission, Sections VIII.A & B.; Mexico's Second Submission, Sections III.A & C.

[53] *See* Mexico's First Submission, paras. 159-175; Mexico's Second Submission, paras. 83-89.

[54] Panel Report, *OCTG from Argentina*, paras. 7.219-7.222.

[55] *See OCTG from Argentina, Italy, Japan, and Korea*, 65 Fed. Reg. 66,701 (Dep't Commerce 7 November 2000)(MEX-62, Tab 174).

[56] Appellate Body Report, *OCTG from Argentina*, paras. 234-235.

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.[57] 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 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."[58]

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");[59]

- the Appellate Body's interpretation of the specific arguments made by Argentina (*e.g.*, "Argentina seems to assume that positive evidence requires absolute certainty ...;[60] "Argentina does not explain, on appeal, why the Panel could not properly find a relationship of cause and effect ...");[61]

- Argentina's failure to persuade the Panel and the Appellate Body regarding specific arguments relating to the Commission's volume, price, and impact conclusions.[62] 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.

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[57] *See* Mexico's Second Submission, para. 161.

[58] Appellate Body Report, *Japan Sunset*, para. 130.

[59] Appellate Body Report, *OCTG from Argentina*, paras. 334, 346.

[60] Appellate Body Report, *OCTG from Argentina*, para. 340.

[61] 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).

[62] Appellate Body Report, *OCTG from Argentina*, paras. 334, 346, 352.

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.[63] Also, Mexico does dispute that shifting production was "technically possible."[64]

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.[65] Mexico has developed detailed arguments that demonstrate why the Commission's conclusions regarding each of the so-called five incentives can 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).[66] Mexico challenged the factual and legal basis for the Commission's reliance on all five of these factors.[67] 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."[68] 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."[69]

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

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[63] Appellate Body Report, *OCTG from Argentina*, para. 335; *see also* Mexico's First Submission, paras. 202-210; Mexico's Second Submission, paras. 122-127.

[64] Appellate Body Report, *OCTG from Argentina*, para. 337; *see also* Mexico's First Submission, paras. 202-210; Mexico's Second Submission, paras. 122-127.

[65] Appellate Body Report, *OCTG from Argentina*, paras. 335-336.

[66] *See* Appellate Body Report, *OCTG from Argentina*, paras. 335-342.

[67] *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.

[68] Appellate Body Report, *OCTG from Argentina*, para. 340.

[69] Appellate Body Report, *Japan Sunset*, para. 111.

- 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.[70]

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.[71] 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 effects of dumped imports."[72] 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.[73]

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.[74]

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."[75] 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

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[70] Mexico's Second Submission, para. 198.

[71] Appellate Body Report, *OCTG from Argentina*, paras. 342, 348, 352.

[72] Appellate Body Report, *OCTG from Argentina*, para. 328.

[73] *See* Mexico's Second Submission, paras. 192-197; Mexico's Oral Statement at Second Panel Meeting, paras. 49-51.

[74] *See* Mexico's Second Submission, paras. 192-197; Mexico's Oral Statement at Second Panel Meeting, paras. 49-51.

[75] Panel Report, *OCTG from Argentina*, paras 7.273 and 7.274.

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. [76]

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 'too far in the future would be highly speculative'").[77] 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.[78] 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."[79] 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

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[76] *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).

[77] Appellate Body Report, *OCTG from Argentina*, para. 360.

[78] *See* Appellate Body Report, *OCTG from Argentina*, para. 178.

[79] Appellate Body Report, *Japan – Sunset*, para. 104.

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."[80] 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"[81]

57. In light of the US comments on Mexico's answer,[82] 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.

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."[83]

59. Mexico reiterates that: "Termination of a countervailing [or anti-dumping] duty is the rule and its continuation is the exception;"[84] "the continuation of an anti-dumping duty is an "exception" to the otherwise-mandated expiry of the duty after five years;"[85] Article 11.3 "lays down a mandatory rule with an exception"[86], the "authorities must conduct a rigorous examination in a sunset review before the exception (namely, the continuation of the duty) can apply;"[87] and Article 11.4 "create[s] an additional exception to the requirement that anti-dumping duties will be terminated after five years."[88]

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

[80] Mexico's Responses to the Panel's Questions Following the Second Meeting (13 September 2004), para. 15.
[81] Mexico's Responses to the Panel's Questions Following the Second Meeting (13 September 2004), para. 16.
[82] 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.
[83] 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.
[84] 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.
[85] Appellate Body Report, *OCTG from Argentina*, para. 178.
[86] Appellate Body Report, *Japan Sunset*, para. 104.
[87] Appellate Body Report, *Japan Sunset*, para. 113.
[88] Appellate Body Report, *Japan Sunset*, para. 113.

> it and proving the consistency of the measure with its requirements has been placed on the responding party."[89] (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.[90] For this reason, the 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.[91] 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.[92]

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[89] 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.

[90] *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.

[91] *See* Mexico's First Submission, paras 376-381; Mexico's Second Submission, paras. 297-310.

[92] *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.[1] 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.[2] 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.[3] 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*.[4]

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."[5] The evidence in support of this statement was "Mexico's Exhibit

[1] 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.

[2] 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.

[3] Appellate Body Report, para.

[4] Appellate Body Report, para. 215.

[5] First Submission of Mexico, para. 99.

MEX-62"[6] – the equivalent 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.[7]

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."[8] 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.[9] Mexico has also relied solely on the same statistical evidence in support of its Article X:3(a) claim.[10] 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.[11] 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.[12] 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.[13]

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.[14] 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

[6] First Submission of Mexico, para. 113. Mexico updated its exhibit to include subsequent reviews, Exhibit MEX-65.
[7] Panel Report, WT/DS268/R, circulated 16 July 2004, paras. 7.152-7.157.
[8] Appellate Body Report, para. 217.
[9] Appellate Body Report, paras. 218-219.
[10] *See, e.g.*, First Submission of Mexico, paras. 359-366.
[11] *See, e.g.*, First Submission of Mexico, para. 118.
[12] Appellate Body Report, para. 220.
[13] Appellate Body Report, para. 220.
[14] Appellate Body Report, paras. 231-232.

11.3 to make their likelihood-of-dumping determinations on a company-specific basis ...."[15] 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 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.[16]

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.[17] 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.[18] 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.[19] 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.[20] 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,

[15] Appellate Body Report, para. 231.
[16] US Answers to Second Set of Panel Questions, paras. 15-20.
[17] Appellate Body Report, para. 285.
[18] *See* Appellate Body Report, para. 275.
[19] Appellate Body Report, para. 277.
[20] Appellate Body Report, para. 278.

> 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 conclude that investigating authorities are not *mandated* to follow the provisions of Article 3 when making a likelihood-of-injury determination.[21]

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,[22] 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."[23]

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.[24] 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.[25] 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.[26] 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*,[27] the Appellate Body found that the rationale for cumulation applies both to original determinations as well as to sunset reviews.[28] As the Appellate Body noted, "injury to the domestic industry – whether *existing* injury or *likely future* injury – might come from several sources simultaneously."[29] The Appellate Body

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[21] Appellate Body Report, para. 280 (emphasis in original).
[22] US First Submission (21 April 2004) at para. 234 footnote 247 and at para. 263 footnote 272.
[23] Anti-Dumping Agreement, Article 17.6(i).
[24] Appellate Body Report, para. 292.
[25] Appellate Body Report, para. 293.
[26] Appellate Body Report, para. 294.
[27] 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.
[28] Appellate Body Report, paras. 296-297.
[29] Appellate Body Report, para. 296.

found that cumulation remains a "useful tool" in both inquiries to ensure that all sources of injury and their cumulative impact are taken into account in the investigating authority's original injury and sunset likelihood determinations.[30]

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.[31]

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.[32] 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.[33] 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.'"[34]

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.[35] 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.[36] 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.[37] The United States has previously explained to this Panel the merits of the Argentina panel's findings on

[30] Appellate Body Report, para. 297.
[31] Appellate Body Report, para. 301.
[32] *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.
[33] *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.
[34] Appellate Body Report, paras. 311.
[35] Appellate Body Report, para. 312.
[36] Appellate Body Report, para. 312, *citing Argentina Panel Report*, para. 7.285.
[37] Appellate Body Report, paras. 315-352.

these factual questions.[38] 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."[39] 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.[40]

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.[41] The Appellate Body explained that its earlier finding in *US – Carbon Steel*[42] does not prohibit investigating authorities from referring in a sunset review to information related to the original investigation.[43] 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.[44] 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;[45] this Panel should find so as well. The Appellate Body saw no need to modify the Argentina panel's conclusions.[46]

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[38] *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.

[39] Appellate Body Report, para. 323.

[40] *See* Appellate Body Report, paras. 323, 342, 348, 352.

[41] Appellate Body Report, para. 328.

[42] 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.

[43] *Argentina OCTG* Appellate Body Report, para. 328.

[44] Appellate Body Report, paras. 334-335.

[45] *Argentina Panel Report*, paras. 7.290-7.297.

[46] Appellate Body Report, paras. 334-335.

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 the record.[47] 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.[48] 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."[49]

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.[50]

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.[51] 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.[52]

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.[53]

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.[54] 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.[55]

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.[56] 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.[57] 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.[58] 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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[47] Argentina Panel Report, para. 7.306.
[48] Appellate Body Report, para. 346.
[49] Appellate Body Report, para. 346.
[50] Appellate Body Report, paras. 349-352.
[51] Appellate Body Report, paras. 354-361.
[52] Appellate Body Report, para. 36; Argentina Panel Report, paras. 7.193 and 8.1(c).
[53] Appellate Body Report, para. 360.
[54] *See, e.g.*, Second Written Submission of Mexico, paras. 166-167.
[55] Appellate Body Report, para. 359.
[56] Appellate Body Report, paras. 362-364.
[57] Appellate Body Report, para. 364.
[58] Appellate Body Report, para. 364.

ANNEX F

REQUEST FOR THE ESTABLISHMENT OF A PANEL

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ANNEX F

REQUEST FOR THE ESTABLISHMENT
OF A PANEL

WORLD TRADE ORGANIZATION

WT/DS282/2
8 August 2003

(03-4171)

Original: Spanish

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

Request for the Establishment of a Panel by Mexico

The following communication, dated 29 July 2003, from the Permanent Mission of Mexico to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 18 February 2003, the Government of Mexico requested consultations[1] with the Government of the United States of America (United States) pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII.1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement) regarding the final determinations of the United States Department of Commerce (the Department) and the United States International Trade Commission (the Commission) in the sunset and fourth administrative reviews of oil country tubular goods (OCTG) from Mexico, as well as certain United States laws, regulations, procedures, administrative provisions and practice as described below:

Mexico and the United States held consultations on 4 April 2003, but they failed to settle the dispute.

Mexico therefore requests, pursuant to Article 6 of the DSU, Article XXIII of the GATT 1994 and Article 17.4 of the Anti-Dumping Agreement, that a panel be established at the next meeting of the Dispute Settlement Body, to be held on 18 August 2003. Mexico further requests that the panel have the standard terms of reference, as provided for in Article 7 of the DSU.

[1] WT/DS282/1; G/L/605; G/ADP/D47/1.

Mexico considers that the measures set forth below are inconsistent with the obligations of the United States under the Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement) and the Agreements annexed thereto, and that they have resulted in the nullification or impairment of benefits accruing directly or indirectly to Mexico under those Agreements:

- Oil Country Tubular Goods ("OCTG") From Mexico: Final Results of Sunset Review of Antidumping Duty Order, Federal Register, Vol. 66, page 14131 (9 March 2001) and the accompanying Issues and Decision Memorandum ("Department's Sunset Review Determination");

- Oil Country Tubular Goods From Argentina, Italy, Japan, Korea, and Mexico, Inventory Nos. 701-TA-364 (Review), 731-TA-711, and 713-716 (Review), USITC Publication 3434 (June 2001); and Federal Register, Vol. 66, page 35997 (10 July 2001) ("Commission's Sunset Review Determination");

- Continuation of Countervailing and Antidumping 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);

- Oil Country Tubular Goods From Mexico; Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke in Part, Federal Register, Vol. 66, page 15832 (21 March 2001) and the accompanying Issues and Decision Memorandum ("Fourth Administrative Review Determination Not To Terminate");

- Sections 751 and 752 of the Tariff Act of 1930, as amended, codified at Title 19 of The United States Code §§ 1675 and 1675a, and the United States Statement of Administrative Action accompanying the Uruguay Round Agreements Act (the "SAA"), H.R. Doc. No. 103-316, Vol. 1;

- the Department's Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin, Federal Register, Vol. 63, page 18871 (16 April 1998) ("Department's Sunset Policy Bulletin");

- the Department's sunset review regulations, codified at Title 19 of the United States Code of Federal Regulations § 351.218, and the Commission's sunset review regulations, codified at Title 19 of the United States Code of Federal Regulations §§ 207.60-69; and

- the Department's administrative review regulations, including those codified at Title 19 of the United States Code of Federal Regulations §§ 351.213, 351.221, and 351.222.

These United States anti-dumping measures are inconsistent with the following provisions of the Anti-Dumping Agreement, the GATT 1994, and the WTO Agreement:

- Articles 1, 2, 3, 6, 11, and 18 of the Anti-Dumping Agreement;

- Articles VI and X of the GATT 1994; and

- Article XVI.4 of the WTO Agreement.

Mexico's claims are described in detail below:

A. With respect to the Department's Sunset Review Determination:

1. 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.

2. The Department's standard for determining whether termination of the anti-dumping duties would be likely to lead to continuation or recurrence of dumping is based on a presumption in favour of maintaining the anti-dumping duties, in violation of Articles 2 and 11.3 of the Anti-Dumping Agreement.

B. With respect to the Commission's Sunset Review Determination:

1. The Commission's "likely" standard for determining whether termination of the anti-dumping duties would be likely to lead to continuation or recurrence of injury is inconsistent, both as such and as applied, with Articles 11.1, 11.3, 3.1, 3.2, 3.4, 3.5, 3.7, and 3.8 of the Anti-Dumping Agreement.

2. The United States statutory requirements that the Commission determine whether termination of the anti-dumping duties would be likely to lead to continuation or recurrence of the injury "within a reasonably foreseeable time" (19 U.S.C. § 1675a(a)(1)) and 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" (19 U.S.C. § 1675a(a)(5)), are inconsistent, both as such and as applied, with Articles 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 11.1, and 11.3 of the Anti-Dumping Agreement.

3. The Commission's determination that termination of the anti-dumping duties would be likely to lead to continuation or recurrence of the injury is inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 11.1, and 11.3 of the Anti-Dumping Agreement inasmuch as the Commission did not conduct an "objective examination" of the record and did not base its determination on "positive evidence."

4. The Commission's Sunset Review Determination is inconsistent with Articles 3.1, 3.2, 3.3, 3.4, 3.5, 3.7, 3.8, 11.1, and 11.3 of the Anti-Dumping Agreement inasmuch as the Commission:

(a) Failed to base its determination on a proper analysis of the volume of dumped imports, their effect on prices in the domestic market, and the consequent impact of the dumped imports on the domestic industry;

(b) failed to evaluate all relevant economic factors and indices having a bearing on the state of the domestic industry, including all the factors enumerated in Article 3.4;

(c) failed to base its determination on the "effects of dumping" on the domestic industry;

(d) failed to consider, in making its determination, "any known factors other than the dumped imports"; and

(e) in making its determination, improperly considered the WTO-inconsistent margin reported by the Department.

5. The Commission's Sunset Review Determination is inconsistent with Articles 3.1, 3.2, 3.3, 3.4, 3.5, 3.7, 3.8, 11.1, and 11.3 of the Anti-Dumping Agreement because the Commission used a "cumulative" injury analysis in determining whether termination of the anti-dumping duty would be likely to lead to continuation or recurrence of injury.

C. With respect to the Fourth Administrative Review Determination Not to Terminate:

1. The Department's determination not to terminate the anti-dumping duty immediately when it was demonstrated that the continued application of the duty was not necessary to "offset dumping," is inconsistent with Articles 11.1, 11.2, 2.1, 2.2, 2.4, 6.1, 6.2, 6.4, 6.6, and 6.9 of the Anti-Dumping Agreement.

2. The Department applied conditions for termination of the anti-dumping duty on Tubos de Acero de Mexico, S.A. de C.V. ("TAMSA"), where such conditions are not part of the standard under Article 11.2, and had not been published in advance of their application, in violation of Article 11.1 and 11.2 of the Anti-Dumping Agreement and Article X.2 of the GATT 1994.

3. The Department used a "zeroing" methodology for negative dumping margins in calculating the dumping margin of Hylsa, S.A. de C.V. ("Hylsa") and, as a result, failed to make a fair comparison in calculating the dumping margin, which is inconsistent with Articles 11.1, 11.2, and 2.4 of the Anti-Dumping Agreement.

D. The Department and the Commission failed to apply United States anti-dumping laws, regulations, decisions and rulings in a uniform, impartial, and reasonable manner, as required by Article X.3(a) of the GATT 1994. The facts and claims set forth above reveal a lack of uniformity, impartiality and objectivity on the part of the United States in administering laws, regulations, procedures, and practice in relation to the anti-dumping duties on OCTG from Mexico.

E. The Department and the Commission acted inconsistently with Article 1 of the Anti-Dumping Agreement, inasmuch as the anti-dumping duty on OCTG from Mexico was not applied under the circumstances provided in Article VI of the GATT 1994. The Department and the Commission acted inconsistently with Article 18.1 of the Anti-Dumping Agreement, inasmuch as the anti-dumping duty measure on OCTG from Mexico was not imposed in accordance with the provisions of the GATT 1994, as interpreted by the Anti-Dumping Agreement.

F. Insofar as the aforementioned United States laws, regulations and administrative procedures do not comply with the United States WTO obligations, they are inconsistent with Article XVI.4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.

Mexico respectfully requests that the panel recommend that the United States bring its measures into conformity with its WTO obligations. Pursuant to Article 19 of the DSU, Mexico requests that the panel suggest that the United States implement the recommendation by terminating the anti-dumping duties on OCTG from Mexico, and repealing or amending WTO-inconsistent laws, regulations, procedures, and administrative provisions.